

2014

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

49th Annual Report

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2014 ANNUAL REPORT

OF THE

WESTERN STATES WATER COUNCIL

INTRODUCTION

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

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

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

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

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

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

Meetings of the Council are held on a regular basis, rotating among the member states, with state representatives hosting Council members and guests. In 2014, meetings were held in: Washington, DC on April 1-4; Helena, Montana on July 16-18; and Scottsdale, Arizona on October 8-10. Guest speakers are scheduled according to the relevant subjects to be considered at each meeting. The Council meetings are open to the public. Information regarding future meeting locations and agenda items can be obtained by contacting the Council's office, or visiting our website. Included herein are reports on each of the Council meetings, positions and resolutions adopted by the Council, and a discussion of other important activities and events related to western water resources. Other information about the Council and Council members is also included.

The Council relies almost exclusively on state dues for funding the organization. Dues are set by the Executive Committee and each state pays the same amount. During the Fall WSWC meetings in San Antonio, the Executive Committee authorized WSWC staff to move to a bi-annual audit as opposed to annual audits. Therefore no audit was performed in 2014.

During 2014, the Council staff was comprised of: Anthony G. (Tony) Willardson, Executive Director; Nathan Bracken, Assistant Director/General Counsel; Sara Larsen, Water Data Exchange Program Manager; and a secretarial staff consisting of Cheryl Redding and Julie Groat. In August, Patrick Lambert (USGS) was selected to serve as the next WestFAST Federal Liaison replacing Eric Stevens, who returned to the U.S. Army Corps of Engineers.

The Western States Water Council offices are located in the metropolitan Salt Lake City area:

5296 South Commerce Drive, Suite 202
Murray, Utah 84107
(801) 685-2555
Fax (801) 685-2559
<http://www.westernstateswater.org>

MEMBERS ADDRESSES AND PHONE NUMBERS⁺

ALASKA

***Honorable Bill Walker**

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

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

†**Lynn J. T. Kent**
Deputy Commissioner
Department of Environmental Conservation
410 Willoughby, Suite 303
P.O. Box 11180
Juneau, AK 99811-1800
(907) 465-5066
(907) 465-5070 (fax)
lynn.kent@alaska.gov

†**David W. Schade** (Alt)
Natural Resources Manager III
Chief, Water Resources Section
Division of Mining Land & Water
Alaska Department of Natural Resources
550 W 7th Avenue, Suite 1020
Anchorage, AK 99501-3579
(907) 269-8645
david.w.schade@alaska.gov

ARIZONA

***Honorable Janice K. Brewer**
Governor of Arizona
Statehouse
Phoenix, AZ 85007
(602) 542-4331

†Michael Lacey**, Director
Department of Water Resources
3550 North Central Avenue, 2nd Floor
Phoenix, AZ 85012-2105
(602) 771-8426
(602) 771-8681 (fax)
mjlacey@azwater.gov

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

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

Cynthia Chandley, Attorney (Alt.)
Snell & Wilmer
One Arizona Center
400 East Van Buren Street, Suite 1900
Phoenix, AZ 85004-2202
(602) 382-6154
(602) 382-6070 (fax)
cchandley@swlaw.com

CALIFORNIA

***Honorable Jerry Brown**
Governor of California
State Capitol
Sacramento, CA 95814
(916) 445-2841

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

*Ex-Officio Member
**Executive Committee Member

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

⁺List as of December 31, 2014.

Thomas Howard
Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
(916) 341-5615
(916) 341-5620 (fax)
thoward@waterboards.ca.gov

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

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

COLORADO

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

****James L. Eklund, Director**
Colorado Water Conservation Board
1313 Sherman Street, Room 721
Denver, CO 80203
(303) 866-3441
(303) 866-4474 (fax)
james eklund@state.co.us

Trisha Oeth, Administrator
Water Quality Control Commission
OED-OLRA-A5
4300 Cherry Creek Drive South
Denver, CO 80246-1530
(303) 692-3468
(303) 691-7702 (fax)
trisha.oeth@state.co.us

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

Patrick Pfalzgraff, Director (Alt.)
Water Quality Control Division
WQCD-DO-B2
4300 Cherry Creek Drive South
Denver, CO 80246-1530
(303) 692-3509
(303) 782-0390 (fax)
patrick.j.pfaltzgraff@state.co.us

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

John R. Stulp (Alt.)
Special Policy Advisor to the Governor for Water
IBCC Director
1313 Sherman Street, Suite 721
Denver, CO 80203
(303) 866-3441 x. 3257
john.stulp@state.co.us

IDAHO

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

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

†Curt Fransen, Director
Department of Environmental Quality
Statehouse Mail
1410 North Hilton Street
Boise, ID 83706-1255
(208) 373-0240
(208) 373-0417 (fax)
curt.fransen@deq.idaho.gov

John Simpson

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

Gary Spackman, Director (Alt.)

Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
(208) 287-4800
(208) 287-6700 (fax)
gary.spackman@idwr.idaho.gov

KANSAS

***Honorable Sam Brownback**

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

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

Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, KS 66502
(785) 564-6658
(785) 564-6779 (fax)
david.barfield@kda.ks.gov

Tracy Streeter, Director

Kansas Water Office
900 SW Jackson Street, Suite 404
Topeka, KS 66612
(785) 296-3185
(785) 296-0878 (fax)
tracy.streeter@kwo.ks.gov

Greg Foley

Executive Director, Division of Conservation
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, KS 66502
(785) 564-6621
(785) 564-6779 (fax)
greg.foley@kda.ks.gov

Chris W. Beightel, Program Manager (Alt.)

Water Management Services
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, KS 66502
(785) 564-6659
(785) 564-6779 (fax)
chris.beightel@kda.ks.gov

Christopher M. Grunewald (Alt.)

Assistant Attorney General
Civil Litigation Division
Kansas Attorney General's Office
120 SW 10th Avenue, 2nd Floor
Topeka, KS 66612-1597
(785) 291-3988
(785) 291-3767 (fax)
chris.grunewald@ag.ks.gov

Earl Lewis, Assistant Director (Alt.)

Kansas Water Office
900 SW Jackson Street, Suite 404
Topeka, KS 66612
(785) 296-3185
(785) 296-0878 (fax)
earl.lewis@kwo.ks.gov

Tom Stiles, Chief (Alt.)

Kansas Department of Health & Environment
Office of Watershed Planning
Signature Building
1000 SW Jackson Street
Topeka, KS 66612-1367
(785) 296-6170
(785) 291-3266 (fax)
tstiles@kdheks.gov

MONTANA

***Honorable Steve Bullock**

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

****Tim Davis**

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

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

John Tubbs, Director
Dept. of Natural Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-1948
(406) 444-0533 (fax)
jtubbs@mt.gov

Anne Yates (Alt.)
Chief Legal Counsel
Dept. of Natural Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-0503
(406) 444-0533 (fax)
ayates@mt.gov

Tracy Stone-Manning, Director (Alt.)
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-1601
(406) 444-2544
(406) 444-4386 (fax)
tstone-manning@mt.gov

Mike Volesky (Alt.)
Deputy Director
Montana Fish, Wildlife & Parks
1420 East Sixth Avenue
P.O. Box 200701
Helena, MT 59620-0701
(406) 444-4600
(406) 444-4952 (fax)
mvolesky@mt.gov

Jay Weiner (Alt.)
Assistant Attorney General
Civil Services Bureau
Office of the Attorney General
215 North Sanders Street, 3rd Floor
Helena, MT 59620
(406) 444-2026
(406) 444-3549 (fax)
jweiner2@mt.gov

NEBRASKA

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

****†Jim Schneider**, Acting Director
Department of Natural Resources
P.O. Box 94676
Lincoln, NE 68509-4676
(402) 471-2366
(402) 471-2900 (fax)
jim.schneider@nebraska.gov

Patrick Rice, Director (Alt.)
Department of Environmental Quality
Suite 400, The Atrium
P.O. Box 98922
Lincoln, NE 68509-8922
(402) 471-2186
(402) 471-2909 (fax)
pat.rice@nebraska.gov

NEVADA

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

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

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

Jason King
Nevada State Engineer
Division of Water Resources
901 South Stewart Street, Suite 2002
Carson City, NV 89701-9965
(775) 684-2861
(775) 684-2811 (fax)
jking@water.nv.gov

Colleen Cripps (Alt.)
Administrator
Division of Environmental Protection
901 South Stewart Street, Suite 4001
Carson City, NV 89701-5249
(775) 687-9301
(775) 687-5856 (fax)
cripps@ndep.nv.gov

NEW MEXICO

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

****†Tom Blaine**, State Engineer
Office of the State Engineer
Concha Ortiz y Pino Building
130 South Capitol Street, NEA Building
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6175
(505) 827-6188 (fax)
tom.blaine@state.nm.us

†Ryan Flynn, Cabinet Secretary
New Mexico Environment Department
1190 Street Francis Drive, N4050
P.O. Box 26110
Santa Fe, NM 87502-0110
(505) 827-2855
ryan.flynn@state.nm.us

Bidtah N. Becker, Attorney (Alt.)
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515
(928) 871-7510
(928) 6200 (fax)
bbecker@nndoj.org

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

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

†Greg Ridgley (Alt.)
Office of the State Engineer
130 South Capital
Santa Fe, NM 87506-5108
(505) 827-6150
(505) 827-3887 (fax)
greg.ridgley@state.nm.us

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

NORTH DAKOTA

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

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

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

Jennifer L. Verleger

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

Michelle Klose (Alt.)

Assistant State Engineer
State Water Commission
900 East Boulevard Avenue
Bismarck, ND 58505-0850
(701) 328-4959
(701) 328-3696 (fax)
maklose@nd.gov

Andrea Travnicek (Alt.)

Senior Policy Advisory
Office of the Governor
600 East Boulevard Avenue
Bismarck, ND 58505-0001
(701) 328-2206
atravnicek@nd.gov

OKLAHOMA

***Honorable Mary Fallin**

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

****J.D. Strong**

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

†Shellie Chard-McClary, Director

Water Quality Division
Oklahoma Dept. of Environmental Quality
P.O. Box 1677
Oklahoma City, OK 73101-1677
(405) 702-7100
(405) 702-7101 (fax)
shellie.chard-mcclary@deq.ok.gov

OREGON

***Honorable John Kitzhaber**

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

****Thomas M. Byler, Director**

Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271
(503) 986-0900
(503) 986-0903 (fax)
thomas.m.byler@wrđ.state.or.us

†Jennifer Wigal

Water Quality Program Manager
Oregon Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204
(503) 229-5323
(503) 229-5408 (fax)
wigal.jennifer@deq.state.or.us

SOUTH DAKOTA

***Honorable Dennis Daugaard**

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

****Steven M. Pirner, Secretary**

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

Kent Woodmansey, PE

Engineering Manager
Feedlot Permit Program
Dept. of Environment & Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181
(605) 773-3351
(605) 773-4068 (fax)
kent.woodmansey@state.sd.us

TEXAS

***Honorable Rick Perry**

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

****Carlos Rubinstein**

Chairman
Texas Water Development Board
1700 North Congress Ave.
Austin, TX 78701
(512) 463-7354
(512) 475-2053 (fax)
carlos.rubinstein@twddb.texas.gov

Christopher Tobias "Toby" Baker

Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087
(512) 239-5515
(512) 239-5533 (fax)
toby.baker@tceq.texas.gov

John R. Elliott (Alt.)

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

Craig Estes, Senator (Alt.)

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

F. Scott Spears, Jr. (Alt)

Partner
Arenson & Spears
901 MoPac Expressway South
Austin, TX 78746-5797
(512) 327-4422
(512) 327-1524 (fax)
scottspearslegal@aol.com

UTAH

***Honorable Gary R. Herbert**

Governor of Utah
State Capitol
Salt Lake City, UT 84114
(801) 538-1000

****Walter L. Baker, Director**

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

Eric Millis, Director

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

Dallin Jensen (Alt.)

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

Norman K. Johnson (Alt.)

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

WASHINGTON

***Honorable Jay Inslee**

Governor of Washington
State Capitol
Olympia, WA 98504
(360) 753-6780

****Maia Bellon**, Director
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600
(360) 407-7001
(360) 407-6989 (fax)
maib461@ecy.wa.gov

Tom Loranger
Water Resources Program Manager
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600
(360) 407-6672
(360) 407-6574 (fax)
tlor461@ecy.wa.gov

Ted Sturdevant, Executive Director
Legislative Affairs and Policy
Office of Governor Inslee
State Capitol
Olympia, WA 98504
(360) 753-6780
ted.sturdevant@gov.wa.gov

Alan Reichman (Alt.)
Assistant Attorney General
Ecology Division, Water Section
Washington State Attorney General's Office
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6748
(360) 586-6760 (fax)
alanr@atg.wa.gov

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

WYOMING

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

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

Christopher Brown
Senior Assistant Attorney General
Water and Natural Resources Division
123 Capitol Avenue
Cheyenne, WY 82002
(307) 777-3406
(307) 777-5451 (fax)
chris.brown@wyo.gov

Todd Parfitt, Director
Wyoming Dept. of Environmental Quality
Herschler Building, 4th Floor West
122 West 25th Street
Cheyenne, WY 82002
(307) 777-7555
(307) 777-7682 (fax)
todd.parfitt@wyo.gov

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

Harry LaBonde, Director (Alt.)
Wyoming Water Development Commission
6920 Yellowtail Road
Cheyenne, WY 82002
(307) 777-7626
(307) 777-6819 (fax)
harry.labonde@wyo.gov

***Kevin Frederick**, Administrator (Alt.)
Wyoming Department of Environmental Quality
Herschler Building, 4th Floor West
122 West 25th Street
Cheyenne, WY 82002
(307) 777-7072
(307) 777-5973 (fax)
kevin.frederick@wyo.gov

WESTERN STATES WATER COUNCIL

Committee Assignments

EXECUTIVE COMMITTEE

Vacant - Alaska
Michael Lacey - Arizona
Mark Cowin - California
Jeanine Jones - California
(Alternate)*
James Eklund - Colorado
Hal Simpson - Colorado
(Alternate)*
Jerry Rigby - Idaho
(Vice-Chair)
David Barfield - Kansas
Tim Davis - Montana
Jim Schneider - Nebraska
Roland Westergard - Nevada
Leo Drozdoff - Nevada
(Alternate)*
Tom Blaine - New Mexico
Todd Sando - North Dakota
J.D. Strong - Oklahoma
Thomas Byler - Oregon
Steve Pirner - South Dakota
Kent Woodmansey - South Dakota
(Alternate)*
Carlos Rubinstein - Texas
Walt Baker - Utah
Maia Bellon - Washington
Patrick T. Tyrrell - Wyoming
(Chair)

Management Subcommittee

Patrick Tyrrell
(Chair)
Jerry Rigby
(Vice-Chair)
Scott Verhines
(Secretary/Treasurer)
Tony Willardson
(Executive Director)

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
Herman Settemeyer - Texas
Sue Lowry - Wyoming

Ex-Officio Representatives

FWS - Andrew Hautzinger
David Cottingham

Shared Water Vision Subcommittee

Sue Lowry - **(Chair)** - Wyoming
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Mike Volesky - Montana
Carlos Rubinstein - 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

Ex-Officio Representatives

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

LEGAL COMMITTEE

David Schade - Alaska
William Staudenmaier - Arizona
Cynthia Chandley - Arizona
(Alternate)*
Jeanine Jones - California
James Eklund - Colorado
Jerry Rigby - Idaho
John Simpson - Idaho
(Alternate)*
Chris Grunewald - Kansas
Anne Yates - Montana
Jay Weiner - Montana
(Alternate)*
Jim Schneider - Nebraska
Roland Westergard - Nevada
Jason King - Nevada
(Alternate)*
Maria O'Brien - New Mexico
Greg Ridgley - New Mexico
(Alternate)*
Jennifer Verleger - North Dakota
(Chair)
Jerry Barnett - Oklahoma
Thomas Byler - Oregon
Kent Woodmansey - South Dakota
John Elliott - Texas
Norman Johnson - Utah
Alan Reichman - Washington
Chris Brown - Wyoming

Non-Tribal Federal Water Needs Subcommittee

Melissa Hombein - Montana
Ed Bagley - New Mexico
Dwight French - Oregon
Herman Settemeyer - Texas

Ex-Officio Representatives

BLM - Lee Koss
USFS - Jean Thomas
FWS - Andrew Hautzinger
DOD - Marc Kodack

Tribal Reserved Water Rights Subcommittee

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

Water Transfers and the Public Interest

Jerry Rigby - Idaho
Pat Tyrrell - Wyoming

Natural Flows Subcommittee

Michelle Klose - North Dakota
J.D. Strong - Oklahoma
Jennifer Verleger - North Dakota
Carlos Rubinstein - Texas
Herman Settemeyer - Texas

WATER QUALITY COMMITTEE

Lynn Kent - Alaska
Mike Fulton - Arizona
Thomas Howard - California
Betty Olson - California
(Alternate)*
Trisha Oeth - Colorado
Patrick Pfaltzgraff - Colorado
(Alternate)*
Curt Fransen - Idaho
Tom Stiles - Kansas
George Mathieus - Montana
Tracy Stone-Manning - Montana
(Alternate)*
Patrick Rice - Nebraska
Colleen Cripps - Nevada
Ryan Flynn - New Mexico
David Glatt - North Dakota
J.D. Strong - Oklahoma
(Chair)
Shellie Chard-McClary - Oklahoma
(Alternate)*
Jennifer Wigal - Oregon
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Steve Pimer - South Dakota
(Alternate)*
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(Alternate)*
Walter Baker - Utah
Maia Bellon - Washington
Stephen Bernath - Washington
(Alternate)*
Pat Tyrrell - Wyoming
Kevin Frederick - Wyoming
(Alternate)*
Todd Parfitt - Wyoming
(Alternate)*

Clean Water Act Subcommittee

Michelle Hale - Alaska
Ruth Hamilton Heese - Alaska
Michael Fulton - Arizona
Trisha Oeth - Colorado
Barry Burnell - Idaho
Tom Stiles - Kansas
Michelle Klose - North Dakota
Jennifer Verleger - North Dakota
J.D. Strong - Oklahoma
Todd Chenoweth - Texas
Walt Baker - Utah
Stephen Bernath - Washington
Lauren Driscoll - Washington

Ex-Officio Representatives

Corps - Wade Eakle
EPA - Donna Downing

WATER RESOURCES COMMITTEE

David Schade - Alaska
Michael Lacey - 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
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(Alternate)*
Jim Schneider - Nebraska
Jason King - Nevada
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JD Strong - Oklahoma
Thomas Byler - Oregon
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Carlos Rubinstein - Texas
Herman Settemeyer - Texas
(Alternate)*
Eric Millis - Utah
Tom Loranger - Washington
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

Lane Letourneau – Kansas
David Rodriguez – New Mexico
Julie Cunningham – Oklahoma
Barry Norris – Oregon
Robert Mace – Texas
Pat Tyrrell – Wyoming
Sue Lowry – Wyoming

Ex-Officio Representatives

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
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

Committee Assignments

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(Alternate)*
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(Alternate)*
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(Vice-Chair)
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(Alternate)*
Pat Tyrrell - Wyoming
Kevin Frederick - Wyoming
(Alternate)*
Todd Parfitt - Wyoming
(Alternate)*

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(Alternate)*
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(Alternate)*
Sue Lowry - Wyoming
(Alternate)*

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(Alternate)*
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Greg Ridgley - New Mexico
(Alternate)*
Jennifer Verleger - North Dakota
(Chair)
Jerry Barnett - Oklahoma
Thomas Byler - Oregon
Kent Woodmansey - South Dakota
John Elliott - Texas
Norman Johnson - Utah
Alan Reichman - Washington
Chris Brown - Wyoming

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Western States Federal Agency Support Team (WestFAST)

Cottingham, David (FWS alternate)
Senior Advisor to the Director
U.S. Fish and Wildlife Service
1849 C Street NW
Washington, DC 20240-0001
(202) 208-4331
david_cottingham@fws.gov

D'Antonio, John (USACE)
Deputy District Engineer
Programs and Project Management
Albuquerque District
U.S. Army Corps of Engineers
4101 Jefferson Plaza NE
Albuquerque, NM 87109
(505) 342-3261
john.r.d'antonio@usace.army.mil

Dempsey, Lauren M. (DoD alternate)
Western Region Water Specialist
Air Force Western Regional Environmental
Office: AFCEC/CZO (San Francisco)
540 Airlift Drive, Suite C201
Travis AFB, CA 94535
(707) 424-8628
lauren.dempsey@us.af.mil

Doorn, Bradley (NASA)
Program Manager, Water Resources Program
Science Mission Directorate
Earth Science Division
National Aeronautics and Space Administration
300 E Street, SW
Washington, DC 20546
(202) 358-2187
bradley.doom@nasa.gov

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

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

Hamilton, Pixie (USGS)
Cooperative Water Program Coordinator
U.S. Geological Survey
12201 Sunrise Valley Drive, MS: 409
Reston, VA 20192
(703) 648-5061
pahamilt@usgs.gov

Hansen, Bill (NPS Alternate)
Water Rights Branch Chief
National Parks Service
(970) 225-3532
bill_hansen@nps.gov

Ellsworth, Alan (NPS Alternate)
Water Advisor
National Parks Service
(202) 513-7181
alan_ellsworth@nps.gov

Harvey, Ed (NPS)
Chief, Water Resources Division
National Parks Service
(970) 225-3511
forrest_harvey@nps.gov

Fulkerson, Becky (BoR) WestFAST Chair
Policy Analyst
Bureau of Reclamation
1849 C Street NW
Washington, DC 20240-0001
(202) 513-0638
rfulkerson@usbr.gov

Hautzinger, Andrew (FWS)
Chief, Division of Water Resources
Fish and Wildlife Service
500 Gold Avenue SW, Room 4002
Albuquerque, NM 87102
(505) 248-7946
andrew_hautzinger@fws.gov

Kodack, Marc (DoD)
Office of the Assistant Secretary of the Army
Energy and Sustainability
U.S. Department of Defense
110 Army Pentagon, RM 3D453
Washington, DC 20310
(571) 256-4197
marc.d.kodack.civ@mail.mil

Koss, Lee (BLM)
Lead, Water
Bureau of Land Management
20 M Street SE
Washington, DC 20003
(202) 912-7139
lkoss@blm.gov

Werner, Kevin (NOAA)
Regional Climate Services Director
NOAA Western Region
2725 Montlake Boulevard E, Room 216E
Seattle, WA 98112
(206) 860-3490
kevin.werner@noaa.gov

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

Lambert, Pat (USGS)
WestFAST Liaison
Western States Water Council
5296 South Commerce Drive, Suite 202
Murray, UT 84107
(801) 685-2555
patlambert@wswc.utah.gov

Strobel, Michael (NRCS)
Director, National Water and Climate Center
USDA-Natural Resources Conservation Service
1201 NE Lloyd Boulevard, Suite 802
Portland, OR 97232
(503) 414-3055
michael.strobel@por.usda.gov

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

Webb, Robin (NOAA alternate)
NOAA/OAR/ESRL PSD
Climate Analysis Branch Chief
325 Broadway
Boulder, CO 80305-3328
(303) 497-6967
robert.s.webb@noaa.gov

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

**Council Members
Helena, Montana
July 18, 2014**



Front Row: Left to Right

Pat Tyrrell, John Tubbs, Toby Baker, Racquel Rancier, David Schade, Trisha Oeth, Betty Olsen, Jeanine Jones, Carlos Rubinstein, Bill Staudenmaier, Jerry Rigby, Philip Stuckert, and Jennifer Verleger.

Row 2: Left to Right

Tony Willardson (Executive Director), Kevin Frederick, Tom Howard, Kent Woodmansey, Jim Schneider, Buck Smith, Tim Davis, Stephen Bernath, Scott Verhines, Eric Millis, Curtis Seaton, Chris Brown, John Simpson, Walt Baker, and George Mathieus

Back Row:

Norman Johnson and J.D. Strong

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

IN MEMORIAM

On February 22, **John Guhin**, a Deputy and Assistant Attorney General for South Dakota, passed away following a 14-month battle with leukemia. John was known for his expertise in Indian law, water law, and the laws governing the Missouri River. He had also served on the WSWC since June 1988.

Arizona

In January, Arizona Department of Water Resources (ADWR) Director and WSWC member **Sandra Fabritz-Whitney** stepped down to become the Director of Water Strategy for mining company Freeport- McMoRan Copper and Gold, Inc. Sandy had served on the WSWC since August 2012.

Governor Jan Brewer named ADWR Deputy Director **Michael Lacey** as Sandra's successor. Prior to his role with ADWR, Mike was a business owner and consulting hydrologist for 22 years, and also worked for the U.S. Forest Service. He has graduate and undergraduate degrees in physical geography from Arizona State University and the University of Delaware.

Colorado

WSWC member **Steve Gunderson** announced his retirement in May as the Director of Colorado's Water Quality Control Division. Steve had served on the WSWC since April 2008.

Montana

Governor Steve Bullock named **Anne W. Yates** to the WSWC. Anne is the Chief Counsel for the Montana Department of Natural Resources and Conservation.

Nebraska

Brian Dunnigan, the Director of the Nebraska Department of Natural Resources (DNR) and a WSWC member, stepped down on December 5 to take a position with Olsson Associates, an engineering consulting firm. Brian worked for DNR for over 30 years and served as Director since 2008, working on interstate matters involving the Republican River Compact and the Platte River Recovery Implementation Program, among other issues.

New Mexico

Governor Susana Martinez appointed **Tom Blaine** the new State Engineer, replacing former State Engineer and WSWC Council member Scott Verhines.

North Dakota

Governor Jack Dalrymple named **Michelle Klose** and **Andrea Travnicek** as alternate members to the WSWC. Michelle is North Dakota's Assistant State Engineer and Andrea is a Senior Policy Advisor in the Governor's office.

Oregon

Governor John Kitzhaber named **Tom Byler**, the new Director of the ODWR, to the WSWC. Tom succeeded **Tom Paul**, who led ODWR on an interim basis when former Director and prior WSWC Chair **Phil Ward** left to become the State Executive Director for USDA's Farm Service Agency in Oregon in June. Phil had served on the WSWC since April 2003.

Utah

Governor Gary Herbert named **Eric Millis**, Director of the Utah Division of Water Resources, to the WSWC. Eric will succeed former Director and WSWC member **Dennis Strong**, who retired last fall.

WSWC/WestFAST

WestFAST selected **Patrick Lambert** with the U.S. Geological Survey (USGS) to serve a two-year detail as the next Federal Liaison to the WSWC. Pat will be stationed in the WSWC's offices and will work to coordinate WSWC and WestFAST activities and to further federal-state collaboration. He has 29 years of experience as a hydrologist and currently serves as the Director of USGS's Utah Science Center. Pat succeeded **Eric Stevens** with the Corps, who concluded his tenure as Liaison on September 3.

COUNCIL MEETINGS

174th Council Meetings Washington, DC April 1-4

On April 3, the WSWC held its 174th meeting in Washington, DC. During the Full Council Meeting, the WSWC approved three new positions: (1) supporting reauthorization of “such sums as may be necessary” for the Bureau of Reclamation to carry out the Reclamation Safety of Dams Act of 1978; (2) requesting “careful evaluation” of efforts to transfer title of federal water and power assets to non-federal ownership, and to establish a process for title transfer proposals with “strong state involvement and protections for state water laws and water rights;” and (3) supporting development of a process to provide information on Reclamation’s maintenance, repair, and replacement needs, and to ensure that such information is “readily accessible and easy to understand.”

The WSWC renewed two sunseting positions. The first supports development of a national program of safety standards for levees and flood water conveyance canals, but specifies that such a program should not apply to water supply canals. The second seeks stable and continuing federal appropriations for the Clean Water and Drinking Water State Revolving Funds (SRF). It urges more flexibility and less restrictions on state SRF management and includes revised language stating that new water and wastewater financing efforts should not come at the expense of the SRFs.

The WSWC also presented Executive Director Tony Willardson with an award to honor his 35 years of “distinguished and exemplary service” with the WSWC.

Dr. Michael Freilich, Director of the Earth Science Division within the National Aeronautics and Space Administration, described the Division’s water-related efforts, including Landsat. Among other things, he said the Administration is committed to a sustained national land imaging system, not just a single mission.

WestFAST Chair Becky Fulkerson of Reclamation discussed her organization’s recent activities, including the formation of four workgroups consisting of officials from the WestFAST agencies to address drought, data needs, infrastructure, and the energy-water nexus. The workgroups will first develop a consensus among the WestFAST members on these issues, and will ultimately identify ways to assist the states.

At the Water Resources Committee meeting, Environmental Protection Agency (EPA) Senior Policy Advisor and WestFAST Vice-Chair Roger Gorke described the National Drought Resilience Partnership (NDRP). The NDRP will create a new, web-based portal to improve access to federal drought resources, host more frequent national drought outlook forums, and improve drought monitoring and forecasting. The U.S. Department of Agriculture (USDA) and the National Oceanic and Atmospheric Administration (NOAA) are spearheading the NDRP, which includes the Department of Energy (DOE), the Department of the Interior, EPA, the U.S. Army Corps of Engineers, and the Federal Emergency Management Agency.

Tom Iseman, Deputy Assistant Secretary of the Interior for Water and Science, discussed the Principles and Requirements (P&Rs), which were finalized in 2012 to govern how federal agencies

evaluate proposed water resource projects and programs. The P&Rs will replace the 1983 Principles and Guidelines and will apply to more federal agencies and a broader set of federal activities affecting water. The P&Rs will also assess a larger suite of values in addition to project costs and economic benefits. Federal agencies are developing interagency guidelines to determine how the P&Rs will be implemented across the federal government as well as agency-specific guidelines. The interagency guidelines may be finalized this summer.

Iseman gave a second presentation during the Legal Committee meeting on Reclamation's drought authorities, which he said include the WaterSMART grants program, the basin studies program, project-specific authorities, and planning and emergency response efforts under the yet-to-be-re-authorized Reclamation States Emergency Drought Relief Act. Reclamations FY 2015 budget request seeks \$1.5 million for drought response and planning efforts.

Becky Patton, Climate Change Adaptation Policy Program Manager for the Office of the Deputy Under Secretary of Defense (Installations and Environment), also discussed the Department of Defense's (DOD) water-related efforts, which include water reuse, conservation, and other efforts. Specifically, DOD is "well ahead" of achieving a goal to reduce potable water use 26% by 2020. In addition, the Army has a "Net Zero" initiative that is working towards a 50% reduction in its "water use intensity" by 2020.

During the Water Quality Committee meeting, John Dombrowski, Director of the Enforcement Targeting and Data Division within EPA's Office of Enforcement and Compliance Assurance, discussed a rule EPA proposed last July to establish electronic reporting for the National Pollutant Discharge Elimination System (NPDES). Dombrowski said the proposed rule does not create new reporting requirements and would shift the NPDES program from paper to electronic reporting, saving time and money, improving transparency, and obtaining more accurate and timely information. The public comment period on the rule closed in December, and EPA has formed a workgroup with the Environmental Council of the States and the Association of Clean Water Administrators to discuss and improve the rule.

On April 2, the WSWC and the Interstate Council on Water Policy co-sponsored a roundtable discussion with Administration and Congressional officials. Bruce Carlson, a Senior Policy Advisor with the Corps, discussed the need for increased investments in water infrastructure, noting that cuts to the Corps' budget have hindered its ability to reduce its project backlog. Carlson also addressed concerns about the lack of state consultation in the development of the Corps' surplus water rule, stating that the Office of Management and Budget (OMB) can address concerns once it has received the rule for interagency review.

Don Cline, Chief of the National Weather Service's (NWS) Hydrology Laboratory, said the NWS has historically focused on "high water," but has been asked to improve its efforts to address other water challenges and support integrated water management.

Ann Mills, Deputy Under Secretary for Natural Resources and Environment within USDA, described USDA efforts involving drought and wildfire. Among other things, she described the creation of an inter-departmental water team to address water issues affecting USDA's missions and priorities. She said USDA is "happy" with the recently enacted Farm Bill.

EPA Senior Advisor Ken Kopocis, who President Obama has nominated to be the Assistant Administrator for EPA's Office of Water, said EPA and the Corps are committed to addressing concerns the Western Governors' Association, the WSWC, and others have expressed about the lack of substantive state consultation in the development of the agencies' proposed CWA rule. Kopocis also said EPA is still determining its response to a March 28 federal district court ruling that struck down its water transfers rule. The rule exempts transfers from NPDES permitting.

Fain Gildea, Deputy Director of the Secretary of the Interior's Indian Water Rights Office, said Interior is developing a systematic approach to address settlements, and plans to exclude settlements from application of the P&Rs.

Dionne Thompson, Chief of Congressional and Legislative Affairs for Reclamation, said Interior supports legislation to: (1) reauthorize the Reclamation States Emergency Drought Relief Act (S. 659/H.R. 3176); (2) reauthorize the WaterSMART grants and the National Water Availability and Use Assessment's grant program (S. 2019); (3) provide permanent authority under the Reclamation Safety of Dams Act of 1978 (S. 1946); and (4) facilitate the transfer of title for Reclamation projects and facilities to non-federal entities (S. 2034). Thompson also said S. 1800, which would require Reclamation to report to Congress on major repair and rehabilitation needs, would draw resources away from existing efforts.

Diana Bauer with DOE's Office of Energy Policy and Systems Analysis, described DOE's energy-water nexus efforts, including a forthcoming report on the nexus.

The roundtable concluded with presentations from Camille Calimlim Touton, Minority Staff for the House Natural Resources Committee, and Sara Tucker, Majority Staff for the Senate Energy and Natural Resources Committee. Among other things, they noted an increasing focus on drought in the 113th Congress given conditions in California and elsewhere.

On April 4, the WSWC met with lead officials from the 12 WestFAST agencies to stress the importance of state-federal collaboration and to highlight WestFAST's accomplishments and ongoing efforts. WSWC members also discussed state interests and priorities, including a desire to improve state consultation during the federal rulemaking process. Of note, Deputy Assistant Secretary of the Army (Civil Works) Marie Therese Dominguez said the Corps has not submitted a surplus water rule to OMB for interagency review.

175th Council Meetings Helena, Montana July 16-18

On July 16-18, the WSWC held its 175th meetings in Helena, Montana. On June 16, Montana Governor Steve Bullock guided the WSWC on a tour of the Gates of the Mountains Wilderness on the Missouri River. Prior to the tour, Bullock and Anne Castle, Assistant Secretary of the Interior for Water and Science, announced a new drought resilience demonstration project in Montana that will address drought in the Upper Missouri River Basin. The project is part of the National Drought Resilience Partnership.

The meetings included the election of new officers with the WSWC selecting Pat Tyrrell of Wyoming as Chair, Jerry Rigby of Idaho as Vice-Chair, and Scott Verhines of New Mexico as

Secretary-Treasurer. Pat also selected John Tubbs of Montana to succeed Brian Dunnigan of Nebraska as Chair of the Water Resources Committee, and Jennifer Verleger of North Dakota to succeed Maria O'Brien of New Mexico as Chair of the Legal Committee. J.D. Strong of Oklahoma will continue as the Water Quality Committee Chair.

The WSWC approved a revised and updated position on Clean Water Act (CWA) jurisdiction. The new position: (1) asserts that states are co-regulators with EPA and the Corps in administering the CWA, and are separate and apart from the general public and therefore deserve a unique audience with the federal government in the development and implementation of any federal effort to clarify or redefine CWA jurisdiction; (2) states that "information sharing does not equate to meaningful consultation" and urges the federal government to develop and implement federal CWA jurisdiction efforts in "authentic partnership" with the states; and (3) identifies a number of actions the federal government should take when carrying out any effort to clarify or define CWA jurisdiction.

The WSWC also revised and re-adopted four existing positions that: (1) support federal research and development of hydroclimate guidance for extreme meteorological events; (2) urge Congress to use the Reclamation Fund to finance water infrastructure projects in the West; (3) urge Congress to maintain the authorization and funding for the Water Resources Research Institutes; and (4) oppose preemption of state water law in federal legislation.

Additionally, the WSWC adopted a position regarding state consultation in the development of federal policies, and approved a comment letter for an interpretive rule the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers have adopted regarding agricultural exemptions under the Clean Water Act (CWA). The position and letter were not noticed prior to the meetings and were sent to the Western Governors' Association for a ten-day review pursuant the WSWC's rules of organization.

The WSWC also adopted resolutions of appreciation for outgoing Chairman Phil Ward of Oregon, who has left state service to become the Oregon State Executive Director of the U.S. Department of Agriculture's Farm Service Agency. The WSWC also adopted resolutions of appreciation for former members DL Sanders of New Mexico and Steve Gunderson of Colorado.

EPA Region 8 Administrator Shaun McGrath discussed the CWA jurisdiction rule EPA and the Corps have developed, which he said is still a proposal and can be changed. He also said EPA is considering a possible interpretive rule to make it easier for tribes to obtain "treatment of states" status to administer CWA regulatory programs by removing the requirement that they demonstrate "inherent regulatory authority." The WSWC adopted a resolution of appreciation for Shaun, who served previously as the WGA's water program manager, the White House Deputy Director of Intergovernmental Affairs, and the mayor of Boulder, Colorado.

WSWC members John Tubbs, Tim Davis, and George Mathieus of Montana gave a presentation on water issues in their state. John described a recent report the Montana Department of Natural Resources and Conservation completed to describe the department's impacts to Montana's economy. Tim reported on efforts to carry out a state water plan, the first in 20 years, that will address how much water is currently used in the state, what future demand will be, how the state will meet that demand, and how the state will address drought. George discussed Montana's efforts to develop nutrient criteria, which will use a flexible, staged approach.

James Peña, Associate Deputy Chief of the National Forest System (NFS), described a proposed directive from the U.S. Forest Service (USFS) that is intended to create a comprehensive direction for the agency's management of groundwater on NFS lands. He said the directive is not intended to interfere with state groundwater allocation, will not change or expand USFS authority over surface water uses, and will not impose new conditions on oil and gas development. While comments were originally due on August 4, the USFS will extend the public comment period by an additional 30 days. The WSWC decided to continue consulting with USFS and will wait until USFS has responded to questions the WGA has raised about the directive before taking action on the proposal.

James gave a separate presentation on another proposed USFS groundwater directive for water quality best management practices on federal lands. He said the Forest Service will work with state and tribal governments to carry out the directive. The public comments on the directive were originally due on July 7, but James said USFS will extend the comment deadline.

Veva Deheza, Regional Drought Information Coordinator for the National Oceanic and Atmospheric Administration (NOAA), updated the WSWC on the National Integrated Drought Information System (NIDIS). She said NIDIS is working to coordinate what it hopes will become a national soil moisture network.

Mike Strobel, Director of the National Water and Climate Center, discussed the Natural Resources and Conservation Service's Snow Survey and Water Supply Forecasting program. Among other things, he said the program is moving away from manual snow course measurements to automated sites. The sites are being updated in a way that will preserve the long-term record.

Mike Norris with the U.S. Geological Survey's (USGS) National Streamflow Information Program updated the WSWC on his agency's streamgaging programs. He said federal funding for the National Streamflow Information Program has increased from \$105 million to \$160 million since 2003, while Cooperative Water Program funding has remained relatively flat. State and local contributions have almost doubled. Mike also said there are about 150 threatened or endangered gages, the lowest since tracking of endangered gages began.

Doug Kluck, NOAA's Central Regional Climate Services Director, described a provision in the recently passed Water Resources, Reform and Development Act that authorizes a federal coordinated effort to conduct a flood and drought monitoring program in the Upper Missouri River Basin.

Frank Kelly, Director of the USGS' Earth Resources Observation and Science Center, described the current status of Landsat 8, which launched in 2013. He also said Landsat 7 will likely last through 2017 and maybe into 2018. If a successor satellite is not launched before then, the current 8-day coverage provided by Landsat 7 and 8 could increase from 8 days to 16, which could create challenges for two-thirds of Landsat users who require the 8-day coverage. Possible options include building a "clone" of Landsat 8 or building a satellite with only a thermal sensor and flying it in tandem with a European satellite, which has not yet been built or flown. Thus, Frank said work is needed now to identify a "near-term" solution as soon as possible.

Timi Vam, NOAA's Western Regional Collaboration Coordinator, reported on joint WSWC-NOAA efforts that produced a series of briefing materials on programmatic data and

monitoring needs in the West, as well as NOAA water programs that assist western water management. NOAA and the WSWC also developed related House and Senate briefings in May that were attended by House Water and Power Subcommittee Chair Grace Napolitano (D-CA) and 25 staff from various Congressional offices.

Peter Nichols, a Special Assistant Attorney General for Colorado and New Mexico, updated the WSWC on a federal district court decision in New York that vacated EPA's water transfers rule, which clarifies that certain transfers are not subject to CWA permitting. EPA has filed a "protective" notice of appeal and has until September to file its opening briefs. A coalition of eleven western states led by Colorado and New Mexico that intervened in the case will also appeal the decision.

Alf Brandt gave an overview of the Dividing the Waters Initiative, where he serves as Executive Director. The Initiative provides training and resources to judges who preside over complex water litigation. Alf also noted that the Initiative's funding source is set to expire in the next few years and urged WSWC members to consider ways to help support the program. Former Montana Water Judge Bruce Loble joined Alf in discussing the value of the Initiative for judges.

Prior to the meetings, the WSWC and WestFAST held a workshop on July 15-16, that brought together over 40 state and federal experts from around the West to discuss ways to improve the resolution of federal non-tribal water rights claims. Next steps that emerged from the workshop include the establishment of a state-federal workgroup to foster collaboration and relationship building as well as a clearinghouse of relevant information.

176th Council Meetings Scottsdale, Arizona October 8-10

On October 8-10, the WSWC held its 176th meetings in Scottsdale, Arizona. During the meetings, the WSWC approved comments on the Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' proposed Clean Water Act (CWA) rule. The comments are based on the WSWC's position on CWA jurisdiction and on its prior letters and testimony regarding the rulemaking. They state that the rule should provide a deadline by which the agencies must make jurisdictional determinations for so-called "other waters." They also say the rule should use a "specific, quantifiable measure or measures" to determine "significance" when interpreting the significant nexus test Justice Kennedy set forth in the U.S. Supreme Court's *Rapanos* decision. Additionally, the comments ask the agencies to create a state-federal workgroup to further develop these recommendations and to refine other aspects of the rule. While the comments express appreciation for the agencies' decision to extend the public comment period from October 20 to November 14, they note that the Western Governors' Association (WGA) asked for a longer, 89-day extension.

The WSWC also adopted a new position in support of the Dividing the Waters Program within the National Judicial College, which educates judges overseeing complex water litigation. The program's funding will expire in 2016 and the position "...urges public interest foundations and other interested entities to provide funding for the program."

The WSWC re-adopted three existing positions supporting Indian water rights settlements, asserting state primacy over groundwater protection, and outlining actions federal agencies should

take to improve general stream adjudications. The WSWC added language to the general stream adjudication position that asks federal agencies to: (1) place a “higher priority” on educating their leaders and staff regarding western water rights and state water law; and (2) consult with states to consider ways to address federal needs under state law before asserting water rights claims.

As for other notable WSWC developments, new WSWC Chair Pat Tyrrell of Wyoming said his chairmanship will focus on improving state-federal collaboration. Tim Davis of Montana will also chair the Water Resources Committee, succeeding fellow Montanan John Tubbs. Prior to the meetings, the WSWC approved a resolution of appreciation for Anne Castle, who stepped down last month as the Assistant Secretary of the Interior for Water and Science.

Tom Iseman, Deputy Assistant Secretary of the Interior for Water and Science and the WGA’s former Water Program Manager, called in by phone to update WSWC members on notable Interior activities. He said Interior will finalize interagency guidelines for the Principles and Requirements (P&Rs) in November 2014. The Administration enacted the P&Rs last year to guide federal investments in water resource projects. Tom also said climate change, drought, data, and infrastructure are areas of interest for Interior. Others on the phone included Principal Deputy Assistant Secretary for Water and Science Jennifer Gimbel, a former WSWC member from Colorado and Wyoming; Principal Deputy Commissioner of the Bureau of Reclamation Estevan López, the former Director of the New Mexico Interstate Stream Commission; and Counselor for Water and Science Camille Calimlim Touton, formerly with the minority staff for the House Natural Resources Committee. Tom said the WSWC is well placed to work with Interior, noting its longstanding relationships with himself, Jennifer, Estevan, and Camille.

Bill Werkheiser, U.S. Geological Survey (USGS) Assistant Director for Water, said USGS priorities for the future include: (1) national networks that are “stable, interdisciplinary, and responsive;” (2) “continued enhancement of real time monitoring and modeling;” (3) “continued development of applications for information management and delivery;” (4) monitoring and modeling for prediction and forecasting of water quantity and quality; and (5) innovative techniques for monitoring and analysis. Bill also said USGS is focusing on funding streamgages that are important to states and that further federal objectives, so that states and other non-federal partners can focus their resources on other gages. In addition, Bill gave a brief overview of the Advisory Committee on Water Information’s (ACWI) activities.

Chris Carlson, the U.S. Forest Service’s (USFS) Groundwater Program Leader, discussed his agency’s proposed groundwater management directive, which is intended to provide a unified direction for the agency’s groundwater efforts on National Forest System (NFS) lands. Chris noted that the need for the directive stems from judicial determinations that the USFS has not adequately characterized groundwater resources and the impacts of its permitted activities. Chris said the directive is not intended to infringe on state water management and acknowledged that further work may be needed to refine the proposal. He also offered to work with the WSWC to address state concerns.

Following Chris’ remarks, Pat Tyrrell described a memorandum of understanding (MOU) Wyoming has with the USFS that describes how the state processes water permits under state law for water rights and uses located on or derived from NFS lands. The MOU recognizes Wyoming as the exclusive water allocation authority, and has worked well. Wyoming also has a similar MOU with the Bureau of Land Management.

Next, Tim Davis gave an overview of Montana's compact with the USFS. The compact quantifies the agency's water rights and has been recognized as a successful example of how states and federal agencies can work together to address federal water needs.

Arizona Department of Water Resources (ADWR) Director Michael Lacey described a strategic vision for water supply sustainability that his agency developed to provide a comprehensive water supply and demand analysis for Arizona. While the state is not facing an immediate crisis, he said future water supply and management challenges are likely if action is not taken now. To address these challenges, the vision identifies a number of proactive water management strategies, such as the use of reclaimed water and brackish groundwater, revised watershed management practices, weather modification, and other actions.

Next, Arizona Water Quality Division Director Michael Fulton described his state's wastewater reuse efforts, which he said are driven by need and by a comprehensive legal framework that supports reuse in Arizona. He said 60% of Arizona's 300 wastewater treatment plants distribute treated wastewater for reuse. Moreover, in Phoenix, 82% of treated wastewater is reused, with 22% for power, 22% for agriculture, 21% for recharge, 11% for environmental uses, and 6% for landscape and turf irrigation.

Fulton also gave a separate presentation on brine management in Arizona. He said brackish groundwater is a potential water source, but noted that there are questions about how to discharge desalinated brine. Deep well injection is one possible option and the state is convening a stakeholder group to analyze the state's statutes and rules, examine potential control technology criteria, and review best practices in other states.

Former ADWR Director and former WSWC member Sandy Fabritz-Whitney, now with Freeport-McMoRan, Inc., discussed a recent settlement agreement between her company and the Hualapai Tribe in Arizona regarding water right claims the tribe has asserted for a small executive order reservation. The settlement resolves the tribe's objections to a water transfer Freeport is seeking as part of its mining operations. It acknowledges the tribe's right to a certain amount of water and requires Freeport to make a financial contribution to support the tribe's economic development, among other things. The settlement does not involve any federal funding and does not pertain to the tribe's outstanding claims regarding its main reservation along the Colorado River.

WSWC member Cindy Chandley, a partner with Snell and Wilmer in Phoenix, gave an update on Arizona's Gila River and Little Colorado General Stream Adjudications, which involve around 85,000 and 14,000 claims, respectively. Cindy said the adjudication process has been slow, due in part to the state's statutory framework.

WSWC member Tom Stiles from Kansas described the vision that EPA and the states have developed regarding the Total Maximum Daily Load (TMDL) program under Section 303(d) of the Clean Water Act. He said the vision is intended to: (1) ensure that state-EPA collaboration is the "way it was meant to be;" (2) emphasize "product and progress over process and pace;" (3) focus on the "probability of successful implementation" when setting priorities; (4) diversify restoration approaches; (5) support state assumption of long range priorities; and (6) "do less with less but do what's most important."

WestFAST Chair Becky Fulkerson of the Bureau of Reclamation gave an update on her team's recent activities. She said the National Park Service has joined WestFAST and that Pat Lambert of USGS has begun his tenure as the Federal Liaison to the WSWC, succeeding Eric Stevens of the Corps. WestFAST is also working to more closely tie its workplan to those of the WSWC. Lastly, Becky said WestFAST will continue to work with the WSWC to improve federal-state collaboration.

Before the meetings, Arizona sponsored a field trip to the Scottsdale water campus, one of the largest indirect potable water reuse projects in the world. The field trip followed a roundtable discussion the WSWC held on state drought efforts and preceded a discussion the WSWC held with eastern interests regarding the Corps' surplus water rulemaking.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 9-11, in Colorado Springs, Colorado. WGA Chairman John Hickenlooper (D-CO) convened the meeting, where the governors elected Governors Brian Sandoval (R-NV) and John Kitzhaber (D-OR) as WGA's new Chairman and Vice-Chairman. In addition to Hickenlooper and Sandoval, Governors Jan Brewer (R-AZ), Butch Otter (R-ID), Sam Brownback (R-KS), Steve Bullock (D-MT), Jack Dalrymple (R-ND), Dennis Daugaard (R-SD), Gary Herbert (R-UT), and Matt Mead (R-WY) attended. Canadian Ambassador Gary Doer also attended.

Governor Sandoval discussed the Western Governors' Drought Forum initiative for the coming year, which will support the governors' leadership on drought preparedness and response by leveraging western state water, agriculture, and resources expertise and working to foster a dialogue about best practices for drought management over the coming year. Deliverables include: (1) an analysis of existing state drought plans, common themes, and unique approaches; (2) a series of regional meetings on drought impacts to specific communities, resources, or industries; (3) a report on the lessons learned; (4) a publication of case studies via a best practices digital library; and (5) codifying the framework so that the Forum lives beyond its initial year.

The meetings began with a private live video-conference with the governors and President Obama on wildfire and efforts to improve forest management, including putting an end to "fire borrowing," in which discretionary funding is carved out of federal agency accounts to pay for unanticipated emergency firefighting expenses.

Governor Hickenlooper executed one of his last responsibilities as WGA Chairman by signing a memorandum of understanding (MOU) with National Oceanic and Atmospheric Administration (NOAA) Administrator Dr. Kathryn Sullivan to continue an existing collaborative effort that will improve the development, coordination, and dissemination of drought and extreme weather data, information, and analysis, as well as preparedness, planning tools, and innovations, to support resource management decisions in the West.

The governors also approved six new resolutions on: (1) respecting state authority and expertise; (2) regional wildfire fighting resources; (3) species of concern and candidate species under the Endangered Species Act (ESA); (4) federal agreements with western states; (5) Clean Air Act (CAA) authority and air quality regulation; and (6) state wildlife science, data, and analysis.

The meetings included three keynote addresses. First, Secretary of the Interior Sally Jewell discussed drought and wildfire. Second, Environmental Protection Agency (EPA) Administrator Gina McCarthy gave a luncheon keynote address that focused on her agency's recently proposed regulations on carbon emissions from existing power plants under the CAA. Lastly, Fred Hochberg, Chairman and President of the Export-Import Bank of the U.S. discussed financing activities.

Deputy Secretary of the Interior Mike Connor participated in a roundtable discussion on water challenges and opportunities in the West, along with Colorado Conservation Board Director James Eklund, a WSWC member, and Southern Nevada Water Authority General Manager John

Entsminger. The discussion addressed water management strategies in the context of growing demands and the West's unique hydrology. Connor noted Interior's history of working cooperatively with the WGA and WSWC.

Governor Dugaard moderated a roundtable discussion on preparing and responding to drought and flooding that included Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works), and Robert Bonnie, Under Secretary for Natural Resources and Environment for the U.S. Department of Agriculture (USDA). Darcy specifically noted the creation of WestFAST and its WSWC Liaison as a growing model for collaboration and joint efforts to provide easier access to water data, improve forecasting, and consider infrastructure needs.²

Drought Forum

On September 11, Western Governors' Association (WGA) Chairman Brian Sandoval (R-NV) announced the first four meetings of the Western Governors' Drought Forum, to foster a regional dialogue on drought policy, preparedness, and management. Each meeting focused on a specific sector impacted by drought and featured experts from government, industry, and others. The first four invitation-only meetings are: (1) Managing Drought in the Energy Sector, September 18-19, Norman, Oklahoma; (2) Drought Impacts and Solutions in the Manufacturing, Mining and Industrial Sectors, October 7-8, Tempe, Arizona; (3) Drought Impacts and Solutions in the Agricultural Sector, November 13-14, Sacramento, California; and (4) Drought Impacts and Solutions for Water Supply, December 8-9, Las Vegas, Nevada. WSWC members and staff participated in each of the Forum meetings.³

Norman, Oklahoma

On September 18-19, the Western Governors' Association (WGA) held the first of its invitation-only Drought Forum meetings at the National Weather Center in Norman, Oklahoma. The WGA is conducting the Forum in partnership with the National Oceanic and Atmospheric Administration's (NOAA) National Integrated Drought Information System. The Oklahoma meetings discussed energy-related drought impacts and included nearly 50 experts from around the West and multiple sectors.

Oklahoma Governor Mary Fallin (R) kicked off the meetings. "In Oklahoma, we've been experiencing drought since the fall of 2010," she said. "Oklahoma has suffered \$2 billion in losses from the 2011 and 2012 drought." She also discussed the Oklahoma Water for 2060 Act, which she signed to establish a goal that the state will use no more fresh water in 2060 than in 2012.

Oklahoma Secretary of Energy and Environment Michael Teague also gave a featured presentation. "There's not a single agency that can fix this by themselves; not a single state, not a single sector; we have to work together," he said.

Oklahoma Water Resources Board (OWRB) Executive Director and WSWC member J.D. Strong discussed industry responses to drought. "What we need is a more thoughtful drought planning system," he said. "Planning way in advance for those worst case situations, conserving our

²<http://westgov.org/meetings>.

³<http://westgov.org/news>.

water whether in drought or not, reusing and recycling water, constantly innovating, and avoiding costs.”

Jennifer Gardner with the Utah Governor’s Office of Energy discussed Utah’s Water-Energy Challenge, which seeks a 25% reduction in water use by 2025. She also said Utah is in a “relatively good position” but that reservoirs are “...below normal and the state faces a real risk of running out of fresh water by 2025 if more aggressive conservation actions aren’t taken now.”

Similarly, Alaina Burtenshaw, Chair of the Nevada Public Utility Commission said: “Drought is the normal situation. We need to adapt to deal with these conditions on a regular basis. The 20th Century was the wettest century in the last 1,000 years. It has given us false expectations about what the future will be.”

Former OWRB Executive Director Duane Smith, who also served previously as the WSWC’s Chair, participated in a case study regarding Oklahoma’s Panhandle Regional Water Plan. “The impetus for the plan was to change the conversation from ‘Ag is the problem,’ with producers being depicted as greedy irrigators who keep using water despite drought,” he said. “Farmers were concerned that they would put regulations in place downstate [in Oklahoma City] when they don’t actually understand the way agriculture is done in the Panhandle.”

Two roundtable discussions focused on technologies and innovative approaches as well as needs and new frontiers for data and analysis. “The biggest challenge is how to project uncertainty by doing better modeling and predictions,” said Mike Hightower, a member of Sandia National Laboratories’ technical staff. Ed Steele, the Water Technical Manager at GE’s Global Research Center also observed: “The people and the general public need to be sold on using treated water for it to ever work. The technology is there, but it is overcoming attitudes that is the real challenge.”

A number of other speakers discussed the drought outlook for the Southern Great Plains and possible impacts on energy. Mark Shafer, Director of NOAA’s Southern Climate Impacts Planning Program, reported that there is a good chance of more precipitation from the Southern Great Plains all the way to California, but that the precipitation won’t end current drought conditions. Kevin Geraghty, Vice President of Energy Supply at Nevada Energy, also noted that the “...megawatt that you never have to make is actually the most valuable thing in terms of water savings for the energy sector.”

Tempe, Arizona

The second Drought Forum meeting was held on October 7-8 in Tempe, Arizona. The meeting focused on drought-related challenges that mining, manufacturing, and industry are facing.⁴

“If [Arizona] is going to continue to grow economically, our water supplies must keep pace,” said keynote speaker Sandra Fabritz-Whitney, the Director of Water Strategy for Freeport-McMoRan and a former WSWC member and former Director of the Arizona Department of Water Resources (ADWR). “Companies like Freeport may be able to solve short-term problems alone, but wide-reaching planning issues can’t be solved alone.”

⁴*Western States Water*, #2016, December 5, 2014.

ADWR Director and WSWC member Michael Lacey participated in a roundtable discussion on policy approaches, noting that it took a “sustained, multi-generational effort” to build the Salt River Project (SRP) and the Central Arizona Project. “We are at that point again where we must recognize that we need additional supplies and work towards that point,” he said.

Bill Staudenmaier, a partner with Snell and Wilmer in Phoenix and a WSWC member, discussed drought impacts on the manufacturing, mining, and industrial sectors. “Effluent water needs to be addressed as a source of power plant water,” he said. “It is about as close to a drought-proof water supply source that you will get. As population grows, so does your effluent - and, so does your demand for power.”

Other experts discussed drought impacts in Arizona and the West. “People ask me if the drought is over,” said Charlie Ester of SRP. “I usually answer, does it matter? [P]lanning for drought needs to become the norm, not just something done during dry years.” Kevin Werner, the Western Regional Climate Services Director for the National Oceanic and Atmospheric Administration, also noted: “We are not out there to do science for science’s sake, we are doing things to help inform decision makers.”

Additional speakers participated in a case study discussion on the partnership between the Gila River Community and SRP, as well as roundtable discussions on technology, data and analysis.

Sacramento, California

California Governor Jerry Brown and Nevada Governor Brian Sandoval addressed participants at the drought forum focused on agricultural impacts and responses held November 13-14, in Sacramento. Governor Sandoval, WGA Chair, stated, “Farmers...come to me and they feel really helpless. They don’t know what to do, and their livelihood is at stake.” He noted that 97% of Nevada is in some degree of drought. Governor Brown declared, “The drought will test our imagination and our science, our technology and our political capacity to collaborate.” Brown noted plans to build twin tunnels under the Sacramento-San Joaquin Delta to move more water to Central Valley farms and Southern California with fewer environmental impacts. Brown, whose father presided over construction of the California State Water Project in the 1960s, observed: “There are a lot of people who think somehow engineering water from point A to point B is somehow unnatural. Well we long ago passed the unnatural in California.”

Las Vegas, Nevada

The WGA held the forth in its series of Drought Forum workshops on December 8-9, in Las Vegas, Nevada. The workshop immediately followed the WGA’s Winter Meeting and focused on drought impacts and solutions for water supply management.⁵ WGA Chair Brian Sandoval (R-NV), who initiated the Forum, provided the opening remarks for the workshop, stating: “We have a dream team of drought experts in the West - and in America - here to share best practices [and] help solve this challenge.” Sandoval further noted that he wants the Forum to create a tool that can be used across the West and be updated continually, which will include an online resources library, a collection of best practices, cases studies, and news about drought. Among other topics, the workshop discussed current drought conditions in the West and the impact of drought on water

⁵*Western States Water*, #2109, October 17, 2014.

supply management. It also included a case study on collaborative efforts to address drought in southern Nevada.⁶

Winter Meeting

On December 6-7, the Western Governors' Association (WGA) held its 2014 Winter Meeting in Las Vegas, Nevada. WGA Chair Brian Sandoval (R-NV) convened the meeting, which Governors John Hickenlooper (D-CO), Butch Otter (R-ID), Steve Bullock (D-MT), Susana Martinez (R-NM), Gary Herbert (R-UT), and Matt Mead (R-WY) attended.

“The West still represents opportunity, rugged individualism, the vast potentials of enterprise and hard work, in short, the very best of what it is to be an American,” said Sandoval in his opening remarks. “We’re only limited by how big we are willing to dream and how hard we are willing to work.”

Secretary of the Interior Sally Jewell gave one of two keynote addresses during the meeting. “We are in a period of epic collaboration,” she said. “That’s what is happening for sage-grouse across the eleven states. We have incredible momentum so we can’t stop now, we need to get across the finish line.”

Secretary of Energy Ernest Moniz gave the other keynote address. Among other things, he said: “We are committed to an all-of-the-above energy strategy. Our job is to make sure the options are there for our communities and states to make the choices they need to make for a clean energy future.”

The meetings included a roundtable discussion and four plenary sessions that focused on: (1) managing lands and species; (2) freight and electricity infrastructure; and (3) improving services and opportunities for veterans.

The meetings also included the public rollout of WGA’s Regulatory and Permitting Information Desktop toolkit (RAPID) that integrates information related to potential energy transmission routes and key permitting and siting requirements of federal and state agencies. In addition, the governors approved two new resolutions regarding methane emissions regulation and wild horse and burro management.

WSWC/NOAA House and Senate Briefing

On May 8, the Western States Water Council and NOAA West presented House and Senate briefings for congressional staff, titled “*Western Water Issues, Actions and Partnerships*.” The briefing which brought state and local water management experts together with NOAA scientists and leaders to discuss some of the most pressing water resource issues facing the West, actions that are being taken in response, and the partnerships that are making the region more resilient to future challenges.

Water in the West is an increasingly scarce and precious resource, given population growth and an expanding range of often competing economic and ecological demands. As states carry out

⁶<http://westgov.org/drought-forum>.

their traditional role with regard to water allocation and management, the challenges continue to grow. More frequent occurrences of extreme weather – such as floods, and longer-term conditions, such as drought – threaten regional water security and sustainability, jobs (livelihoods) and quality of life. The region is responding with excellent examples of cooperative partnerships, but there is much more to do. Successful management and adaptation strategies and practices are dependent on accurate, precise and timely data, and actionable information.

Congresswoman Grace Napolitano (D-CA) provided opening remarks for the House briefing. She noted that floods and droughts impact the economy and affect everyone; it is not a partisan issue. These events are only likely to become more challenging in the future, and there is a lot to be gained from advance planning, as well as providing communities with the information and tools they need to be prepared to respond. She welcomed and thanked the panelists and attendees for taking the time to understand how critically important this is to the country. Senator Feinstein's (D-CA) staff secured the room for the Senate briefing and attended. In all, about 25 staff participated, including Congressional Research Service staff.

Tony Willardson, WSWC Executive Director, remarked on the establishment and role of the Council, and provided welcoming remarks. He talked about the relationship between the Council and federal agencies with water resources responsibilities, and the continued need for coordination and collaboration. He also noted the value of NOAA's Regional Integrated Sciences and Assessment program, and weather and river forecast offices. He also mentioned a soon to be re-signed MOU between the Western Governors' Association and NOAA to collaborate on drought, flooding, and wildfire preparedness, sharing information and building resilience in planning for extreme events.

Kevin Werner, NOAA's Western Regional Climate Services Director, introduced the panelists and at the conclusion of each panel, moderated a question and answer session.

Panel 1: NOAA's Hydrometeorology Testbed, Atmospheric Rivers, and Improving Sub-seasonal to Seasonal Forecasting – California Case Study.

Jeanine Jones, California Department of Water Resources (Sacramento, CA) and Allen White, NOAA Office of Oceanic and Atmospheric Research (Boulder, CO) provided an overview of the Hydromet Test Bed (HMT) collaboration involving an enhanced observing system for extreme precipitation and related research towards improving our understanding of the role played by "atmospheric rivers" (ARs) in California's hydrology and prediction of both wet and dry extremes. Governor Brown's 2014 drought emergency proclamation directed the CDWR to refine its seasonal forecasting and drought prediction capability by advancing new methodologies. CDWR is looking to knowledge gleaned from the HMT project and from further work with NOAA to achieve this objective.

Attendees asked how atmospheric rivers affect water in the West, and were interested in the observation and monitoring collaboration between the CDWR and NOAA. The amount of water vapor in an atmospheric river can be 8-10 times the flow of the Mississippi River. While only a small fraction of this falls as precipitation over the West Coast, it is still significant. Atmospheric rivers provide approximately half of California's annual water supply. Atmospheric rivers occur all over the world, and the Western United States experiences 5-8 events a year on average, with a "dry year" being one in which only 1-2 events occur.

Panel 2: Colorado River Water Management – Snowpack, Spring Melt and Water Supply Forecasts.

Eric Kuhn, Colorado River District (Glenwood Springs, CO) and Michelle Stokes, NOAA, National Weather Service (Salt Lake City, UT), discussed Colorado River water management challenges that are driven by winter snowpack and spring melt. Although existing infrastructure (e.g. dams, reservoirs and water distribution systems) reduces vulnerabilities to climate variability, it does not eliminate all risk. Colorado River stakeholders require reliable forecasts of the quantity of spring melt volumes in the river and its tributaries. NOAA's Colorado Basin River Forecast Center routinely generates water supply forecasts and works with stakeholders such as the Colorado River District to ensure forecasts are meeting their needs.

Attendees were interested to learn that water supply forecasts are different in the Western United States, because so much of the water supply is stored in mountain snowpacks. This makes relationships with other federal agencies, such as the U.S. Geological Survey (which measures and monitors streamflow), and the Natural Resources Conservation Service (which operates SNOTEL sites), critically important. There were questions about the affect of dust on snow, and efforts to incorporate that information into snow melt and runoff forecasts. There were also questions about river district operations, and whether or not the time scale of the forecast was what is needed. The river district is happy with the information that is provided on a one or two-year time scale. What is needed is better information over a 2-5 year timeframe.

Panel 3: Habitat, Harvest, Hatcheries and Hydropower: Achieving Balanced Solutions to Salmon Recovery.

Derek Van Marter, Upper Columbia Salmon Recovery Board (Wenatchee, WA) and Scott Rumsey, NOAA National Marine Fisheries Service (Portland, OR), described effective management approaches that are utilizing local and grassroots expertise to identify problems and develop solutions. States, tribes, local communities and the federal government are working together in coordinated and respectful ways. The board, established by the Washington State Legislature, works to integrate federal, state and local programs and facilitate a science-based process to target funding toward efficient and effective habitat restoration projects. This is helping to “turn the corner” on salmon recovery in balanced collaborative ways.

Attendees were curious to know the benefits of a board, and if it was a challenge to get it established. One benefit is the ability to assemble local expertise and allow parties to work in a non-regulatory way. Through the board, local and federal experts can work through differences and develop a shared vision.

Panel 4: Connecting Drought Early Warning with Long Term Planning.

Michael Hayes, National Drought Mitigation Center (Lincoln, NE) and Veva Deheza, NOAA National Integrated Drought Information System (NIDIS - Boulder, CO), provided examples of how state, tribal and local governments depend on NOAA and other federal agency information to support drought early warning systems. Effective drought response and mitigation strategies rely on strong connections between these early warning systems and drought planning activities and policy efforts. This panel highlighted NOAA's NIDIS, existing regional drought early warning systems, and how the National Drought Mitigation Center is using this information to help entities and individuals prepare for future droughts.

Attendees asked how people act during a drought – especially long-term mitigation in drought situations. Messaging is very critical and a lot more water user education is needed at a regional scale. We are starting to see more educated communities. The media and broadcast meteorologists help by showing the U.S. Drought Monitor maps and other information on TV during the weather forecast.

During a general question and answer session, attendees asked how well NOAA works with other federal water management agencies such as the Bureau of Reclamation and U.S. Army Corps of Engineers. There are clear links between the science and their operations. In California, for example, NOAA is “joined at the hip” with the State and the federal water management agencies out of sheer necessity. Information is consumed immediately. Where disagreements occur, it is usually around operational risk management. The more coarse the data, the more conservative the risk management.

Attendees also noted that while everyone wants and needs more information, monitoring is often an easy target for budget cuts. It is difficult to educate the public if we’re losing data sets needed for forecasting and prediction. Observations and data are the foundation for every resource management issue discussed in the briefing.

Will Stelle, West Coast Regional Administrator, NOAA National Marine Fisheries Service, provided summary remarks. The subject of Western water is critically important not only to the region, but to the country as a whole. In order to efficiently and effectively manage this resource, we must have observations, data, science, and effective decision support. Science matters. It is our touchstone. Data matters. It is what helps us make judgments and manage risks. Scale matters, both temporally and spatially, from large scales and long-term time periods, to local scales and the present moment. Precision matters. The degree of forecast and prediction skill at multiple scales is directly related to efficiency and the ability to steer closer to risk boundaries. Managers are less risk tolerant if precision is poor. The costs of data and observations are far outweighed by the increase in efficiency, given the value of water, as well as the support data provides for managing risks related to droughts and floods.

CONGRESSIONAL TESTIMONY

Senate Subcommittee on Interior and Environment

On May 23, the Western States Water Council (WSWC) and the Native American Rights Fund (NARF) submitted the following written joint testimony to the Senate Subcommittee on Interior and Environment in support of adequate funding for the Secretary of the Interior's Indian Water Rights Office (SIWRO) and the Bureau of Indian Affairs (BIA) to carry out their responsibilities in support of Indian water rights settlements.⁷ This testimony is based on WSWC Policy Resolution No. 336.⁸

For over 30 years, the WSWC and NARF have worked together to support the negotiated resolution of Indian water rights claims. Our organizations believe there is a need to quantify Indian water rights, that negotiated settlements are preferable to litigation as a means of quantifying those rights, and that the federal government should encourage and facilitate settlements. As discussed below, the SIWRO and the BIA play a key role in the settlement process, and Congress should ensure they receive sufficient funding to carry out their settlement efforts.

Prior Appropriation and Indian Water Right Claims

The doctrine of prior appropriation governs the allocation of water in most western states. Under this system, the first parties to physically divert and put water to a "beneficial use" have priority over subsequent water users. Thus, senior water right holders with earlier priority dates (the date the water was first put to beneficial use) can seek curtailment of uses with junior priority dates in times of shortage.

Most non-Indian water development in the West occurred after the federal government finalized treaties and executive orders to establish reservations for tribes, and after Congress severed land and water rights in the West and directed that water rights be obtained under state law. In addition, most tribal treaties and executive orders creating Indian reservations did not specify the tribes' water rights.

The U.S. Supreme Court addressed the resulting conflict in *Winters v. United States*, 207 U.S. 564 (1908), finding that tribal treaties and executive orders impliedly reserved water rights necessary to meet the purpose(s) of a tribe's reservation. These reserved rights differ from state-issued water rights because they: (1) arise independently of beneficial use; (2) are not limited by beneficial use; (3) are measured by present and future supplies needed to fulfill the reservation's purpose(s) instead of past uses; and (4) have priority dates that correspond to the date the tribe's reservation was established.

⁷The WSWC is a government entity created by the western Governors, which advises the Governors of 18 western states on water policy matters and is associated with the Western Governors' Association. NARF is a non-profit 501c(3) organization that provides legal representation and technical assistance to Indian tribes, organizations and individuals nationwide - a constituency that often lacks access to the justice system.

⁸<http://www.westernstateswater.org/policies-2/>.

The Need to Resolve Tribal Water Rights Claims

Resolving *Winters* rights claims is critical for western states because tribal rights typically have priority dates that are senior to non-Indian uses, and therefore have the potential to displace established state-issued rights. This is especially problematic where tribal rights pertain to river systems that are fully appropriated by non-Indian users. The un-quantified nature of many tribal rights creates great uncertainty with regard to existing state-based uses and can impede local, state, and regional economic development. As a result, quantifying tribal water right claims is essential for western states to address increasing water demands related to the West's growing population, and to allocate water supplies that continually change and are often scarce due to drought, reduced snowpacks, and other factors.

At the same time, tribes often lack the resources to develop their water rights. This lack of a reliable water supply and related infrastructure throughout Indian Country sometimes prevents tribes from protecting the health, welfare, and safety of their communities. For example, over 40% of tribal members in the Navajo Nation haul water for domestic use. This lack of potable water has caused various illnesses.⁹ Members of the Kickapoo Tribe of Kansas, the Chippewa Cree Tribe of Montana, and others also haul water for basic domestic needs.¹⁰

The absence of adequate and reliable potable water supplies also contributes to unemployment, poverty, and mortality rates on reservations that are much higher than those of neighboring non-Indian communities. In California, the lack of an adequate water supply has prevented the Tule River Tribe from providing fire protection, housing, and economic opportunities to tribal members. The Tribe also has unemployment and mortality rates that are 50% higher than Tulare County as a whole and has been unable to act on hundreds of housing applications.¹¹

Settlements are the preferred manner of resolving tribal water rights claims because they allow states and tribes to address these issues in ways that are not available through litigation. Specifically, settlements: (1) enable tribes to turn quantified rights into “wet water,” while litigation typically provides tribes with “paper rights” only; (2) allow tribes and non-Indian parties to craft mutually-beneficial solutions tailored to their specific needs; (3) are often less costly and time-consuming than litigation, which can last for decades and be extremely expensive for all parties, including the federal government; (4) give states and tribes control over the resolution of water rights claims; and (5) build positive relationships between states, tribes, and the federal government, which are essential because water is a shared resource that all parties must cooperatively manage after adjudication.

⁹Concerning S. 1771 – *Northwest New Mexico Rural Water Projects Act: Hearing on S. 1771 Before the S. Comm. on Energy and Natural Resources*, 110th Cong. 8 (2007) (statement of Joe Shirley, Jr., President, Navajo Nation).

¹⁰*Testimony of John Echohawk on behalf of the Native American Rights Fund: Oversight Hearing on Indian Water Rights Settlements Before the Subcomm. on Water and Power of the H. Comm. on Natural Resources*, 110th Cong. 7-8 (2008) (statement of John Echohawk, Executive Director, NARF) [hereinafter Echohawk Testimony].

¹¹*In Support of S. 789, the Tule River Tribe Water Development Act: Hearing to Receive Testimony on S. 637, S. 789, S. 1080, and S. 1453 Before the Subcomm. on Water and Power of the S. Comm. on Energy and Natural Resources*, 111th Cong. 7 (2009) (statement of Ryan Garfield, Chairman, Tule River Tribe); Echohawk Testimony, *supra* note 6, at 7.

For example, the federal government holds Indian water rights in trust for the tribes and has a fiduciary duty to protect tribal water rights. Because the federal government has not always protected tribal water rights, tribes often have significant breach of trust claims against the United States. At the same time, many tribal water rights claims in the arid West involve fully-appropriated stream systems. To address these issues, tribes will often waive their breach of trust claims against the federal government as well as a portion of their claimed water rights in consideration for federal funding to build needed drinking water infrastructure, water supply projects, and tribal fishery restoration projects. These projects generally enable tribal and non-tribal water users to use existing water supplies more efficiently and advantageously and do not take water from existing non-Indian water users. Moreover, these types of mutually-acceptable outcomes are simply not available through litigation.

The Role of the Federal Government in Settlements

The federal government is joined in all water rights adjudications involving tribes because it holds the tribes' rights in trust. This means that it has a fiduciary duty to help tribes resolve their rights and ensure that settlements are funded and implemented, in addition to its obligation to protect tribal water rights. It also means that Congress and the President must approve each settlement.

The federal government has long supported a policy of resolving Indian water rights claims through negotiation rather than litigation. To this end, the Department of the Interior's Indian Water Rights Settlement Program facilitates federal involvement in the settlement process. The SIWRO leads this program in consultation with Interior's Officer of the Solicitor, facilitating inter-agency participation and cooperation needed to achieve and implement comprehensive settlements.

In particular, the SIWRO coordinates and supports federal settlement activities through 38 federal assessment, negotiation, and implementation teams that are working throughout the West. These teams consist of representatives from agencies and bureaus within Interior, including the BIA, the Bureau of Reclamation, the Solicitor's Office, the Fish and Wildlife Service, as well as the Department of Justice and other federal departments. These teams also provide a unified federal voice that helps further the settlement process, a matter of crucial importance for the states as well. However, the legitimate need for these teams far outstrips the number of teams available.

Furthermore, Interior and its agencies and bureaus provide critical monetary, personnel, and technical support that tribes need to effectively participate in the settlement process. As part of these efforts, the BIA provides technical assistance to tribes and coordinates the process of soliciting water-related funding proposals from tribes. It also identifies funding needs for studies required in ongoing Indian water rights litigation and negotiations. For instance, the BIA's Water Rights Negotiation/Litigation Program provides necessary documentation, technical studies, and other materials needed for the United States to further the negotiation of tribal water right claims.

Appropriating insufficient funds for these purposes hinders the resolution of tribal water right claims. Therefore, Congress should ensure that the SIWRO and the BIA receive adequate appropriations to carry out their responsibilities in support of Interior's water rights settlement program.

The Consequences of Not Supporting Settlement Efforts

Tribes require the resources that the SIWRO and the BIA provide to participate effectively in the settlement process. Failure to provide adequate appropriations for these programs could postpone the negotiation and implementation of Indian water rights settlements. Ultimately, this makes the resolution of many tribal water rights claims more expensive for the federal government in the long-run because increasing water demands, decreasing water supplies, and other factors will only increase the costs of resolving these claims.

Conclusion

The United States has a trust obligation to the tribes that includes ensuring that they can participate in the settlement process. Failure to provide sufficient funding to fulfill this obligation will only increase federal costs, perpetuate hardships to tribes, and prolong resolution of conflicts between reserved water rights and state-created water rights. This, in turn, could potentially disrupt established economies and hinder effective state and regional water planning and development.

House Subcommittee on Water Resources and Environment

On June 11, the WSWC was invited to testify on the “Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule” before the House Subcommittee on Water Resources and Environment. J.D. Strong, Executive Director of the Oklahoma Water Resources Board provided testimony on behalf of the the Western Governors’ Association (WGA) and the Western States Water Council (WSWC) in his capacity as the Chairman of the WSWC’s Water Quality Committee. His testimony was based on a series of letters the WGA and WSWC have sent EPA and the Corps regarding the rulemaking. Separately, he submitted testimony on behalf of Oklahoma.

The WGA and the WSWC recognize that the EPA and the Corps are especially impactful to the West. These agencies have rich potential to either support state efforts or impinge on state authority under the Clean Water Act (CWA). They can exercise vital leadership or they can interfere with well-managed state activities. Accordingly, it is critical that state and federal agencies develop and maintain positive, cooperative working relationships. Our organizations believe that such cooperation is only possible when states are regarded as full and equal partners of the federal government in the development and execution of programs for which both have responsibility.

This is particularly true for the CWA because Congress intended for the states and EPA to implement the CWA in partnership, delegating authority to the states to administer the law as co-regulators with EPA. Such consultation will be critical in ensuring the effectiveness of this particular rulemaking and in avoiding unintended consequences, especially in the West, which is defined by arid landscapes and unique hydrologic and geographic features not found in the East. As such, state water managers must have a robust and meaningful voice in the development of any rule regarding the jurisdiction of the CWA.

The Lack of Substantive State Consultation in the Development of the Rule

WGA and the WSWC are concerned that states were insufficiently consulted in the development of the proposed CWA rule and had no involvement in its drafting. The WSWC first wrote EPA and the Corps in 2011 to urge them to pursue formal rulemaking instead of the now

withdrawn guidance.¹² At that time, the western states believed rulemaking, unlike guidance, would afford greater opportunities for early and ongoing state consultation and would better ensure the treatment of states as co-regulators. In making this request, the WSWC urged EPA and the Corps to consult with the states in the early phases of the rule's development, a request it reiterated in three subsequent letters dated April 10, 2013, November 20, 2013, and March 10, 2014.

As the WSWC noted repeatedly in its letters, waiting until the public comment period to solicit state input does not allow for meaningful consideration of state views, especially with respect to the consideration of alternative ways of meeting federal objectives. Unfortunately, these requests for substantive consultation were largely ignored, and EPA and the Corps issued the proposed rule without conducting substantive consultation with the states.

In addition, the WSWC also urged the agencies to acknowledge the federalism implications of the rulemaking and to comply with the state consultation criteria set forth in Executive Order 13132. However, as noted in the preamble of the proposed rule, EPA and the Corps do not believe that Executive Order 13132 applies to this rulemaking and also believe that the rulemaking "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."¹³ Contrary to this belief, any effort to redefine or clarify the term "waters of the U.S." has, on its face, numerous federalism implications that some western states believe will have very substantial and direct effects, thereby requiring robust state consultation and compliance with Executive Order 13132.

While EPA and the Corps conducted some outreach with the WGA, the WSWC, and other state organizations during their development of the rule, much of this consisted primarily of communicating the agencies' goals and time lines for the rulemaking. Moreover, prior to the issuance of the proposed rule, the agencies consistently stated that they could not discuss the "substance" of the rule they were developing, thereby limiting the ability of the states to meaningfully participate in its development.

The federal government should engage in true consultation with states as co-regulators. EPA and Corps communications cannot take the place of substantive, collaborative engagement with the individual states and their respective water quality agencies. The substantial differences in hydrology, geography, and the legal frameworks in the West require significant consultation with each state to determine how the draft rule will effect them and be implemented, in order to avoid misrepresentations and unintended consequences.

Once EPA and the Corps issued the rule, the WGA and WSWC urged EPA and the Corps to fully avail themselves of the states' on-the-ground knowledge of their unique circumstances, as well as their primary role in protecting water quality, by giving as much weight and deference as possible to the states' collective and individual comments, concerns, priorities, and needs.

¹²U.S. Environmental Protection Agency and U.S. Department of the Army, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (May 2, 2011), available at: http://www.epa.gov/tribal/pdf/wous_guidance_4-2011.pdf.

¹³Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188, 22,220 – 22,221 (Apr. 21, 2014).

Our organizations also reiterate a request Governors John Hickenlooper of Colorado and Brian Sandoval of Nevada, the Chairman and Vice Chairman of the WGA, made in a March 25 letter to EPA and the Corps. Namely, the Governors urged the agencies to consult with the states, individually and through the WGA, “in advance of any further action” on the rulemaking. Governors Hickenlooper and Sandoval also sent EPA and the Corps a subsequent letter on May 30, requesting a 180-day extension of the public comment period for the rule, stating:

“The published 91-day public comment period is insufficient for states to thoroughly review the content and analyze the implications of the proposed rule.... Before proceeding further with this proposal, your agencies should take the time to engage in true, substantive consultation with states.”

Notably, the WGA and WSWC have had some initial contact with EPA, particularly Region 8, about this request, and the WSWC is coordinating conference calls with states, EPA and the Corps to facilitate a dialogue on particular issues of concern to the western states. While the WSWC and WGA appreciate the willingness of EPA and the Corps to participate in these calls, information sharing does not equate to meaningful consultation. Therefore, in this and future rulemaking processes, the WGA and WSWC urge EPA and the Corps to pursue an authentic partnership with the states.

EPA’s Science Advisory Board

The states’ role would also be significantly enhanced by greater state representation on EPA’s Science Advisory Board (SAB), on which the agency relies to provide the scientific underpinnings for this and other regulatory decisions.

The SAB was established by the Environmental Research, Development, and Demonstration Authorization Act of 1978 in accordance with the Federal Advisory Committee Act of 1972 (FACA). It has a broad mandate to advise EPA on scientific, technological, and social and economic issues and its Charter defines the SAB as a scientific and technical advisory committee. Sections 5(b)(2) and 5(c) of FACA further require the membership of an advisory committee to be “fairly balanced in terms of points of view represented and the functions to be performed.”

Despite the foregoing mandates and the tremendous value that would be added to SAB processes by state participation, state agency scientists are woefully and demonstrably under-represented on the SAB, as well as on its standing and *ad hoc* committees. This is particularly true for the SAB panel that is reviewing the EPA connectivity report that will serve to inform the final CWA rule.¹⁴ Of the 27 experts on the panel, not one is a state agency scientist or expert.¹⁵

¹⁴U.S. Environmental Protection Agency, *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/660R-11/098B, (Sept. 2013), available at: [http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/\\$File/WOUS_ERD2_Sep2013.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf).

¹⁵U.S. Environmental Protection Agency Science Advisory Board, *Members of the Panel for the Review of the EPA Water Body Connectivity Report, External Draft*, available at: <http://yosemite.epa.gov/sab/sabpeople.nsf/WebExternalSubCommitteeRosters?OpenView&ccommittee=BOARD&subcommittee=Panel%20for%20the%20Review%20of%20the%20EPA%20Water%20Body%20Connectivity%20Report>.

In addition, EPA and the Corps released the proposed CWA rule before finalizing the connectivity report. Releasing the proposed rule before the report raises concerns that the final report will have little or no influence on the final rule. Many western states have submitted individual comments for the SAB to consider in its review of the draft report. Waiting until the report was finished to release the proposed rule would have given EPA more information to consider, and could have led to revisions that may have improved the proposed rule.

Notably, some press reports have indicated that the SAB is still developing its comments on the connectivity report and has identified some preliminary areas that may require further changes to both the report and the rule. Although these comments are still in draft form, the SAB's deliberations underscore the premature nature of the rule's publication. Among other things, press reports have indicated that the SAB's draft comments state that the report could be more useful to decision-makers if it brought more clarity to the interpretation of connectivity, especially regarding the quantification of the magnitude, degree, or consequences of connectivity, and the aggregate effects of streams and wetlands on downstream waters. The SAB's deliberations further note that the report often treats connectivity as a binary property, either present or absent, rather than recognizing varying degrees of connectivity.¹⁶

The SAB's preliminary comments speak directly to one of the concerns that the WSWC has expressed about the rule – that the rule should quantify “significance” as used in Justice Kennedy's concurring opinion in *Rapanos v. United States*¹⁷ to ensure that the rule does not extend jurisdiction to waters that have a de minimis connection to jurisdictional waters.

For these reasons, the WSWC encouraged EPA and the Corps to complete the connectivity report before publishing the proposed rule.

Additional Recommendations

The lack of effective state consultation in the development of the proposed CWA rule is not unique to this particular rulemaking, and many other EPA and Corps rulemaking efforts have failed to include sufficient state consultation in their development and implementation. To address this broader concern, the WGA and the WSWC make the following recommendations.

First, the WGA and WSWC encourage congressional direction to EPA and the Corps to engage states early and often (separate and before public involvement) in the development of any CWA rulemaking, guidance, policies, or studies as such efforts cannot help but affect the roles and jurisdiction of the states.

Second, the WGA and WSWC encourage congressional direction to ensure that EPA achieves more balanced SAB representation, to include state participation that constitutes no less than 10% of the membership of SAB committees, subcommittees and subject matter panels.

¹⁶Saiyid, Amena. “Science Panel Urges EPA to Address Cumulative Impacts of Isolated Waters.” *Bloomberg BNA* 7 Apr. 2014: n. pag. Web; Daily News, “EPA Plans Method for Determining Whether Waters’ Nexus is ‘Significant.’” *InsideEPA* (Apr. 8, 2014): n.pag. Web.

¹⁷547 U.S. 715 (2006).

We believe the above recommendations would significantly improve the EPA's and the Corps' consultation with the states, which will ultimately result in more effective CWA policies and regulations.

Conclusion

The foregoing comments and recommendations are offered in a spirit of cooperation and respect. As such, the WGA and WSWC are prepared to assist the Committee, the EPA, and the Corps in the discharge of their critical and challenging responsibilities.

House Subcommittee on Conservation, Energy & Forestry

On September 10, the WSWC was invited to testify on the U.S. Forest Service's (USFS) Proposed Directive on Groundwater Resource Management (published in the *Federal Register* for public comment on May 6) before the House Subcommittee on Conservation, Energy & Forestry. Tony Willardson, WSWC Executive Director provided testimony based on Council Position No. 340 – State Primacy over Groundwater, as well as WGA Policy Resolution 2014-03 on Water Resources Management in the West, and a July 2nd letter to USDA Secretary Tom Vilsack from Governors John Hickenlooper of Colorado and Brian Sandoval of Nevada, then Chair and Vice Chair of the Western Governors' Association. The latter states: "Our initial review of the Proposed Directive leads us to believe that this measure could have significant implications for our states and our groundwater resources."

In an August 29 letter, shortly before the close of the originally published comment period, Secretary Vilsack responded to a number of questions raised by the Governors and the Western Governors' Association, which is considering the Secretary's explanations and plans to comment prior to the newly extended deadline of October 3. The Council and WGA continue to work closely together on this issue, and reiterate, as stated in the Governors' letter that "States are the exclusive authority for allocating, administering, protecting and developing groundwater resources, and they are primarily responsible for water supply planning within their boundaries."

We request that the USFS seek an authentic dialogue with the States to achieve appropriate policies that reflect both the legal division of power and the on-the-ground realities of the West. USFS should have consulted with the States before publishing the proposed directive, and should now seek substantive engagement with the States in order to define and remedy any perceived deficiencies or inconsistencies. The directive may be well intentioned, but the problems that it is designed to address are not apparent, nor is the protection of groundwater a primary USFS responsibility.

State Primacy Over Surface Water and Groundwater

The Congress and the U.S. Supreme Court have consistently recognized that states have primary authority and responsibility for the appropriation, allocation, development, conservation and protection of the surface water and groundwater resources. Congress has recognized States as the sole authority over groundwater since the Desert Land Act of 1877. Moreover, the Court held in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that states have exclusive authority over the allocation, administration, protection, and control of the non-navigable waters located within their borders.

While the proposed directive identifies States as “potentially affected parties” and recognizes States as having responsibilities for water resources within their boundaries, it does not adequately acknowledge the primary and exclusive nature of these responsibilities. Further, the proposed directive does not explain how it will ensure that it will not infringe upon state allocation and administration of water rights and uses for both surface water and groundwater. Consequently, the Council is concerned that the proposed directive could conflict with state water management and water rights administration.

First, the Council is concerned that the proposed directive will require the implementation of certain conditions and limitations as part of the approval or renewal of special use permits that may interfere with the exercise of state issued water rights. Such requirements may create a significant burden on existing surface water and groundwater right holders who need the special use permits to exercise their water rights and could limit or hinder the exercise of current and future rights as permitted by the States. For example, proposed conservation requirements could limit the full exercise of certain water rights. The proposal would also require special use permit holders to meter and report their groundwater use, which could be expensive and may run contrary to the laws of some states. Restrictions placed on injection wells, already regulated by state and federal laws, could affect groundwater recharge projects. These are just a few examples.

There is little information presented on the extent of groundwater use on USFS lands and the needs the directive is intended to address. Consequently, additional work is needed before adoption of the directive to better understand its implications for myriad projects and activities to ensure that the proposal does not impair the exercise of existing and prospective state granted water rights. The USFS should work with the state authorities, and state expertise and resources could help define the problem areas within the directive.

Second, the directive would require the USFS to evaluate all water rights applications on National Forest System (NFS) lands, as well as applications on adjacent lands that could adversely affect groundwater resources the USFS asserts are NFS groundwater resources. As any other landowner or water user, USFS has the right to participate in state administrative processes to ensure that USFS interests are represented. USFS may also condition activities on National Forest lands and permit land surface disturbances. However, to the extent that the directive purports to interfere with or limit the exercise of state granted groundwater rights and state water use permitting authorities on USFS lands, and particularly pertaining to uses on non-USFS property, the proposed directive is beyond the scope of the agency’s authority. The directive’s requirement could also impose an unnecessary burden on USFS staff and other resources, as state water right administrators not only have exclusive water use permitting authority, but also have the expertise to evaluate any and all impacts on water resources and water users. The directive raises the possibility of USFS actions interfering with the exercise of valid pre-existing property rights to the use of state waters. It is inappropriate for the USFS to attempt to extend its administrative reach to waters and adjacent lands over which it has no authority.

Third, the proposal’s rebuttable presumption that surface water and groundwater are hydraulically connected raises another set of questions, including the standard and methods that may be used to rebut this presumption. In fact, groundwater and surface waters may or may not be hydrologically connected requiring extensive and expensive geohydrologic analyses, which the USFS is ill equipped to undertake on a large scale. Further, the management of groundwater and rights to the use of groundwater varies by state and is as much a legal question as it is a scientific

question of connectivity. Moreover, if the USFS presumes to have authority to regulate groundwater uses, then their rebuttable presumption of a connection to surface water sources could lead to an unwarranted and contentious assertion of authority over surface water uses as well, which the U.S. Supreme Court has clearly rebuffed.

Legal Basis of the Proposed Directive

The Council has a number of questions about the legal basis for the proposed directive. While the proposal cites various federal statutes that it describes as directing or authorizing water or watershed management on NFS lands, it contains very little discussion or analysis of how these provisions specifically authorize the activities contemplated in the proposed directive. The proposal also does not address the limits of the USFS' legal authority regarding water resources.

Instead of supporting the proposed directive's activities, many of the authorities cited in the proposal support a more limited scope for USFS water management activities. For instance, none of the cited statutes mention groundwater specifically and many are primarily limited to the surface estate. Moreover, 16 U.S. Code Section 481 specifically provides that: "All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated...."

The Council is particularly troubled by language in the directive that would require application of the reserved water rights doctrine to groundwater. As noted in the Council's position, the U.S. Supreme Court has recognized federal reserved rights to surface water, but no federal statute has addressed, nor has any federal court recognized, any federal property or other rights related to groundwater. Except as otherwise recognized under State water law, the Council opposes any assertion of a federal ownership interest in groundwater or efforts to otherwise diminish the primary and exclusive authority of states over groundwater.

It is also important to note that the U.S. Supreme Court narrowly interpreted the Organic Act, which the USFS cites as one of the legal justifications for the proposal, in *United States v. New Mexico*, 438 U.S. 696 (1978). Namely, the Court denied USFS claims to implied reserved surface water rights claims for fish, wildlife, and recreation uses and found that reserved rights made pursuant to the Act were limited to the minimum amount of water necessary to satisfy "primary purposes" of the national forest reservation, such as the conservation of favorable surface water flows and the production of timber. Furthermore, the Court found that all other needs were secondary purposes that required state-issued water rights. Similarly, the Court's other decisions regarding the reserved water rights doctrine have generally narrowed its scope by imposing "primary purpose" and "minimal needs" requirements. The proposal must ensure that it complies with the limits the Court has placed upon the recognition and exercise of implied federal reserved water rights.

Further, the assertion of reserved water rights in state general water rights adjudications and administrative proceedings can be contentious, time-consuming, costly, and counterproductive, often resulting in outcomes that do not adequately provide for federal needs. For this reason, different States and federal agencies have worked together to craft mutually acceptable and innovative solutions to address federal water needs. The State of Montana and USFS have entered into a compact that recognizes and resolves such needs. These types of negotiated outcomes are often much more capable of accommodating federal interests and needs and should be considered before asserting any reserved rights claims. At a minimum, the directive should require the USFS to

consider alternatives to asserting reserved water rights claims, including those made in general state water rights adjudications and administrative proceedings.

The Lack of State Consultation

The Council is especially concerned by the lack of state consultation in the development of the proposed directive and its assertion that it will not have substantial direct effects on the States, on the relationship between the federal government and the States, and the distribution of powers between the various levels of government. WSWC Position No. 371 notes that E.O. 13132 requires federal agencies to “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications....”

As declared by the governors, the directive has the potential to significantly impact the States and their groundwater resources. Any federal action that involves the possible infringement on state water rights and the assertion of reserved water rights claims has, on its face, the ability to significantly impact state granted private property and water use rights, their administration, and state water management and water supply planning.

It is particularly perplexing that the USFS deems it necessary to consult with tribes under Executive Order 13175, but has determined that the States do not warrant similar consultation under Executive Order 13132. It is difficult to understand how the USFS will be able to carry out this proposal in coordination with the States, as the directive proposes, without robust and meaningful consultation with the States. Moreover, waiting until the public comment period to solicit state input, as the USFS has done in this instance, is dismissive and counterproductive. Timely and substantive discussions could have led to improvements in the directive before being proposed, recognized and incorporated State’s authorities and values, and avoided or minimized conflicts. The states should have been consulted much earlier in the development of this directive, especially given that it has apparently been under discussion for years.

Conclusion

The Council appreciates the opportunity to testify and express our concerns with the proposed directive. Secretary Vilsack’s letter to the Governors includes an invitation to meet and discuss the directive. The Council encourages such a dialogue before the USFS takes any further action on this proposal. The Council is also ready to participate in a dialogue with the USFS to address questions and concerns raised herein regarding the proposed directive, as well as those raised by our member States in their comments, some of which have already been submitted.

Thank you for your oversight efforts. We ask for your careful consideration of our concerns and those of our member States. We look forward to further dialogue with the USFS regarding this proposal, and hope the USFS will appropriately defer to the authority of the States to manage their groundwater and surface waters, as recognized by the Congress and the Supreme Court.

WATER DATA EXCHANGE

The WSWC continued work in 2014 on its Water Data Exchange (WaDE). As a foundational effort, the WSWC conducted an inventory of the states' water data practices and drafted a document containing survey results. The WaDE State Capabilities Assessment Workgroup was the primary editing group for that document and published the report in 2014. A short online presentation that highlights the report's findings and recommendations, the final report itself, and links to companion maps that show related data about the states can be found on the WSWC's webpage¹⁸ under the WaDE tab. This report was a significant milestone in the WaDE project, as it relates what types of information will be found within the WaDE portal, as well as other information targeted for incorporation in the future. The report also discusses limitations to WaDE at the time of its release, and the challenges to presenting a more uniform picture of water availability and use in the West.

The outreach phase of the WaDE project was largely concluded in 2014, although meetings with some state agencies, especially pilot states, continued. A total of fifteen of the eighteen member states were personally visited and briefed on the project. The remaining states that could possibly benefit from a WaDE briefing meeting in the future include North and South Dakota and Alaska. Outreach visits were essential for generating support for the project and for the refinement of the schema (format) of the WaDE targeted data. Revisions to the schema have been made to more accurately and easily accommodate the states' data products.

Outreach efforts included a joint presentation between the Texas Commission on Environmental Quality (TCEQ) and WSWC at the 2014 National Environmental Information Exchange Network (NEIEN) conference. This visit gave the WSWC a greater understanding of how the NEIEN functions and how it proposes to focus on publishing and sharing common environmental datasets. WSWC also gave an informative talk at the National Water Quality Monitoring (NWQM) Conference and the American Water Resources Association (AWRA) GIS Specialty Conference. These visits have resulted in greater visibility and exposure for the WaDE program and valuable information regarding other data sharing and publishing initiatives.

A continuing discussion among state partners and WaDE developers concerns the housing of methodology data. One of the recommendations of the State Capabilities Assessment Report and workgroup is the creation of a central repository for common terms, definitions and methodologies used by the states. Originally, the states intended to host their own methodology information which would be accessed with the related data, but this approach would not allow for an easy comparison of methodologies between states' planning programs. It was decided that a good solution would be to develop tables and functions within the WaDE database that would house and access the information at the state node, but also allow the WSWC to access the same information and incorporate it into a "Central Methodology Catalog," similar in nature to the "Central Data Catalog" concept. The WaDE components were adjusted accordingly.

Public access to methodology information for all states would be accessed from the WSWC's Central Portal, similar to the Central Catalog. The WaDE database tables and programmed functions were also altered to fully support all GIS related features (points, lines and polygons). Prior to this,

¹⁸www.westernstateswater.org.

WaDE could only support point coordinates. While this approach worked for points of diversion, it could not accommodate summary-related data presented in watersheds, and some places of use (often polygonal) could not be accessed. Infrastructure and schema changes have been reviewed by the U.S. Geological Survey's Center for Integrated Data Analytics (CIDA) for robustness and workability with the U.S. Water Census effort. These adjustments in approach (GetMethods web services and GIS data) required additional development time.

Utah and Wyoming began the data mapping effort with minimal financial assistance in 2014, with the exception of the purchase of server capacity with Utah's central IT department and a SQL Server database license. Other states expressed an interest in deployment without financial assistance and will be phased in as the initial deployment efforts proceed. WSWC wrote extensive documentation for both the MSSQL and Postgres deployment platforms, for states to use as they begin the data-mapping/installation phases. States interested in reviewing the database may inquire with WSWC for access to the database/code downloads and online documentation.

During 2014, the FY2013 EN Grant Partners - Texas, Oklahoma, Idaho, Oregon, Washington and Utah - formed a steering committee and charter, and began to draw up legal agreements for distributing funds. This contract was completed with WSWC in late 2014, so that it would be able to transition effectively from WGA/DOE funding to the new source. The funding of the WaDE data schema as a primary data flow within the NEIEN is likely to establish it as a fully-fledged and rigorously documented web service within EPA's existing framework. The news that the WaDE grant application has been funded and the EN has an interest in considering funding of WaDE-related efforts in future years, may encourage remaining states to plug into the project. WSWC will assist states in finding additional funding that wish to participate.

During the final quarter of 2014, a new EN grant application was assembled between WSWC, California, South Dakota and Nevada, for WaDE deployment efforts and to continue coordination.

WESTERN STATES FEDERAL AGENCY SUPPORT TEAM

The Western States Federal Agency Support Team (WestFAST) promotes collaboration between the Western States Water Council (WSWC) and twelve federal agencies with water resource management responsibilities in the West. WestFAST was established pursuant to a request from the Western Governors' Association (WGA) and a recommendation in the WGA's 2008 report titled: *Water Needs and Strategies for a Sustainable Future: Next Steps (Next Steps Report)*. Specifically, WestFAST was formed to promote cooperation and coordination between federal agencies, and between states and federal agencies. WestFAST was intended to help the WSWC implement recommendations and collaborative efforts outlined in the *Next Steps Report*.

WestFAST federal agencies include: U.S. Department of Agriculture Forest Service (FS) and Natural Resources Conservation Service (NRCS); U.S. Army Corps of Engineers (USACE); U.S. Department of Defense (DOD); U.S. Environmental Protection Agency (EPA); U.S. Fish and Wildlife Service (FWS); U.S. Geological Survey (USGS); Bureau of Land Management (BLM); Bureau of Reclamation (BOR) National Aeronautics and Space Administration (NASA); National Oceanic and Atmospheric Administration (NOAA); and National Parks Service (NPS).

In 2014, WestFAST focused on a number of federal initiatives and promoted communication between federal agencies relevant to priority issues identified in WGA and WSWC reports and resolutions. WestFAST also worked closely during 2014 with WSWC Committee Chairs to create a new WestFAST work plan for 2015-2017. WestFAST representatives reviewed WSWC committees' work plans and the WestFAST Federal Liaison conferenced with WSWC leadership to correlate WestFAST actions plans with WSWC priority objectives. WestFAST focused on a number of emerging federal initiatives to promote communication between states and federal agencies. Some WestFAST activities in 2014 are highlighted below.

- WestFAST developed plans to create and host regular "Special Topics" seminars – information meetings, held mainly via webinar, on topics of interest to WestFAST member agencies and WSWC water-resource managers, scientists, and stakeholders.
- WestFAST agencies gave 32 presentations at four WSWC meetings sharing information and coordinating on priority issue areas for both the WSWC and the federal agencies.
- WestFAST also assisted in the development of and participated in several focused workshops during the year including:
 - Hydroclimate Monitoring Systems/Measurement Needs Workshop - June 23-24, in San Diego, California: WestFAST agency representatives participated in a discussion of strategies for supporting and improving key observing systems. WestFAST helped present an overview of the funding status of key federal monitoring programs, development of a 21st century observing system for extreme precipitation in the West, emerging opportunities for supplementing ground-based observations with remote sensing, and strategic planning for sustaining long-term observing records. Specific WestFAST agency presentations covered: USGS surface and groundwater monitoring networks; the NRCS Snotel network and water supply forecasting; NOAA ocean and atmosphere observing systems and budgets; NOAA/USGS Landsat missions and their value in water

use monitoring applications; and USGS/EPA strategic planning for maintaining long-term water quality observing records.

- Non-Tribal Water Claims Workshop - July 15–16, in Helena, Montana: The workshop brought together over 40 state and federal officials to identify policy options that states and federal agencies can use to improve the process to resolve federal non-tribal water rights claims. The workshop focused on specific issues, tools, and information to be included in a workgroup clearinghouse, as well the framework, design, and format of a clearinghouse, e.g., a report, regularly updated, website or database. The workshop also generated a recommendation to convene a state-federal workgroup to help guide the development of the clearinghouse and to foster ongoing communication and collaboration between the states and federal agencies, including case study presentations on the State General Stream Adjudications and the Montana Compact, Mountain Home Air Force Base Water Rights in Idaho, accommodating federal water needs within state legal frameworks, the Platte River Recovery Program, permitting activities on federal lands and water issues associated with grazing permits in Oregon.
- WSWC/California Department of Water Resources (CDWR) Remote Sensing Workshop - August 25-27, NASA Jet Propulsion Laboratory, Pasadena, California: A review and discussion of current and emerging NASA monitoring, mapping, and modeling capabilities relevant to assessment of water resources. WestFAST members assisted with the organization of the workshop and presented. Combined, NASA staff and other WestFAST agency representatives gave 21 presentations including describing upcoming missions. Brad Dorn closed the meeting with a discussion on sustaining partnerships in hydrologic observations.
- Statutory Authorities Related to Drought Workshop - December 9, Las Vegas, Nevada: The WSWC and WestFAST held a state-federal technical review workshop on statutory authorities related to drought. The workshop was a follow-on to discussions from a WGA Drought Forum Roundtable held in Scottsdale, Arizona on October 9. Workshop attendees heard reports on the status and scope of drought response authorities and of other federal agency support programs to aid them in assessing the utility of available tools and to determine what additional instruments might yet be needed in the future. WestFAST member departments and the agencies participating in the workshop including the Department of the Interior's Office of Water and Science, USBR, BLM, NRCS, NOAA, EPA, and the WestFAST Federal Liaison.
- WestFAST has assisted in the coordination of the water-use component of the USGS National Water Census, as well as with WSWC efforts to develop and implement its Water Data Exchange (WaDE). The National Water Census is a USGS research program on national water availability and use, implemented through the Department of the Interior's 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 also participated in WestFAST Work Groups to aid in that coordination. Eventually, WaDE will also provide access to federal, as well as state data.
- WestFAST and WSWC convened a state-federal workgroup in November 2014 pursuant to the workshop recommendation above and began work on gathering documents and other information on water-right issues and settlements. The workgroup has also planned for periodic webinars to review certain aspects of non-tribal water rights. The workgroup selected and began work on the first of these webinars which will focus on the McCarran Amendment as it relates to the general adjudication of water rights from state and federal agency perspectives and review case studies of its application and relevance in the West.
 - 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. As part of this effort, during 2014 WestFAST:
 - Published a monthly newsletter distributed to more 140 federal agency staff and state and local partners.
 - Continued to maintain a WestFAST web site containing information about WestFAST's origins, goals and objective, and documentation of activities, reports, newsletters, and webinars.

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 2014 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 addresses that touched on water-related issues.

California Governor Edmund "Jerry" Brown focused on his state's record-breaking drought, stating: "I have convened an Interagency Drought Task Force and declared a State of Emergency. We need everyone in every part of the state to conserve water. We need regulators to re-balance water rules and enable voluntary transfers of water and we must prepare for forest fires. [W]ater recycling, expanded storage and serious groundwater management must all be part of the mix. So, too, must be investment in safe drinking water, particularly in disadvantaged communities. We also need wetlands and watershed restoration and further progress on the Bay-Delta Conservation Plan."

In Colorado, Governor John Hickenlooper said: "Our budget is requesting a second year of funding to help create cleaner water.... This year we will complete the Colorado Water Plan, which will emphasize conservation, address incremental storage, and address drought mitigation. We must create alternative choices to buy-and-dry [transfers]. No matter where we live, we cannot afford to let our farm and ranch land dry up." Hickenlooper also proposed a "nonprofit enterprise" to foster public-private partnerships to fund water and transportation infrastructure projects.

Idaho Governor C.L. "Butch" Otter discussed efforts "...to more actively and effectively manage the Eastern Snake River Plain Aquifer and other surface and underground water sources throughout Idaho for greater long-term stability." Otter also said his budget recommendation includes \$15 million in one-time spending for specific water supply improvement projects.

Kansas Governor Sam Brownback said: "Fortunately, strong bipartisan majorities of this Legislature took steps to extend the life of the Ogallala Aquifer and encourage best practices towards

water usage statewide.... [T]his year, people from across our state will...develop a comprehensive water strategy - a strategy to secure our water future for the next 50 years.

New Mexico Governor Susanna Martinez said her state's water infrastructure is in crisis. "I have seen first-hand the effects of our devastating drought," she said. "We cannot control the duration or intensity of the drought we face. But we can control our response to it. If we invest in water infrastructure in a way that benefits each of our unique local economies, we will not only create jobs in the short run, but also set the stage for long-term economic growth.... That's why I'm asking that we invest 60% of our capital dollars on critical water projects throughout New Mexico."

South Dakota Governor Dennis Daugaard reported that his state "...is no longer suffering from drought. A year ago at this time 100% of the state was in drought...and 97% of that was 'severe drought.' Today, only 4% of the state is classified...as 'abnormally dry'...and none of the state is even classified otherwise." Daugaard also noted that 98.2% of South Dakota's community water systems meet or exceed Environmental Protection Agency (EPA) standards.

Utah Governor Gary Herbert said: "The 'Your Utah, Your Future' initiative I launched in October is the most comprehensive planning effort ever undertaken in our state's history. This effort...is aimed at ensuring there is sufficient water and clean air for future generations. When our pioneer ancestors made the desert blossom as a rose, they understood they could not do it without water.... To take care of this most precious resource, I have put together a Water Advisory Team to evaluate strategies to secure Utah's water future."

Washington Governor Jay Inslee described the efforts of a Climate Legislative and Executive Workgroup charged with recommending specific actions to reduce carbon pollution. The group is nearing completion of a final report, and Inslee said: "Rest assured, we will move forward. Going backward is not an option. Inaction is not an option. Whether you care about our environment or our economy, or hopefully both, tackling climate change makes sense. If we stop fighting over whether to act and instead work together on how to act, we can innovate our way to a better future."

Wyoming Governor Matt Mead said: "[W]e need to develop a state water strategy.... [N]ow is the time to put projects on the ground...Water projects are expensive, take time, and the permitting is difficult. They are easy to put off until tomorrow, but I submit today is the day to begin. We must all begin to push for water projects - big and small." Mead also said Wyoming's development agency is "top notch" and that: "We have some of the best planners and engineers available...."

Because their legislatures were not in session, Governors Steve Bullock (D-MT), Brian Sandoval (R-NV), Jack Dalrymple (R-ND), and Rick Perry (R-TX) did not deliver addresses this year.¹⁹

¹⁹<http://westgov.org/news/298-news-2014/566-read-state-of-the-state-speeches-by-western-governors>.

Bureau of Reclamation

Senate Hearing on Water-Related Bills

On February 27, the Senate Energy and Natural Resources Committee's Subcommittee on Water and Power held a hearing on eight water-related bills. Notable bills include: (1) S. 1800 from Senator John Barrasso (R-WY) to require the Bureau of Reclamation to report to Congress on major repair and rehabilitation needs at all Reclamation projects, and to provide an itemized list of needs for individual Reclamation facilities; (2) S. 1946 from Senator Ron Wyden (D-OR) to permanently re-authorize the Reclamation Safety of Dams Act, which provides authority and funding for Reclamation to carry out dam safety efforts; (3) S. 2010/H.R. 1963 from Barrasso to facilitate small hydropower development at facilities constructed under the Water Conservation and Utilization Act; (4) S. 2019 from Subcommittee Chair Brian Schatz (D-HI) to reauthorize the WaterSMART grants program and the National Water Availability and Use Assessment's grant program; and (5) S. 2034 from Schatz to establish a process that would facilitate the transfer of title for Reclamation projects and facilities to non-federal entities in consultation with the governor of the affected state and in conformity with state water laws.

In discussing S. 2019, Schatz (D-HI) said the bill's reauthorization of the WaterSMART grants program is "...particularly important as the nation experiences severe and recurring drought." He also discussed the need to address the nation's aging water infrastructure, noting that S. 1946 addresses the "piecemeal" funding Reclamation has received for dam safety efforts. Schatz further stated that S. 2034 would divest Reclamation of liability and responsibility for certain projects by transferring them to non-federal entities, who would have "autonomy and flexibility" to manage them.

Barrasso, who stood in for Ranking Member Mike Lee (R-UT), discussed the need for S. 1800, stating that he is "very concerned" that the Department of the Interior has been "less than forthcoming about the depth and scope" of Reclamation's maintenance backlog. Barrasso also said that he has been unsuccessful in securing an easy-to-understand list of infrastructure maintenance needs for projects in Wyoming.

Reclamation Senior Advisor Robert Quint said Interior does not support S. 1800 because it would duplicate and draw resources away from existing efforts and would not improve the information available on Reclamation's infrastructure. However, Quint said Interior does support S. 1946 and S. 2034, and would likely support S. 2010 with technical amendments.

Quint also said Interior "strongly supports" S. 2019. In his written testimony, Quint addressed provisions in the bill that would make Hawaii eligible for WaterSMART grants, noting that Hawaii shares some features with the 17 Reclamation states and already participates in Reclamation's Title XVI Water Reclamation and Reuse Program, parts of the Reclamation States Emergency Drought Relief Program, and certain water resources studies. As such, Interior believes any expansion of the WaterSMART grant program should be limited to Hawaii as "piece-meal" incorporation of additional states would be a "significant expansion" of Reclamation's mission.

The WSWC also submitted a letter for the record on February 25 regarding S. 2019. The letter was based on WSWC Position No. 357, which supported implementation of the SECURE

Water Act, and expressed support for the bill's reauthorization of the WaterSMART and the National Water Availability and Use Assessment grant programs.²⁰

On June 18, the Senate Energy and Natural Resources Committee reported S. 2019, from Senator Brian Schatz (D-HI), to reauthorize the WaterSMART grants program and National Water Use and Availability Assessment grant program that provides funding to states to acquire locally-generated water data for the USGS to integrate into national data sets on water use and availability. In reporting the bill, the Committee approved an amendment from Senator Jeff Flake (R-AZ) that specified the total authorization for the WaterSMART Grants program as \$100 million instead of "such sums as are necessary," which the bill had originally proposed.

The WSWC sent a joint letter with the National Water Resources Association and the Theodore Roosevelt Conservation Partnership in support of the bill's reauthorization of the two grant programs. The joint letter was based on a letter the WSWC sent in February regarding S. 2019. Both letters are based on WSWC Position No. 357.

The Committee also reported: (1) S. 1946 from Senator Ron Wyden (D-OR) to raise the funding ceiling for the Reclamation Safety of Dams Act; (2) H.R. 1963 from Rep. Steve Daines (R-MT) and S. 2010 from Senator John Barrasso (R-WY) to authorize small, non-federal hydropower development at facilities constructed under the Water Conservation and Utilization Act; and (3) S. 1800 to require the Bureau of Reclamation to report major repair and rehabilitation needs at all Reclamation projects, and to provide an itemized list of needs for individual facilities.

FY2015 Budget

On March 4, President Obama sent his \$3.9 trillion FY2015 budget request to Congress. Republicans criticized the proposal for raising taxes and for increasing federal spending.

Under the request, the Department of the Interior would receive \$11.9 billion, a 2.4% increase over FY2014 enacted levels. Within Interior, Bureau of Reclamation funding would fall \$69 million to about \$1 billion. Reclamation's budget for Water and Related Resources, its principal operating account, would be \$761 million, a \$193.4 million cut. Within this account, rural water projects would receive \$34 million, \$33 million below FY2014 levels, while funding for Reclamation's WaterSMART programs would increase \$3.1 million to \$52 million. As for notable WaterSMART programs, Basin Studies Program funding would fall \$884,000 to \$3.8 million, while funding for the WaterSMART Grants and Title XVI Water Reclamation and Reuse Programs would stay at \$19 million and \$21.5 million respectively. The request would also transfer Central Utah (CUP) activities from the Department of the Interior's budget to Reclamation's budget, with CUP receiving \$7.3 million.

Estimated appropriations from the Reclamation Fund would total \$819 million for FY2015. Projected FY2015 fund receipts are \$2 billion, most of which would be derived from mineral leasing revenues on federal lands. Receipts for FY2013 and FY2014 were also about \$2 billion each, while appropriations totaled \$858 million and \$913 million respectively. The estimated unobligated balance at the end of FY2015 is \$14.3 billion, compared to \$13 billion in FY2014 and \$12 billion in FY2013.

²⁰*Western States Water*, #1975, March 23, 2012.

Indian water rights settlements would rise \$1.7 million to \$112 million, of which \$90 million would be used to establish an Indian Water Rights Settlement Account to continue implementation of settlements authorized under the Claims Resolution Act of 2010. The account would provide \$3 million for the Aamodt settlement in New Mexico, \$2 million for the Crow settlement in Montana, and \$4 million for the Taos settlement in New Mexico. The remaining \$81 million would fund development of the Navajo-Gallup Water Supply Project, a key component of the Navajo Nation's settlement with New Mexico. The request would also seek \$22 million in Reclamation's Water and Related Resources account for operation and maintenance of other projects that are part of authorized settlements.

ONRC Action v. Bureau of Reclamation

On March 21, twelve western states filed an amicus brief with the 9th Circuit Court of Appeals in *ONRC Action v. Bureau of Reclamation*, asking it to uphold EPA's water transfers rule. The rule exempts certain types of transfers from National Pollutant Discharge Elimination System (NPDES) permits. The case marks the first time the 9th Circuit will review the rule since its promulgation in 2008, although it has previously rejected the reasoning upon which the rule is based. Alaska, Arizona, Colorado, Idaho, Kansas, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Wyoming signed the brief.

At issue are claims by an environmental group that Reclamation needs an NPDES permit to operate a drain in the federal Klamath Project that transfers water between the Klamath River and Lower Klamath Lake near the California-Oregon border. A federal district court found that Reclamation does not need a permit under the rule, which it found to be a reasonable interpretation of the CWA entitled to deference.

The brief agrees with the outcome of the district court's ruling, but argues that "...EPA's Rule is the only permissible interpretation of the [CWA] because the Act lacks a 'clear and manifest statement from Congress to authorize an unprecedented federal intrusion into traditional State authority' - i.e., state authority to allocate water within their jurisdictions.... EPA's Rule is not an 'exemption,' but ... a regulatory recognition that Congress did not intend for the federal NPDES program to extend to water transfers in the first instance because such transfers are fundamental to the states' primary authority over water allocation and management."²¹

House Subcommittee Hearings

Two House Subcommittees held hearings on the Bureau of Reclamation's \$1 billion FY2015 budget request, which represents a \$69 million cut.

During a March 26 hearing before the Appropriations Subcommittee on Water and Power, Chairman Mike Simpson (R-ID) expressed concern that Reclamation "...continues to be expected to do more but without more funding." Ranking Member Marcy Kaptur (D-OH) also said the request represents a six percent cut and could continue "disinvestment" in water infrastructure.²²

²¹*Western States Water*, #2057, October 18, 2013.

²²<http://appropriations.house.gov/calendararchive/>.

The Natural Resources Water and Power Subcommittee held an earlier hearing on March 25, during which Chairman Tom McClintock (R-CA) said the request ignores the need for increased storage, stating “...long term solutions can only be found by expanding supply through multi-purpose facilities.” However, Ranking Member Grace Napolitano (D-CA) said the request’s push for more conservation is “...a realistic look at how we can safely keep the lights on and the water flowing in the face of growing demand.”²³

Acting Reclamation Commissioner Lowell Pinley gave similar testimony at both hearings, noting that his agency’s “...goal is to promote sustainability, resiliency, and certainty for those who use and rely on water resources in the West.” He also said Reclamation’s WaterSMART efforts are working to conserve 840,000 acre-feet through 2015, and 1 million acre-feet through 2018.

Rural Water Projects

On April 8, Rep. Steve Daines (R-MT) introduced the Authorized Rural Water Projects Completion Act (H.R. 4420), a companion bill to S. 715, which former Senator Max Baucus (D-MT) introduced last year. Both bills would authorize the use of \$80 million per year in Reclamation Fund revenues through 2030 to help fund authorized rural water infrastructure projects.

However, Daines’ bill does not include amendments the Senate Energy and Natural Resources Committee approved when it reported S. 715 last November. Those amendments would provide \$35 million per year from the Reclamation Fund for water projects that are part of authorized Indian water rights settlements, as well as another \$35 million per year for the repair, replacement, and maintenance of certain Indian irrigation projects.

The WSWC has long supported the negotiated resolution of Indian water rights claims, and supports using the Reclamation Fund to support western water infrastructure projects.²⁴

Reclamation Water Settlements Fund

On May 7, the WSWC and the Native American Rights Fund submitted joint written testimony to the Senate Appropriations Committee’s Energy and Water Subcommittee in support of sufficient appropriations for the Bureau of Reclamation’s Indian water rights settlement activities. The testimony is based on WSWC Positions No. 333 and 336.

The testimony said Reclamation helps further the settlement process by providing monetary, technical, and personnel support for tribes, and by participating in the Department of the Interior’s negotiation and implementation teams. The testimony also supported sufficient appropriations for these programs, noting that insufficient funding hinders the settlement process.

Next, the testimony urged Congress to ensure authorized settlements receive sufficient appropriations without “corresponding offsets from other Interior programs.” The testimony also asked Congress to use the Reclamation Fund to provide funding for authorized settlements and to

²³<http://naturalresources.house.gov/calendar/list.aspx?Day=3%2f25%2f2014>.

²⁴*Western States Water*, #2063, November 29, 2013.

make permanent the Reclamation Water Settlements Fund (RWSF). The RWSF will receive \$120 million per year for 10 years in transfers from the Reclamation Fund for settlements in New Mexico, Montana, and Arizona. However, the RWSF will not begin receiving funding until 2020 and its disbursements are only authorized through 2034, which the testimony said contributes to a “significant gap” in funding.

Storage Water Projects

On June 4, Senators John Barrasso (R-WY) and Mike Enzi (R-WY) introduced legislation (S. 2427) to consolidate the permitting process needed to construct surface storage water projects on lands that the Department of the Interior and the U.S. Department of Agriculture (USDA) administer. The bill is similar to legislation (H.R. 3980) House Natural Resources Subcommittee on Water and Power Chair Tom McClintock (R-CA) and Rep. Cynthia Lummis (R-WY) introduced earlier in 2014.

According to Barrasso and Enzi, the current storage water permitting process is duplicative and time consuming because it requires parties seeking to construct storage water projects to obtain permits from a number of different federal agencies. The bill would make the Bureau of Reclamation the lead coordinator for all federal approvals, permits, and decisions regarding storage water projects on Interior and USDA-administered lands. It would also require Reclamation to identify all federal agencies with permitting authority or responsibilities, make them aware of pending applications, and develop a timeline by which all the agencies must finish and submit their reviews and permits. Agencies cooperating with Reclamation would be required to adhere to the timeline and use one combined environmental review. The bill would also give states where a project is being considered the option of participating as a “cooperating agency” in the coordinated review process.²⁵

Clean Water Act/Corp of Engineers/Environmental Protection Agency

Waters of the United States Rulemaking

On January 2, Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy responded to a letter the WSWC sent the U.S. Army Corps of Engineers and the Environmental Protection Agency (EPA) on November 20, 2013 urging the agencies to consult with the states as co-regulators in their Clean Water Act (CWA) rulemaking. The WSWC’s letter also expressed concern about the lack of state consultation in the rulemaking process to date, asked that the agencies comply with the state consultation criteria set forth in Executive Order 13132, and expressed concern about waiting until the public comment period to seek state input. Darcy coordinated her response with EPA, which she said will be responding in a separate letter.²⁶

Darcy said: “The [Corps] and EPA have jointly drafted a proposed rule for defining waters of the U.S. The proposed draft rule was submitted to the Office of Management and Budget (OMB)...for interagency review on 17 September 2013.... Executive Order 13132 discusses the issues of ‘federalism’ and the ‘Unfunded Mandates Reform Act,’ intended to preserve the rights of

²⁵<http://www.barrasso.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases>.

²⁶*Western States Water*, #2062, November 22, 2013.

states in regulating themselves. The EPA is the lead federal agency for determining jurisdiction under the CWA...[and] is the lead federal agency on the joint rulemaking effort. As such, federalism implications and coordination with the states are primarily the responsibility of the EPA. The Corps does note that there will be a public notice comment period after the OMB interagency process, during which the states may provide specific comments.”

On February 10, Environmental Protection Agency (EPA) Acting Assistant Administrator for Water Nancy Stoner wrote a response to the WSWC letter. The letter explains that EPA and the Corps began the rulemaking process “...in response to requests from a broad range of interests including some members of Congress, industry, agriculture, states, environmental groups, and other stakeholders that we clarify the geographic scope of [CWA] jurisdiction through formal notice and comment rulemaking.... Both the EPA and the Army recognize the critical role that states play in implementing the [CWA]. For this reason, the agencies have involved states in the earliest stages of their rulemaking process, and are committed to ensuring that the states remain active participants in future states of the rulemaking process.”²⁷

The letter continues: “Because of states’ critical [CWA] role, the EPA and the Corps voluntarily conducted extensive informal outreach and federalism consultation in late 2011, early in the rule development process. Our consultations took place with the ten associations that are typically a part of federalism consultations (the “Big 10”), which include the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and Townships, the International City/County Management Association, and the Environmental Council of the States. [W]e also invited the National Association of Clean Water Agencies, the Western Governors’ Association [WGA] and the Association of Clean Water Administrators to participate.”

“As part of this process, the agencies hosted three in-person meetings, two phone consultations and numerous outreach calls with state and local government agencies seeking technical input. More than 400 people participated in these discussions, and participants represented a wide variety of state and local agencies and associations, including the [WGA] and the [WSWC].

“As part of the consultation, we asked participants to provide input on what should be contained in a proposed rule and what areas of the definition of waters of the U.S. needed additional clarity. We received written comments from twelve counties, eight associations, and agencies from five states (Alaska, Wyoming, Kansas, Tennessee, and Texas). In their written and oral comments, state and local governments identified a number of issues, including concerns about state authority over water rights, the jurisdictional status of groundwater, and the overall scope and extent of jurisdiction. The EPA and the Army have considered these comments in drafting the...rule, which is...undergoing interagency review.”

“When the interagency review process concludes, the EPA and the Army will publish a proposed rule...and provide an additional opportunity for the [WSWC] and other interested parties to review the proposal and to provide comments. After the proposed rule is published, the agencies plan to meet with state and local government associations to review the comments we received

²⁷*Western States Water*, #2069, January 10, 2014.

during federal consultation and discuss how the proposed rule addresses those comments.... EPA's Regional Administrators will be playing an active role in reaching out to states and other partners, so you can expect direct engagement of your member states from EPA's Regional offices in the West. The EPA and Army will continue to take input from state and local governments through the end of the public comment process that will follow publication of the proposed rule. At the time the agencies publish a final rule, we will publish a federalism summary impact statement with the final rule, consistent with Executive Order 13132."

Stoner also acknowledged another letter the WSWC sent to EPA regarding the agency's draft "connectivity" report, which EPA has said will serve as the basis of the final CWA rule. "The report is currently undergoing independent peer review by the EPA's Science Advisory Board," Stoner said. "When the peer review process...is complete, the EPA will ensure that public and peer review comments are reflected in the final report..."

Of note, the WSWC has met with EPA and the Corps to discuss the agencies' goals and time lines for the now-withdrawn guidance and rulemaking. The WSWC remains concerned that this communication should not take the place of substantive collaboration with the states and their water quality agencies on an individual basis and that such consultation should occur before the publication of a rule for public comment.

On March 10, the WSWC wrote EPA and the Corps to provide further comments on six aspects of the agencies' CWA rulemaking. The letter is based on WSWC Position No. 330.5 and builds upon prior comments the WSWC has sent EPA and the Corps regarding the rulemaking.²⁸

First, the letter addresses a report EPA is preparing on the connectivity between water bodies that will inform the final rulemaking. "[T]he draft rule's submission to the Office of Management and Budget (OMB) before the finalization of the connectivity report raises concerns that the final report will have little or no influence on the final rule," the letter said. "[T]he connectivity report should be finalized before EPA and the Corps publish the draft jurisdictional rule...for public comment.... Waiting until the report is finalized will give EPA more information to consider, and may...lead to revisions that improve the rule before its publication for public comment."

Second, the letter requests that "...the text of the rule itself should give full force and effect to, and should not diminish or in any way detract from, the intent and purpose of CWA Sections 101(b) and 101(g) regarding the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality."

Third, the letter addresses the possibility that the draft rule may establish jurisdiction for waters that have a "shallow subsurface hydrologic connection" with jurisdictional waters. "Congress did not intend for the... CWA to apply to the management and protection of groundwater," the letter said. "The WSWC understands that the preamble for the draft rule may include disclaimers that the rule is not intended to cause the shallow subsurface connections themselves to become jurisdictional, and that such connections would not be considered Waters of the United States (WOTUS) in and of themselves. The WSWC supports the intent of such language. However...the text of the rule

²⁸*Western States Water*, #2076, February 28, 2014.

itself should expressly exclude groundwater and any subsurface flows used to establish shallow subsurface hydrologic connections between surface waters.”

Fourth, pursuant to the WSWC’s position that federal efforts to clarify CWA jurisdiction should comply with U.S. Supreme Court limitations, the letter says the following should be excluded from the rule’s definition of WOTUS:(1) farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA’s agricultural exemption; (2) man-made dugouts and ponds used for stock watering or irrigation in upland areas that are not connected to surface waters; (3) dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement; (4) man-made pits and quarries that have been excavated in uplands and that fill with groundwater but are not connected to surface water; and (5) prairie potholes and playa lakes.

The letter further states: “The preamble for the rule should...recognize that the states have authority pursuant to their ‘waters of the state’ jurisdiction to protect excluded waters, and that excluding such waters from federal CWA jurisdiction does not mean that they will be exempt from regulation. The preamble should further recognize that the states are best suited to understand the unique aspects of their geography, hydrology, and legal frameworks, and are therefore in the best position to provide the most feasible and effective protections for excluded waters.”

Fifth, the letter explains that “...the WSWC understands that the draft rule may recognize that Justice Kennedy’s significant nexus test requires a connection between waters that is ‘more than speculative or insubstantial’ to establish jurisdiction. The WSWC supports the intent of such recognition. However, the rule should also quantify ‘significance’ to ensure that it does not extend jurisdiction to waters that have a de minimis connection to jurisdictional waters.”

Lastly, the letter responds regarding outreach efforts the EPA and the Corps conducted with state organizations such as the WSWC and other stakeholders regarding the rulemaking. The WSWC’s letter explains that “...the western states remain concerned about the process EPA and the Corps are using to develop this rule. In 2011, the WSWC asked EPA and the Corps to pursue formal rulemaking instead of finalizing the now withdrawn guidance. At that time, the WSWC believed rulemaking, unlike guidance, would afford greater opportunities for early and ongoing consultation with the states. The WSWC also believed rulemaking would better ensure the treatment of states as co-regulators in the development of a draft rule.”

“However, the submission of a draft rule on CWA jurisdiction to OMB for interagency review without any substantive state consultation in the development of the rule raises significant concerns that your agencies will use a process that is no better than the one they used to develop the draft guidance. In particular, we remain concerned that individual states will not have the opportunity to provide substantive feedback until after EPA and the Corps have developed a draft rule and published it for public comment in the Federal Register.”

“While we recognize that EPA and the Corps have participated in... meetings and calls with the WSWC and other state organizations to discuss their goals and time lines for the rulemaking, such communication cannot take the place of substantive, collaborative engagement with the states and their respective water quality agencies on an individual basis. In particular, the substantial differences in hydrology, geography, and legal frameworks in the West will require significant consultation with each state to determine how the draft rule will be implemented in order to avoid

misinterpretations and unintended consequences. The potential for unintended consequences further underscores the need for EPA and the Corps to avail themselves of the states' on-the-ground knowledge of their unique circumstances by giving as much weight and deference as possible to the states' collective and individual comments, concerns, priorities, and needs.”

The letter concludes by stating: “EPA and the Corps should not wait until the public comment period to involve the states on a collective and individual basis in the development of the draft rule. States are co-regulators and are therefore separate and apart from the public. As such, waiting until the public comment period to consult with the states, both individually and collectively, in the development of the draft rule ignores their role as co-regulators and will not allow for meaningful state input or consideration of state concerns.”

On March 25, the EPA and Corps released a pre-publication draft of their proposed CWA rule to clarify CWA jurisdiction in light of the U.S. Supreme Court’s *SWANCC* and *Rapanos* decisions.

The proposed rule is similar to a draft that leaked last year. Among other things, it would: (1) designate most seasonal and rain-dependent streams, including all tributaries of jurisdictional waters, as “waters of the U.S.” (WOTUS); (2) include wetlands near rivers and streams as jurisdictional; (3) establish jurisdiction for certain waters that have “shallow subsurface hydrologic connections” with jurisdictional waters; (4) maintain agricultural exemptions and exclusions; and (5) utilize a case-specific approach to establish jurisdiction for “other waters” and wetlands that alone or in combination with “other similarly situated” waters and wetlands have a “significant nexus” to jurisdictional waters.

Unlike the leaked draft, the text of the proposed rule excludes groundwater as a WOTUS, which is something the WSWC requested. Although the WSWC had also asked that the text of the rule give full force and effect to sections 101(b) and 101(g) of the CWA regarding deference to the states’ rights to allocate and protect their waters, the preamble but not the rule references and quotes these sections.

The preamble continues to assert that the rulemaking does not trigger state consultation under Executive Order (E.O.) 13132. Nevertheless, the preamble describes outreach the EPA and the Corps have undertaken to satisfy the order’s state consultation requirements, including communication with the WGA and WSWC. The WSWC has urged EPA and the Corps to comply with E.O. 13132 and has raised concerns that their communications with the states have not been substantive enough to qualify as consultation.

To explain the rule, EPA and the Corps held a conference call on March 25 with states, local entities, and tribes. Both agencies said the rulemaking will not apply to new types of waters that have not “historically been covered” under the CWA, and that the rulemaking is consistent with *SWANCC* and *Rapanos*. Notably, the agencies said the rulemaking supports the CWA’s cooperative federalism framework and will empower states to protect their waters. To support this assertion, the agencies cited a 2013 Environmental Law Institute report that found that 36 states have legal limitations on their ability to “fully protect waters that are not covered by the CWA.”²⁹

²⁹<http://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>.

Moving forward, EPA and the Corps indicated that EPA's various regions will conduct consultation with their respective states. EPA will also continue to finalize a report on the connectivity of waters that it says will inform the final rule. The WSWC had asked EPA to finalize that report before publishing the rule for public comment.³⁰

In addition, EPA and the Corps released a final "interpretive rule" intended to ensure 53 agricultural conservation practices that protect or improve water quality would not be subject to Section 404 permits.³¹

In related news, on March 25, Governors John Hickenlooper (D-CO) and Brian Sandoval (R-NV) wrote EPA and the Corps in their capacity as the Chair and Vice Chair of the Western Governors' Association (WGA) to express concern that the CWA rule "...was developed without sufficient consultation with the states and that the rulemaking could impinge upon state authority in water management." The letter also said the agencies' communications with the states have not been "...sufficiently detailed to constitute substantive consultation." Additionally, the WGA's letter references the issues the WSWC raised in its March 10 letter, and urges the agencies to "...engage with us, individually and through the [WGA], to resolve these important concerns in advance of any further action on this issue."³²

Environmental and conservation groups have largely praised the proposed rule as providing needed protections, as have a number of Democrats, including Senate Environment and Public Works Chair Barbara Boxer (D-CA). However, other Democrats, including Senate Energy and Natural Resources Chair Mary Landrieu (D-LA), and Republicans have criticized the rule for expanding CWA jurisdiction and have vowed to overturn it with legislation. House Transportation and Infrastructure Committee Chair Bill Shuster (R-PA) also said his Committee will hold an oversight on the rule in the near future, while House Appropriations Chair Hal Rogers (R-KY) said that his Committee will squash the rule through the appropriations process.³³

On April 1, the EPA announced that its Science Advisory Board (SAB) will hold public conference calls on April 28 and May 2 to discuss a report EPA is preparing on the connectivity of different water bodies. The report will inform the final version of the proposed rule on CWA jurisdiction that EPA released for public comment last month with the Corps. The WSWC had asked EPA to finalize the report before publishing the proposed rule for public comment.³⁴

On April 21, the EPA and the Corps jointly published their proposed CWA rule in the *Federal Register*. Although the agencies had earlier released the text of the proposed rule, the official publication of the rule triggered a 90-day public comment period to conclude on July 21.³⁵

EPA and the Corps also published a related "interpretive rule" intended to ensure that certain agricultural conservation practices that protect or improve water quality will not be subject to Section

³⁰<http://www2.epa.gov/uswaters>.

³¹<http://www2.epa.gov/uswaters/interpretive-rule-regarding-applicability-clean-water-act-section-404>.

³²<http://westgov.org/letters-testimony-30>.

³³*Western States Water*, #2078, March 14, 2014.

³⁴<https://federalregister.gov/a/2014-07239>. *Western States Water*, #2078, March 14, 2014.

³⁵<http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0001>.

404 permits. Although the interpretive rule went into effect in March, EPA and the Corps have indicated that they were willing to make changes and sought comments through June 5.³⁶

On May 8, forty-six Republican members of the Senate and House Western Caucuses sent a joint letter to EPA, stating that the proposed CWA rule EPA developed with the Corps “provides essentially no limit to CWA jurisdiction.” Among other concerns, the letter said: “Congress has demonstrated strong opposition to past efforts to have the federal government control all wet areas of the states.” The letter also cited a March 25 WGA letter that said the rule was developed without sufficient state consultation and could impinge on state water management authority. “We fail to understand why the EPA has not adequately consulted our Governors about a rule that has such a significant impact on the [economies] of our states,” the Western Caucuses wrote. Eighteen senators and 28 Representatives signed the letter.³⁷

The letter follows a similar request that 231 members of both parties in the House sent EPA and the Corps on May 1, asking the agencies to withdraw the rule. In particular, that letter argued that the rule contradicts prior U.S. Supreme Court decisions and “aggressively expands” CWA jurisdiction contrary to Congressional direction by placing “...features such as ditches, ephemeral drainages, ponds (natural or man-made), prairie potholes, seeps, flood plains, and other occasionally or seasonally wet areas under federal control.” The letter also took issue with the agencies’ economic analysis of the rule and the publication of the rule before the completion of an EPA report on the connectivity of different waterbodies, which the agencies have said will inform the final rule.³⁸

On June 3, the WSWC held a conference call with officials from EPA, the Corps, and other state associations to discuss the interpretive rule that EPA, the Corps, and the U.S. Department of Agriculture (USDA) issued regarding agricultural exemptions under Section 404(f)(1)(a) of the CWA. During the call, EPA and Corps officials explained that the rule identifies 56 “new” agricultural exemptions. The exemptions are based upon the agencies’ interpretation of the CWA and are in addition to existing and previously recognized agricultural exemptions. The agencies further noted that in order to qualify for the exemptions, agricultural producers will need to comply with Natural Resources Conservation Service practice standards. Although the rule was final when issued in March, the agencies indicated that they will review the public comments they receive and refine the rule as needed.

State representatives participating in the call raised a number of questions and concerns about the proposed rule, including, among others: (1) the rule may conflict with state water quality laws; (2) the agencies developed the rule without consulting with the states; (3) the rule may create conflict or narrow existing agricultural exemptions; and (4) how states will know that projects have been carried out in accordance with the exemptions.

In related news, EPA announced on June 4 that it has granted a 30-day extension of the comment period for the interpretive rule.³⁹

³⁶*Western States Water*, #2083, April 18, 2014.

³⁷http://noem.house.gov/index.cfm/files/serve?File_id=5ABCBD90-60AF-4F3B-8FE5-A4A40047A49D.

³⁸<http://noem.house.gov/index.cfm/press-releases?ID=BA1FBDFE-27BE-4AA9-B188-F298EA2E274F>.

Western States Water, #2083, April 18, 2014.

³⁹<http://www2.epa.gov/uswaters>. *Western States Water*, #2080, March 28, 2014.

On June 11, the House Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment held a hearing to discuss the CWA jurisdiction rule EPA and the Corps proposed.

Committee Chair Bill Shuster (R-PA) said the proposed rule will "...dramatically extend the reach of the federal government when it comes to regulating ponds, ditches, and other wet areas." Subcommittee Chair Bob Gibbs (R-OH) expressed similar concerns, as did Committee Ranking Member Nick Rahall (D-WV), who said: "This proposal certainly does provide certainty - the certainty that if you want to undertake any activity whatsoever that may involve so much as a puddle, you must seek a permit." However, Subcommittee Ranking Member Tim Bishop (D-NY) expressed concerns about stopping the rulemaking over concerns related to the current draft.

EPA Deputy Administrator Bob Perciasepe said the rule is intended to clarify the extent of CWA jurisdiction following the U.S. Supreme Court's decisions in *SWANCC* and *Rapanos*, which he said will improve the process for making jurisdictional determinations by minimizing delays and costs and improving predictability and consistency.

Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy said the rule does not assert jurisdiction over new categories of waters, but will be a "slight" increase over the current 2008 CWA guidance.

Oklahoma Water Resources Board Executive Director and WSWC Water Quality Committee Chair J.D. Strong testified on behalf of the WGA and WSWC, stating: "It's extremely important that states be regarded as full and equal partners, in fact as co-regulators, under the CWA as Congress intended.... [T]he western states are unanimous in their concern...that the states were not adequately consulted.... [W]aiting until the public comment period to solicit state input does not allow for meaningful consideration of state views as well as alternative ways....of meeting federal objectives." Strong also reiterated WGA's request that the agencies consult with the states individually and through the WGA before proceeding with the rule.⁴⁰

During the question and comment portion of the hearing, Shuster and Gibbs both expressed concern that the rule's terms are too vague, with Gibbs stating that the ambiguity could "open things up" for citizen lawsuits. Gibbs expressed further concerns that the rule could undermine state-federal partnerships needed to implement the CWA. Bishop was more supportive, noting that much of rule's language comes from the Court's rulings and stating that efforts to prevent the rulemaking ignore the possibility that the current 2008 CWA guidance may be more restrictive than the proposed rule.

Western members of the Subcommittee also raised a number of issues, with Rep. Markwayne Mullin (R-OK), who introduced Strong at the hearing, criticizing EPA and the Corps for not consulting with the states before published the rule for comment. Rep. Don Young (R-AK) said the agencies have underestimated the economic costs of the rule and questioned whether any states support the rule. Rep. Grace Napolitano asked if the rule clearly excluded water reclamation, while Rep. Jeff Denham (R-CA) expressed concern about the rule's impact on farming. Rep. John Garamendi (D-CA) noted that the rule is not final and committed Darcy and Perciasepe to listen to

⁴⁰See page 40.

objections and take them into account, and to modify the proposal to address ambiguities as appropriate.⁴¹

On June 19, Senator John Barrasso (R-WY) introduced the Protecting Water and Property Rights Act of 2014, which is intended to prevent the EPA and the Corps from finalizing the proposed rule on CWA jurisdiction. The bill would also prohibit the agencies from using the proposed rule “...as the basis for any rulemaking or any decision regarding the scope or enforcement of the [CWA].”⁴²

Twenty-nine other Republicans co-sponsored the bill, including Senate Environment and Public Works Committee Ranking Member David Vitter (R-LA) and western Senators Mike Crapo (R-ID), James Risch (R-ID), Pat Roberts (R-KS), Dean Heller (R-NV), James Inhofe (R-OK), Tom Coburn (R-OK), Mike Johanns (R-NE), Deb Fischer (R-NE), John Hoeven (R-ND), John Thune (R-SD), John Cornyn (R-TX), Ted Cruz (R-TX), Orrin Hatch (R-UT), Mike Lee (R-UT), and Mike Enzi (R-WY).⁴³

On July 9, the House Science, Space and Technology Committee held a hearing to discuss the CWA jurisdiction rule. Chair Lamar Smith (R-TX) said the rule does not provide any more clarity about “what is or isn’t a ‘water?’” He also criticized EPA for publishing the proposed rule for comment before its SAB had finished reviewing a scientific report on water connectivity that will inform the final rule. “Even though [CWA] jurisdiction is ultimately a legal question, the Agency’s refusal to wait for the science undercuts the opportunity for policy decisions,” he said. Smith also said the Committee “...sent official questions to the Board as its review began [but] EPA stepped in to prevent the experts from responding.”

Ranking Member Suzanne Bonamici (D-OR) said her constituents have expressed both concerns and support for the rule. She also noted that over 100 stakeholders have asked EPA and the Corps to provide clarity about which waters are jurisdictional. “Although...not all of these organizations are supportive of the proposed rule, the goal of the agencies is to provide all interested parties with the clarity that they need and deserve.”

EPA Deputy Administrator Bob Perciasepe said the rule is a proposal and that EPA will review the comments it receives. He also said the proposed rule, among other things: (1) preserves all existing agricultural exemptions; (2) “continues to respect states’ well-defined and long-standing relationships with federal agencies in implementing CWA programs;” (3) “continues to reflect the state’s primary and exclusive authority over water allocation and water rights administration, as well as state and federal co-regulation over water quality;” (4) expressly excludes groundwater; (5) “reduces jurisdiction over ditches, and maintains existing exclusions for prior converted cropland and waste treatment systems, ponds or lagoons;” and (6) would not assert jurisdiction over waters not currently subject to CWA jurisdiction.

Representatives Ralph Hall (R-TX) and Cynthia Lummis (R-WY) expressed concern about the lack of state experts on the SAB panel reviewing EPA’s connectivity report. Lummis said “...this

⁴¹<http://transportation.house.gov/calendar/eventsingle.aspx?EventID=378392>.

⁴²<http://www.barrasso.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases>.

⁴³*Western States Water*, #2091, June 13, 2014.

scientific committee has no expertise in our water jurisdiction concerns.” Similarly, Hall noted that nine state experts had been nominated to the SAB panel reviewing the connectivity report, and that 13 had been nominated to a panel reviewing an EPA report on hydraulic fracturing. However, Hall reported that EPA did not name any state agency experts to either panel and urged EPA to name more state and local experts with geographic diversity to the SAB. Additionally, Hall opined that states have more expertise and experience regarding hydraulic fracturing than EPA.

In response, Perciasepe said EPA strives for diversity on the SAB and committed to looking at ways to improve. He also said: “I absolutely agree that the states have significant and important [expertise] and we need to rely on [state expertise] in the area of hydraulic fracturing.” Additionally, Perciasepe agreed to submit a more detailed written response for the record regarding state participation on the SAB.

Of note, the WGA has expressed concern about the lack of state experts on the SAB and has urged Congress to ensure that EPA achieves more balanced SAB representation, to include state participation that constitutes no less than 10% of the membership of SAB committees, subcommittees and subject matter panels.⁴⁴

On July 18, the House Committee on Transportation and Infrastructure reported on the Waters of the United States Regulatory Overreach Protection Act of 2014 (H.R. 5078) introduced by Rep. Steve Southerland (R-FL), which would prohibit the EPA and the Corps from finalizing their proposed CWA jurisdiction rule. Among other provisions, the bill would require EPA and the Corps to “jointly consult with relevant State and local officials to develop recommendations for a regulatory proposal” that would identify the scope of waters covered under the CWA as well as the scope of non-jurisdictional waters consistent with U.S. Supreme Court rulings. The bill has 70 co-sponsors, including five Democrats.⁴⁵

On July 31, Senate Agriculture Committee Chair Debbie Stabenow (D-MI) and 12 other Senate Democrats wrote EPA, the Corps, and the U.S. Department of Agriculture to ask the agencies to ensure that the proposed CWA jurisdiction rule and the related agricultural interpretive rule do not have unintended effects on agriculture and conservation practices currently used by farmers and ranchers. Western signatories include Senators Michael Bennet (D-CO) and Tim Johnson (D-SD).⁴⁶

“The proposed ‘waters of the U.S.’ [WOTUS] rule and the interpretive rule could undermine progress made in the 2014 Farm Bill if they create an atmosphere of uncertainty that results in fewer conservation practices or significant new burdens for our nation’s farmers and ranchers,” the letter said. “Given the many uncertainties that remain regarding the effects [the WOTUS] rule may have on agriculture...we request that you reach out to stakeholders...to better understand their concerns as you continue to consider this rule.”

The letter also raised two specific concerns about the WOTUS rule. First, it states: “[M]any questions have been raised about intermittent streams and low-lying areas on fields. Some concerned stakeholders believe that flow and runoff from fields may be categorized as tributaries and

⁴⁴<http://science.house.gov/hearing/full-committee-hearing-navigating-clean-water-act-water-wet>. *Western States Water*, #2086, May 9, 2014.

⁴⁵*Western States Water*, #2096, July 21, 2014.

⁴⁶*Western States Water*, #2095, July 11, 2014 and #2090, June 9, 2014.

thus regulated under the proposed rule. To this point, the proposed rule states that ephemeral features located on agricultural lands that do not possess a bed and bank are not tributaries. We believe defining the term ‘bed and bank’ will significantly help resolve confusion as to which agricultural features can be classified as tributaries.”

Second, the letter urges the agencies to address concerns regarding the WOTUS rule’s treatment of ditches, noting that the rule only excludes “...ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.’ Many producers are concerned because their farms contain fields in floodplains. Because the ditches on these low-lying fields would not be considered upland ditches, they are concerned that these ditches are now jurisdictional.”

With respect to the interpretive rule, the letter cited stakeholder concerns that the rule’s intended purpose of promoting conservation practices and providing certainty for farmers and ranchers will not be met. It also asks whether: (1) the conservation practices listed in the rule would require CWA permits without the rule; (2) the rule will increase the threat of citizen suits against farmers and ranchers and if EPA can take steps to “...insulate agriculture from unnecessary citizen suits;” (3) those conservation practices not identified in the rule will require CWA permits when “...many farmers and ranchers believe conservation practices have always qualified for the Section 404 ‘normal farming’ activity exemption;” and (4) the rule will affect existing conservation efforts.⁴⁷

On August 11, the WSWC finalized a resolution urging federal agencies to “...fully recognize and follow the requirements of Executive Order 13132 by establishing and implementing appropriate procedures and processes for substantively consulting with States, their Governors...and their appointed representatives, such as the [WSWC], on the implications of their [regulatory] proposals and by fully recognizing and deferring to State prerogatives.” The executive order requires federal agencies to have an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications. The resolution also states that nothing in any federal rule, regulation, directive, order or policy should “affect, erode, or interfere” with state water laws, interstate compacts, and negotiated water rights agreements.

The WSWC also approved a letter to the EPA and the Corps, asking them to withdraw the interpretive rule the agencies issued in March regarding agricultural exemptions under the CWA. The rule identifies 56 agricultural exemptions that are intended to be in addition to existing exemptions. However, as the letter states: “[N]otwithstanding your agencies’ intentions, the interpretive rule has created a significant amount of confusion and uncertainty about the scope and applicability of the CWA’s agricultural exemptions and their interaction with state water quality programs.... The [WSWC] stands ready to help facilitate further dialogue between your agencies and the western states on ways to clarify and provide further guidance on the CWA’s agricultural exemptions in a manner that creates less confusion.”⁴⁸

⁴⁷<http://www.ag.senate.gov/newsroom/majority-news>.

⁴⁸*Western States Water*, #2096, July 21, 2014.

The WSWC initially approved both documents at its summer meetings held in Helena, Montana. However, both issues were raised shortly before the meetings and were not noticed in advance, requiring a review by the WGA pursuant to the WSWC's Rules of Organization.⁴⁹

On August 27, WGA Chair Brian Sandoval (R-NV) and Vice-Chair John Kitzhaber (D-OR) wrote EPA and the Corps, asking the agencies to extend the public comment period for their proposed CWA jurisdiction rule by an additional 89 days. "Western Governors originally requested a 180-day extension of the comment period," the letter said. "While we appreciate the 91-day extension of the comment period announced on June 9, the time frame remains insufficient for states to formulate thorough and thoughtful commentary on the rule's extensive impacts, effects and implications."

The letter also references newly released national and state maps from EPA that classify streams, waterbodies, and wetlands within each state as perennial, intermittent, "canal/ditch," lake/pond/reservoir, swamp/marsh, playa, wash, or unclassified. EPA released the maps following a hearing last month before the House Science, Space and Technology Committee in which EPA Deputy Administrator Bob Perciasepe confirmed the maps' existence and agreed to release them in response to questions from the Committee. "[O]ur states need more time to review the streams and waterbodies and wetlands maps recently released by [EPA]," the letter said. "The additional extension of the comment period will provide states with adequate time to review these resources."⁵⁰

According to letters former EPA Office of Water Assistant Administrator Nancy Stoner sent the House Science Committee in July and August, EPA developed the maps using U.S. Geological Survey (USGS) data to "...better understand the potential impacts of certain court decisions to aquatic resources, but not to depict the scope of waters protected under the Clean Water Act [CWA].... The mapping is being used by the agencies, including EPA, to identify the potential extent and location of various types of waterbodies and, in particular, visually representing data regarding regional patterns of stream flow characteristics nationwide within states." EPA also provided additional maps it developed using Fish and Wildlife Service data, which depict wetlands and deepwater habitats. Stoner said these maps "...have not been used for any regulatory purpose."

Stoner's correspondence further explained: "To EPA's knowledge, no national or statewide maps have been prepared by any agency, including EPA, showing the scope of waters subject to the [CWA] or representing jurisdiction under the Army/EPA proposed rule. To develop maps of jurisdictional waters requires site-specific knowledge of the physical features of water bodies, and these data are not available and are not shown on any EPA maps. Additionally, in order for waterbodies to be visible on the national and state maps they must be shown by a discernible line that is not to scale and does not represent the actual width of the water features. At state and national scales, this can give the false impression that most of the state is 'water,' when in fact that is clearly not the case."

However, on August 27, House Science Committee Chair Lamar Smith (R-TX) wrote EPA Administrator Gina McCarthy, expressing concern that the maps "...show the EPA's plan: to control a huge amount of private property across the country.... You claim that the EPA has *not yet* used

⁴⁹<http://www.westernstateswater.org/about-wswc>.

⁵⁰http://westgov.org/component/docman/doc_download/1831-cwa-comment-extension-letter-2?Itemid=

these maps to regulate. However, the EPA failed to explain why it used taxpayer money to create these maps. It is apparent that the EPA paid a private contractor to make many of these maps, yet the details of the arrangement remain murky. While the Agency marches forward with a rule that could fundamentally re-define American's private property rights, EPA kept these maps hidden. Serious questions remain regarding the EPA's underlying motivations for creating such highly detailed maps. The maps were created just days after the EPA announced the rule and show its sweeping scope. The EPA's job is to regulate. The maps must have been created with this purpose in mind."

Given these concerns, Smith asked EPA to provide information regarding its contract with the private contractor that created the maps. He also asked EPA to enter the maps into the official rulemaking docket and provide a 60-day public comment period.⁵¹

On September 5, the WSWC held a conference call with officials from the EPA and the Corps to discuss how the agencies' proposed CWA rule will interact with Sections 101(g) and 101(b) of the law, which require deference to state water allocations and the preservation of the states' primary responsibility to reduce, prevent, and eliminate water pollution. Members of the Association of Clean Water Administrators also participated in the call.

Ken Kopocis, EPA's Deputy Assistant Administrator for Water, said the CWA does not authorize the agencies to allocate water or affect state water allocation. He also said the rule will not affect the agencies' relationship with the states.

State participants asked a number of questions, including whether impoundments needed to exercise state water rights that were built on waters previously determined to be non-jurisdictional will require CWA permits under the new rule. EPA and the Corps said waters that were not jurisdictional previously will likely not be jurisdictional under the rule, although the Corps did acknowledge that it has not discussed how previous jurisdictional determinations will be "grandfathered" under the new rule.⁵²

On September 9, the House passed H.R. 5078 to prohibit the EPA and the Corps from finalizing their proposed CWA jurisdiction rule. Introduced by Rep. Steve Southerland (R-FL) with 120 co-sponsors, the bill passed 262-152, with all but one Republican and 35 Democrats voting in favor of the bill. Senator Barrasso (R-WY) introduced similar legislation (S. 2496) in the Senate.⁵³

On September 30, the EPA's Science Advisory Board (SAB) wrote EPA to relay its conclusion that the "available science" supports key components of the proposed rule on CWA jurisdiction that EPA has developed with the U.S. Army Corps of Engineers. Importantly, the letter focuses on the rule and does not address a separate EPA science report on water connectivity that will inform the final rule. The SAB is expected to finish its review of the connectivity report later this month.

⁵¹<http://science.house.gov/epa-maps-state-2013#overlay-context>. *Western States Water*, #2095, July 11, 2014.

⁵²*Western States Water*, #2104, September 12, 2014.

⁵³*Western States Water*, #2092, June 20, 2014.

With respect to specific aspects of the rule, the SAB urges EPA to consider a broader definition for “tributaries,” which the rule defines as having a bed and banks and ordinary high water mark. “[N]ot all tributaries have ordinary high water marks,” the SAB explained. “An ordinary high water mark may be absent in ephemeral streams within arid and semi-arid environments or low gradient landscapes where the flow of water is unlikely to cause an ordinary high water mark. The [SAB] advises the agency to consider changing the wording in the definition to ‘bed, bank, and other evidence of flow.’”

Next, the SAB says defining “adjacency” should be based on “...functional relationships, not on how close an adjacent water is to a navigable water.” For this reason, the SAB advises the agency not to define adjacent waters and wetlands “...solely on the basis of geographical proximity or distance to jurisdictional waters. The science also supports consideration of the temporal dimension of connectivity to define adjacent waters and wetlands. This is particularly important in arid systems with intermittent and ephemeral streams.”

The SAB similarly found that the science supports “...a determination that certain subcategories and types of ‘other waters’ in particular regions of the United States (e.g., Caroline and Delmarva Bays, Texas coastal prairie wetlands, prairie potholes, pocosins, western vernal pools)...are Waters of the United States.... [T]he science does not support excluding groups of ‘other waters’ (or subcategories of them, e.g., Great Plains playa lakes) that may influence the physical, chemical and biological integrity of downstream waters.”

Moreover, the SAB takes issue with certain exclusions in the rule, which the SAB believes do not have a “strong scientific justification” and may need to be reconsidered. These exclusions include: (1) groundwater; (2) certain ditches; and (3) gullies, rills, and non-wetland swales; and (4) artificial lakes or ponds, or reflection pools, created by excavation, diking, or construction.

Lastly, the SAB says the rule does not adequately define “significant nexus,” and asks EPA to “...clarify in its general communications and in the preamble to the final rule that ‘significant nexus’ is a legal term, not a scientific term.”

Of note, WSWC Position No. 337 states that the CWA was not intended to include groundwater and WSWC Position No. 369 states that groundwater, as well as prairie potholes and playa lakes, should be excluded from CWA jurisdiction. Moreover, the WSWC’s November 2013 comments on EPA’s connectivity report noted that the question of CWA jurisdiction “...is not one of science, but of legal authority....”⁵⁴

On October 8, six Republican governors and the attorneys general for eleven states sent a joint letter to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers, urging the agencies to withdraw their proposed rule regarding Clean Water Act (CWA) jurisdiction. “The Rule seeks to bring within the Agencies’ power every water and land that happens to lie within giant floodplains on the supposition that those waters and lands may connect to national waters after a once-in-a-decade rainstorm,” the letter said. “The Proposed Rule unlawfully and unconstitutionally seeks to assert federal jurisdiction over local water and land use management, while making it

⁵⁴*Western States Water*, #2105, September 19, 2014.

impossible for farmers, developers and homeowners to know when they may carry on their activities without obtaining an extremely expensive federal permit.”

The letter also requests further state consultation “...to better understand the careful measures [state] officials are taking to protect the land and water in their respective States. After undergoing that...process, the Agencies should propose a very different rule, which respects the States’ primary responsibility over the lands and waters within their borders and gives farmers, developers and homeowners clear guidance as to when the CWA’s requirements apply.”

The attorneys general from Nebraska, Oklahoma, and West Virginia authored the letter, which was joined by their colleagues from Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, and South Dakota. Western Governors Sam Brownback of Kansas and Dave Heineman of Nebraska signed the letter, along with their counterparts from Iowa, Mississippi, North Carolina, and South Carolina.⁵⁵

In related news, the federal Office of Advocacy within the Small Business Administration (SBA) has also asked EPA and the Corps to withdraw the rule. In an October 1 letter, the Office said it is “extremely concerned” about the rule and that the agencies failed to comply with the Regulatory Flexibility Act (RFA) by certifying the rule and publishing it for public comment before convening a Small Business Advocacy Review Panel (SBARP) to consider concerns from small businesses and other small entities. The Office specifically criticized the agencies for finding that the rule would not have a significant economic impact on a substantial number of small business entities, and that compliance with RFA requirements was therefore unnecessary. In contrast, the Office notes that the agencies’ own economic analysis “...provides ample evidence of a potentially significant economic impact.”

The Office of Advocacy also criticized the methodology the agencies used to determine that the rule would not significantly impact small businesses. Namely, it notes that the agencies made their finding by comparing the new rule to a 1986 rule, which it said “...has been abrogated by several Supreme Court cases and is no longer in use.” Instead, the Office said the agencies should compare the proposed rule to current practice. As a result, the Office said the agencies should withdraw the rule and conduct a SBARP before re-proposing the rule.

The Office of Advocacy is an independent federal entity and serves as the watchdog for the RFA. Its views do not necessarily represent the views of the SBA or the Administration.⁵⁶

On October 17, the EPA’s Science Advisory Board submitted its comments on a report EPA had prepared regarding the connectivity of different water bodies. The SAB found that the report is “...a thorough and technically accurate review of the literature on the connectivity of streams and wetlands to downstream waters.” With respect to specific aspects of the report, the SAB agreed with conclusions that streams and “bidirectional” floodplain wetlands are physically, chemically, and/or biologically connected to downstream navigable waters. Similarly, it agreed that “...ephemeral,

⁵⁵<http://www.ago.wv.gov/pressroom/Documents/WOTUS%20Comment%20Letter%202010-8-FINAL.pdf>.

⁵⁶<http://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>. *Western States Water*, #2107, October 3, 2014.

intermittent, and perennial streams exert a strong influence on the character and functioning of downstream waters and that tributary streams are connected to downstream waters.”

However, the SAB took issue with the report’s tendency to treat connectivity as a binary property in which waters are connected or not connected. Instead, the SAB recommended that “...the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and consequences of those connections.” The SAB further noted that “...relatively low levels of connectivity can be meaningful in terms of impacts on the chemical, physical, and biological integrity of downstream waters.”

The SAB disagreed with the report’s finding that not enough information is available to generalize about the connectivity of wetlands in “unidirectional, non-floodplain settings,” such as prairie potholes. Instead, it said science “...supports a more definitive statement that reflects how numerous functions of non-floodplain wetlands sustain the physical, chemical, and/or biological integrity of downstream waters, although the degree of connectivity can vary widely.”

The SAB further noted that the report is a “science, not policy, document,” and recommended that the report should “...clearly indicate that the definitions used for rivers, streams, and wetlands are scientific, rather than legal or regulatory definitions, and may differ from those used in the [CWA] and associated regulations.”

The SAB panel that reviewed the report consisted of 27 scientists, most of whom are from universities within the United States. However, there were a few exceptions, including scientists from the University of Manitoba in Canada and The Nature Conservancy. The panel did not include any state agency scientists or experts.⁵⁷

Notably, the WSWC had asked EPA and the Corps to wait until after the SAB finished its review and until after the report was complete before taking further action to revise and finalize the proposed CWA rule. The WSWC also observed that the “overriding question” in the rulemaking is not one of science, but one of legal authority, and that the report should not be used to support a rule that improperly asserts that the scope of the CWA is unlimited. The WGA has further encouraged congressional direction to ensure more balanced SAB representation, to include state representation of at least 10% on the SAB itself as well as its committees and panels.

On October 23, twenty-four Republican senators wrote the EPA and the Corps urging them to withdraw the agencies’ proposed “waters of the United States” rule regarding CWA jurisdiction. The letter states that the rule will give the agencies “virtually unlimited regulatory authority” and displaces state and local officials in their “primary role” in environmental protection. “Undoubtedly, there is a disconnect between regulatory reality and the Administration’s utopian view of the proposed...rule,” the letter said. “We believe this reflects the Administration’s refusal to listen to the thousands of Americans who have asked that the proposed rule be immediately withdrawn.”

The letter also accuses the Administration of manipulating the rulemaking “in ways that appear to be designed to prejudice the outcome.” It then identifies a series of “bias factors.” First, it

⁵⁷http://yosemite.epa.gov/sab/sabproduct.nsf/fedgrstr_activites/Watershed%20Connectivity%20Report?OpenDocument. *Western States Water*, #2108, October 10, 2014 and #2107, October 3, 2014.

criticizes Administration claims that the rule responds to prior requests for a rulemaking, stating: “A request for a regulatory clarification does not provide a license to run roughshod over the property rights of millions of Americans.”

Second, the letter says the Administration has insinuated that “opposition to the...rule is equivalent to opposition to clean water.” “This is an insulting ploy that belies the numerous efforts made in recent years by agriculture, industry, and local officials to improve water quality throughout the country,” it said. “It ignores the fact that nonfederal waterbodies are subject to local and state water quality regulations.” The letter further states that Section 101(b) of the CWA, which recognizes the states’ primary rights and responsibilities to prevent, reduce, and eliminate pollution, “...negates the canard that choosing clean water requires acceding to unlimited federal regulatory authority.”

Third, the letter accuses EPA of attempting to “delegitimize” questions and concerns the rule’s critics have raised. “If EPA believes concerns with the proposed rule are unwarranted, the appropriate course of action would be for the agency to respond formally in the context of the notice and comment procedures accompanying the current rulemaking.”

Fourth, the letter says the agencies have “blatantly misrepresented” the impacts of increased CWA jurisdiction by claiming that such impacts are insignificant and would not infringe on private property rights. “These assertions strain credulity,” it said. “That such statements have come from EPA and the Corps suggests that the agencies either don’t appreciate the real-world impacts of the law they’re charged with administering, or they are intentionally trying to minimize the effect of the proposed rule.”

Fifth, the letter says EPA efforts to support the rule “prejudices the rulemaking process.” In particular, the letter said the agency’s “Ditch the Myth” website and the Twitter account for its Office of Water raise “serious questions” about compliance with the Anti-Lobbying Act, and that: “EPA’s social media advocacy removes any pretense that the agency will act as a fair and neutral arbiter during the rulemaking... Why should state officials believe that their concerns...will be fully considered, when EPA has already determined [on the Ditch the Myth website] that the proposed rule ‘fully preserves and respects the effective federal-state partnership...under the CWA.’ EPA’s social media advocacy is a firm indicator that adverse comments will receive scant attention during the rulemaking period.” The letter also questions whether the rulemaking can comply with the Administrative Procedure Act, which it said requires EPA to “maintain a flexible and open minded attitude towards its own rules.”

Senators John Barrasso (WY) and Ted Cruz (R-TX) developed the letter with Minority Leader Mitch McConnell (KY) and Senate Environment and Public Works Committee Ranking Member David Vitter (LA). Western signatories include Senators Mike Crapo (ID), Jim Risch (ID), Pat Roberts (KS), Jerry Moran (KS), Mike Johanns (NE), Deb Fischer (NE), James Inhofe (OK), John Cornyn (TX), Orrin Hatch (UT), Mike Lee (UT), and Mike Enzi (R-WY).⁵⁸

⁵⁸http://www.barrasso.senate.gov/public/_files/WOTUS_Letter10_23_14.pdf. *Western States Water*, #2109, October 17, 2014 and #2096, July 21, 2014.

In related news, Senator Thad Cochran (MS) and eight other Republicans on the Senate Agriculture Committee sent a letter to EPA and the Corps asking them to withdraw an interpretive rule they finalized in March regarding the CWA's agricultural exemptions. "Under current law, normal farming and ranching activities are exempt from permitting requirements," the letter said. "The Interpretive Rule has inserted substantial uncertainty into this process by outlining just 56 activities out of more than 160 conservation practices that previously qualified for the...exemption... Further, it calls into question whether any other normal farming or ranching activity not conducted in accordance with a [U.S. Department of Agriculture (USDA)] technical standard can qualify for this exemption." The letter notes that USDA has established "an unprecedented relationship of trust" with farmers, ranchers, and rural stakeholders, and that "...[b]ringing USDA into the [CWA] permitting process would profoundly shift the nature of this successful approach by dismantling a longstanding partnership between the Federal government and agriculture community."

Other westerners signing the letter include Senators Pat Roberts (KS), Mike Johanns (KS), John Thune (SD), and John Hoeven (ND). Senate Majority Leader Mitch McConnell (KY) also signed the letter.⁵⁹

Of note, the WSWC believes the CWA's agricultural exemptions are working properly, and has asked EPA and the Corps to withdraw the interpretive rule.

On November 5, EPA's Local Government Advisory Committee submitted comments on the CWA jurisdictional rule EPA and the Corps have proposed. EPA convened the committee, which consists of local government officials, after it published the rule for comment in March. The committee then held a series of outreach meetings across the country to discuss local perspectives and perceptions regarding the rule.

The committee found that "considerable work remains if the rule is to be embraced locally," namely: (1) "[It] does not, as written, provide clear definitions nor achieve the objective of clarifying the extent of federal jurisdiction over local water bodies;" (2) many local agencies are "frustrated" with the CWA permitting process, and that a "clear and predictable" process is an "essential foundation" for any new regulatory proposal regarding CWA jurisdiction; and (3) questions remain about the status of the CWA's agricultural exemptions and municipal separate storm sewer system permittees, which "...must be easily answered in order for the rule and permitting process to be effective."

The committee recommends that permitting process deficiencies be addressed, and that the rule be written so that a water body's jurisdictional status is clear to local agencies, states, and the federal agencies. Moreover, it recommends that the rule clearly define agricultural exemptions, address "significant regional differences," and acknowledge and incentivize best management practices that are already underway. Lastly, the Committee urges the agencies to "...engage state, local, and tribal agencies in the rule development process."⁶⁰

⁵⁹<http://www.cochran.senate.gov/public/index.cfm/news-releases?ID=d312091e-4bb6-4b6c-9f4e-c59260a13de8>.

⁶⁰http://www.epa.gov/ocir/scas_lgac/lgac_index.htm.

On November 14, the WGA submitted comments regarding the CWA jurisdiction rule that EPA and the Corps proposed. The WGA's letter supports comments the WSWC submitted on October 15, and asks that the WSWC's comments be incorporated by reference to its own. Governors Brian Sandoval (R-NV) and John Kitzhaber (D-OR), the Chair and Vice-Chair of the WGA, signed WGA's letter.

The governors identify a number of other issues in addition to the WSWC's comments. First, they state: "The Western Governors appreciate the proposed rule's objective to clarify the meaning of 'Waters of the United States' in the CWA. Any changes within the proposed rule must stay within the limits set by Congress and the Supreme Court, recognizing the authority of states to manage water within their boundaries."

Second, the governors address comments EPA's SAB submitted regarding a draft science report EPA prepared on water body connectivity that will inform the final rule. "We note with concern...that the [SAB] has indicated...support for utilizing connectivity of water as a scientific basis for even broader federal agency jurisdiction under the CWA than what is now suggested under the proposed rule. We urge you to remember that legal authority and precedent are at the core of the question of the agencies' jurisdiction under the Act. Both hydrology and laws vary from state to state. The best policy when considering the intersection of science and law is one that allows for regional flexibility and acknowledges the role of state experts who live with - and intimately understand - the issue at hand."

Third, the governors express concern about the potential for the proposed jurisdictional rule to impact state economies. "Some analyses indicate that the agencies may have misunderstood the economic impact of the proposed rule," they said. "Water is crucial to Western economies; because of this, we ask that you critically and completely examine the potential for the proposed rule to impact state and local economies."

Lastly, the governors express appreciation for the agencies' decision to extend the public comment period for the rule, but note that the WGA had twice requested a longer, 180-day extension. "As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of state water resources," they said. "While we appreciate the outreach from EPA and the Corps since the release of the proposed rule, we note that the agencies did not engage the states in substantive consultation prior to the release. Extending the comment period would allow for meaningful consultation between your agencies and the states. This is particularly imperative because the SAB panel for the review of the EPA water body connectivity report includes no state representatives at all. That report was therefore developed without the regulatory expertise, scientific resources and on-the-ground knowledge possessed by state professionals."⁶¹

⁶¹http://westgov.org/component/docman/doc_download/1847-wotus-comments?Itemid=. *Western States Water*, #2112, November 7, 2014.

Clean Water Act/Environmental Protection Agency

EPA's 404 Veto Authority

On April 9, the House Transportation and Infrastructure Committee reported legislation (H.R. 524) that would prohibit EPA from retroactively vetoing dredge and fill permits the Corps has issued pursuant to Section 404 of the CWA. The bill responds to EPA's 2011 retroactive veto of a 404 permit the Corps had issued to Mingo Logan, a West Virginia coal mine.

Senate Environment and Public Works Committee Ranking Member David Vitter (R-LA) also introduced a similar bill on March 25 (S. 2156) to limit EPA's veto authority and prohibit retroactive vetoes. However, unlike H.R. 524, Vitter's bill would also preclude "pre-emptive" vetoes.⁶²

These developments follow the U.S. Supreme Court's March 24 decision not to review the DC Circuit Court of Appeals' decision in *Mingo Logan v. EPA*, which upheld EPA's retroactive veto of Mingo Logan's permit and found that the CWA's language expressly authorizes such vetoes. Twenty-seven states, including 13 western states, had asked the Court to overturn the decision.

Water Transfers Rule

On May 12, the Western Governors' Association (WGA) and the WSWC sent a joint letter to the Environmental Protection Agency (EPA), urging it to appeal a recent federal district court decision that overturned EPA's water transfers rule, which clarifies that certain transfers are not subject to National Pollutant Discharge Elimination System (NPDES) permit requirements under the Clean Water Act (CWA). The letter follows a similar request WGA sent the Council on Environmental Quality last week and was signed by WGA Executive Director James Ogsbury and WSWC Executive Director Tony Willardson.⁶³

Citing the WGA's longstanding support for the rule, the letter noted that Section 101(g) of the CWA states that the law will not supersede or abrogate the rights of states to allocate water quantities within their jurisdiction, and that water rights established by state law shall be protected. "NPDES permitting requirements could have the effect of forcing water suppliers to forgo the full exercise of their state water rights, which would directly abrogate or supersede state water law and the allocation of state water rights," the letter said.

The letter also said the court's decision is "troubling" because it "...incorrectly questions state primacy over water allocation, finding that the CWA implies a 'secondary' role for the federal government to plan the development of water resources, and that 'states should have control over water resource allocation only when they have an EPA approved [Section 402] program and a water resource-allocation program.' Such reasoning is in direct conflict with Section 101(g) and other provisions of the CWA prioritizing state rights."

⁶²*Western States Water*, #2067, December 27, 2013.

⁶³*Western States Water*, #2086, May 9, 2014.

The letter further said requiring NPDES permits for the thousands of transfers in the West could make them “...prohibitively expensive, technically impractical, and could compel the curtailment of certain transfers, with little if any water quality benefits.” The letter closed by stating: “Western Governors appreciate EPA’s longstanding support for the water transfers rule and will stand with EPA in its defense of the rule.”⁶⁴

On May 29, EPA filed a notice indicating that it plans to appeal a recent decision from the U.S. District Court for the Southern District of New York (SDNY) that struck down EPA’s water transfers rule. The rule clarifies that transfers are not subject to the CWA’s National Pollutant Discharge Elimination System (NPDES). The appeal would take place in the Second Circuit Court of Appeals.

Of further note, eleven western states intervened in the case to support EPA’s rule. Those states filed a notice of appeal on May 27, and include Alaska, Arizona, Colorado, Idaho, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Wyoming.⁶⁵

On July 3, the Environmental Protection Agency (EPA) wrote the Western Governors’ Association (WGA) and the WSWC to confirm that the Administration has filed notice indicating that it will appeal a recent decision from the U.S. District Court for the Southern District of New York that vacated EPA’s water transfers rule. The rule clarifies that certain transfers are not subject to National Pollutant Discharge Elimination System permits under the Clean Water Act (CWA). The WGA and WSWC have long supported the rule and sent a joint letter to EPA in May, asking EPA to appeal the decision and stating that the Western Governors would stand with EPA in its defense of the rule.⁶⁶

Treatment as States

On October 1, EPA hosted a conference call with state associations to discuss its plans for a possible rulemaking that would outline a process for tribes to apply for “treatment as states” (TAS) authority to establish lists of impaired waters and Total Daily Maximum Loads (TMDLs) pursuant to section 303(d) of the CWA. During the call, EPA said the rule is needed because Section 518 of the CWA requires the agency to develop regulations that describe how tribes can obtain TAS status to operate certain CWA programs. While EPA has developed regulations that establish TAS processes for other relevant CWA programs available to tribes, it has yet to develop similar regulations for section 303(d).

EPA has conducted pre-proposal consultation with the tribes and is beginning a similar effort with the states. Specifically, EPA has offered to hold calls with state associations and their members to discuss the possible proposal and is requesting initial state comments by November 1, or as soon as possible thereafter. If EPA moves ahead with the proposal, it will likely publish a proposed rule in late 2014 with a 60-day comment period. A final rule would be expected in late 2015.

⁶⁴http://westgov.org/component/docman/doc_download/1809-water-transfers-letter-to-epa?Itemid=.

⁶⁵*Western States Water*, #2087, May 16, 2014.

⁶⁶*Western States Water*, #2089, May 30, 2014.

The TMDL rulemaking would be separate and apart from a possible interpretive rule EPA is contemplating that would reinterpret current Section 518 TAS regulations by removing requirements that tribes must show they have inherent authority to administer CWA programs.⁶⁷

Corps of Engineers

Water Resources and Development Act

On April 10, WGA Executive Director James Ogsbury wrote Senators Barbara Boxer (D-CA) and David Vitter (R-LA), the Chair and Ranking Member of the Senate Environment and Public Works Committee, to reiterate the WGA's support for Water Resources and Development Act (WRDA) reauthorization and aspects of the House (H.R. 3080) and Senate (S. 601) WRDA bills. A conference committee is currently working to reconcile the differences between the two bills.

First, the letter urges Congress to "...recognize and protect the states' interests and rights in water management, including water stored at U.S. Army Corps of Engineers and [Bureau of] Reclamation reservoirs." It also supports Senator John Hoeven's (R-ND) Amendment 863 that: "No fee for surplus water shall be charged under a contract for surplus water if the contract is for surplus water stored on the Missouri River."

Second, the letter supports Section 5008 in S. 610, which would establish a flood and drought monitoring program in the Upper Missouri River Basin. "WGA policy encourages prioritization of the nation's water measurement and monitoring data networks, particularly for drought planning," it said. "The program, as proposed...would cost [\$11.25] million - far less than the \$2 billion in losses incurred by the 2011 floods on the Missouri River."

Lastly, the letter says: "The Western Governors are generally supportive of a national levee safety program, so long as it is not applied to water supply canals."⁶⁸

On May 15, the Conference Committee working to reconcile the House and Senate Water Resources Development Act (WRDA) bills (H.R. 3080/S. 601) released a conference report, or final version of the bill. The final bill would authorize 34 new lock, dam, levee, port, and ecosystem restoration projects, while also making a number of reforms to U.S. Army Corps of Engineers policy, including provisions to streamline the environmental review process. The Congressional Budget Office has yet to score the bill, but early reports indicate that it will cost around \$12 billion and de-authorize \$18 billion in inactive projects. The House and Senate are expected to pass the measure next week.

With respect to notable provisions, Section 1046 of the bill would prohibit the Corps from charging a fee for surplus storage water over the next 10 years on Corps reservoir projects in the Upper Missouri River Basin.

⁶⁷*Western States Water*, #2096, July 21, 2014.

⁶⁸http://westgov.org/reports/doc_download/1802-wrda-conferees. *Western States Water*, #2061, November 15, 2013.

Section 3016 would establish a “levee safety initiative” similar to the “national levee safety program” proposed in S. 601, that would promote consistent safety standards and assist state levee safety efforts. Like S. 601, the bill defines “levee” as a “...manmade barrier...the primary purpose of which is to provide hurricane, storm, or flood protection relating to seasonal high water, storm surges, precipitation, or other weather events; and that is normally subject to water loading for only a few days or weeks during a calendar year.”

Section 4003 would create a flood and drought monitoring program in the Upper Missouri River Basin to operate USGS streamgages and carry out soil moisture and snowpack monitoring, including Natural Resources Conservation Service (NRCS) SNOTEL sites. The Corps would establish the program with the National Oceanic and Atmospheric Administration, NRCS, USGS, and the Bureau of Reclamation.

The bill would also authorize new requirements for the Clean Water State Revolving Loan Fund (CWSRF). Notable changes include: (1) Section 5002 to require states to maintain CWSRF funds with repayments to ensure that fund balances are available in perpetuity and to specify that fees charged by states are considered program income for the financing and administration of the fund; (2) Section 5003 to clarify project activities eligible for CWSRF assistance and to clarify that states may provide additional subsidization, including principal forgiveness and negative interest loans; (3) Section 5004 to establish “Buy American” requirements for iron and steel used in projects receiving CWSRF funding; and (4) Section 5013 to clarify that no more than 2% of CWSRF funds are available for loans to Indian tribes.

Title V, Subtitle C of the bill would establish a five-year Water Infrastructure Finance and Innovation Act (WIFIA) pilot program that would allow the Corps and EPA to provide direct loans and loan guarantees for levee, flood control, drinking water, and wastewater projects. The program is modeled after the Transportation Infrastructure Finance and Innovation Act program and is similar to a proposal contained in S. 601. It would authorize \$20 million for 2015, \$25 million for 2016, \$35 million for 2017, \$45 million for 2018, and \$50 million for 2019.⁶⁹

Dams/NPDES Permits

On August 4, the U.S. Army Corps of Engineers filed a settlement with a federal district court in Oregon, which requires the agency to apply for National Pollutant Discharge Elimination System (NPDES) permits for pollutants leaking from the gates, turbines, and other equipment in eight dams along the Columbia and Snake Rivers in Oregon and Washington. While the Corps admits no wrongdoing, it also agreed to disclose the amount of pollutants coming from the dams and to pay over \$140,000 in attorney’s fees. The settlement will resolve a lawsuit Columbia Riverkeeper filed over the oil spills, which the group argued require NPDES permits pursuant to the Clean Water Act (CWA). The settlement marks the first time the Corps has agreed to monitor and disclose the chemicals released from its dams.

Columbia Riverkeeper hailed the agreement as a “victory,” stating that the dams have discharged oil pollution for years, including 1,500 gallons of transformer oil that one of the dams

⁶⁹<http://transportation.house.gov/news/documentsingle.aspx?DocumentID=379806>. *Western States Water*, #2083, April 18, 2014.

released in 2012. A press release from the organization also cited a number of CWA experts on the possible impact of the settlement, including Lewis and Clark Law Professor Melissa Powers, who said the settlement "...has implications for dams operating without pollution permits across the country. Like any industrial facility, dams are prohibited from discharging pollution until they obtain pollution permits."⁷⁰

However, House Natural Resources Committee Chair Doc Hastings (R-WA) wrote the Corps on August 6 to express "strong concerns" about the settlement. "Like an increasing number of the Obama Administration's 'sue and settle' agreements over the past few years, this settlement was negotiated behind closed doors...without consultation or input from those most directly impacted," he said. "Of great concern is the likely precedent that this decision could have relating to the EPA's enforcement of the [CWA] relating to the operation and maintenance of federal and non-federal dams.... This settlement would empower EPA to enforce stringent [NPDES] permit requirements that could slow down or impede the Army Corps' operation or maintenance of the dams. It also sets a host of burdensome and fixed deadline requirements that could lead to even more litigation in the future."⁷¹

Drought

National Integrated Drought Information System

On February 10, the House voted 365-21 to pass H.R. 2431, which would reauthorize the National Integrated Drought Information System (NIDIS). The Senate also passed its NIDIS bill (S. 376) on February 25 by unanimous consent. The most notable difference is that H.R. 2431 would authorize \$13.5 million for each of fiscal years 2014 through 2018, compared to \$12 million in S. 376. The WGA and the WSWC strongly support NIDIS reauthorization.⁷²

On March 6, President Obama signed the NIDIS Reauthorization Act (H.R. 2431), which was introduced by Rep. Ralph Hall (R-TX).

Drought Study

Researchers from the U.S. Geological Survey, the University of Arizona, and Cornell University have completed a study finding that there is at least a 50% chance that a decade-long drought similar to the 1930s Dust Bowl will develop in the southwestern states of Arizona, California, and New Mexico. The study also found that the chances of a "megadrought," which it defines as a drought lasting up to 35 years, range from 20% to 50% over the next century in the Southwest. At the same time, the study found that the chances for drought in the northwestern states of Idaho, Montana, and Washington may decrease. The study is based on climate models, rainfall data, and paleoclimate data and published in the American Meteorological Society's Journal of Climate.

⁷⁰<http://columbiariverkeeper.org/featured/victory-new-era-of-accountability-for-some-of-nations-largest-dams/>.

⁷¹<http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=390429>.

⁷²*Western States Water*, #2064, December 6, 2013.

“For the southwestern U.S., I’m not optimistic about avoiding real megadroughts,” said Toby Ault, Cornell assistant professor of earth and atmospheric sciences and the lead author of the study. “As we add greenhouse gases into the atmosphere...we are weighting the dice for megadrought.... This will be worse than anything seen during the last 2,000 years and would pose unprecedented challenges to water resources in the region.”⁷³

Forest Service

Proposed Groundwater Directive

On June 25, the House Natural Resources Committee’s Subcommittee on Water and Power held an oversight hearing titled: “New Federal Schemes to Soak Up Water Authority: Impacts to States, Water Users, Recreation, and Jobs.” The hearing focused on the U.S. Forest Service’s (USFS) proposed groundwater directive, which is intended to create a comprehensive direction for the agency’s management of groundwater on National Forest System (NFS) lands. It also addressed the Environmental Protection Agency’s (EPA) and the U.S. Army Corps of Engineers’ proposed rule on Clean Water Act (CWA) jurisdiction.

Committee Chair Doc Hastings (R-WA) said the proposals “...do nothing more than make it more difficult to rehabilitate or build new projects that benefit agriculture, municipalities, species and habitat.” Subcommittee Chair Tom McClintock (R-CA) said the proposals threaten to upend state water laws and “...present us with a Constitutional crisis, the significance of which cannot be overstated.... These proposals must be withdrawn and there is bipartisan support to do just that.... We will pursue legislation both through the appropriation and authorization powers of Congress to stop this unconstitutional and illegal overreach.”

Ranking Member Pete DeFazio (D-OR) expressed concern that certain waters that may no longer be subject to CWA jurisdiction under the EPA’s and the Corps’ proposed rule, such as gullies and rills. Subcommittee Ranking Member Grace Napolitano (D-CA) noted that the CWA rule and the USFS directive are not yet final and that both are currently out for public comment.

The U.S. Department of Agriculture (USDA) and the Bureau of Reclamation were invited to testify but did not send witnesses to the hearing, submitting written statements instead. EPA was not invited.

The USDA statement said the USFS “...along with most states, considers surface water and groundwater to be connected and interdependent resources. The proposed directive would establish policy for managing surface uses with the understanding that surface water and groundwater are interconnected. The [USFS] recognizes the states’ roles in managing water resources and administering water rights within their borders. Nothing in the proposed directive would affect states’ role in the management of water rights.”

Reclamation’s statement said “...it is our understanding that the proposed [CWA] rule is not designed to expand the Act’s applicability beyond existing regulation; that it is not designed to cover

⁷³<http://news.cornell.edu/stories/2014/08/study-southwest-may-face-megadrought-within-century>.

groundwater; and that the rule does not expand the Act's reach to cover additional irrigation ditches or alter the existing water transfers exclusion....”

Wyoming State Engineer Pat Tyrrell, the WSWC's Vice-Chair, testified on behalf of his state, urging the USFS to withdraw the directive. He said the USFS lacks authority to manage groundwater and that the proposal would impose new obligations and costs on Wyoming water users. Among other concerns, he said the proposal would require USFS to evaluate all applications to states for water rights on lands adjacent to NFS lands, which he described as “...an extra-territorial reach beyond USFS authority [that] conflicts with Wyoming law, which establishes the Wyoming State Engineer as the exclusive permitting agency.” Similarly, he said the rule's presumption that groundwater and surface water are connected conflicts with Wyoming law, which places the burden on the USFS to prove a hydraulic connection instead of on individual appropriators as presumed by the directive. Tyrrell further noted that USFS developed the proposal without consulting with the states, but did consult with tribes.

Tyrrell said the CWA rule was created without state input and was proposed before EPA completed the scientific report that will serve as the basis of the final rule. Wyoming is also concerned that the rule improperly expands CWA authority, does not clarify which waters are jurisdictional, has vague exemptions, asserts jurisdiction over groundwater, and creates confusion about ditches.⁷⁴

In related news, Hastings, McClintock, and 41 other Republican Senators and Representatives wrote USDA on June 24, asking it to withdraw the USFS directive. “Like other proposals stemming from this Administration...this Directive seeks to further federalize water resources at the expense of state authority,” the letter said. “This sweeping proposal additionally seeks to impose water use restrictions and deny agricultural, recreational, and other economic activity in 155 National Forests and their adjacent state, local and private neighbors in 40 states. The end result could be lost jobs and reduced recreational access to public lands, with little or no environmental benefit... We are further concerned that this Directive will lead to regulations that undermine the [USFS'] statutory multiple-use responsibilities.... The proposed Directive could also encourage litigation and impose de facto federal buffer zones on water users and job creators adjacent to NFS lands. In addition, this action has been pursued without the initial and necessary input from impacted States, farmers, recreationists, and ranchers, and many others....”⁷⁵

Hydraulic Fracturing

On October 23, Republicans on the Senate Environment and Public Works Committee released a report criticizing the Obama Administration's actions regarding hydraulic fracturing. According to the report, hydraulic fracturing and horizontal drilling are driving the nation's “energy renaissance,” which is responsible for significant economic benefits. However, the report accuses the Administration of “obstructing” oil and gas development on federal lands, stating that from 2009-2013 there was a 6% fall in oil production and a 28% fall in gas production, while production on private lands increased “dramatically.” The report also cites Bureau of Land Management estimates

⁷⁴<http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=384481>.

⁷⁵http://www.crapo.senate.gov/media/newsreleases/release_full.cfm?id=352964. *Western States Water*, #2086, May 9, 2014.

that classify 90% of natural gas and 92% of oil located on federal lands as being either inaccessible or restricted.

The report takes particular aim at EPA, which it says has undertaken unnecessary studies, investigations, and regulations to make hydraulic fracturing more expensive and burdensome. In support of this claim, it says EPA's regulation of oil and gas activities outpaced overall federal oil and gas regulation by a ratio of 5:1 from 1997 to 2012. According to the report, this "regulatory onslaught" intensified under President Obama "...as EPA regulation over oil and natural gas development grew 32.6% during his first term." The report also says EPA "does not have the competency" to make informed decisions on hydraulic fracturing, citing its efforts to study possible groundwater quality impairments in Pennsylvania, Wyoming, and Texas. "Despite the Agency's efforts and political agenda in all three cases, the facts led EPA to reverse course and end [its] investigations without the smoking gun [it] so hoped to manufacture," the report said.

The report finds that states are effectively regulating hydraulic fracturing, and are in "the best position" to create effective policies that address their specific regulatory needs. "A major misconception intentionally perpetuated by anti-fossil fuel activists is that hydraulic fracturing is unregulated," said the report. "This could not be further from the truth. The process is extensively regulated by the states and has been for over 60 years.... [S]tate regulatory schemes encompass all stages of development, including the process of hydraulic fracturing, and are constantly evolving as technologies change and potential new challenges arise."

In addition, the report describes studies showing that hydraulic fracturing does not pose a threat to water quality. It also addresses concerns about possible water supply impacts, citing Interior and USGS findings that water consumption "...by all mining activities, including hydraulic fracturing and other oil and natural gas production techniques, is about 1% of the billions of gallons consumed in the U.S. daily."⁷⁶

Of note, WSWC Position No. 353 says federal efforts to study hydraulic fracturing should leverage state expertise. It also opposes efforts to diminish the state's primary and exclusive authority over the allocation of water used in hydraulic fracturing.⁷⁷

Indian Water Rights

Montana/Flathead Reservation

On January 6-7, the Montana Legislature's Water Policy Interim Committee met in Helena, Montana to address a number of water-related issues, including a report from the Montana Reserved Rights Compact Commission on a proposed water rights compact between the state and the Confederated Salish and Kootenai Tribes of the Flathead Reservation. The Legislature declined to approve the compact last year and Governor Steve Bullock, who supports the settlement, directed the Commission to prepare the report to address questions that arose during the 2013 legislative session.

⁷⁶<http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases>.

⁷⁷*Western States Water*, #2041, June 28, 2013.

Montana Department of Natural Resources and Conservation Director John Tubbs, a WSWC member, described the report, stating that the compact would provide protections for state water users and access to a new supply of water for the region, while providing for needed repairs and upgrades to the Flathead Indian Irrigation Project (FIIP), among other benefits.

The compact would quantify the tribes' water rights, protect current water uses, and provide for unitary water management on the reservation. Among other provisions, it would allocate 90,000 acre-feet of water from Hungry Horse Reservoir for the tribes to use or lease within Montana, of which at least 11,000 acre-feet must be available to lease for off-reservation mitigation of new or existing uses. The U.S. and Montana would also fund FIIP improvements to benefit tribal natural resources, FIIP management, the FIIP land base, and the Reservation's economy. Additionally, the compact would resolve the tribes' off-reservation in-stream flow claims to satisfy specific language in their treaty, which is unique to the tribes' treaty and would not set a precedent for other Montana tribes to make off-reservation claims.

A separate but related agreement between the tribes, the Flathead Joint Board of Control, and the U.S. would resolve issues regarding water rights for the FIIP by specifying that rights for the project (not private rights) would become part of the tribes' tribal water right under the compact, with all FIIP water users benefitting from the tribes' 1855 priority date.⁷⁸

Montana Water Resources Division Director and WSWC member Tim Davis also updated the Committee on Montana's water plan and ongoing adjudications, while WSWC Executive Director Tony Willardson discussed the WGA/WSWC's Water Transfers Report. Other updates of note addressed the *Montana v. Wyoming* litigation over the Yellowstone River Compact, exempt wells, Forest Service water reservations, the Columbia River Treaty review process, and in-stream leasing.⁷⁹

Nevada/Pyramid Lake Tribe

On September 18, the Senate passed legislation (H.R. 3716) that Rep. Mark Amodei (R-NV) introduced to authorize a water rights agreement between the Pyramid Lake Paiute Tribe and a water company in Nevada. The agreement would resolve the tribe's objections to a project the company is developing that could potentially send up to 13,000 acre-feet of groundwater per year to the Reno, Nevada area. As part of the settlement, the ranch would make a number of payments to the tribe for various purposes. While the agreement does not involve any federal funding, it does require Congressional authorization for the tribe to execute certain waivers and releases of claims. The House passed the legislation in July and the bill was presented to the President on September 23 for his signature. The bill is the first Indian water rights bill that Congress has passed this session.

Arizona/Hualapai Tribe

On September 19, the House Natural Resources Subcommittee on Water and Power held a hearing on H.R. 4924, which would authorize two related water rights agreements in Arizona's Bill Williams River basin. The first settlement, the Big Sandy River-Planet Ranch Agreement, would

⁷⁸<http://dnrc.mt.gov/rwrcc/Compacts/CSKT/Default.asp>.

⁷⁹<http://leg.mt.gov/css/Committees/interim/2013-2014/Water-Policy/default.asp>.

facilitate the severance and transfer of water rights owned by Freeport Minerals Corporation along the Bill Williams River and resolve pending objections by the Department of the Interior and the Arizona Game and Fish Commission (AGFC). This will enable Freeport to move its rights and carry out mining activities along the Big Sandy River, an upstream tributary of the Bill Williams River. Under the agreement, Freeport would cap its withdrawals and other specified groundwater wells at their historic maximum pumping level of 10,055 acre-feet per year. Further, the Bureau of Reclamation would lease water rights and lands owned by Freeport to support the Lower Colorado River Multi-Species Conservation Program (MSCP). Freeport would then donate the lands that Reclamation leases to the AGFC.

The second agreement, the Hualapai Tribe Bill Williams River Water Rights Settlement Agreement, would resolve water rights claims the tribe has asserted for a small Executive Order reservation, as well as related objections Interior has filed on the tribe's behalf over Freeport's proposed water transfer at issue in the Big Sandy agreement. Under the Hualapai agreement, Freeport and the United States would acknowledge the tribe's right to 694 acre-feet of water per year in the basin. Freeport would also implement certain protections for the tribe's water uses on culturally significant lands, and make a financial contribution into the tribe's Economic Development Fund. The tribe would use this money to address water needs on its main reservation along the Colorado River. The settlement does not involve any federal funding and does not resolve the tribe's outstanding water rights claims regarding its main reservation.

Subcommittee Chairman Tom McClintock (R-CA) discussed settlements generally, noting that he has repeatedly asked the Justice Department to "...determine whether the reduction in federal liability meets the federal expenditures authorized in [Indian water rights] bills. Unfortunately, we've received no response from the Department... Until the Justice Department becomes responsive and transparent, we're left focusing on Indian water rights bills that have no federal costs." He also said H.R. 4924's limited waiver provisions regarding federal liability are reasonable and necessary for the agreement to be enforceable.

Subcommittee Ranking Member Grace Napolitano (D-CA) did not attend the hearing and Rep. Paul Gosar (R-AZ), the bill's sponsor, was the only other Representative in attendance. Gosar noted that every member of Arizona's congressional delegation in the House has co-sponsored the bill. Senators Jeff Flake (R-AZ) and John McCain (R-AZ) have also introduced companion legislation (S. 2503) in the Senate.

Michael Black, Director of the Bureau of Indian Affairs, said Interior supports the goals of the bill but noted that the Administration has "significant concerns" that it would like to address. "[W]e oppose the bill's inclusion of a new, [limited] ad hoc waiver of the sovereign immunity of the United States," he said. "These agreements, like other settlements that the United States enters into, can be enforced against the United States through existing avenues, including general waivers of sovereign immunity.... Piecemeal waivers of sovereign immunity for particular matters do not aid in the uniform resolution of underlying disputes but tend to promote wasteful litigation and may lead to conflicting outcomes."

Thomas Buschatzke with the Arizona Department of Water Resources' Water (ADWR) Planning Division, said the "...State of Arizona strongly supports this legislation. The legislation authorizes a settlement that not only will provide secure water supplies for the settling parties in the Bill Williams River watershed, but also will provide benefits to other water users in the State. The

settlement will provide land and water rights to help achieve the goals of the MSCP and will pave the way for a comprehensive water rights settlement with the Hualapai Tribe.” Buschatzke also said the bill would advance the goals of a recently released strategic vision ADWR developed to meet current and anticipated water demands.

Witnesses for the Hualapai Tribe and Freeport also testified in support of the bill.⁸⁰

On November 19, the House Natural Resources Committee unanimously reported H.R. 4924. The settlement does not involve any federal funding nor does it resolve the tribe’s larger claims involving the Colorado River.⁸¹ On December 2, the Senate passed H.R. 4924.

“Senate passage of [the bill] marks yet another positive step forward in Arizona’s long history of proactive water management,” said Flake. “If signed by the president, this settlement will help to foster economic growth in northwestern Arizona, while safeguarding the Hualapai tribe’s culturally significant water uses in the Big Sandy River basin.”

The bill marks the second Indian water rights settlement Congress has authorized this session, including H.R. 3716, which approved an agreement between the Pyramid Lake Tribe in Nevada and a water company. Like the Hualapai tribe’s settlement, that agreement did not involve federal funding.⁸²

Indian Water Rights Settlements Evaluation

On October 9, the Department of the Interior wrote tribal leaders to seek input regarding an effort to re-evaluate its approach to Indian water rights settlements. Specifically, the letter says Interior is re-evaluating “...how it can best ensure the availability of resources to address the increasing need for protection of Indian water rights and strengthen the oversight, management, and analytical capabilities of the [Secretary’s] Indian Water Rights Office (SIWRO) and the Department bureaus and offices that work on Indian water rights settlement issues.”

The letter seeks tribal input on four specific areas. The first pertains to the possible creation of a “Comprehensive Indian Water Rights Settlement Fund.” The letter asks whether a “long term, stable funding source” would be useful, and whether such a source should cover administrative negotiation costs for the Department and Indian tribes. Other questions seek input on the management and optimal size of such a fund.

The second set of questions focuses on the SIWRO, which has two full-time staff to coordinate and manage around 30 federal negotiation and implementation teams working on settlements across the country. The letter asks if additional SIWRO staff is needed, what improvements are needed for the negotiation and implementation teams, and whether there should be a “stronger prioritization” or other guidelines for appointing new negotiation teams.

⁸⁰<http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=393246>.

⁸¹*Western States Water*, #2106, September 26, 2014.

⁸²*Western States Water*, #2106, September 26, 2014.

The third series of questions address possible criteria for negotiating or evaluating Indian water rights settlements, including the types of criteria or guidelines Interior should use to evaluate water infrastructure projects proposed as part of a settlement. Other questions ask whether: (1) state and local cost share guidelines are needed; (2) whether a uniform indexing mechanism is needed to adjust for changes in costs over time for “both construction and trust funds;” (3) Bureau of Reclamation tools such as design engineering and its construction advisory teams have been useful; and (4) guidelines would be useful if Interior were to require tribes to submit economic development plans as a pre-requisite to receiving Administration support for including development funds as part of a proposed settlement.

The final series of questions seek information on the roles of Interior agencies, including the optimum level of funding for the water resources programs within Reclamation and the Bureau of Indian Affairs (BIA). Other questions ask whether the U.S. Geological Survey should play a larger role in the negotiation process and whether the current ranking and allocation system for BIA water resource program funding should be changed.

Interior hosted tribal consultation sessions on October 26 in Atlanta, Georgia, and on November 13 in Lakewood, Colorado. Interior had also asked the tribes to provide written comments by November 30.

Of note, the WSWC has long supported the negotiated resolution of tribal water right claims, as well as meaningful federal contributions that recognize the United States’ trust obligations to the tribes, including adequate support for the SIWRO. The WSWC also supports using receipts accruing to the Reclamation Fund to finance congressionally-authorized settlements.

Landsat

On August 21, USGS released a White House-led assessment which found that Landsat is the nation’s third most critical Earth observing system, following GPS and weather. The report highlights examples of how Landsat data supports water management and related activities, including: (1) Bureau of Reclamation mapping and monitoring on the lower Colorado River; (2) enforcement of the Upper Colorado River Compact; (3) Colorado Water Conservation Board planning activities, which have used Landsat data for over 20 years; (4) evidence that helped resolve two Idaho water rights cases; and (5) wine industry efforts to conserve water and sustain, or improve, crop productivity during drought.⁸³

River Basins

Oregon/Klamath Basin

On April 18, Oregon Governor John Kitzhaber signed the Upper Klamath Basin Comprehensive Agreement along with tribal leaders and ranchers from the Basin. A number of other officials were present to witness the signing, including Secretary of the Interior Sally Jewell, Oregon Senators Ron Wyden (D) and Jeff Merkley (D), Undersecretary of the Department of Commerce Kathryn Sullivan, and California Natural Resources Director John Laird.

⁸³<http://pubs.usgs.gov/of/2014/1108/pdf/ofr2014-1108.pdf>. *Western States Water*, #2098, August 1, 2014.

The agreement details water management and restoration measures needed to resolve water disputes in the Basin, where the tribes issued a call last summer pursuant to recently adjudicated “time immemorial” water rights. The agreement, which the parties developed using Landsat evapotranspiration data, will help implement the larger Klamath Hydroelectric Settlement Agreement and the Klamath Basin Restoration Agreement. Those agreements involve Oregon and California and address river usage, water rights, dam removal, and other issues in the Klamath River and Klamath Basin.⁸⁴

“This agreement is the last, missing piece of the puzzle that knits together California, Oregon, lower basin tribes, upper basin tribes, and irrigators,” said Kitzhaber. “It reflects a spirit of sharing in times of shortage and pulling together to rebuild the vitality of this river and all who depend upon it.”

Jewell said: “With the three...agreements in place, we have the tools needed to restore the basin, advance the recovery of its fisheries, uphold trust responsibilities to the Tribes, and sustain our ranching heritage from the headwaters of the Klamath to the ocean.”

Senators Wyden and Merkley said they will work to pass legislation to authorize the agreement.⁸⁵

Lake Powell/Lake Mead

On August 13, the Bureau of Reclamation published a study that found that releases from Lake Powell to Lake Mead for the 2015 water year will be 8.23 million acre-feet, a 10% increase from 2014’s 7.48 million acre-feet release, which was the lowest since Lake Powell filled in the 1960s. The study also finds that Lake Mead will operate under normal conditions in 2015, with water users in the Lower Colorado River Basin and Mexico receiving their full water orders. The study projected that the elevation in Lake Mead will continue to decrease in 2015, notwithstanding the greater release from Lake Powell.

According to the study, April through July runoff in 2014 in the Upper Basin was 97% of average, compared to 47% in 2013 and 45% in 2012. However, despite near average runoff this year, Lake Mead’s current elevation of 1,080 feet is the lowest since the reservoir filled in the 1930s, due to a 15-year drought that began in 2000 and continued Lower Basin demands.

The study’s projections will be used in accordance with the 2007 Colorado River Interim Guidelines. The Guidelines allow water managers to plan ahead for varying Colorado River reservoir levels but also set forth specific levels that trigger cuts to water deliveries to the Lower Colorado River Basin. The study reports that longer-term projections from Reclamation’s hydrologic models show the first chance for reduced water deliveries will be in 2016.⁸⁶

⁸⁴*Western States Water*, #1967, January 27, 2012.

⁸⁵http://www.oregon.gov/gov/media_room/Pages/press_releases/press_041814.aspx. *Western States Water*, #2077, March 7, 2014.

⁸⁶<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=47753>.

Republican River Compact

On October 22, Colorado, Kansas, and Nebraska approved two agreements related to the Republican River Compact. The first provides Nebraska with full credit for its 2014 augmentation efforts, which pumped about 63,500 acre-feet of water into the river system. This benefits both Nebraska and Kansas water users, because much of this augmentation water would have been released from a reservoir near the Kansas-Nebraska border in late 2014 for compact compliance purposes, making this water unavailable to Kansas irrigators next year. Now, this water will be available to Kansas during the 2015 irrigation season, and Nebraska will obtain a larger benefit from its augmentation projects than the 37,000 acre-feet provided under the default compact accounting procedures.

The second agreement approves the operation of the Colorado Compact Compliance Pipeline (CCP) for another year. The CCP is intended to help Colorado comply with the compact by offsetting stream depletions with groundwater delivered to the river's north fork. The states first agreed to operate the CCP last year to provide insight into its operations. Under the new deal, Colorado will receive credit for the pumping in 2015 in exchange for identifying options to increase streamflow on the south fork at the state line, and to investigate modeling and accounting procedures needed when Bonny Reservoir is empty and to resolve Kansas concerns that the CCP could allow Colorado to achieve statewide compliance by delivering water to the north fork, but could deprive Kansas waters users on the south fork.⁸⁷

The agreements follow oral arguments the U.S. Supreme Court held on October 14, regarding Kansas' allegations that Nebraska exceeded its compact allotment in 2005 and 2006. Nebraska has acknowledged it exceeded its allotment, and the Court's special master has recommended that it pay Kansas \$5.5 million, the value of the water, as well as a \$1.8 million penalty. The special master also recommended updates to the compact's accounting procedures. All three states have objected to various aspects of the recommendations. The Court will likely rule by the end of June.⁸⁸

States

California

California Emergency Drought Relief Act

On February 11, Senator Dianne Feinstein (D-CA) introduced the California Emergency Drought Relief Act of 2014 (S. 2016) to address drought in California and Oregon, and to assist other western states facing drought. Co-sponsors include Senators Barbara Boxer (D-CA), Ron Wyden (D-OR), and Jeff Merkley (D-OR).

The bill would reauthorize the Reclamation States Emergency Drought Relief Act through 2017, increasing funding from \$90 million to \$190 million. It would also raise the authorization ceiling for the SECURE Water Act's WaterSMART grants program from \$200 million to \$250 million. In addition, it would prioritize funding from the WaterSMART grant program and EPA's

⁸⁷<https://agriculture.ks.gov/divisions-programs/dwr/interstate-rivers-and-compacts/republican-river-compact>.

⁸⁸*Western States Water*, #2070, January 17, 2014, and #1925, April 8, 2011.

Drinking Water and Clean Water State Revolving Funds for projects that boost drinking and municipal water supplies.

Provisions specific to California and Oregon would, among other things: (1) authorize federal actions to maximize water supplies in California's Bay-Delta; (2) fund federal efforts to develop other water sources for wildlife refuges in California to save Central Valley Project water for crops and drinking water; and (3) authorize water planning and management activities to reduce water use in the Klamath Basin in California and Oregon. The bill also specifies that it would not preempt state water law.

In related news, Senator Brian Schatz (D-HI) introduced the SECURE Water Amendments Act of 2014 (S. 2019) on February 12. Like S. 2016, the bill would amend the SECURE Water Act to raise the authorization ceiling for the WaterSMART grants program, authorizing "such sums as are necessary" through 2023. It would also clarify that activities to plan for and reduce drought impacts are eligible for the grants and make projects in Hawaii eligible. Additional provisions would reauthorize the National Water Availability and Use Assessment (NWAUA) through 2023, providing "such sums as are necessary," compared to the previously authorized amount of \$12.5 million. Wyden also co-sponsored this bill, along with Senators Mark Udall (D-CO), Mazie Hirono (D-HI), Tom Udall (D-NM), and Martin Heinrich (D-NM).

The WSWC supports implementation of the SECURE Water Act and has expressed concern that its programs are unfunded or underfunded, including the WaterSMART grants program. The WSWC also supports reauthorization of the Reclamation Emergency Drought Relief Act.⁸⁹

NOAA/Drought

On December 8, the National Oceanic and Atmospheric Administration (NOAA) announced the results of a study it sponsored on the causes of California's ongoing drought. The study found that natural oceanic and atmospheric patterns are the primary drivers behind the state's ongoing drought. Specifically, a high pressure ridge off the West Coast prevailed for three winters, blocking wet season storms. NOAA believes further studies on these oceanic conditions and their impact on California's climate may lead to advances in providing early warnings for drought that can help water managers better prepare for future lengthy dry spells.

"California's drought, while extreme, is not an uncommon occurrence for the state," said Richard Seager, the report's lead author and a professor with Columbia University's Lamont Doherty Earth Observatory. "In fact, multi-year droughts appear regularly in the state's climate record, and it's a safe bet that a similar event will happen again. Thus, preparedness is key."⁹⁰

In related news, the U.S. Geological Survey (USGS) developed an interactive website to provide a visualization of California's drought. Developed as part of the federal government's Open Water Data Initiative, the website features graphics that illustrate the drought's impact on regional

⁸⁹*Western States Water*, #2072, January 31, 2014 and #2055, October 7, 2013.

⁹⁰http://www.noaanews.noaa.gov/stories2014/20141208_californiadrought.html.

reservoir storage from 2011-2014. The website also illustrates the connection between snowpack and reservoir levels, as well as current streamflow levels relative to historic averages.⁹¹

Wyoming

Compliance Order

On March 12, Senate Environment and Public Works Committee Ranking Member David Vitter (R-LA) along with Senators John Barrasso (R-WY) and Mike Enzi (R-WY) wrote the Environmental Protection Agency (EPA), asking it to withdraw a January compliance order EPA Region 8 issued to Wyoming landowner Andrew Johnson. The order, which has received national attention, found that Johnson violated the Clean Water Act (CWA) by building a dam on his property, the construction of which inundated and discharged dredged and fill material to a nearby creek, without obtaining a Section 404 permit from the U.S. Army Corps of Engineers. Johnson maintains that he built a stock pond, the construction of which is exempt from CWA permitting under Section 404(f)(1)(C). Johnson's construction activities also complied with a water right permit he obtained from the Wyoming State Engineer's Office. Under the EPA order, Johnson could face fines of up to \$75,000 per day if he does not restore the creek to its pre-impact condition and grade.

The order found that the creek in question is subject to CWA jurisdiction because it is a perennial tributary of the Blacks Fork River, which is a tributary of the Green River... "[which] is, and was at all relevant times a navigable, interstate water of the United States." The order also noted that Johnson failed to respond to a September 2012 request from the Corps for information about his construction activities, and that the Corps wrote him again in October 2012, stating that his activities required a 404 permit and ordering him to "...cease and desist any further earth-moving activities."

The Senators' letter states "...the [Order] reads like a draconian edict of a heavy-handed bureaucracy. [It] also appears to rest on a broad assertion of federal jurisdiction under the [CWA], offering an ominous signal of EPA's intentions for its current 'waters of the United States' rulemaking.... EPA appears more interested in intimidating and bankrupting Mr. Johnson than it does in working cooperatively with him."

"[I]t is our understanding that Mr. Johnson maintains that he in fact built a stock pond. As EPA is aware, the discharge of dredged and fill material for the purpose of constructing a farm or stock pond is generally exempt from [CWA] permitting requirements, and this may explain Mr. Johnson's apparent non-response to initial Corps' inquiries. More to the point, fairness and due process require that EPA base its...Order on more than an assumption. Instead of treating Mr. Johnson as guilty until he proves his innocence by demonstrating his entitlement to the...section 404(f)(1)(C) stock pond exemption, EPA should make its case that a dam was built and that the...exemption does not apply. As it stands now, EPA's failure to demonstrate in detail how Mr. Johnson's building activities constituted the construction of a dam prejudices his opportunity to meaningfully respond to the...Order."

⁹¹http://www.usgs.gov/newsroom/article.asp?ID=4069#.VJL3P_-ZBA.

“[T]o the extent EPA is predicating federal jurisdiction on [the creek’s] connection to the Green River, the significance of this connection is unclear; we suspect the connection may be tenuous given the...Order’s inference that the [creek] flows directly into the Blacks Fork River, and not the Green River.... EPA has an obligation to more fully support its claim that [the creek] is a jurisdictional water. If instead the...Order stands as an example of how EPA intends to operate after completing its current ‘waters of the United States’ rulemaking, it should give pause to each and every landowner throughout the country.”⁹²

Texas

The Aransas Project v. Shaw

On June 30, a three-judge panel for the 5th Circuit Court of Appeals issued a unanimous decision in *The Aransas Project v. Shaw*, overturning a federal district court decision that had found the Texas Commission on Environmental Quality (TCEQ) liable for causing the unlawful “take” of 23 endangered whooping cranes in violation of the Endangered Species Act (ESA). The lower court reached this decision by finding that Texas’ surface water permit system did not ensure sufficient in-stream flows into two river systems, which the court found led to a reduction in freshwater inflows during a severe drought to estuaries where the birds make their winter home. As a result, the lower court issued an injunction prohibiting TCEQ from issuing new permits to withdraw water from rivers that feed the estuary. The injunction further required TCEQ to seek an incidental-take permit from the U.S. Fish and Wildlife Service.⁹³

The 5th Circuit disagreed, reasoning that the district court has misapplied proximate cause, the legal process courts use to determine whether to impose liability, finding that the district court’s opinion “...misapplies [the] proximate cause analysis and further, even if proximate cause had been proven, the injunction is an abuse of discretion.” In reaching this conclusion, the 5th Circuit found that the lower court “...either misunderstood the relevant liability test or misapplied proximate cause when it held the state defendants responsible for remote, attenuated, and fortuitous events following their issuances of water permits.... Nowhere does the court explain why the remote connection between water licensing, decisions to draw river water by hundreds of users, whooping crane habitat, and crane deaths that occurred during a year of extraordinary drought compels ESA liability. As an articulation of the potential ESA liability of state or local regulators, the court’s ambiguous conclusions cannot be sustained.”

The 5th Circuit further reasoned, among other things, that the district court’s “...failure to engage in proximate cause analysis becomes manifest in its [fact findings]. [T]here is a long chain of causation here between the TCEQ’s issuance of permits to take water from the rivers and cranes’ mortality.... Every link of this chain depends on modeling and estimation. At best, the court found but-for-causation. Proximate cause, however, requires the causal factors and the result to be reasonably foreseeable.... The lack of foreseeability or direct connection between TCEQ permitting and [the] crane deaths is also highlighted by the number of contingencies affecting the chain of causation from licensing to crane deaths. The contingencies are all outside the state’s control and often outside human control.”

⁹²<http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases>.

⁹³*Western States Water*, #2030, April 12, 2013.

The 5th Circuit also held that the district court erred in issuing the injunction, finding: “To sustain the court’s barren findings, [the plaintiff] contends that the cranes continue to be an endangered species and TCEQ continues to issue some water use permits. These observations are insufficient to show likely, imminent future harm by a preponderance of the evidence. Although the cranes have been endangered for many decades, it is also clear that TCEQ has been issuing permits continuously up until 2010, yet [the plaintiff] neither alleged nor proved ‘takes’ in any year before or after 2008-2009. Injunctive relief for the indefinite future cannot be predicated on the unique events of one year without proof of their likely, imminent replication.”⁹⁴

Water Supply Outlook

The Natural Resources Conservation Service’s (NRCS) Weekly Snowpack and Drought Monitor Update for February 6 showed that drought and abnormally dry conditions existed in every western state. Exceptional and extreme drought covered much of California, which is experiencing its worst drought in modern history. Similar conditions also covered southern Idaho and northwest Nevada, as well as parts of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, Oregon, and Texas. Moderate and/or severe drought also existed in parts of these states as well as in Arizona, Colorado, Montana, Oregon, Utah, Washington, and Wyoming. With respect to snowpack, year-to-date snow water equivalent levels for most basins in Arizona, Nevada, New Mexico, Oregon, and Washington were below 69% of normal, with many basins reporting levels under 30%. The majority of basins in Idaho and Utah were in the 50% to 89% range, while most basins in Colorado, Montana, and Wyoming report levels above 100%.⁹⁵

A June 26 report showed that drought and abnormally dry conditions existed in every western state, except North Dakota. Extreme to exceptional drought conditions covered much of California and Nevada as well as part of Colorado, Oklahoma, and Texas. Parts of Arizona, Idaho, Kansas, Oregon, and New Mexico suffered from extreme drought conditions. Moderate to severe drought covered the remaining portions of California and Nevada and parts of most other western states, except for Montana, South Dakota, and Wyoming, which have a few pockets of abnormally dry conditions.

Looking ahead, the update predicts that drought will likely persist across much of the West and the southern Great Plains, although improvements were expected in the Southwest and Central Great Plains.

With respect to precipitation, year-to-date levels were above 90% of normal in most of Colorado, Montana, Washington, and Wyoming, as well as northern Idaho and northern Oregon. Basins in other parts of the West were generally below 89% of normal. The largest deficits can be found in Arizona, New Mexico, southern Oregon, the Sierra Nevada Mountains in California and Nevada, and southern and eastern Utah. Arizona and New Mexico were particularly dry with a total of six basins below 50%, the lowest levels in the West.⁹⁶

⁹⁴<http://www.gbra.org/documents/news/2014/063003a.pdf>.

⁹⁵<http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20140206.pdf>. *Western States Water*, #2065, December 13, 2013.

⁹⁶<http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20140626.pdf>.

The August 14 report showed that drought and abnormally dry conditions persisted in many parts of the West. Exceptional and extreme drought conditions covered much of California and western Nevada, as well as parts of Texas and Oklahoma, with pockets of extreme drought scattered across the West. Moderate to severe drought conditions covered large portions of Arizona, Colorado, Kansas, Idaho, New Mexico, Oregon, Utah, and Washington. Other than Alaska, abnormally dry to moderate drought conditions could be found in parts of the remaining western states. Drought conditions persisted throughout all of California and in large parts of Idaho, Oregon, Nevada, Texas, and Washington, with drought developing in parts of western Idaho, northern Oregon, western Washington, and southern Texas.

Conditions were expected to improve in much of Arizona, Colorado, Kansas, Nebraska, New Mexico, Oklahoma, and Utah. Month-to-date precipitation was well over 150% of normal for much of the West, with some basins in Idaho, Oregon, and Nevada reporting levels over 1,000% of normal. As for year-to-date precipitation levels, surpluses existed in northern Colorado, southern Montana, and most of Wyoming, while near average conditions were found in the northern Cascades, northern Idaho, northwest Montana, the Bear River Basin in Utah and Idaho, and southern Colorado. The largest deficits were in Arizona, New Mexico, southern Oregon, the Sierra Nevada mountains in California and Nevada, and southern and eastern Utah.⁹⁷

Wildfire

On August 15, the Western Governors' Association (WGA) wrote Congressional and Administration leaders to reiterate its long-standing support for federal wildfire suppression funding and the need to end "fire borrowing" practices, in which discretionary funding is carved out of accounts for the Department of the Interior and the U.S. Forest Service (USFS) to pay for unanticipated emergency firefighting efforts. Governors Brian Sandoval (R-NV) and John Kitzhaber (D-OR), the Chair and Vice-Chair of the WGA, signed the letter.

Noting large increases in wildfire size and the length of the fire season, the letter states: "If the fires continue at their current intensity and frequency, USFS and [Interior] will once again need to borrow funds from non-suppression accounts. That funding will come from accounts that support proactive management work to reduce wildfire risk and improve forest health... This does not represent responsible forest management... We strongly urge Congress and the Administration to resolve this burgeoning problem for the West without further delay." The letter also says the governors are encouraged by ideas being considered by Congress and the Administration to "...improve policy related to wildfire suppression funding, in particular by ending fire borrowing and protecting as well as advancing program funds that proactively improve forest health and fire resilience...."⁹⁸

In related news, Secretary of Agriculture Tom Vilsack released a report on August 20 that found that the average number of fires on federal lands has more than doubled since 1980 and that the total area burned each year has tripled. The USFS's firefighting appropriation has also grown from 16% of the agency's budget in 1995 to 42% of its budget today, forcing cuts in other areas. Further, USFS fire suppression costs have exceeded allocated amounts in all but four years since

⁹⁷<http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20140814.pdf>. *Western States Water*, #2094, July 3, 2014.

⁹⁸<http://westgov.org/letters-testimony>.

2000, requiring “fire borrowing” to cover the shortfall. To address this issue, Vilsack supports using an existing fund to cover excess costs in years when expenses exceed the budget Congress has provided, without borrowing from other USFS programs.⁹⁹

⁹⁹http://www.usda.gov/wps/portal/usda/usdahome?navid=LATEST_RELEASES. *Western States Water*, #2089, May 30, 2014.

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 2014, the Council adopted the following positions (including the revision and re-adoption of sunset positions):

Position No. 360 supports the development of a process to provide information on Reclamation's maintenance, repair, and replacement needs, and to ensure that such information is "readily accessible and easy to understand."

Position No. 361 supports reauthorization of "such sums as may be necessary" for the Bureau of Reclamation to carry out the Reclamation Safety of Dams Act of 1978.

Position No. 362 requests "careful evaluation" of efforts to transfer title of federal water and power assets to non-federal ownership, and to establish a process for title transfer proposals with "strong state involvement and protections for state water laws and water rights."

Position No. 363 supports the development of a national program of safety standards for levees and flood water conveyance canals, but specifies that such a program should not apply to water supply canals.

Position No. 364 seeks stable and continuing federal appropriations for the Clean Water and Drinking Water State Revolving Funds (SRF). It urges more flexibility and less restrictions on state SRF management and includes revised language stating that new water and wastewater financing efforts should not come at the expense of the SRFs.

Position No. 365 opposes preemption of state water law in federal legislation.

Position No. 366 supports federal research and development of hydroclimate guidance for extreme meteorological events.

Position No. 367 urges Congress to use the Reclamation Fund to finance water infrastructure projects in the West.

Position No. 368 urges Congress to maintain the authorization and funding for the Water Resources Research Institutes.

Position No. 369 on CWA jurisdiction, was readopted after several revisions. The new position: (1) asserts that states are co-regulators with EPA and the Corps in administering the CWA, and are separate and apart from the general public and therefore deserve a unique audience with the federal government in the development and implementation of any federal effort to clarify or redefine CWA jurisdiction; (2) states that "information sharing does not equate to meaningful consultation" and urges the federal government to develop and implement federal CWA jurisdiction

efforts in “authentic partnership” with the states; and (3) identifies a number of actions the federal government should take when carrying out any effort to clarify or define CWA jurisdiction.

Position No. 370 approved a comment letter for an interpretive rule the Environmental Protection Agency and the U.S. Army Corps of Engineers had adopted regarding agricultural exemptions under the Clean Water Act. Position No. 371 concerns state consultation in the development of federal policies.

The position and letter were not noticed prior to the meetings and were sent to the Western Governors’ Association for a ten-day review pursuant the WSWC’s rules of organization. They became final with no objections raised during the WGA’s review.

Position No. 372 included comments on the proposed U.S. Forest Service’s (USFS) Proposed Directive on Groundwater Resource Management, published in the *Federal Register* for public comment on May 6 (FSM 2560).

Position No. 373 approved comments on the Environmental Protection Agency’s and the U.S. Army Corps of Engineers’ proposed Clean Water Act rule. The comments are based on the WSWC’s position on CWA jurisdiction and on its prior letters and testimony regarding the rulemaking. They state that the rule should provide a deadline by which the agencies must make jurisdictional determinations for so-called “other waters.” They also say the rule should use a “specific, quantifiable measure or measures” to determine “significance” when interpreting the significant nexus test Justice Kennedy set forth in the U.S. Supreme Court’s *Rapanos* decision. Additionally, the comments asked the agencies to create a state-federal workgroup to further develop these recommendations and to refine other aspects of the rule. While the comments express appreciation for the agencies’ decision to extend the public comment period from October 20 to November 14, they note that the Western Governors’ Association asked for a longer, 89-day extension.

Position No. 374 is in support of the Dividing the Waters Program within the National Judicial College, which educates judges overseeing complex water litigation. The program’s funding will expire in 2016 and the position “...urges public interest foundations and other interested entities to provide funding for the program.”

Position No. 375 outlines actions federal agencies should take to improve general stream adjudications. The WSWC added language to the general stream adjudication position that asks federal agencies to: (1) place a “higher priority” on educating their leaders and staff regarding western water rights and state water law; and (2) consult with states to consider ways to address federal needs under state law before asserting water rights claims.

Position No. 376 reiterates the Council’s support for the policy of encouraging negotiated settlements of disputed Indian water rights claims as the best solution to a critical problem that affects almost all of the Western States.

Position No. 377 asserting state primacy over groundwater protection stating that, “any federal ground water quality strategy must recognize and respect state primacy, reflect a true state-federal partnership, and provide adequate funding consistent with current federal statutory authorities.”

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding the
BUREAU OF RECLAMATION'S
MAINTENANCE, REPAIR AND REHABILITATION NEEDS
Arlington, Virginia
April 3, 2014

WHEREAS, the Bureau of Reclamation operates hundreds of dams, reservoirs, and related infrastructure in the West, supplying water and power to millions of people, irrigating millions of acres for food and fiber, providing flood control and recreation, and supporting wildlife and habitat; and

WHEREAS, the importance of maintaining these projects cannot be overstated; and

WHEREAS, many of Reclamation's facilities are nearing, or have already exceeded, their design lives and are in need of maintenance, repair, and/or rehabilitation (MR&R), threatening public safety as well as private and public property; and

WHEREAS, Reclamation's funding has not kept pace with its MR&R needs; and

WHEREAS, Reclamation estimates that the backlog of projects needed to address its MR&R needs is \$2.6 billion; and

WHEREAS, Congress and the Administration must have access to consistent and accurate information on Reclamation's MR&R needs to address these needs through investments that are based on long-term capital budgeting efficiencies rather than annual incremental choices; and

WHEREAS, state water managers require this information to carry out their water planning and other water administration activities; and

WHEREAS, in recent years, Reclamation has made progress in developing and improving estimates of MR&R needs for infrastructure under its jurisdiction; and

WHEREAS, notwithstanding these improvements, much of the currently available information regarding Reclamation's MR&R needs is inconsistent and difficult to obtain, including the basis for Reclamation's MR&R backlog estimates; and

WHEREAS, a process is needed to evaluate Reclamation MR&R needs pursuant to standard asset management criteria that evaluate risks to: (1) human health and safety; (2) economic growth; and (3) the environment.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council urges Congress and the Administration to work together to develop a standardized process to provide the most up-to-date, consistent, and accurate information regarding Reclamation's MR&R needs, including the estimated costs of those needs and the relative priority or importance of addressing those needs; and

BE IT FURTHER RESOLVED that Reclamation should ensure that appropriate information on its MR&R needs is readily accessible and easy to understand by Congress, state policy makers, and the public.

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding the
RECLAMATION SAFETY OF DAMS ACT OF 1978
Arlington, Virginia
April 3, 2014**

WHEREAS, the Bureau of Reclamation's dams and reservoirs are the primary source of water for numerous regions and communities throughout the West; and

WHEREAS, Reclamation's dams and reservoirs provide essential benefits such as drinking water, irrigation, hydropower, flood control, and recreation, while also supporting wildlife and habitat; and

WHEREAS, the safe operation and maintenance of Reclamation's dams is critical to sustaining these benefits and preventing dam failure, which threatens lives as well as private and public property; and

WHEREAS, many of Reclamation's dams are nearing, or have already exceeded, their design lives and are in need of rehabilitation or modernization; and

WHEREAS, maintaining and rehabilitating dams and related infrastructure is one of the most serious problems that Reclamation currently faces; and

WHEREAS, the Reclamation Safety of Dams Act of 1978 provides Reclamation with authority to preserve and maintain the structural safety of dams under its stewardship; and

WHEREAS, current authorizations for the Act will soon be exhausted; and

WHEREAS, failure to authorize such sums as are necessary for Reclamation's dam safety activities under the Act will increase the chances of dam failures by hindering the agency's ability to carry out critical dam safety rehabilitation and modernization efforts.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council urges the Administration and Congress to work together and determine such sums as may be necessary for Reclamation to carry out the purposes of the Reclamation Safety of Dams Act of 1978.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
THE TRANSFER OF FEDERAL WATER AND POWER PROJECTS
AND RELATED FACILITIES
Arlington, Virginia
April 3, 2014

WHEREAS, past and present proposals have been made to transfer ownership of various federal agencies' water and power projects and related facilities to non-federal entities; and

WHEREAS, such transfers may offer important benefits, but many are necessarily very complex and involve many different interests, including important public and third-party interests protected under various state and federal laws; and

WHEREAS, many of these projects serve multiple purposes and were built (and their capital costs are being repaid) under longstanding agreements with water, power, and other users; and

WHEREAS, some single-purpose projects might be appropriately transferred under an expedited review process to their non-federal sponsors/operators by mutual agreement; and

WHEREAS, the many potential public benefits and costs related to transfers involve state and local governments and other interests, in addition to the federal government; and

WHEREAS, present and potential benefits may be lost unless there is a careful analysis of the transfer of individual projects; and

WHEREAS, federal project transfers require a careful project-by-project analysis of expected costs and benefits; and

WHEREAS, states have the primary responsibility for the comprehensive development, administration, and protection of their water resources for all purposes.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council supports the careful evaluation of the transfer of federal water and power assets and urges the Administration and Congress to work together to establish a process and develop appropriate criteria and guidelines for a project-by-project review of transfer proposals, with strong state involvement and protections for state water laws and water rights.

For reference, see also Position No. 209 readopted November 20, 1998, which was allowed to sunset at the meetings held in Oklahoma City, OK on November 16, 2001. (Originally adopted Nov. 17, 1995)

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

**Arlington, Virginia
April 3, 2014**

WHEREAS, Congress enacted the National Levee Safety Act of 2007 (the Act) in the aftermath of Hurricane Katrina and the failure of the levees and flood water conveyance canals in New Orleans, Louisiana;¹⁰⁰ and

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

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

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

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

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

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

WHEREAS, Reclamation already has authority under the Aging Water Infrastructure and Maintenance Act, which Congress enacted as part of the Omnibus Public Lands Management Act of 2009,¹⁰¹ to address the canals it owns, and inspections of those embankment sections of canals located in urban areas; and

¹⁰⁰121 Stat. 1288, P.L. 110-114.

¹⁰¹123 Stat. 991, P.L. 111-11.

WHEREAS, the Water Resources Development Act currently in conference would create a National Levee Safety Program to encourage establishment of State and Tribal levee safety programs, recognizing States and Tribes are uniquely positioned to regulate local and regional levee systems; and

WHEREAS, the purpose of the program is to promote sound technical practices in levee design, construction, operation, maintenance, inspection, assessment, and security; and

WHEREAS, the program definitions for “canal structures” should specifically exclude water supply canals, which are fundamentally different from flood risk reduction systems that may include floodways and canals providing protection by moving floodwaters associated with precipitation accompanying hurricanes and other similar extreme weather-related events; and

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

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

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

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

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

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

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

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

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

BE IT FURTHER RESOLVED, that the Western States Water Council encourages the Administration and Congress to work together and determine the level of adequate funding for the Aging Water Infrastructure and Maintenance Act; and

BE IT FURTHER RESOLVED, that the Administration and Congress should work together to encourage implementation of Title II of the Rural Water Supply Act of 2006,¹⁰² and provide for the use of federal loan guarantees for addressing extraordinary maintenance needs related to the operation of federal Reclamation projects.

¹⁰²120 Stat. 3345, P.L. 109-451.

See also Position No. 329 adopted April 15, 2011 in Santa Fe, New Mexico.

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

**Arlington, Virginia
April 3, 2014**

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

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

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

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

WHEREAS, the Environmental Protection Agency's (EPA) most recent estimates show a total capital investment need of \$298 billion for wastewater and stormwater infrastructure and \$334.8 billion for drinking water infrastructure nationwide over the next 20 years; and

WHEREAS, the EPA has identified a significant funding gap of nearly \$55 billion under current spending and operation practices; and

WHEREAS, the American Society of Civil Engineers has reported that failure to address this funding gap could lead to \$206 billion in increased costs for businesses and households by 2020, as well as a potential loss of up to 700,000 jobs; and

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

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

WHEREAS, EPA’s Clean Water and Drinking Water Infrastructure Sustainability Policy mandates that state SRF programs promote sustainable systems; and

WHEREAS, the SRF Programs already have measures in place to ensure system sustainability and account for individual state needs and priorities; and

WHEREAS, the SRF programs are one of the most successful delivery mechanisms for federal assistance; and

WHEREAS, new competing water and wastewater infrastructure funding programs should not come at the expense of the SRFs, which are a proven model for addressing water and wastewater infrastructure needs; and

WHEREAS, Congress has approved a number of additional restrictions on the states’ management and use of SRF funds, including but not limited to: (1) mandating the use of between 20% and 30% of appropriated funds for principal forgiveness, negative interest loans, grants, or a combination thereof; (2) setting aside 10% of funds for green infrastructure, water or energy efficiency, or other environmentally innovative activities; and (3) “Buy American” provisions that limit the use of SRF funds to purchase certain types of materials and services; and

WHEREAS, although often well-intended, these types of restrictions are generally aimed at advancing policy objectives that are unrelated or contrary to the SRFs’ primary purpose of providing funding for basic water infrastructure; and

WHEREAS, these types of restrictions reduce flexibility, increase administrative burdens and capital costs, and hinder the states’ ability to manage the SRFs in the most cost effective manner; and

WHEREAS, additional restrictions on state SRF management represent unfunded federal mandates that impose significant regulatory burdens and make state SRF programs less attractive to local entities; and

WHEREAS, every federal dollar directed away from addressing the primary goal of the SRF programs reduces the capacity of a state to leverage their SRF programs and address infrastructure needs.

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

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

See also Position No. 330 adopted April 15, 2011 in Santa Fe, New Mexico.

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
REGARDING PREEMPTION OF STATE LAW IN FEDERAL LEGISLATION
Helena, Montana
July 18, 2014**

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

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

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

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

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

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

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

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

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

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

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

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

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

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
supporting
FEDERAL RESEARCH AND DEVELOPMENT OF UPDATED HYDROCLIMATE
GUIDANCE FOR FLOODS & DROUGHTS
Helena, Montana
July 18, 2014

WHEREAS, Western states continue to experience extreme flooding, droughts, or wildfires that threaten public safety, tax aging water infrastructure, and/or have significant economic consequences; and

WHEREAS, according to the National Oceanic and Atmospheric Administration (NOAA), the nation's top ten multi-billion dollar disasters have occurred since 1980, with six of those in the last decade; and

WHEREAS, we must be prepared to effectively manage for frequent, extensive, and severe storms, floods, coastal inundation, and droughts; and

WHEREAS Western states experienced extreme drought in 2011-2014, as well as recent floods of record in areas such as parts of the Missouri River Basin in 2011 and Colorado in 2013, and further Winter Storm Atlas in 2013; and

WHEREAS, key long-term observation networks needed for monitoring extreme events, such as USGS streamgages and the NWS Cooperative Observer network, face continued funding and programmatic challenges that threaten the continuity of crucial long-term data records; and

WHEREAS, snow water content and soil moisture monitoring are also critical for drought and flood forecasting and management, but the NRCS snow survey and water supply forecasting program, related SNOTEL sites, and its Soil Climate Analysis Network remain underfunded; and

WHEREAS, some of NOAA's probable maximum precipitation estimates used by water agencies for dam safety and other analyses have not been updated since the 1960s and the federal Guidelines for Determining Flood Flow Frequency Analysis (published as Bulletin 17B) have not been revised since 1981; and

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

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

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

WHEREAS, the present scientific capability for forecasting beyond the weather time domain - beyond the ten day time horizon - and at the subseasonal to interannual timescales important for water management is not skillful enough to support water management decision-making; and

WHEREAS, the Council has co-sponsored a number of workshops on hydroclimate data and extreme events, to identify actions that can be taken at planning to operational time scales to improve readiness for extreme events; and

WHEREAS, multiple approaches have been identified at these workshops that could be employed at the planning time scale, including ensembles of global circulation models, paleoclimate analyses, and improved statistical modeling, that could be used to improve flood frequency analysis or seasonal forecasting; and

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

WHEREAS, WGA and NOAA signed a Memorandum of Agreement in June 2014 on improving resilience to droughts and floods;

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

BE IT FURTHER RESOLVED, that the federal government should place a priority on improving subseasonal and seasonal precipitation forecasting capability that would support water management decisions.

BE IT FURTHER RESOLVED, that the Western States Water Council supports development of an improved observing system for Western extreme precipitation events such as atmospheric river storms, as well as baseline and enhanced stream, snow and soil moisture monitoring capabilities.

BE IT FURTHER RESOLVED, that the federal government should sustain and expand its Hydrometeorology Testbed - West program, in partnership with states and regional centers, to build upon the initial progress made in that program for developing and installing new technologies for precipitation observations.

Position No. 366
Revised and Readopted
(formerly Position No. 332 - July 29, 2011)

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

BE IT FURTHER RESOLVED, that the Western States Water Council will work with NOAA and WGA in supporting efforts on climate extremes, variability, and future trends.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding the
THE RECLAMATION FUND
Helena, Montana
July 18, 2014

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

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

WHEREAS, then President Theodore Roosevelt stated, “The work of the Reclamation Service in developing the larger opportunities of the western half of our country for irrigation is more important than almost any other movement. The constant purpose of the Government in connection with the Reclamation Service has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent homemakers, to use and develop it for themselves and for their children and children’s children...;”¹⁰³ and

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

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

WHEREAS, the Bureau of Reclamation has built facilities that include 348 reservoirs with the capacity to store 245 million acre-feet of water, irrigating approximately 10 million acres of farmland that produce 60 percent of the nation’s vegetables and 25 percent of its fruits and nuts, as well as providing water to about 31 million people for municipal and industrial uses, while generating more than 40 billion kilowatt hours of energy each year from 53 hydroelectric power plants, enough to serve 3.5 million households, while providing 289 recreation areas with over 90 million visits annually, and further providing flood control, and fish and wildlife benefits; and

¹⁰³State of the Union Address, 1907.

WHEREAS, project sponsors have and continue to repay the cost of these facilities, which also produce power receipts that annually return nearly one billion in gross power revenues to the federal government, prevent millions in damages due to floods each year, and generate billions of dollars in economic returns from agricultural production; and

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

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

WHEREAS, according to the Administration's FY 2015 request actual and estimated receipts and collections accruing to the Reclamation Fund are \$2.046 billion for FY 2013, \$2.002 billion for FY 2014, and \$2.037 billion for FY2015, compared to actual and estimated appropriations of \$858 million for FY 2013, \$913 million for FY 2014, and \$819 million for FY 2015 and as a result the unobligated balance at the end of each year respectively is calculated to be \$12.029 billion, \$13.118 billion and \$14.336 billion respectively; and

WHEREAS, this unobligated balance in the Reclamation Fund continues to grow at an increasing rate from an actual balance of \$5.67 billion at the end of FY 2006, to the estimated \$14.336 billion by the end of FY 2015, over a 150% increase; and

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

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

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council asks the Administration and the Congress to fully appropriate the receipts and collections accruing to the Reclamation Fund subsequent to the Reclamation Act and other acts for their intended purpose in the continuing conservation, development and wise use of western resources to meet western water-

Position No. 367
Revised and Readopted
(formerly Position No. 333 - 7/29/2011;
See also Position No. 304 - 7/11/2008)

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.

BE IT FURTHER RESOLVED, that such “needs” may include the construction of Reclamation facilities incorporated as part of a Congressionally approved Indian water right settlement.

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

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of the
WATER RESOURCES RESEARCH INSTITUTES
Helena, Montana
July 18, 2014

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

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

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

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

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

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

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

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

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

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

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
CLEAN WATER ACT JURISDICTION
Helena, Montana
July 18, 2014**

WHEREAS, the Clean Water Act (CWA) is built upon the principle of cooperative federalism in which Congress intended the states, the Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers to implement the CWA as partners, delegating co-regulator authority to the states;

WHEREAS, the CWA's cooperative federalism framework has resulted in significant water quality improvements since the law's enactment in 1972, and western states have made great strides in protecting water quality and coordinating water quality and water quantity decisions; and

WHEREAS, states are best positioned to manage the water within their borders because of their on-the-ground knowledge of the unique aspects of their hydrology, geology, and legal frameworks; and

WHEREAS, states have authority pursuant to their "waters of the state" jurisdiction to protect the quality of waters within their borders and such jurisdiction generally extends beyond the limits of federal jurisdiction under the CWA; and

WHEREAS, Section 101(b) supports the states' critical role in protecting water quality by stating: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution;" and

WHEREAS, Section 101(g) of the CWA further provides that the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act;" and

WHEREAS, current federal regulations, guidance, and programs pertaining to the CWA do not always recognize the specific conditions and needs in the West, where water can be scarce and a variety of unique waterbodies exist, including but not limited to small ephemeral washes, effluent-dependent streams, prairie potholes, playa lakes, and numerous man-made reservoirs, waterways, and water conveyance structures; and

WHEREAS, recent federal efforts to clarify the extent of CWA jurisdiction following the U.S. Supreme Court's decisions in *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006), have failed to include adequate state consultation in their development, despite repeated requests from the Western States Water Council to do so; and

WHEREAS, the considerable differences in hydrology, geology, and legal frameworks that exist among the western states mean that any effort to clarify CWA jurisdiction will invariably impact each state differently, thus underscoring the need to thoroughly involve states in developing regulatory language that clearly respects and avoids conflict with state authority over the regulation and allocation of waters within their respective borders; and

WHEREAS, any efforts to redefine or clarify CWA jurisdiction have, on their face, numerous federalism implications that have the potential to significantly impact states and alter the distribution of power and responsibilities among the states and the federal government, and therefore trigger federalism consultation with the states under Executive Order 13132; and

WHEREAS, as co-regulators, states are separate and apart from the general public, and deserve a unique audience with the federal government in the development and implementation of any federal effort to clarify or redefine CWA jurisdiction; and

WHEREAS, information-sharing does not equate to meaningful consultation, and the uncertainty and differences of opinion that exist regarding CWA jurisdiction requires EPA and the Corps to develop and implement federal CWA jurisdiction efforts in authentic partnership with the states;

NOW, THEREFORE BE IT RESOLVED that Congress and the Administration should ensure that any federal effort to clarify or define CWA jurisdiction:

1. Gives as much weight and deference as possible to state needs, priorities, and concerns;
2. Includes robust and meaningful state participation and consultation in its development and implementation. Such consultation should take place as early as possible and before the publication of any proposal for public comment, when irreversible momentum may preclude effective state participation and the consideration of alternate ways of meeting federal objectives. Federal CWA jurisdiction efforts should also acknowledge their inherent federalism implications and comply with Executive Order 13132's state consultation criteria.
3. Gives full force and effect to, and does not diminish or in any way detract from, the intent and purpose of CWA Sections 101(b) and 101(g).
4. Recognizes that Justice Kennedy's "significant nexus" test in *Rapanos* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. Federal CWA jurisdiction efforts should also quantify "significance" to ensure that the term's usage does not extend jurisdiction to waters with a *de minimis* connection to jurisdictional waters.
5. Complies with the limits Congress and the U.S. Supreme Court have placed on CWA jurisdiction, while providing clear and recognizable limits to the extent of CWA jurisdiction.
6. Specifically excludes waters and features generally considered to be outside the scope of CWA jurisdiction, including:
 - (a) Groundwater;
 - (b) Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA's agricultural exemption;
 - (c) Man-made dugouts and ponds used for stockwatering or irrigation in upland areas that are not connected to surface waters;

- (d) Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement; and
 - (e) Prairie potholes and playa lakes.
7. Acknowledges that states have authority pursuant to their “waters of the state” jurisdiction to protect excluded waters, and that excluding waters from federal jurisdiction does not mean that they will be exempt from regulation and protection.



WESTERN STATES WATER COUNCIL

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

Web Page: www.westgov.org/lwswc

August 11, 2014

Position No. 370

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: Interpretive Rule Regarding Applicability of the Exemption from Permitting under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices

Dear Administrator McCarthy and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing 18 western states on water policy issues, I am writing to comment on the interpretive rule your agencies adopted in March regarding agricultural exemptions under Section 404(f)(1)(A) of the Clean Water Act (CWA).

On June 3, EPA and Corps officials participated in a conference call with the Council to discuss the interpretive rule. The Council greatly appreciates your agencies' willingness to hold this call, which helped provide further clarification and insight into the intentions and motivations behind the rule. Based on the call, the Council understands that the rule is intended to identify agricultural exemptions under Section 404(f)(1)(A) that are in addition to existing agricultural exemptions under the CWA.

After further consideration, the Council believes the CWA's agricultural exemptions are operating appropriately. Notwithstanding your agencies' intentions, the interpretive rule has created a significant amount of confusion and uncertainty about the scope and applicability of the CWA's agricultural exemptions and their interaction with state water quality programs. Consequently, the Council respectfully requests that your agencies withdraw the interpretive rule to remove this uncertainty.

Please also note that the Council stands ready to help facilitate further dialogue between your agencies and the western states on ways to clarify and provide further guidance on the CWA's agricultural exemptions in a manner that creates less confusion.

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

Sincerely,

A handwritten signature in black ink that reads "Patrick T. Tyrrell". The signature is written in a cursive style.

Patrick T. Tyrrell, Chairman
Western States Water Council

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
WATER-RELATED FEDERAL RULES, REGULATIONS, DIRECTIVES, ORDERS and
POLICIES
Helena, Montana
August 11, 2014

WHEREAS, Presidential Executive Order 13132, issued on August 4, 1999, requires federal agencies to “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications...”; and

WHEREAS, an increasing number of federal regulatory initiatives and directives are being proposed that threaten principles of federalism, an appropriate balance of responsibilities, and the authority of the states to govern the appropriation, allocation, protection, conservation, development and management of the waters within their borders; and

WHEREAS, taking such actions goes beyond the intent of the applicable laws; and

WHEREAS, a number of these recent proposals have been made with little substantive consultation with State Governments; and

WHEREAS, a Western Federal Agency Support Team (WestFAST) now comprised of twelve water-related federal agencies was created pursuant to a recommendation of the Western Governors’ Association and Western States Water Council to foster cooperation and collaboration between the federal agencies and States and state agencies in addressing water resource needs; and

WHEREAS, State consultation should take place early in the policy development process, with the States as partners in the development of policies; and

WHEREAS, federal agencies have inappropriately dismissed the need to apply this requirement to their rulemaking processes and procedures; and

WHEREAS, water quantity regulation and management are the prerogatives of States, and water rights are private property, protected and regulated under State law;

NOW, THEREFORE, BE IT RESOLVED, that nothing in any federal rule, regulation, directive, order or policy should affect, erode, or interfere with the lawful government and role of the respective States relating to: (a) the appropriation and allocation of water from any and all sources within their borders; and/or (b) the withdrawal, control, use, or distribution of water; and/or (c) affect or interfere with any interstate compact, decree or negotiated water rights agreement; and/or (d) application, development and/or implementation of rules, laws, and regulations related to water.

BE IT FURTHER RESOLVED, that federal agencies with water related responsibilities fully recognize and follow the requirements of Executive Order 13132 by establishing and implementing appropriate procedures and processes for substantively consulting with States, their Governors, as elected by the people, and their appointed representatives, such as the Western States Water Council, on the implications of their proposals and fully recognize and defer to States’ prerogatives.



WESTERN STATES WATER COUNCIL

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

Web Page: www.westgov.org/lwswc

Position No. 372

October 3, 2014

Tom Tidwell, Chief
U.S. Forest Service
1400 Independence Avenue
Washington D.C. 20250-1111

ATTN: Rob Harper
U.S. Forest Service
WFWARP, 201 14th Street, SW
Washington D.C. 20250

RE: Proposed USFS Directive on Groundwater Resources – Forest Service Manual 2560

Dear Chief Tidwell and Mr. Harper:

On behalf of the Western States Water Council, I am writing to comment on the proposed U.S. Forest Service's (USFS) Proposed Directive on Groundwater Resource Management, published in the Federal Register for public comment on May 6 (FSM 2560). Attached to this letter are more specific comments. We appreciate the recognition of the importance of groundwater and the impact that USFS activities and USFS-permitted surface activities can have on this vital state resource, particularly in the West, where most USFS managed lands are located. Moreover, as any other landowner, we also recognize USFS authority to permit access to federal lands for lawful activities, including water resources development and operation of facilities to exercise state granted water rights.

While perhaps well intended, our member States have serious concerns over the lack of substantive state participation in the development of the directive, especially given that the States have primary, often exclusive authority, over the protection, development and management of waters within their boundaries, including surface waters arising on, and flowing across USFS lands, and groundwater below those lands. Groundwater is a state and not a federal resource. The problems that the directive may be intended to address are not apparent, nor is the protection of groundwater a primary USFS responsibility. Indeed, the U.S. Supreme Court held in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that states have exclusive authority over the allocation, administration, protection, and control of all non-navigable waters located within their borders.

We believe the USFS assertions of broad authority over groundwater and the potential interference with the lawful exercise of state water rights and permitted water uses on National Forest Service (NFS) lands are contrary to over 100 years of deference afforded state water laws by the Congress and the Supreme Court of the United States. Among other things, presumptive claims of any reserved right to groundwater are unsupported by legislation or opinions of the Court. Moreover, such claims are counterproductive and will only involve the USFS in extended litigation. Rather, USFS should partner with States to identify and address USFS needs. The existing compact between the State of Montana and USFS, as well as a Memorandum of Understanding between USFS and the State of Wyoming, may serve as appropriate options that may be emulated by USFS in other States. The Council and our federal partners have, working through our Western Federal Agency Support Team, also entered into continuing discussion on how best to fulfill legitimate federal water needs within state water law.

The directive to “apply federal reserved water rights to groundwater as well as surface water” is inappropriate and legally unsupportable as none of the USFS cited statutes and authorities mention groundwater, nor establish any basis to manage or allocate waters, nor reserve any federal rights to water. Further, no federal court has ever upheld a reserved right to groundwater. The U.S. Supreme Court in *United States v. New Mexico*, 438 U.S. 696 (1978) specifically denied USFS claims to implied reserved surface water rights claimed for fish, wildlife, and recreation uses and found that reserved rights made pursuant to the Act were limited to the minimum amount of water necessary to satisfy the “primary purposes” of the national forest reservation. These primary purposes include the production of timber and watershed protection to insure favorable surface water flows. Furthermore, the Court found that all other needs were secondary purposes that required state-issued water rights. The proposed directive cannot extend USFS authorities beyond the limits the Court has set. Even where reserved rights are recognized, the Congress has left it up to the States, under the McCarran Amendment, to quantify such rights in general state stream adjudications in state courts.

Limited USFS resources are already overextended, as evidenced by necessary “fire borrowing,” requiring careful consideration of national funding priorities. Even if it had the authority, the USFS is ill-equipped to undertake the extensive and costly processes and procedures that would be necessary to implement the directive. Moreover, much of the work the USFS envisions it would undertake or contract out would very likely duplicate existing capabilities of the States and other federal agencies.

Governors John Hickenlooper of Colorado and Brian Sandoval of Nevada, then Chair and Vice Chair of the Western Governors’ Association, wrote Secretary Tom Vilsack on July 2nd declaring, “Our initial review of the Proposed Directive leads us to believe that this measure could have significant implications for our states and our groundwater resources.” In an August 29th reply, Secretary Vilsack replied with an “open invitation to meet and discuss these directives.” The WGA and the Council are working closely together on this issue, and we would reiterate, as also stated in the Governors’ letter: “States are the exclusive authority for allocating, administering, protecting and developing groundwater resources....” This directive has significant negative federalism implications for the States.

We strongly urge you to take no final action on the directive until there has been an extended and extensive opportunity for USFS to work with our member States, the WGA, and the Council to identify and seek to resolve in a mutually acceptable manner the problems which the directive is intended to address. Notably, the directive mentions required consultation with the tribes, but not the States. We are prepared to enter into a substantive dialogue that would fulfill the requirements of Executive Order 13132 (“E.O.”) on Federalism. As stated therein, “One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems.” Sec. 2(f)

Moreover, the E.O. states: “National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means.” Sec. 3(b)

The E.O. continues: “When undertaking to formulate and implement policies that have federalism implications agencies shall...where possible, defer to the States to establish standards; in determining whether to establish uniform national standards, consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority....” Sec. 3(d) Sec. 6 requires: “Each

agency shall have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.”

We again request that the USFS enter into an authentic dialogue with the WGA, the Council, and the States towards achieving a mutually acceptable policy that reflects both the constitutional division of power and the on-the-ground realities of the West. The USFS should also recognize that a flexible and consistent state-by-state approach may be a more effective and more feasible way of addressing USFS needs than a national approach that does not account for the significant physical, hydrological, and legal differences that exist between the states. USFS should have consulted extensively with the States before publishing the proposed directive, and should now substantively engage the States, in order to define and remedy any perceived need to “clarify existing responsibilities and provide greater consistency and accountability....”

Thank you for your attention to our concerns, and we look forward to engaging in a productive dialogue with you and other USFS representatives.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Tyrrell". The signature is written in a cursive, flowing style.

Patrick Tyrrell, Chairman
Western States Water Council



WESTERN STATES WATER COUNCIL

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

Web Page: www.westgov.org/lswc

October 15, 2014

Position No. 373

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Re: Attention – Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

The Western States Water Council (WSWC), representing 18 western states on water policy issues, submits the following comments regarding the proposed rule the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) have developed to clarify the scope of Clean Water Act (CWA) jurisdiction. These comments are based on WSWC Policy No. 369 and prior WSWC letters and testimony regarding the development of this rule, which are attached and incorporated by reference.

Please note that the WSWC's comments are applicable to all 11 sections of the Code of Federal Regulations (CFR) that are proposed for revision. However, for the purposes of this letter, the WSWC's comments are keyed to the version of the definition of "Waters of the United States" that pertains to part 230.3 of the CFR and appears on pages 22,268-22,269 of the Federal Register notice dated April 21, 2014.

I. WSWC POLICY No. 369

WSWC Policy No. 369 sets forth the unanimous, consensus position of the western states regarding federal efforts to clarify or redefine CWA jurisdiction. The WSWC urges EPA and the Corps to review this policy carefully and to incorporate its recommendations. Specifically, the WSWC urges EPA and the Corps to ensure that the rule:

- A. Gives as much weight and deference as possible to state needs, priorities, and concerns;
- B. Gives full force and effect to, and does not diminish or in any way detract from, the intent and purpose of CWA Sections 101(b) and 101(g);
- C. Recognizes that Justice Kennedy's "significant nexus" test in *Rapanos* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. The rule should also quantify "significance" to ensure that the term's usage does not extend jurisdiction to waters with a de minimis connection to jurisdictional waters;

- D. Complies with the limits Congress and the U.S. Supreme Court have placed on CWA jurisdiction, while providing clear and recognizable limits to the extent of CWA jurisdiction;
- E. Specifically excludes water and features generally considered to be outside the scope of CWA jurisdiction, including:
 - 1. Groundwater;
 - 2. Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA’s agricultural exemption;
 - 3. Man-made dugouts and ponds used for stockwatering or irrigation in upland areas that are not connected to surface waters;
 - 4. Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement; and
 - 5. Prairie potholes and playa lakes.
- F. Acknowledges that states have authority pursuant to their “waters of the state” jurisdiction to protect excluded waters, and that excluding waters from federal jurisdiction does not mean that excluded waters will be exempt from regulation and protection.

More specific aspects of the WSWC’s policy are discussed in greater detail below.

II. EPA’S CONNECTIVITY REPORT AND PUBLIC COMMENT EXTENSION

While the WSWC appreciates the agencies’ decision to extend the public comment period for the rule, we note that the Western Governors’ Association requested in its August 27 letter (attached) an 89-day extension of the comment period. Such an extension would allow states to formulate thorough and thoughtful comments on the draft rule and its possible impacts, effects and implications, and also would allow for the review and consideration of the Science Advisory Board’s comments on EPA’s scientific report regarding the connectivity of differing waterbodies.

As stated in the WSWC’s November 5th letter (attached), “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 v. United States*, 547 U.S. 715 (2006)].” Therefore, while it is important for the rule to be scientifically sound, the report should not be used to support a rule that improperly asserts that the scope of the CWA is unlimited.

III. STATE CONSULTATION AND IMPLEMENTATION OF THE RULE

The WSWC’s prior correspondence with EPA and the Corps expressed repeated concerns about the lack of significant state consultation in the development of the rule before its publication for public comment. While the WSWC remains concerned about the lack of state consultation in the rule’s development, it has since participated in a series of calls with EPA and the Corps after the rule’s publication for public comment. The WSWC appreciates your agencies’ willingness to speak with the WSWC about the rule during these calls. The WSWC also appreciates the efforts of EPA Region 8 Administrator Shaun McGrath and Region 8 Senior Advisor Joan Card in facilitating these discussions.

Nevertheless, there is still a significant need and opportunity for continued, sustained dialogue and consultation with the states in the revision and implementation of the rule, particularly on a state-by-state basis. Such consultation should treat states as co-regulators that are separate and apart from the general public, as envisioned by the CWA's framework of cooperative federalism and as required by Executive Order 13132.

One way to facilitate continued dialogue and consultation with the states would be to establish a state-federal workgroup between EPA, the Corps, and the states as your agencies work to revise and implement the rule. Although such a workgroup would be unlikely to reach a consensus on every issue, it would help facilitate the types of dialogue, collaboration, and relationship-building needed to create a more workable and effective rule. One possible model could be the workgroup EPA established with the Environmental Council of States and the Association of Clean Water Administrators to discuss revisions to the National Pollutant Discharge Elimination System electronic reporting rule. Consensus is not necessarily sought but individual state participants discuss their individual views with the federal agencies. The WSWC would welcome the opportunity to help develop and participate in a similar workgroup to review the CWA rule.

IV. AREAS WHERE FURTHER CLARIFICATION IS NEEDED

The WSWC understands that the rule is intended to clarify the scope of CWA jurisdiction in light of recent U.S. Supreme Court decisions, particularly its *Rapanos* decision. However, as noted in the following subsections, further clarification is needed in a number of areas to realize this goal. The WSWC also believes that these areas represent an opportunity for your agencies and the states to work together in joint partnership as co-regulators, both on an individual basis and through the above-requested workgroup, to further refine the rule so that it will better accomplish its stated purpose of clarifying the extent of CWA jurisdiction.

A. Other Waters

As currently drafted, the rule states that jurisdictional determinations for so-called "other waters" will be made on a "case-specific basis," provided that those waters "alone, or in combination with other similarly situated waters...located in the same region, have a significant nexus" to a traditional navigable water, interstate water, or the territorial seas.¹⁰⁴

While the rule and the related preamble are clear that other waters may be jurisdictional, the documents are less clear about how, when, or in which circumstances your agencies will perform case-by-case analyses to determine the jurisdictional status of these waters. This lack of clarity could be interpreted as implying that all other waters are potentially jurisdictional until EPA and the Corps determine otherwise at an indeterminate point in time. Such an implication has the potential to put landowners in limbo regarding the status of other waters located on their property and runs counter to the proposed rule's stated purpose of increased clarity. It also requires landowners to prove a negative should they desire to develop their land, or risk the possibility of incurring fines and other penalties if your agencies subsequently determine that the water is jurisdictional.

¹⁰⁴Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,269 (April 21, 2014) (to be codified at 40 CFR Part 230.3).

Instead, the rule should ensure that the applicable permitting agency, such as the Corps for Section 404 jurisdictional determinations in most states, bears the burden of determining the jurisdictional status of other waters in a timely manner. To help achieve this goal, the rule should provide a specific deadline by which the applicable agency must make a jurisdictional determination for other waters after it receives a jurisdictional determination request from a landowner.

The WSWC urges your agencies to work with the WSWC and through the above-requested state-federal workgroup to determine a reasonable timeframe for jurisdictional determinations regarding other waters and to address any other issues associated with this proposal, including possible consequences and remedies in those situations where the permitting agency does not meet the specified deadline. The WSWC also proposes 180 days as an initial, possible starting point for discussions regarding the time period for your agencies' other waters determinations.

B. Significant Nexus

As noted above, the WSWC Policy No. 369 states that federal efforts to clarify CWA jurisdiction should recognize that the “significant nexus” Justice Kennedy set forth in *Rapanos* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. The policy further states that federal CWA jurisdiction efforts should quantify “significance” to ensure that the term’s usage does not extend jurisdiction to waters with a de minimis connection to jurisdictional waters. While the WSWC appreciates language in the rule stating that effects to jurisdictional waters must be “more than speculative or insubstantial,” further work is needed to quantify the concept of significance, particularly the term “significantly affects” in paragraph (u)(7), and to flesh out a transparent process for your agencies to use when making significance determinations.¹⁰⁵

To address this uncertainty, the WSWC believes the rule should use a specific, quantifiable measure or measures to determine significance rather than only stating that the water’s effect on another, jurisdictional water must be more than speculative or insubstantial. Under this proposal, waters that satisfy the specified measures would be presumed to have a significant connection to the waters identified in paragraphs (s)(1) through (3) of the rule, while waters that do not would be presumed to lack a significant connection. Under this general framework, parties could still provide evidence to rebut a presumption of significance or non-significance. Consequently, the use of specific, quantifiable measures would provide much needed clarity by providing a starting point for significance determinations.

The WSWC recognizes that further discussion between the states and your agencies is needed to develop the specifics of such a process, particularly in light of the considerable variety of hydrologic and geologic conditions that exist across the nation. As such, the WSWC urges your agencies to work with the WSWC and through the above-requested state-federal workgroup to identify and develop specific, quantifiable measures for determining significance consistent with the WSWC’s rebuttable presumption concept.

C. Agricultural Exemptions

The WSWC believes the CWA’s current agricultural exemptions are operating properly and that the rule should not alter or create unnecessary uncertainty about these exemptions. The WSWC understands that the rule is intended to preserve these exemptions, but the rule and the related

¹⁰⁵*Id.*

interpretive rule regarding exempt activities under Section 404(f)(1)(a) have nevertheless created confusion and uncertainty about the scope and applicability of the CWA's agricultural exemptions, as well as their interaction with state water quality programs.

Given this confusion, the rule should include language stating that:

“Nothing in this section shall be interpreted to limit or otherwise conflict with the exemptions set forth in 33 U.S.C. 1344(f) and in 33 C.F.R. 323.4 and 40 C.F.R. 232.3.”

In addition, the interpretive rule has created a significant amount of uncertainty concerning its possible implications for “normal farming, ranching, and silvicultural” activities. To resolve this uncertainty and to ensure that the current exemptions remain unchanged, your agencies should withdraw the interpretive rule, as the WSWC requested in its attached letter dated August 11, 2014. Notwithstanding the WSWC's request that the rule be withdrawn, any effort to revise the rule should be done in joint partnership with the states, particularly to determine what constitutes exempt “normal farming, ranching or silvicultural activities.”

The WSWC stands ready to help facilitate further dialogue between your agencies and the western states to provide further clarity regarding the CWA's agricultural exemptions. The WSWC further believes that the above-requested state-federal workgroup could help ensure that the rule is revised and implemented in such a way that it fulfills your agencies' stated goal of preserving the existing agricultural exemptions.

D. Groundwater

The regulatory reach of the CWA was not intended to be applied to the management and protection of groundwater. As such, the WSWC appreciates the rule's exclusion of “groundwater, including groundwater drained through subsurface drainage systems.”¹⁰⁶ Given the rule's use of “shallow subsurface hydrologic connections” to establish jurisdiction between surface waters, the WSWC also appreciates the preamble's statement that “nothing...would cause the shallow subsurface connections themselves to become jurisdictional.”¹⁰⁷

However, once codified, the preamble language regarding shallow subsurface hydrologic connections will not be published in the CFR, leading to possible misinterpretations and confusion about your agencies' intent and the jurisdictional status of such waters. Therefore, the WSWC requests that the groundwater exclusion in paragraph (t)(5)(vi) of the rule be amended to state as follows:

“Groundwater, including *but not limited to* groundwater drained through subsurface drainage systems *and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters under this section*” (changes in italics).

E. Definitions Needed for Key Terms

The rule does not adequately define the following key terms: (1) shallow subsurface hydrologic connection; (2) bed and banks; (3) ordinary high water mark; and (4) uplands. Further consultation is needed between your agencies and the states to determine how to define these terms. The WSWC

¹⁰⁶*Id.*

¹⁰⁷*Id.* At 22210

believes that the above-requested state-federal workgroup would provide a suitable forum for your agencies to work in partnership with the states to define these terms. In addition to these terms, further clarification is needed regarding the terms “floodplains” and “riparian” as used in the rule.

F. The Possibility for Unintended Consequences

The WSWC believes the programs operating under Sections 402 and 303 of the CWA are working as they should, and that much of the confusion involving CWA jurisdiction pertains to the 404 program. However, in striving to address the challenges involving Section 404, there is some concern that the rule could have related and unintended impacts to Section 402 and Section 303 programs. Where possible, EPA and the Corps should ensure that their efforts to address the current uncertainty regarding Section 404 through the development and implementation of the rule do not adversely affect other CWA programs. Additional and ongoing consultation with the states, particularly through the above-requested stated-federal workgroup, will help minimize the potential for unintended consequences.

V. **CONCLUSION**

The WSWC appreciates the EPA’s and the Corps’ consideration of the above comments. As always, the WSWC stands ready to work with EPA and the Corps to support further dialogue and consultation between your agencies and the western states regarding this rule and any and all other issues involving the protection of our nation’s waters.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Tyrrell". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Patrick Tyrrell, Chairman
Western States Water Council

Enclosures

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
The *Dividing the Waters* Program
Scottsdale, Arizona
October 10, 2014

WHEREAS, the *Dividing the Waters* Program of the National Judicial College has served western judges overseeing complex water litigation for more than 20 years, providing information and training resources on water law and water conflicts to state, tribal, and federal judges; and

WHEREAS, five judicial officers with extensive experience in water adjudication lead *Dividing the Waters* for the benefit of their colleagues in the judiciary, making it a program by judges for judges; and

WHEREAS, the Program includes participating judicial officers from 12 western states who adjudicate a wide range of water cases, from statewide water right adjudications to conflicts over endangered species and water quality; and

WHEREAS, *Dividing the Waters* has received funding from public interest foundations for 22 years but foundation funding for education programs has dwindled in recent years and its current funder, the Stephen J. Bechtel Foundation, closes its doors at the end of 2016; and

WHEREAS, it is in the interest of the executive branch water agencies of the western states to ensure that the judicial officers who adjudicate water cases in their states have an understanding of the fundamentals of western water law and the latest information on water adjudication; and

WHEREAS, the recent recession has resulted in limited state funding for judicial branch education in many states, particularly for water and related natural resource topics; and

WHEREAS, *Dividing the Waters* provides a critical link between the executive branch water agencies and the judicial branch that adjudicates water conflicts in the western states;

NOW, THEREFORE, BE IT RESOLVED, that the Western States Water Council supports *Dividing the Waters* and urges public interest foundations and other interested entities to provide funding for the program.

RESOLUTION
on the
FEDERAL GOVERNMENT'S ROLE IN EXPEDITING
STATE GENERAL STREAM ADJUDICATIONS
Scottsdale, Arizona
October 10, 2014

WHEREAS, the western states use general stream adjudications to quantify and document relative water rights within basins, including rights to waters claimed by the United States under either state or federal law; and

WHEREAS, general stream adjudications give certainty to water rights, provide the basis for water right administration, reduce conflict over water allocation and water usage, and incidentally facilitate important market transactions for western water rights; and

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

WHEREAS, adjudications typically involve hundreds or even tens of thousands of claimants, and federal water right claims are typically the largest, most complex, and costly to resolve; and

WHEREAS, the United States Supreme Court held in *United States v. Idaho*, 508 U.S. 1 (1992), that the McCarran Amendment does not require the United States to pay the filing fees that many states use to help fund adjudications; and

WHEREAS, the Court's holding shifted much of the costs of adjudicating federal claims in many states to private water users and state taxpayers, draining state resources and significantly inhibiting the ability of both state and federal agencies to conduct adjudications in a timely manner, threatening private and public property interests; and

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

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

1. As a matter of policy, federal agencies should pay a fair share of the costs associated with adjudicating their claims in state adjudications. The federal government has discretion to adopt such a policy as a matter of fairness, even though not presently required to do so by law. Federal payment of filing fees was a common practice prior to the Court's *United States v. Idaho* decision.

2. General stream adjudications pursuant to the McCarran Amendment should be brought in state and not in federal court. Actions brought in federal court divert substantial resources from state adjudications and are contrary to the intent of the McCarran Amendment.
3. There must be high-level federal involvement in negotiations and mediation that often occur with regard to federal claims within the context of ongoing adjudications in order to be effective. Experience has shown that without the involvement of federal participants who have the authority to make decisions, achieving agreements can be illusory and delay mutually beneficial outcomes. Policy direction must be provided by the relevant federal agencies.
4. Federal agencies should be given policy direction to ensure that federal claims filed in state adjudications have a sound basis in fact and law. States continue to encounter questionable claims that can be very costly to evaluate, thus diverting limited state resources from completing general stream adjudications, and which are ultimately of no benefit to the United States.
5. Federal agencies should place a higher priority on educating their leaders and applicable staff regarding western water rights. Leadership and staff for some federal agencies often have an incomplete understanding of the nature of their claims, the processes needed to resolve them, and state water law, which can result in federal actions and policies that hinder or delay the adjudication process or infringe on state authority and water management. Educating federal leaders and staff regarding western water rights will improve federal participation in the adjudication process, thereby improving the process as a whole.
6. Federal agencies should consult with states before asserting water rights claims. Federal water rights claims, particularly reserved water rights claims, can be contentious, time-consuming, costly, and counterproductive, often resulting in outcomes that do not adequately provide for federal needs. States and federal agencies have worked together to craft mutually acceptable and innovative solutions to address federal water needs that are often more capable of accommodating federal interests. At a minimum, federal agencies should consult with states to consider alternatives before filing reserved water rights and other claims in adjudications.
7. Requiring the federal government to provide whatever evidence it may have to substantiate its claims at the time of filing would ensure that federal claims have a sound basis in fact, and also would facilitate timely review of those claims. Given the complexity and the contentiousness involving such claims, states are justified in asking the federal government to take this step. Doing so will expedite the process by: (1) minimizing the filing of questionable claims; and (2) providing a basis for states to ascertain early on the level of resources that states need to commit to the investigation of such claims.

(See also Positions No. 247, 272(a-b), 308 and 335)

Originally adopted October 9, 2002

Reaffirmed October 21, 2005, October 17, 2008, October 7, 2011

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
INDIAN WATER RIGHTS SETTLEMENTS
Scottsdale, Arizona
October 10, 2014

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

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

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

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

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

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

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

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

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

WHEREAS, current budgetary pressures and legislative policies make it difficult for the Administration, the states and the tribes to negotiate settlements knowing that they may not be

funded because either they are considered earmarks or because funding must be offset by a corresponding reduction in some other expenditure, such as another tribal or essential Interior Department program;

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

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

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

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

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

(See also Nos. 250, 275, 310, and 336)

Originally adopted March 21, 2003

Revised and reaffirmed Mar 29, 2006, October 17, 2008, and October 7, 2011

POSITION
of the
WESTERN STATES WATER COUNCIL
on
PROTECTING GROUND WATER QUALITY
Scottsdale, Arizona
October 10, 2014
(revised and reaffirmed)

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

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

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

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

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

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

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

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

(See also Nos. 215, 230, 249, 274, 309, and 337
Originally adopted March 14, 1997
Revised and Reaffirmed:
Mar 14, 2000, Mar 21, 2003, Mar 29, 2006, Oct 17, 2008, and Oct 7, 2011

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 changes that were adopted in October 2011 at the Council's 167th meetings in Idaho Falls, Idaho.