

**2017**

**ANNUAL REPORT**

**of the**

**WESTERN STATES WATER COUNCIL**

**52nd Annual Report**

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# **2017 ANNUAL REPORT**

## **OF THE**

## **WESTERN STATES WATER COUNCIL**

### **INTRODUCTION**

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

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

WSWC membership and associate membership status is determined based on a request from the governor. Originally, WSWC 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 WSWC 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 WSWC. **HAWAII** was a member from 1991-1999. In 1999, **OKLAHOMA** requested and received membership. In 2000, both **KANSAS** and **NEBRASKA** joined the WSWC at the request of their respective governors. WSWC membership is automatically open to all member states of the Western Governors' Association (WGA). 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 WSWC 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.)

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

Meetings of the Council are held on a regular basis, rotating among the member states, with state representatives hosting Council members and guests. In 2017, meetings were held in: Nebraska City, Nebraska on April 12-14; Rohnert Park, California on June 27-29; and Albuquerque, New Mexico on October 18-20. 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 WSWC relies primarily on state dues for funding the organization. Dues are set by the Executive Committee and each state pays the same amount. A copy of the audit performed or the fiscal year ending June 30, 2017 can be obtained from the WSWC office.

During 2017, the WSWC staff was comprised of: Anthony G. (Tony) Willardson, Executive Director; Michelle Bushman, Legal Counsel; Sara Larsen, Water Data Exchange Program Manager; Roger Pierce, WestFAST Liaison; Cheryl Redding, Office Manager; and Julie Groat Administrative Assistant.

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**WESTERN STATES WATER COUNCIL**  
**Committee Assignments**

**EXECUTIVE COMMITTEE**

Vacant - Alaska  
Thomas Buschatzke- Arizona  
Grant Davis - California  
Jeanine Jones - California  
    **(Vice-Chair)** (Alternate)\*  
John Stulp - Colorado  
Hal Simpson - Colorado  
    (Alternate)\*  
Jerry Rigby - Idaho  
    **(Chair)**  
David Barfield - Kansas  
Tim Davis - Montana  
Jeff Fassett - Nebraska  
Jason King - Nevada  
Roland Westergard - Nevada  
    (Alternate)\*  
Tom Blaine - New Mexico  
Garland Erbele - North Dakota  
Julie Cunningham - Oklahoma  
Thomas Byler - Oregon  
Steve Pirner - South Dakota  
Kent Woodmansey - South Dakota  
    (Alternate)\*  
Jon Niermann - Texas  
Eric Millis - Utah  
Maia Bellon - Washington  
Patrick T. Tyrrell - Wyoming

**Management Subcommittee**

Jerry Rigby  
    **(Chair)**  
Jeanine Jones  
    **(Vice-Chair)**  
Tim Davis  
    **(Secretary/Treasurer)**  
Tony Willardson  
    **(Executive Director)**  
Pat Tyrrell  
    **(Former Chair)**

**Nominating Subcommittee**

Roland Westergard **(Chair)** - Nevada  
Hal Simpson - Colorado  
Pat Tyrrell - Wyoming

Ex-Officio Representatives

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

## **LEGAL COMMITTEE**

David Schade - Alaska  
William Staudenmaier - Arizona  
Cynthia Chandley - Arizona  
(Alternate)\*  
Jeanine Jones - California  
Kevin Rein - Colorado  
Jerry Rigby - Idaho  
John Simpson - Idaho  
(Alternate)\*  
Kenneth Titus - Kansas  
Jay Weiner - Montana  
Jim Macy - Nebraska  
Jason King - Nevada  
Roland Westergard - Nevada  
(Alternate)\*  
Maria O'Brien - New Mexico  
Greg Ridgley - New Mexico  
(Alternate)\*  
Jennifer Verleger - North Dakota  
(Chair)  
Rob Singletary - Oklahoma  
Thomas Byler - Oregon  
Kent Woodmansey - South Dakota  
Jon Niermann - Texas  
Norman Johnson - Utah  
Alan Reichman - Washington  
Chris Brown - Wyoming  
(Vice-Chair)

## **Clean Water Act Jurisdiction**

Michelle Hale - Alaska  
Trisha Oeth - Colorado  
Barry Burnell - Idaho  
Tom Stiles - Kansas  
Jennifer Verleger - North Dakota  
Todd Chenoweth - Texas  
Lauren Driscoll - Washington  
Bill DiRienzo - Wyoming

## **Non-Tribal Federal Water Needs Subcommittee**

David Schade - Alaska  
Jay Weiner - Montana  
Kristen Geddy - Nevada  
Susan Joseph-Taylor - Nevada  
Greg Ridgley - New Mexico  
Jennifer Verleger - North Dakota  
Jonathan Allen - Oklahoma  
Dwight French - Oregon  
Jesse Ratcliff - Oregon  
Todd Chenoweth - Texas  
Norm Johnson - Utah  
Buck Smith - Washington  
Abigail Boudewyns - Wyoming  
Chris Brown - Wyoming  
Pat Tyrrell - Wyoming

### **Ex-Officio Representatives**

BLM - Paul Curtis  
USBR - Becky Fulkerson  
Owen Walker  
DOD - Marc Kodack  
Lauren Dempsey  
USFS - Michael Eberle, Chris Carlson  
NPS - Jeff Hughes

## **Tribal Reserved Water Rights Subcommittee**

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

## **WRDA/Corps Policies**

Tom Stiles - Kansas  
Tim Davis - Montana  
Jennifer Verleger - North Dakota



## **WATER QUALITY COMMITTEE**

Alice Edwards - Alaska  
Trevor Baggione - Arizona  
Vacant - California  
Betty Olson - California  
(Alternate)\*  
Trisha Oeth - Colorado  
Patrick Pfaltzgraff - Colorado  
(Alternate)\*  
John Tippets - Idaho  
Tom Stiles - Kansas  
George Mathieus - Montana  
Jim Macy - Nebraska  
Greg Lovato - Nevada  
Butch Tongate - New Mexico  
David Glatt - North Dakota  
Julie Cunningham - Oklahoma  
Shellie Chard - Oklahoma  
(Alternate)\*  
Jennifer Wigal - Oregon  
Kent Woodmansey - South Dakota  
**(Chair)**  
Steve Pirner - South Dakota  
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Jon Niermann - Texas  
Todd Chenoweth - Texas  
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Erica Gaddis - Utah  
Maia Bellon - Washington  
Pat Tyrrell - Wyoming  
Kevin Frederick - Wyoming  
**(Vice-Chair)** (Alternate)\*  
Todd Parfitt - Wyoming  
(Alternate)\*

## Clean Water Act Subcommittee

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Barry Burnell - Idaho  
Tom Stiles - Kansas  
Jennifer Verleger - North Dakota  
Todd Chenoweth - Texas  
Lauren Driscoll - Washington  
Kevin Frederick - Wyoming

## **Water Quality/Quantity Nexus Workgroup**

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## **WATER RESOURCES COMMITTEE**

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Rebecca Mitchell - Colorado  
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John Simpson - Idaho  
Jerry Rigby - Idaho  
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David Barfield - Kansas  
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Jeff Fassett - Nebraska  
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Tom Blaine - New Mexico  
Garland Erbele - North Dakota  
Julie Cunningham - Oklahoma  
Thomas Byler - Oregon  
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Eric Millis - Utah  
Tom Loranger - Washington  
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## **Climate Adaptation and Drought Subcommittee**

Jeanine Jones - California (Chair)

Ex-Officio Representatives

Corps - Rolf Olsen  
NRCS - Mike Strobel

## **Water Information and Data Subcommittee (WIDS)**

Lisa Williams - Arizona  
Mathew Weaver - Idaho  
Lane Letourneau - Kansas  
Ginger Pugh - Kansas  
Julie Cunningham - Oklahoma  
Kent Wilkins - Oklahoma  
Ken Stahr - Oregon  
Sam Hermitte - Texas  
Todd Adams - Utah  
Candice Hasenyager - Utah  
Steve Wolff - Wyoming

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USBR - Allison Danner  
USEPA - Dwane Young  
USGS - Nancy Barber  
NASA - Brad Doorn  
NOAA - DeWayne Cecil  
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**Council Members  
Rohnert Park, California  
June 29, 2017**



(left to right)

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Row 2: Jon Niermann, Mike Gallagher, Tom Byler, Greg Ridgley, Tom Blaine, Jim Macy, Roland Westergard, and Kent Woodmansey.

Row 3: Bech Bruun, Patrick Pfaltzgraff, John Stulp, Tracy Streeter, Robert Mace, Pat Tyrrell, and Garland Erbele.

## COUNCIL STAFF



From Left to Right: Julie Groat, Pat Lambert, Sara Larsen, Tony Willardson, Michelle Bushman and Cheryl Redding

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Michelle Bushman ..... Legal Counsel  
Sara Larsen ..... Water Data Exchange Program Manager  
Patrick Lambert..... Former Federal Liaison (2014-2016)  
Cheryl Redding..... Office Manager  
Julie Groat..... Administrative Assistant

Roger Pierce, WestFAST Liaison (NOAA)  
From 2016 -2018



## COUNCIL MEMBERSHIP/CHANGES

### Colorado

In April, **James Eklund** joined Squire Patton Boggs global Environmental, Safety & Health Practice Group. James served as the Director of the Colorado Water Conservation Board. James was appointed to the WSWC in March of 2012 and served on the Executive, Water Resources, and Legal Committees.

WSWC Member **Dick Wolfe**, announced his retirement as State Engineer of the Colorado Division of Water Resources effective June 30, a position he had held since November 2007. He was appointed to the Council in April 2008 and served on the Water Resources Committee.

### Kansas

In July, Governor Sam Brownback appointed **Kenneth Titus**, Chief Counsel, Kansas Department of Agriculture to serve on the WSWC's Legal Committee.

### Oklahoma

In April, Governor Mary Fallin appointed **Julie Cunningham**, Executive Director, Oklahoma Water Resources Board to the WSWC. Julie had been serving as the interim executive director since October 2016 when WSWC Secretary/Treasurer **J.D. Strong** left to lead the Oklahoma Department of Wildlife Conservation.

### Utah

**Walt Baker** announced his retirement as Director of the Division of Water Quality and Executive Secretary of the Utah Water Quality Board effective June 1, positions he had held since May 2004. Walt was appointed to the WSWC in June 2004 and made valuable contributions to the work of the WSWC as a member, and as Chair of the Water Quality Committee from 2009-2011.

In August, Governor Gary Herbert appointed **Alan Matheson**, Executive Director, Utah Department of Environmental Quality (DEQ), and Senior Environmental Advisor to the Governor to replace Walt Baker on the WSWC. The Governor also appointed **Erica Gaddis**, Director, Division of Water Quality, DEQ as an alternate to the WSWC.

## **COUNCIL MEETINGS**

### **183<sup>rd</sup> Council Meetings Nebraska City, Nebraska April 12-14, 2017**

On April 12-14, the WSWC held its 183<sup>rd</sup> meetings in Nebraska City, Nebraska. The WSWC revised and re-adopted five sunseting positions that: (1) urge Congress and the Administration to develop a standardized, transparent process for determining the Bureau of Reclamation's up-to-date maintenance, repair and rehabilitation infrastructure needs; (2) urge Congress and the Administration to adequately fund the safe operation and maintenance of Reclamation's dams; (3) support the careful evaluation of multiple purpose projects and protect appropriate interests in the transfer of federal water and power projects; (4) support the National Levee Safety Act insofar as water supply canals are excluded from the interpretation of levees; and (5) urge Congress and the Administration to ensure stable and continuing appropriations to the State Revolving Fund capitalization grants, as well as State and Tribal Assistance Grants. Two new positions were considered, the first supporting weather research, including seasonal to sub-seasonal forecasting; and the second, adopted subject to review by the Western Governors' Association (WGA), supporting U.S. Department of Agriculture rural water and wastewater grant and loan programs.

Nebraska Governor Pete Ricketts addressed the WSWC. He emphasized the importance of attracting new business and jobs by being more effective, efficient and customer oriented. "I want to see Nebraskans at work." Time is vital to companies, and Nebraska is committed to reducing regulatory burdens and the time required for permitting decisions, while continuing to protect the environment. Nebraska has created a Center for Operational Excellence to train state employees on process improvement to reduce costs and provide better government services, treating people as customers. Reducing regulatory overhead and eliminating useless complexity allows the state to better attract business. Nebraska is also undertaking major comprehensive tax relief, which has brought new jobs to Nebraska.

"After our people, water is our most precious natural resource," Governor Ricketts declared. Nebraska is an agricultural state and irrigated agriculture is vital, providing \$3.6 to \$4.5 billion to the economy. Drought reduces the amount of water available for irrigation and has hurt the economy. "We continue to strive to conserve and grow more food with less water." Carefully managing Nebraska's water resources is critical to keeping farmers and ranchers on the land and allowing them to pass their land and water onto future generations. Water is also important for our cities and towns, for ethanol production, for recreation, and for fish and wildlife. Flood control and stormwater management are also important. The Nebraska Department of Natural Resources and Department of Environmental Quality have the task of bringing all these diverse interests and needs together and serving our citizens as customers. He recognized the WSWC for its role in promoting the wise use of water in the West.



During the Water Resources Committee Meeting, Ward Scott, WGA Policy Advisor, provided an update on WGA's water-related activities, including efforts to codify the U.S. Environmental Protection Agency's (EPA) Water Transfers Rule, getting involved in any new rulemaking defining the Waters of the United States (WOTUS), and recent comments made on the U.S. Army Corps of Engineers (Corps) surplus waters rule. These rules have major federalism ramifications requiring state consultation, and are critical to western water resources management and infrastructure. The federal government is realigning the state-federal relationship, and WGA is working toward positive changes and increased collaboration.

Bob Swanson, U.S. Geological Survey (USGS) Nebraska Director, noted that Nebraska is a groundwater state, and most of the withdrawals are used for irrigation. USGS has been monitoring the High Plains Aquifer by Congressional mandate since 1986, and their studies, equipment, and models have continuously improved to better identify water level changes due to pumping, drought, flooding, and other environmental and human stresses, and to forecast aquifer responses for the future.

Duane Smith, former WSWC Chairman, talked about the National Drought Resiliency Partnership (NDRP) pilot project in Altus, Oklahoma, where prolonged drought nearly dried up the reservoirs supplying local communities. Altus Air Force Base was so short that they considered flying water in to meet their needs. Despite initial frustrations and finger pointing, a grassroots water action plan started to come together, coordinating efforts between local water users. Through WestFAST, Oklahoma was able to communicate with the federal agencies and request technical assistance with the plan implementation. Within a month of emergency planning and relief efforts, rain began refilling the reservoirs, but the changes to the structure of water use and planning have continued.

Doug Kluck, National Oceanic and Atmospheric Administration (NOAA) Central Region Climate Services Director, presented a National Integrated Drought Information System (NIDIS) update and covered Missouri River Basin efforts to understand wide precipitation variability, assess vulnerabilities, and help build water resource resilience for states and tribes. He noted the NDRP demonstration projects in Oklahoma and Montana, cross-basin activities to improve regional monitoring, and weekly and monthly newsletters and briefings to provide updated information to local farmers, ranchers, and others.

Danielle Wood, National Aeronautics and Space Administration (NASA) Applied Sciences Manager, talked about tools to access NASA data and efforts in the Western Water Applications Office to leverage available data to answer questions relevant to water managers.

During the Water Quality Committee, Colorado, New Mexico, and Utah provided updates on the Gold King Mine spill and other abandoned mine concerns. Dennis McQuillan, New Mexico Chief Scientist, addressed the ongoing monitoring efforts, sampling sediments, crops, fish, and human biometrics for metals analysis. They are working toward publishing better information for the public on uncontaminated upstream sites, keeping an eye on treatment concerns for public water

systems, and updating preparedness plans for spring runoff and high streamflow events. Skip Feeney, Mine Impacted Stream Expert, Colorado Water Quality Control Division, discussed the task force Colorado formed to inventory abandoned mines and existing studies and datasets housed in different state and federal agencies. They want to determine how many mines are leaching and impacting surface water quality. He reviewed the Gold King monitoring efforts to assess public health risks, with alert systems in place along the Animas River. Walt Baker, Director of the Utah Division of Water Quality, noted that no Utah communities draw drinking water from the San Juan River, and while there were high lead levels following the Gold King Mine spill, metal concentrations did not exceed standards to the point of recreational impairments. Studies are focusing on the long-term effects of the spill on the surrounding area, including Lake Powell, and distinguishing the sources of metals, as some are naturally-occurring from the surrounding watersheds, rather than from mining activities.

Roger Gorke, WestFAST Chair, provided an update on EPA leadership, budget, and priorities. He noted that the Administration proposed a 31% budget cut, including the possible loss of 3,200 positions. Congress is in the process of working on another continuing resolution and omnibus funding. Two areas of focus for this Administration are infrastructure and better federal state partnerships. Federal agencies are continuing to look at WestFAST as a model for improving state-federal relationships. Jim Gebhardt, EPA Water Finance Center, added that there are no proposed cuts for SRF programs, and the Water Infrastructure Finance and Innovation Act (WIFIA) program still has funding. The NDRP goals and efforts are still in place for now, and EPA continues to evaluate infrastructure financing valuable to the western states in collaboration with other agencies and stakeholders.

In the Legal Committee, Peter Nichols, Special Assistant Attorney General to Colorado and New Mexico, provided an overview of the 2<sup>nd</sup> Circuit decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA* and the significance of the EPA's Water Transfers Rule on the tens of thousands of daily western water transfers. Meeting National Pollutant Discharge Elimination System (NPDES) permitting requirements would be economically infeasible, technically challenging, and environmentally impossible, and the fines would quickly reach astronomical levels. He noted that now may be the best time to codify the Water Transfer Rule.

**184<sup>th</sup> Council Meetings**  
**Rohnert Park, California**  
**June 27-29, 2017**

On June 27-29, the WSWC met for the 184<sup>th</sup> time in Rohnert Park, California. Six sunseting positions were revised and re-adopted that: (1) oppose any federal legislation intended to preempt state water law; (2) support federal research and the development of updated hydroclimate guidance for floods and droughts; (3) request Congress fully appropriate receipts accruing to the Reclamation Fund for their intended purpose; (4) request Congress maintain federal authorization and financial support for the USGS State Water Resources Research Institutes program; (5) request Congress and the Administration acknowledge state authority over “waters of the state,” and provide clear and

recognizable limits to Clean Water Act jurisdiction consistent with sections 101(b) and 101(g), as well as robust and meaningful state participation and consultation in their development and implementation of any rule; and (6) emphasize state primacy over water resources and request that federal agencies establish and implement appropriate procedures and processes for substantively consulting with the states. A position that requested the withdrawal of a proposed interpretive rule regarding certain agricultural exemptions to the Clean Water Act (CWA) was allowed to sunset, as the proposed rule was withdrawn.

Edgar Ruiz, Executive Director of the Council of State Governments (CSG)-West addressed members. Washington State Senator Sam Hunt is the current CSG-West Chair, and will host their annual meeting in Tacoma, Washington on August 15-19. Edgar noted the close working relationship with the WGA and the WSWC. CSG-West's Water and Agriculture Committee is focusing on water rights adjudications, as well as the WOTUS Rule. There is also a Legislative Council on River Governance that includes the Northwest States of Idaho, Oregon and Washington that is looking into water supply, hydropower relicensing and water infrastructure financing issues. CSG has created a Federalism Task Force, and is also working with others<sup>1</sup> including House Speaker Paul Ryan's Task Force on Intergovernmental Affairs.

Jeanine Jones, California Department of Water Resources (CDWR), and WSWC Vice-Chair welcomed members and noted that it has been a very busy water year for California, wrapping up a drought emergency, coping with a flood emergency, and dealing with the Oroville Dam spillway incident. The state has been working on implementing the 2014 Sustainable Groundwater Management Act (SGMA), with the formation of local Groundwater Sustainable Agencies (GSAs) from various specialized districts with water supply responsibilities. These local agencies are to manage subsidence, collect data, and increase groundwater storage, with the state agencies providing assistance with enforcement, regional planning, and technical and financial needs. Jay Jasperse, Chief Engineer and Director of Groundwater Management, Sonoma County Water Agency, provided additional details about local GSAs' authority and flexibility, enabling them to implement the sustainability program while accommodating projects that are important locally. There has been some question as to what groups and districts qualify to participate as GSAs. There are other questions, such as how the GSA authority to set well spacing requirements, monitor wells, regulate extractions, and assess fees to cover costs will impact the county well permitting programs and setback requirements.

During the Water Resources Committee Meeting, Tom Farr and Cathleen Jones from the NASA Jet Propulsion Laboratory demonstrated measuring land subsidence using Interferometric Synthetic Aperture Radar (InSAR) data collected from satellites and aircraft radar. InSAR can provide information on groundwater levels by measuring surface deformation caused by the withdrawal and recharge of water within aquifers over time. Analysis of the continuous data over several years shows the development of hot spots where subsidence reaches levels that can cause damage to aqueducts, wells, and other infrastructure. Data have been analyzed for the Central Valley

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<sup>1</sup>*Western States Water*, #2246, June 2, 2017.

and Los Angeles Basins, and they are beginning to process data for other basins in California. CDWR has incorporated InSAR into their geographic information system (GIS) for operational decision making.

Sonya Jones, USGS Water Availability and Use Science Program Coordinator, updated members on water mission activities and plans for the coming fiscal year. Since the budget structure change in 2016, Cooperative Matching Funds (CMF), which support both local science needs and federal programs, have been separated into: (1) the Groundwater and Streamflow Information Program; (2) the National Water Quality Program; and (3) the Water Availability and Use Sciences Program. Congress has increased funding, but has been very specific about how those funds are applied. Ten western states are participating in the groundwater monitoring network, with additional state participation expected. The national water use compilation for 2015 is underway, and the full report should be completed by 2018. Water Use Data and Research (WUDR) grants will be distributed in coming months. USGS has started new regional level groundwater studies, with modeling of California's Coastal Basins. There is also a pilot project on coupled surface-groundwater flow models and the Colorado Plateau. A report was released on brackish groundwater showing geographic distribution and water chemistry.<sup>2</sup>

Einev Henenson, Arizona Department of Water Resources (ADWR), summarized their automated Annual Water Use Reporting System. Many different types of reports, with nearly 60 different forms, have to be filed yearly by a variety of water users. In 2007, they started an online reporting process, which now includes well reporting, agriculture schedules and fees (paid online), industrial forms for turf and other facilities. They also automated the internal fee disbursement process. They have experienced a 60% reduction in staff, but have been able to accomplish the same goals with one-third the staff they had in 2007.

David Parker, CDWR, talked about the California Data Exchange Center (CDEC) and its objectives and ability to collect and disseminate real-time hydrologic and weather information. The centralized database monitors river levels and water quality. It serves as an early flood warning system, and provides water supply forecasting information for reservoir operations. Information is collected on an hourly basis and pushed to CDEC. There are over a thousand remote data stations that collect satellite transmissions. CDEC also houses electronically transferred information from the National Weather Service (NWS), the Bureau of Reclamation (USBR), Corps, and other state and federal agencies. The Flood Emergency Response Information Exchange (FERIX) pulls together geo-referenced information on levee status and other flood-related data for integrated management. CDEC staff includes seven programmers and one GIS specialist.<sup>3</sup>

In the Water Quality Committee, Kent Woodmansey talked about the unique features of South Dakota's general permits for concentrated animal feeding operations (CAFOs). In 2012, while EPA was issuing new CAFO regulations, South Dakota made changes to its nutrient management

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<sup>2</sup><https://pubs.er.usgs.gov/publication/pp1833>.

<sup>3</sup><http://cdec.water.ca.gov>.

plan standards, based on suggestions from producers, engineers, crop consultants, environmental groups, and others. The South Dakota CAFO permit now includes state and federal requirements to ensure that manure management systems are properly designed, constructed, operated and maintained to protect both surface and shallow groundwater. Any nutrients used as fertilizers must be applied by trained producers, in compliance with an approved nutrient management plan. All CAFOs must have a general or individual water pollution control permit under the state law, including large CAFOs from neighboring states or reservations that stockpile manure or process wastewater within South Dakota's jurisdiction. Unlike an NPDES permit, the state permit does not allow discharge to waters of the state, does not provide an opportunity for a contested case hearing, has different annual reporting requirements, and a different process for updating nutrient management plans, including Endangered Species Action Plans where applicable.

Jim Macy, Director, Nebraska Department of Environmental Quality (NDEQ), provided an update on online permitting in Nebraska. In August 2015, they started converting from paper processes. It now takes about four hours to complete a permit. A NEPA process that once took 14 days can be completed in an hour online. Permits between sister agencies used to take months to complete, but now some general permits have reduced that time. Barriers to sharing data across platforms and computer operating systems have been reduced. Over the past two years, NDEQ saved almost two full-time employees' work, which represents a significant return on investment. Next, Jennifer Wigal, Association of Clean Water Agencies (ACWA) Vice Chair and WSWC member, provided an update on the outreach efforts from EPA and the Corps on the development of a new WOTUS Rule.

Jen Verleger, North Dakota, chaired the Legal Committee meeting and provided an update on legal developments related to the Corps' water supply rule (still pending), and WOTUS litigation. Rod Walston, Of Counsel at Best, Best, and Krieger, and a former WSWC member, provided an overview of the *Agua Caliente* case and the potential impact of the 9<sup>th</sup> Circuit's decision on federally reserved water rights in general, and the potential new application of the doctrine to groundwater. Michelle Bushman updated members on legislation and litigation. The Committee also held a roundtable discussion on groundwater recharge and recovery laws. The Water Rights Protection Act and related WGA testimony were also covered.

**185<sup>th</sup> Council Meetings**  
**Albuquerque, New Mexico**  
**October 18-20, 2017**

On October 18-20, the WSWC held its 185<sup>th</sup> meetings in Albuquerque, New Mexico. The Council adopted one new position supporting several Farm Bill programs important to western states. Multiple U.S. Department of Agriculture (USDA) financial assistance programs are particularly important to producers and rural communities, water users and water quality managers, including the Conservation Reserve Program (CRP), Conservation Reserve Enhancement Program (CREP), Conservation Stewardship Program (CSP), Emergency Watershed Protection Program (EWPP), Environmental Quality Improvement Program (EQIP) and its Conservation Innovation

Grants (CIG), the Colorado River Basin Salinity Control Program (CRBSCP), and Regional Conservation Partnership Program (RCP). EQIP funding also covers a number of initiatives, including the Drought, the Ogallala Aquifer, National Water Quality, Resiliency to Climate Change, and Water Smart Initiatives. The Council supports prompt reauthorization of the Farm Bill in 2018.

The WSWC also revised and re-adopted four positions: (1) supporting Indian water rights settlements; (2) asserting state primacy over protecting groundwater quality; (3) supporting the Dividing the Waters program for judges; and (4) outlining actions federal agencies should take to expedite general stream adjudications.

During the Full Council meeting on Friday, Charles (Chuck) DuMars, Law & Resource Planning Associates, P.C. and Professor Emeritus addressed members on western water challenges and opportunities. In particular, he noted that there are some complicated challenges associated with water. Chuck commented that the way in which water arrives is changing – as experienced in the recent huge storm events known as Harvey, Irma, and Maria. Furthermore, he noted it will be interesting to find out how the federal-state relationship will play out over time. He cautioned to try to avoid litigation. The easy cases have already been resolved. Outcomes that are win-wins have been reached by collaborating with each other and our federal partners. The cases yet to be heard and settled will be tougher, and may be win-lose situations.

Pat Lambert, Western Federal Agency Support Team (WestFAST), reported agencies want to pro-actively maintain and enhance collaborative state federal partnerships, which takes persistence and patience. WestFAST will strive to engage with the states early and often on policy and technical programs. Roger Pierce, WestFAST Liaison expressed appreciation to the WSWC staff for a warm welcome. Further, he noted the WestFAST work plan is being updated taking into account WSWC priorities.

The meeting included an informative roundtable discussion on infrastructure challenges and financing, as well as other state water needs and actions.

On Thursday, Tom Blaine, New Mexico State Engineer welcomed members and discussed hot topics on water rights administration and guidelines that have been adopted and developed for evaluation, appropriation, and impairment. He noted the new guidelines provide direction on: (1) general effects; and (2) the effects on points of diversion. The general guidelines are known as the “Morrison” assessments. Some guidelines are still in the process of development.

Greg Ridgley, Chief Counsel, New Mexico Office of the State Engineer, provided an overview on legal aspects of the administration of water in New Mexico and described the Aamodt Water Rights Adjudication. This is an historic settlement for New Mexico after 51 years of litigation.

Lucia Sanchez, New Mexico Water Planning Program Manager, noted the state was divided into 16 planning regions in 1987. They are now integrating regional plans and developing their 2<sup>nd</sup>

state water plan, under a new common technical platform using water conservation and use reports. The plan addresses data needs, ground water and surface water monitoring, watersheds, conservation, and infrastructure project and funding needs. Public involvement is important with town hall meetings. Further, New Mexico is look at other states planning efforts.

During the Water Resources Committee, Josh Maxwell and Andrew Vlasaty, House and Senate Agriculture Committee professional staff, addressed the outlook for the Farm Bill reauthorization. Both Committees are committed to addressing the needs of farmers, ranchers, and stakeholders across the country. The Committees have held listening sessions and hearings on rural infrastructure, the state of the rural economy, commodities, credit, crop insurance, global and local markets, etc. Few changes are expected to the Conservation Title, given extensive changes and consolidation of programs in 2014. The listening sessions evidenced strong support for EQIP, and support for a modest increase in acreage enrollment limits for CRP. Tracy Streeter, Kansas, and Jeanine Jones, California, discussed existing and potential uses of Farm Bill programs for enhanced water management, including water conservation initiatives and transitioning from irrigated to dryland farming in some areas.

Various state water management efforts were reviewed. Julie Cunningham, Oklahoma, and Duane Smith (a former WSWC member) described work on the Southwest Oklahoma Water Plan prepared in response to an historic drought that threatened water supplies and the economy. The plan calls for specific short, medium and long-term actions to achieve sustainability. A number of federal agencies, under the WestFAST umbrella, and as part of the National Drought Resiliency Partnership (NDRP), are working to provide financial and technical assistance. Roger Gorke, EPA, addressed NDRP efforts.

Mathew Weaver, Idaho, and Jason King, Nevada, addressed respectively, aquifer recharge and recovery efforts on Idaho's Eastern Snake Plain, and conjunctive groundwater and surface water management rules and activities in Nevada's Humboldt River Basin.

Jeanine Jones and Roger Pierce, described discussions about a possible seasonal to sub-seasonal (S2S) pilot proposal for improving water supply predictions in the Upper Colorado River Basin.

Sara Larsen provided an overview of progress with the WSWC's Water Data Exchange (WaDE), and its genesis. With respect to the latter, Vince Tidwell, Sandia National Lab, described ongoing studies on energy and water needs in the western United States. WaDE is a continuation of efforts initiated through the Western Governors' Association in cooperation with Sandia and other national labs.

During the Legal Committee, Peter Nichols provided an update on the EPA Water Transfers Rule. Several states and organizations filed petitions for certiorari with the U.S. Supreme Court,

appealing the 2<sup>nd</sup> Circuit decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*.<sup>4</sup> Most WSWC member states support the decision that transfers of water without the addition of a pollutant do not require a permit under the CWA.

Several states described their processes for adjudicating or otherwise addressing water rights claims, priorities and disputes during a roundtable discussion, including Arizona, Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming.

The Legal Committee also discussed tribal water codes with respect to management and administration of water rights on Indian reservations, particularly in cases where the native land is intermingled with non-native land. States with some experience in this area include Oregon, Utah, Montana, and Wyoming.

Roger Pierce, WestFAST Liaison, summarized the WSWC/WestFAST Federal Non-Tribal Water Claims Workshop, which was held on October 18. Case studies included state and federal efforts to protect federal water resources at Crater Lake in Oregon, Devil's Hole in Nevada, and Quivira National Wildlife Refuge in Kansas. He noted three overarching themes that emerged as a result of the case studies discussed: (1) communication; (2) economics; and (3) smart use of new technologies. The workgroup will continue furthering their efforts on non-tribal federal water rights.

In the Water Quality Committee, Roger Gorke provided an update on the Environmental Protection Agency's (EPA) new Waters of the U.S. (WOTUS) rule, noting the EPA is still in drafting mode and asking states to share with the agency what they think a new rule should look like. Roger also described a workshop held about a month ago and hosted by the EPA Water Finance Center to discuss the idea of a Water Innovation Fund. Roger also stated that EPA has been approached by a group in California to do a Good Samaritan abandoned mine clean up, which an internal EPA team is looking into.

The Water Quality Committee held roundtable discussions on three topics: (1) State Revolving Funds (SRFs) and Water Infrastructure Finance and Innovation Authority (WIFIA) Projects; (2) state water quality authorities; and (3) the Bureau of Land Management hydraulic fracturing rule and state authorities. The Committee plans to send out surveys to inventory how each state defines "waters of the state," and how they use their state and delegated federal authorities to manage water quality.

Erica Gaddis, Director, Utah Division of Water Quality, updated members on the coordinated federal, state, and tribal efforts following the Gold King Mine spill to improve interagency and public communication and watershed-level water quality for ongoing legacy mine issues.<sup>5</sup>

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<sup>4</sup>*Western States Water*, #2262, September 22, 2017.

<sup>5</sup>PowerPoint 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

#### Forest and Rangeland Management

On January 23-24, Oregon hosted the fourth workshop on Forest and Rangeland Management, part of WGA Chair and Montana Governor Steve Bullock's initiative, to examine forest management programs and investigate collaborative forest landscape restoration.

Governor Kate Brown addressed attendees, highlighting the role of collaboration as not only preserving natural resources, but also sustaining rural and timber economies in Oregon. She noted the formation of the Blue Mountain Forest Partners collaborative has created progress in the timber sale program and reinstated active forest management. U.S. Forest Service Deputy Chief Leslie Weldon also provided a keynote address.

Roundtable topics included: (1) setting the stage for the conversation; (2) increasing resilience for communities and the environment – dealing with legacy effects and adapting to a changing climate; (3) getting more out of collaboration; (4) changing agency culture; and (5) supporting and diversifying rural economies. The workshop also included a case study on implementing an all-hands, all-lands approach. The series of workshops play a central role in collecting information that will position Western Governors to promote congressional efforts to improve forest management authorities.<sup>6</sup>

#### Annual Meeting

The Western Governors' Association (WGA) held its 2017 Annual Meeting in Whitefish, Montana on June 26-28. Governor Steve Bullock welcomed the governors and attendees to Montana, and in his remarks urged them to “examine the opportunities and challenges we face as a country and...the tests we face to keep our lands healthy...” The governors adopted five new policy resolutions on: (1) funding, education, research, and conservation programs for Western agriculture and responsible management of federal lands in the West, with policy recommendations to consider for the 2018 Farm Bill; (2) national forest and rangeland management, supporting programs to reduce wildfire risks and improve forest health and resilience; (3) federal use of state wildlife science, data, analysis, and expertise as the principle sources in developing regulatory actions to manage species and habitat; (4) refinements to improve the operation of the Endangered Species Act, amending WGA Policy Resolution 2016-08; and (5) innovative approaches to meet workforce development needs in the West.

The resolution on Western Agriculture acknowledges the differences and greater variations in “soil, climate, terrain...and water availability” relative to other regions of the country. Western

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<sup>6</sup><http://www.westgov.org/initiatives/forest-and-rangeland-initiative/workshops>.

agricultural and forest lands are primary sources of water supplies and other important resources. Responsible management of these public lands “provide numerous conservation benefits, water supply, and recreational opportunities for Western communities and the nation.” The resolution also notes, “Many agricultural producers in the West rely on irrigation water delivery systems that are shared among multiple producers and operated by an irrigation district, canal company, or mutual ditch company.” The governors support funding for various U.S. Department of Agriculture programs, as well as “collaborative, targeted and voluntary conservation to address locally identified natural resource issues for farm, range, and forest resource concerns on private and public lands, such as soil health, air and water quality, drought and wildfire resilience, wildlife habitat conservation and invasive species....” They support an increased role for state and local governments in managing public lands for multiple uses, including agriculture. They also support “the continued efforts of the Rural Utilities Service to provide financial assistance for drinking water, wastewater facilities and broadband connectivity in rural and remote areas, particularly in communities that have minimal or no such infrastructure.”

The resolution on National Forest and Rangeland Management notes that the states have a particular interest in improving the active management of federal forest lands, as poorly managed forests can have “significant and broad impacts on the landscapes and communities in the West, including...degradation of rivers and streams and associated water quality,” including drinking water. Many forests throughout the West have been damaged by disease and insect infestation, and the “significant decline in forest health has also created serious threats and challenges to watershed integrity, wildlife and fisheries habitats, recreational uses, businesses and tourism.” The resolution emphasizes the importance of collaborative community planning and implementation of forest health projects, addressing landscape, watershed, and other needs, and calls for continued reform of management practices to protect water quality, address fire risk, protect key habitats and meet other important community needs.

#### Summit on Realigning the State-Federal Relationship

The WGA hosted a Summit on Realigning the State-Federal Relationship in Denver, Colorado on August 25. The intent of the meeting was to explore next steps towards implementing Principles to Clarify and Strengthen the State-Federal Relationship, which were adopted by the governors in December 2016, together with the Conference of Western Attorneys General (CWAG), Council of State Governments – West (CSG-West), National Association of Counties – Western Interstate Region, and Pacific NorthWest Economic Region (legislatively created by Pacific Northwest States and Western Canadian Provinces to promote economic well-being and quality of life. The Western States Air Resources Council also signed on.

Following approval by the WSWC Executive Committee, in an August 25 letter to WGA, CSG-West and CWAG, WSWC Executive Director Tony Willardson wrote: “On behalf of the Western States Water Council (WSWC), I am writing to communicate our unanimous endorsement of the Principles... and express our support for efforts to implement them. As a government entity whose members are appointed by western governors to advise them on water policy, we are pleased

to join others adopting these principles and add our voice to the call for clarifying and strengthening state-federal relations. While the WSWC has a long working relationship with many federal agencies with water resources planning, management, development and protection responsibilities, a number of actions and events have led the WSWC to adopt a number of positions calling for renewed recognition and deference to the primary role of the states with regard to our water resources. Two of these positions are attached regarding the pre-emption of state law in federal legislation, and regarding water-related federal rules, regulation, directives, orders and policies. We look forward to working with you and others to ensure states are granted the greatest degree of deference and flexibility possible under the law.”

Other entities invited to the Summit and encouraged to consider signing the document include the Association of Fish & Wildlife Agencies, Environmental Council of the States, National Governors Association, Western Forestry Leadership Coalition, Council of Western State Foresters, Western Interstate Energy Board, and Western States Land Commissioners Association. Each organization was invited to share their views and efforts to advance cooperative federalism, followed by an extended discussion related to federal consultation with states, and what it is that states actually want with regard to participation and consideration of states authorities.

WGA Executive Director Jim Ogsbury noted that six words he really hates are “states, tribes, counties and other stakeholders.” Many expressed their frustration with being treated as any other stakeholder – and not as sovereign entities with constitutional and delegated statutory authorities. Federal statutes may recognize states as co-regulators, or states’ primary authority to manage natural resources, but generally states are not involved in the development of federal rules, regulations, directives and policies. WGA has prepared a framework for defining state and federal authority, roles and responsibilities, as well as an agency-by-agency matrix of possible reforms. WGA’s initial efforts have been well received at a “pretty high conceptual level,” and WGA will take the lead in creating a more detailed model for meaningful state-federal consultation and coordination. Participants agreed that there is a window of opportunity within which to achieve real improvements in state-federal relations and governance.

### Winter Meeting

The WGA’s winter meeting was held at the historic Arizona Biltmore in Phoenix, Arizona on December 1-2. WGA Chair and South Dakota Governor Dennis Daugaard was joined at the meeting by WGA Vice Chair and Hawaii Governor David Ige, as well as ten other governors including: Alaska Governor Bill Walker, Arizona Governor Doug Ducey, Colorado Governor John Hickenlooper, Idaho Governor Butch Otter, Montana Governor Steve Bullock, North Dakota Governor Doug Burgum, Utah Governor Gary Herbert, Wyoming Governor Matt Mead, Guam Governor Eddie Calvo, and Northern Mariana Islands Governor Ralph Torres.

The meeting featured keynotes by U.S. Department of Transportation Secretary Elaine Chao and Labor Secretary Alexander Acosta. Acosta declared, “The workplace is changing. The skills of today are not the skills of yesterday, and it’s important that education keep pace.” He added,

“Today, more than one in four Americans require a license to do their job. We want to reduce unnecessary licensing and barriers to job mobility.” Chao affirmed, “Safety will always be our number one priority and second is addressing infrastructure needs – repairing and rebuilding our infrastructure. And third, preparing for the future by encouraging innovation.”

The Governors also heard from Forest Service Chief Tony Tooke and Arizona Cardinals President Michael Bidwill. Tooke said, “We see that there is a lack of sufficient coordination across landscapes and we see the excessive costs associated with environmental planning and environmental analysis.... So to improve our customer service, we need to better understand what the requirements are of each of those customers and expand our best practices, and we will apply those innovative tools to overcome obstacles that get in the way of us doing that.” Bidwell proclaimed, “Our stadium opened 12 years ago and has turned into an enormous economic engine for Arizona,” Bidwill said. “We’ve hosted Super Bowls, college football championships, and this year, our first NCAA Final Four.”

John Raztenberger, Cheers actor and comedian, spoke over dinner. “Actors and celebrities and sports stars did not build our civilization....” It was the tinkerers. The inventors. Every single industry started with one person inventing one thing. There’s no exception to that. Every single industry was somebody tinkering in the garage or down in the basement.

The changing face of the West, workforce development, disaster preparedness, energy, infrastructure, transportation, state-federal relations and the ability of technology to impact the rural West were among the topics addressed by a series of panels.

Bruce Hallin, Salt River Project, stated: “Drought resilience requires significant investments, partnerships, and certainty.... Forest and watershed health depends on effective forest management.” Jeffrey Pillon, National Association of State Energy Officials: “The risk to the nation’s infrastructure is significant when considering the potential economic and human impacts. Last year, power outages cost the U.S. \$150 million; so far in 2017, we’ve had 15 weather disasters costing over \$1 billion.” Richard Fry, Pew Research Center: “Employment growth from 1980 to 2015 was more rapid in occupations requiring higher social or analytical skills, which typically earn higher wages.” Ryan Harkins, Microsoft Corporation: “Advances in cloud computing - and the opportunities it provides - require access to broadband.... Our initiative has an ambitious goal: establish broadband service across the country in five years.”

A panel of historians lectured on state-federal relations. Patty Limerick, Center of the American West at the University of Colorado: “The Founders didn’t have the West in mind. New institutions came into play to deal with the vast, rugged, often arid landscapes of the West.” Peter Onuf, Thomas Jefferson Foundation Professor of History, Emeritus, University of Virginia: “American history is the history of federalism ... We need to keep looking back to our country’s founding because it helps us understand the larger arc and how we fit into it.” Leisl Carr Childers, Assistant Professor of History, University of Northern Iowa: “The story of public and federal lands was trial and error.... Crafting the legal structure was necessary where realities of rugged and arid

lands were being sparsely populated. The Federal government provided support to see that public lands could be used to still have economic value to the nation.” Sarah S. Elkind, Professor of History, San Diego State University: “We want to look at the way federal policies still reflect the bottom-up process. In the Twentieth Century, lots of Americans went from seeing governments as protectors of liberty to the biggest threat.”

Governor Ige announced the latest resolutions adopted by the Western Governors, including Wild Horse and Burro Management, Public Lands Grazing, Federal Disaster Recovery Assistance for Communities in the West, and Energy in the West.<sup>7</sup>

### **National Integrated Drought Information System**

On April 20, the National Integrated Drought Information System (NIDIS) Executive Council met in Washington, DC to review implementation actions over the past six months and discuss 2017 priorities. Roger Pulwarty, Senior Scientist, National Oceanic and Atmospheric Administration (NOAA) and Tony Willardson, WSWC Executive Director, co-chaired the meeting and welcomed participants. Several other federal agencies and organizations were represented including the American Water Works Association, American Meteorological Society, Appalachia-Chattahoochee-Flint (ACF Rivers) Stakeholders, Inc., International Business Machines (IBM), Interstate Council on Water Policy (ICWP), National Atmospheric and Space Administration (NASA), National Drought Mitigation Center (NDMC), U.S. Department of Agriculture (USDA) and its Natural Resources Conservation Service (NRCS), U.S. Army Corps of Engineers (Corps), U.S. Department of the Interior’s Bureau of Indian Affairs (BIA) and Bureau of Reclamation (USBR), and the Universities Council on Water Resources (UCOWR). Many had an opportunity to update the Council on drought related activities.

Veva Dehaza, NIDIS Executive Director, summarized recent activities and called for input on future efforts. She noted interest and support for the program on Capitol Hill, looking forward to reauthorization of NIDIS authority in 2018. Reference documents describing the NIDIS public law, 2016 Implementation Plan, December 2016 Update, and NIDIS services and innovations were made available.

Peter Colohan, NOAA, addressed the relationship between NDRP and NIDIS. NIDIS is about providing early warning and risk communication, while NDRP is about early action. Peter is on the NDRP steering committee, and recently attended an NDRP meeting of acting federal agency principals. Priorities for action focus on data collection, soil moisture monitoring, groundwater and consumptive use. Recognizing green infrastructure as critical infrastructure, and innovative water use and recycling were also discussed. He referred to a January 2017 NDRP report. Peter noted NOAA is working to centralize forecasting and focus on stakeholder engagement and impact-based decision support services. He discussed the National Water Center and continuing development of

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<sup>7</sup><http://westgov.org/resolutions>.

a National Water Model, focused on streamflow measurements and projections. The model is most useful in projecting high flows.

Dave Rath, USBR, described USBR's 2015 drought program authorization, including drought planning assistance, as well as funding for both permanent and non-permanent emergency actions. USBR assistance is based on development of a drought monitoring plan, a vulnerability assessments, detailed mitigation and response actions, operational and administration plans, and a process for updating the plan. Reclamation has provided between \$5-\$10 million each year since 2015, which has been used to leverage about ten times that much in non-federal dollars. He also noted that 5-6 times more assistance has been requested than available funds. Dan Lawson, NRCS, centered his remarks on the development of a national soil moisture monitoring network, and the advantages on working with the thousands of USDA extension agents in nearly every county across the country.

Robin Webb, NOAA, noted work on atmospheric rivers and the contribution of such extreme precipitation events to ending drought. Can we predict "drought busters?" How do we improve our ability to reliably predict weather events? As evidenced by projections given last year's El Nino and this year's La Nina, which didn't materialize as expected, further research is needed to improve our understanding of the science. NOAA is working to improve their skill across short and long-term timescales, including hourly forecasts for 250 square meter grids that can be aggregated up across larger landscapes.

Ann Bartuska, USDA, Deputy Under Secretary for Research, Education and Economics, was a special guest speaker. She praised NIDIS as a "signature example of cooperation," among federal and non-federal agencies and organizations. Where are we going in the future? Well, there is increasing interest in connecting across landscapes [and river basins]. She mentioned the Landscape Conservation Cooperatives, regional climate hubs, and Regional Integrated Science and Assessment (RISA) programs. How are we going to move into a world of climate adaptation and resiliency? She highlighted the need for science-based decision-making.

Mark Svoboda, NDMC, described scenario-based drought planning and drought resiliency. Assessing drought impacts and vulnerabilities is important, as is communication of drought risk. He noted NDMC's "Dry Horizons" publication, and development of the NIDIS regional Drought Early Warning Systems (DEWS).

John Tubbs, Director, Montana Department of Natural Resources and a WSWC member, outlined work on the Upper Missouri River NDRP pilot, and Tony noted the assistance sought for a Southwest Oklahoma pilot. Both addressed the importance of recognizing and working within state water law to resolve drought related problems. They also talked about the importance of understanding and balancing both water supplies and existing water demands and uses. The WSWC WaDE program was described. Also, of note Peter Williams, IBM, highlighted a number of data driven efforts related to both water quantity and water quality.

Will Sarni, CEO, Water Foundry, discussed world-wide corporate water strategy services, addressing water issues related to physical, regulatory and reputational risk. It is important for companies to understand the risks related to operational disruptions due to water shortages, such as drought, especially when the price of water may only be “noise” on a profit and loss statement. In reality, few companies look at the risk to their production operations, including their supply chain. There is a need to think about water in terms of enterprise risk and treat it as a strategic resource. Will’s work with stakeholders and companies has led him to conclude that fact-based dialogue drives better policy and business decisions. He is working in Colorado to organize a water data hub.

There was considerable discussion of ways to better quantify the value of planning for drought and other water supply shortages. Basic economic input and output models don’t account for the many indirect costs. A number of case studies related to business siting were raised.

### **Sub-Seasonal to Seasonal Precipitation Forecasting Workshop**

The California Department of Water Resources (CDWR) and the WSWC hosted another workshop on improving sub-seasonal to seasonal (S2S) precipitation forecasting in San Diego, California on May 17-19. The meeting drew 45 state and federal agency officials, climatologists, hydrologists and meteorologists, scientists, graduate students and water managers. Jeanine Jones, CDWR and WSWC Vice-Chair, provided a summary of past efforts, future challenges and desired outcomes. She also presented examples of the potential value of improved longer range forecasts from California’s recent drought. WSWC Executive Director Tony Willardson provided context for S2S forecasting within the broader view of current water policy, law, water rights administration, and water resources development and management.

Mike Anderson, CDWR State Climatologist compared predicted and observed outcomes for the 2016 and 2017 water years. Dave DeWitt, National Weather Service (NWS), Climate Prediction Center, summarized opportunities and challenges to achieving greater predictive skill with existing tools and science. A panel of water managers discussed forecast informed reservoir operations (FIRO), with another panel of scientists outlining research and advances in predictability. Tom Graziano, NWS, described the National Water Model’s capabilities and possible improvements. Separate panels addressed improving the transition from research to operations, and the potential user applications of S2S forecast improvements.<sup>8</sup>

### **Symposium on the Settlement of Indian Reserved Water Rights Claims**

The WSWC and the Native American Rights Fund (NARF) held their 15<sup>th</sup> biennial Symposium on the Settlement of Indian Reserved Water Rights Claims on August 8-10, at the Best

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<sup>8</sup><http://www.westernstateswater.org/improving-long-range-weather-forecasts-sub-seasonal-to-seasonal-precipitation-forecasting/>.

Western Plus Heritage Inn in Great Falls, Montana. The Blackfeet Nation and State of Montana co-hosted the Symposium.

On August 8, NARF Executive Director John Echohawk welcomed attendees and provided a brief history of NARF, a non-profit started in 1975 to address tribal legal concerns, including the protection and quantification of water rights. Once the tribes convinced the federal government to file claims as trustee, the states, businesses and other stakeholders began to see the value of negotiating settlements as an alternative to litigation. The Department of the Interior (DOI) created the Secretary's Indian Water Rights Office (SIWRO) to develop criteria and procedures for a process favorable to settlements. It was not easy to reach a point where the federal government and the states are willing to work together with the tribes, but this Symposium serves as a good format to discuss settlement issues and evaluate how settlements are achieved following each session of Congress.

Tony Willardson, WSWC Executive Director, noted that WSWC was created by the Western Governors in 1965 when they saw a need for collaboration between the states to ensure they had enough water of suitable quality to meet their needs. Communication and efforts to find common ground despite our differences are key to avoiding conflict. WSWC and NARF have been working together for four decades, and the challenges of getting settlements creatively negotiated, passed by Congress, and implemented with adequate funding aren't getting any easier. Well-defined water rights make good neighbors, and we continue our joint efforts to resolve these claims across the West.

Lieutenant Governor Mike Cooney welcomed everyone to Montana. He talked about the landmark *Winters* 1908 case addressing the water rights claims on the Ft. Belknap Reservation just to the east of Great Falls, and how reserved water rights are a key component of the self-determination of Indian tribes. Over the course of 30 years, the Montana Compact Commission completed 18 compacts, with all seven Indian reservations and the federal agencies. He noted the severe drought in Montana this summer that underscore the continued need to cooperate and work together through the implementation of these agreements. John Tubbs, Director, Montana Department of Natural Resources and Conservation (DNRC), acknowledged the significance for Montana, the tribes, and the federal government to have all of these disputes resolved after more than forty years of litigation and negotiation.

U.S. Senator Steve Daines (R-MT) sent his congratulations to Montana and thanked NARF and WSWC via letter for their role in providing a forum to discuss these settlements that are cost-effective alternatives to litigation. He talked about tangible benefits, such as improving the nation's oldest water structures and putting productive farmland to good use. Senator Jon Tester (D-MT) commented via letter on the importance of reliable access to clean water for families, and stated that Congress is working to secure funding for implementation of the Blackfeet Compact and to schedule a Senate hearing on the Confederated Salish and Kootenai Tribe (CSKT) Compact. He emphasized that this work is not optional, it is a trust and treaty responsibility.



Alan Mikkelson, USBR Acting Commissioner, offered the keynote address. He passed on Department of the Interior (DOI) Secretary Ryan Zinke's support for settlements "As Interior Secretary, I believe water is a vital resource for Indian Tribes. The Federal Government has a responsibility to uphold our trust responsibilities, which includes Tribal water rights. We are continuing to work on Indian Water Settlements with Tribes, States, and all water users to ensure there is certainty for all and an opportunity for economic development in local communities." Alan described both his journey and the journey of the tribes working on water issues, and how they eventually found a successful path through respect, mutual trust, and identifying problems with their potential solutions.

The Symposium started with a primer on Western water law and Indian reserved water rights, a new session added at the request of past attendees who are unfamiliar with the legal framework that makes settlements so crucial for the economic development of the tribes and states in the West. Professor Robert Anderson from the University of Washington School of Law, noted that it's always good to get back to the basics. He covered the historical development of Western common law, from mining claims, prior appropriation, and beneficial use, to public interest, instream flows, and Indian reserved water rights under the *Winan* (1905) and *Winters* (1908) court cases. He described the conflicts that arose as the USBR (1902) began building infrastructure projects throughout the West without consideration for whether the system held enough water to sustain those projects, the passage of the McCarran Amendment (1953) allowing states to adjudicate tribal claims in state courts, and the rise in litigation through the 1970s to begin to quantify tribal water rights.

Arne Wick, Compact Implementation Supervisor, Montana DNRC, moderated the first panel that discussed the importance of gathering background information and the role of technicians in settlement negotiations. Rod Lewis, Consultant at Akin Gump Strauss Hauer & Feld, provided details about the Pechanga settlement, including the sources and quality of water, the protection of allottees, and the opportunities for water banking. David Barfield, Chief Engineer, Kansas Department of Agriculture, described the technical efforts of the state and Kickapoo tribe to establish the "direct flow" needs of the tribe using a municipal buildout development model rather than "practical irrigable acreage." The agreement allows monitoring and annual review, with flexibility to modify the assumed seepage and evaporation rates once a reservoir is built if the actual numbers are larger. Christopher Banet, Southwest Trust Resources & Protection Manager, Bureau of Indian Affairs (BIA), talked about recognizing and dealing with data gaps, including hydrographic surveys to determine quantities and quality of available surface and groundwater flow, and how sometimes this complex effort is put off until the end or even after settlements are completed.

NARF Attorney Sue Noe moderated a panel on identifying the relevant parties and issues, and how negotiations can bind larger groups. Maria O'Brien, Attorney at Modrall Sperlring, noted that aside from some federal guidelines to keep in mind, there really isn't a blueprint to figure out the unique issues, goals, and claims that will effectuate the needs of the parties. Patience, flexibility, knowing who needs to be at the table, and respect are critical. Building on mutual shared interests can create a workable framework. It's important to understand the legal context, the scope of claims, reliability of water resources, and to be aware of lurking legal, political, and social issues. Chairman

Temet Aguilar, Pauma Band of Luiseno Indians, emphasized that building relationships was important, from tribal members visiting members of Congress, to colleagues across the country recognizing the claims in terms of contract law. The support of the surrounding cities matters. Duane Meecham, Solicitor's Office Advisor, DOI, outlined the core federal goals, to resolve water claims in a way that is enforceable, can be approved by Congress, and gets wet water to the tribes, while establishing a quantity and priority date for those claims. He discussed the Administration's Criteria and Procedures, factors that are considered when appointing a federal negotiation team, and unrelated issues that can become too tangential to be included in settlements.

Next, John Thorson, Federal Water Master for the Lummi Decree, provided an overview of the role of groundwater in settlements and litigation, including recent developments in the *Agua Caliente* case. He moderated a panel that discussed several different approaches to address groundwater as a source to meet tribal water needs. Faye Bergan, former Legal Counsel on the Montana Water Rights Compact Commission, noted that the framework of the compacts enabled Montana and the tribes to tackle the difficult issues. Rather than litigate whether there was a reserved right to groundwater, their settlements acknowledge a tribal right to groundwater and protect existing non-tribal water rights. Stanley Pollack, Assistant Attorney General, Navajo Nation Department of Justice, distinguished between tribes with ample surface water supply available, and those located in dry areas where groundwater is the only viable source, and argued that the few existing cases on reserved water rights may not be inconsistent given those differences. Ruth Thayer, Native American Affairs Advisor, USBR, added that convincing technical data for good groundwater models takes time and funding, both of which are often in short supply. The Administration has difficulty signing off on a settlement without the data necessary to determine the impact of water use on surface and groundwater sources.

On August 9, Alan Mikkelson along with Pam Williams, SIWRO Director, offered a presentation on the Administration's Settlement Policy. Pam provided statistics on the 32 settlements that have been Congressionally approved and four settlements Administratively approved. She remarked that there is no cookie cutter model for settlements. She explained how SIWRO operates, with Alan as the current chairman, and how the different federal agencies participate on the assigned negotiation teams. The Criteria & Procedures (C&Ps) guide the federal decisions about supporting the settlement and determining the federal cost share. SIWRO consulted with the tribes on whether to revise the old C&Ps last Fall, and the final report will be submitted to the DOI Working Group on Indian Water Rights Settlements for a decision.

Federal costs of settlements are increasing, and Alan noted that they're looking for new funding mechanisms, looking at the \$15 billion Reclamation Fund as a more reliable source to resolve the infrastructure components of Indian water rights settlements. Economic development and infrastructure investments are important to the Native communities, who need access to clean, reliable water while facing drought conditions. He added that litigation is pending for 65 tribes in 12 states, with more requests for federal litigation assistance. But we can't predict the outcome of litigation, or address the needs of federal, tribal, and state parties the way settlements can.

Greg Ridgley, General Counsel to the New Mexico Office of State Engineer, moderated a response panel, providing state and tribal perspectives of how the Administration's policies have affected various settlements over time. Vanessa Ray-Hodge, Attorney at Sonosky Chambers Sasche Mielke & Brownell, noted how the Administration has changed its view on federal cost share, dealing with scoring issues, earmark bans, and the recent Bishop letters.<sup>9</sup> Ryan Rusche, Tribal Attorney, Confederated Salish & Kootenai Tribes, said that it's an exciting time, with Secretary Zinke leading the DOI and Chairman Mikkelson leading SIWRO, both of whom understand the significance of these settlements to the tribes, states, and federal government. Norman Johnson, Natural Resources Division Director, Utah Attorney General's Office, described the experiences of Utah and the Navajo Nation in completing their settlement, and the process of educating the Administration after a federal team was assigned.

The panel describing the Blackfeet Nation's water rights settlement was moderated by Susan Cottingham, former WSWC member. Panelists included Ryan Smith, Shareholder at Brownstein, Hyatt, Farber and Schreck; Jay Weiner, Montana Assistant Attorney General; Sam Gollis, Indian Resources Section Attorney with the U.S. Department of Justice; and John Chaffin, Attorney with the DOI's Solicitor's Office. The panel started with a welcome from Chairman Harry Barnes from the Blackfeet Nation. He said there was no instruction manual to help them, and it took considerable effort for the tribe to be recognized as a stable government with an elected council. The Blackfeet Nation held a referendum in April on the Congressionally-passed settlement, and 75% the members approved the settlement. The tribe now controls 95% of the water that flows through its lands. He described some of the challenges of wrestling the settlement through Congress, how the Bishop letter gave DOI a stronger negotiating hand, and the challenges that still lie ahead in funding the implementation of the agreement.

Ryan Smith pointed out that Congressional approval has become very bi-partisan, but it takes a great deal of effort to work with the Office of Management and Budget (OMB). He explained that the tribe has a limited ability to market the water off the reservation, and the state is providing funding to mitigate the impact of non-reservation users on one of the creeks. Jay Weiner provided a Montana perspective on the Compact process that evolved over time, and acknowledged the many concessions the tribe had to make before the Administration would approve the agreement. Sam Gollis and John Chaffin discussed the waivers and withdrawal of tribal objections to USBR water rights claims, although Montana has stepped in to object to the claims in place of the Blackfeet Nation.

Joe McKay, Blackfeet Tribal Business Council Member, and Chief Earl Old Person of the Blackfeet Nation, presented an historical and cultural perspective on the Blackfeet Compact. Joe explained that the Blackfeet people were not accustomed to thinking of water in terms of legal ownership, diversions, and beneficial use. They believed they had the right to use the water that crossed their lands, and since they lived at the headwaters, they weren't ever worried about protecting their water from upstream users. In 1978, as Montana was starting to adjudicate water

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<sup>9</sup>Representative Rob Bishop (R-UT), Chair, House Natural Resources Committee.

rights, his father took him aside and said that the Blackfeet people were going to wish they had found a way to store all of this water, because someday it would be more precious than gold. As an attorney, Joe saw the risks and limitations of litigation, including a 1924 Debler Report that quantified only 284,300 acre-feet for the tribe on the Two-Medicine, Cut Bank, and Badger Creeks. Negotiating a settlement opened opportunities to go beyond priority dates, diversions, and historic uses of water, to include: (1) opening up an international treaty; (2) addressing jurisdiction, regulation, and control of water both on and off the reservation; and (3) allocating water from Lake Elwell and the St. Mary's canal. Persuading the members of the tribe that settlement was a better alternative was a decades-long process, and he noted that he was hung in effigy for his advocacy of settlement in the early days. Joe shared an experience of speaking with one of his tribal elders, reasoning that the Blackfeet people did not own the water or have the right to stop the water from flowing downstream, ending the lives of the beings that also relied on that water. "We only have the right to use the water that will meet our needs." On a final note, he added that going through the Bishop letter process was like renegotiating the settlement with the Administration, only the tribe had no leverage. DOI required several significant concessions that were not included in the previous negotiations, and the only thing the tribes would get in return was the Administration signing off on the settlement to meet the requirements of the letter.

Chief Earl Old Person talked about how he stood with the elders of the tribe back in the 1950s and 60s, saying water flowing through their land unquestionably belonged to the tribe. By the 1980s, he and the elders realized that they would need to do something to protect that water within the framework of the non-Indian laws, and they were concerned about whether their treaties would be honored. With so many laws against them, the elders saw that they would not be able to win through litigation, and that they needed to make decisions that would protect their future and hold their people together. There are still members of the tribe opposed to the Compact, unsure if it's going to help or cause more problems, given the lessons of the past. It's up to the tribal leaders to explain it to their people, to stand together for greater strength. "Today I'm glad that I could be a part of what has taken place."

On August 10, the Symposium concluded with a discussion of settlement legislation and getting bills through Congress. Brandon Ashley, Senior Policy Advisor, Senate Indian Affairs, talked about the two-year cycle of Congress and how the window to pass legislation seems to get smaller every session. He talked about the importance of getting bills introduced early in the session to allow for hearings and markups in the Senate and House, and having air-tight clarity in the language. When these bills move, they move quickly, and as soon as Congress identifies a bill that can be used as a vehicle to get these settlements approved, there isn't time to make amendments. Even small clerical errors can literally take another Act of Congress to fix.

Matthew Muirragui, Professional Staff, House Natural Resources Committee, pointed out that most members of Congress don't have a background in water law or Indian law, and the message about fulfilling trust obligations needs to be persistent, consistent, and simple. The message is more meaningful when it comes from the tribes rather than their non-tribal attorneys or lobbyists. He also noted that the Bishop letter has set a higher bar for settlements to be approved by the House.

Melanie Stansbury and Lane Dickson, both Professional Staff from the Senate Energy and Natural Resources Committee, offered additional thoughts, including the importance of continuous engagement with the Administration and the relevant committees in Congress. Melanie pointed out that not all of the settlement language needs to be in the proposed legislation, only those components where Congress has a role. There is a legislative council that works on the language before a bill is introduced, and that language should be fully vetted and supported with consensus from the tribe, state, DOI, and Congressional delegation. Regarding the Bishop letter, she noted that there is something to be said for clearly articulating the cost-benefit analysis, and talked about the value of working with an economist.

Lane added that lawmakers don't like to be surprised by big price tags they don't understand. When introducing a bill, members of Congress become stakeholders as well. Coalitions of tribal and state leaders are vital to educate those members about the benefits of these settlements throughout the West: (1) removing the uncertainty that comes with unresolved claims; (2) improving water management particularly in areas of drought; (3) unleashing the ability of Indians and non-Indians to develop and make economic improvements; (4) getting wet water to the tribes; and (5) the value of problem-solving partnerships between the settling parties.

NARF Attorney Heather Whiteman Runs Him, moderated a response panel that addressed recent experiences with settlement legislation. Stephen Greetham, Senior Counsel, Chickasaw Nation, said there really is no substitute for having a powerful champion in Congress. Communicating their message to the Congressional delegation and the Administration about what the tribe was trying to accomplish didn't start at the end of the negotiations, but at the time they filed their lawsuit. While the human message is always important, you also need to know your audience and speak their language, so they will be willing to carry that message back with them. Ryan Smith emphasized that all roads lead past OMB, and every settlement with a federal funding component will require convincing OMB that it makes sense from a federal perspective. Tracy Goodluck, SIWRO Deputy Director, noted that the Administration is probatively and consistently supportive of resolving its federal trust responsibilities through these settlements, striving for Indian self-determination and economic self-sufficiency. Finding creative ways to fund these settlements will be a challenge as costs continue to rise. The Bishop letter is a reality, and we have to have economic justification for these settlements to be approved by Congress. With that process, she said, we were able to pass four water rights settlements in the 114<sup>th</sup> Congress.

### **State General Water Adjudications**

On August 18, the CSG-West Agriculture and Water Committee met in Tacoma, Washington. Two WSWC members, John Simpson (Idaho), Partner, Barker, Rosholt & Simpson, LLP, and Alan Reichman (Washington), Assistant Attorney General and Senior Counsel for the Water Resources Program within the Washington State Attorney General's Office provided presentations. John's presentation focused on Idaho's Snake River Basin Adjudication (SRBA) and the Swan Falls Settlement, which involved customers of Idaho Power challenging the company over protecting its hydropower resources and water rights, leading to the adjudication. Although some

have questioned and suggested modifying the Prior Appropriation Doctrine, in Idaho: “We have hung on to it as strong as we can.” Idaho has had a permitting process for surface water use since 1971, and for ground water since 1983. Prior to this, “Constitutional Rights” to the use of water were acquired simply by diversion and beneficial use.

John explained the federal McCarran Amendment, which waives U.S. sovereign immunity and allows for federal water right claims, including tribal water right claims, to be decreed in state court as part of any general stream adjudication. While nearly all SRBA rights have been decreed, Idaho continues to work on adjudicating other river basins. Of note, the SRBA has taken 27 years, \$94 million and resolved 43,822 contested cases, while addressing some 50,000 federal water claims. He also explained that the U.S. Supreme Court held that federal agencies were not subject to the type of fees Idaho imposed on other water users claiming water under the adjudication. He described the importance of the development and use of an Eastern Snake Plain Groundwater Model and subsequent conjunctive administration of surface and groundwater. One of the catalysts for the SBRA was the impact of groundwater development on the Thousand Springs area and senior surface water rights.

Alan focused on the *Ecology v. Acquavella* case and adjudication of the Yakima River Basin. The Washington State Water Code was enacted in 1917 and established an adjudication process. Like Idaho, there are many water rights established and recognized under common law that predate the 1917 statute. Prior to permitting requirements, landowners only needed to fill out a claim form. Statewide there are some 170,000 historical pre-code claims. The *Acquavella* case started in 1977, with the U.S. threatening to sue on behalf of the Yakama Nation to protect tribal water rights. The claims eventually were brought into state court under a general adjudication. Progress on resolving the claims was delayed until about 1987, and a proposed final decree was just issued on August 10, 2017, opening an eight-month period for objections and review of rights that were conditionally confirmed in 1989. This is a significant accomplishment as the Yakima Basin accounts for about 15% of the total surface water area of the state. Alan remarked that progress on adjudications is limited by the availability of state funds.

Questions raised addressed the challenge of transitioning between rural and urban uses. Agriculture generally holds senior surface water rights under the Prior Appropriation Doctrine. While there are conflicts among users, Alan observed: “Solutions happen when people come together.” In the Yakima Basin they have developed a win-win plan for the future.

## WATER DATA EXCHANGE

The Water Data Exchange (WaDE) program continues to expand. At the beginning of 2017, the WaDE Central Portal supported twelve different state water agencies, spanning ten states. By the end of the year this was increased to fifteen, some states with multiple agencies, others with multiple datatypes (i.e., more than one primary datatype such as water rights). See Figure 1 for the WaDE Central Portal status at the end of the 2017 calendar year.

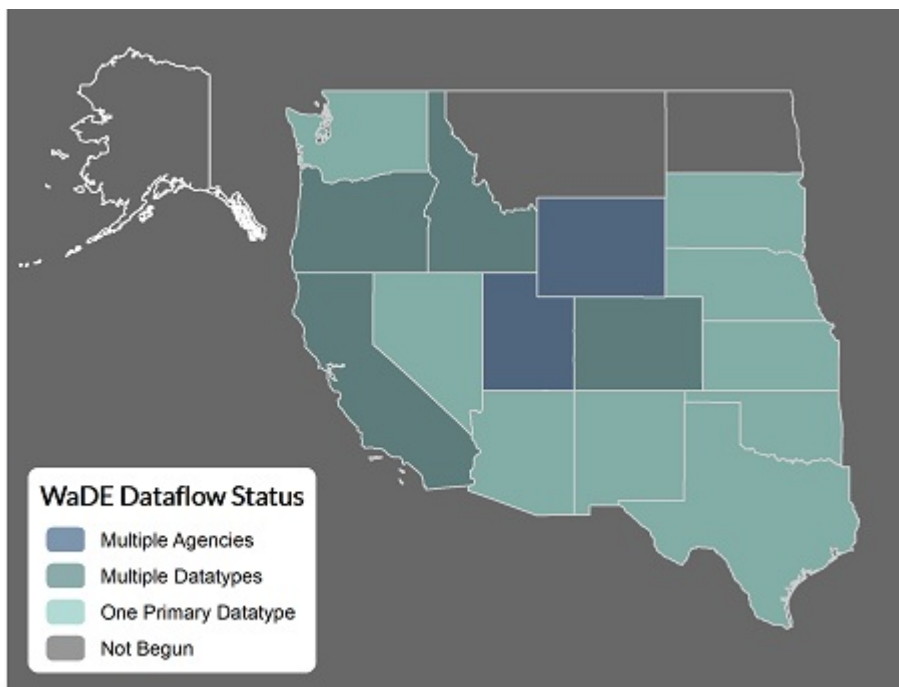


Figure 1. Status of WaDE Program Providers in 2017

The original WaDE Central Portal (Beta) was replaced with an entirely new website that could present the WaDE program in a more integrated format. The new site was launched at the WSWC Spring Meeting in Nebraska City, Nebraska. The new website contains a wealth of information about the WaDE program history and project status, database components, web services documentation, an Application Program Interface (API) for software and application developers, governance and funding entities for the program, and a community forum to engage and solicit feedback from users. The new website can be found at <http://wade.westernstateswater.org>. (see Figure 2)

To provide more examples of how to use the WaDE API, WSWC staff put together several R/Shiny-based applications that can be used by developers in their own applications (R and Shiny are a statistical software package, computing environment and a web application hosting service, respectively). For example, the graphic below includes a barplot or pie chart of any selected Detailed Analysis Unit (DAU) - California's preferred geospatial index - and the related categories and amounts of water supply and water use for the year 2012. Several variations of this and water rights viewing applications were developed and made available on the WaDE website under the "How WaDE Works" menu item.

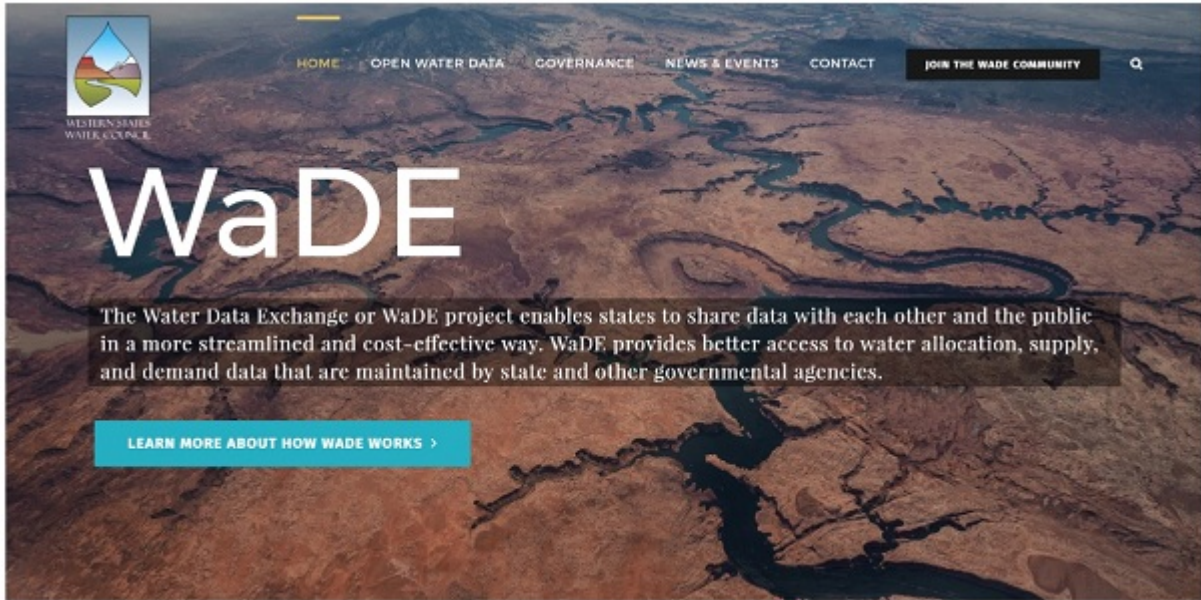


Figure 2 Header for the WaDE website - [wade.westernstateswater.org](http://wade.westernstateswater.org)

**WaDE Component Development.** Google Analytics tracking widgets were added to the WaDE web services code, as well as style and front-end user interface improvements. The WaDE database and web services software for v0.2 were also finalized prior to the website launch. User feedback is continually being sought from both data providers and potential data customers. These are also being collated for future inclusion as “known issues” on the WSWC’s GitHub Community repository. Modifications requested thus far include data elements for increased geospatial data support. The inclusion of stream segment addressing site-specific data would also enable these sites to be indexed to a national scale data-sharing platform based on the National Hydrography Dataset. The federal Advisory Committee for Water Information's (ACWI) Open Water Data Initiative (OWDI) group, with WSWC participation, has continued its work to develop this platform or rework the National Water Model to be able to include heterogeneous data providers.

Other modifications requested by users include the ability to filter data by datatype (e.g. water supply, water use) in addition to the current indexing by geographic location. This was completed in 2017. Registration of state web service endpoints and components in the Exchange Network Discovery Service (ENDS) and Reusable Component Service (RCS) was a requirement to complete WSWC's Exchange Network (EN) grant obligations. All data providers in WaDE, regardless of receiving grant funds or not, had their web service endpoints entered into the ENDS system. The WSWC’s GitHub repository was added to the EN’s RCS platform, to allow interested developers to access the most recent version of all WaDE components that can be shared publicly.

As more and more partners provide information in WaDE, the difficulty of maintaining all the system components and meeting all providers’ security requirements has increased as well. There are a number of challenges related to the distributed-node architecture that was initially selected by the technical workgroup at the onset of the WaDE pilot. With that in mind, a review of alternate



architecture approaches began, including hosting the system on a cloud platform or at an available supercomputer center, or continuing the current local/distributed node setup with a local cache copy of the entire node. This review task was undertaken, while also investigating the capabilities that WSWC member states have regarding cloud computing and related strategies, jointly and with financial assistance from the NASA Western Water Applications Office (WWAO). See the Outreach and Engagement section below.

**WSWC Water Information & Data Subcommittee (WIDS).** During 2017, WSWC reinvigorated the WIDS, composed of member agencies' IT and program staff and federal representatives who specialize in water data topics and hands-on water data management. The primary purpose of the WIDS is to advise WSWC staff and the WSWC Executive Committee and oversee and direct present and future WSWC data-related efforts, including WaDE. WIDS serves as a forum for addressing basic water data issues, data-sharing, data best management practices, quality control, publication, etc. Other tasks include the consideration, development, and hosting of a WSWC Water Information Management Systems (WIMS) Workshop, to foster the exchange of technical or data-related challenges and solutions between state agencies. The WIDS also directs and guides funding procurement and provides guidance and direction for data-sharing amongst WSWC members. Current WIDS membership and all meeting information can be found at <http://wade.westernstateswater.org/water-information-and-data-subcommittee-wids-page/>.

**Exchange Network (EN) Grant Partnerships.** Texas (the FY2013 grant lead state), Oklahoma, Idaho, Oregon, and Washington - the five FY2013 state partners - finalized the datasets that they would be maintaining in the WaDE platform and successfully closed out their grant obligations. With the exception of Washington, the partners agreed to continue to participate in the WaDE program via the WIDS.

WSWC's second EN-WaDE grant partnership (FY2015) is led by California, with South Dakota and Nevada as state partners. The California Department of Water Resources (CDWR) completed its initial operating capability and is planning an update to the water supply and water use data in 2018. These data will be uploaded when they are finalized. WSWC completed modifications to the WaDE Central Portal interface required to support additional representations of CDWR's data, allowing them to be summarized at the Detailed Analysis Unit, Planning Area, and Hydrologic Unit scales.

CDWR has begun a concerted effort to implement AB1755 - the Open and Transparent Water Data law enacted in 2016. The new law requires a comprehensive survey of data sources and potential use cases that can be built, with cooperation across California agencies with a water focus. CDWR requested assistance from WSWC, including reviews of technical documentation for the process, and the development of their Open Water Information Architecture (OWIA). WSWC benefitted from these interactions by learning more from experts in the field, and a review of architecture platforms and existing water data standards that will improve the WaDE 2.0 schema and visualization.

South Dakota's Bureau of Information Technology (SDBIT) successfully mapped their native water rights dataset to the WaDE schema. At this time, their WaDE node is located on WSWC servers, with a plan to relocate the application to SD-BIT in mid-2018, with the availability of the WaDE software in C#, their supported programming language.

The Nevada Division of Water Resources successfully mapped their native water rights datasets to the WaDE schema also. They will add water use datasets into the WaDE portal in mid-2018 after a more extended quality assurance quality control (QA/QC) process. During 2017, WSWC, South Dakota, and Nevada requested and received reimbursements from CDWR for the work completed under the FY2015 EN-WaDE Grant.

The FY2015 EN-WaDE Grant partner's steering committee held quarterly conference calls/webinars to update the group and evaluate partner progress. The group's meetings and materials can be found online at: <http://wade.westernstateswater.org/fy2015-wade-en-grant-partners/>.

**Outreach and Collaboration.** WSWC staff continue to participate in a number of forums and conferences to increase awareness of general "open water data" concepts and support for the WaDE program. These include participation at Open Water Data Initiative (OWDI) meetings that seek to make federal water-related datasets more widely available. WSWC staff, continue to work with the USGS Water Availability and Use Program (WAUSP) staff, participating on their Water Use Strategy team, and helping USGS to implement the WaDE application to enable web services on their Aggregated Water Use Database (AWUDS). WSWC and USGS are working to build out this capability and also to enable quick set up of WaDE using Amazon Web Services.

The USGS also maintains a program that is of particular interest to WSWC and its member states. The Water Use and Data Research (WUDR) program seeks to augment state data gathering programs. WSWC staff attended and provided feedback during a WUDR Proposal Review in Austin, Texas in January 2017. WSWC was able to ensure that states who share their water use data using WaDE as a supporting platform would fulfill the publication requirements for a WUDR grant.

Other outreach efforts include participation in a dialogue series hosted by the Aspen Institute on Sharing and Integrating Water Data for Sustainability in San Francisco, California in February that brought together a select group of water managers, policy makers, regulators, and leaders from private and social sectors to develop principles and recommendations to articulate the value of investing in, sharing, and integrating data systems for more sustainable water management. The Aspen Institute published a report of their findings from the dialogue entitled: *Internet of Water: Sharing and Integrating Water Data for Sustainability* (<https://www.aspeninstitute.org/publications/internet-of-water/>).

WSWC staff presented the website launch during the WSWC's Spring Meeting in Nebraska City, Nebraska in April of 2017, as well as a follow-up presentation at the WSWC's Summer Meeting in Rohnert Park, California in June and the Fall Meeting in Albuquerque, New Mexico in October.

WSWC staff attended the 2017 Exchange Network conference in Philadelphia, Pennsylvania in May, and presented on water and environmental data interoperability at a workshop conducted by the National Integrated Drought Information System (NIDIS) Drought Early Warning System (DEWS) kickoff meeting for the California and Nevada region.

Ongoing collaboration with the NASA Western Water Applications Office (WWAO) resulted in an opportunity to present WaDE to NASA researchers and WWAO team members in July. During that conference, WSWC and WWAO staff members were able to meet and discuss shared concerns about whether cloud computing platforms were an option for state water resource agencies for installation and operation of NASA Applied Science Program (ASP) research tools and as a future WaDE architecture solution. Their shared interest in the topic lead WSWC to survey its members on their interactions with Centralized IT Services (CIS) groups within each state, determined whether or not they use any cloud platforms, and if so, what they were hosting, and if not, why they don't use the cloud.

The survey was conducted during the latter half of 2017. WSWC and NASA's WWAO agreed to co-host a Water Information Management System (WIMS) workshop on the Jet Propulsion Laboratory (JPL) campus in Pasadena, California in January 2018. The results of the survey and the WIMS meeting were to be compiled in a report and as a suite of information available on the WSWC website.

Other outreach efforts included participation in a workshop on the OWIA effort hosted by CDWR, and WSWC staff speaking about the WaDE program at the Wyoming Water Forum in Cheyenne, Wyoming in October.

WSWC staff attended and provided feedback on a WUDR Proposal Review in Austin, Texas in November 2017. WSWC was able to ensure that states who share their water use data using WaDE as a supporting platform would be able to fulfill the publication requirements for a WUDR grant. Further, the NASA WWAO director invited the WaDE Program Manager to present on the WSWC and WWAO's collaborative work and on WaDE during a Western States Water session at the American Geophysical Union (AGU) conference in New Orleans, Louisiana in December.

**Summer Internships.** Carly Hansen, a University of Utah Civil Engineering PhD candidate, continued with WSWC as a hydroinformatics intern during 2017. She compiled many of the R/Shiny applications and developed the increased search functionality for the WaDE Central Portal. During the summer of 2017, WSWC hired another civil engineering hydroinformatics PhD student from Utah State University, Adel Abdallah, to assist with the WaDE 2.0 schema development and other visualizations of WaDE data.

## WESTERN STATES FEDERAL AGENCY SUPPORT TEAM

The Western States Federal Agency Support Team (WestFAST) promotes collaboration between the WSWC and twelve federal agencies with water resource management responsibilities in the West. WestFAST was established pursuant to a request from the 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's Forest Service (USFS) and Natural Resources Conservation Service (NRCS); U.S. Army Corps of Engineers (Corps); U.S. Department of Defense (DOD); U.S. Environmental Protection Agency (EPA); the U.S. Department of the Interior's - Bureau of Land Management (BLM), Bureau of Reclamation (USBR), National Parks Service (NPS), U.S. Fish and Wildlife Service (FWS), and U.S. Geological Survey (USGS); National Aeronautics and Space Administration (NASA); and National Oceanic and Atmospheric Administration (NOAA). The WestFAST/WSWC Liaison is Roger Pierce, NOAA.

In 2017, WestFAST focused on many federal initiatives and promoted communication between federal agencies relevant to priority issues identified in the above-referenced WGA and WSWC reports and resolutions. WestFAST representatives reviewed WSWC committees' work plans and the WestFAST Work Plan to ensure consistent activities could be promoted for 2017. The Federal Liaison held conference calls with WSWC leadership and WestFAST leadership to correlate WestFAST actions and WSWC priority objectives.

- WestFAST members held monthly conference calls to discuss ongoing programs and coordinate interagency and federal-state collaboration and outreach opportunities.
- WestFAST "Water Data" and "Drought and Water Availability" Workgroups met periodically to work on specific planned actions in these areas.
- WestFAST published a monthly newsletter distributed to more than 163 federal agency staff, and state and local partners.
- WestFAST continued to maintain a WestFAST web site containing information about WestFAST's origins, goals and objectives, and documentation of activities, reports, newsletters, and webinars.
- WestFAST continued its series of "Special Topics" information meetings, held mainly via webinar, on issues of interest to WestFAST member agencies and WSWC water-resource managers, scientists, and stakeholders. The series included the following in 2017:

- o 6/22/17 - NASA Satellite Data and Hydrology Tools
  - o 8/24/17 - EPA's Water Innovation Fund
  - o 10/10/17 - "Getting to know your Cooperative Ecosystem Studies Units"
  - o 11/16/17 - Getting to know the DOI-USGS Climate Science Centers
- WestFAST sponsored and/or participated in five WSWC meetings and four jointly-sponsored WSWC seminars and workshops. WestFAST agencies gave a combined 64 presentations during these events. These efforts were very beneficial to both the WSWC and the federal agencies, in that they provided a forum for discussion of a number of priority issues.
- WestFAST has continued its work to foster federal-state communication on general water issues in the West. One of the larger emerging issue in the west is the Waters of the United States (WOTUS) Ruling 2.0. Discussions that the Environmental Protection Agency was rescinding the 2015 rule and would come up with a replacement began at the start of the Trump Administration. The WSWC with input from the WestFAST has continued preparing the states for the upcoming rulemaking. The idea was to get everyone together and start discussion on how improvements can be made to the rule.
- The WestFAST Federal Liaison continued working with the Western Regional Partnership (WRP) on the water-resource components of their programs. The WRP is a Department of Defense-led collaboration between federal, state, local and tribal interests in six western states: Arizona; California; Colorado; Nevada; New Mexico; and Utah. The WestFAST Liaison is working with the WRP Natural Resources Committee assisting them in developing a coordinated water-resource action plan.
- WestFAST agencies continued support for the Open Water Data Initiative (OWDI) and to provide linkage from western states to initiatives and working groups forwarding the coordination of spatial water data among all levels of government. The OWDI will be collaborative, building on the work of the Integrated Water Resources Science and Service (IWRSS) consortium, and engaging the Subcommittee on Spatial Water Data (SSWD), which is a shared subcommittee of the Federal Geographic Data Committee (FGDC) and the Advisory Committee on Water Information (ACWI). Bureau of Reclamation (USBR) has taken the lead in an OWDI Water Availability and Water Supply Use Case Project. Part of that activity includes assessing the interoperability of USBR data.
- WestFAST continued to support the WSWC in the implementation of the Water Data Exchange (WaDE). WaDE is a cooperative effort between the WSWC, the WGA, DOE, USGS and WestFAST. WaDE is a data framework (not a data repository) which provides a central catalog of state water data (specifically water use and supply data) that allows data to be discovered and accessed via web services. WestFAST sees WaDE as a potential tool to support federal water resource programs such as the National Water

Census and sub-programs that include assessing national water use and availability. The WSWC is also interested in promoting and incorporating shared federal water-resource datasets (streamgage data, snowpack and streamflow forecasts, reservoir storage and gage elevations, etc.) into WaDE to assist the states and make their water planning efforts easier. The WestFAST Water Data Workgroup developed a pilot study plan to test WaDE's current utility in accessing water use and supply data, and to identify federal data sets that might be cataloged in WaDE.

- The WestFAST continues to assisted in the coordination of the water-use component of the USGS National Water Census with the WSWC and with the development and implementation of WaDE. The National Water Census and the USGS Water Use Data and Research Program (WUDR) are implemented through the Department of the Interior's WaterSMART Initiative. The programs develop new water accounting tools and assess water availability at regional and national scales. WestFAST has facilitated coordination between WUDR and WSWC WaDE developers and briefed the WSWC on the program. The WUDR program is providing financial assistance through cooperative agreements with State water resource agencies to improve the availability, quality, compatibility, and delivery of water-use data that is collected or estimated by States. WestFAST has assisted informing States, through the WSWC of the scope of these funding opportunities.
- WestFAST continues to provide support to state and federal agencies engaging in the National Groundwater Monitoring Network (NGWMN). The NGWMN Data Portal provides access to groundwater data from multiple, dispersed databases in a web-based mapping application. The NGWMN is a product of the Subcommittee on Ground Water (SOGW) of the Federal Advisory Committee on Water Information (ACWI).
- The WestFAST and WSWC continue its work on Non-Tribal Federal Water Rights. This is a continuing state-federal relationship through the implementation phase of decreed and adjudicated water rights.

## OTHER IMPORTANT ACTIVITIES AND EVENTS

### Western States Water

Since the first issue in 1974, the WSWC'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 WSWC meetings, changes in WSWC membership, and other WSWC 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 congressional 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 2017 primarily taken from the newsletter. However, this does not represent an exclusive listing of all WSWC activities, or other important events. Rather, it seeks to highlight specific topics.

### Western Governors' State of the State Addresses

During their state of the state addresses, a few western governors touched on water-related issues. Alaska Governor Bill Walker called for a sustainable fiscal plan accounting for reduced revenues. He praised the Transboundary Working Group and Lt. Governor Mallot for their work on an agreement to allow Alaskans to have more say in the permitting of Canadian projects that impact Alaska waters. He thanked the British Columbia government "...for recognizing their responsibility to clean up the old Tulsequah Chief Mine. Water does not recognize political borders. I am committed to protecting our waters and the rich resources they support."

Governor Walker noted recent victories for state sovereignty, including a favorable Supreme Court ruling in *Sturgeon v. Frost*<sup>10</sup> and a significant win in the *Mosquito Fork* case regarding frivolous government claims.<sup>11</sup> Governor Walker also noted efforts to address the impacts of a changing climate, "Alaskans have known for some time that our landscape is changing at an accelerating pace. Alaska is the only Arctic state in the nation – and we are ground zero for climate impacts. We must maintain the integrity of our lands, air and water for future generations. My Administration is developing a framework to engage Alaskans in this effort to protect our way of life. We will seek out local and traditional knowledge. We will seek out industry input. We will seek to involve every sector to help us meet this challenge. It is one of the greatest challenges of our era. We look forward to working with you to create a legacy of timely response."

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<sup>10</sup>*Western States Water*, #2185, April 1, 2016.

<sup>11</sup>*Western States Water*, #2191, May 13, 2016.

California Governor Jerry Brown highlighted several of the State's recent accomplishments, including passing a water bond. He pointed to infrastructure investment as an area where California and Washington, D.C., can work together. "We have roads and tunnels and railroads and even a dam that the President could help us with. And that will create good-paying American jobs."

On January 12, Colorado Governor John Hickenlooper delivered his annual State of the State address. He discussed partnering with rural economies on intractable issues including the energy, economy, and clean air and water. He noted that "...in the first year of Colorado's water plan, we made progress on every measurable goal. The Water Conservation Board has a strong funding plan to ensure we stay on track, so farmers can keep feeding millions while we protect our environment."

Idaho Governor Butch Otter expressed hope for improved state-federal relationships. "For years now, we in the West have been frustrated by the increasing imposition of the federal government's will over our livelihoods and quality of life. Regulatory bureaucracies and entrenched interests have become practiced at reaching far beyond the letter of such laws as the Clean Air Act, Clean Water Act and Endangered Species Act to essentially nullify the commonsense stewardship of states and local jurisdictions. I am optimistic that President-elect Trump and his team will work to ensure that meaningful reforms are implemented to keep such agencies as the EPA, the BLM, the Forest Service and the U.S. Fish and Wildlife Service in check. Their focus must be shifted to working more collaboratively with states to develop national policies that are flexible enough to accommodate local needs and realities." He added, "Idaho has an exemplary record of managing and protecting our own natural resources. Our own citizens and communities have the civic virtue and proven know-how to ensure our lands and resources are responsibly used for the long-term economic and recreational opportunities they can provide." He provided an example of state-federal collaboration, where authority granted by the 2014 Farm Bill enabled Idaho to play a more active role in watershed restoration and reducing threats to watershed from catastrophic wildfires on federal forests and intermingled timberlands. "Folks, federalism can and does work, but only when it involves willing partners."

Kansas Governor Sam Brownback emphasized a balanced budget that reconciles spending with available revenue, seeking greater efficiencies in government services before asking for more revenue. "This Administration has focused efforts on solving long term issues facing our state like the need...to preserve water resources. We've seen the life of the Ogallala Aquifer extended in some areas through conservation and new technology."

Montana Governor Steve Bullock addressed the state legislature, judges, and tribal leaders. He celebrated recent infrastructure improvements, including putting people to work "...in 70 communities to deliver clean drinking water and upgrade sewage treatment plants." He stated that his proposed budget included money for additional improvements. He pointed out that environmental protection and economic development, particularly for Montana's outdoor economy, are not mutually exclusive endeavors. The State's energy resources can be used responsibly to provide good paying jobs, while "safeguarding our quality of life – especially our clean air, clean water, and the tens of thousands of jobs that rely on them."



Nebraska Governor Pete Ricketts delivered his State of the State address, praising the unicameral legislature for consistently passing a balanced budget on time, and highlighting efforts to make government more efficient and effective. “The Department of Environmental Quality launched online applications for storm water permits and new general air construction permits, significantly reducing wait times.” He also noted the State’s reduced revenue, and the potential tax reforms on agricultural lands based on methods used by neighboring states, including Kansas, North Dakota and South Dakota.

Nevada Governor Brian Sandoval praised Nevada’s recent economic development successes, noting that the state has “taken an international leadership role in the development of unmanned aerial systems, autonomous vehicles, and water technology through our economic development efforts.” He emphasized the importance of state parks, including Lake Tahoe. “We must continue the effort to preserve what Mark Twain called ‘surely the fairest picture the whole world affords,’ and my budget includes funding to fight aquatic invasive species, reduce the threat of wildfire and improve storm water drainage. I don’t have to remind anyone about the duty we have to protect this awesome natural treasure and its world-famous clarity.”

New Mexico Governor Susana Martinez addressed concerns about lost oil and gas revenue, consolidation of state agencies, and greater transparency and efficiency in government spending. “Let’s invest in big projects like water infrastructure or our roads and highways. In San Juan County for example, lawmakers pooled their capital funds and made critical improvements to their wastewater system. And in Bernalillo and Sandoval Counties, legislators invested in transportation infrastructure. These projects will benefit the communities for decades, create jobs and lay a foundation for economic growth.”

North Dakota’s newly elected Governor Doug Burgum delivered his first state of the state address. He addressed concerns over the Dakota Access Pipeline, noting the differences between peaceful protests and acts of vandalism, harassment, and trespass. He stated that the protesters’ actions have endangered valuable water resources. “The main protest camp is located directly in the floodplain of the Cannonball-Missouri River confluence. Given the snowfall this winter and historic data on the Cannonball River, the camp will likely flood in early March. Vacating the unauthorized main camp on Army Corps land, cleaning up the abandoned cars, illegal structures and the human waste from months of occupation, will be a costly and time-consuming effort. The clean-up will require coordination from tribal, county, state and federal agencies. Anything less than a complete restoration of the area prior to the early March flood will endanger the lives of the protesters and first responders. It will also create an environmental threat to waters of the Missouri. Chairman Dave Archambault from the Standing Rock Sioux Tribe has repeatedly asked for the remaining protesters to leave. We unequivocally support him in this request.” He highlighted the need to improve government-to-government relations, including between the State and the tribal nations.

Oregon Governor Kate Brown addressed a revenue shortfall and opportunities to improve Oregon’s economy and help its rural communities to thrive, including investments in water. “In the Umatilla Basin, we’ve shown that getting water out of the Columbia River and onto the ground helps grow crops, which, in turn, helps grow jobs. That’s why my budget includes \$32 million in bond

funding in grants for local water projects, which will help meet the needs of rural communities, agriculture, and the environment.”

South Dakota Governor Dennis Daugaard addressed continued improvements in state-tribal relations, noting that while national headlines often emphasize the divisions, “...we have more in common than we sometimes realize. The important thing, even where we may differ, is to treat each other with dignity.” He recalled the first-ever State of the Tribes address given to the legislature in 2016 by Chairman Harold Frazier of the Cheyenne River Sioux Tribe, and stated that he looks forward to this year’s address from Chairman Robert Flying Hawk of the Yankton Sioux Tribe, expressing hope that the annual tradition will continue. Governor Daugaard announced that he would introduce a bill to provide property tax incentives for riparian buffer strips on agricultural property, to protect water quality in streams and lakes by filtering sediment and surface contaminants from agricultural runoff. Due to constitutional concerns, he vetoed a similar bill, “overwhelmingly passed” by the legislature last year. “I believe the new bill overcomes these concerns, and the legislation I am proposing has received positive support from ag groups, local governments, conservationists, sportsmen, and the Ag Land Assessment Task Force.”

Washington Governor Jay Inslee focused his remarks primarily on education, but also asked the legislature to continue the important conversations on issues like “vital water infrastructure needs on both sides of the Cascades.”

Wyoming Governor Matt Mead discussed the State Water Strategy and its ten initiatives, including an initiative to build ten new reservoirs in ten years. This year’s legislature is considering four of those water projects as part of an Omnibus Water Bill: (1) the Big Sandy Reservoir Enlargement; (2) the Big Piney Reservoir; (3) the Alkali Creek Reservoir; and (4) the Leavitt Reservoir Expansion. Governor Mead noted that these projects are separately funded “...from Water Account III, which has accumulated over years and has the funding available. Together these projects would add over 31,000 acre feet of storage of our most precious natural resource, and that is water. Water is key to economic development, ag production and more, and water development must remain a priority.”

## **Bureau of Reclamation**

### Budget Request

The budget request for the Department of the Interior’s (DOI) Bureau of Reclamation (USBR) is \$1.097 billion, in line with the Administration’s goals of secure water supplies and fulfilling commitments to tribal nations. Secretary of the Interior Ryan Zinke said, “Being from the West, I’ve seen how years of bloated bureaucracy and D.C.-centric policies hurt our rural communities. The President’s budget saves taxpayers by focusing program spending, shrinking bureaucracy, and empowering the front lines.” USBR is the nation’s largest wholesale water supplier and second-largest hydropower producer. Its projects and programs are an important economic driver in the West.

“President Trump’s budget for Reclamation shows his strong commitment to our mission of managing water and producing hydropower in the West,” Acting Commissioner Alan Mikkelsen said. “Reclamation’s infrastructure needs are also a high in priority to keep dams safe for the public they serve.”

The request for the Water and Related Resources account was \$960 million for: Water and Energy Management and Development (\$313.7 million); Land Management and Development (\$44.2 million); Fish and Wildlife Management and Development (\$153 million); Facility Operations (\$296 million); and Facility Maintenance and Rehabilitation (\$153.2 million). It emphasizes USBR’s core mission and assisting states, tribes and local entities in solving water resource issues. The budget supports water rights settlements to ensure sufficient resources to address the requirements of legislation passed by Congress.

USBR requests \$151.3 million to help meet Interior’s tribal trust and treaty obligations. Indian water rights settlements are among the highest priorities. The request includes \$98.6 million for authorized settlements, including the Claims Resolution Act of 2010, the Omnibus Public Land Management Act of 2009 and the newly enacted Water Infrastructure Improvements for the Nation Act of 2016. There is \$67.8 million for the Navajo-Gallup Water Supply Project, \$12.8 million for the Crow Tribe Water Rights Settlement, \$8 million for the Aamodt Litigation Settlement, and \$10 million for the Blackfeet Water Rights Settlement (as the first installment towards meeting required contribution of \$246.5 million by 2025). In addition, these settlements will use available mandatory funding to continue project activities. In FY2018, the discretionary funds are requested within Water and Related Resources, as opposed to a separate appropriations account as requested in prior years.

Separate funding is also included for a number of projects that serve tribal communities, including the Mni Wiconi Project (\$13.5 million), the Nez Perce Settlement and Columbia and Snake River Salmon Recovery Project (\$7.1 million), the San Carlos Apache Tribe Water Settlement Act (\$1.6 million) and the Ak Chin Indian Water Rights Settlement Act (\$16.2 million).

The FY2018 request emphasizes preventing and combating the infestation of invasive quagga and zebra mussels across Reclamation states, impacting water and power project operations, disrupting the ecological balance, and threatening native species. This work will be pursued in close cooperation with the Western Governors’ Association, and includes a focus on working with states and tribes to keep invasive mussels out of the Columbia River Basin in the Pacific Northwest. This includes research to develop improved methods for monitoring, detection and control of invasive mussels that continue to spread in the West, infesting Reclamation dams, power plants, and facilities of other water providers.

The FY18 budget request also includes: (1) \$41 million for the Central Valley Project Restoration Fund offset by discretionary receipts, with \$2 million in fees collected from Friant Division water users deposited in the San Joaquin Restoration Fund; (2) \$88.1 million for the Safety of Dams Evaluation and Modification Program, including preconstruction and construction activities for several ongoing and planned modifications; (3) \$2.9 million for desalination research for new and continued projects and programs, including produced waters from oil and gas extraction

activities; (4) \$11.1 million for continued science and technology projects, dissemination and outreach, and prize competitions in water management, hydropower generation, infrastructure management and environmental compliance; and (5) \$26.2 million for ongoing physical security upgrades at key facilities, guards and patrols, anti-terrorism program activities and security risk assessments.

Of note, the President's proposed budget for the WaterSMART program Sustain and Manage America's Resources for Tomorrow – is \$59.1 million to assist communities in optimizing the use of water supplies by improving water management. This includes: \$23.4 million for WaterSMART grants; \$5.2 million for Basin Studies; \$21.5 million for the Title XVI Water Reclamation and Reuse Program; \$4 million for the Water Conservation Field Service Program; \$1.75 million for the Cooperative Watershed Management Program; and \$3.25 million for the Drought Response Program.<sup>12</sup>

#### New Water Available to Every Reclamation State Act

On January 11, Rep. Jeff Denham (R-CA) introduced the New Water Available to Every Reclamation State (New WATER) Act (H.R. 434), with bipartisan co-sponsors from California and Washington. The bill authorizes the DOI to provide financial assistance, including secured loans and loan guarantees, to non-federal entities that contract with the USBR to carry out eligible water projects within the 17 Reclamation states, Alaska, or Hawaii. Eligible projects would cost at least \$20 million, with maximum federal assistance up to 80% of the total cost, and include: (1) infrastructure projects for domestic, agricultural, environmental, municipal or industrial water supply; (2) enhanced energy efficiency in the operation of a water system; (3) accelerated repair and replacement of aging water distribution facilities; (4) desalination; and (5) acquisition of real property for water storage, reclaimed or recycled water, or wastewater integral to such a project.

Loan repayment would begin within 5 years of project completion and last no more than 35 years. Federal financial assistance under this Act would not qualify as a federal action that triggers a NEPA review, but does not supersede compliance with relevant state, tribal, and local laws and permitting requirements. The bill would appropriate annual funds in graduated amounts: \$20 million for FY2018; \$25 million for FY2019; \$35 million for FY2020; \$45 million for FY2021; and \$50 million for FY2022. While referred to the House Natural Resources Committee, no further action was taken.

#### Bureau of Reclamation Transparency Act

On March 30, the Senate Energy and Natural Resources Committee passed the Bureau of Reclamation Transparency Act (S. 216). Introduced by Senator John Barrasso (R-WY), in January, the bill would require the DOI to submit to Congress a biennial report on Reclamation's efforts to safely manage its aging infrastructure assets, which provide important benefits to the seventeen Reclamation States, including irrigated agriculture, municipal and industrial water, hydropower,

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<sup>12</sup><https://www.usbr.gov/budget>.

flood control, fish and wildlife, and recreation. The replacement value of these assets was \$94.5 billion in 2013, and many of the facilities are over 60 years old.

The bill would have required DOI to submit an Asset Management Report to Congress for reserved and transferred works, describing maintenance and major repair and rehabilitation needs, with an estimate of the appropriations needed to complete each item, and a risk rating system. DOI may consult with the U.S. Army Corps of Engineers and with water and power contractors as appropriate to facilitate the preparation of the report. As an offset, the bill would also reduce the federal cost share of the Central Valley Water Recycling Project in Utah by \$2 million. No further action was taken.<sup>13</sup>

### Public-Private Partnerships for Water Projects

On April 25, the USBR announced the release of a “Request for Information” (RFI) on potential public-private partnerships (P3s) for water projects. The information gathered in the responses to the RFI will help Reclamation steer planning and development efforts for these and other projects and assess cooperative alternative financing arrangements. P3s can potentially boost efficiency in the provision of public infrastructure and services for Reclamation’s reserved works and those where operations and maintenance are transferred to other operators.

On May 9, the USBR sponsored a Water Infrastructure and Alternative Financing Forum in Denver, Colorado. The meeting was designed to present a representative portfolio of projects suitable for potential P3. Private sources can provide an infusion of capital and greater management flexibility and efficiencies through designing, constructing and operating public infrastructure. USBR’s reserved works are federally-owned projects, but operated and maintained by non-federal sponsors. As the federal budget contracts, alternative financing, such as non-federal and private investment in federal projects, is an important tool to meet growing infrastructure demands in the most timely and cost-effective manner.

Reserved works present another problem, as major rehabilitation and repair work undertaken by USBR (as funds are available) often require repayment by the operator within a year. Such repairs can be in the millions of dollars, often beyond the ability of the non-federal operators to repay without extended financing. Traditional private financing is problematic as the non-federal operator does not “own” the project and therefore has no asset to pledge as collateral. While Congress has authorized federal loan guarantees to address this problem, the Office of Management and Budget has raised objections and legal hurdles to such guarantees.

The Forum began with a welcome and portfolio overview by Acting Bureau of Reclamation Commissioner David Murillo and David Palumbo, Deputy Commissioner for Operations. Alan Mikkelsen, Deputy Commissioner for Public Affairs also spoke briefly. Murillo mentioned Reclamation’s mission, including conserving natural resources and improving water use efficiency, as well as investing in storage and infrastructure. Five examples of potential P3 projects were

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<sup>13</sup>S Rpt. 115-97.

highlighted: (1) the Kachess Drought Relief Pumping Station in Washington’s Yakima River Basin; (2) Eastern New Mexico Rural Water System; (3) Paradox Valley Unit of the Colorado River Salinity Control Program; (4) Yuma Desalting Plant in Arizona; and (5) the Arkansas Valley Conduit in Southeastern Colorado. Murillo said, “There’s just not a lot of money to build large projects.... What we are looking for also is access to [private] financial capital.” He noted that in addition to large projects, there are many smaller projects that may fit a P3 model. Reclamation can help identify promising P3 opportunities, and also brings its engineering, hydrology, and environmental expertise to the table.<sup>14</sup>

### Reclamation Title Transfer Act

On July 18, Rep. Doug Lamborn (R-CO) introduced legislation (H.R.3281) to facilitate the transfer to non-federal ownership of appropriate reclamation projects or facilities. The Reclamation Title Transfer and Non-Federal Infrastructure Act, defines eligible facilities to include any portion of a project, including dams and appurtenant works, water rights, infrastructure distribution and drainage works and associated lands. Entities qualified include a State or local government, Indian tribe, municipal corporation, public agency or water district that held or holds a federal water service or repayment contract, water rights settlement contract or exchange contract for water from the eligible facility to be transferred. The Secretary of the Interior must determine that the entity has the capacity to manage the conveyed property for the same purposes under Reclamation Law.

The legislation was referred to the House Natural Resources Committee. It would direct the Secretary, without further authorization from Congress, to convey all right, title and interest by a written agreement. Not less than 30 days before any conveyance, the Secretary is to transmit to the House Natural Resources Committee and the Senate Energy and Natural Resources Committee notice including written consent from the qualifying entity and reasons for supporting the conveyance.

The Secretary is to establish criteria for determining eligible facilities, including requirements that the transfer: (1) “...will not have an unmitigated significant effect on the environment;” (2) it is “consistent with the Secretary’s responsibility to protect land and water resources held in trust for federally recognized Indian Tribes;” (3) ensures “compliance with international treaties and interstate compacts;” and (4) the qualifying entity provides “consideration for the assets to be conveyed, compensation to the United States worth the equivalent of the present value of any repayment obligation...or other income stream...from the assets to be transferred....” No conveyance may adversely impact power rates or repayment obligations. Proposals are to be considered under a categorical exclusion process under the National Environmental Policy Act. The Secretary is to report annually as part of Interior’s budget submission on actions under the Act, including a list of conveyances.

Following conveyance, the property “shall not be considered to be a part of a Federal reclamation project.” The entity receiving the property “shall comply with all applicable Federal,

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<sup>14</sup>[www.usbr.gov/p3](http://www.usbr.gov/p3).

State, and local laws and regulations in its operation of the conveyed property.” The U.S. “shall not be liable for damages of any kind arising out of any act, omission, or occurrence based on its prior ownership or operation of the conveyed property, except for damages caused by acts of negligence....”

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

### Water of the United States Rule

#### Congressional Actions

On January 12, Senators Deb Fischer (R-NE) and Joni Ernst (R-IA) introduced a Senate Resolution (S. Res. 12) that clean water is a national priority, but the U.S. Environmental Protection Agency’s (EPA) and U.S. Army Corps of Engineers (Corps) June 29, 2015, Waters of the United States (WOTUS) Rule should be withdrawn or vacated. Senator Fischer said: “We all want clean air and clean water, but the federal overreach we saw with the WOTUS rule was completely unprecedented. This rule would hurt all Nebraskans: families, communities, ag producers, and businesses. This resolution signifies our intent to quickly get to work to stop WOTUS in its tracks once the new administration takes office.” The resolution was referred to the Committee on Environment and Public Works, but no further action was taken.

Senator Ernst declared: “I’ve heard from farmers, manufacturers, and small business owners across the state of Iowa about the confusion and burdensome red-tape the expanded WOTUS rule creates, and the urgency for it to be scrapped immediately. That’s why I led an effort in 2015 to disapprove this rule. It is imperative we relieve hard-working Americans from this power grab, and allow Iowans to care for their land without the heavy hand of EPA determining their every move. Today’s action reaffirms Iowans’ voice will be heard in Washington and stresses the need to protect our rural communities from this federal overreach.”

On April 26, the Senate Environment and Public Works Committee, Chaired by Senator John Barrasso (R-WY), held a hearing to review the technical, scientific and legal basis for the 2015 WOTUS Rule. The first witness, Ken Kopocis, former Deputy Assistant Administrator, EPA Office of Water, directed publication of the 2015 rule, which he defended. “Clean water in adequate supply is essential to our existence.... Waters are also important to the environment in which we live.... About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but are critically important to the health of downstream waters.... Approximately 117 million people - get their drinking water from public systems that rely on seasonal, rain-dependent, and headwater streams. The Clean Water Rule was developed and issued...making waters better protected from pollution and destruction by having the scope of the Clean Water Act (CWA) easier to understand, more predictable, and more consistent with the law and peer-reviewed science.” Referring to the Supreme Court’s *Rapanos* decision, he said, “The Clean Water Rule clarifies the jurisdiction of the Clean Water Act and would reduce the costly and time-consuming case-specific significant nexus analysis that resulted from the *Rapanos* decision. The Rule interprets the [CWA], it does not expand it.”

Major General John Peabody (retired), formerly the Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers, testified, “During my time in the Corps, I gained a keen appreciation for the decisive importance of water resource infrastructure to America’s economic vitality, international competitiveness, and environmental health.... Corps’ regulators process well over 99% of all Section 404 Clean Water Act actions... This makes the Corps...uniquely positioned as the nation’s premier experts on the application and nuances of Section 404.... According to the Corps’ FY2016 data, approximately 79,000 permitting actions were processed, of which only 87 were denied. Most were covered under the general permit program.... Of particular note, nearly 7,000 requests resulted in a determination that no permit was required.... Over 85% of all applications are processed within 60 days from receipt of a final policy-compliant application....”

He continued, “I have tremendous respect for the amazingly talented and incredibly dedicated professionals of the Corps who expertly navigate the wide array of laws, polices and regulations that both enable and constrain their work, yet somehow manage to deliver positive results despite innumerable funding and policy challenges, and frequent interagency disagreements.... Caught in the middle of this debate, what the Corps needs more than anything is clear and objective policy direction that is well founded on facts, science, and clearly articulated laws.... In mid-September 2014, the Assistant Secretary of the Army (Civil Works) informed me...that the Administration intended to finalize the CWA WOTUS Rule quickly, with a goal of early January 2015.... Senior Corps staff were concerned...given the record number of public comments approaching one million..., the reality that the Connectivity report was still undergoing Science Advisory Board review, and the fact that the Corps had no visibility on the status of the Economic Analysis or Technical Support documents.... Beginning in November 2014, the Corps was marginalized from substantive participation in the rule-making process.... [We] were no longer being invited to the rule-making meetings.... The more concerning issue was that...Corps expertise, concerns and related recommendations – founded on serious and significant concerns with the viability of the rule from a factual, scientific, technical and legal basis – [were] so completely disregarded.... Corps concerns and recommendations remained unaddressed in the rule or preamble language throughout the process.”

He testified, “EPA misapplied Corps data to draw unsupportable conclusions. In general, EPA took specific data sets and applied them more broadly than the data could justify; made assumptions without an analytical basis; overestimated compensatory mitigation required under Section 404; failed to address potential decreases in jurisdiction; incorrectly concluded the rule has no tribal implications; among many other errors in both the Economic Analysis and the Technical Support Document.... [It] was then and is now my firm belief that an updated rule is needed....”

On November 29, the House Science, Space and Technology Subcommittee on Environment, Chaired by Rep. Andy Biggs (R-AZ) held a hearing on the Future of the WOTUS: Examining the Role of the States. Biggs’ opening statement noted: “The Waters of the United States rule, or WOTUS, issued by the [EPA] in 2015, amounted to one of the biggest federal overreaches in modern history. Not only did the rule’s flimsy definitions and underlying science mean that the agency had the ability to regulate private land, but it also placed significant financial burdens on



some of our country's hardest workers.... We all want to be good stewards of the environment. We also want to be good stewards for the people we are here in Washington to represent. When a federal agency overlooks the needs of American citizens, we in Congress have a duty to ask questions and address the concerns of our constituents.”

Biggs added, “For example, when WOTUS was proposed, there was a large outcry from stakeholders across the nation that the rule’s vague definitions regarding navigable water could include sometimes-dry drainage ditches on private farmland. It is absurd to consider a dry ditch ‘navigable.’ Our nation depends on the hard work of farmers and ranchers: these men and women simply don’t have the time to deal with bureaucratic nonsense. Of course, it’s not just them who suffer: costly and unnecessary government mandates have drastic economic impacts on each and every one of us.”

He concluded, “The shortcomings of WOTUS are so self-evident that it is not surprising this onerous rule has been challenged across the country. And now we can point to a very encouraging action from the new administration: President Trump recently issued an executive order directing EPA and the Army Corps of Engineers to review the WOTUS rule. I applaud the administration for heeding the calls of Americans. A revision to the 2015 rule is desperately needed to provide greater clarity to states and stakeholders. Instead of rushing forward with burdensome federal regulations, the government needs to do its due diligence and propose a rule that is helpful, not harmful. Today we will hear ideas about how some of those fixes to the regulation should look. Witnesses will inform Congress how federal water regulations affect them and what they need from the government to continue operating effectively.”

Witnesses testifying included: Wesley Mehl, Deputy Commissioner, Arizona State Land Department; James Chilton, Jr., Chilton Ranch; Ken Kopocis, American University Washington College of Law (and formerly EPA Assistant Administrator for Water under President Obama); and Reed Hopper, Pacific Legal Foundation.

Rep. Ralph Norman (R-SC) asked, “If you regulate water, aren’t you regulating land use?” He said, “How can the agency deny that by expanding vastly its definition of waters of the U.S. it is effectively limiting the activities that can occur on your private property.” Mehl agreed, “The rule does affect land use.” He added, “The 2015 rule resolved ambiguity in preference for total inclusion. There is a high cost for that.”

Kopocis argued the 2015 Rule actually limited the definition of a tributary, referencing not only the ordinary high water mark, but requiring that to fall under federal jurisdiction tributaries have to have a bed and banks. “There are tributaries that were previously considered jurisdictional that are excluded under this rule. It is more narrow because it is more specific.” Kopocis explained that the 2015 Rule drafted by EPA and the Corps was designed to address Justice Kennedy’s “significant nexus” test in a 2006 Supreme Court decision. Rep. Randy Weber (R-TX) asked, “Is the Supreme Court ever wrong?” Citing civil rights decisions he questioned, “Does *Brown v. Board of Education*, *Plessy v. Ferguson* and *Dred Scott* mean anything to you?” He observed, the Supreme Court has changed its mind in the past.

Rep. Don Beyer (D-VA) questioned the choice of witnesses for the hearing. “Naturally, the average American would think that the Science Committee would be weighing the science of the rule. That is not the case.”

### Litigation

On January 13, the U.S. Supreme Court granted certiorari in *National Association of Manufacturers (NAM) v. Department of Defense (DOD)*, #16-299. In 2015, states and other parties filed 18 lawsuits in federal district courts and 22 petitions for review in appellate courts, challenging the EPA and Corps’ WOTUS Rule. The appeal arises from the February 2016, 2-1 split decision by the 6<sup>th</sup> Circuit regarding consolidated jurisdiction over the cases under the authority of 33 U.S.C. §1369(b)(1). The petitioners argued on appeal that the cases belonged before the district courts instead.<sup>15</sup>

On April 27, several briefs were submitted to the Supreme Court in *NAM v. DOD*, including NAM’s opening brief and a supporting amicus brief from 30 states. The petitioners requested a reversal of the 6<sup>th</sup> Circuit’s decision that it has subject matter jurisdiction over the consolidated petitions. They argued that the federal rule defining WOTUS does not fall within the exclusive, original jurisdiction of the circuit courts of appeals under 33 U.S.C. §1369(b)(1), because the rule does not fit within one of the seven actions listed for judicial review. They oppose the federal argument that policy concerns for judicial efficiency should grant immediate appellate jurisdiction, noting the wisdom in allowing difficult issues to mature through full consideration by different district courts. NAM pointed out that, “Stretching the text of §1369(b) past its breaking point to increase efficiency undermines the very purpose of the [law].”

On October 11, the U.S. Supreme Court heard oral argument on the issue of whether the 6<sup>th</sup> Circuit had jurisdiction over the combined WOTUS lawsuits. The Court could rule that the cases belong in the various federal district courts, rather than at the appellate court level, which would lift the 6<sup>th</sup> Circuit’s nationwide stay of the 2015 Rule. Only the U.S. District Court for North Dakota has issued a stay of the 2015 Rule, for the thirteen states involved in that lawsuit. The remaining states would become subject to the 2015 Rule, creating regulatory uncertainty.

### President’s Executive Order

On February 28, the President issued Executive Order 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the WOTUS Rule. The order sets forth as policy, “It is in the national interest to ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.” The EPA Administrator and the Corps Assistant Secretary were directed to review the WOTUS Rule<sup>16</sup> for consistency with this policy, “...and publish for notice and comment a proposed rule rescinding or

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<sup>15</sup>*Western States Water*, #2214, October 21, 2016, and #2208, September 9, 2016.

<sup>16</sup>80 Fed. Reg. 37054.

revising the rule, as appropriate and consistent with law.” They were also directed to review any related orders, rules, regulations, guidelines or policies and rescind or revise them as appropriate.

The EPA and Corps were further directed to keep the U.S. Attorney General notified of the review so that he may take appropriate measures concerning WOTUS litigation. The order stated that the EPA and Corps “shall consider interpreting the term ‘navigable waters,’ as defined in 33 U.S.C. §1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).”<sup>17</sup>

On March 6, EPA and the Corps published notice of their intention to review and rescind, or revise the Clean Water Rule.<sup>18</sup>

On May 8, Scott Pruitt, EPA Administrator, and Douglas Lamont, Army Deputy Assistant Secretary, sent a letter to governors seeking input on a new definition of “Waters of the United States,” including how each state “might respond to a reduced scope of federal jurisdiction under the Clean Water Act.” Consulting with state and local government officials – or their representative national organizations – before proposing regulations with federalism implications is a priority for this Administration. “We hope to keep the states at the forefront of our mission and your input during the federalism process will enable us to do that effectively.”

To meet the objectives of Executive Order 13778, the agencies are following a two-step process to provide as much certainty as quickly as possible. As a first step, the agencies are “re-codifying the regulation that was in place prior to the issuance of the Clean Water Rule,” which is what the agencies are currently implementing under the 6<sup>th</sup> Circuit’s nationwide stay of the 2015 WOTUS rule. The second step is to propose a new definition of protected waters that is consistent with the opinion of Justice Scalia in *Rapanos*. The federalism consultation began with an initial meeting on April 19, with state and local government associations. “In addition to discussions our respective staffs will have with associations and individual state environmental agencies, we are reaching out to you directly to ensure we received the benefit of your particular state’s experiences and expertise. The agencies are soliciting written comments from state and local governments until June 19, 2017,” before a public notice-and-comment rulemaking.

In a press release, Lamont said, “As we go through the rulemaking process, we will continue to make the implementation of the [CWA §404] regulatory program as transparent as possible....” Pruitt said, “EPA is restoring states’ important role in the regulation of water.... I believe that we need to work with our state governments to understand what they think is the best way to protect their waters, and what actions they are already taking to do so. We want to return to a regulatory partnership, rather than regulate by executive fiat.”

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<sup>17</sup><https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>.

<sup>18</sup>82 Fed. Reg.12532.

Between April 19 and June 19, the agencies held 24 meetings and received 169 letters, including from: 19 Governors; 2 Lieutenant Governors; 1 State Senator; 20 Attorneys General; 63 state agencies/offices; 10 water districts; and 6 state and professional associations.

### WGA and WSWC Comments

On June 19, the Western Governors' Association (WGA) submitted comments to EPA and the Corps in response to renewed efforts to define WOTUS as that term applies to the jurisdictional scope of the CWA. The agencies sought comments from state and local governments regarding the best way to protect waters, including how States regulate the "waters of the State" that are excluded from federal jurisdiction. WGA's letter notes the importance of this consultation with the States as co-regulators with the primary authority for allocating, administering, protecting, and developing water resources within their boundaries. "Western Governors were quite concerned about the lack of substantive consultation with states during the promulgation of the 2015 Clean Water Rule. Governors are encouraged by the recent efforts of both EPA and the Corps to conduct early outreach in this renewed rulemaking process. Importantly, these efforts have involved direct outreach to individual states through their Governors. WGA strongly urges the agencies to pursue continued consultation with Governors throughout the substantive development of any new rule under the CWA."

While deferring to individual states for their own substantive comments, WGA highlighted four procedural matters in the rulemaking process: (1) the proposed rule must stay within the limits established by Congress and the U.S. Supreme Court, and recognize the primary authority of States to manage and allocate water resources within their boundaries; (2) substantive consultation with States should continue from the development stage of any proposed rule through any refinements that lead to a final version; (3) state data and expertise should be included in the development and analysis of science that serves as the basis for the new rule, with greater representation on relevant committees and panels; and (4) due to the disproportionate impact of water on the economies of Western States, the analysis of the economic impact of the rule on States and local communities must be thorough and complete.

"Western Governors recognize the essential role of partnerships between the States and federal agencies and the tradition of cooperative federalism in protecting our nation's waters. WGA recognizes the EPA and the Corps for your positive efforts in beginning a dialogue with Western Governors in this renewed rulemaking process. We request that you pursue future state consultation with diligence and carefully consider the comments submitted in this letter, as well as those submitted by individual states, recognizing states' authority and unique role in the implementation of the CWA for the protection of their water resources."

WSWC also sent a letter on June 19, noting that "Implementation of any rule will require broad support among state agencies with delegated authority to administer CWA programs." The Council emphasized congressional deference to state authority to regulate the waters within their boundaries and recognizing the States' critical role in protecting water quality, citing CWA §101(b) and (g). "The U.S. Supreme Court has clearly determined that not all waters are jurisdictional, and

the rule should not try to expand jurisdiction beyond the limits set by the Court to address a perceived gap in regulation. Rather, the rule should acknowledge 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.”

WSWC provided some suggestions for improved clarity in determining which waters are jurisdictional in a timely manner, and reiterated its list of waters from its 2014 letter to EPA that should clearly be outside the scope of CWA jurisdiction. It also recommended working with the EPA and Corps representatives on WestFAST to serve as a bridge to the Western States as the agencies work to revise and implement a workable new rule.

### Recodification of Pre-Existing Rules

On June 27, EPA and the Corps provided advanced notice of the proposed rule, Definition of the “Waters of the United States” Recodification of Pre-Existing Rules.<sup>19</sup>

On July 6, eighteen environmental groups sent a letter to EPA Administrator Pruitt and Army Deputy Assistant Secretary Lamont requesting an extension of time on the public comment period for the proposed Recodification of Pre-Existing Rule to rescind the 2015 Clean Water Rule. The groups requested at least six months. “Your planned 30-day comment period disregards the more than one million people who participated in the development of that rule and is a grossly inadequate amount of time for stakeholders to meaningfully engage in this rulemaking process.”

The letter also cited Executive Order 12866, which requires agencies to provide the public, as well as state, local, and tribal officials, with meaningful participation in the regulatory process, for both new and existing regulations. Section 6(a) of Executive Order 12866 states, “In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”

The letter emphasizes the scientific record, peer-reviewed publications on connections between waters, and input from stakeholders and over a million comments from the public supporting the 2015 Rule. “Considering the critical functions that these water bodies serve, the far-reaching ramifications that repealing the Clean Water Rule would have on them, and the previous Administration’s record of engagement on this issue, we urge EPA and the Army Corps to extend the comment period so that stakeholders have adequate time to meaningfully engage in the rulemaking process.”<sup>20</sup>

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<sup>19</sup>82 Fed. Reg. 24899. (The proposed rule was published in the *Federal Register* on July 27).

<sup>20</sup><https://www.lcv.org/article/re-clean-water-rule-repeal-comment-extension/>. *Western States Water*, #2243, May 12, 2017, and #2251, July 7, 2017.

On July 27, EPA and the Corps published its proposed rule<sup>21</sup> to rescind the Clean Water Rule and re-codify the regulatory text that existed prior to 2015, which currently governs administration of the CWA. The agencies' action is intended to provide certainty while a second rulemaking is pending to substantively engage state and local governments, tribes and stakeholders in a re-evaluation of the WOTUS definition. The proposed rule would be implemented in accordance with Supreme Court decisions, agency guidance, and longstanding practice, according to EPA.

“We are taking significant action to return power to the states and provide regulatory certainty to our nation’s farmers and businesses,” said Administrator Scott Pruitt. “This is the first step in the two-step process to redefine ‘Waters of the U.S.’ and we are committed to moving through this re-evaluation to quickly provide regulatory certainty, in a way that is thoughtful, transparent and collaborative with other agencies and the public.”

The new rule, when final, would not change current practice with respect to the WOTUS definition. EPA and the Corps have begun outreach on the second rulemaking step involving a re-evaluation and revision of the WOTUS definition.

“The Army, together with the Corps of Engineers, is committed to working closely with and supporting the EPA on these rulemakings. As we go through the rulemaking process, we will continue to make the implementation of the Clean Water Act Section 404 regulatory program as transparent as possible for the regulated public,” said Mr. Douglas Lamont, senior official performing the duties of the Assistant Secretary of the Army for Civil Works.<sup>22</sup>

On August 16, EPA and the Corps announced a 30-day extension to the comment period for the July 27 proposed rule “Definition of Waters of the United States – Recodification of Pre-Existing Rules.”<sup>23</sup> The deadline for written comments was moved to September 27, 2017. EPA notes, “With this extension, the public will have more than 90 days to review the proposal. When finalized, the proposed rule would replace the 2015 Clean Water Rule with the regulations that were in effect immediately preceding the 2015 rule.”<sup>24</sup>

On September 21, the Association of Clean Water Administrators (ACWA) sent a letter to the EPA and Corps regarding the development of a new WOTUS 2.0 rule, urging them to work directly with state water quality program directors. ACWA President and WSWC Member Jennifer Wigal wrote, “You have emphasized a desire to craft a final rule which avoids common regulatory pitfalls such as lack of clarity, inflexibility, and inadequate consideration of state level implementation concerns, and for that we are deeply appreciative.” She noted that the program directors “possess unique knowledge and insight” and encouraged the agencies to complement their work with state political leadership by consulting with ACWA’s members.

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<sup>21</sup>82 Fed. Reg. 34899.

<sup>22</sup><http://www.epa.gov/wotus-rule>.

<sup>23</sup>82 Fed. Reg. 34899.

<sup>24</sup>*Western States Water*, #2251, July 7, 2017.

Following EPA’s federalism outreach consultation, ACWA has “continued preparing to assist EPA...by compiling key background information on both state water resource management authority and state program flexibility.” She also asks that EPA “provide at least an early draft of regulatory text, or options with sufficient detail for our workgroup members to give EPA useful and specific feedback on the new rule.” Substantive dialogue, with the opportunity to evaluate proposed text for “technical details, implementation challenges and barriers, and unintended consequences” allows a thorough consideration of the mechanics of the rule by co-regulators working together.

On September 25, WSWC submitted comments on EPA’s proposed Recodification of Pre-Existing Rules. Consistent with WSWC Positions No. 410 and No. 373, the letter emphasizes that the states have authority apart from the CWA to protect waters within their states. “Importantly, excluding waters from federal jurisdiction does not mean that the excluded waters will be exempt from regulation and protection.”

The WSWC letter notes the principles of cooperative federalism embedded in the CWA, and the critical role of the states in protecting water quality as well as allocating water within their boundaries. “Reconciling these state roles over water quality and water quantity can be complex in arid regions. Water is often scarce, requiring careful management of unique water bodies such as small ephemeral washes, effluent dependent streams, prairie potholes, playa lakes, and numerous man-made reservoirs, waterways, and water conveyance structures. The States are in the best position to manage the water within their borders due to their intimate knowledge of the unique aspects of their hydrology, geology, and legal frameworks. Any CWA jurisdictional rule must not only be scientifically sound in its application and clarify its scope, but more importantly, carefully comply with the legal limits the Congress and the U.S. Supreme Court have set.”

The letter concludes by encouraging EPA to follow WGA’s “Principles to Clarify and Strengthen the State-Federal Relationship,” and to further engage WSWC in “substantive, meaningful consultation during the development of any replacement rule.”

On November 22, the agencies published a proposed rule in the *Federal Register*, Definition of “Waters of the United States” - Addition of the Applicability Date to 2015 Clean Water Rule.<sup>25</sup> The proposed rule intends to postpone the applicability date of the 2015 Clean Water Rule to two years from the date of final action on the 2015 Clean Water Rule, to account for the anticipated removal of the 6<sup>th</sup> Circuits nationwide stay of the rule, maintaining the state quo and the current level of regulatory certainty while the agencies review, rescind, or revise the rule. The comment period closed on December 31, and the agencies received 4,660 comments.

EPA and the Corps received over 700,000 comments on its July 27 proposal to rescind the 2015 Rule, and EPA anticipated that it would complete its review of those comments and make a determination on whether to rescind the 2015 Rule by Spring 2018. EPA also planned to do a second round of federalism consultation with state and local governments on the development of

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<sup>25</sup>82 Fed. Reg. 55542.

WOTUS 2.0 as soon as they had a better idea of what that new rule might look like, allowing further comments from states as part of the deliberative process.

### EPA Mission Oversight

On December 7, the Energy and Commerce Committee's Environment Subcommittee held a hearing titled The Mission of the Environmental Protection Agency. Administrator Scott Pruitt discussed EPA's "Back to Basics" goals: (1) to refocus the agency back to its core mission; (2) to restore power to the states through cooperative federalism; and (3) to lead the agency through improved processes and adhere to the rule of law. Pruitt said: "We will use a full set of compliance tools, such as compliance monitoring, electronic reporting, traditional enforcement, grants to states and tribes, and tribal capacity building, to work jointly with our co-regulators to protect human health and the environment. EPA will also respect the important role that state governors play in cooperative federalism and will seek their views and perspectives on compliance assistance and other opportunities to improve the EPA-state partnership. In addition, the Agency will work to strengthen intergovernmental consultation methods to engage stakeholders and hear diverse views on the impacts of prospective regulations."

The Committee's jurisdiction includes the Safe Drinking Water Act (SDWA) and several other environmental protection acts, but does not include the Clean Water Act; however, the current rulemaking efforts to define "Waters of the U.S." came up during comments and questions from Rep. Richard Hudson (R-NC) and Rep. Jeff Duncan (R-SC).

Hudson questioned Pruitt about whether EPA is doing the same thing under this administration that it was accused of doing under the previous administration, pre-determining the outcome of the rule and going through the motions of the rulemaking process to find justification for the decision. Pruitt said that the 2015 rule was intended to provide clarity on where federal jurisdiction begins and ends, but that EPA "failed miserably" to meet that objective. He said they are now going through a process to deal with the deficiency. He described the steps of the rulemaking process, and provided an April 2018 timeframe for publication of the new proposed rule.

Hudson noted that one of the main arguments in favor of the Obama Administration's WOTUS rule is that it is essential to protect drinking water, and that without the 2015 version of the rule, public health would be at risk. He pointed to the provisions of the SDWA intended to protect both source waters at the surface and underground, and asked Pruitt whether this legislation provided sufficient protection. Pruitt agreed, but noted that one of the greatest environmental threats this country faces is the tremendous challenge of replacing service lines and lead seeping into the water supply in the meantime. He said the estimated cost to replace these lines is \$30 billion - \$50 billion, and that some of the current infrastructure discussions need to address water infrastructure problems. He pointed to the leadership of the Governor of Michigan, where they are spending significant funds on replacement, and considering improving their lead standards from 15 ppb down to 10 ppb. He emphasized the need for politicians in Washington, D.C. to have those kinds of conversations with states across the country.



Duncan said “I have been extremely impressed and supportive of the EPA thus far under the Trump administration and your leadership. You all understand what the intended role of the Agency is, and have effectively worked to roll back the bureaucratic overreach and power abuses of the Agency under the previous administration. Through cooperative federalism you prioritized what should be left up to the states when it comes to both energy and environmental matters. The states should be the ones to set their own limits in regards to the environment, and I thank you for understanding the crucial role the states and localities play in this process.... A lot of us were alarmed when we saw what was defined as a navigable waterway under the previous administration. A lot of times these were ditches that didn’t hold any water, no stream bed, only had water during a significant rain event, but yet they were regulated under the Waters of the U.S., and that was to the detriment of the developer, the landowner, the farmers....”

Duncan asked Pruitt about the lengthy permitting process for ports, noting that ports are a main economic driver for South Carolina, with one in every eleven jobs attributed to some sort of port activity. Pruitt acknowledged that EPA has a problem with a variety of permit decisions, including ports, that take a decade or more to approve or deny, and individuals from different EPA regions are receiving different decisions. He called it “entirely unacceptable” and said EPA’s goal is to have processes in place by the end of 2018 to ensure that permit applicants receive an answer within six months, and to provide those answers with more clarity and certainty. Duncan said: “I applaud you for that and wish this committee had jurisdiction over the Corps of Engineers, and we could encourage them to manage river systems in this country on a regional basis instead of a one-size-fits-all. Because I can tell you, eastern river systems...[are] different than western river systems...” and management from the Corps and EPA should reflect those differences.

### Water Quality Improvement Act

On January 12, Rep. Bob Gibbs (R-OH) introduced the Water Quality Improvement Act (H.R. 465), to provide an integrated planning and permitting process for municipalities facing financial challenges in Clean Water Act (CWA) compliance. Referred to the House Committee on Transportation and Infrastructure, the bill would allow municipalities to obtain permits for wastewater and stormwater management with the most cost-effective and technically-feasible approaches to CWA compliance. In coordination with the State – or EPA, where the State does not have delegated authority – the municipality could develop a plan that prioritizes the maximum health benefits for the resources expended.

In determining whether a plan is economically affordable, the State can take into consideration existing and potential future costs for implementation, including: (1) the economic and social impact on the service area; (2) low-income households and cumulative costs that exceed 2% of annual household income; (3) impact of increased costs on local industry; (4) unemployment rates; (5) bond ratings; (6) the legal ability to pass increased costs through to ratepayers; and (7) whether compliance would require a municipality to divert resources away from essential capital improvements that would provide core public services to the community.

When evaluating the technical feasibility of a plan, the State would consider: (1) naturally-occurring pollutants; (2) natural, ephemeral, intermittent, or low-flow conditions or water levels; (3) human-caused pollution that cannot be remedied; (4) dams, diversions, or other types of hydrologic modifications that make CWA compliance impracticable; or (5) other physical conditions related to the natural features of a water body unrelated to water quality that preclude compliance. The bill would direct EPA to coordinate with States to select fifteen eligible municipalities to develop and implement integrated plans as pilot projects.

The bill would also direct EPA to update its 1997 financial capability assessment guidance, titled “Combined Sewer Overflows – Guidance for Financial Capability Assessment and Schedule Development.”<sup>26</sup> The update would occur in consultation with municipal representatives and State officials, including regional or national organizations focusing on how to assess the financial capability of municipalities to implement effluent limitations and other CWA control measures. The updated guidance would also take into consideration relevant studies and reports, and would provide a consistent reference point to aid parties in negotiating reasonable and effective schedules for implementation. Referred to the House Transportation and Infrastructure Committee Subcommittee on Water Resources and Environment, no further action was taken.

The bill was similar to H.R. 6182, introduced in the 114<sup>th</sup> Congress. About that bill, Rep. Gibbs said: “Too many cities and towns in America are facing expensive EPA mandates with no real way to achieve them. One-size-fits-all policies out of Washington do not work when American mayors and administrators need flexibility. The Water Quality Improvement Act will write into law the EPA’s Integrated Planning Process, providing that flexibility. [Some] in complying with mandates that may not even be technically achievable or economically affordable. I am proud to support our nation’s cities, mayors, and their residents by introducing this bill.”

### Gold King Mine

On January 13, EPA determined that it was not legally liable to pay compensation for claims brought under the Federal Tort Claims Act (FTCA) for the Gold King Mine spill on August 5, 2015. Because the agency was conducting a site investigation at the Gold King Mine under the Comprehensive Environmental Response, Compensation, and Liability Act, the agency’s work was considered a “discretionary function” under the FTCA, and the claims do not meet the necessary conditions set forth by Congress. The rejected claimants could appeal the decision to the U.S. District Court within six months.<sup>27</sup>

Senators Tom Udall (D-NM) and Martin Heinrich (D-NM), and Rep. Ben Ray Luján (D-NM) denounced the decision: “We are outraged at this last-ditch move by the federal government’s lawyers to go back on the EPA’s promise to the people of the state of New Mexico – and especially the Navajo Nation – that it would fully address this environmental disaster that still plagues the people of the Four Corners region.... We believe – regardless of the shameful legal interpretation

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<sup>26</sup>EPA-832-B-97-004.

<sup>27</sup><https://www.epa.gov/goldkingmine/decision-federal-tort-claims-act-claims>.

of liability today or the outcome of any lawsuits in the future – that the federal government has a moral obligation to compensate farmers, small business owners and others injured for their losses; to fully reimburse local and Tribal governments for the costs of responding to the spill; and to continue to pay the costs of independent water monitoring until the people have faith in the water again. But we can assure those New Mexicans affected that none of us is willing to wait and hope for someone to do the right thing; we will be pushing for legislative solutions as well, and we will not give up until the government makes this right.”

### *New Mexico v. Colorado*

On May 23, the United States filed an amicus brief in *New Mexico v. Colorado*. New Mexico’s lawsuit seeks relief from the harms from abandoned mine contamination to rivers. Although CERCLA and RCRA statutes provide for exclusive jurisdiction in the federal district courts, the Supreme Court has original and exclusive jurisdiction over controversies between states. The Supreme Court invited the U.S. to brief the jurisdiction issue.<sup>28</sup>

The federal brief argues that New Mexico’s complaint should be denied because the issue can be resolved in an alternative administrative forum. New Mexico can petition EPA to withdraw Colorado’s authorization to administer its National Pollutant Discharge Elimination System (NPDES) program. The U.S. says that the federal common law claims of public nuisance and negligence to address pollution have been displaced by the CWA. The brief also argues that CERCLA and RCRA provisions do not apply to Colorado, because it was not managing, directing, or conducting mine operations or disposing of hazardous substances under the meaning of the statutes. “Colorado’s cleanup activities at the Gold King Mine were an exercise of the State’s conventional police power...to address releases of hazardous substances caused by others.”

The U.S. also makes recommendations regarding the resolution of other consolidated Gold King Mine lawsuits in the district court. “Given the substantial legal and factual overlap between the two actions, this Court would benefit from development and resolution of [these] issues in the district court, as well as the resolution of any appeal, which could be reviewed by this Court on a petition for a writ of certiorari.”

On June 6, New Mexico filed a response to the U.S. brief, arguing that Colorado’s “decade-long abdication of its regulatory duties” and active management and operation of the mining waste sites has served Colorado’s own economic and political interests at the expense of New Mexico’s sovereign interests, and subjects Colorado to the provisions of CERCLA and RCRA. New Mexico points out that NPDES permits are not designed to deal with catastrophic events and ongoing pollution from abandoned mines. EPA has never withdrawn a state’s authority to administer the NPDES program “despite dozens of past requests to do so,” and even if it did, the result would likely be less environmental regulation and enforcement, contrary to the goals of New

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<sup>28</sup>*Western States Water*, #2198, July 1, 2016, and #2216, July 1, 2016.

Mexico's lawsuit. The recent Superfund designation does nothing to address the issue of actual economic and environmental harm and damages from the Gold King Mine spill, emphasizing a gap that is central to New Mexico's common law claims for relief.

New Mexico also noted that the biased characterization of the issues is consistent with the U.S. arguments on behalf of EPA in the district court proceedings. It stresses that the Supreme Court's exercise of original jurisdiction to address damages from interstate pollution is necessary, particularly "in this time of regulatory retrenchment..." and where the complaining State is powerless to prohibit the pollution.

### Water Transfers Rule

On January 18, a 2<sup>nd</sup> Circuit panel of three judges issued a 2-1 decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (Catskill III)*, #14-1823, reversing the judgment of the U.S. District Court for the Southern District of New York. The decision allows EPA's Water Transfers Rule, 40 C.F.R. §122.3(i), to stand. The plaintiffs are expected to seek rehearing en banc by the entire 2<sup>nd</sup> Circuit, and the case may still go to the U.S. Supreme Court on appeal.

New York City gets its water from the Schoharie Reservoir through a series of creeks, reservoirs, tunnels and aqueducts in an interbasin "water transfer" that conveys waters of the United States without subjecting those waters to any intervening industrial, municipal, or commercial use. "Water transfers are an integral part of America's water-supply infrastructure, of which the Schoharie Reservoir system is but a very small part."

The court noted that the EPA has historically "taken a hands-off approach to water transfers, choosing not to subject them to the requirements of the National Pollutant Discharge Elimination System (NPDES) permitting program established by the Clean Water Act (CWA) in 1972." In 2008, EPA formalized its decades-long stance by promulgating the Water Transfers Rule. The Rule was vacated by the District Court, under the two-step framework of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), finding that EPA's interpretation was unreasonable and contrary to CWA requirements.

The 2<sup>nd</sup> Circuit panel also applied a *Chevron* analysis, but concluded that EPA's interpretation of the CWA was reasonable and supported by valid considerations. "The Act does not require that water quality be improved whatever the cost or means, and the Rule preserves state authority over many aspects of water regulation, gives regulators flexibility to balance the need to improve water quality with the potentially high costs of compliance with an NPDES permitting program, and allows for several alternative means for regulating water transfers. While we might prefer an interpretation more consistent with what appear to us to be the most prominent goals of the CWA, *Chevron* tells us that so long as the agency's statutory interpretation is reasonable, what we might prefer is irrelevant." The Court pointed to several alternative means to regulate pollution in water transfers, including state statutory and common law, interstate compacts, and international treaties.

On April 18, the 2<sup>nd</sup> Circuit Court denied petitions for rehearing allowing a three-judge panel's decision on deference to EPA's Water Transfers Rule to stand. Petitioners sought rehearing on the grounds that *Catskills III* was inconsistent with the 2<sup>nd</sup> Circuit's decisions in *Catskills I* and *II*. However, the panel distinguished the cases, concluding that the earlier decisions did not hold the plain language of the CWA to be unambiguous with regard to water transfers, which led to a *Chevron* analysis in *Catskills III* that defers to EPA's expertise in promulgating the rule. The parties had until July 17 to file a petition for certiorari to the U.S. Supreme Court.

On September 15, the plaintiffs states of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Washington, and the Canadian province of Manitoba filed a petition for a writ of certiorari, appealing the 2<sup>nd</sup> Circuit's decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2017).

EPA's Water Transfers Rule, 40 C.F.R. §122.3(i), excludes certain water transfers from costly permitting requirements under the NPDES. The plaintiffs states question whether the rule conflicts with the plain meaning of the CWA, which prohibits the addition of any pollutant to navigable waters from any point source without a permit. They also raise the issue of whether EPA may justify the Water Transfers Rule on the basis of the perceived costs and benefits caused by the CWA permitting process given the lack of actual assessment of those costs and benefits. They argue that the 2<sup>nd</sup> Circuit's decision conflicts with the decisions of other courts, that Congress did not authorize a water transfer exemption, and that EPA's rationale for the rule conflicts with Supreme Court precedent.

"This case is the culmination of a nationwide, decades-long battle over whether the Act requires a NPDES permit for interbasin water transfers," the brief says, citing cases that support their position from the 1<sup>st</sup>, 2<sup>nd</sup>, and 11<sup>th</sup> Circuits, as well as the State of Pennsylvania. "The current case has pitted seven states...against eleven other states and EPA." Notably, the States of Minnesota, Missouri have withdrawn from the coalition of eastern states.

The plaintiff states note that artificial water transfers of distinct water bodies can introduce salt water, fecal matter, algal blooms, or invasive species into previously unaffected waterways, and that the States and their residents rely on the NPDES program "to preserve the integrity of the country's navigable waters." They argue that the rule undermines the federal procedures for downstream states to resolve interstate disputes over water pollution.

Also on September 15, three environmental, conservation, and sporting plaintiffs filed a petition for a writ of certiorari, arguing that the 2<sup>nd</sup> Circuit's analysis of step two of *Chevron v. Natural Resources Defense Council* was inconsistent with the Supreme Court's reasoning in *Michigan v. EPA*, 135 S. Ct. 2699 (2015) and created a circuit split. They also raised the question of whether the 2<sup>nd</sup> Circuit erred in applying the CWA terms relating to the addition of pollutants to navigable waters "differently to discharges of dredged materials and transfers of polluted water between water bodies...." The two petitions are *New York et al. v. EPA* and *Riverkeeper, Inc. et al. v. EPA*.

## Stormwater Discharge

On February 28, the DC Circuit Court of Appeals dismissed *Center for Regulatory Reasonableness v. EPA* (No. 14-1150) for lack of jurisdiction. The lawsuit concerned EPA's blending rule, prohibiting wastewater treatment plants from diluting stormwater before discharging it into rivers and streams, and restricting how facilities treat wastewater during heavy rains, focusing on internal secondary treatment rather than the point of discharge into navigable waters. In *Iowa League of Cities v. EPA*, 711 F.3d 844 (8<sup>th</sup> Cir., 2013), EPA's informal policies were held procedurally invalid under the Administrative Procedures Act (APA). The Center for Regulatory Reasonableness sued EPA after the agency issued letters and statements that it would not follow the 8<sup>th</sup> Circuit's decision outside of that Circuit, making determinations on a case-by-case basis. The National Association of Clean Water Agencies had argued that EPA's approach created uncertainty for the treatment plants that rely on blending.

The DC Circuit rejected the petition to review the new letters and statements as a violation of the 8<sup>th</sup> Circuit's decision. The Court determined that 33 U.S.C. 1369(b)(1)(E), which provides direct review of EPA limits on discharge of pollutants, did not apply "because EPA's non-acquiescence statement does not announce an effluent or other limit on discharge of pollutants...[it] merely articulates how EPA will interpret the [8<sup>th</sup> Circuit's] decision." The Center for Regulatory Reasonableness "must follow the usual path of suing in district court under the [APA], assuming other reviewability criteria are satisfied." Notably, this is the same statute the 6<sup>th</sup> Circuit recently used as grounds to retain jurisdiction over the multi-district and multi-circuit challenges to the WOTUS rule in *Murray Energy Corporation v. EPA* (No. 15-3751).

## State and Tribal Assistance Grants

On March 14, the Association of Clean Water Administrators (ACWA), Association of State Drinking Water Administrators (ASDWA), and Ground Water Protection Council (GWPC), wrote Office of Management and Budget (OMB) Director Mick Mulvaney and EPA Administrator Scott Pruitt, to express concern over publicized information concerning a proposed 30% cut to State and Tribal Assistance Grants (STAG). Under the federal CWA and Safe Drinking Water Act (SDWA), States are responsible for programs to meet federal water quality goals, including permitting and compliance. States rely on STAG categorical grants to implement federal mandates, and the letter states: "It is paramount that EPA's budget reflect the importance of providing state programs with crucial grant funds, and that EPA provide flexibility for states to determine how to best use those funds.... Our communities depend on safe and reliable sources of drinking water and value it highly. We have come so far over the past 40-years as we have removed pollution sources that literally made the water different colors, or our rivers burn.... To us and our member states, STAG funding is critical to maintain and continuing with these improvements, this funding goes beyond simply fulfilling legislative requirements. This is a pivotal time for us to sustain and build upon the critical relationship and responsibilities shared between EPA and the states."

The organizations' letter addresses Administrator Pruitt saying, "[W]e appreciate the fact that you have made cooperative federalism a point of emphasis when discussing EPA priorities for the

new Administration. Indeed, your remarks to EPA during your first day as Administrator reinforced in us your belief in the importance of the co-regulator relationship between EPA and states, ...working together with states as partners rather than adversaries. An important aspect of the state-federal relationship is supporting states in their role as the main implementer of the CWA and SDWA. A critical aspect of this support is providing necessary and adequate funding through federal grant programs to allow states to carry out those programs, utilize their local expertise and promote innovative approaches to regulation. ... [S]tates currently provide, on average, over half and sometimes as much as three quarters of core funding for their own environmental programs, and rely of federal funds to fill in remaining funding gaps.”

The letter added, “Should the FY2018 EPA budget make drastic cuts to STAG categorical grants and other crucial state funding sources such as State Revolving Funds (SRFs), states will be severely limited in their ability to implement core water protection programs as required by the CWA and the SDWA...” It continues, also saying that it would limit states’ ability to “...provide critically-needed infrastructure financing and technical assistance to struggling communities to ensure clean and available drinking water. Indeed, some states may be forced to relinquish certain programs back into the hands of EPA, which will only decrease customer service and increase permit backlogs that will stall the expansion of America’s economy.”

It concluded, “We look forward to continuing discussions about CWA and SDWA program funding and the co-regulator relationship between states and EPA.” It was signed by ACWA Executive Director Julia Anastasia, ASDWA Executive Director Alan Roberson, and GWPC Executive Director Mike Paque.

#### Small and Rural Community Clean Water Technical Assistance/Water Infrastructure Flexibility

On March 28, the Senate Environment and Public Works Committee, Subcommittee on Fisheries, Water, and Wildlife held hearings on two bills that would provide technical assistance to communities under the CWA and SDWA. The Small and Rural Community Clean Water Technical Assistance Act (S. 518) would help small treatment works serving fewer than 10,000 people. It authorizes \$15 million each year from FY2018 - FY2022 for grants or cooperative agreements for onsite and regional training programs, and provides support for circuit riders and other multi-state or regional assistance programs. The bill was reported on May 17, and placed on the Senate Calendar.

The Water Infrastructure Flexibility Act (S. 692) would provide technical assistance, outreach, and training related to the CWA and SDWA, including information about financial assistance and regulatory flexibility, opportunities to develop integrated plans, and promotion of green infrastructure on a local and regional level. The Senate passed the bill on October 5, and sent it to the House.

Dennis Sternberg, Executive Director, Arkansas Rural Water Association, representing the National Rural Water Association, testified in support of S. 518. He noted that 80% of our country’s approximately 16,000 sewer systems or wastewater utilities are small, serving populations under

10,000. Although large communities may have teams of technical experts – including engineers, chemists, and highly trained operators – on their full-time staffs, the small communities may only have one operator with multiple duties besides wastewater treatment. Many communities are helped by circuit riders, experts in wastewater treatment operation, maintenance, governance and compliance, who visit hundreds of communities and are on call when communities need help. “Small and rural communities have more difficulty affording public wastewater service due to lack of population density and lack of economies of scale.... Every small community wants to provide quality wastewater to protect their citizens and the environment, but they need to know, often with hands-on demonstration, just how to operate their wastewater systems. Circuit Riders operate free of charge to small communities which often saves the community many thousands of dollars from having to hire consultants or open themselves to civil penalties under the CWA....” Sternberg noted that a similar provision authorizing assistance with drinking water facilities passed in 2016, P.L. 114-98, but money has not been appropriated, preventing assistance from reaching rural communities in various states.

Mayor J. Richard Gray, Lancaster, Pennsylvania, testified on behalf of the Conference of Mayors in support of S. 692. He detailed the challenges his city faced in implementing a state-approved Long Term Control Plan and adopting a Green Infrastructure Plan. Although EPA has since lauded the integrated program and held it up as a model for other cities, the process was onerous. The city struggled against aggressive EPA and Department of Justice enforcement actions, rigid methods, and threats of large punitive civil penalties. Despite limited municipal resources and a small population, EPA pressured them “to use costly technology rather than allowing time to implement a more sustainable (and affordable) integrated set of green and gray solutions.” He pointed out that the CWA already allows EPA flexibility in water quality attainment designations and variances where compliance is overly burdensome. He said cities cannot simultaneously update infrastructure, meet unfunded mandates on short time scales, and provide safe and affordable water and wastewater services. Higher long-term debts to meet all these obligations translate to rate hikes that 80% of Americans served by these systems can ill afford, and the required investments do not provide commensurate public health, economic, or environmental benefits.

Gray said, “Local and elected leaders have a documented record of directing public investments to clean and protect our lakes and streams, but we can’t get there if that means bankrupting our most vulnerable citizens with plans that overemphasize energy intensive gray infrastructure and downgrade the contribution of green infrastructure.” He concluded that EPA should eliminate fines, treat cities as the co-regulators they are, offer flexibility for integrated plans implemented with oversight over a long period of time, and work together with cities to achieve the greatest environmental benefits they can with limited resources.

#### Water Infrastructure Finance and Innovation Act

The EPA Water Infrastructure Finance and Innovation Act (WIFIA) program received an additional \$8 million for credit subsidies in the Consolidated Appropriations Act of 2017, which was signed into law by President Trump on May 5. WIFIA is a federal loan and guarantee program that aims to accelerate investment in our Nation’s water by providing long-term loans and low-cost



supplemental credit assistance for regionally and nationally significant projects. Combined with \$17 million appropriated for credit subsidies in December 2016, the WIFIA program can lend about \$1.5 billion for projects. EPA has received 43 letters of interest requesting \$6 billion in WIFIA loans from public and private entities. Combined with EPA's State Revolving Fund (SRF) loans, private equity, and municipal bonds, over \$12 billion in infrastructure projects could be funded.

EPA Administrator Scott Pruitt said, "Thanks to President Trump and Congress, this additional funding will accelerate the construction of projects to meet communities' water infrastructure needs. This investment will empower states, municipalities, companies, and public-private partnerships to solve real environmental problems in our communities, like the need for clean and safe water."

Entities are seeking financing for a wide array of water and wastewater projects, including repair, rehabilitation, and replacement of aging treatment plants and pipe systems, construction of new infrastructure for desalination, water recycling and drought mitigation. EPA is currently evaluating project eligibility, credit worthiness, engineering feasibility, and alignment with WIFIA's statutory and regulatory criteria.

On June 6, EPA announced the names and locations of prospective borrowers who submitted letters of interest to the WIFIA loan and guarantee program. WIFIA may fund up to 49% of project costs. EPA said the \$25 million in FY2017 funding "will allow for \$1.5 billion in loans, spurring \$3 billion in projects...." The WIFIA invitation led to 43 letters of interest from entities in 19 states including Arizona, California, Colorado, Kansas, Nebraska, and Washington. EPA said, "These letters demonstrate the high need to invest in water infrastructure improvements in communities across the nation and the value that WIFIA financing can offer."

On July 19, the EPA announced the selection of 12 projects in nine states eligible to apply for WIFIA loans. EPA screened the letters of interest for eligibility, creditworthiness, and selection criteria. Four of the selected projects were from California, including: (1) the Southeast Water Pollution Control Plant bio-solids digester facilities project from the San Francisco Public Utilities Commission; (2) the groundwater replenishment system final expansion for the Orange County Water District; (3) Pure Water San Diego; and (4) the water reclamation facility small community project in Morro Bay. Also selected were the Saddle Creek combined overflow retention treatment basin in Omaha, Nebraska, and the Georgetown wet weather treatment station in King County, Washington.

The application process involves a detailed financial and engineering review that will be used to develop the terms and conditions of the loan for the project. Once the EPA Administrator approves the mutually agreeable term sheet, the WIFIA program will finalize the terms of credit assistance and execute the credit agreement. EPA Administrator Scott Pruitt said, "Rebuilding America's infrastructure is a critical pillar of the President's agenda. These large-scale projects will improve water quality for 20 million Americans, especially those communities that need it the most – such as rural and urban communities."

WIFIA established a federal loan and guarantee program, aiming to accelerate water infrastructure investment. EPA hosted four information sessions to discuss the WIFIA program and the financial benefits of WIFIA loans, eligibility and statutory requirements, and tips for completing WIFIA application materials. Prospective borrowers are the intended audience, including municipal entities, corporations, partnerships, State Revolving Fund programs, and private and non-governmental organizations that support prospective borrowers.<sup>29</sup>

On November 30, Rep. Brian Mast (R-FL) introduced the Water Infrastructure Finance and Innovation Reauthorization Act (WIFIA) (H.R. 4492). The bill would extend authorization for EPA's water infrastructure federal loan guarantee pilot program five years, through 2024. It would double authorization for appropriations to \$90 million, with incremental annual increases. The bill shifts primary administration of the WIFIA program to EPA rather than sharing the responsibility with the Corps. Projects under the jurisdiction of the Corps must submit concurrent applications to the Corps. The bill was referred to the House Energy and Commerce, and Transportation and Infrastructure Committees.

The bill is designed to accelerate water structure investments. Rep. Mast said: "Strengthening this bipartisan program will make more resources available for ecosystem restoration, non-point source pollution management projects, estuary conservation projects and more." Co-sponsor Rep. Bob Gibbs (R-OH) added: "EPA can utilize WIFIA and help supplement state revolving funds to assist local governments in providing safe and affordable water utilities and make necessary repairs to their aging water infrastructure."<sup>30</sup>

#### FIFRA/Pesticides

On May 24, the House passed the Reducing Regulatory Burdens Act (H.R. 953) by a vote of 256-165. The bill would amend the CWA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to prohibit the EPA and States from requiring permits for a pollutant discharge from a point source into navigable waters due to the application of pesticides already authorized under FIFRA. It would overturn *National Cotton Council v. EPA* (6<sup>th</sup> Cir. 2009), which held that the CWA requires NPDES permits for pesticides applications. According to a statement from the House Committee on Agriculture, "EPA has estimated that this redundant process affects 365,000 pesticide users, including state agencies, cities, counties, mosquito control districts, water districts, pesticide applicators, farmers, ranchers, forest managers, scientists, and private citizens."<sup>31</sup>

Rep. Bob Gibbs (R-OH), who introduced the bill, said, "We've seen the consequences of this duplicative and unnecessary permitting requirement since it went into effect in 2011. Cities and local governments that conduct routine preventive mosquito abatement should not have to do it with one hand tied behind their backs. This bill ensures the permitting process adheres to EPA's current authority under [FIFRA] to approve and regulate these lifesaving pesticides."

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<sup>29</sup><https://www.epa.gov/wifia>.

<sup>30</sup><https://mast.house.gov/2017/11/mast-introduces-bill-to-accelerate-investment-in-water-infrastructure>.

<sup>31</sup>H. Rpt. 115-131.

House Transportation and Infrastructure Committee Chairman Bill Schuster (R-PA) said, “This bill eliminates the pointless duplication of regulation over the lawful use of pesticides. Under this bill, the use of pesticides will continue to be properly regulated, but without excessive burdens on communities, farmers, and private citizens, and without requirements that cause federal and state agencies to spend limited funds on red tape instead of on protecting public health.”

Agriculture Committee Chairman Michael Conway (R-TX) added, “Pesticides are already fully regulated under [FIFRA], but a misguided court interpretation has required additional permitting, unnecessarily costing producers both time and money. I applaud the approval of Mr. Gibbs’ common sense bill to remove this additional hurdle and look forward to giving farmers and applicators much-needed relief from this needless regulation.”<sup>32</sup> The Senate did not act on the bill in 2017.

### Sue and Settle Practices

On October 16, EPA Administrator Scott Pruitt issued a directive to end “sue and settle” practices to increase public participation and transparency in EPA consent decrees and settlement agreements. The directive notes that EPA, “...in partnership with the states, serves a vital role in protecting human health and the environment.” In resolving past lawsuits, EPA’s actions have “had the effect of creating Agency priorities and rules outside the normal administrative process,” giving the appearance of collusion with outside groups. “When negotiating these agreements, EPA excluded intervenors, interested stakeholders, and affected states from those discussions. The days of this regulation through litigation...are terminated. EPA will not resolve litigation through backroom deals with any type of special interest group.”

The directive lists ten procedures EPA will follow, including online publication of lawsuit notices and direct notification to affected states or regulated entities of both complaints and any negotiations to resolve them, seeking their concurrence before entering into an agreement.<sup>33</sup>

On October 25, the House passed the Sunshine for Regulations and Regulatory Decrees and Settlements Act (H.R. 469) by a vote of 234-187, largely along party lines. The bill is intended to inhibit the ability of federal agencies to enter into consent decrees with special interest groups to compel agency action, realign regulatory priorities, and create new rules affecting American citizens without public input.

The bill establishes procedures for public notice and comment on proposed agreements; requires publication of notices and reports to Congress on complaints, consent decrees, and settlement agreements; and requires courts to allow sufficient time and procedures to comply with the Administrative Procedures Act, rulemaking statutes, and executive orders before approving consent decrees or settlement agreements.

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<sup>32</sup><https://agriculture.house.gov/news/documentsingle.aspx?DocumentID=3889>.

<sup>33</sup><https://www.epa.gov/newsreleases/administrator-pruitt-issues-directive-end-epa-sue-settle>.

Rep. Doug Collins (R-GA) introduced H.R. 469, and praised the passage of the bill as well as EPA's recent directive. He said: "The back-room litigation that the EPA, Fish and Wildlife Service and other agencies favored throughout the last administration must come to an end. A government by and for the people has no business allowing unelected bureaucrats to redraft laws behind closed doors...."<sup>34</sup> The Senate did not act on the bill, which was referred to the Judiciary Committee.

## Corps of Engineers

### Water Supply Rule

On February 7, the U.S. Army Corps of Engineers (Corps) published a correction to its December 2016 notice of proposed rulemaking,<sup>35</sup> extending the comment period on the Corps Water Supply Rule to May 15, 2017.<sup>36</sup>

On May 12, the WSWC submitted a comment letter addressing the Corps proposed water supply rule, "Use of Corps Reservoir Projects for Domestic, Municipal and Industrial Water Supply." The letter expresses concern over the lack of substantive state participation in the development of the rule. "State input for such a water supply rule is critical, particularly where the Corps policies will result in a disproportionate impact on western water resources, where the laws differ significantly from the laws governing riparian water users along rivers in the East. The Western States have primary, often exclusive authority over the protection, development, and management of waters within their boundaries, including natural surface waters flowing through Corps reservoirs and dams. We believe that the Corps' assertions of broad authority over surface waters and the potential interference with the lawful exercise of state water rights are contrary to over 100 years of deference afforded state water laws by the Congress and the Supreme Court of the United States."

WSWC noted that the definition of "surplus waters" must explicitly exclude the natural flows that would exist regardless of federal dams and reservoirs. Otherwise, the Corps proposed rule would interfere with state authority to develop, use, manage, control, distribute, and allocate state water, and in some states may interfere with vested property rights in water with Constitutional protections. "We request that the Corps enter into an open and authentic dialogue with the states designed to achieve a mutually acceptable policy that reflects the Constitutional division of powers, state primacy over water resources allocation, and the realities of western water law, with a flexible but consistent approach that accounts for the significant physical, hydrological, and legal differences that exist between the states."

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<sup>34</sup><https://dougcollins.house.gov/press-releases/house-passes-collins-bill-to-stop-sueandsettle-abuse/>.

<sup>35</sup>81 Fed. Reg. 91556.

<sup>36</sup>*Western States Water*, #2222, December 16, 2016.

Comments from the Texas Commission on Environmental Quality, which manages Texas' surface water, noted the lack of coordination with states in developing this rule, the obvious federalism implications of the rule, and that the imposition of a major national policy without state consultation as not only inappropriate, but it results in flawed policy. "Corps policies, as set out in this rulemaking, have the potential to undermine state authority to allocate and manage water resources in Texas. The discussion in the proposed rule related to consumptive and non-consumptive use and the purposes for which Texas can allocate water conflicts with Texas statutes. In addition, the proposed section on water supply storage accounting does not take into account how water is managed and allocated in Texas." The storage accounting method appears to apply a narrow solution to a localized problem on a nationwide basis, without considering differences between state laws. "The Corps' allocation of return flows and other made inflows to all users in a reservoir would result in water that is permitted to an existing Texas water right being allocated to other users in a manner that violates state statutes and ownership of state water. . . . Texas water right holders have made significant investments to utilize their permitted water. The proposed rule would have the effect of allocating this water to someone else and the Corps accounting would directly conflict with the terms of the state issued water rights."

Oklahoma addressed a concern that the definition of surplus water could allow the Corps to go beyond its responsibility to provide specified entities with storage water for certain authorized purposes, affecting state water supplies and tribal water rights. Additionally, the Corps only has authority to provide storage space for water allocated by the State, not to assume control over natural flows or issue storage contracts or easements for non-project waters. "Under this proposed definition of surplus, water that naturally flows into Lake Texoma and is authorized for use in Oklahoma could be reallocated to users in Texas. If USACE continues to include natural flows in the surplus definition, Oklahoma's water supply could be in danger."

South Dakota stated that the proposed rule is unacceptable, re-writing Congressional intent and ignoring state water laws and the science and engineering of hydrology. The rule attempts to "mandate a federal take-over of all our unappropriated natural flows," as well as existing appropriations of natural flows of the Missouri River that pre-date "the Pick-Sloan Act and the construction of the Missouri River dams. The proposed rule in its current form threatens to strip away those water rights through future water supply agreements, renewal of access easements, and other processes for which the [Corps] has no authority." South Dakota law issues water rights for as long as water users put the water to beneficial use. The Corps' rule creates uncertainty for water rights holders obtaining their water from Corps reservoirs, because there is no guarantee that the Corps will renew water supply agreements when they expire. This will hinder development in South Dakota.

Idaho stated, "The Corps must exclude Idaho from the scope of the Rule because it is based on theories of the nature, extent, and administration of state water rights devised by the Corps that are incompatible with Idaho water law. The Corps was required by the McCarran Amendment, 43 U.S.C. §666, to assert in Idaho's Snake River Basin Adjudication any claim or argument that federal law requires Idaho to adopt the Corps' theories of the nature, extent, and administration of water rights for the Corps' reservoirs. Having failed to do so, the Corps is now precluded as a matter of law

from attempting to impose through the Rule a system of water rights and water administration that conflicts with Idaho water law.”<sup>37</sup>

The Corps again extended the comment period (82 FR 40085) for the notice of proposed rulemaking on the use of Corps reservoir projects for domestic, municipal, and industrial water supply. The new extension comes at the request of multiple parties. The new deadline for comments is November 16.<sup>38</sup>

On September 14, North Dakota State Engineer and WSWC member Garland Erbele submitted comments on the Corps request for comments on reviewing regulations that may be appropriate for repeal, replacement, or modification. The letter attached several of North Dakota’s past comments, noting that “they remain valid as the concerns have not changed nor have they been addressed.”

Regarding the Corps’ efforts to establish a nationwide policy for water supply use in Corps-operated reservoirs, North Dakota’s comments addressed the proposed water supply rule in 2017, scoping for a reallocation study on the Missouri River in 2012, and surplus water reports for reservoirs on the Missouri River in 2011 and 2012. The letter incorporates North Dakota’s 2014 comments on the Corps and EPA proposed definition of “Waters of the United States.” It also references the 2017 comments on the need for direct consultation with North Dakota for the Missouri River Recovery Management Plan and Environmental Impact Statement.

The Corps’ request for comments<sup>39</sup> follows the President’s Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” calling on federal agencies to establish a Regulatory Reform Task Force and review regulations that are ineffective, inconsistent, or unnecessarily burdensome without providing the intended benefits. While the Corps welcomes comments on all of its regulations, they are currently seeking input on 33 CFR chapters II and III. Among other regulations, this includes: part 230, procedures for implementing NEPA; part 323, permits for discharges of dredged or fill material into WOTUS; part 325, processing of permits; part 328, definition of WOTUS; part 329, definition of navigable WOTUS; and part 330, the nationwide permit program.

On November 16, the National Water Supply Alliance (NWSA) submitted comments on the Corps proposed water supply rule. The letter notes that many NWSA members hold storage contracts, “...and all have a strong interest in integrating the storage service provided by the Corps into their water supply plans.” NWSA recognized the role of the Corps in the storage of water and the management of reservoirs, but strongly opposed the proposed rule’s “intrusion on States’ authority to allocate water and to manage water resources within their borders – especially the provisions relating to the definition of surplus water, storage accounting, and made inflows.”

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<sup>37</sup><http://www.westernstateswater.org/letters/>.

<sup>38</sup>*Western States Water*, #2222, December 16, 2016; #2230, February 10, 2017; #2233, March 3, 2017; and #2244, May 19, 2017.

<sup>39</sup>82 Fed. Reg. 33470.

The comments address six main concerns: (1) the federalism implications to state responsibilities and authorities over water; (2) storage accounting that ignores both state law allocating water rights as well as local water supply planning; (3) the importance of basing water storage costs on recouping government costs for the construction and maintenance of the Corps facility rather than generating profit; (4) defining “surplus water;” (5) determining the appropriate authority, procedure, and policy for surplus water allocation approval and various contract provisions; and (6) the role of power marketing agencies in providing information for cost calculations.

The letter emphasizes the need to distinguish storage from water. “From a water provider perspective, what the Corps provides is a facility in which to store water.... Once a contract is executed...the local water provider should be free to integrate this storage capacity into their water supply plans however it makes sense. They should be free to use the space they purchase from the Corps to store any water available to them under State law.” The letter also notes that, although there is no consensus among NWSA members regarding whether the Corps should issue a water supply rule, there is consensus about the flaws of the proposed rule and the concerns expressed in the letter.

#### CWA Jurisdictional Determinations

On January 24, the U.S. District Court for Minnesota issued its ruling in *Hawkes Co., Inc. et al. v. Corps of Engineers* (Corps) (#13-107), holding that the Corp’s revised jurisdictional determination was unlawful as arbitrary, capricious, and an abuse of discretion. The court enjoining the Corps from exercising jurisdiction over the wetlands in question under the CWA.

In 2010, the plaintiffs applied to the Corps for a CWA §404 permit to mine peat from a wetland on their property for stable golf greens. In 2012, the Corps issued a jurisdictional determination (JD) that the property contained “Waters of the United States,” because the wetlands had a “significant nexus” to the Red River of the North, located 120 miles away. To continue with the permitting process, the Corps required the respondents to submit numerous property assessments that would cost upwards of \$100,000. The plaintiffs appealed the JD administratively and then sought judicial review. On May 31, 2016, the U.S. Supreme Court ruled that the JD was a final agency action subject to judicial review.<sup>40</sup>

On remand, the District Court found that the information and documentation in the revised JD was insufficient to establish more than a speculative or insubstantial nexus between the wetlands and the Red River. The lack of site-specific water quality data, or evidence of water flow from precipitation runoff or groundwater flow connecting the wetlands to the river, rendered the Corps’ determination that a significant physical, chemical or biological nexus exists as “arbitrary and capricious.” Rather than remanding the matter to the Corps to establish site-specific evidence, the District Court declined to give the Corps a “third bite at the apple” that would force the Plaintiffs back through “a never ending loop from which aggrieved parties would never receive justice.”

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<sup>40</sup>Western States Water, #2194, June 3, 2016.

## Nationwide Permits

On January 6, the Corps published, revised, and renewed, nationwide permits (NWP) in the *Federal Register*.<sup>41</sup> These permits are intended to provide incentives to avoid and minimize impacts on aquatic resources, and are necessary for work in streams, wetlands and other WOTUS under the CWA §404 and the 1899 Rivers and Harbors Act §10. The new NWPs will take effect March 19, 2017, replacing the existing permits, which automatically expired on March 18, 2017. The Corps is reissuing 50 permits and adding two new permits, NWP 53 covering the removal of low-head dams, and NWP 54, covering the construction and maintenance of living shorelines. Most of the reissued nationwide permits have no major changes from 2012.

The proposal to reissue NWPs was published in the *Federal Register* on June 1, 2016, soliciting comments from NWP users and other interested parties. The Corps requested feedback on some potential revisions, including definitions of terms such as “Waters of the United States,” “adjacent,” and “ordinary high water mark,” following publication of the 2015 WOTUS Rule. Implementation of the WOTUS Rule has been stayed by the 6<sup>th</sup> Circuit since October 9, 2015. The Corps received approximately 54,000 comments, and determined to rely on existing definitions and to retain the proposed acreage limits and preconstruction notification (PCN) thresholds for NWPs. Some commenters noted that the WOTUS Rule was only in effect for several weeks before the court’s stay, which was insufficient time to collect data and examples of the effects of the rule on the utility of the NWPs in order to provide meaningful comments to the Corps.

The current regulations and guidance will be the definition of “Waters of the United States” published in the November 13, 1986, issue of the *Federal Register*<sup>42</sup> plus the January 2003 clarifying guidance regarding the U.S. Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers*, 531 U.S. 159 (2001) (68 FR 1995) and the December 2008 guidance entitled Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States*. The text of the NWP’s general conditions and definitions were modified so that they do not cite specific provisions of 33 CFR 328 impacted by the 2015 WOTUS Rule. The Corps’ districts will process PCNs and voluntary requests for NWP verifications according to the current regulations and guidance, and will not implement the 2015 WOTUS Rule unless the stay is lifted and the Rule goes back into effect. “If the Corps determines that the NWPs issued today need to be modified to address changes in the geographic scope of Clean Water Act jurisdiction or other regulation changes, the Corps will conduct rulemaking in accordance with the Administrative Procedure Act prior to making those changes.”<sup>43</sup>

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<sup>41</sup>82 Fed. Reg. 1860.

<sup>42</sup>51 Fed. Reg 41206.

<sup>43</sup><http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.



## **Drought**

### Water Security/Drought Preparedness

On August 2, the Committee on Energy and Natural Resources Subcommittee on Water and Power held a hearing to examine improving water security and drought preparedness through infrastructure, management, and innovation. Witnesses included Tom Buschatzke, Director, Arizona Department of Water Resources; Shirlee Zane, Chairwoman, Sonoma County Water Agency in California; Martha Sheils, Director, New England Environmental Finance Center, University of Southern Maine; Heiner Markhoff, President, GE Power – Water & Process Technologies; and Carlos Riva, President, Poseidon Water, LLC.

Buschatzke testified on state-federal partnerships to prepare for drought and flexibly manage water supplies. Arizona, California, and Nevada are negotiating a Drought Contingency Plan to conserve water in the Lower Basin of the Colorado River. Even with a good winter, the water levels have not erased concerns about shortages as soon as next year. Assurances from the USBR to preserve the water in the system and federal approval of Minute 323 to the 1944 Mexican Water Treaty are essential to create certainty for conservation investments. He discussed recycling and reuse of reclaimed water, the settlement of Indian reserved water rights claims, and the development of dams, canals, and other infrastructure to develop, store, and deploy water resources.

Zane said, “Lake Mendocino and Lake Sonoma are dual-purpose reservoirs that provide flood protection, managed by the U.S. Army Corps of Engineers (Corps), and water supply, controlled and coordinated by the Water Agency.... We make releases to meet the needs of residential water users...[and] to maintain minimum instream flow requirements for beneficial uses, including recreation and the maintenance and conservation of vital fish habitat.” However, the Corps’ 1959 flood control manual needs to be updated to reflect new hydrologic data, improved forecasting ability, changing climate conditions, and reduced inflows. In 2013, “...the Corps was required to release 25,000 acre-feet of rainfall from Lake Mendocino’s reservoir because it had to adhere to the antiquated rule curve, despite weather predictions that no precipitation was forecasted.” The county then headed into three years of drought with a reduced reservoir water supply.

Zane provided an overview of progress on the state-federal collaborative Forecast Informed Reservoir Operations (FIRO) demonstration project at Lake Mendocino, which started in 2014. She also emphasize the need for better tools to improve flood control and other water management decisions, including sub-seasonal to seasonal precipitation forecasting that provides lead-time information about weather events.

## **Hydraulic Fracturing**

### Rescinding the 2015 Fracking Rule

On March 15, the Bureau of Land Management (BLM) filed a motion in *Wyoming et al v. Zinke* (#16-8068), requesting the 10<sup>th</sup> Circuit to stay the case pending the outcome of new rulemaking

efforts. The motion states that the BLM’s 2015 Final Rule on “Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands,” 80 FR 16128, does not reflect the policies and priorities of the new Administration, and that BLM expects to issue a notice of proposed rulemaking within 90 days, which would rescind the 2015 Final Rule. The Court postponed the oral arguments scheduled for March 22, but ordered supplemental briefing rather than staying the case for an indefinite period of time.<sup>44</sup>

On July 25, the BLM published its proposal to rescind the 2015 rule. President Trump’s Executive Order 13783 directed BLM to review the rule for consistency with the policy to avoid “regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation,” and that agencies should “promote clean air and clean water, while respecting the proper roles of Congress and the States concerning these matters....” BLM reviewed the rule, as well as state and tribal laws and regulations, and found that the proposed rescission “would not leave hydraulic fracturing operations entirely unregulated.” At the time the 2015 rule was issued, 20 of the 32 states with federal oil and gas leases had regulations addressing hydraulic fracturing, and the remaining 12 states have since introduced laws or regulations. Some tribes with oil and gas resources have also taken steps to regulate hydraulic fracturing on their lands.

BLM determined that there is no need for a federal chemical disclosure requirement, since companies already make those disclosures, either voluntarily or to comply with state law. There are 23 states that currently use FracFocus for chemical disclosures, including the major oil and gas operations in Colorado, Montana, North Dakota, Oklahoma, Texas, and Utah. Additionally, adverse environmental impacts from hydraulic fracturing incidents on federal and Indian lands are rare, and BLM possesses authority allowing it to impose site-specific protective measures to reduce risks from fracturing jobs as needed. BLM concluded that the compliance costs associated with the 2015 final rule, from \$32 million to \$45 million per year, are not justified.

In rescinding the rule, BLM is proposing to revise five subsections of 43 CFR Parts 3160 and 3162, noting that these revisions would not change any of the current requirements since the 2015 rule never went into effect. “The BLM is seeking comments on the specific regulatory changes that would be made by this proposed rule and is interested particularly in information that would improve BLM’s understanding of state and tribal regulatory capacity in this area. Further, the BLM is seeking specific comments on approaches that could be used under existing Federal authorities, including what additional information could be collected during the APD process or through sundry notices, to further minimize the risks from hydraulic fracturing operations, particularly in states or on tribal lands where the corresponding regulations or enforcement mechanisms may be less comprehensive.” Comments were due by September 25.<sup>45</sup>

Katherine MacGregor, Acting Assistant Secretary for Land and Minerals Management, said, “America’s public lands offer outstanding commercial, recreational, and conservation opportunities, and energy development is one of them. Maintaining positive, productive working relationships with

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<sup>44</sup>*Western States Water*, #2197, June 24, 2016 and #2206, August 26, 2016.

<sup>45</sup><https://www.regulations.gov/document?D=BLM-2017-0001-0001>.

our state and tribal partners is a top priority of this Administration. We are committed to working collaboratively with them to ensure the safe and environmentally responsible development of our Nation's energy resources.”

Members of the Congressional Western Caucus support the proposal to rescind the rule. Rep. David Valadao (R-CA) said, “Hydraulic fracturing has played an important role in the development of America’s oil and natural gas resources for more than 60 years.... California diligently regulates the industry, balancing the need to protect our environment with the value of economic growth, leaving a negligible need for federal involvement.” Rep. Scott Tipton (R-CO) said, “Western states, including Colorado, have done a good job of regulating and monitoring hydraulic fracturing and those efforts should be able to continue without heavy-handed federal bureaucratic regulations that prevent responsible energy development from moving forward.” Rep. Kevin Cramer (R-ND) said, “The official rescinding of BLM’s hydraulic fracturing rule marks another win for regulatory relief in North Dakota. This duplicative rule of state regulatory programs would have added more cost and delay to our energy producers with no safety or environmental benefits to show for it.”

On September 13, Wyoming Governor Matt Mead submitted a letter to Interior Secretary Ryan Zinke and the BLM, commenting on the proposed withdrawal of the 2015 Hydraulic Fracturing Rule.<sup>46</sup> Citing *Wyoming v. U.S. Department of the Interior*, No. 15-cv-41 (D. WY), Governor Mead noted that the States of Wyoming, Colorado, Utah, and North Dakota successfully argued that the BLM exceeded its statutory authority when it promulgated the hydraulic fracturing regulation. He pointed out the lack of evidence linking the hydraulic fracturing process to groundwater contamination. The rule increases costs without a corresponding environmental benefit.

The letter goes on to say that the States are already effectively regulating the process, and under the comprehensive state regimes, operators have employed the technology safely and efficiently for decades. “Intrusion by the BLM into a process already adequately regulated by the states will decrease efficiency and increase costs. The BLM does not have the staff, the budget, or the expertise to process applications for permits to drill (ADPs) with the same efficiency as the states. The delay in processing ADPs by the BLM will result in declining production from federal lands to the detriment of the public.” Governor Mead added that significant provisions of the rule are technically deficient, and without recounting all of the problems, reiterated the Court’s findings that likely rendered the rule invalid even if the BLM had authority to issue the rule. “The hydraulic fracturing regulation was ill conceived, based on suspect legal authority, and unnecessary. I urge you and the BLM to finalize its rescission.”

On September 20, the North Dakota Industrial Commission (NDIC) also submitted a letter supporting the rescission of the 2015 rule. The NDIC is a legislative commission, created to manage utility, industry, and business projects established by state law. Governor Doug Burgum is the Chairman, Attorney General Wayne Stenehjem is the general counsel, and Agriculture Commissioner Doug Goehring is the third member.

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<sup>46</sup>80 Fed. Reg. 16128.

The NDIC letter emphasizes North Dakota's "enormous interest" in withdrawing the rule given the increased oil production due solely to hydraulic fracturing in horizontal wells. The state "already has comprehensive laws and regulations of hydraulic fracturing that require chemical disclosure, ensure adequate groundwater protection, safe hydraulic fracturing practices, and protect the environment."

In North Dakota, the surface estates are often severed from the minerals. The land in many cases is owned by the State or private parties, but the surface operations penetrate a combination of federal, state, and private mineral ownership. "The 2015 final rule inappropriately broadened the authority of the BLM to regulate surface operations for hydraulically fractured wells that penetrate federal minerals but where the United States does not own the surface." The letter continues with a list of definitions and provisions in the 2015 rule that interfere with North Dakota's regulations, protection of its groundwater, support of oil and gas development, prevention of waste, and protection of the correlative rights of all owners.

The letter notes that "there has been no proven case of ground water contamination from hydraulic fracturing in the United States to date; nor has there been any occurrence of mechanical failures in North Dakota since the NDIC's hydraulic fracturing regulations were implemented." NDIC says the 2015 rule is duplicative and unnecessary. "Since each sedimentary basin has unique deposits and geologic features which result in unique local environmental and geologic conditions[,] regulating oil and gas development is a role best left to the states."

On September 21, the 10<sup>th</sup> Circuit dismissed the appeals in *Wyoming et al. v. Zinke* (#16-8068). Citing the change in Administrations and BLM's process of rescinding the 2015 Fracking Rule, the Court concluded that these new circumstances rendered the appeals "prudentially unripe." The doctrine "contemplates that there will be instances when the exercise of Article III jurisdiction is unwise," including instances where the courts would entangle themselves "in abstract disagreements over administrative policies," or "to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Although the appeals present a clear legal issue regarding BLM's statutory authority to promulgate the Fracking Rule, the court held that making a determination about whether the District Court of Wyoming erred in invalidating the Rule at the same time BLM is rescinding the rule "appears to be a very wasteful use of limited judicial resources.... It is clearly evident that the disputed matter that forms the basis for our jurisdiction has thus become a moving target."

Rather than abate the appeals for an indefinite period of time while the BLM engages in the rulemaking process – noting that it took BLM five years to promulgate the Fracking Rule in the first place, and that resolving competing policy choices is a political rather than judicial role – the Court decided to dismiss the appeals. Additionally, the 10<sup>th</sup> Circuit decided to vacate the district court's decision "to prevent it from spawning any legal consequences." The Court remanded the case with instructions to dismiss the underlying State and Tribal lawsuits without prejudice. "As a practical matter, dismissing the underlying action is appropriate in this case given that there would be nothing

for the district court to do upon remand except wait for the BLM to finalize its rule rescinding the Fracking Regulation.”

On September 25, WSWC submitted comments on the BLM’s proposed withdrawal of its Hydraulic Fracturing Rule. Consistent with WSWC Position No. 393, the letter agrees with BLM that adverse environmental impacts are rare, noting that “...western states have experienced few, if any, adverse impacts involving water quality and water allocation attributable to hydraulic fracturing. The process has been used for more than a million wells for over sixty years, and is responsible for increasing the nation’s ability to recover oil and gas at great economic benefit.”

The letter also agreed with BLM’s assessment that the appropriate framework for mitigating any impacts exists through state regulations. “The states have decades of experience and currently employ a range of programmatic elements and regulations to protect water resources and the environment, including requirements for well permitting, well construction, the handling of exploration and production waste fluids, well closures, and the abandonment of well sites. The states are in the best position to regulate hydraulic fracturing due to their understanding of regional and local conditions, and their ability to tailor regulations to fit the needs of the local environment.”

The letter concluded by encouraging BLM to follow the WGA’s “Principles to Clarify and Strengthen the State-Federal Relationship,” endorsed by WSWC, and to further engage WSWC in “substantive, meaningful consultation to improve BLM’s understanding of state regulatory capacity with regard to hydraulic fracturing.”

On December 28, the BLM published its *Federal Register* notice of the final decision to rescind the stayed 2015 Hydraulic Fracturing Rule. BLM’s review of the Rule found that all 32 of the states with federal oil and gas leases have regulations to address hydraulic fracturing, and that companies are disclosing the chemical content of their hydraulic fracturing fluids using FracFocus or other state regulatory databases. Rescinding the 2015 Rule is consistent with the Administration’s Executive Order 13771 to reduce the costs of regulatory compliance.

## **Indian Water Rights**

### *Agua Caliente/Groundwater*

On March 7, the 9<sup>th</sup> Circuit upheld the California District Court’s summary judgment from Phase I of the trifurcated case, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* (No. 15-55896). The 9<sup>th</sup> Circuit decision holds that the United States implicitly reserved a right to water when it created the Agua Caliente Reservation, and that the Tribe’s reserved water right extends to the groundwater underlying the Reservation. The court summarized hydrologic considerations in the arid valley, noting that “even in a peak year the river system provides very little water for irrigation or human consumption.” Given the lack of perennial streams in the area and the importance of water for survival, “...a reservation without an adequate source of surface water must be able to access groundwater.” The court expressed “...no opinion on how much water falls within the scope of the Tribe’s federal groundwater right,” since that will be determined at a later phase of

the case. However, even with water under state-law entitlements, “...there can be no question that water [from the aquifer] in some amount was necessarily reserved to support the reservation created.”

The court acknowledged that it was unable to find any controlling federal appellate authority explicitly holding that the federal reserved water rights doctrine in *Winters v. United States*, 207 U.S. 564 (1908), extends to groundwater. Instead, it pointed to *United States v. Cappaert*, 426 U.S. 128 (1976) and *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) as persuasive and implied authority for its decision, emphasizing that *Winters* does not distinguish between surface and groundwater or prohibit the inclusion of groundwater among the reserved rights. “Apart from the requirement that the primary purpose of the reservation must intend water use, the other main limitation of the reserved rights doctrine is that the unappropriated water must be ‘appurtenant’ to the reservation.” The court determined that as long as the waters are attached to the reservation, it does not matter whether that water is above or below the ground.

The court noted that it previously held in its review of *Cappaert* “...that the *Winters* doctrine applies not only to surface water, but also to underground water.... But on appeal, the Supreme Court did not reach this question.” Rather, the 9<sup>th</sup> Circuit panel said, the Supreme Court hinted that reserved waters may include appurtenant groundwater when *Cappaert* held that “the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.” The 9<sup>th</sup> Circuit determined. “If the United States can protect against groundwater diversions, it follows that the government can protect the groundwater itself.”

The court also held that federal reserved water rights preempt conflicting state law. The water district argued that the Tribe does not need a federal reserved right to prevent the purpose of the reservation from being defeated, because: (1) the Tribe has a correlative right to groundwater under California law; (2) the Tribe has not historically used groundwater; and (3) the Tribe is entitled to surface water under the Whitewater River Decree. The court rejected these arguments, noting that state water entitlements do not affect the analysis of the Tribe’s federally reserved water right, and that States do not have power to dispose of reserved rights.

On July 5, the Desert Water Agency (DWA) petitioned the U.S. Supreme Court for a Writ of Certiorari related to the 9<sup>th</sup> Circuit Court’s decision in *Agua Caliente*, with the band of Cahuilla Indians and the United States as respondents. Roderick E. Walston, DWA Counsel of Record is a former WSWC member. The Coachella Valley Water District (CVWD) separately petitioned. Petitioners contend that the Court has never decided whether the reserved rights doctrine applies to groundwater, and the questions presented include whether or not the federal government, in reserving lands, impliedly reserves ground water to accomplish the reservation purposes. In *U.S. v. New Mexico*, 438 U.S. 696 (1978), the Court limited the reserved rights doctrine, according to the DWA brief, “...because it conflicts with Congress’ deference to state water law,” and held that federal water rights are impliedly reserved only as “necessary” to accomplish the primary purposes of the reservation and prevent them from being “entirely defeated.” *New Mexico*, 438 U.S. at 700,702.

The 9<sup>th</sup> Circuit held that New Mexico’s limitations apply in quantifying an existing federal reserved right, but not in determining whether a right exists – and whether the right exists depends on whether the reservation purpose “envisions” use of water. The 9<sup>th</sup> Circuit held that in this case the reservation of land “envisions” use of water, and thus the tribe has a reserved right in groundwater. The petitioners contend a federal reserved right exists only if the reservation of water is “necessary,” so as not to be “entirely defeated.” Then, the question remains, whether the Reserved Rights Doctrine applies to groundwater. Finally, does the Tribe have a reserved right in groundwater, in light of the fact that the Tribe has the right to use groundwater under California law. The DWA stated that the most significant issue is whether the existence of a water right under state law is relevant in determining whether a federal reserved water right exists under federal law. DWA argued that since the Tribe has the same right to use groundwater under California law, as other overlying landowners, the Tribe’s claimed reserved right is not “necessary,” and does not meet the Supreme Court’s standard in New Mexico for an implied reserved right. The Tribe also has a 1938 decreed right to the use of surface water from the Whitewater River that includes the precise amount of water that the United States had “suggested” during the adjudication proceeding was necessary to meet the Tribe’s reservation needs.

Historical documents surrounding the creation of the reservation by Executive Orders signed by Presidents Grant and Hayes in the 1870s, indicate that the Tribe was not using groundwater, which DWA contends defeats any implication that they intended to create a reserved right in groundwater. Even today, the Tribe does not use groundwater, but instead purchases DWA and CVWD water. Therefore, DWA argues, the Tribe’s failure to use or attempt to use groundwater demonstrates that their prosperity and success is not dependent on whether or not the Tribe has a reserved right in groundwater. “Notably, the Tribe’s complaint does not allege otherwise. Instead, the complaint alleges that DWA and CVWD are required to compensate the Tribe for importing and storing water [from the Colorado River] into the groundwater basin that the Tribe allegedly ‘owns.’” The Tribe seeks money, not wet water.

On August 7, the States of Nevada, Arizona, Arkansas, Idaho, Nebraska, North Dakota, South Dakota, Texas, Wisconsin, and Wyoming filed an amicus curiae brief with the U.S. Supreme Court in support of the petition for writ of certiorari, appealing the 9<sup>th</sup> Circuit’s decision in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F. 3d 1262 (9<sup>th</sup> Cir. 2017). The brief argues that the 9<sup>th</sup> Circuit’s expansion of the federal reserved water rights doctrine unsettles the scope of the States’ authority over groundwater resources, and that the decision is inconsistent with caution courts must exercise when altering the federal-state balance by interfering with state sovereign power, particularly when applying implied Congressional intent. It calls the decision an “indiscriminate application of the Winters doctrine to groundwater” that ignores the nuances of past court decisions and express Congressional intent.

The brief describes three factors that the 9<sup>th</sup> Circuit ignored: (1) the long historical differential treatment of surface water and groundwater by most States, in part due to the fact that “never before has any court recognized an unqualified reserved right in the groundwater disconnected from any consideration of the protections already offered by the state;” (2) the primary purposes of the reservation should inform whether a reserved groundwater right exists at all, not just the quantity of

the right; and (3) a primary purpose need for surface water is distinguishable from whether that purpose included a need for groundwater. Water that is valuable for secondary use purposes on federal reservations may still be acquired in the same manner as any other public or private appropriator.

Western States have vast quantities of federal land withdrawn from the public domain, and States have allocated and adjudicated groundwater rights with a “legitimate expectation that they had primary control over their groundwater” based on past court decisions. “If a federal reservation can assert absolute preemption over state groundwater allocation laws and regulations, a state’s effort to effectively manage those limited water resources will be thrown out of balance.”

While the States have adopted various approaches to managing and allocating water rights, many of their existing water rights holders have relied on the availability of water and invested heavily in putting their water rights to beneficial use. A newly-created, previously unknown federal senior water right, which cannot be lost through non-use unlike other water rights in the system, has the ability to curtail or dispossess those established rights under the 9<sup>th</sup> Circuit’s decision.

Especially troubling to the amicus States is the 9<sup>th</sup> Circuit’s holding that the implied reservation of water may be flexible and change over time, expanding beyond the original purpose and expected beneficial use at the time the reservation was created. “It leaves States facing a possible tide of federal reserved water rights claims in excess of those rights already allocated, and budgeted, in the States’ respective water allocation system.”

*Agua Caliente* also has the potential to create uncertainty for States that do not rely on a temporal priority system of rights. Using Minnesota’s administrative process of addressing riparian water-use conflicts as an example, the brief illustrates federalism and domestic water supply concerns that would arise if an implied federal reserved water right unnecessarily preempted applicable state law. The Supreme Court extended the petition response deadline to September 6.

#### Navajo Utah Water Rights Settlement Act

On March 15, Senator Orrin Hatch (R-UT) introduced the Navajo Utah Water Rights Settlement Act (S.664). It includes a water settlement fund to be used for the construction of drinking water infrastructure, domestic and municipal, and the financing of a distribution system on the Navajo Nation in exchange for limiting the legal exposure and litigation expenses of the federal government and the State of Utah.

The agreement quantifies the Navajo Nation’s right to use 81,500 acre-feet of water annually, from sources on or adjacent to the Navajo Reservation within Utah’s boundaries. The authorized federal contribution would be up to \$198.3 million, which includes \$11.1 million to assist the Navajo Nation with the expense of operating, maintaining, and replacing the water development projects, and \$1 million for programmatic costs, including the preparation of a hydrographic survey of historic and existing water uses on the reservation. The total federal obligation would increase or decrease based on construction costs using June 2014 cost indices. Utah would contribute \$8 million for



planning, design and construction of water projects, with payments spread over three years. The bill was referred to the Senate Committee on Indian Affairs.

In a press release, Senator Hatch said: “I’m thrilled that over a decade of work with our Navajo friends and neighbors has culminated in this fair, equitable settlement that benefits all water users in the region. This result took a great deal of time and commitment, and I’m grateful so many willing partners stepped up to the plate to address this complex issue.”

Utah Governor Gary Herbert said: “For more than a decade the State of Utah and the Navajo Nation have worked together to reach consensus on these critical water right claims. This agreement did not happen overnight; it has taken time and commitment from partners on every side of the issue. This deliberative process has led to a fair and equitable agreement which will benefit Utah, the Navajo Nation, the federal government and all water users in the Colorado River Basin alike.” Utah Attorney General Sean Reyes noted the importance of resolving the water rights claims, which “must come from Utah’s precious Colorado River allocation.”

Navajo Nation President Russell Begaye said: “The settlement represents a win-win for the Navajo Nation and the State of Utah. Consequently, we are looking forward to working with...the Utah congressional delegation in moving this historic legislation through Congress.”

On December 6, the Senate Indian Affairs Committee held a legislative hearing to receive testimony on the Navajo Utah Water Rights Settlement Act (S.664) and the Hualapai Tribe Water Rights Settlement Act (S. 1770). Witnesses included USBR Deputy Commissioner Alan Mikkelson, Navajo Nation President Russell Begaye, Hualapai Nation Chairman Damon Clarke, Utah Lieutenant Governor Spencer Cox, and Arizona Department of Water Resources Director Thomas Buschatzke.

Mikkelson noted that the Department of the Interior “...supports the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation.” The settlements “...have the potential to resolve long-standing claims to water, provide certainty to water users, foster cooperation among water users within a watershed, allow for the development of water infrastructure, promote tribal sovereignty and self-sufficiency, and improve environmental and health conditions on reservations.”

Mikkelson testified in support of the Navajo-Utah bill, while noting a few concerns that they are still negotiating with the Navajo Nation and the State, including the waiver of claims language, indexing the water development fund, water rights on public domain allotments within the Reservation boundaries, and construction of infrastructure. “Subsequent to the introduction of S. 664, the United States, the Nation, and the State discussed a simplified settlement, which would replace the Department’s construction obligations under Section 6 with a water development fund to be used by the Nation to build water projects on a needed basis. Such a revision would afford the Navajo Nation the opportunity to achieve economic efficiency and flexibility in designing and [constructing] water projects over time as needs arise. We believe that a fund-based settlement would allow for tribal self-sufficiency...[while] relieving the Department of the risks inherent in attempting to design and estimate the costs of projects that have not advanced beyond a conceptual level.”

Begaye reminded the Committee of the terms of the 1868 Treaty with the Navajo Nation, including the United States' promise to assist the Nation to create a permanent homeland on their reservation lands. "In the arid West, it is clear – no lands can be a permanent homeland without an adequate supply of water. The Navajo Nation will secure its water rights either through litigation or through settlement.... [T]he advantages of settlement in this case far outweigh the costs, risks, and policy disadvantages of divisive litigation." In particular, the settlement results in a quantification of the Nation's water rights in the Upper Basin of the Colorado River while protecting existing Utah water right commitments and interstate compacts.

Begaye noted that, even using conservative estimates of the value of the water foregone by the Nation, in the range of \$250 million to \$850 million, the benefits far exceed the \$211 million authorization for appropriations included in the bill. That does not include the added value of the foregone litigation and related costs for "...the failure of the United States to ensure that the Upper Colorado River Basin Compact does not limit Navajo uses of water in Utah." Nor does it include the value of the Nation's agreement not to make calls on the San Juan River against upstream water users in Colorado and New Mexico, avoiding "...the threat of litigation that could jeopardize the Law of the River."

Recent hurricanes in Houston, Florida, and Puerto Rico highlighted "...the terrible economic and social costs associated with the lack of safe water supplies...." While less than 1% of the general American population lives without safe water and waste disposal facilities, "...the corresponding rate on the Navajo Reservation in Utah has been estimated to be at least 40%. Investment in basic water delivery infrastructure is essential for the Navajo people...." Communities such as Oljato on the Utah-Arizona border have "a single spigot on a desolate road, miles from any residence" to serve 900 people. The water development fund would allow the Navajo Nation's Department of Water Resources to use its technical expertise to manage the projects identified by the Nation, Utah, and the United States that will provide the greatest return on investment, and to build them in the most cost-efficient manner as needed for future development and water quality purposes. The fund allows "the flexibility to adopt project designs that take advantage of economies of scale...."

Cox testified in support of S. 664, noting the importance of the settlement to protect Utah's water users, as well as the quality of life improvements and economic opportunities for Navajo Nation citizens living in Utah. He acknowledged the competing interests for federal resources, but said that the contemplated expenditure was both justified and appropriate, given the federal trust obligations and the waivers of liability. The Navajo Nation and State also agree that the Utah contribution of \$8 million is an appropriate share of costs. "This bill, and the process that led to it, is the essence of cooperative federalism. The state and tribal governments, with input and assistance from the federal government, have worked together to find an equitable solution to pressing challenges. This is the kind of agreement we should celebrate and try to do more often."

Mikkelson expressed greater concern with the Hualapai legislation. The Department of the Interior believes "the cost to construct a 70-mile pipeline from the Colorado River lifting water over 4,000 feet in elevation will greatly exceed the costs currently contemplated in S. 1770 and might

trigger significant additional litigation.” Interior wants to complete its ongoing groundwater studies to better inform its views on the pipeline, water rights, water availability, and the tribe’s water resource needs. He also took issue with the non-federal cost share of the settlement, noting that it should be proportionate to the benefits those parties receive. The provisions of S. 1770 include “an overly broad waiver of sovereign immunity,” ambiguous language about the settlement fund, a prohibition against objecting to groundwater uses outside the reservation “even if those uses interfere with acknowledged Federal reserved groundwater rights,” and unnecessary project-related obligations for Reclamation. Interior is still committed to the goal of achieving a final and fair settlement of the Tribe’s water rights claims, Mikkelson concluded, but one that adheres to Interior’s 1990 *Criteria and Procedures*.

Clarke countered Mikkelson’s testimony with details about the Tribe’s tourism-based economy at Grand Canyon West, the limited and diminishing groundwater resources, and the lack of any significant surface streams other than the Colorado River. He pointed to a July 2017 report by Professor Joseph P. Kalt, *Economic Impact of the Hualapai Water Rights Settlement and Proposed Diamond Creek Pipeline*, showing that the settlement would support 10,000 jobs, \$1.5 billion in federal tax revenues, and over \$9.3 billion in gross domestic product for the United States. “I believe this settlement is unique among Indian water settlements in supporting this level of regional and national economic benefits – benefits that dwarf the level of federal outlays authorized by S. 1770.”

The Tribe paid for an engineering study that concluded the most feasible project was a 70-mile pipeline from Diamond Creek to the residential community at Peach Springs and on to Grand Canyon West. The water would accommodate increased tourism and the development of a new residential community near Grand Canyon West for tribal members who work there and currently commute over four hours a day on dirt roads. Clarke said the lack of water “is our major obstacle to achieving economic self-sufficiency....”

Clarke also pointed to the “substantial non-federal contributions to this settlement,” including the Freeport Minerals Company providing a multi-million dollar contribution to the Tribe’s “economic development fund which the Tribe can use to purchase Colorado River water rights to supplement the allocation of CAP water provided by the settlement.” Freeport contributed an additional \$1 million “that enabled the Tribe to conduct an essential ‘appraisal-plus level’ study to determine the feasibility and costs of alternative infrastructure projects to bring Colorado River water to the Hualapai Reservation.” Arizona has agreed to firm 557.5 acre-feet of the Tribe’s allocation of CAP water until 2018, at an estimated cost of \$3.2 million. The Tribe has agreed to pay the cost of constructing an electric transmission line that will supply power to pump water through the proposed pipeline, at a cost of about \$40 million. “In aggregate these various non-federal contributions to the settlement constitute over 30% of the Federal costs of the comprehensive settlement.”

Buschatzke explained the annual charge for the use of priority CAP water on the reservation, noting that the charge is proportionately assessed against all CAP water users to pay for fixed operation costs. He said that “without proper operation, maintenance and replacement of the CAP,

there would be no CAP canal and no CAP water.” This is not a double charge for water deliveries, contrary to Interior’s position, because all CAP users, not just the Tribe, are also responsible for paying expenses relating to their own delivery systems as a separate and distinct charge.

Arizona strongly supports S. 1770, as the settlement resolves the Tribe’s claims to the Colorado River and replaces groundwater use with a renewable water supply “consistent with the State’s policy of preserving non-renewable groundwater supplies for use during drought conditions.” It also avoids the costs and risks of litigation, provides certainty to water users in the state, and allows the Tribe to maximize its economic development on the reservation.

### Blackfoot Water Rights Settlement

On April 20, the Blackfoot Nation voted 1894-631 to approve the Blackfoot Water Compact and the Blackfoot Water Rights Settlement Act. Harry Barnes, Chairman of the Blackfoot Tribal Business Council, said: “This is a historic day for the Blackfoot people. All of the time and effort by Blackfoot staff and leaders over the past four decades was well worth it. The benefits of the water compact will be seen for generations to come. My faith in the wisdom of the people’s vote has come to reality.” Jay Weiner, Montana Assistant Attorney General and WSWC member, noted that the next steps will be obtaining the approval of the Montana Water Court and securing the federal funds to carry out the settlement agreement. The Blackfoot Nation will begin settlement implementation by developing a community-based plan for infrastructure projects.<sup>47</sup>

### *Crow Creek Sioux Tribe v. U.S.*

On June 1, the Court of Federal Claims dismissed *Crow Creek Sioux Tribe v. U.S.* (1:16-cv-760) for lack of standing and ripeness. The Tribe filed suit in 2016 seeking damages of \$200 million for the federal government’s failure to fulfill its trust responsibilities, alleging among other things that the U.S. has “squandered” the Tribe’s water and ignored its reserved water rights in favor of non-Indian use, reclamation, urban development and consumption, and that the U.S. “has never attempted to even quantify or render an accounting of those rights.”

The court noted that the U.S. trust responsibilities toward the tribe are robust, but general in nature, without requiring any specific action. “Absent statutory authority to direct the government to more affirmatively manage Indian natural resources, and absent an actual compensable injury, this court lacks jurisdiction to hear Crow Creek’s claim.” The court said opening discovery to find evidence that the federal government has taken an amount of water that the Tribe could have used for another purpose would be a waste of both parties’ resources. “Damages for violation of Winters doctrine rights typically result from circumstances in which the Government’s diversion causes the tribes to experience a shortage of water needed for their reservations.” The Tribe did not point to an actual or imminent injury due to a shortage of water based on the diversions that have benefitted others. “The Tribe has not shown that it has a need for the water other than for its own consumption, or that the water it obtains pursuant to the Winters doctrine is insufficient for its intended purpose.”

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<sup>47</sup>*Flathead Beacon*, 4/21/17.

The court concluded that the Tribe’s efforts during the proposed discovery “could only establish the value of water that has been diverted from the Missouri River over a period of time. Such a value would not equate to damages suffered by the Tribe in the circumstances of this case.”

### Aamodt Litigation Settlement Act

On July 14, the U.S. District Court for New Mexico entered its final judgement and decree on the water rights to the Pojoaque Basin tributaries to the Rio Grande River, in *State of New Mexico ex rel. State Engineer, et al. v. R. Lee Aamodt, et al.* (6:66-cv-06639) (Aamodt). The decree adjudicates the water rights of the Pojoaque, Tesuque, Nambe, and San Ildefonso Pueblos, and incorporates and expressly approves the adjudicated water rights of other parties within the stream system.

The Aamodt case was initially filed in 1966, and the Aamodt Litigation Settlement Act, Pub. L. 111-291, approved federal funding for water infrastructure and the acquisition of water rights for the benefit of the Pueblos. One of the conditions of the 2010 settlement was a final court decree on the water rights addressed by the authorized settlement agreement no later than September 15, 2017. The court noted that the case has been active for more than fifty-one years, and having considered objections to New Mexico’s motion for a final decree filed in December 2016, saw no just reason for delaying the entry of the decree.<sup>48</sup>

On September 15, the DOI published its Statement of Findings in the *Federal Register*<sup>49</sup> in accordance with the requirements of the Aamodt Litigation Settlement Act, Title VI of the Claims Resolution Act of 2010. The Settlement Act and underlying agreements quantify and define the water rights claims of the Pueblos of Pojoaque, Nambé, Tesuque, and San Ildefonso, to surface and groundwater, as well as additional water to be supplied via contract from the USBR’s San Juan-Chama Project. It recognizes certain non-Pueblo water entitlements and allocations, including for local governments and water districts. It provides federal funding to help construct the Pojoaque Basin Regional Water System and establish the Aamodt Pueblos Settlement Fund.

To remain enforceable, the Settlement Act outlined nine conditions in §623 that had to be fulfilled by September 15, 2017. Secretary Zinke found that all conditions have been met, including: (1) revisions made to the agreement to conform with the Settlement Act; (2) the agreement has been signed by all the parties; (3) the authorized funds have been appropriated by Congress; (4) DOI has acquired and entered into appropriate water rights contracts; (5) the New Mexico State Engineer has issued permits to the Pojoaque Basin Regional Water Authority to change the points of diversion to the mainstem of the Rio Grande for the consumptive use of at least 2,381 acre-feet by the Pueblos; (6) the New Mexico State Legislature has enacted necessary legislation and provided the required state funding; (7) the U.S. District Court for the District of New Mexico has approved a partial final decree that sets forth the water rights according to the agreements and the Settlement Act; (8) the Court has approved a final decree that sets forth the water rights for all parties to the *New Mexico*

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<sup>48</sup><http://www.ose.state.nm.us/Legal/Adjudication/Aamodt/finProp.php>.

<sup>49</sup>82 Fed. Reg. 43400.

*v. Aamodt* case (66-cv-6639); and (9) the Pueblos and the U.S. have executed the waivers and releases required by §624 of the Settlement Act.

### Kickapoo Water Rights Settlement Act

On November 16, Senator Jerry Moran (R-KS) introduced the Kickapoo Tribe in Kansas Water Rights Settlement Act (S. 2154), a bill to approve the 2016 settlement agreement between the Tribe and the State of Kansas. The bill confirms the Tribal consumptive right of up to 4,705 acre-feet of water per year for any purpose. Allottee entitlements to water within reservation boundaries are to be fulfilled from the Tribe's water.

The Tribe would have the authority "to use, allocate, distribute, and lease the Tribal water rights on or off the Reservation" under a Tribal Water Code, the settlement agreement, or other applicable federal law. The Tribe is directed to enact a Tribal Water Code within three years of the enforceability date, with provisions for permitting and limitations on diversion, storage and use of water; a due process system for disputed claims or contested administrative decisions; irrigation delivery and associated charges to allottees; and other requirements. The State of Kansas will continue to administer all Kansas water rights in the Delaware River Basin.

The bill also directs the Department of Agriculture's Natural Resources Conservation Service and the Department of the Interior's Indian Water Rights Office to study the Upper Delaware and Tributaries Watershed Project. It would require them to make recommendations about the Project to Congress within 2 years on any changes necessary to effectuate the water rights confirmed by S. 2154. The bill was referred to the Senate Indian Affairs Committee.

### Pechanga Water Rights Settlement Agreement

On November 29, U.S. Secretary of the Interior Ryan Zinke and Mark Macarro, Chairman of the Pechanga Band of Luiseño Mission Indians signed the Pechanga Water Rights Settlement Agreement, as authorized by Congress as part of the Water Infrastructure Improvements for the Nation Act (P.L. 114-322) in December 2016. The Agreement quantifies the water rights claims for the Pechanga Band in Southern California's Temecula Valley, which have been pending in an adjudication dating back to the 1950s. It settles competing claims involving the Rancho California Water District and the Eastern Municipal Water District, which both pump water from a large aquifer in the region that stretches 750 square miles from Southwest Riverside County to northern San Diego County. It removes potential liability for both the United States and the other parties may have had regarding the Band's rights, and establishes a cooperative water management regime involving Pechanga and local agencies. It also includes protections for the Pechanga Band's access to groundwater in the region, and provides the tribe over \$30 million in federal funds for water storage projects.

"The Federal Government has a critical responsibility to uphold our trust responsibilities, especially Tribal water rights," Secretary Zinke said. "This is why we are continuing to work on Indian Water Settlements with Tribes, States, and all water users to ensure there is certainty for all

and an opportunity for economic development in local communities. As a former State Senator and Congressman who helped usher the Blackfeet compact through to fruition, I understand all too well the hard work and enormous struggle that goes into making these important water rights settlements possible. I congratulate all of you for your perseverance, dedication, and commitment to making this settlement happen.”

“The Pechanga Band has tirelessly pursued the quantification of its water rights and, through negotiations, engaged its neighbors in a multiyear process of building mutual trust and understanding,” said Pechanga Chairman Macarro. “Generations of tribal leaders have fought from the courts to Capitol Hill to protect this vital resource for future generations. This settlement agreement benefits all of the parties by securing adequate water supplies for the Pechanga Band and its members and encouraging cooperative water resources management among all of the parties.”

“For the tribe, local community, and the many federal employees who have contributed to these settlements, seeing these agreements signed is the culmination of years of dedication and hard work. I think we all recognize that this is just the start of the journey towards settlement finality,” Zinke said. He commended Rep. Ken Calvert (R-CA) and others who “fought to bring these settlements across the finish line. “The Pechanga Band of Luiseño Indians, as well as all of the parties to this settlement, deserve to have some certainty on the future of their water supply,” Rep. Calvert said. “I’m grateful we have been able to enact the settlement and ensure all of the stakeholders in the Santa Margarita River Watershed can better shape their future.”

Interior is in the initial stages of implementing the 2016 Settlement Act, and together with the Department of Justice has established protocols for processing settlement agreements for execution. The Act and Agreement establish the Pechanga Settlement Fund and authorize the appropriation of about \$3 million to construct a storage pond. The legislation also authorizes about \$26 million, with about \$4 million in construction overrun costs, to build interim and permanent water storage.

Pechanga Council Members Catalina R. Chacon; Robert Munoa; Russell Murphy; Marc Luker; Raymond Basquez Jr. and Michael Vasquez witnessed execution of the agreement. Deputy Secretary of the Interior David Bernhard and Associate Deputy Secretary Jim Cason also joined the ceremony. *A DOI Press Release* added “Water resources and management of scarce water supplies are central concerns in the Western states. Additionally, in many parts of the West, water resources are now either fully appropriated or over-appropriated. These situations underscore the need for cooperative management of water supplies, and highlight the important role that Indian water rights settlements can play in the West.”

## **Infrastructure**

### Senate Committee on Environment and Public Works Hearing

On March 1, the Senate Committee on Environment and Public Works held a hearing titled, “Flood Control Infrastructure: Safety Questions Raised by Current Events.” Chairman John Barrasso

(R-WY) noted that the Nation’s infrastructure is critical to our prosperity, and that members of the committee on both sides of the aisle always list it as a top priority, because it impacts every community. “Recent natural weather events in the last month in California and other western states are highlighting the need to focus our attention on our levees and dams, and other structures, that prevent catastrophic flooding in both rural and urban communities.” He listed the examples of severe weather leading to potential dam failure at Oroville and ice jam flooding in northern Wyoming along the Big Horn River. “In certain instances, flooding could be mitigated by the Army Corps providing more flexibility in allowing towns to take the steps they need to protect their communities.” He talked about the “absurd results” of bureaucratic red tape and one-size-fits-all policies. He added that “in the past two WRDA bills this committee provided additional authority to both the Corps and to [the Federal Emergency Management Agency (FEMA)] to help states, local governments and dam owners address deficient levees and dams. It is time to implement these authorities. I would also like to hear what else this committee and the Army Corps can do to improve existing infrastructure, reduce red tape, and develop lifesaving technology and materials to prevent flooding.”

Ranking Member Tom Carper (D-DE) believed there is a thoughtful, bipartisan solution to the need to modernize and rebuild aging infrastructure. “Flood control investments are not ones average citizens can make for themselves, and not only do the construction of dams and levees create jobs, these investments also support local economies, help drive commerce, and put our communities on the path to stability.... When dams and levees fail, they can result in loss of life and economic devastation.... I think it is critically important we learn from each other’s experiences, and that we take that shared knowledge forward in the legislative process... I am particularly interested to hear...where there are gaps that need to be filled as it relates to protecting, investing in, and maintaining critical infrastructure such as levees and dams. The concept of shared responsibility has been an overarching theme in many of my infrastructure-related conversations.... I’m interested in how the Federal Government can be more efficient with our current funding streams and get the most out of every dollar of Federal investment. I also want to know how we can make sure that we are prioritizing the most critical investments and ensuring that we maintain the assets we have first, before building new assets that we can’t afford to maintain. There is no one size fits all approach to solving this problem. We must work in a bipartisan fashion to really address these concerns and build consensus on a path forward for this shared State-Federal-Local government responsibility to our economy.”

The hearing featured testimony from Lieutenant General Todd Semonite, U.S. Army Corps’ Chief of Engineers; the Honorable Terry Wolf, Chairman of the Washakie County Commissioners in Wyoming; the Honorable Ron Corbett, Mayor of Cedar Rapids, Iowa; Secretary John Laird, Deputy Secretary for External Affairs for the California Natural Resources Agency; and Mr. Larry Larson, Director Emeritus and Senior Policy Advisor for the Association of State Floodplain Managers Inc.

Laird spoke of the atmospheric rivers bringing torrential amounts of rain and snow after five years of severe drought, and the importance of these weather events to California’s yearly precipitation. “But their number, size, and severity this water year has strained the state’s flood



control and water management infrastructure; forcing evacuations, damaging roads, destroying homes, communities, and livelihoods.” He noted California’s investments and planning efforts, and that “experience battling California’s cyclical floods has developed critical expertise in our community’s flood managers, scientists, engineers and emergency responders.... California’s extraordinary response to this year’s storms was only possible due to local, state and federal cooperation, and significant prior investments in the state’s water, flood control, safety and emergency response systems.” California’s dam safety program, one of the oldest in the nation. “...is widely recognized as the best in the nation. But we can and must do better.”

As he turned to efforts to bolster dam safety and immediate investments in water infrastructure, Laird pointed out: “While we welcome the partnership, California is not waiting for the federal government to meet this urgent need and real opportunity. As a first step, on February 24, Governor Brown redirected \$50 million from the state’s General Fund and requested a \$387 million [water bond] appropriation from the State Legislature to fund near-term flood control and emergency response actions.... Governor Brown has proposed the passage of state legislation that would additionally direct the California Department of Water Resources (CDWR)...to require the owners of all 1,250 dams under its jurisdiction to complete an emergency action plan that is updated every ten years...and to map inundation zones every ten years or sooner if local development patterns change.... To complement the immediate actions of our state agencies, as Secretary of Natural Resources, I have requested the following actions from our partner federal agencies: (1) Expand inspection and review of all federally-owned dams in California. The inspections should parallel state efforts, including review of ancillary structures such as spillways. (2) Update the federal operating manuals for key California reservoirs. It is imperative to revise these manuals to reflect current scientific knowledge. The Corps needs to be fully funded to complete these updates or allow non-federal authorities to finance this work. (3) Fund the recently enacted Water Infrastructure Improvements for the Nation Act, which authorizes a program for rehabilitation of high hazard dams at the Federal Emergency Management Agency. Also, prioritize the publication of the program’s rules to assist California and other states in this rehabilitation effort.”

He concluded his remarks: “Californians today are the inheritors of a water system born from the necessity of building certainty into California’s hydrologic variability. Now, our state population is growing. Our hydrology and climate are changing. Our infrastructure is aging. As the assumptions and understandings of the earlier eras give way to better science, advances in technology, and new understandings, the limitations of today’s failing water infrastructure means we must invest in the infrastructure of tomorrow.”

Wolf said ice flows in Wakashie County in rural northwest Wyoming impact the communities and agricultural land in the semi-arid Big Horn Basin. The flooding on February 11 of this year is almost identical to the flooding in 2014. “[I]ce blocks the size of trucks and weighing up to 300,000 pounds jam up and block the flow of the river. The ice jams push the water over the banks and into the communities of Worland, Manderson, Basin, and Greybull, flooding homes and businesses and threatening the sugar processing plant...” The flooding also damages roads, railroads, and critical energy and communications infrastructure. The ice blocks gather at an island in the river that has formed from sediment buildup over several years. “Following the 2014 flood

we pursued the possibility of removing the island. Initial estimates at the time indicated that removal of about 1.7 acres of area at a depth of at least 5 feet, requiring about 1,700 truckloads, would ensure free-flowing passage of ice blocks. While a project like this is very small for an agency like the Army Corps, it is much too large for a community as small as ours to tackle on our own.” The cost for clean-up and recovery for the state and local governments is around \$200,000, and that cost is likely to be repeated as the community faces similar flooding events in the future.

In 2015, the community attempted to pursue a small flood damage reduction project with the Corps under the authority of §205 of the Flood Control Act, but “...we backed off after inquiries uncovered the likelihood of difficult and expensive bureaucratic hurdles, and the potential of more stringent and expensive environmental permits to remove the sediment island. Additionally, while the federal share of costs associated with these small projects is significant, we were concerned that the local share was still more than a rural agricultural-based county could meet.” Wolf noted that §1150 of the Water Infrastructure Improvements for the Nation (WIIN) Act included specific language to authorize ice jam flood mitigation projects, with pilot projects to develop and demonstrate cost-effective technologies and designs. “Removal of the island appears to be the solution to our flooding in Worland, but at the local level we are flexible enough to explore other options if the Army Corps is flexible enough to make use of this new language to research and explore cost effective technologies to mitigate what is likely to be a repeated disaster in our area... Seasonal runoff or unique weather events are things over which we have no control, but the floods caused by ice jams and a sediment island in the Big Horn River is something we can control with assistance from the Army Corps of Engineers.”

Semonite offered testimony on the Corps’ role in dam and levee safety. “The Corps owns and operates only a small fraction of the dams and levees in the Nation – 715 dams (less than 1% of the 90,580 dams in the 2016 national inventory of dams) and roughly 2,500 miles of levees (less than 10% of the roughly 30,000 miles now in the national levee inventory).” The dams and levees were constructed “primarily to provide navigation and/or flood risk reduction benefits, but many of them also support other uses such as hydropower, water supply, and recreation.” Although the projects were planned and constructed individually, many of them “now operate as integrated components of a larger water resources management system.” The benefits of these structures requires the proper management of the associated risks and costs, many of which are now shared. “As we make choices as to which of these structures warrant an improvement for safety and who should bear the costs, we must be careful not to create divides with one group bearing the costs, another gaining the benefits, others being held responsible, and yet others absorbing the risk. Such a divided system is neither fair nor sustainable...and would complicate the task of establishing a better set of incentives to reduce these risks in the future.”

Semonite summarized several project-specific and programmatic authorities for the operation, maintenance, and safety of dams and levees. “There are few state levee safety programs and no recognized standards at the national level for those programs.” In the absence of such programs and standards, the repair and rebuilding following flood damage “...often falls on the Federal government and the U.S. taxpayer.” The Corps is working to develop a national inventory of levees and national guidelines, to help build state capabilities for levee safety. “For the dams and

levees that the Corps owns, we are working to align the costs, responsibilities, risks and benefits, in order to inform our decisions on providing for the safe operation, proper maintenance, and effective management of risk. A similar framework of risk-informed management may help meet this objectives for decisions on the safety of other dams and levees across the Nation.”

Larson provided testimony on practical steps the federal government can take to improve flood risk management and the safety of flood control infrastructure. “Many federal agencies are involved in managing flood risk, and many programs promote using nature to reduce flooding. Examples include the conservation programs in [the U.S. Department of Agriculture], coastal management programs in [the National Oceanic and Atmospheric Administration] and water quality/stormwater programs in EPA. Agencies like [the U.S. Housing and Urban Development Department] and [the U.S. Department of Transportation] recognize the advantage of building in a way that will ensure housing, bridges and roads that are safe and resilient now and in the future.” However, many federal programs with authorization lack adequate funding, and programs are not coordinated for maximum benefit. “Too often, stormwater programs and floodplain management programs are not integrated, even at the local level. This may be partly due to the programs coming to the local community in separate stovepipes – stormwater from EPA focused on water quality and flooding concerns focused on water quantity from either FEMA or [the Corps].... [The agencies] should collaborate to address the disconnect between water quality and quantity that results in exacerbating current problems for one while mitigating the other.” Environmental restoration projects can help reduce flood losses, and infrastructure can be paired with nature to meet water quality and flood loss reduction goals.

The federal government can provide much-needed technical assistance, particularly in providing data and expertise. “Fundamental to any flood risk reduction infrastructure is data to understand how floods may occur (flood studies), where floods will impact people and property (topography and flood maps) and how any new infrastructure (both large flood control structures and smaller, non-structural measures) affects flooding. The data is important for the purposes of flood preparedness, response, recovery and mitigation.” Larson highlighted the value of enhanced elevation data in the form of high-quality light detection and ranging (LiDAR) collection. “With better topography, FEMA flood map updates could take much less time, flood maps would be far more precise, and flood forecasts can be more accurate and timely. Beyond flood, LiDAR based topography is helpful for infrastructure project planning of other hazards as well.”

Although financing through private-public partnerships can be beneficial, robust federal funding is necessary in addition to any financing incentives. “We believe there needs to be real dollar investments of taxpayer funding to save our crumbling infrastructure. Current taxpayers benefit, so we should not pass this cost to future generations. In conversations we have had with large global capital investors, they indicate a hesitancy to invest in infrastructure like levees. They say it’s because they have no way to determine if the levee is designed, constructed, operated or maintained to quality standards or if it will withstand expected future conditions. They indicate that if adequate national standards existed, and they were assured these kinds of projects meet all those standards, and that the owner has an assured source of revenue to pay off loans, they could be a partner. Similarly, a P3 roundtable hosted by [EPA] in 2012 found that while P3 arrangements are

somewhat common with some forms of water infrastructure (drinking water and wastewater systems), to help finance the construction, retrofit and/or operations of such systems they are essentially non-existent for urban stormwater retrofits, which is another kind of flood risk management infrastructure. The report noted that the P3 model is highly complex, needing expertise in contracting at the public level and is not a panacea for all types of infrastructure. So while financing is one tool in the toolbox, it is a minor one as applied to flood risk management infrastructure. Funding is a much more immediate and widespread need and a more successful tool.”

Larson also pointed out the need to account for future conditions and build resiliency into the infrastructure. “We cannot afford to rebuild that infrastructure time and again because we did not take into account expected sea level rise, future watershed development that increases runoff and floods, or predictable increased rainfall that creates the kind of extreme flood events we have seen in the last decade.”

Other issues Larson raised are: (1) the need for maps that include residual risk; (2) making “For Official Use Only” flood maps publicly available despite terrorist and other security concerns; (3) developing by-pass systems for emergency overflow into historical floodplain areas where damage is limited, such as agricultural lands; (4) increasing tax incentives and decreasing federal disaster assistance to communities failing to participate in programs that reduce risks of flooding; (5) avoiding downstream development in areas that will convert low hazard dams to high hazard dams; and (6) ensuring that flood mitigation activities in one area do not impact properties elsewhere along the river.<sup>50</sup>

Also on March 1, the House Committee on Natural Resources, Subcommittee on Water, Power, and Oceans, held an oversight hearing titled, “Modernizing Western Water and Power Infrastructure in the 21st Century.” The committee examined ways to protect existing infrastructure, ways to facilitate construction of new facilities, modernizing federal regulations, reviewing bureaucratic barriers impacting facilities, and implementation of the WIIN Act to develop water storage and other water supply projects.

While USBR projects have transformed the West, environmental permitting and other regulatory obstacles have stalled large, multi-purpose dam projects for the past generation. Non-federal ownership of major surface storage projects has become increasingly common, but federal permitting of such facilities can be a major impediment, causing investors to question the viability of these projects. The committee heard testimony regarding streamlining the current multi-agency process to help facilitate the construction of non-federal facilities, as well as revisions to the costly and time-consuming process of transferring title of Reclamation projects to local water users to encourage non-federal investment in water infrastructure. The WIIN Act authorizes the Interior Secretary to participate in federally-owned and state-led storage projects, as well as funding for new facilities, the WaterSMART program, and water recycling and desalination projects, which may address some of the hurdles to new water infrastructure development.

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<sup>50</sup><https://www.epw.senate.gov/public/index.cfm/hearings>.

Witnesses testifying included Andrew Colosimo, Government and Corporate Affairs Manager, Colorado Springs Utilities; Andrew Fecko, Director of Resource Development, Placer County Water Agency, Auburn, CA; Jonathan C. Kaledin, Executive Vice President & General Counsel, Natural Systems Utilities, Hillsborough, NJ; and attorney Robert S. Lynch, Robert S. Lynch & Associates, Phoenix, AZ.<sup>51</sup>

## **River Basins**

### **Yakima River Basin Water Enhancement Project**

On March 23, Senator Maria Cantwell (D-WA) reintroduced a bill to amend the Yakima River Basin Water Enhancement Project (PL 103-434) to authorize Phase III (S. 714). The bill is similar to S. 1964, which Cantwell introduced in June 2015 and was passed as part of the bipartisan North American Energy Security and Infrastructure Act (S. 2012), but differences between the House and Senate were never resolved.

As noted in Senator Cantwell's press release, S.714 "addresses water security needs in the Yakima River Basin, which is one of the Columbia River Basin's most significant tributaries, through an unprecedented, collaborative approach that has become a national model for water management. The bill authorizes key elements of a plan to meet the long-term water needs of both humans and nature through a combination of conservation, restoration, fish recovery and drought relief measures."<sup>52</sup> The bill was reported by the Senate Energy and Natural Resources Committee and placed on the Senate calendar on June 13.

### **Colorado River**

As of May 10, the U.S. Bureau of Reclamation (USBR) anticipated releasing between 8.23 million acre-feet (Maf) of water and 9.0 Maf from Lake Powell to Lake Mead to balance the reservoir levels for the 2017 water year. "Current runoff projections into Lake Powell are provided by the National Weather Service's Colorado Basin River Forecast Center and are as follows. Observed unregulated inflow into Lake Powell for the month of April was 1.607 Maf or 152% of the 30-year average from 1981 to 2010. The forecast for May unregulated inflow into Lake Powell is 2.900 Maf or 124% of the 30-year average. The forecasted 2017 April through July unregulated inflow is 8.800 Maf or 123% of average."<sup>53</sup>

### **Water Quality Standards for Salinity**

On July 11, the seven-state Colorado River Basin Salinity Control Forum released a draft of its 2017 Review of Water Quality Standards for Salinity in the Colorado River System. The Forum is seeking written public comment through August 25.<sup>54</sup>

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<sup>51</sup><http://naturalresources.house.gov/calendar>.

<sup>52</sup><https://www.energy.senate.gov>. *Western States Water*, #2189, April 29, 2016.

<sup>53</sup><https://www.usbr.gov/lc/region/g4000/24mo.pdf>.

<sup>54</sup><http://coloradoriversalinity.org/>.

The water quality standards include numeric criteria and a plan for implementation, and are reviewed every three years under Clean Water Act §3039(c). The final review is submitted to the governors of the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, for inclusion in their respective state water quality standards. The Forum, created in 1973 and comprised of governor-appointed members, coordinates salinity control efforts among the states and federal agencies, and evaluates opportunities for additional salinity control to increase the economic and environmental benefits of the river in the Upper and Lower Basins.

The Forum's Salinity Control Program controls over 1.33 million tons of salt annually, and is working toward 1.66 millions tons annually by 2035. The current Plan of Implementation anticipates an additional 63,500 tons of annual salinity control over the next three years, and includes: (1) construction of salinity control measures by USBR, USDA, the Basin States Program and BLM to the extent that those measures remain viable and appropriately cost-effective; (2) state implementation of the Forum's NPDES effluent limitation policies; and (3) implementation of non-point source management plans developed by the states and approved by EPA.

The Forum recommends that the numeric salinity criteria at the stations on the lower main stem of the Colorado River remain the same: 723 mg below Hoover Dam; 747 mg below Parker Dam; and 879 mg at Imperial Dam. Reclamation's numerical modeling indicates that, with the current and planned salinity control projects, the probability of exceeding these criteria over the next three years is less than 5%. "The Salinity Control Program continues to be a successful federal and state partnership that has environmental and economic benefits for users of Colorado River water."

### Mexican Water Treaty/Minute 323

On July 21, the Trump Administration released a document containing the key terms summarizing Minute 323 to the 1944 treaty between Mexico and the United States on the utilization of water from the Colorado and Tijuana Rivers and the Rio Grande. The two nations, the Colorado River Basin States of Arizona, California, Colorado, New Mexico, Nevada, Utah, and Wyoming, and key water users have been working since 2015 to develop a successor agreement to Minute 319, set to expire at the end of 2017. Once signed, Minute 323 will authorize the continuation of cooperative efforts to protect and sustain the Colorado River system to benefit both nations.

Minute 319 allowed Mexico and the United States five years to assess the long-term opportunities for water conservation, management, and development. Cooperative measures included management of salinity, variable water supplies, sharing benefits of flow during high reservoir conditions, water exchanges, and water to benefit the environment. The new agreement maintains several of the key terms from Minute 319, including shortage and surplus sharing and habitat development and protection, with modifications to further the shared goals between the nations. It provides new conservation opportunities, sediment removal for increased delivery capacity, modernization of operational technologies to provide real-time data, and it incorporates the Lower Basin Drought Contingency Plan if implemented, to address Lake Mead shortages. Minute 323 extends the cooperative efforts.

The agreement establishes a pilot program of temporary measures, with several water agencies and the USBR contributing monetary capital in exchange for binational intentionally created surplus waters. It identifies possible conservation projects including canal lining, on-farm conservation, fallowing, regulating reservoirs, and modernization of irrigation districts. It authorizes the evaluation of potential new water source projects, including desalination plants and reuse of effluent, although a separate agreement would be required to implement those projects.

Minute 323 is undergoing a diplomatic review process in the State Department, but is expected to be signed by mid-September. Several domestic agreements between the Colorado River Basin states, the USBR, and various local water agencies will be executed concurrently, enabling the implementation of Minute 323.

On September 27, the United States and Mexico formally announced the approval of Minute 323, “Extension of Cooperative Measures and Adoption of a Binational Water Scarcity Contingency Plan in the Colorado River Basin.” The agreement, will remain in effect through 2026.

The International Boundary and Water Commission (IBWC) is responsible for applying the 1944 U.S.-Mexico Water Treaty, allotting Mexico 1.5M acre-foot/year of Colorado River water. U.S. IBWC Commissioner Edward Drusina said, “Minute 323 is the result of many rounds of technical discussions involving a broad group of stakeholders from both countries. This agreement puts us on a path of cooperation rather than conflict as we work with Mexico to address the Colorado River Basin’s many challenges.” Mexico IBWC Commissioner Roberto Salmon added, “This agreement provides certainty for water operations in both countries and mainly establishes a planning tool that allows Mexico to define the most suitable actions for managing its Colorado River waters allotted by the 1944 Water Treaty.”

The Minute’s entry into force was announced during a ceremony held at the Water Education Foundation’s Colorado River Symposium in Santa Fe, New Mexico. Joining the Commissioners at the ceremony were David Bernhardt, Deputy Secretary, Department of the Interior; Thomas Buschatzke, Director, Arizona Department of Water Resources; Hillary Quam, Border Affairs Coordinator, U.S. Department of State, Office of Mexican Affairs; and, from Mexico, Director General for North America Mauricio Ibarra of the Ministry of Foreign Relations.<sup>55</sup>

### Endangered Fish Recovery Programs Extension Act

On December 13, the Endangered Fish Recovery Programs Extension Act (H.R. 4465) was reported by the House Natural Resources Committee, by unanimous consent. The bill authorizes the Upper Colorado and San Juan River Basins Endangered Fish Recovery Programs Act (P.L. 106-392) passed by Congress in 2000. It would maintain base annual funding for the federal cost-share programs through FY2023, and extend the programs’ authorization to use hydropower revenues. It would also require a report, prepared in consultation with program participants, on the implementation and effectiveness of those programs, including the listing status of four warm-water

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<sup>55</sup>[https://www.ibwc.gov/Files/Press\\_Release\\_092717.pdf](https://www.ibwc.gov/Files/Press_Release_092717.pdf).

endangered fish, expenditures of appropriated funds broken down by activity categories, and contributions from States, Tribes, hydropower revenues, water users, and environmental organizations. On March 13, the bill passed the House, and was sent to the Senate.

The Subcommittee on Water, Power and Oceans held a December 6 hearing on H.R.4465. Witnesses included: the bill's sponsor, Rep. John Curtis (R-UT); Utah Department of Natural Resources' Director of Recovery Programs Henry Maddux; The Nature Conservancy's Senior Water Policy Advisor Jimmy Hague; and the Colorado Springs Utilities' Government and Corporate Affairs Manager Andrew Colosimo.

The Subcommittee's hearing memo notes that endangered fish designations impact water and power uses at numerous USBR and non-federal water projects that played a core role in western settlement and that continue to be important for growing cities and sustaining the economy. The States of Colorado, New Mexico, Utah, and Wyoming, and the Navajo Nation, Southern Ute Tribe, Ute Mountain Tribe, and Jicarilla Apache Nation have signed cooperative agreements with the federal government to achieve the dual goals of recovering endangered fish and continuing water and power operations. State, Tribal, and federal fish hatcheries raise endangered populations to adulthood, and the States and water and power users foot 57% of the capital costs. Electricity ratepayers also absorb the cost of some of the non-capital program functions. The environmental organizations Western Resource Advocates and The Nature Conservancy participate in the cooperative agreements and management of the programs, and have contributed \$1.5 million for habitat restoration. Participating federal agencies include the USBR, BIA, BLM, and the FWS.

Maddux testified that the FWS found that the programs impact approximately 2,500 water projects in the Upper Colorado and San Juan River Basins, "including every Reclamation project upstream of Lake Powell. There have been no lawsuits filed regarding Endangered Species Act (ESA) compliance under the recovery programs." He added that the programs have streamlined ESA compliance for federal agencies and the water users, and that fish populations have improved to the point that FWS may be able to downlist the species from endangered to threatened in its 2018 report. He said the programs have had the support of five presidential administrations, bipartisan congressional support, and strong grassroots support of all the participants.

Hague said the successful programs are characterized by a culture of respect among the 19 member organizations, science-based decision making, earnest collaboration and consensus-based problem-solving toward shared objectives. The current level of annual base federal funding is \$8.2 million, he said, and cutting the federal share of costs would risk the substantial progress of the past three decades. "It would also create uncertainty with respect to ESA compliance for the millions of agricultural, industrial, and municipal water users who rely on steady supplies from the Colorado River and its tributaries."

Colosimo called the programs a proven federal-non-federal collaborative effort for water projects that withdraw about 3.7 million acre-feet annually. The programs operate in accordance with state water laws, tribal laws, and interstate compacts, and there has been no taking of water from any water user or Reclamation contractor in order to implement the program.



## Seasonal Forecasting/Weather Research

### Weather Research and Forecasting Innovation Act

On January 9, the House passed the Weather Research and Forecasting Innovation Act (H.R. 353) to improve the National Oceanic and Atmospheric Administration's (NOAA) weather research through a focused program of investment on affordable and attainable advances in observational, computing, and modeling capabilities. It is designed to support substantial improvement in weather forecasting and prediction of high impact events, to expand commercial opportunities for the provision of weather data, and for other purposes. Introduced, by Rep. Frank Lucas (R-OK), its co-sponsors include Representatives Jim Bridenstine (R-OK), Lamar Smith (R-TX), Dana Rohrabacher (R-CA), Chris Stewart (R-UT), and Suzanne Bonamici (D-OR).

Rep. Lucas stated: "H.R. 353 prioritizes improving weather forecasting for the protection of lives and property...by focusing research and computing resources..., quantitative observing data planning, next generation modeling, and an emphasis on research-to-operations technology transfer. As a Representative from Oklahoma, I understand the need for accurate and timely weather predictions firsthand. Every year, the loss of life from deadly tornadoes in my home state is a stark reminder that we can do better to predict severe weather events and provide longer lead times to protect Americans in harm's way."

Under H.R. 353, NOAA would prioritize weather research through "a focused, affordable, attainable, forward-looking research plan," while also encouraging "innovations and new technology capacities," in order to "restore our country's leadership in weather forecasting." It also directs NOAA to "actively consider new commercial data and private sector solutions to further enhance our weather forecasting capacities." Rep. Lucas noted it has taken 4 years to "craft a meaningful package."

Rep. Bonamici added the bill is the "product of hard work and negotiation," and is the "result of a truly bipartisan and bicameral effort." The bill incorporates elements of several bills passed by the House or Senate in the 114<sup>th</sup> Congress, including the Weather Research and Forecast Innovation Act (H.R. 1561) and the Seasonal Weather Forecasting Act (S. 1331). She stated, "In the northwest Oregon communities I represent, my constituents rely on timely weather forecasts to decide when to harvest their crops, when to go to sea to fish, how to navigate the roads safely when there is freezing rain and snow, and to prepare for possible flood conditions. The National Weather Service (NWS) provides excellent forecasting products to support our economy, but with the increasing frequency of severe weather events, there can be and should be improvements in our forecasting capabilities and delivery.... Improved forecasts can provide more lead time to allow communities to prepare.... The bill connects the research side of NOAA, the Office of Oceanic and Atmospheric Research, more effectively to the forecasting needs of the NWS. This research-to-operations pipeline is essential for the continued improvement of our weather forecasting enterprise."

Under Title I, NOAA is directed to prioritize its research to improving weather data, modeling, computing, forecasting, and warnings for the protection of life and property and for the

enhancement of the national economy. The Assistant Administrator for the Office of Oceanic and Atmospheric Research (OAR) would conduct a program to develop improved understanding of and forecast capabilities for atmospheric events and their impacts, placing priority on developing more accurate, timely, and effective warnings and forecasts of high impact weather events.

Program elements focus on advanced radar, radar networking technologies, and other ground-based technologies, including: (1) those emphasizing rapid, fine-scale sensing of the boundary layer and lower troposphere, and the use of innovative, dual-polarization, phased-array technologies; (2) aerial weather observing systems; (3) high performance computing and information technology and wireless communication networks; (4) advanced numerical weather prediction systems and forecasting tools and techniques that improve the forecasting of timing, track, intensity, and severity of high impact weather, including through – (a) the development of more effective mesoscale models; (b) more effective use of existing, and the development of new, regional and national cloud-resolving models; (c) enhanced global weather models; and (iv) integrated assessment models; (5) quantitative assessment tools for measuring the impact and value of data and observing systems; (6) atmospheric chemistry and interactions essential to accurately characterizing atmospheric composition and predicting meteorological processes, including cloud microphysical, precipitation, and atmospheric electrification processes, to more effectively understand their role in severe weather; and (7) additional sources of weather data and information, including commercial observing systems.

It directs NOAA to issue a research and development and research to operations plan to restore and maintain United States leadership in numerical weather prediction and forecasting that describes forecasting skill and technology goals, objectives, and progress performance metrics. NOAA will collaborate with stakeholders, including the weather industry defined as individuals and organizations including public, private, and academic sector partners. NOAA will also develop and maintain a prioritized list of observation data requirements necessary to ensure weather forecasting capabilities protect life and property to the maximum extent practicable, and identify current and potential future data gaps in observing capabilities.

Title I authorizes \$111.5 million for FY2017-FY2018 for the OAR, plus \$85.8 million for weather laboratories and cooperative institutes; \$25.8 million for weather and air chemistry research; and an additional \$20 million for a joint technology transfer initiative.

Title II addresses improving subseasonal and seasonal forecasts and directs that the Under Secretary of Commerce for Oceans and Atmosphere, acting through the Director of the NWS and the heads of other NOAA programs as the Under Secretary considers appropriate, shall: (1) collect and utilize information in order to make usable, reliable, and timely foundational forecasts of subseasonal (2 weeks to 3 months) and seasonal (3 month to 2 years) temperature and precipitation; (2) leverage existing research and models from the weather industry to improve such forecasts; and (3) determine and provide information on how the forecasted conditions may impact the number and severity of droughts, fires, tornadoes, hurricanes, floods, heat waves, coastal inundation, winter storms, high impact weather, or other relevant natural disasters, as well as snowpack and sea ice conditions.

Title II provides for Forecast Communication Coordinators. NOAA is directed to foster effective communication, understanding, and use of the forecasts by the intended users of the information. Each state may request up to \$100,000 on a 50%-50% matching basis for assistance from NOAA including funds to support an individual to serve as a liaison with NOAA, other federal agencies, the weather industry, counties, tribes and other interests, and to receive and disseminate forecasts and information.

Within 180 months, after enactment, NOAA is required to submit a report to Congress with: (1) an analysis of the how information on subseasonal and seasonal forecasts is used in public planning and preparedness; (2) specific plans and goals for the continued development of the subseasonal and seasonal forecasts and related products; and (3) an identification of research, monitoring, observing, and forecasting requirements to meet the goals. In developing the report, NOAA would consult with relevant federal, regional, state, tribal, and local government agencies, research institutions, and the private sector.

Title III, NOAA Weather Satellite and Data Innovation, addresses completion and operationalization of the Constellation Observing System for Meteorology, Ionosphere, and Climate-1 and Climate-2 (COSMIC) by: (1) deploying constellations of microsatellites in both the equatorial and polar orbits; (2) by integrating the resulting data and research into all national operational and research weather forecast models; and (3) by ensuring that the resulting data are free and open to all communities.

Also, Title III directs NOAA to: (1) integrate additional coastal and ocean observations, and other data and research, from the Integrated Ocean Observing System (IOOS) into regional weather forecasts to improve weather forecasts and forecasting decision support systems; and (2) support the development of real-time data sharing products and forecast products in collaboration with the private sector, academia, and research institutions to ensure timely and accurate use of ocean and coastal data in regional forecasts.

NOAA is directed to identify degradation of existing monitoring and observation capabilities that could lead to a reduction in forecast quality, and develop specifications for new satellite systems or data determined by operational needs. It calls for an independent study by the National Academy of Science or another appropriate organization of future satellite data needs and develop recommendations to make the data portfolio more “robust and cost-effective,” including a review of the costs and benefits of moving toward a constellation of many small satellites, standardizing satellite bus design, relying more on the purchasing of data, or acquiring data from other sources or methods.

Title IV maintains a standing Environmental Information Services Working Group to advise on prioritizing weather research initiatives to produce real improvement in forecasting, as well as evaluate incorporating existing or emerging technologies or techniques in private industry. The working group would identify further opportunities to improve communications between public and private entities, including emergency management personnel, and the public.

It provides for one-year interagency details between the NWS and OAR, as well as visiting academic researchers at the National Centers for Environmental Prediction. Another change is the designation of NWS Warning Coordination Meteorologists, in order to increase impact-based decision support services and products for users, including agricultural communities and forestry, land and water management interests. Another of the coordinators' responsibilities will be to work closely with State, local and tribal emergency management agencies and other disaster management agencies to "ensure a planned, coordinated, and effective preparedness and response effort."

Title IV also addresses improving NOAA communication of hazardous weather and water events including its system for issuing watches and warnings to prevent loss of life and property. The intent is to focus on ways to communicate risks as broadly and rapidly as practicable, as well as encourage actions by the public to mitigate the risk, in consultation with a wide range of interests. Weather impacts in urban areas on infrastructure are also to be reviewed, "taking into account factors including varying building heights, impermeable surfaces, lack of tree canopy, traffic, pollution, and inter-building wind effects."

On March 29, the Senate passed an amended version of the Weather Research and Forecasting Innovation Act (H.R. 353) after pre-negotiating changes with the House to address concerns that blocked passage of a similar bill in the last Congress. The amendments excluded a controversial watershed study and added a study of weather radar coverage.

Senate Commerce Committee Chairman John Thune (R-SD) said: "From long-term forecasting that can prevent costly agricultural losses to more actionable information about severe weather, this legislation will help save lives and reduce avoidable property loss. Thanks to a bipartisan resiliency in both the House and Senate, we now have an agreement to send the bill to the President's desk."<sup>56</sup>

On April 18, the President signed the Weather Research and Forecasting Innovation Act into law (P.L. 115-25).

#### California/S2S Forecasting

After five years of drought, the 2017 water year brought unexpectedly heavy precipitation, ranking second only to 1983 as California's wettest year for statewide runoff. The dramatic swing in water conditions highlights the need to develop better long-range weather forecasting to cope with highly variable annual precipitation. The California Department of Water Resources (CDWR) is beginning the 2018 water year intent on narrowing the forecasting gap with improved sub-seasonal to seasonal (S2S) forecasting. Working with researchers at the National Aeronautics and Space Administration (NASA) and the Scripps Institution of Oceanography, CDWR is developing innovative technology to forecast land-falling atmospheric rivers.

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<sup>56</sup><https://www.commerce.senate.gov>.

“Current short-term forecasting for seven days out is 70 percent accurate, while the 14-day forecast is only seven percent accurate,” said CDWR Director Grant Davis. “That isn’t adequate for water management. Advancing accurate, even longer-range forecasting is critical for our ability to plan for California’s highly variable weather.” The water year ended September 30 saw an extraordinary number of atmospheric rivers that created high water conditions throughout the State. The record-setting precipitation in Northern California and above-average rainfall elsewhere contributed to flooding in several river systems. Drought impacts lingered, with a state of emergency continuing for Fresno, Kings, Tulare, and Tuolumne Counties, where homes with dry or contaminated private wells continued to receive emergency drinking water deliveries.<sup>57</sup>

## States

### Ninth Circuit Jurisdiction

Three bills were introduced to move several western states out of the overburdened 9<sup>th</sup> Circuit and into a newly created 12<sup>th</sup> Circuit. On January 3, Rep. Michael Simpson (R-ID) introduced the Ninth Circuit Court of Appeals Judgeship and Reorganization Act (H.R. 196). The bill divides the 9<sup>th</sup> Circuit into: (1) a new 9<sup>th</sup> Circuit, composed of California, Guam, Hawaii, and Northern Mariana Islands; and (2) the Twelfth Circuit, composed of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington. The President must appoint two additional judges for the former 9<sup>th</sup> Circuit, three judges for the new 9<sup>th</sup> Circuit, and two additional temporary judges for the former 9<sup>th</sup> Circuit. The bill: (1) specifies the locations where new circuits are to hold regular sessions; (2) distributes active circuit judges of the former 9<sup>th</sup> Circuit to the new circuits; (3) allows senior circuit judges of the former 9<sup>th</sup> Circuit to elect assignment; and (4) authorizes administrative coordination between any two contiguous circuits. The bill was referred to the House Subcommittee on Courts, Intellectual Property, and the Internet.

On January 13, Rep. Andy Biggs (R-AZ) introduced the Judicial Administration and Improvement Act (H.R. 250), with four Arizona Republican co-sponsors. The bill is similar to H.R. 196, but divides the 9<sup>th</sup> Circuit differently, with Washington and Oregon remaining in the new 9<sup>th</sup> Circuit. The bill was referred to the House Subcommittee on Courts, Intellectual Property, and the Internet.

On February 2, Senators Jeff Flake (R-AZ) and John McCain (R-AZ), in coordination with Arizona Governor Doug Ducey, re-introduced the Judicial Administration and Improvement Act (S.276). The Senate version of the bill would assign Washington to the 12<sup>th</sup> Circuit and keep Oregon in the 9<sup>th</sup> Circuit. The bill specifies that the new 12<sup>th</sup> Circuit would not be bound by the precedent of the former 9<sup>th</sup> Circuit decisions, which would have the same persuasive authority as other circuits. The Senate did not act on the bill, which was referred to the Judiciary Committee.

In a joint press release, Senator Flake, a member of the Senate Judiciary Committee, noted that the 9<sup>th</sup> Circuit covers 20% of the U.S. population, and the circuit hears over 12,000 appeals each

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<sup>57</sup>California Department of Water Resources Press Release, October 3.

year, with an average wait time exceeding 15 months. He said: “Establishing a new circuit with stronger local, regional, and cultural ties will ease the burden across the West....” Governor Ducey said: “This is about responsible, good government. The 9<sup>th</sup> Circuit is by far the most overburdened court in the country. Its pending cases are more than double the caseload of the next busiest court....” Senator McCain said: “With this legislation, we will continue the effort forged by Senator Jon Kyl to create a new 12<sup>th</sup> Circuit in order to ensure that all Arizonans have timely and fair access to the federal courts.”

## California

### Drought/WaterFix

On January 3, the U.S. Department of the Interior (DOI) issued Order #3343 to document and continue agency efforts to address the effects of drought and climate change on California’s water supply and species listed under the Endangered Species Act. The State of California has been coordinating with DOI, particularly the U.S. Bureau of Reclamation (USBR), the Fish and Wildlife Service (FWS), and the U.S. Geological Survey (USGS), as well as other agencies and stakeholders, to carry out several collaborative water resource initiatives. The order was developed in consultation with the state and federal agencies and provides direction for the federal agencies to complete the technical, scientific, and analytical work necessary to make permitting, regulatory, and other decisions. It also facilitates the integration of state and federal efforts to increase water supply reliability, meet the needs of agriculture and municipalities, and to foster species conservation and restore the health of aquatic ecosystems.

The order directs the USBR and FWS to complete the environmental review for California’s WaterFix project to upgrade water infrastructure.<sup>58</sup> It directs continued collaboration and use of the WaterFix Adaptive Management Framework to guide scientific studies and monitoring, to assist with Central Valley Project and State Water Project operations, and achieve state and federal goals for the Bay-Delta Plan. In December, California and USBR released the final environmental impact statement for the Delta tunnels that Governor Jerry Brown supported. Other initiatives included in the Order are the Implementation of a Delta Smelt Resiliency Strategy and Sacramento Winter-Run Chinook Salmon Action Plan, and California EcoRestore.

Governor Brown said: “Today’s action tracks closely with the state’s multi-pronged Water Action Plan and commits the federal government to a timely review of the California WaterFix project. This state-federal partnership is what’s needed to improve water reliability for residents and farmers and protect vulnerable ecosystems.”

DOI Deputy Secretary Michael Connor said: “This Secretarial Order is a practical and broad-based strategy to help protect California’s water lifeline for present and future generations. This order will ensure the integration of the Department’s actions with those of the State of

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<sup>58</sup>*Western States Water*, #2223, December 23, 2016.

California to provide a reliable drinking water supply for the public, sustain California's agriculture, and continue to protect the Bay Delta ecosystem and enhance the conservation of species."<sup>59</sup>

### Oroville Dam Spillway

On February 7, the CDWR observed an unusual flow pattern in releases from its Oroville Dam spillway; subsequent investigation revealed erosion damage to the lower portion of the gated concrete-lined spillway. With high levels of storm runoff continuing to enter the reservoir, CDWR proceeded with limited operation of the gated spillway to lessen the risk of erosion affecting the control gates and nearby transmission line towers for the dam's powerplant, while at the same time preparing for use of the ungated, unlined emergency spillway. By February 11, runoff from recent storms fully filled the 3.5 million acre-foot (MAF) reservoir, and unregulated flows began at the emergency spillway. Rapid erosion began occurring near the head of the emergency spillway, threatening to undermine the spillway crest, which would have allowed large uncontrolled releases of reservoir water downstream.

On February 12, local law enforcement issued mandatory evacuation orders affecting some 188,000 people. CDWR increased releases from the damaged gated spillway to take pressure off the ungated one, and began a major emergency repair on the ungated one as soon as flows permitted. Helicopters and heavy equipment placed rock and grout in position, moving 1200 tons of material per hour. On February 14, the mandatory evacuation order was reduced to a warning, as continued operation of the gated spillway was able to lower reservoir levels well below the emergency spillway. CDWR is now using barges and cranes to excavate debris from the area around the dam's powerplant outlet, to allow use of the plant to help manage lake levels. The northern Sierra Nevada has received more than 200% of normal precipitation this winter, and Oroville reservoir levels will have to be managed using the damaged spillways and aggressive monitoring until the spring runoff period ends and permanent repairs can be made for both spillways. Governor Jerry Brown said: "I've been in close contact with emergency personnel managing the situation in Oroville throughout the weekend and it's clear the circumstances are complex and rapidly changing.... The state is directing all necessary personnel and resources to deal with this very serious situation." A Presidential disaster declaration for the emergency was issued on February 14. The 770-foot high Oroville Dam is a separate structure from the spillways and remains sound with the main concern now the auxiliary spillway.<sup>60</sup>

### Dam Safety/Federal Assistance

On February 24, John Laird, Secretary for California Natural Resources Agency wrote Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works), David Murillo, Acting

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<sup>59</sup><https://www.doi.gov/pressreleases/secretary-jewell-lays-out-strategy-address-impacts-drought-and-climate-change>.

<sup>60</sup>Photo gallery of the spillway emergency: <http://pixel-ca-dwr.photoshelter.com/galleries/C0000OxvlgXg3yfg/G00003YCcmDTx48Y/Oroville-Spillway-Damage>.

Commissioner of the USBR, and Robert Fenton, Acting Administrator, Federal Emergency Management Agency (FEMA) requesting federal assistance to: (1) expand inspection of all federally owned dams; (2) update federal operating manuals for key reservoirs; (3) provide funds for rehabilitation of high hazards dams, as authorized by the Water Infrastructure Improvements for the Nation (WIIN) Act; and (4) appropriately cost share on flood control projects towards which California has committed \$1 billion over the next two years.

The letter referred to the recent spillway erosion at Oroville Dam and highlighted the need to “strengthen and repair” California’s infrastructure. Governor Jerry Brown has already ordered state dam safety program enhancements, calling for inspection and review of ancillary structures like spillways, and accelerating investments in flood control infrastructure. He said, “Now is the time to invest in California’s critical infrastructure to preserve our resources and protect our people.” The request recognizes the “major role that the federal government plays in regulating and funding California dams and flood control projects.” Governor Brown forwarded a copy of the letter to Secretary John Kelly, Department of Homeland Security, Secretary Jim Mathis of the Department of Defense, and Acting Secretary Kevin Haugrud of the Department of the Interior, noting “this is an urgent need, but also a great opportunity!”

#### Drought/Executive Order

On April 7, California Governor Jerry Brown issued an Executive Order terminating his January 2014 drought emergency declaration. “Californians responded to the drought by conserving water at unprecedented levels, reducing water use in communities by more than 22% between June 2015 and January 2017,” he noted. State agencies “worked cooperatively to manage and mitigate the effects of drought on our communities, businesses, and the environment.” Although California’s snowpack is 164% of the seasonal average and major storage reservoirs are above normal storage levels, the effects of drought persist, including groundwater depletion and subsidence. He added that developing resilience to the changing climate “requires California to continue to adopt and adhere to permanent changes to use water more wisely and to prepare for more frequent and persistent periods of limited water supply.”

He ordered that the provisions in his May 2016 Executive Order, “Making Water Conservation a Way of Life,” remain in full force, with a few modifications. A final report with the same name was also released by the California Department of Water Resources, State Water Resources Control Board, Public Utilities Commission, Department of Food and Agriculture, and Energy Commission. It provides information for the public and the legislature, detailing successes and making recommendations regarding implementation of the conservation order and its four inter-related objectives: (1) using water more wisely; (2) eliminating water waste; (3) strengthening local drought resilience; and (4) improving agricultural water use efficiency and drought planning.<sup>61</sup>

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<sup>61</sup>[www.water.ca.gov/wateruseefficiency/conservation/](http://www.water.ca.gov/wateruseefficiency/conservation/).



## Gaining Responsibility on Water Act

On January 3, Rep. David Valadao (R-CA) introduced the Gaining Responsibility on Water (GROW) Act, H.R. 23, to provide drought relief in California. The bill is co-sponsored by twelve California Republican representatives, and was referred to the House Committees on Natural Resources and Agriculture. The bill is intended to make more water available to communities in California and bordering western states, providing relief to California families, farmers, and communities by restoring water deliveries that have been drastically reduced over the last two decades as a result of various environmental lawsuits and state and federal regulations.

The legislation requires regulators to comply with the bipartisan Bay-Delta Accord, consistent with the requirements of the ESA. The bill is also intended to cut red tape holding back major water storage projects that have been authorized for over a decade, to aid the entire Western United States during dry years. The bill also contains provisions recognizing state authority to manage and allocate water.

Rep. Valadao stated: “This Western drought has had devastating consequences on my constituents in California’s Central Valley; our economy is stagnant and parents are struggling to provide for their children. Now, the entire country feels the consequences of this drought. While we were able to implement temporary provisions in the 114<sup>th</sup> Congress, a complete and long term agreement is still needed. My bill, the GROW Act, will enact policies to expand our water infrastructure and allow for more water conveyance while protecting the water rights of users across the state.”

On July 10, California Governor Jerry Brown sent a letter to Speaker of the House Paul Ryan opposing the GROW Act (H.R. 23). “This bill overrides California water law, ignoring our state’s prerogative to oversee our waters.” He noted that courts have consistently recognized state laws when it comes to the development and use of water. “Western states have successfully resisted any attempted intrusion into this essential attribute of their sovereignty, including in the operation or construction of water projects involving the federal government.” He said that California’s economy depends on the wise and equitable use of its water, and that decision-making requires consideration and balancing of economics, biodiversity and wildlife resources, which is best done at the local level. “Undermining state law is especially unwise today as California, with input from all stakeholders, is poised to make its boldest water infrastructure investments in decades: funding surface storage, updating antiquated delta water conveyance, and adopting water-use efficiency targets.”

Section 108 of the bill would codify provisions of the bipartisan 1994 Bay-Delta Accord between California and the federal government, requiring the Central Valley Project (CVP) and State Water Project (SWP) to be operated pursuant to the water quality standards and operational constraints, without regard to the Endangered Species Act (ESA). It would prohibit both federal and state agencies from restricting the exercise of California water rights to “conserve, enhance, recover or otherwise protect any species that is affected by operations of the [CVP] or [SWP]” or from using the Public Trust Doctrine to protect, enhance, or restore any public trust value. Implementation of the Bay Delta Accord “shall be in strict compliance with the water rights priority system and

statutory protections for areas of origin.” Section 108(d) would preempt California law “with respect to any restriction on the quantity or size of nonnative fish taken or harvested that preys upon one or more native fish species that occupy the Sacramento and San Joaquin Rivers,” their tributaries and delta.

Rep. Valadao stated, “For years, California’s sophisticated network of storage and delivery facilities have been sorely mismanaged, causing devastating impacts across the state. This problem has become even more apparent during the last several months. Despite record precipitation levels, families, farmers, and communities still lack access to a reliable supply of water. My bill, the GROW Act, will restore water deliveries, ensuring the Central Valley has access to a reliable water supply. I look forward to working with the Senate and sending this bill to the President’s desk.” Majority Leader Kevin McCarthy (R-CA) said: “Today, we take another major step forward to bring our communities the water they contract and pay for by increasing pumping and speeding up the process to approve new water projects. Water is a necessity, and with it California and the entire west will have a brighter future.”

On July 12, the House passed the Gaining Responsibility on Water Act (GROW) (H.R. 23) by a vote of 230-190. The bill was amended to incorporate provisions from several other water-related bills. The seven titles of H.R. 23 are intended to provide both short and long-term solutions to expand water storage, improve infrastructure, restore reliability, protect privately-held water rights, and create more abundant and reliable water resources to benefit both communities and the environment. It is also intended to build on the water storage and delivery provisions of the Water Infrastructure Improvements for the Nation (WIIN) Act passed last December and give federal agencies the necessary tools to help safeguard communities from the effects of droughts.

Senators Dianne Feinstein (D-CA) and Kamala Harris (D-CA) said they would fight to defeat the bill in the Senate. “We oppose Congressman Valadao’s bill to weaken California’s ability to manage its own natural resources. California’s Central Valley helps feed the world. It deserves sensible and responsible water solutions – this measure doesn’t even come close to meeting that test. His legislation would preempt existing California environmental laws and regulations, giving the Trump administration greater control over water management in our state. Science should be at the center of all decisions affecting California’s water supply. This bill would eliminate the existing biological opinions required under the Endangered Species Act. It also prevents California from using new scientific data to manage our water supply by reverting us back to outdated limits set more than two decades ago.”

Title I addresses water reliability, predictability, and availability in California for the Central Valley Project (CVP) and the State Water Project (SWP). It would amend the purposes and definitions of the Central Valley Project Improvement Act to facilitate water transfers, to authorize contracts for additional storage and water delivery, to ensure that water dedicated to fish and wildlife purposes is replaced and provided to water contractors at the lowest cost reasonably achievable, and clarifies the meanings of “anadromous fish” and “reasonable flows.” Under Section 108, if the CVP and SWP are operated consistent with the Bay-Delta Accord, they may operate without additional regard to Endangered Species Act compliance. The bill limits the mitigation measures and

adjustments to operating criteria that may be imposed on diversions during water supply shortages. Section 113 amends the San Joaquin River Restoration Settlement Act, noting that the settlement cannot be implemented as originally authorized due to catastrophic species declines, cost estimates that have more than doubled, and scientific assessments that no amount of additional flow in the San Joaquin River will sustain Spring-run Chinook salmon. It provides an alternative settlement option that includes the development and implementation of a warm water fishery program, requiring California and the Secretary of the Interior to determine whether the changes are consistent with the settlement agreement.<sup>62</sup>

Title II sets deadlines for the completion of five feasibility studies relating to the coordinated CALFED surface storage projects in California. It prohibits Wild and Scenic River Act designations from hindering the completion of the proposed Temperance Flat Reservoir Project. It authorizes the Secretary of the Interior to enter agreements with local entities to advance water storage projects, to coordinate with state and local water agencies to conduct geophysical surveys of aquifers to consider the areas of greatest recharge potential, and to partner with state and local water agencies and academics to study ways of enhancing mountain runoff to reservoirs through headwater restoration.

Title III protects the joint operation of the CVP and SWP, and includes protections for California senior water rights holders.

Title IV requires an accounting of CVP water supply used for fishery beneficial purposes to fulfill any post-1992 agreements. It limits the volume of water that may be released from Lewiston Dam based on the type of water year (dry versus wet). It requires Interior, in coordination with other federal and state agencies, to publish an annual report on instream flow releases from CVP and SWP, including details about the measured environmental benefit of the releases. Section 405 requires the federal agencies to “recognize Congressional opposition to the violation of private property rights by the California State Water Resources Control Board in their proposal to require a minimum percentage of unimpaired flows in the main tributaries of the San Joaquin River; and recognize the need to provide reliable water supplies to municipal, industrial, and agricultural users across the State.” It also prohibits the use of the \$18 million, authorized in section 4010(b) of WIIN Act to carry out activities to benefit endangered species, to acquire land or water already designated for other instream uses or environmental purposes.

Title V incorporated the provisions of the Water Supply Permitting Coordination Act (H.R. 1654), passed by the House on June 22, by a vote of 233-180. The bill would authorize the Secretary of the Interior to coordinate federal and state permitting processes related to the construction of new surface water storage projects on lands under the jurisdiction of the Secretary of the Interior and the Secretary of Agriculture and to designate the USBR as the lead agency. In general, Reclamation would serve as a point of contact for project applicants, state agencies, Indian tribes and others. It would coordinate preparation of unified environmental documentation and coordinate federal agency reviews, beginning with a preapplication meeting to explain applicable processes, data requirements, and submissions necessary to complete required federal agency reviews. Reclamation would

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<sup>62</sup>*Western States Water*, #2252, July 14, 2017.

establish a schedule and timeframe for agency action, and consult with the cooperating agencies to set deadlines and a project schedule. Reclamation would also prepare a unified environmental review document, maintain a consolidated administrative record, ensure that all project data is submitted and maintained in generally accessible electronic format (to the extent practicable) and make such data available to cooperating agencies, the project applicant and the public, as well as appoint a project manager. Cooperating agency responsibilities are also detailed. The bill was referred to the Senate Committee on Energy and Natural Resources.

Title VI, Bureau of Reclamation Project Streamlining Act (H.R. 875), was introduced in the House in February. It was intended to facilitate and streamline the USBR process for creating or expanding water storage, rural water supply, and water recycling projects under Reclamation law. The bill sets forth provisions governing feasibility studies for surface water storage projects initiated by the Department of the Interior under the Reclamation Act of 1902 (project studies). It requires a project study initiated after enactment to: (1) result in the completion of a final feasibility report within three years; (2) have a maximum federal cost of \$3 million; and (3) ensure that personnel from the local project area, region, and headquarters levels of the USBR concurrently conduct the required review, while eliminating repetitive discussions of the same environmental issues. It delineates factors for extending timelines for complex projects, and sets requirements for Interior to complete reviews for project studies, set meetings, provide information and expedite project study completion, as well as other responsibilities. It also sets requirements for National Environmental Policy Act (NEPA) compliance, sets forth responsibilities of the lead agency, and provides for a reduction of funds for an agency that fails to render such a decision by a specified deadline. The bill was referred to the to the Subcommittee on Water, Power and Oceans.

Title VI directs Interior to: (1) survey the use by the Bureau of categorical exclusions in projects since 2005 and propose a new categorical exclusion for activities if merited; and (2) establish a program to measure and report on progress made toward improving and expediting the planning and environmental review process. It requires Interior to develop and submit an annual Report to Congress on Future Water Project Development that: (1) identifies the project reports, proposed project studies, and proposed modifications to authorized projects and project studies that are related to the missions and authorities of the USBR, that require specific congressional authorization, that have not been congressionally authorized, that have not been included in any previous annual report, and that, if authorized, could be carried out by the USBR; (2) provides a description of the benefits to the protection of human life and property, improvements to domestic irrigated water and power supplies, the national economy, the environment, or the national security interests; and (3) for proposed project studies, whether the non-federal interest submitting the proposal has local support and the financial ability to cost-share.

Title VII, the Water Rights Protection Act (H.R. 2939), was reintroduced on June 21. The bill would prohibit the Departments of the Interior and Agriculture from conditioning any permit, lease, or other use agreement on the transfer of any water right to the U.S. Rep. Scott Tipton (R-CO), the sponsor, noted that federal attempts over several decades to manipulate the federal processes “to circumvent long-established state water law and hijack privately-held water rights sounded the alarm for all non-federal water users that rely on these water rights for their livelihood.

The Water Rights Protection Act is commonsense legislation that provides certainty by upholding longstanding federal deference to state water law.”

WGA provided testimony on H.R. 2939, stating: “Nowhere is the need for substantive consultation between states and the federal government more critical than in the water arena.” Consultation requires each federal agency to have a clear and accountable process to provide each state with early, meaningful, and substantive input in the development of regulatory policies with federalism implications. “That process involves communicating with the governor and any state and local representatives the governor designates.”

In a statement summarizing the GROW Act, Rep. Valadao said: “Complex and inconsistent system of laws, court decisions, and regulations at the state and federal levels is resulting in the mismanagement of critical water resources throughout the West. The current regulatory framework governing movement and storage of water is based upon outdated science and illogical regulations and is resulting in the misallocation of precious water resources and a lack of adequate water storage. These shortcomings negatively impact local economies across the West, pose an increasing threat to America’s food security, and place undue burdens on our environment.”<sup>63</sup>

### State Water Primacy

On May 18, the House Natural Resource’s Subcommittee on Water, Power, and Oceans held a legislative hearing on two bills to increase federal transparency, safeguard private and state water rights, and provide certainty to water and power users.

Rep. Scott Tipton (R-CO) introduced a discussion draft of the Water Rights Protection Act intended to protect state water law and private property rights from future federal takings. It would prohibit the Departments of the Interior and Agriculture from conditioning any permit, lease, or other use agreement on the transfer of any water right to the U.S. Tipton noted that federal attempts over several decades to manipulate the federal processes “to circumvent long-established state water law and hijack privately-held water rights sounded the alarm for all non-federal water users that rely on these water rights for their livelihood. The Water Rights Protection Act is commonsense legislation that provides certainty by upholding longstanding federal deference to state water law.” Subcommittee Chairman Doug Lamborn (R-CO) said, “Private water rights holders should not live in fear of the federal government coming after them.”

Executive Director Jim Ogsbury, Western Governors’ Association, noted in his testimony on the Tipton bill that: “Nowhere is the need for substantive consultation between states and the federal government more critical than in the water arena.” Consultation requires each federal agency to have a clear and accountable process to provide each state with early, meaningful, and substantive input in the development of regulatory policies with federalism implications. That process involves communicating with the governor and any state and local representatives the governor designates.

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<sup>63</sup>[https://valadao.house.gov/uploadedfiles/hr23\\_summary\\_document.pdf](https://valadao.house.gov/uploadedfiles/hr23_summary_document.pdf).

Ogsbury provided examples of the Forest Service’s proposed groundwater directive and ski area water rights, the EPA and Corps’ Clean Water Rule expanding jurisdiction over waters of the United States, and the Corps’ proposed water supply rule affecting natural flows through federal reservoirs. “Certain previously proposed rules, regulations, and directives have threatened to disrupt the traditional balance of state and federal power over water management and protection, and preempt state authority.” Congressional intent to preempt state law should be clear, and only where there is express delegation of Constitutional authority to the federal government. Otherwise, state authority over its water resources should be presumed sovereign. “While states have primary authority over their water resources generally, their authority over groundwater management and allocation is even more extensive and has not been expressly preempted by federal legislation.” He emphasized that state authority is the cornerstone of effective water management in the West, and that States are in the best position to understand their own water laws, local hydrology, and citizen needs. “Federal efforts to assume greater authority over water jeopardize the distinct advantages of on-the-ground resource management.”

Randy Parker, Utah Farm Bureau, testified about the uncertainty federal agencies are creating for ranchers, grazing rights, and livestock water rights. “The U.S. Forest Service (USFS) and the Bureau of Land Management (BLM) have been systematically challenging state sovereignty and historic privately held water rights on the public lands.... The growing conflict in states like Utah, Nevada and Idaho where the federal agencies require an ownership interest in water located on public lands is adversely affecting critical water development, water maintenance efforts and even frustrating range improvement projects valuable for livestock, wildlife including sage grouse and the overall ecosystem.” Parker discussed the history of livestock grazing rights, ownership of public lands, and grazing statistics over time. He provided examples of congressional and court acknowledgments of state sovereignty over water rights, with details about USFS and BLM policies attempting to circumvent that sovereignty.

Christopher Treese, Colorado River Water Conservation District, said, “Nearly all of the water used in our district and, in fact, in Colorado and the West, originates on or flows across federal lands. Accordingly, a constructive, working relationship with federal land management agencies is absolutely necessary for the sustainable use of western water. Recent efforts by federal agencies to force transfer of ownership of water rights as a condition of agency permitting is contrary to both federal and state law and ultimately counterproductive to the cooperative relationship necessary for the stewardship of the arid West’s scarce water resources.”

Treese’s testimony focused on new bypass flow requirements for federal permit renewals or the reissuance of permits for existing infrastructure, providing some examples. “Such requirements may require expensive retrofits of existing facilities and can also result in water users effectively losing a significant portion of their historical water supplies. This can have the effect of reallocating water from long-established private as well as public rights to federal purposes. Furthermore, the Forest Service has often done so in a manner that is wholly inconsistent with the adjudication and administration of federal and non-federal water rights by the states. As such, water that is required by new permit conditions to be bypassed past existing structures cannot be administered by states to ensure the intended, flow-related benefits are actually accomplished. A bypass flow requirement

placed on a special use permit, easement, or right-of-way does not create a legal water right in Colorado nor, to my knowledge, any other Western state. Consequently, the bypassed water is too often simply available for diversion by the next downstream junior water right holder.”

Vanessa Ray-Hodge, former Senior Counselor to the Solicitor at the Department of the Interior, expressed concerns about the proposed Water Rights Protection Act. She said it had the potential to complicate and impede the Indian water rights settlement process, which has generally benefitted both tribes and states. The Department of the Interior’s ability to take legal and policy positions on the nature of a tribe’s state-based water rights is “critical to the United States’ ability to fulfill and honor its trust responsibilities and special commitments to Indian tribes.” Because the tribe’s water rights are held in trust, any limitation on the Secretary of the Interior with respect to his ability to quantify, settle, protect, or enforce those rights impacts the ability of the tribes to do the same. Despite the efforts to protect all existing legal rights to water in Section 5 of the proposed bill, Section 2 defines “water right” in terms of beneficial use, but Indian reserved water rights are exempt from appropriation and beneficial use requirements. The limitations imposed by Section 3 would limit the authority of the Secretary of the Interior to protect and preserve Indian reserved water rights from conflicting state water rights, including state groundwater practices.

She noted that it could also be interpreted to constrain the Secretary’s ability to approve or participate in water settlements, which invariably involve compromise and may include the transfer of state water rights to the United States for the benefit of the tribe. “In addition, Indian water settlements sometimes depend on the ability of the Secretary and Indian tribes to limit or condition the use of state based water rights (surface and/or groundwater) by non-Indians. In exchange, Indian tribes agree to subordinate their legally senior water rights to protect all current non-Indian uses in existence at the time of the settlement (commonly referred to as grandfather provisions). But Sections 3 and 4 of the bill could be construed to prohibit the Secretary and Indian tribes from negotiating or taking positions that would conflict with or require state based water rights to be limited in any manner.”

Rep. Paul Gosar (R-AZ) introduced the Western Area Power Administration Transparency Act (H.R. 2371), which would establish a pilot project to increase the transparency of the Western Area Power Administration’s (WAPA) costs, rates, and other financial operational dealings for utility ratepayers and taxpayers.

Dennis Sullivan, Western Area Power Administration, noted that WAPA is committed to transparency, and that the proposed legislation is consistent with WAPA’s efforts over the past three years to proactively address customers’ reasonable concerns about rates, their annual budget, and gaining access to the information that informs WAPA’s planning and operations. Some of those concerns arose over organizational changes, shifting budgets, and targeted investments that resulted in increased efficiencies and improved compliance with standards and laws. “Some of our customers may not agree with the changes that we have made. I believe it is, in part, because we did not do a good enough job communicating early and sufficiently.” WAPA has worked to improve the communication gaps, making data available, and entering Memoranda of Understanding to discuss financial information with customer groups. Customers have commented that they are seeing

improvements in how WAPA engages with them on budget issues. “I am eager to improve and develop the systems necessary to support the sustainability of the pilot program outlined in the proposed legislation. We are committed to sharing information openly and honestly and providing a mechanism for feedback. As an organization, we are accountable for delivering on our mission and responsible for the stewardship of our program and resources for all of our region’s customers.”

Patrick Ledger, Arizona Electric Power Cooperative, acknowledged WAPA’s efforts, but noted that the meetings and information presented “lack granularity” that would enable them to in turn answer their own customers’ questions about rate increases. “H.R. 2371 would require Western to provide detailed accounting for expenditures, capital costs, and staffing costs on a regional basis and include the Western headquarters office. In particular, the legislation would require a breakdown of these costs on a functional and budgetary level so that the power and transmission customers can assess how Western is executing its budget authority and how those expenses are showing up in rates. Further, the legislation would require Western to document the magnitude of these changes so that customers can track year to year changes.” While all utilities are facing cost increases due to environmental laws and other responsibilities, Ledger said that WAPA’s hiring of 52 employees to meet obligations that the local utilities are meeting with one or two employees does not sit well, particularly when local utilities have to eliminate staff positions to make up for the 32% unexplained increase in WAPA rates over 5 years.

The Committee marked up and reported H.R. 2371 on July 26 and August 29, respectively.

## Montana

### Wildfires

On September 7, Montana Governor Steve Bullock met with FEMA Administrator Brock Long, urging additional assistance and resources to help fight wildfires. Governor Bullock said, “It has been a long and challenging fire season in Montana. We’ve had losses to homes, livestock, forage and infrastructure, and we’ve tragically lost the lives of two wildland firefighters. We are experiencing impacts to individuals and businesses across the state, who have endured losses due to evacuations, hazardous air quality, and sustained threats to our tourism and recreation industries. The situation is likely to get worse before it gets better. While I will continue to pursue every available resource to support fire response and recovery, I am asking that we work together to ensure the long-term health, safety, and livelihood of Montanans impacted by this disaster.”

## Nebraska

### Water Supply/Surplus Water Rule/Natural Flows

Jeff Fassett, Director of the Nebraska Department of Natural Resources (NDNR) and WSWC Member, submitted a letter to the U.S. Army Corps of Engineers (Corps) in May, urging them to engage in substantive consultation with the states before moving forward with the proposed rulemaking. “Asking for comments does not meet the requirement of consultation.” Sitting down



to discuss the various state water laws enables all entities to better understand the needs and requirements that exist.

Nebraska's involvement with its 17 Corps reservoirs is significant. Although the Corps is exempted from submitting to state regulatory authority when it engages in flood control and navigation projects, "...once the [Corps] decides to engage in providing water supply the [Corps] must first obtain whatever permits are required by the States for purposes of regulating and allocating water supply under their various water right systems."

Nebraska objects to the interpretation of surplus water that includes natural flows in order to authorize easements to access the state's water that would flow in the river even without the reservoirs. "[I]f the [Corps] wants to subject natural flows to its authority within the footprint of its reservoirs, then it needs Congress to grant that authority." Granting an easement to authorize access to natural flow is different from entering into a contract for the use of storage water that is surplus to existing uses, and recognizing the difference is critical.

Additionally, the Corps must quantify the surplus water available before it can administer water supply uses, even if it obtains the necessary authority. "The cumulative effects of all existing water uses and the proposed new uses from the reservoirs will need to be assessed in future surplus water studies." Nebraska notes that for Corps reservoirs on the Missouri River, "Except for the 16.3 million acre-feet space allocated for flood control, there has been no allocation among the other seven congressionally authorized purposes including hydropower, water supply, water quality control, recreation, navigation, irrigation, and fish & wildlife. Thus at this time no determination can be made regarding the amount of surplus storage available to be contracted under a water supply agreement. Additionally, the flood control storage should not be re-allocated for other uses because flood control remains a continuing unmet need. Moreover flood control is Nebraska's top concern and flood control should be [the Corps'] primary purpose for operating Missouri River mainstem dams."

## Nevada

### Flooding/Dam Safety

Strong winter storms brought heavy snow to the Sierras and Northern Nevada, followed by warming temperatures across the Great Basin that led to rising rivers and streams. On February 8, Twenty-one Mile Dam burst near Montello, Nevada, a small rural town north of Interstate 80 on Highway 233 about 10 miles west of the Utah border. The dam, which provides irrigation water, had been inspected last summer and received a "fair" grade, compared to "poor," or "satisfactory." According to Nevada State Engineer Jason King, a WSWC member, inspectors recommended some improvements, including the removal of deep-rooted vegetation and the monitoring of areas where seepage occurs, but there were "no issues identified as needing immediate attention." Further, the dam is a "low hazard structure," and its failure did not cause loss of life, though there was widespread property damage in the small town. Highway 223, north of town, washed out, also closing Highway 30 in northwest Utah. Sheriff Jim Pitts observed that every building in the rural town is flooded. Residents of Montello were allowed to go in and out of the town, but the road was

officially closed. The State is cautiously trying to evaluate damage to the highway. The water from the Twenty-one Mile Reservoir flows eastward into Utah's Salt Flats, north of Wendover. Reconnaissance flights tried to determine the impacts and status of other reservoirs.

Elko County remained under a state of emergency and National Weather Service flood warnings continued. "The state of emergency will help the county get assistance from the State," said Pitts. U.S. Highway 93 north of Wells, Nevada was closed. "The flood waters raised and engulfed the road," according to the Nevada Department of Transportation. "Right now they've deemed it unsafe for any vehicles to get through." A bridge south of Jackpot, Nevada awaits a safety inspection. The north-south route connects eastern Nevada with Idaho to the north and Las Vegas and Arizona to the south. Water on Interstate 80 reduced traffic to one lane. The Humboldt River, through Elko, peaked at 8.5 feet. While running high, no problems were reported. Wells, Nevada has several houses with water damage, but no one has been evacuated yet from Wells or Elko. Union Pacific railroad tracks are submerged and unpassable.

In Reno, the Truckee River was above minor flood stage, with some people trapped by the flood waters. At least one boater took advantage of the waters rushing through downtown. Transportation concerns led Washoe County schools to close, and Interstate 80 over Donner Pass required 4-wheel drive and snow chains as winter weather battered the area. Winds up to 90 miles per hour were also reported. U.S. 50 was closed due to a rockslide and California 89 also closed north of Truckee and northwest of South Lake Tahoe, which also experienced some flooding.<sup>64</sup>

On the Owyhee River, moderate flooding occurred, with the river forecast to rise slightly to near major flood stage, according to the National Weather Service.<sup>65</sup>

## New Mexico

### Drought Preparedness Act of 2017

On May 2, Senators Tom Udall (D-NM) and Martin Heinrich (D-NM) introduced the New Mexico Drought Preparedness Act of 2017 (S. 1012). Section 3 authorizes \$30 million for the Secretary of Interior to carry out a water acquisition program in basins in New Mexico through lease, purchase or contract from willing lessors or sellers, consistent with state law, to enhance: (1) streamflow for fish and wildlife (including endangered species), water quality, and river ecosystem restoration; and (2) to "enhance stewardship and conservation of working land, water, and watersheds in the basins..." The Secretary may provide funds to a federally established nonprofit entity with particular expertise in western water transactions.

Section 4 authorizes \$18 million so the Secretary of the Interior may, in cooperation with water districts and pueblos, provide funding and technical assistance for the installation of metering and measurement devices and the construction of check structures on irrigation diversions, canals,

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<sup>64</sup>(*Reno Gazette Journal*, 2/10/17)

<sup>65</sup>(*Elko Daily Free Press*, 2/9/17)

laterals, ditches and drains intended to ensure efficient use, reduce actual consumptive use, or not increase the use of water, and improve the measurement and allocation of acquired water. Further, the Secretary “shall” provide for the development of a comprehensive plan for the San Acacia and Isleta reaches to balance river maintenance, water availability, use and deliver, as well as ecosystem benefits.

Section 5 addresses Middle Rio Grande peak flow restoration and directs the Secretary of the Army to continue existing temporary deviations in operations of Cochiti Lake and Jemez Canyon Dam, and evaluate the benefits with a report to Congress, while a permanent reauthorization of the reservoirs is pursued. The goal is to restore natural river processes, including a Spring peak flow, as a means of increasing the spawning and recruitment of the endangered Rio Grande silvery minnow and overbanking flows necessary to maintain a healthy bosque and Southwestern willow flycatcher habitat, as well as channel capacity, and to increase irrigation and municipal water projects operational flexibility. The Secretary is to first obtain approval for any deviation from the Cochiti and Santa Ana Pueblos and the Rio Grande Compact Commission.

Section 6 directs the Secretary of the Army to enter into an arrangement with the National Academy of Sciences to carry out a study on water and reservoir management and operation issues for Rio Grande reservoirs, including: (1) an evaluation of reservoir authorizations and legal requirements; (2) physical-hydrologic understanding; (3) potential constraints in light of climate change projections; (4) opportunities to optimize storage; (5) identified water use, supply and accounting impacts; (6) operational considerations; and (7) recommendations for future management. The report merits “due deference.”

Section 7 would authorize emergency financial assistance under the Reclamation States Emergency Drought Relief Act of 1991, Title XII of the Food Security Act of 1985, and other federal laws to assist New Mexico and other western states with eligible water projects to assist in addressing “drought-related impacts to water supplies or any other immediate water-related crisis or conflict.” Financial assistance would also be available to organizations and entities, including tribal governments, engaged in collaborative processes for environmental restoration.

Eligible water projects include: (1) installing pumps, temporary barriers or gates for water diversion and fish protection; (2) drought-relief ground-water wells for Indian tribes and wildlife refuges; (3) acquisition of water from willing sellers; (4) agricultural and urban conservation projects with multiple benefits; (5) emergency temporary water exchanges; (6) planting cover crops; (7) emergency pumping projects; (8) reducing demand consistent with a comprehensive program for environmental restoration and settlement of water rights claims; (9) innovative on-farm water conservation; (10) protect, restore or enhance fish and wildlife habitat or other environmental improvements; (11) promoting groundwater recharge and reducing groundwater depletion; (12) technical assistance for irrigation improvement practices; (13) brackish water development and aquifer storage and recovery; (14) lining ditches and canals; (15) municipal water supply planning assistance, including hydrological forecasting, identification of alternative water supplies, and guidance on potential water transfer partners; and (16) any other “assistance the Secretary determines

to be necessary to increase available water supplies, maintain the health of river ecosystems, or mitigate drought impacts.”

Section 8 would reauthorize the Secure Water Act (Section 9504 of the Omnibus Public Land Management Act of 2009) and provide that the Commissioner of the U.S. Bureau of Reclamation (USBR) “may” waive cost-sharing requirement to address emergency drought situations and prioritize projects that “expeditiously yield multiple water supply benefits..., prevent any other immediate water-related crisis or conflict,” and demonstrate “innovative conservation tools or methods that balance instream and out-of-stream water supply needs, including water conservation and water marketing.” It also raised the authorized ceiling by \$100 million.

Section 9 authorizes another \$100 million under the Reclamation States Emergency Drought Relief Act.

Section 10 extends the Rio Grande Pueblo Irrigation Infrastructure Reauthorization through 2014, and authorizes another \$6 million.

The Secretary of Agriculture, under Section 11, may allocate financial assistance consistent with the Food Security Act of 1985 to establish “special conservation initiatives at the local, state or regional level to assist producers in implementing eligible activities on agricultural land in the western States” for: (1) mitigating the effects of drought on agriculture and the environment; (2) improving water quality and quantity, including reducing groundwater depletion; (3) restoring, enhancing, and preserving fish and wildlife habitat; and (4) promoting innovative and collaborative conservation tools and approaches.

Section 12 expands authority under the Conservation Reserve Program to cover “water quantity, or habitat impacts related to agricultural production activities...,” as well as the Special Conservation Reserve Enhancement Program, “...including improving water conservation and drought mitigation.”

Of particular note, Section 13 declares: “An action taken by any of the Secretaries or other entity under this Act or an amendment made by this Act shall comply with applicable State laws...” It further declares: “Nothing in this Act or an amendment made by this Act affects, is intended to affect, or interferes with a law of the State relating to the control, appropriation, use, or distribution of water, or any vested right acquired under the law.”

A May 10 hearing to receive testimony on the bill was cancelled rescheduled for June 14.

Also on the hearing schedule was S.677, the Water Supply Permitting Coordination Act, introduced by Senator John Barrasso (R-WY) on March 21, to authorize the Secretary of the Interior, through the USBR, to coordinate federal and state permitting processes related to the construction of new surface water storage projects on lands under the jurisdiction of the Departments of Agriculture and the Interior. Consistent with state law, a State “may” choose to participate and designate state agencies as a cooperating agency, subject to the processes outlined in the act, with

respect to any state review, analysis, opinion, permit, license or other approval for a qualifying project.

In general, Reclamation would serve as a point of contact for project applicants, State agencies, Indian tribes and others. It would coordinate preparation of unified environmental documentation and coordinate federal agency reviews, beginning with a preapplication meeting to explain applicable processes, data requirements, and submission necessary to complete required federal agency reviews. Reclamation would establish a schedule and timeframe for agency action, and consult with the cooperating agencies to set deadlines and a project schedule. Reclamation would also prepare a unified environmental review document, maintain a consolidated administrative record, ensure that all project data is submitted and maintained in generally accessible electronic format (to the extent practicable) and make such data available to cooperating agencies, the project applicant and the public, as well as appoint a project manager. Cooperating agency responsibilities are also detailed. No further action on S. 677 was taken in 2017.

## North Dakota

### Drought Relief

On September 7, North Dakota Governor Doug Burgum met with U.S. Secretary of Agriculture Sonny Perdue and Secretary of the Interior Ryan Zinke to discuss drought relief and build on collaborative relationships. Nearly half of North Dakota is experiencing severe, extreme, or exceptional drought conditions. The Federal Emergency Management Agency (FEMA) is currently considering Governor Burgum's request for a presidential major disaster declaration to make assistance available to affected farmers and ranchers. The Governor thanked Perdue for the release of Conservation Reserve Program acres for haying and grazing. They discussed the importance of a strong crop insurance program in the next farm bill, as well as the need for more accurate data when reporting crop conditions.

Burgum also advocated for the USBR's approval of the Red River Valley Water Supply Project intake permit from the Garrison Diversion's McClusky Canal. They also discussed the Department of the Interior's (DOI) important land, water and minerals management role, especially as it pertains to collaboration on tribal lands.

### Northwest Area Water Supply

On August 10, the U.S. District Court for the District of Columbia ruled in favor of *North Dakota and the Bureau of Reclamation in Manitoba v. Zinke* (02-2057), allowing the Northwest Area Water Supply (NAWS) Project to move forward. Congress authorized the project to divert Missouri River water from Lake Sakakawea for irrigation, municipal, industrial, and other uses in 1965 (Pub. L. 89-108), to address "longstanding water shortages and poor water quality in northwestern and northcentral North Dakota." The NAWS project would transfer water to the Hudson Bay Basin. Congress amended the authorization in 2000 (Pub. L. 106-554) to require NEPA compliance.

The Canadian Province of Manitoba sued in 2002, over the potential introduction of invasive species to the Hudson Bay Basin. Manitoba also objected to Reclamation's failure to select another alternative to supply North Dakota communities, and its interpretation of the impacts of climate change on turbidity. The Court held that Reclamation had "finally" complied with NEPA requirements, and cautioned the parties to continue to work together on an adaptive management plan.

The State of Missouri also sued, asserting Reclamation failed to thoroughly consider "the effects of annually withdrawing billions of gallons of water from Lake Sakakawea on the downstream residents of the Missouri River." The Court noted that the Missouri River System is the largest reservoir system in North America, consisting of six dams and reservoirs operated by the Army Corps of Engineers with the capacity to store 72.3 million acre feet (MAF) of water. "Fully one-third of that storage (23.6 MAF) exists in Lake Sakakawea. At oral argument, North Dakota emphasized the small percentage of water that would be diverted from the Missouri River Basin for NAWS."

Missouri sued under the specific legal doctrine of *parens patriae*, "parent of the country," which requires a state to assert a quasi-sovereign interest apart from the interests of particular private parties. The court provided a detailed discussion of the inability of a state to represent its residents when challenging federal law under this theory. The court concluded that Missouri did not have standing to sue on behalf of its residents, at least not as a *parens patriae*.

Notably, the court did not address water as a matter of full state sovereignty, involving ownership, management, or control of water as a public resource on behalf of its citizens. Instead, it focused on the federal government as the greater political power, the allocation of authorities within a federal system, and that a state cannot institute judicial proceedings to protect citizens of the United States from the operation of its statutes.

## Texas

### Hurricane Harvey

On August 23, Governor Greg Abbott preemptively declared a State of Disaster for 30 counties in anticipation of Hurricane Harvey reaching land along the coast of Texas. Governor Abbott said, "Texans believe in taking action and always being prepared in the event of an emergency." The declaration "...will allow Texas to quickly deploy resources for the emergency response effort in anticipation of the storm's hazardous conditions."

On August 25, Governor Abbott sent a letter requesting a Presidential Disaster Declaration to provide Texas with the necessary resources to respond to the storm, and by the end of the day the Federal Emergency Management Agency (FEMA) granted the request. Governor Abbott said, "I want to thank the President and FEMA for their quick response in granting this disaster declaration. We will continue to work with our federal and local partners on all issues relating to this storm, and

I encourage Texans to continue heeding all warnings from local officials.”<sup>66</sup> The storm made landfall late on August 25, bringing over 50 inches of rain to Houston and the surrounding areas over the next five days, exceeding the city’s average annual precipitation in less than a week. Governor Abbott added 32 counties to the disaster declarations. The Texas Commission on Environmental Quality (TCEQ) issued boil water notices for dozens of public water systems, with several sewer overflows and inoperable wastewater facilities.

On August 28, the Corps initiated controlled stormwater releases from the Addicks and Barker Reservoirs, both built in the 1940s to prevent flooding of downtown Houston and the Houston Ship Channel. By August 29, the Addicks Reservoir flowed over the spillway, but both dams were functioning as designed. The Harris County Flood Control District wrote, “The Corps is continuously monitoring the structural integrity of the dams, including the ends of the dams. This work includes balancing the flow of stormwater into the reservoirs with releases through the reservoir outlets. This effort is complicated by the historic rains that resulted from Hurricane Harvey, the resulting high water levels in both the reservoirs and along Buffalo Bayou, which can impact the public, and the need to build capacity in the reservoirs in case of further rainfall.”<sup>67</sup>

On October 31, Governor Greg Abbott met with White House and Office of Management and Budget (OMB) officials and Senate and House leaders to request \$61 billion in expedited federal funding to repair public infrastructure damaged by Hurricane Harvey. The request is derived from a report compiled by the Governor’s Commission to Rebuild Texas, based on surveys submitted by mayors and county judges listing their community needs, as well as U.S. Army Corps of Engineer flood control projects that could mitigate future storm damage. The request includes: \$12 billion for the Galveston County Coastal Spine, a barrier aimed at protecting coastal areas from hurricane storm surge; \$6 billion to purchase flood zone land and easements around Buffalo Bayou and the Addicks and Barker Reservoirs; \$2 billion for flood control and other mitigation projects around power plants and other critical infrastructure; and \$466 million to create resiliency along the Houston Ship Channel. After the meetings, Governor Abbott said: “The Texas delegation is working very collaboratively and very cohesively as an entire team to ensure that their fellow Texans are going to be helped out in the way they need....”<sup>68</sup>

## Wyoming

### Colorado River/Seedskaadee Project

On March 15, the House passed H.R. 648 by a vote of 408-0. The bill would amend the Colorado River Storage Project Act, authorizing the Department of the Interior, in cooperation with the State of Wyoming, to amend the Definite Plan Report for the Seedskaadee Project. The bill provides for the study, design, planning, and construction of facilities that will enable the use of all active storage capacity behind Fontenelle Dam in the reservoir, including the placement of sufficient

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<sup>66</sup><https://gov.texas.gov/news>.

<sup>67</sup><https://www.hcfd.org/flooding-floodplains/addicks-and-barker-reservoirs/>.

<sup>68</sup><https://gov.texas.gov/news/post/commission-to-rebuild-texas-update-issue-8>.

riprap on the upstream face of the dam to allow such storage capacity to be used for authorized project purposes. On March 30, the Senate Energy and Natural Resources Committee favorably reported a companion bill, S. 199, which was placed on the Senate Legislative Calendar.

In a press release, Rep. Liz Cheney (R-WY) said: “After years of requests and endless D.C. red tape, I am happy to see this bill heading to the Senate [floor]. Wyoming’s water storage and water development projects hedge against potential drought. I am proud to work with Senator Barrasso and Senator Enzi on this legislation. Increasing water storage at Fontenelle Reservoir reaffirms our commitment to our most precious natural resource. The project exemplifies the common-sense knowledge of protecting water uses in an arid region. Additional water available in the existing reservoir will mean more opportunity for potential growth in jobs and the economy ....”<sup>69</sup>

## Washington

### Tribal Treaties Fishing Rights

On August 17, the State of Washington appealed the 9<sup>th</sup> Circuit’s decision in *United States v. Washington*, 853 F.3d 946 (2017), holding that the State must remove culverts that restrict salmon passage to fulfill federal treaty obligations to Indian tribes.<sup>70</sup> The petition for certiorari presents three questions: (1) whether the 9<sup>th</sup> Circuit’s interpretation of the treaties, guaranteeing sufficient fish to provide a “moderate living,” conflicts with the U.S. Supreme Court decision in *Washington v. Fishing Vessel*, 443 U.S. 658 (1979) that the tribes are guaranteed at most a 50% share of available fish; (2) whether the federal role in designing and permitting the culverts in question should require the court to consider a more equitable solution; and (3) whether the injunction to remove the culverts at great cost violates principles of federalism and comity, when there is no clear evidence of a connection to the tribal fisheries, or that culvert replacement will have an impact.

Beginning in the 1990s, Washington took the initiative in its own economic self-interest to identify and replace fish-barrier culverts, becoming a national leader in developing new culvert designs that allow fish to pass. However, state-owned culverts are a small fraction (less than 25%) of the ubiquitous barrier culverts that are also owned by federal, tribal, municipal, and private landowners. Consequently, the state focused its voluntary replacement efforts on streams without non-state culverts, providing the most cost-effective replacement and meaningful access to habitat. Since 1991, Washington has spent over \$135 million to replace culverts, and several hundred million dollars on other salmon recovery efforts. The 9<sup>th</sup> Circuit ordered the State to replace all 817 culverts by 2030, at a cost of several billion dollars, without regard to the fact that 90% of them are co-located on streams with non-state culvert barriers and would not increase available salmon habitat. The State argues that the cost will come at the expense of other salmon restoration efforts to the detriment of fish, the tribes and the State.

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<sup>69</sup>*Western States Water*, #2144, June 19, 2015 and #2145, June 26, 2015.

<sup>70</sup>*Western States Water*, #2198, July 1, 2016.



The State also argues that the new interpretation of the treaty, requiring the State to ensure enough fish to enable a “moderate living” for the tribes, “is not only irreconcilable with precedent, it is also unworkable.” It ignores natural fluctuations in salmon runs, salmon prices, non-salmon tribal incomes, and tribal population. Further, the court’s broad decision could be used to attack a variety of development, construction, or farming practices perceived to diminish salmon harvest numbers, or to demand the removal of dams or the elimination of century-old water rights, significantly affecting the State’s natural resource management. Additionally, “the future reach of this decision extends far beyond the State of Washington, as the same fishing rights are reserved to tribes in Idaho, Montana, and Oregon.”

On September 20, the States of Idaho, Kansas, Louisiana, Maine, Montana, Nebraska, and Wyoming filed an amicus brief in support of the petition for certiorari in *Washington v. United States* (#17-269).<sup>71</sup>

The States argue that the 9<sup>th</sup> Circuit’s decision creates an environmental servitude that goes far beyond the removal of culverts, writing “a script for subjecting a broad swath of regulation by States...to like servitudes.” By way of example, the States point to recent EPA reliance on the 9<sup>th</sup> Circuit’s decision to impose federal water quality standards in Maine and Washington. “It is a short step from [transforming the treaty right] to creating a claim for injunctive relief against States...[for] any diminishment of fish runs subject to harvest and human consumption.” This has implications for dams, water diversions, increasing stream temperatures, timber harvests, grazing practices, and sediment-producing construction, among other things. The States also note the failure of the 9<sup>th</sup> Circuit to apply a more appropriate culvert-specific assessment of benefits and costs, or to take into consideration the fact that Washington is already two decades into the process of improving culvert fish passage.

On the same day, a group of business, real estate, farming, and municipal organizations filed a separate amicus brief. They argue, “If tribes have a right to ensure that States maintain a particular number of fish for tribal interests, then few activities in the West will escape judicial superintendence at the behest of tribes.” The organizations’ brief explains that the 9<sup>th</sup> Circuit decision offers tribes a treaty-based guarantee of sufficient water to support salmon populations, undermining established water rights. “The Ninth Circuit has previously ruled that a tribally held reserved water right for aboriginal fishing uses would have a priority date of time immemorial. Such a priority date has the potential to displace every other water right lawfully created and recognized under Washington law. If tribes have an implied reserved water right for enough streamflow to support a quantity of fish that would provide for a ‘moderate living’ for each tribe in each of the tribes’ usual and accustomed places, there may be no surface water left in Washington to allocate to future users. Similarly, if there is not enough water to support the tribes’ implied reserved water rights, then junior users whose rights infringe the tribes’ water rights could see their perfected state-law water rights disappear.” This could create “ongoing uncertainty about the legal regime governing development throughout the West” and “holders of water rights will face doubt about

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<sup>71</sup>*Western States Water*, #2258, August 25, 2017.

whether their state-law property rights will be impaired to satisfy the court's understanding of the treaty's obligations.”

## **Water Supply Outlook**

On January 5, the Natural Resources Conservation Service (NRCS) reported that heavy winter storms during the first week of 2017 increased the snowpack across the Sierra Nevada with over four inches of Snow Water Equivalent (SWE) blanketing the mountain range. The Great Basin, Wasatch Range, and the central Rocky Mountains also had from one to four inches of SWE increase during this time. Additional storms were expected to affect this same region. Northern and central California and environs face the prospect of a major precipitation and flood event, where soils have already been moistened by recent storms. Heavy rain at lower and middle elevations would result in significant runoff that may be partly contained by reservoirs that are still rebounding from a multi-year drought. Nevertheless, flooding could be a consequence of precipitation totals that may reach 4 to 16 inches in the Sierra Nevada foothills. Other areas of the West also experienced stormy weather, with locally heavy precipitation (and high-elevation snow) in the Great Basin, Intermountain West, and Rockies. Other areas of the country experienced high-impact weather, from light to heavy snowfall.<sup>72</sup>

On February 10, the NRCS reported record levels of snowpack in the Sierra Nevada mountains following a series of atmospheric river storm systems. The storms brought significant rain to coastal areas of Washington, Oregon, and California. Most of the major reservoirs in California were above historical averages, and the U.S. Department of Agriculture (USDA) significantly reduced the area designated as extreme drought in southern California. Snowpack was normal to above normal across the Great Basin, the southern Cascades, the Wasatch, and central and southern Rockies, with significant snowfall in parts of Washington and Montana. In the southern Plains and Oklahoma, overall dry conditions persisted.

By mid-July, parts of North Dakota and Montana were categorized as exceptional drought, the most severe category for determining aid for agricultural producers. At least 80% of North and South Dakota and most of the eastern half of Montana were experiencing moderate drought conditions or worse. USDA Secretarial Drought Designations expanded across Montana, North Dakota, and South Dakota throughout the summer.

Montana Governor Steve Bullock issued Executive Orders in June and July declaring a drought emergency, with persistent dry conditions impacting agriculture, livestock, and the economies of 28 counties and five Indian Reservations. North Dakota Governor Doug Burgum declared a drought disaster in June and July, and on August 7 requested a presidential major disaster declaration for 33 counties and one Indian reservation. He cited concerns about recent economic losses, wildfires, diminished water quality and inadequate water supply for livestock, blue-green algae contamination, and reduced crop yields. South Dakota Governor Dennis Daugaard activated

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<sup>72</sup><http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20170105.pdf>.

the state Drought Task Force in June to monitor drought conditions, and declared a statewide emergency to ease haying and transportation restrictions to assist agriculture producers and keep livestock fed.

The seasonal outlook from the National Oceanic and Atmospheric (NOAA) Climate Prediction Center indicated that drought conditions would continue through October, although “this period (summer into fall) is notoriously difficult to predict due to variable summertime convection and the wild card Atlantic hurricane season. Furthermore, there was little guidance in the longer-term statistical and dynamical precipitation models as they were limited in their probability, areal coverage, and consistency, therefore much of this [seasonal drought outlook] was based upon climatology, current conditions, and short-term forecasts, along with any slight tilts in the 1- and 3-month precipitation and temperature outlooks.”<sup>73</sup>

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<sup>73</sup>[http://www.cpc.ncep.noaa.gov/products/expert\\_assessment/sdo\\_summary.php](http://www.cpc.ncep.noaa.gov/products/expert_assessment/sdo_summary.php).

## **RESOLUTIONS AND POLICY POSITIONS**

From time to time, the WSWC 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. All WSWC positions are also vetted through the Western Governors' Association.

In 2017, the WSWC adopted three new positions (No. 399, 405 and 443) and revised and re-adopted numerous sunseting positions:

Position No. 399 supports weather research, including seasonal to sub-seasonal forecasting.

Position No. 400 urges Congress and the Administration to develop a standardized, transparent process for determining the Bureau of Reclamation's up-to-date maintenance, repair and rehabilitation infrastructure needs.

Position No. 401 urges Congress and the Administration to adequately fund the safe operation and maintenance of Reclamation's dams.

Position No. 402 supports the careful evaluation of multiple purpose projects and protect appropriate interests in the transfer of federal water and power projects.

Position No. 403 supports the National Levee Safety Act insofar as water supply canals are excluded from the interpretation of levees.

Position No. 404 urges Congress and the Administration to ensure stable and continuing appropriations to the State Revolving Fund capitalization grants, as well as State and Tribal Assistance Grants.

Position 405 supports U.S. Department of Agriculture rural water and wastewater grant and loan programs.

Position No. 406 opposes any federal legislation intended to preempt state water law.

Position No. 407 supports federal research and the development of updated hydroclimate guidance for floods and droughts.

Position No. 408 requests Congress fully appropriate receipts accruing to the Reclamation Fund for their intended purpose.

Position No. 409 requests Congress maintain federal authorization and financial support for the USGS State Water Resources Research Institutes program.

Position No. 410 requests Congress and the Administration acknowledge state authority over “waters of the state,” and provide clear and recognizable limits to Clean Water Act jurisdiction consistent with sections 101(b) and 101(g), as well as robust and meaningful state participation and consultation in the development and implementation of any rule.

Position No. 411 emphasizes state primacy over water resources and requests that federal agencies establish and implement appropriate procedures and processes for substantively consulting with the States.

Position No. 412 reiterates support for the policy of encouraging negotiated settlements of disputed Indian water rights claims.

Position No. 413 supports prompt reauthorization of the Farm Bill in 2018.

Position No. 414 asserts state primacy over protecting groundwater quality.

Position No. 415 supports the Dividing the Waters program for judges education.

Position No. 416 outlines actions federal agencies should take to expedite general stream adjudications.



**RESOLUTION  
of the  
WESTERN STATES WATER COUNCIL  
Urging Congress to Support**

**SUB-SEASONAL to SEASONAL  
WEATHER RESEARCH, FORECASTING, and INNOVATION**

**Nebraska City, Nebraska  
April 14, 2017**

**WHEREAS**, Western States experience great subseasonal, seasonal, and annual variability in precipitation, with serious impacts and consequences for water supply planning and management, drought and flood preparedness and response, water rights administration, operation of water projects, and aging water infrastructure; and

**WHEREAS**, sound decision-making to protect life and property by reducing flood risks and to inform decisions involving billions of dollars of economic activity for urban centers, agriculture, hydropower generation, and fisheries depends on our ability to observe, understand, model, predict, and adapt to precipitation variability on operational time scales ranging from a few weeks to a season or more; and

**WHEREAS**, investments in observations, modeling, high-performance computing capabilities, research, and operational forecasting of precipitation provide an opportunity to significantly improve planning and water project operations to reduce flood damages, mitigate economic and environmental damages, and maximize water storage and water use efficiency; and

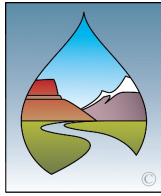
**WHEREAS**, operating aging water infrastructure in the face of growing and often competing water supply and water management demands requires that state, federal, tribal, and local agencies optimize operations for maximum efficiency and seek innovations, such as improved subseasonal to seasonal forecasting, to support their decision-making; and

**WHEREAS**, the responsibility for operational weather forecasting rests with the National Weather Service (NWS), and current NWS subseasonal to seasonal precipitation outlooks are not yet sufficiently reliable to support water resources decision-making; and

**WHEREAS**, there is a need to prioritize National Oceanic and Atmospheric Administration (NOAA) research and weather modeling to improve operational sub-seasonal and seasonal precipitation forecasts, with attention to Western needs; and

**WHEREAS**, the Congress recently enacted the Weather Research and Forecasting Innovation Act of 2017.

**NOW, THEREFORE, BE IT RESOLVED** that the Western States Water Council supports the implementation of the legislation, authorizing federal action to improve precipitation forecasting at the seasonal and sub-seasonal scales in the West, and urges NOAA to work with western states.



Position No. 400  
Revised and Readopted  
(Originally Position No. 360 adopted April 3, 2014)

**RESOLUTION  
of the  
WESTERN STATES WATER COUNCIL  
regarding the  
BUREAU OF RECLAMATION'S  
MAINTENANCE, REPAIR AND REHABILITATION NEEDS**

**Nebraska City, Nebraska  
April 14, 2017**

**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 original design lives and are in need of maintenance, repair, and/or rehabilitation (MR&R), in order to minimize risks to: (1) human health and safety; (2) economic growth; and (3) the environment; and

**WHEREAS**, MR&R needs refer to both maintenance that has been deferred and future projections or anticipated maintenance, repair and rehabilitation work; and

**WHEREAS**, Reclamation's funding and the funding from non-federal partners which operate two-thirds of Reclamation's infrastructure under contract is not sufficient to address all MR&R needs; and

**WHEREAS**, in 2015, Reclamation's Infrastructure Investment Strategy estimated that the total funding needed to address its MR&R needs is \$2.9 billion;<sup>74</sup> 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 planning and budgeting strategies; 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 as well as standard asset management criteria that evaluate risks to: (1) human health and safety; (2) economic growth; and (3) the environment; and

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<sup>74</sup>See page 6 of [https://www.usbr.gov/live/8-20-15/Infrastructure\\_Investment\\_Strategy\\_Final\\_Report\\_May\\_2015-2.pdf](https://www.usbr.gov/live/8-20-15/Infrastructure_Investment_Strategy_Final_Report_May_2015-2.pdf).

**WHEREAS**, Reclamation also continues to work with non-federal operating entities to clarify the processes for providing non-federal input into compiling and reporting MR&R needs; and

**WHEREAS**, notwithstanding these improvements, much of the currently available information regarding Reclamation's MR&R needs for Reclamation's infrastructure under contract is inconsistent and difficult to obtain; and

**WHEREAS**, a process is needed to evaluate Reclamation's MR&R needs for facilities under contract 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 evaluate Reclamation's MR&R needs for facilities under contract and a process to ensure Reclamation can receive from partners/operating entities, and provide, the most up-to-date, consistent, and accurate information, 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.





Position No. 401  
Revised and Readopted  
(Originally Position No. 361 adopted April 3, 2014)

**RESOLUTION  
of the  
WESTERN STATES WATER COUNCIL  
regarding the  
RECLAMATION SAFETY OF DAMS ACT OF 1978**

**Nebraska City, Nebraska  
April 14, 2017**

**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**, most of Reclamation's dams are older than 50 years, with an average age of 70 years, and the agency has identified recommended modifications to prevent safety or performance issues; 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**, in FY2016, the Congress provided an additional \$1.1 billion in budget authority (P.L. 114-113, Section 204), giving Reclamation several more years before reaching its spending ceiling; and

**WHEREAS**, failure to appropriate such sums as are necessary for Reclamation's dam safety activities will increase the chances of dam failures by hindering the agency's ability to carry out critical dam safety rehabilitation and modernization efforts, risking loss of life and public and private property.

**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.



Position No. 402  
Revised and Readopted  
(See also Position No. 362 adopted April 3, 2014)

**RESOLUTION  
of the  
WESTERN STATES WATER COUNCIL  
regarding  
THE TRANSFER OF FEDERAL WATER AND POWER PROJECTS  
AND RELATED FACILITIES**

**Nebraska City, Nebraska  
April 14, 2017**

**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.

**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, with strong state involvement and protections for state water laws and water rights.

*For reference, see also Position #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 No. 403  
Revised and Readopted  
(Originally Position #363 adopted April 3, 2014)

**POSITION  
of the  
WESTERN STATES WATER COUNCIL  
regarding  
THE NATIONAL LEVEE SAFETY ACT OF 2007  
LEVEES AND CANAL STRUCTURES**

**Nebraska City, Nebraska  
April 14, 2017**

**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; 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**, one objective of the National Levee Safety Act of 2007 was to promote sound technical practices in levee design, construction, operation, maintenance, inspection, assessment, and security; and

**WHEREAS**, in January 2009, the NCLS released, “Recommendations for a National Levee Safety Program - A Report to Congress;” 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**, the Water Resources Reform and Development Act (WRRDA) of 2014 subsequently redefined the term “levee” as an embankment or flood wall (i) “the primary purpose of which is to provide hurricane, storm, and flood protection...;” and (ii) “that normally is subject to water loading for only a few days or weeks during a year;” and further defined “canal structures” to mean an embankment, wall or structure along a canal or manmade watercourse that (i) constrains water flows; (ii) is subject to frequent water loading; and (iii) “is an integral part of a flood risk reduction system that protects the leveed area from flood waters” associated with weather-related events; and

**WHEREAS**, water supply canals that are part of an irrigation or municipal or industrial water supply system should appropriately be excluded from the National Levee Safety Program; and

**WHEREAS**, the water loadings of water supply canals are controlled and therefore do not pose the same risk as levees; and

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

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

**WHEREAS**, the U.S. Government Accountability Office (GAO) released a June 2016 report that found that WRRDA directed the U.S. Army Corps of Engineers and Federal Emergency Management Agency (FEMA) to: (1) reconvene the National Committee on Levee Safety; (2) develop a national levee inventory; (3) implement a multifaceted levee safety initiative; (4) report to Congress by June 10, 2015; (4) report on the feasibility of a joint dam and levee-safety program by June 10, 2017; and (5) submit a report with recommendations identifying and addressing legal liabilities of engineering levee projects; and

**WHEREAS**, GAO found that with the exception of continuing to develop a national levee inventory that the Corps and FEMA have made little progress in implementing key WRRDA requirements, given resource constraints; and recommended that they develop a plan with milestones for implementing the required activities using existing resources or request additional resources as needed.

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

**BE IT FURTHER RESOLVED**, that such a program 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 implementing the related requirements of the National Levee Safety Act of 2007, WRRDA 2014, and the Aging Water Infrastructure and Maintenance Act (Subtitle G of the Omnibus Public Lands Management Act of 2009).



Position No. 404  
Revised and Readopted  
(See also Position #364 adopted April 3, 2014)

**POSITION  
of the  
WESTERN STATES WATER COUNCIL  
regarding the  
CLEAN and DRINKING WATER STATE REVOLVING FUNDS  
and  
STATE AND TRIBAL ASSISTANCE GRANTS**

**Nebraska City, Nebraska  
April 14, 2017**

**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 \$271 billion for wastewater and stormwater infrastructure and \$384.2 billion for drinking water infrastructure nationwide over the next 20 years, and a significant funding gap under current spending and operation practices; and

**WHEREAS**, the 2017 American Society of Civil Engineers' Infrastructure Report Card and updated Failure to Act Report estimates that the gap in needed new capital investments in water and wastewater projects could lead to cumulative costs for businesses and households of \$105 billion by 2025, as well as a potential loss of up to 500,000 jobs, and by 2040 to costs of \$152 billion with 956,000 jobs at risk; and

**WHEREAS**, these estimates do not include anticipated operation and maintenance costs, nor an estimated \$30-\$40 billion unfunded gap related to calls for replacing some 7.3 million homes with lead water service lines; 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 help 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**, it is the sense of Congress through the Water Infrastructure Innovation Act (WIIN Act) to provide robust funding of capitalization grants for States' drinking water revolving loan fund and the water pollution control revolving loan fund.

**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 10% and 20% 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; (3) "American Iron and Steel" provisions that limit the use of SRF funds to purchase certain types of materials and services; and (4) Davis-Bacon Prevailing Wage that requires payment of locally prevailing wages and fringe benefits to contractors and subcontractors at the site of work.

**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; and

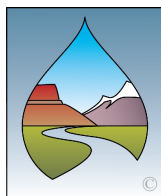
Position No. 404  
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*(See also Position #364 adopted April 3, 2014)*

**WHEREAS**, the State and Tribal Assistance Grants (STAG), including Performance Partnership Grants (PPG) and other grants are critical to the support of state programs that assure that the nation's drinking water and water quality remain safe for the public health of the citizens; and

**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 and State and Tribal Assistance Grants at funding levels that are adequate to help states address their water infrastructure needs and protect public health and the environment for the benefit of the people; 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 the  
RURAL WATER and WASTEWATER PROJECT/INFRASTRUCTURE NEEDS  
and  
U.S. DEPARTMENT of AGRICULTURE PROGRAMS**

**Nebraska City, Nebraska  
April 14, 2017**

**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, our economic and environmental well-being and quality of life; and

**WHEREAS**, across the West, many small, rural and tribal communities are experiencing water supply shortages due to drought, declining streamflows and groundwater supplies, and inadequate infrastructure, with some communities hauling water over substantial distances to satisfy their potable water needs; and

**WHEREAS**, often water supplies that are available to these communities are of poor quality and may be impaired by naturally occurring and man-made contaminants, including arsenic and carcinogens, which impact communities’ health and their ability to comply with increasingly stringent federal water quality and drinking water mandates; and

**WHEREAS**, many small, rural and tribal communities (including colonias) also face challenges related to meeting federal mandates for wastewater treatment; and

**WHEREAS**, at the same time, many small, rural and tribal communities in the West are suffering from significant levels of unemployment and simply lack the financial capacity and expertise to plan, finance and construct needed drinking water and wastewater system improvements; and

**WHEREAS**, there is a Federal responsibility to assist these communities in meeting related federal mandates to achieve water and wastewater public health goals; and

**WHEREAS**, the Budget Blueprint from the Executive Office of the President/Office of Management and Budget proposes elimination of USDA’s water and wastewater grant and loan programs, at a savings of \$498 million, saying rural communities can be served by private sector financing or other federal investments, such as the Environmental Protection Agency’s State Revolving Funds (SRF); and

**WHEREAS**, EPA’s SRF program is already oversubscribed, and these USDA programs help provide financing for clean and reliable drinking water systems, sanitary sewage disposal, solid waste disposal and stormwater drainage for individual households, businesses, cooperatives, private non-profits, and state and local governmental entities and tribal communities - many without access to private, commercial credit on reasonable terms or other federal financial assistance (including the SRFs); and



**WHEREAS**, these programs help very small, financially distressed communities by providing long-term low interest loans (up to 40 years at fixed rates determined by need), loan guarantees, and grants (if funds are available), and related programs provide technical assistance and training grants; and

**WHEREAS**, these wise investments of federal dollars can help businesses and manufacturers to locate or expand operations in these communities, providing an economic boost, as well as environmental improvements and other long-term returns.

**NOW THEREFORE BE IT RESOLVED**, that the Western States Water Council urges the Administration and Congress to carefully consider the needs of small, rural and tribal communities and businesses and provide or otherwise ensure they have access to financial and technical assistance sufficient to ensure they can meet federal water quality and drinking water mandates, as well as achieve public health goals.



*(See former Positions No. 365 - July 18, 2014 and No. 331 - July 29, 2011)*

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

**Rohnert Park, California  
June 29, 2017**

**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

*(See former Positions No. 365 - July 18, 2014 and No. 331 - July 29, 2011)*

**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.



Position No. 407  
Revised and Readopted

*(See former Positions No. 366 - July 18, 2014 and No. 332 - July 29, 2011)*

**RESOLUTION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**supporting**  
**FEDERAL RESEARCH AND DEVELOPMENT OF UPDATED HYDROCLIMATE GUIDANCE**  
**FOR FLOODS & DROUGHTS**

**Rohnert Park, CA**  
**June 29, 2017**

**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**, 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 2011-2016, as well as recent floods of record in Texas; and

**WHEREAS**, key long-term observation networks needed for monitoring extreme events, such as U.S. Geological Survey (USGS) streamgages and the National Weather Service (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 Natural Resources Conservation Service (NRCS) snow survey and water supply forecasting program, related SNOTEL sites, and its Soil Climate Analysis Network (SCAN) remain underfunded; and

**WHEREAS**, some of National Oceanic and Atmospheric Administration's (NOAA) probable maximum precipitation estimates used by water agencies for dam safety and other analyses have not been updated since the 1960s and revisions to the federal Guidelines for Determining Flood Flow Frequency Analysis (drafted as Bulletin 17C) have yet to be finalized; 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

*(See former Positions No. 366 - July 18, 2014 and No. 332 - July 29, 2011)*

**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;

**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.

**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 in supporting efforts on precipitation extremes, variability, and future trends.



Position No. 408

Revised and Readopted

(see former Position No. 367- 7/18/2014; Position No. 333 - 7/29/2011;  
and Position No. 304 - 7/11/2008)

**RESOLUTION  
of the  
WESTERN STATES WATER COUNCIL  
regarding the  
THE RECLAMATION FUND**

**Rohnert Park, California  
June 29, 2017**

**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...;”<sup>75</sup> 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 facilities that include 338 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

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<sup>75</sup>State of the Union Address, 1907

providing 289 recreation areas with over 90 million visits annually, and further providing flood control, and fish and wildlife benefits; and

**WHEREAS**, project sponsors have and continue to repay the cost of these facilities, which also produce power receipts that annually return some one billion in gross power revenues to the federal government, prevent millions in damages due to floods each year, and supports over \$45 billion in economic returns and supporting over 344,000 jobs; 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 2018 request actual and estimated receipts and collections accruing to the Reclamation Fund are \$ 1.969 billion for FY 2016, \$1.475 billion for FY 2017, and \$1.528 billion for FY 2018, compared to actual and estimated appropriations of \$996 million for FY 2016, \$ 1 billion for FY 2017, and \$878 million for FY 2018 and as a result the unobligated balance at the end of each year respectively is calculated to be \$15.133 billion, \$15.608 billion and \$16.308 billion; 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 \$16.308 billion by the end of FY 2018, over a 187% 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-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.

Position No. 408  
Revised and Readopted  
*(see former Position No. 367- 7/18/2014; Position No. 333 - 7/29/2011;  
and Position No. 304 - 7/11/2008)*

**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).





Position No. 409  
Revised and Readopted

*(See former Position No. 334 - 7/29/2011; Position No. 368 - 7/18/2014;  
and Position No. 305 - 7/11/08)*

**RESOLUTION  
of the  
WESTERN STATES WATER COUNCIL  
in support of the  
WATER RESOURCES RESEARCH INSTITUTES**

**Rohnert Park, California  
June 29, 2017**

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

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

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

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

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

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

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

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

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

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



Position No. 410  
Revised and Readopted  
(See former Position No. 369 - July 18, 2014)

**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**, past 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), 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, consistent with the plurality opinion authored by Justice Scalia in *Rapanos*.

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.



Position No. 411  
Readopted  
(See former Position No. 371 - August 11, 2014)

**RESOLUTION  
of the  
WESTERN STATES WATER COUNCIL  
regarding  
WATER-RELATED FEDERAL RULES, REGULATIONS,  
DIRECTIVES, ORDERS and POLICIES**

**Rohnert Park, California  
June 29, 2017**

**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

Position No. 411  
Readopted  
(*See former Position No. 371 - August 11, 2014*)

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.



**RESOLUTION  
of the  
WESTERN STATES WATER COUNCIL  
in support of  
INDIAN WATER RIGHTS SETTLEMENTS**

**Albuquerque, New Mexico  
October 20, 2017**

**WHEREAS**, the Western States Water Council, an instrumentality of eighteen western states advising Western Governors on water policy, 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.

*\*Originally adopted March 21, 2003  
Revised and reaffirmed Mar 29, 2006, October 17, 2008, October 7, 2011 and October 10, 2014  
(See also No 's. 250, 275, 310, 336 and 376)*





**POSITION  
of the  
WESTERN STATES WATER COUNCIL  
regarding  
FARM BILL CONSERVATION PROGRAMS  
and  
WATER RESOURCES**

**Albuquerque, New Mexico  
October 20, 2017**

**WHEREAS**, water is the lifeblood of the West and this is most apparent in the agricultural sector, which accounts for the predominant share of consumptive water use westwide; and

**WHEREAS**, agriculture sustains many rural economies and provides important employment opportunities both directly and indirectly; and

**WHEREAS**, increasing demands on often scarce water resources and periodic drought threaten the West and its agricultural base and the communities built on that base; and

**WHEREAS**, many agricultural producers in the West rely on irrigation surface water delivery systems that are shared among multiple producers and operated by an irrigation district, canal company, or mutual ditch company, while others rely on overdrafted and/or overallocated groundwater basins; and

**WHEREAS**, maintaining a sustainable agricultural economy in the West requires promoting efficient water use and achieving net water savings, while maximizing production and in some cases assisting in the transition from irrigated to dryland farming; and

**WHEREAS**, U.S. Department of Agriculture conservation programs focus on conservation of ground and surface water resources, as well as reductions in nonpoint source pollution, including nutrients, sediment, pesticides and salinity; and

**WHEREAS**, many agricultural producers in the West voluntarily participate in USDA programs to implement conservation practices that improve water use efficiency, water quality and wildlife habitat; and

**WHEREAS**, the Farm Service Agency (FSA), Rural Development (RD), Natural Resources Conservation Service (NRCS) and National Water and Climate Center (NWCC) administer many water-related program; and

**WHEREAS**, multiple USDA farm financial assistance programs are particularly important to producers and rural communities, water users and water quality managers, including the Conservation Reserve Program (CRP), Conservation Reserve Enhancement Program (CREP), Conservation Stewardship Program (CSP), Emergency Watershed Protection Program (EWPP), Environmental Quality Improvement Program (EQIP) and its Conservation Innovation Grants (CIG) and Colorado River Basin Salinity Control Program (CRBSCP), and Regional Conservation Partnership Program (RCPP), and others such as watershed protection and planning programs; and

**WHEREAS**, special EQIP funding also covers a number of initiatives, including the Drought, Ogallala Aquifer, National Water Quality, Resiliency to Climate Change, and Water Smart Initiatives; and

**WHEREAS**, existing acreage caps and spending and staffing limits are an obstacle to achieving further progress toward food and water supply security and reliability; and

**WHEREAS**, the Western States Water Council (WSWC) supports farm bill funding levels based on need rather than baseline budget targets; and

**WHEREAS**, the WSWC supports collaborative, targeted and voluntary conservation actions to address locally identified farm, range, forest and water resource concerns on private and public lands; and

**WHEREAS**, the WSWC supports actions to address secure water supplies, improved water quality, and drought and wildfire resilience, as well as wildlife habitat conservation and invasive species threats; and

**WHEREAS**, the WSWC supports the role of Conservation Title Programs in providing solutions to resolve water supply reliability, water quality impairments, groundwater recharge, and other water resource concerns facing agricultural water users and agricultural producers; and

**WHEREAS**, the WSWC supports changes to Conservation Title programs that remove existing barriers for western users and producers, and make the Farm Bill's conservation title programs more accessible and relevant and effective in stretching limited water resources; and

**WHEREAS**, the WSWC supports the continued efforts of Rural Development to provide financial assistance for drinking water, wastewater facilities and other services to rural communities.

**NOW, THEREFORE BE IT RESOLVED**, that the Western States Water Council supports prompt reauthorization of the next Farm Bill (prior to the current bill's 2018 expiration) to provide certainty and stability for farmers, ranchers and water users making long-term decisions that impact not only rural communities, but our Nation's water resources, economy, food security and environment.

**BE IT FURTHER RESOLVED**, that the WSWC strongly supports Farm Bill Conservation Programs, raising acreage limitations as appropriate, and providing sufficient funding to address water conservation, flood protection and water quality remediation needs.

**BE IT FURTHER RESOLVED**, that the WSWC supports regional cooperative agricultural programs such as EQIP Initiatives, the Colorado River Basin Salinity Control Program, and the Regional Conservation Partnership Program.

**BE IT FURTHER RESOLVED**, that, the WSWC supports the work done by Rural Development to bring clean, safe drinking water and sanitation to rural communities.

**BE IT FURTHER RESOLVED**, that the WSWC supports investment in voluntary, incentive-based conservation programs that are implemented in coordination with state and local governmental partners, while providing the maximum flexibility possible and opportunity for innovation to create efficiencies, coordinate funding and achieve real water savings.



**POSITION  
of the  
WESTERN STATES WATER COUNCIL  
on  
PROTECTING GROUND WATER QUALITY**

**Albuquerque, New Mexico  
October 20, 2017  
(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.

*Originally adopted March 14, 1997*

*Revised and Reaffirmed:*

*March 14, 2000, March 21, 2003, March 29, 2006,  
October 17, 2008, October 7, 2011, and October 10, 2014  
(See also Nos. 215, 230, 249, 274, 309, 337, and 377)*



Position #415

Readopted

(See Position No. 374, adopted Oct. 10, 2014)

**RESOLUTION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**regarding**  
**The *Dividing the Waters* Program**

**Albuquerque, New Mexico**  
**October 20, 2017**

**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**

**Albuquerque, New Mexico**  
**October 20, 2017**

**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.

Originally adopted October 9, 2002  
Reaffirmed Oct 21, 2005, Oct 17, 2008, Oct 7, 2011, and Oct 10, 2014  
(See also Positions #247, #272(a-b), #308, #335, and #375)

## **RULES OF ORGANIZATION**

### **RULES OF ORGANIZATION**

#### **Preamble**

The Western States Water Council is a government entity, an instrumentality of each and every participating state, established to fulfill a number of governmental purposes on behalf of those states, including advising the governors on planning, conservation, development, management and protection of their water resources. As outlined herein, Council membership is comprised of States with member representatives appointed by the Governors of each participating State. The activities of the Council are subject to the control and supervision of the Governors of member States through their appointed representatives. The Council is funded by dues from member States, set by an Executive Committee, which also controls expenditures.

#### **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 (4) 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) 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.

(5) 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 Executive Committee shall determine whether or not States are eligible for participation as members or associate members of the Council.

(3) 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. 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).

(4) The Executive Committee shall annually adopt a budget and oversee all Council expenditures and activities.

(5) The Executive Committee may establish other committees, subcommittees and work groups 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 WGA Executive Director, 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 sunseting. 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 - Dissolution**

In the event of the dissolution of the Council, to the extent practical the assets of the Council shall be liquidated in a timely manner and evenly divided among those member states in good standing, at the time of the dissolution.

### **Article XVI - 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.

## Glossary of Acronyms

<b>ANPRUM</b>	Advance Notice of Proposed Rulemaking
<b>ACWA</b>	Association of Clean Water Administrators
<b>ASDWA</b>	Association of State Drinking Water Administrators
<b>BIA</b>	Bureau of Indian Affairs
<b>BLM</b>	Bureau of Land Management
<b>CERCLA</b>	Comprehensive Environmental Response, Compensation, and Liability Act
<b>CIG</b>	Conservation Innovation Grants
<b>Corps</b>	Army Corps of Engineers
<b>CPC</b>	Climate Prediction Center
<b>CRBSCP</b>	Colorado River Basin Salinity Control Program
<b>CREP</b>	Conservation Reserve Enhancement Program
<b>CRP</b>	Conservation Reserve Program
<b>CSP</b>	Conservation Stewardship Program
<b>CWA</b>	Clean Water Act
<b>CWMP</b>	Cooperative Watershed Management Program
<b>DOI</b>	Department of the Interior (also known as “Interior”)
<b>EPA</b>	Environmental Protection Agency
<b>EPW</b>	Senate Environment and Public Works Committee
<b>EQIP</b>	Environmental Quality Improvement Program
<b>ESA</b>	Endangered Species Act
<b>EWPP</b>	Emergency Watershed Protection Program

<b>FIFRA</b>	Federal Insecticide, Fungicide, and Rodenticide Act
<b>FWS</b>	Fish and Wildlife Service
<b>GWPC</b>	Ground Water Protection Council
<b>NARF</b>	Native American Rights Fund
<b>NASA</b>	National Aeronautics and Space Administration
<b>NDRP</b>	National Drought Resilience Partnership
<b>NIDIS</b>	National Integrated Drought Information System
<b>NOAA</b>	National Oceanic and Atmospheric Administration
<b>NPDES</b>	National Pollutant Discharge Elimination System
<b>NPS</b>	National Park Service
<b>NWS</b>	National Weather Service
<b>OMB</b>	Office of Management and Budget
<b>RCPP</b>	Regional Conservation Partnership Program
<b>RCRA</b>	Resource Conservation and Recovery Act
<b>SDWA</b>	Safe Drinking Water Act
<b>SRF</b>	State Revolving Funds
<b>STAG</b>	State and Tribal Assistance Grants
<b>TAS</b>	Treatment as States
<b>TMDL</b>	Total Maximum Daily Load
<b>USBR</b>	Bureau of Reclamation (also known as “Reclamation”)
<b>USDA</b>	U.S. Department of Agriculture
<b>USFS</b>	U.S. Forest Service

<b>USGS</b>	U.S. Geological Survey
<b>WaDE</b>	Water Data Exchange
<b>WestFAST</b>	Western States Federal Agency Support Team
<b>WGA</b>	Western Governors' Association
<b>WIFIA</b>	Water Infrastructure Finance and Innovation Act
<b>WOTUS</b>	Waters of the United States
<b>WQS</b>	Water Quality Standards
<b>WSWC</b>	Western States Water Council

**183<sup>rd</sup> Council Meetings  
Nebraska City, Nebraska  
April 12-14, 2017**

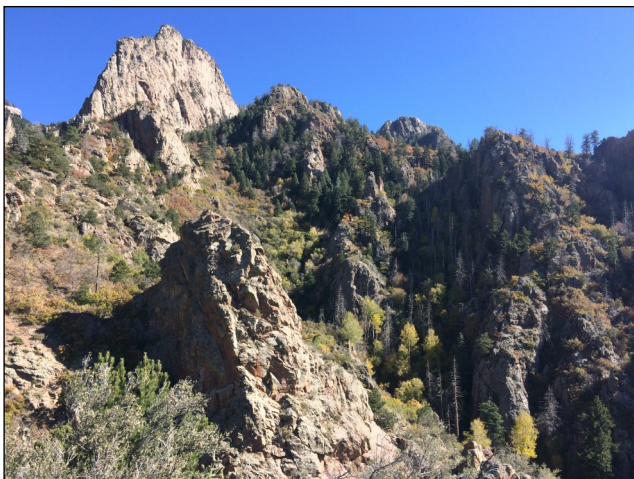
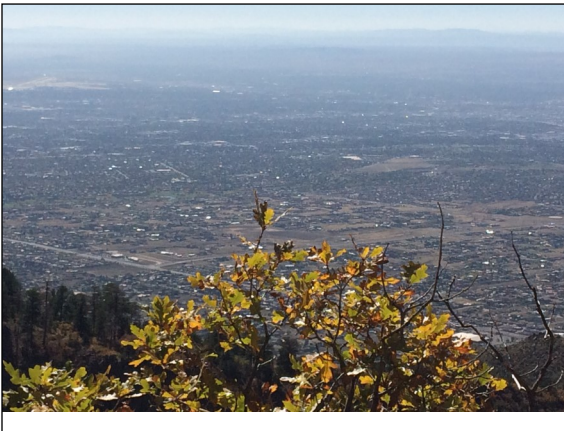






**184<sup>th</sup> Council Meetings**  
**Rohnert Park, California**  
**June 27-29, 2017**





**185<sup>th</sup> Council Meetings**  
**Albuquerque, New Mexico**  
**October 18-20, 2017**