

Western States Water Council



Talking Stick Resort
Scottsdale, Arizona
October 8-10, 2014

Tab A – Schedule of Meetings – Agenda –
30-day Notice

**WESTERN STATES WATER COUNCIL
176th COUNCIL MEETING
Scottsdale, Arizona
October 8-10, 2014**

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- A. Schedule of Meetings - Agenda - 30-day Notice
- B. Membership List
- C. WSWC Policy Positions

Proposed Positions

- regarding the “Dividing the Waters” Initiative
- regarding draft comments on the Clean Water Act

Sunsetting Positions

- #335** – recommending policy changes at the federal level to expedite state general stream adjudications
- #336** – supporting Indian water rights settlements
- #337** – stating that any federal ground water quality strategy must reflect a true state-federal partnership and provide adequate funding consistent with statutory authorities

List of Current WSWC Policy Statements and Sunsetted Positions

- D. Budget
- E. Western Governors’ Association (WGA) Drought Forum
- F. Drought Map
- G. Landsat
- H. Water Data Exchange (WaDE) Interim Progress Report
- I. WSWC Water Management Symposium Draft Agenda
- J. TMDL Update
- K. Settlement – “*Columbia Riverkeeper v. U.S. Army Corps of Engineers*”
- L. Waters of the United States Rulemaking
- M. Interpretive Agricultural Rule
- N. Section 518 “Treatment as States” Proposal for Tribal Eligibility and TMDLs
- O. Water Transfers Litigation
- P. Surplus Water
- Q. Indian Water Rights
- R. U.S. Forest Service Proposed Groundwater Resource Management Directive
- S. WSWC/WestFAST Federal Non-Tribal Water Rights
- T. Federal Legislation and Litigation Update
- U. Future Council Meetings
- V. - Intentionally Blank -
- W. Newsletter Index
- XYZ. Sunsetting Positions for Spring 2015 Meetings (#338 - #341)

SCHEDULE OF MEETINGS

WESTERN STATES WATER COUNCIL 176th COUNCIL MEETINGS

Talking Stick Resort
Scottsdale, Arizona
October 8-10, 2014

<u>Date</u>	<u>Time</u>	<u>Meeting</u>	<u>Room</u>	<u>Adjournment</u>
<u>Wednesday, October 8</u>				
	9:00 am	Drought State Responses (Roundtable Discussion)	Salt River 3	12:00 pm
	1:00 pm	Field Trip – Scottsdale Water Campus		3:45 pm
	4:00 pm	Corps Water Supply Issues (Small Group Discussion)	Salt River 3	6:00 pm
	6:00 pm	Management Subcommittee (over dinner)		
<u>Thursday, October 9</u>				
	8:00 am	Water Resources Committee	Salt River 3	11:15 am
	11:30 am	Executive Committee (<i>over lunch</i>)	Road Runner A	1:00 pm
	1:15 pm	Water Quality Committee	Salt River 3	3:15 pm
	3:30 pm	Legal Committee	Salt River 3	5:30 pm
	6:00 pm	WSWC Reception Sponsors: <i>Snell & Wilmer</i> and <i>Freeport McMoRan, Inc.</i>	Salt River Terrace South	7:00 pm
<u>Friday, October 10</u>				
	8:00 am	Full Council Meeting	Salt River 3	11:30 am

AGENDA
MANAGEMENT SUBCOMMITTEE

Talking Stick Resort
Scottsdale, Arizona
October 8, 2014

Call to Order at: 6:00 p.m.
Conducting: Pat Tyrrell, Chair

Room: Over Dinner

TAB

1. **Welcome**
2. **Approval of Minutes**
- D 3. **Report on Budget and Finances** – Tony Willardson
 - a. FY2014-2015 Budget Status Report
 - b. WGA DOE Grant Status Report
- C 4. **Proposed and Sunsetting Positions** – Tony Willardson

Proposed Positions

- Regarding “Dividing the Waters Initiative”
- Comments on Clean Water Act

Sunsetting Policies

- | | | |
|-----------|--------|--|
| Legal Com | #335 - | Recommending policy changes at the federal level to expedite state general stream adjudications (October 7, 2011) |
| Legal Com | #336 - | Supporting Indian water rights settlements (October 7, 2011) |
| WQ Com | #337 - | Stating that any federal ground water quality strategy must reflect a true state-federal partnership, and provide adequate funding consistent with statutory authorities (October 7, 2011) |
-
5. **Executive Director’s Report** – Tony Willardson
 - a. WGA/WSWC Activities and Meetings
 - b. WestFAST Liaison Transition
 - c. Congressional Visits, Washington, DC
 - d. Member Appointments
 6. **WSWC 50th Anniversary – Western Water Manifesto/Collaborative Principles** – Pat Tyrrell
 7. **WSWC Directions Forward** – Pat Tyrrell
 - U 8. **Future WSWC Meetings**
 - a. WSWC Annual Water Management Symposium – “Western Water Resources Infrastructure Development and Operations: Streamlining Regulatory Requirements”
 - b. WGA Drought Forum
 - c. WSWC Spring Meetings - Oklahoma
 - XYZ 9. **Spring 2015 Meeting Sunsetting Positions**
 - #338 - Commending the introduction of S. 1343, the Energy and Water Integration Act of 2011 (March 15, 2012)
 - #339 - Supports federal applied research and hydroclimate data collection programs (March 15, 2012)
 - #340 - Supports state primacy over groundwater (March 15, 2012)
 - #341 - Addresses proposed changes to Reclamation’s policy manual and requests Reclamation enter into a dialogue with the WSWC (March 15, 2012)
 10. **Other Matters**

AGENDA
WATER RESOURCES COMMITTEE
Talking Stick Resort
Scottsdale, Arizona
October 9, 2014

Called to Order at: 8:00 a.m.
Conducting: Tim Davis, Montana

Room: Salt River 3

TABS

1. **Welcome and Introductions**
2. **Approval of Minutes**
3. **Current & Future Colorado River Basin Challenges: Supplies and Demands**
(Roundtable Discussion)
4. **Water & Mining in Arizona** – Sandy Fabritz-Whitney, Freeport-McMoRan, Inc.
(invited)
5. **The Montana/USFS Compact and Wyoming/USFS MOU** – Tim Davis & Pat Tyrrell
- E 6. **WGA Drought Forums/Water Related Activities** – Carlee Brown
- F 7. **CDWR/WSWC Drought Activities** – Jeanine Jones
8. **CDWR/WSWC/JPL Remote Sensing Workshop Report** – Jeanine Jones
- Break
- G 9. **National Science & Technology Council/Landsat Update** - Tony Willardson
- H 10. **Water Data Exchange (WaDE) Update** – Sara Larsen
- I 11. **Western Water Resources Infrastructure Development and Operations:
Streamlining Regulatory Requirements** – Tony Willardson
12. **FY 2015 Federal Funding Outlook** – Tony Willardson
13. **Federal Advisory Committee on Water Information Membership** – Tony Willardson
(WSWC Member State participation)
14. **Other Matters/Adjourn**

AGENDA
EXECUTIVE COMMITTEE
Talking Stick Resort
Scottsdale, Arizona
October 9, 2014

Call to Order at: 11:30 a.m.
Conducting: Pat Tyrrell, Chair

Room: Road Runner A

TAB

1. **Welcome and Introductions**
2. **Approval of Minutes**
- D 3. **Report on Budget and Finances** – Jerry Rigby
 - a. FY2014-2015 Budget Status Report
 - b. WGA DOE Grant Status Report
- C 4. **Proposed and Sunsetting Positions** – Tony Willardson

Proposed Positions

- Regarding “Dividing the Waters Initiative”
- Comments on Clean Water Act

Sunsetting Policies

- | | | |
|-----------|--------|--|
| Legal Com | #335 - | Recommending policy changes at the federal level to expedite state general stream adjudications (October 7, 2011) |
| Legal Com | #336 - | Supporting Indian water rights settlements (October 7, 2011) |
| WQ Com | #337 - | Stating that any federal ground water quality strategy must reflect a true state-federal partnership, and provide adequate funding consistent with statutory authorities (October 7, 2011) |
-
5. **Executive Director’s Report** – Tony Willardson
 - a. WGA/WSWC Activities and Meetings
 - b. WestFAST Liaison Transition
 - c. Congressional Visits, Washington, DC
 - d. Member Appointments
 6. **WSWC 50th Anniversary – Western Water Manifesto/Collaborative Principles** – Pat Tyrrell
 7. **WSWC Directions Forward** – Pat Tyrrell
 - U 8. **Future WSWC Meetings**
 - a. WSWC Annual Water Management Symposium – “Western Water Resources Infrastructure Development and Operations: Streamlining Regulatory Requirements”
 - b. WGA Drought Forum
 - c. WSWC Spring Meetings - Oklahoma
 - XYZ 9. **Spring 2015 Meeting Sunsetting Positions**
 - #338 - Commending the introduction of S. 1343, the Energy and Water Integration Act of 2011 (March 15, 2012)
 - #339 - Supports federal applied research and hydroclimate data collection programs (March 15, 2012)
 - #340 - Supports state primacy over groundwater (March 15, 2012)
 - #341 - Addresses proposed changes to Reclamation’s policy manual and requests Reclamation enter into a dialogue with the WSWC (March 15, 2012)
 10. **Other Matters**

AGENDA

WATER QUALITY COMMITTEE MEETING

Talking Stick Resort
Scottsdale, Arizona
October 9, 2014

Call to Order at: 1:15 p.m.
Conducting: J.D. Strong, Chair

Room: Salt River 3

TAB

1. **Welcome and Introductions**
2. **Approval of Minutes**
- C 3. **Sunsetting Position: #337: Protecting Groundwater Quality** – J.D. Strong
- J 4. **TMDL Update** – Tom Stiles (via phone)
5. **Water Quality Issues in Arizona** – Mike Fulton
- K 6. **U.S. Army Corps of Engineers' Update - *Columbia Riverkeeper v. U.S. Army Corps of Engineers* Settlement** – Nathan Bracken
- C 7. **WSWC Draft Comments on the Proposed "Waters of the U.S. Rule"**
– J.D. Strong and Nathan Bracken
8. **Overview and Discussion of WSWC Clean Water Act Activities and Next Steps** – J.D. Strong and Nathan Bracken
 - L a. Waters of the U.S. Rulemaking
 - M b. Interpretive Agricultural Rule
 - N c. Section 518 "Treatment as States" Proposal – Tribal Eligibility
 - N d. Section 518 "Treatment as States" Proposal – TMDLS
 - O e. Water Transfers Litigation
9. **Other Matters** – J.D. Strong

AGENDA

LEGAL COMMITTEE MEETING

Talking Stick Resort
Scottsdale, Arizona
October 9, 2014

Call to Order at: 3:30 pm
Conducting: Jennifer Verleger, Chair

Room: Salt River 3

TAB

1. **Welcome and Introductions**
2. **Approval of Minutes**
- C 3. **Sunsetting Positions – Jennifer Verleger**
 - a. #335 – Recommending Policy Changes at the Federal Level in Expediting State General Stream Adjudications
 - b. #336 – Supporting Negotiated Settlements of Indian Water Rights Disputes
- C 4. **Proposed Position Supporting the Dividing the Waters Initiative – Norm Johnson**
5. **General Stream Adjudications in Arizona – Bill Staudenmaier or Cindy Chandley**
- P 6. **Surplus Water Update – Michelle Klose**
- Q 7. **Indian Water Rights Update/2015 WSWC-NARF Symposium – Nathan Bracken**
- R 8. **Update and Discussion of Possible Next Steps Regarding the USFS's Proposed Groundwater Management Directive – Christopher Carlson, Groundwater Program Leader/Technical Team Lead, U.S. Forest Service**
- S 9. **Update on WSWC-WestFAST Federal Non-Tribal Water Rights Workgroup and Clearinghouse – Nathan Bracken and Pat Lambert**
- T 10. **Legislation/Litigation Update – Nathan Bracken**
11. **Other Matters – Jennifer Verleger**

AGENDA

176th COUNCIL MEETING

Talking Stick Resort
Scottsdale, Arizona
October 10, 2014

Call to Order at: 8:00 a.m.
Conducting: Pat Tyrrell, Chair

Room: Salt River 3

TAB

1. **Welcome and Introductions**
2. **Approval of Minutes**
3. **Water Resources and Water Quality Issues in Arizona –**
 - A. **Arizona's Next Century: A Strategic Vision for Water Supply Sustainability** - Michael Lacey, Director, Department of Water Resources
 - B. **Water Reuse in Arizona: Past, Present and Future** - Michael Fulton, Director, Water Quality Division
4. **WestFAST Report** – Becky Fulkerson, Bureau of Reclamation, WestFAST Chair
5. **Department of Interior Water Issues**, Tom Iseman, Deputy Assistant Secretary for Water and Science (via phone)
6. **USGS Water Programs & the Advisory Committee on Water Information** – William (Bill) Werkheiser, Assistant Director for Water
7. **Committee Reports** – Action Items
 - A. Water Resources Committee – Tim Davis
 - C B. Executive Committee – Jerry Rigby
 - C C. Water Quality Committee – J.D. Strong
 - C D. Legal Committee – Jennifer Verleger
8. **State Reports**
- U 9. **Future Council Meetings**
10. **Other Matters**



WESTERN STATES WATER COUNCIL

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Web Page: www.westernstateswater.org

MEMORANDUM

TO: Council Members

FROM: Tony Willardson, Executive Director

DATE: September 10, 2014

RE: **30-Day Notice of Fall (176th) Council Meetings in Scottsdale, Arizona and Minutes**

This memorandum serves as notice that in 30 days the 176th meetings of the Western States Water Council will be held in Scottsdale, Arizona at the Talking Stick Resort on October 8-10. If you have not yet made your hotel reservations, we would urge you to do so at your earliest convenience. The Group **cutoff date is this Friday, September 12, 2014**. Please call reservations at 1-866-877-9897 for the \$149 per night rate (single or double occupancy), and reference **ID #6842**. Reservations requested after September 12 will be accepted based upon availability and at the prevailing rate.

Two new policy positions are being proposed for consideration. The first supports the "Dividing the Waters" Initiative, and the second is regarding draft comments on the Clean Water Act. The WSWC's CWA Workgroup helped develop this draft letter, which is a work in progress and identifies a baseline, initial set of issues where the group is in general agreement. There are a number of additional issues that the Workgroup is considering that it will further develop for the WSWC to consider at its October meetings. These additional issues are highlighted in the draft comment letter.

We will also review three sunseting WSWC policy positions:

- (1) **Position #335**, recommending policy changes at the federal level to expedite state general stream adjudications;
- (2) **Position #336**, supporting Indian water rights settlements; and
- (3) **Position #337**, stating that any federal ground water quality strategy must reflect a true state-federal partnership, and provide adequate funding consistent with statutory authorities.

All proposed and sunseting positions are attached.

We are providing a copy of the WGA Staff Advisory Council (SAC) contact information (attached) so that you may consult your respective Governor's adviser with respect to the aforementioned policy positions.

Please note that Council members are invited to participate in a WSWC roundtable discussion on current drought-related challenges and state response activities, which begins on Wednesday morning at 9:00 a.m. and will conclude by noon.

Following the conclusion of the workshop on Wednesday, Council members and guests are invited to join our Arizona hosts on a field trip to the Scottsdale Water Campus. We request you register in advance (form attached), and the fee is \$20 per person. Please meet in the hotel lobby at 1:00 p.m. for departure. We expect to return to the hotel around 3:30 p.m.

On Thursday, the WSWC Committee meetings will be held sequentially, beginning at 8:00 a.m. with the Water Resources Committee meeting, the Executive Committee at 11:30 a.m., followed by the Water Quality Committee at 1:15 p.m., and the Legal Committee at 3:30 p.m.

On Friday morning, the Full Council meeting will begin at 8:00 a.m. and conclude around 11:30 a.m.

The Committee and Council meetings will be made available via webinar and teleconference. Information will be included in the briefing books, which will be available online the week prior to the meetings. Members who wish to receive a hard copy of the briefing books should **notify Julie Groat no later than September 30, 2014** at jgroat@wswc.utah.gov.

Again, the meeting schedule, agenda, and registration information are available with updates on our [website](#). The minutes from the meetings held in Helena, Montana last July will be available in October on the Council's website for your review and reference.

As is Council policy, an Executive Committee and Committee Chairs conference call will be held to discuss the proposed and sunseting policy positions, as well as other matters. **The conference call is scheduled for Friday, September 26, at 11:00 am Mountain Time** (12:00 pm Central Time; 10:00 am Pacific Time). A call-in number will be provided to Executive Committee members, designated alternates, and the Committee Chairs in a separate email.

For the purpose of the conference call and the meetings themselves, the Council has adopted an internal policy specifying the process for establishing credentials for participation by persons who are not appointed Council representatives. That policy requires written notification of any designee to act on behalf of a member, either in person or via conference call. An email is sufficient notice. As always, each state has only one vote, and the Executive Committee member or a designee is responsible for voting on any proposed Council action.

If we can be of any assistance or answer any questions regarding the foregoing, please call our office.

cc: WGA Staff Council and WGA Staff

Attachments: Schedule of Meetings
Proposed Positions (2)
WSWC Sunseting Positions (3)
Field Trip Registration Form
WGA Staff Council List

Tab B – Membership List

WESTERN STATES WATER COUNCIL

MEMBERSHIP LIST

September 30, 2014

OFFICERS

Chair - **Patrick Tyrrell**
Vice-Chair - **Jerry Rigby**
Secretary-Treasurer - **Scott Verhines**

STAFF

Executive Director - **Tony Willardson**
Assist. Director/Gen. Counsel - **Nathan Bracken**
Federal Liaison - **Pat Lambert**
Hydrologist/Programmer - **Sara Larsen**
Office Manager - **Cheryl Redding**
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ALASKA

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ARIZONA

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***Ex-Officio Member**

****Executive Committee Member**

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

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COLORADO

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John R. Stulp (Alt.)
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IDAHO

***Honorable C. L. "Butch" Otter**

Governor of Idaho
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****Jerry R. Rigby**

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Gary Spackman, Director (Alt.)

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KANSAS

***Honorable Sam Brownback**

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MONTANA

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

Management Subcommittee

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

Nominating Subcommittee

Roland Westergard (Chair) - Nevada
Hal Simpson - Colorado

Ex-Officio Representatives

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

Endangered Species Act Subcommittee

Roland Westergard - Nevada
Herman Settemeyer - Texas
Sue Lowry - Wyoming

Ex-Officio Representatives

FWS - Andrew Hautzinger
David Cottingham

Shared Water Vision Subcommittee

Sue Lowry - (Chair) - Wyoming
Hal Simpson - Colorado
Mike Volesky - Montana
Scott Verhines - New Mexico
Carlos Rubinstein - Texas
Pat Tyrrell - Wyoming

Ex-Officio Representatives

USBR - Dionne Thompson
Corps - John Grothaus
Ray Russo
Stu Townsley
EPA - Roger Gorke
USGS - Pixie Hamilton

Water Resources Infrastructure Subcommittee

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Hal Simpson - Colorado
Mike Volesky - Montana
Scott Verhines - New Mexico

Ex-Officio Representatives

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Corps - Elliot Ng
EPA - Steve Albee
NRCS - Keith Admire
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William Staudenmaier - Arizona
Cynthia Chandley - Arizona
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James Eklund - Colorado
Jerry Rigby - Idaho
John Simpson - Idaho
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Chris Grunewald - Kansas
Anne Yates - Montana
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Brian Dunnigan - Nebraska
Roland Westergard - Nevada
Jason King - Nevada
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Maria O'Brien - New Mexico
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Jennifer Verleger - North Dakota
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Thomas Byler - Oregon
Kent Woodmansey - South Dakota
John Elliott - Texas
Norman Johnson - Utah
Alan Reichman - Washington
Chris Brown - Wyoming

Non-Tribal Federal Water Needs Subcommittee

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Dwight French - Oregon
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FWS - Andrew Hautzinger
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September 30, 2014

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Tab C – WSWC Policy Positions

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
The *Dividing the Waters* Program
Scottsdale, Arizona
October 9, 2014

WHEREAS, the *Dividing the Waters* Program of the National Judicial College has served western judges overseeing complex water litigation for more than 20 years, providing information and training resources on water law and water conflicts to state, tribal, and federal judges; and

WHEREAS, five judicial officers with extensive experience in water adjudication lead *Dividing the Waters* for the benefit of their colleagues in the judiciary, making it a program by judges for judges; and

WHEREAS, the Program includes participating judicial officers from 12 western states who adjudicate a wide range of water cases, from statewide water right adjudications to conflicts over endangered species and water quality; and

WHEREAS, *Dividing the Waters* has received funding from public interest foundations for 22 years but foundation funding for education programs has dwindled in recent years and its current funder, the Stephen J. Bechtel Foundation, closes its doors at the end of 2016; and

WHEREAS, it is in the interest of the executive branch water agencies of the western states to ensure that the judicial officers who adjudicate water cases in their states have an understanding of the fundamentals of western water law and the latest information on water adjudication; and

WHEREAS, the recent recession has resulted in limited state funding for judicial branch education in many states, particularly for water and related natural resource topics; and

WHEREAS, *Dividing the Waters* provides a critical link between the executive branch water agencies and the judicial branch that adjudicates water conflicts in the western states; and

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.



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, 2014

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Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Re: Attention – Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

The Western States Water Council (WSWC), representing 18 western states on water policy issues, submits the following comments regarding the proposed rule the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) have developed to clarify the scope of Clean Water Act (CWA) jurisdiction. These comments are based on WSWC Policy #369 and prior WSWC letters and testimony regarding the development of this rule, which are attached and incorporated by reference.

I. WSWC POLICY #369

WSWC Policy #369 sets forth the unanimous, consensus position of the western states regarding federal efforts to clarify or redefine CWA jurisdiction. The WSWC urges EPA and the Corps to review this policy carefully and to incorporate its recommendations. Specifically, the WSWC urges EPA and the Corps to ensure that the rule:

- (1) Gives as much weight and deference as possible to state needs, priorities, and concerns;
- (2) 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);
- (3) Recognizes that Justice Kennedy's "significant nexus" test in *Rapanos* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. The rule should also quantify "significance" to ensure that the term's usage does not extend jurisdiction to waters with a de minimis connection to jurisdictional waters;
- (4) 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;

- (5) Specifically excludes water 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.
- (6) Acknowledges that states have authority pursuant to their "waters of the state" jurisdiction to protect excluded waters, and that excluding waters from federal jurisdiction does not mean that excluded waters will be exempt from regulation and protection.

More specific aspects of WSWC's policy are discussed in greater detail below.

II. EPA'S CONNECTIVITY REPORT AND PUBLIC COMMENT EXTENSION

EPA's Science Advisory Board (SAB) is reviewing a draft report on the connectivity of differing waterbodies that will inform the final rule. Despite requests to the contrary from the Western Governors' Association (WGA), the WSWC, and others, EPA and the Corps published the proposed rule for public comment before the SAB completed its review of the report and before the report could be finalized.

More recently, EPA and the Corps have indicated that they will wait until the connectivity report has been completed before finalizing the rule. The WSWC supports this decision and believes that waiting until the connectivity report is complete before taking any further action to revise or otherwise develop the rule will provide more time for the SAB to consider and implement state comments, which will improve both the final report and the rule.

The WSWC also supports the WGA's August 27, 2014 letter (attached) to EPA and the Corps requesting an additional extension of the public comment period for the rule. As the Western Governors note in their letter, the current October 20 comment deadline "remains insufficient for states to formulate thorough and thoughtful commentary on the rule's extensive impacts, effects and implications."

In sum, extending the public comment period is prudent given the importance and complexity of this issue and would help reduce state concerns.

III. STATE CONSULTATION AND IMPLEMENTATION OF THE RULE

The WSWC's prior correspondence with EPA and the Corps expressed repeated concerns about the lack of significant state consultation in the development of the rule before its publication for public comment. While the WSWC remains concerned about the lack of state consultation in the rule's development, it has since participated in a series of calls with EPA and the Corps after the rule's publication for public comment. The WSWC appreciates your agencies' willingness to speak with the WSWC about the rule during these calls. The WSWC also appreciates the efforts of EPA Region 8 Administrator Shaun McGrath and Region 8 Senior Advisor Joan Card in facilitating these discussions.

Nevertheless, there is still a significant need and opportunity for continued, sustained dialogue and consultation with the states in the revision and implementation of the rule, particularly on a state-by-state basis. Such consultation should treat states as co-regulators that are separate and apart from the general public, as envisioned by the CWA's framework of cooperative federalism and as required by Executive Order 13132.

One way to facilitate continued dialogue and consultation with the states would be to establish a state-federal workgroup between EPA, the Corps, and the states as your agencies work to revise and implement the rule. Although such a workgroup would be unlikely to reach a consensus on every issue, it would help facilitate the types of dialogue, collaboration, and relationship-building needed to create a more workable and effective rule. One possible model could be the workgroup EPA established with the Environmental Council of States and the Association of Clean Water Administrators to discuss revisions to the National Pollutant Discharge Elimination System electronic reporting rule. Consensus is not necessarily sought but individual state participants discuss their individual views with the federal agencies. The WSWC would welcome the opportunity to help develop and participate in a similar workgroup to review the CWA rule.

IV. AREAS WHERE FURTHER CLARIFICATION IS NEEDED

The WSWC understands that the rule is intended to clarify the scope of CWA jurisdiction in light of recent U.S. Supreme Court decisions, particularly *Rapanos v. United States*, 547 U.S. 715 (2006). However, as noted in the following subsections, further clarification is needed in a number of areas to realize this goal. The WSWC also believes that these areas represent an opportunity for your agencies and the states to work together in joint partnership as co-regulators, both on an individual basis and through the above-requested workgroup, to further refine the rule so that it will better accomplish its stated purpose of clarifying the extent of CWA jurisdiction.

A. Other Waters

As currently drafted, the rule states that jurisdictional determinations for so-called "other waters" will be made on a "case-specific basis," provided that those waters "alone, or in combination with other similarly situated waters...located in the same region have a significant nexus" to a traditional navigable water, interstate water, or the territorial seas.¹

¹ Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. 22,263 (April 21, 2014) (to be codified at 40 CFR Pars 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

While the rule and the related preamble are clear that other waters may be jurisdictional, the documents are less clear about how, when, or in which circumstances your agencies will perform case-by-case analyses to determine the jurisdictional status of these waters. This lack of clarity could be interpreted as implying that all other waters are potentially jurisdictional until EPA and the Corps determine otherwise at an indeterminate point in time. Such an implication has the potential to put landowners in limbo regarding the status of other waters located on their property and runs counter to the proposed rule's stated purpose of increased clarity. It also requires landowners to prove a negative should they desire to develop their land, or risk the possibility of incurring fines and other penalties if your agencies subsequently determine that the water is jurisdictional.

Instead, the rule should ensure that the applicable permitting agency, such as the Corps for Section 404 jurisdictional determinations in most states, bears the burden of determining the jurisdictional status of other waters in a timely manner. To help achieve this goal, the rule should provide a specific deadline by which the applicable agency must make a jurisdictional determination for other waters after it receives a jurisdictional determination request from a landowner.

The WSWC urges your agencies to work with the WSWC and through the above-requested state-federal workgroup to determine a reasonable timeframe for jurisdictional determinations regarding other waters and to address any other issues associated with this proposal, including possible consequences and remedies in those situations where the permitting agency does not meet the specified deadline. The WSWC also proposes 180 days as an initial, possible starting point for discussions regarding the time period for your agencies' other waters determinations.

B. Significant Nexus

As noted above, the WSWC policy #369 states that federal efforts to clarify CWA jurisdiction should recognize that the "significant nexus" Justice Kennedy set forth in *Rapanos* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. The policy further states that federal CWA jurisdiction efforts should quantify "significance" to ensure that the term's usage does not extend jurisdiction to waters with a de minimis connection to jurisdictional waters. While the WSWC appreciates language in the rule stating that effects to jurisdictional waters must be "more than speculative or insubstantial," further work is needed to quantify the concept of significance, particularly the term "significantly effects" in paragraph (u)(7), and to flesh out a transparent process for your agencies to use when making significance determinations.²

To address this uncertainty, the WSWC believes the rule should use a specific, quantifiable measure or measures to determine significance rather than only stating that the water's effect on another, jurisdictional water must be more than speculative or insubstantial. Under this proposal, waters that satisfy the specified measures would be presumed to have a significant connection to the waters identified in paragraphs (s)(1) through (3) of the rule, while waters that do not would be presumed to lack a significant connection. Under this general framework, parties could still provide evidence to rebut a presumption of significance or non-

² *Id.*

significance. Consequently, the use of specific, quantifiable measures would provide much needed clarity by providing a starting point for significance determinations.

The WSWC recognizes that further discussion between the states and your agencies is needed to develop the specifics of such a process, particularly in light of the considerable variety of hydrologic and geologic conditions that exist across the nation. As such, the WSWC urges your agencies to work with the WSWC and through the above-requested state-federal workgroup to identify and develop specific, quantifiable measures for determining significance consistent with the WSWC's rebuttable presumption concept.

C. Agricultural Exemptions

The WSWC believes the CWA's current agricultural exemptions are operating properly and that the rule should not alter or create unnecessary uncertainty about these exemptions. The WSWC understands that the rule is intended to preserve these exemptions, but the rule and the related interpretive rule regarding exempt activities under Section 404(f)(1)(a) have nevertheless created confusion and uncertainty about the scope and applicability of the CWA's agricultural exemptions, as well as their interaction with state water quality programs.

Given this confusion, the rule should include language stating that:

"Nothing in this section shall be interpreted to limit or otherwise conflict with the exemptions set forth in 33 U.S.C. 1344(f) and in 33 C.F.R. 323.4 and 40 C.F.R. 232.3."

In addition, the agricultural interpretive rule has created a significant amount of uncertainty concerning its possible implications for "normal farming, ranching, and silvicultural" activities. To resolve this uncertainty and to ensure that the current exemptions remain unchanged, your agencies should withdraw the interpretive rule, as the WSWC requested in its attached letter dated August 11, 2014. Notwithstanding the WSWC's request that the rule be withdrawn, any effort to revise the rule should be done in joint partnership with the states, particularly to determine what constitutes exempt "normal farming, ranching or silvicultural activities."

The WSWC stands ready to help facilitate further dialogue between your agencies and the western states to provide further clarity regarding the CWA's agricultural exemptions. The WSWC further believes that the above-requested state-federal workgroup could help ensure that the rule is revised and implemented in such a way that it fulfills your agencies' stated goal of preserving the existing agricultural exemptions.

D. Groundwater

The regulatory reach of the CWA was not intended to be applied to the management and protection of groundwater. As such, the WSWC appreciates the rule's exclusion of "groundwater, including groundwater drained through subsurface drainage systems."³ Given the rule's use of "shallow subsurface hydrologic connections" to establish jurisdiction between surface waters, the WSWC also appreciates the preamble's statement that "nothing...would

³ *Id.*

cause the shallow subsurface connections themselves to become jurisdictional.”⁴

However, once codified, the preamble language regarding shallow subsurface hydrologic connections will not be published in the Code of Federal Regulations, leading to possible misinterpretations and confusion about your agencies’ intent and the jurisdictional status of such waters. Therefore, the WSWC requests that the groundwater exclusion in section (t)(5)(vi) of the rule be amended to state as follows:

“Groundwater, including *but not limited to* groundwater drained through subsurface drainage systems *and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters under this section*” (changes in italics).

E. Definitions Needed for Key Terms

The rule does not adequately define the following key terms: (1) shallow subsurface hydrologic connection; (2) bed and banks; (3) ordinary high water mark; and (4) uplands. Further consultation is needed between your agencies and the states to determine how to define these terms. The WSWC believes that the above-requested state-federal workgroup would provide a suitable forum for your agencies to work in partnership with the states to define these terms.

F. The Possibility for Unintended Consequences

The WSWC believes the programs operating under Sections 402 and 303 of the CWA are working as they should, and that much of the confusion involving CWA jurisdiction pertains to the 404 program. However, in striving to address the challenges involving Section 404, there is some concern that the rule could have related and unintended impacts to 402 and 303 programs. Where possible, EPA and the Corps should ensure that their efforts to address the current uncertainty regarding Section 404 through the development and implementation of the rule do not adversely affect other CWA programs. Additional and ongoing consultation with the states, particularly through the above-requested state-federal workgroup, will help minimize the potential for unintended consequences.

VI. CONCLUSION

The WSWC appreciates the EPA’s and the Corps’ consideration of the above comments. As always, the WSWC stands ready to work with EPA and the Corps to support further dialogue and consultation between your agencies and the western states regarding this rule and any and all other issues involving the protection of our nation’s waters.

Sincerely,

Pat Tyrrell, Chairman
Western States Water Council

⁴ *Id.* at 22210.



WESTERN STATES WATER COUNCIL

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Re: Attention – Docket ID No. EPA-HQ-OW-2011-0880

To Whom It May Concern:

The Western States Water Council (WSWC), representing 18 western states on water policy issues, appreciates the opportunity to submit the following comments regarding the rule the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) have proposed to define the scope of Clean Water Act (CWA) jurisdiction. These comments are based on WSWC Policy #369 and prior WSWC letters and testimony regarding the development of this rule, which are attached and incorporated by reference.

I. WSWC POLICY #369

WSWC Policy #369 sets forth the unanimous, consensus position of the western states regarding federal efforts to clarify or redefine CWA jurisdiction. The WSWC urges EPA and the Corps to review this policy carefully and incorporate its recommendations. Specifically, the WSWC urges EPA and the Corps to ensure that the rule:

- (1) Gives as much weight and deference as possible to state needs, priorities, and concerns;
- (2) 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);
- (3) Recognizes that Justice Kennedy's "significant nexus" test in *Rapanos* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. The rule should also quantify "significance" to ensure that the term's usage does not extend jurisdiction to waters with a de minimis connection to jurisdictional waters;
- (4) 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;
- (5) Specifically excludes water and features generally considered to be outside the scope of CWA jurisdiction, including:
 - a. Groundwater;

Comment [NB1]: The WSWC's CWA Workgroup helped develop this draft letter, which is a work in progress and identifies a baseline, initial set of issues where the group is in general agreement.

There are a number of additional issues that the Workgroup is considering that it will further develop for the WSWC to consider at its October meetings. These additional issues are discussed in the comments to this draft letter and in an additional section following the letter's signature page.

- 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.
- (6) Acknowledges that states have authority pursuant to their "waters of the state" jurisdiction to protect excluded waters, and that excluding waters from federal jurisdiction does not mean that excluded waters will be exempt from regulation and protection.

Other recommendations from the WSWC's policy are discussed in greater detail in the following sections of this comment letter.

II. EPA'S CONNECTIVITY REPORT

EPA's Science Advisory Board (SAB) is reviewing a draft report on the connectivity of differing waterbodies that will inform the final rule. Despite requests to the contrary from the Western Governors' Association, the WSWC, and others, EPA and the Corps published the proposed rule for public comment before the SAB completed its review of the report and before the report could be finalized. As the WSWC noted in a letter to the Corps and EPA dated March 10, 2014, the agencies' decision to proceed with the development of the rule before finalizing the report raises concerns that the final report will have little or no influence on the final rule. In addition, many western states have submitted individual comments to the SAB to consider in its review of the report. Therefore, EPA and the Corps should not take any further action to revise or otherwise develop the rule until the SAB has completed its review of the report, and until EPA and the Corps have fully considered the states' comments regarding both the report and rule.

Furthermore, EPA and the Corps more recently have stated their intent to wait for finalization of the rule pending finalization of the report. Providing for an additional extension of time to accept input and comments from states regarding changes to the rule that might stem from finalization of the report seems prudent and would help reduce concerns.

III. AGRICULTURAL EXEMPTIONS

The WSWC believes the CWA's current agricultural exemptions are operating properly and that the rule should not alter or create unnecessary uncertainty about these exemptions. While the WSWC understands that the rule is intended to preserve these exemptions, the rule and the related interpretive rule regarding exempt activities under Section 404(f)(1) have created confusion and uncertainty about the scope and applicability of the CWA's agricultural exemptions as well as their interaction with state water quality programs. Withdrawing the interpretive rule, as requested in the attached letter the WSWC sent EPA and the Corps on August 11, 2014, would help remove some of this uncertainty.

IV. THE POSSIBILITY FOR UNINTENDED CONSEQUENCES

The WSWC believes the programs operating under Sections 402 and 303 of the CWA are working as they should, and that much of the confusion involving CWA jurisdiction pertains to the 404 program. However, in striving to address the challenges involving Section 404, there is some concern that the rule could have related and unintended impacts to 402 and 303 programs. Where possible, the agencies should ensure that their efforts to address the current uncertainty regarding Section 404 through

Comment [NB2]: In addition to reiterating the WSWC's request that the interpretive rule be withdrawn, the Workgroup is working to identify additional comments on ways to ensure that the WOUS rule does not alter the current agricultural exemptions.

Additionally, some states have indicated that the agricultural rule might be acceptable if it left the door open for "normal farming and ranching" activities.

the development and implementation of the rule do not adversely affect other CWA programs.

V. STATE CONSULTATION AND IMPLEMENTATION OF THE RULE

The WSWC's prior correspondence with EPA and the Corps expressed repeated concerns about the lack of significant state consultation in the development of the rule before its publication for public comment. While the WSWC remains concerned about the lack of state consultation in the rule's development, it has since participated in a series of calls with EPA and the Corps after the rule's publication for public comment. The WSWC appreciates the agencies' willingness to speak with the WSWC about the rule during these calls. The WSWC also appreciates the efforts of EPA Region 8 Administrator Shaun McGrath and Region 8 Senior Advisor Joan Card in facilitating these discussions.

Nevertheless, there is still a significant need for continued, sustained dialogue and consultation with the states in the revision and implementation of the rule, particularly on a state-by-state basis. Such consultation should treat states as co-regulators that are separate and apart from the general public, as envisioned by the CWA's framework of cooperative federalism and as required by Executive Order 13132.

One way to facilitate continued dialogue and consultation with the states would be to establish a state-federal workgroup to facilitate ongoing dialogue between EPA, the Corps, and the states as the agencies work to revise and implement the rule. While such a workgroup would be unlikely to reach a consensus on every issue, it would help facilitate the types of dialogue, collaboration, and relationship-building needed to create a more workable and effective rule. One possible model could be the workgroup EPA established with the Environmental Council of States and the Association of Clean Water Administrators to discuss revisions to the National Pollutant Discharge Elimination System electronic reporting rule. The WSWC would welcome the opportunity to help develop and participate in a similar workgroup to review the CWA rule.

VI. CONCLUSION

The WSWC appreciates the EPA's and the Corps' consideration of the above comments. As always, the WSWC stands ready to work with EPA and the Corps to support further dialogue and consultation between the agencies and the western states regarding this rule and any and all other issues involving the protection of the nation's waters.

Sincerely,

Pat Tyrrell, Chairman
Western States Water Council

Comment [NB3]: There appears to be a consensus among the Workgroup that most of the uncertainty regarding CWA jurisdiction pertains to Section 404 and that there is a potential for unintended consequences. The Workgroup is working to determine if consensus is possible regarding more specific comments on this point.

Comment [NB4]: The Workgroup is considering the possibility of specifying certain areas that such a workgroup could address, including:

- (1) Ensuring that the rule does not alter the current agricultural exemptions;
- (2) Developing definitions or further clarity for currently un-defined terms, such as "shallow subsurface hydrologic connection," "bed and banks," "ordinary high water mark," and "uplands;" and
- (3) Way's to ensure that efforts to address 404 problems do not affect other CWA programs.

ADDITIONAL AREAS OF CONSIDERATION

The following topics and language represent additional areas that the CWA Workgroup is reviewing to determine if consensus is possible.

I. Other Waters

Issue: As currently drafted, the rule states that jurisdictional determinations for so-called “other waters” will be made on a “case-specific basis,” provided that those waters “alone, or in combination with other similarly situated waters...located in the same region have a significant nexus” to a traditional navigable water, interstate water, or the territorial seas.

While the rule and the related preamble are clear that other waters may be jurisdictional, the documents are less clear about how, when, or in which circumstances the agencies will perform case-by-case analyses to determine the jurisdictional status of these waters. The rule is also unclear about the effect of a finding of jurisdiction on activities pertaining to the other water in question that began or took place before the determination.

This lack of clarity could be interpreted as implying that all other waters are potentially jurisdictional until EPA and the Corps determine otherwise. The possibility that other waters may be determined to be jurisdictional at an indeterminate point in time puts landowners in limbo regarding the status of waters located on their property and runs counter to the proposed rule’s stated purpose of increased clarity. It also requires them to prove a negative should they desire to develop their land, or risk the possibility of incurring fines and other penalties if the agencies subsequently determine that the water is jurisdictional.

Status of Workgroup Discussions: There is broad support for the idea that greater clarity is needed regarding jurisdictional determinations for other waters and that the federal agencies should bear the burden of proving whether “other waters” are jurisdictional in a timely manner. A number of states have also expressed support for a “rebuttable presumption” that other waters are not jurisdictional until determined otherwise by EPA and the Corps, although some states have expressed concern about this concept and/or the use of the term “rebuttable presumption.”

To this end, the Workgroup reviewed and commented on the below draft language:

The rule should clarify that EPA and the Corps bear the burden of determining the jurisdictional status of “other waters,” and should specify that such waters are not jurisdictional unless and until EPA and the Corps show otherwise. Under this approach, EPA and the Corps would still be able to determine that specific other waters are jurisdictional and could require prospective compliance with the CWA. However, actions pertaining to other waters that took place prior to a finding of jurisdiction would not be subject to fines or other penalties. This approach would provide needed clarity about the scope of the CWA under the rule by removing uncertainty regarding the jurisdictional status of other waters for which a case-by-case analysis has not been completed. Moreover, while other waters would not be jurisdictional absent a determination by the EPA and the Corps, states have the ability to protect the quality of these waters pursuant to their “waters of the state” authorities.

While some states have expressed support for this language, other states have expressed concern that it would give landowners a “free pass” to do what they want with other waters until EPA and the Corps learn of the activities and take action, thereby allowing landowners to cause environmental damage until EPA and the Corps take action. Thus, further work is needed to determine if consensus is possible regarding this concept.

Walt Baker from Utah has also proposed an alternative approach that would put the agencies, primarily the Corps, “on the clock” for making jurisdictional determinations regarding other waters. For example, Walt has proposed a process in which landowners would submit a request for a jurisdictional determination to the Corps regarding other waters and the Corps would need to complete such a determination within a specific period of time (Walt suggested 180 days). If the Corps fails to make a determination within the specified period of time, the other water in question would be deemed to be non-jurisdictional. In those cases where the Corps fails to act, state water quality standards and statutes governing the need to obtain 402 permits would still protect the water in question. The Workgroup is considering this proposal.

II. Significant Nexus

Issue: The WSWC’s policy states that federal efforts to clarify CWA jurisdiction should recognize that Justice Kennedy’s “significant nexus” test in the U.S. Supreme Court’s *Rapanos v. U.S.* decision requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. The policy further states that federal CWA jurisdiction efforts should quantify “significance” to ensure that the term’s usage does not extend jurisdiction to waters with a de minimis connection to jurisdictional waters.

Status of Workgroup Discussions: There appears to be broad agreement that further work is needed to clarify “significance,” as requested in the WSWC’s position. However, there is some uncertainty about how best to accomplish this goal.

Walt Baker of Utah has proposed that there could be some type of reasonable quantification, such as “significance” being less than a specific percentage (Walt proposed 15%) of the flow from to a jurisdictional water being contributed from another water, with the proviso that third parties could contest a finding of non-jurisdiction or non-significance by providing evidence that there is nevertheless a significant nexus to a jurisdictional water even though flow contribution was less than the specified percentage.

III. Regional Guidance or Manuals

Issue: Some states have expressed concern that the rule as drafted does not account for regional and state differences.

Status of Workgroup Discussions: Some states have raised the possibility of requesting that the rule provide sufficient flexibility for EPA’s regions and the Corps’ districts to work in joint partnership with their respective states from the ground up to flesh out the more technical and specific nuances of the rule, such as other waters, significance, and unintended impacts. Washington has also suggested the possibility of urging the regions and districts to develop joint determinations regarding classes of other waters within each state that are or are not jurisdictional under the rule. The idea behind such class-based determinations is to reduce the number of individual determinations.

While there is some support for the use of regional guidance and manuals, a larger percentage of states have expressed concern that this approach would be unwieldy given the number of Corps districts within their borders, inconsistent with the WSWC’s prior requests for a rule, and of questionable utility, among other concerns. Some states have also expressed concern about classed based determinations, including concerns that such determinations could lead to broad jurisdictional determinations.

While further discussion is possible regarding regional guidance and manuals, consensus on this point appears unlikely. Further discussion and development on the “class-based” determination concept is also possible.

IV. **“Relative Permanence” Jurisdiction Test**

Issue: The plurality opinion in the U.S. Supreme Court’s *Rapanos* decision limits CWA jurisdiction to “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers and lakes.’” Some states have expressed concern that the proposed rule focuses primarily on the “significant nexus” test set forth in Justice Kennedy’s concurring opinion and does not focus enough on the plurality opinion’s “relative permanence” test.

Status of Workgroup Discussions: Water Quality Committee Chair J.D. Strong of Oklahoma has raised the issue of whether there is a consensus or quorum among the Workgroup with respect to comments expressing a preference for the plurality’s “relative permanence” test instead of Kennedy’s “significant nexus” test. More specifically, under J.D.’s suggestion, “relatively permanent” waters that have a “significant nexus” to navigable waters; and channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall, would not automatically be jurisdictional without a joint state-federal determination (something akin to a 401 certification that falls to states). In the alternative, J.D. has asked if there is interest in blending of the two concepts to help harmonize the Court’s divergence by saying that both conditions must exist to trigger federal jurisdiction.

J.D. recently proposed this topic and the Workgroup has yet to vet this proposal.

RESOLUTION
on the
FEDERAL GOVERNMENT'S ROLE IN EXPEDITING
STATE GENERAL STREAM ADJUDICATIONS
Scottsdale, Arizona
October 10, 2014

WHEREAS, the western states use general stream adjudications to quantify and document relative water rights within basins, including rights to waters claimed by the United States under either state or federal law; and

WHEREAS, general stream adjudications give certainty to water rights, provide the basis for water right administration, reduce conflict over water allocation and water usage, and incidentally facilitate important market transactions for western water rights; and

WHEREAS, Congress has 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 protect private and public property interests; and

WHEREAS, requiring federal agencies to pay filing and other fees and follow the same procedures as all other water right claimants 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 to facilitate timely review of those claims. Given the complexity and the contentiousness involving such claims, states are justified in asking the federal government to take this step. Doing so will expedite the process by: (1) minimizing the filing of questionable claims; and (2) providing a basis for states to ascertain early-on the level of resources that states need to commit to the investigation of such claims.

(See also Positions #247, #272(a-b), and #308)

Originally adopted October 9, 2002

Reaffirmed October 21, 2005, October 17, 2008, October 10, 2011

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

~~Idaho Falls~~Scottsdale, Idaho~~Arizona~~

October ~~7~~10, ~~2011~~2014

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

~~WHEREAS, states in the West~~the western states have developed comprehensive judicial and administrative proceedings (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, these adjudications are typically complicated, expensive civil court and/or administrative actions that involve hundreds or even tens of thousands of claimants, but such~~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 ~~in the West~~; and

~~WHEREAS, Congress~~ has recognized the benefits of state general adjudication systems ~~and, by adoption when it adopted of~~ the McCarran Amendment (43 U.S.C. §666), which ~~requireds~~ 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 although federal water right claims by federal agencies are often the are typically the largest, and/or most complex, and costly claims in state general adjudications, to resolve; and~~

~~WHEREAS, the United States Supreme Court, in the case of~~ held in *United States v. Idaho*, 508 U.S. 1 (1992), ~~determined~~ that the McCarran Amendment does not require the United States to pay the filing fees, ~~which that many states use to help pay for a portion of the costs associated with conducting~~ fund adjudications; and

~~WHEREAS, the Court's holding means that the shifted much of the costs of adjudicating some federal of the most difficult claims in many states in a state general adjudication has shifted entirely to private water users and state taxpayers, representing a drain on the resources of States draining state resources and which significantly inhibiting~~ the ability of both state and federal agencies to conduct adjudications in a timely manner, threatening protect private and public property interests; and

~~WHEREAS, requiring federal agencies to pay filing and other fees and follow the same procedures as all other water right claimants would helps to 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. Payment of filing fees by federal agencies Federal payment of filing fees was ~~in fact~~ a common practice prior to the ~~unfortunate U. S. Supreme Court ruling on the Forest Service claims in Idaho~~ 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.
57. Requiring the federal government to provide whatever evidence it may have to substantiate its claims at the time of filing ~~is a way to~~ would ensure that federal claims have a sound basis in fact, and also to facilitate timely review of those claims. Given the complexity and the contentiousness involving such claims, ~~S~~states are justified in asking the federal government to take this step. Doing so will expedite the process ~~in two ways by:~~ (1) ~~it will minimize~~ the filing of questionable claims in the first place; and (2) ~~providing it will provide~~ a basis for states to ascertain early-on the level of resources that states need to commit to the investigation of such claims.

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Comment [NB1]: This recommendation emerged from the Federal Non-Tribal Water Rights Workshop.

Comment [NB2]: This is another recommendation from the Federal Non-Tribal Water Rights Workshop.

Position #335

(See also Positions #247, #272(a-b), and #308)

Originally adopted October 9, 2002

Reaffirmed October 21, 2005, ~~and~~ October 17, 2008, October 10, 2011

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
INDIAN WATER RIGHTS SETTLEMENTS
~~Idaho Falls~~Scottsdale, IdahoArizona
October ~~7~~10, 201~~4~~

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

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

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

WHEREAS, the advantages of negotiated settlements include the ability to: (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,"²² 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 ~~S~~states; and

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

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

WHEREAS, current budgetary pressures and legislative policies make it difficult for the Administration, the states and the tribes to negotiate settlements knowing that they may not be funded because either they are considered earmarks or because funding must be offset by a

corresponding reduction in some other expenditure, such as another tribal or essential Interior Department program;

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

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

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

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

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

(See also Nos. 250, 275, and 310)

Originally adopted March 21, 2003

Revised and reaffirmed Mar 29, 2006 ~~and~~ October 17, 2008, and October 7, 2011

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

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

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

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

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

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

WHEREAS, the regulatory reach of the Clean Water Act was not intended and should not be applied to the management and protection of ground water resources contravening state water law, policies and programs; 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 action, policy or strategy regarding ground water quality ~~strategy~~ must recognize and respect state primacy, reflect a true state-federal partnership, and provide adequate funding consistent with current federal statutory authorities.

*(See also Nos. 215, 230, 249, 274, and 309
originally adopted March 14, 1997
revised and reaffirmed Mar 14, 2000, Mar 21, 2003, Mar 29, 2006, and October 17, 2008*

WSWC Policy Statements

The WSWC policy statements are posted on its website at <http://www.westgov.org/wswc/policy.html>. Policy positions will be deactivated three years after their adoption, unless extended by formal action of the Council. The following is a brief description of all current positions, listed by date of adoption and corresponding number.

2014

- Regarding Clean Water Act jurisdiction (July 18, 2014) - #369
- Supporting the Water Resources Research Institutes (requesting Congress to maintain the federal authorization and financial support for the state WRII program) (July 18, 2014) - #368
- Regarding the Reclamation Fund (asks Congress to fully appropriate the receipts and collections accruing to the Reclamation Fund) (July 18, 2014) - #367
- Supporting Federal Research and Development of Updated Hydroclimate Guidance for Floods and Droughts (July 18, 2014) - #366
- Regarding Preemption of State Water Law in Federal Legislation (July 18, 2014) - #365
- Regarding the Clean Water State Revolving Fund and the Drinking Water State Revolving Fund (Apr 3, 2014) - #364
- Regarding the National Levee Safety Act of 2007 and the Interpretation of Levees and Water Supply Canals (Apr 3, 2014) - #363
- Regarding the Transfer of Federal Water and Power Projects and Related Facilities (Apr 3, 2014) - #362
- Regarding the Reclamation Safety of Dams Act of 1978 (Apr 3, 2014) - #361
- Regarding the Bureau of Reclamation's Maintenance, Repair and Rehabilitation Needs (Apr 3, 2014) - #360

2013

- Regarding pesticide applications and National Pollutant Discharge Elimination System discharge permits (October 3, 2013) - #359
- Urging Congress to reaffirm its deference to state water law, provide for the waiver of the United States' immunity to participation in state administrative and judicial proceedings, and provide for payment of fees required by state law (October 3, 2013) - #358
- In the form of a letter to Senate Energy and Natural Resources Committee leaders expressing continued support for implementation of the SECURE Water Act (October 3, 2013) - #357
- Regarding NASA's applied science research program (October 3, 2013) - #356

- Urging the Administration and the Congress to support water research and development programs at the Department of Energy National Laboratories. (June 26, 2013) - #355
- In the form of a letter to House Water Resources and Environment Subcommittee leaders in opposition to H.R. 1460, which would remove “fish and wildlife” as an authorized purpose for which the Corps can manage the Missouri River Mainstem Reservoir System (June 26, 2013) - #354
- Notes that the WSWC “...opposes any and all efforts that would diminish the primary and exclusive authority of states over the allocation of water resources used in hydraulic fracturing.” (June 24, 2013 - #353
- Supports federal efforts to prepare for and respond to extreme weather events, including an expanded and enhanced west-wide extreme precipitation monitoring system. (June 26, 2013) - #352
- Supports federal legislative and administrative actions to authorize and implement reasonable hydropower projects and programs (April 5, 2013) - #351
- Supporting implementation of the Rural Water Supply Act of 2006 (April 5, 2013) - #350
- Urging the Administration and the Congress to give a high priority to federal programs, such as the National Oceanic and Atmospheric Administration’s Regional Integrated Science and Assessments (RISA) program (April 5, 2013) - #349

2012

- Regarding States' water rights and natural flows (October 12, 2012) - #348
- Supporting legislation to reauthorize the Reclamation States Emergency Drought Relief Act (October 12, 2012) - #347
- Supporting legislation to reauthorize the National Integrated Drought Information System (NIDIS) Act, and accompanying letter to NOAA Administrator Lubchenco (October 12, 2012) - #346
- Regarding federal water and climate data collection and analysis programs (October 4, 2012) - #345
- WSWC Vision on Water (June 8, 2012) - #344
- Supporting legislative action to establish a dedicated funding source for completion of federal rural water projects authorized by Congress (June 8, 2012) - #343
- Regarding water transfers and National Pollutant Discharge Elimination System (NPDES) discharge permits (June 8, 2012) - #342
- Addresses proposed changes to Reclamation's policy manual and requests Reclamation enter into a dialogue with the WSWC (March 15, 2012) - #341
- Supports state primacy over groundwater (March 15, 2012) - #340
- Supports federal applied research and hydroclimate data collection programs (March 15, 2012) - #339

- Commending the introduction of S. 1343, the Energy and Water Integration Act of 2011 (March 15, 2012) - #338

2011

- Stating that any federal ground water quality strategy must reflect a true state-federal partnership, and provide adequate funding consistent with statutory authorities (October 7, 2011) - #337
- Supporting Indian water rights settlements (October 7, 2011) - #336
- Recommending policy changes at the federal level to expedite state general stream adjudications (October 7, 2011) - #335

Sunsetted Positions

2013

#323 A Shared Vision on Water Planning and Policy (*superceded by more recent position*)

2012

#313 Letter Regarding National Water Research and Development Initiative Act. (*There is no current legislation*)

#315 Letter to House Transportation and Infrastructure Committee leaders raising concerns regarding a draft bill entitled the Sustainable Watershed Planning Act. (*outdated, not reintroduced*)

#317 Supporting the Bureau of Reclamation's Field Services Program. (*outdated*)

#318 Offering general comments to CEQ on the Principles and Guidelines. (*outdated*)

#319 Describing principles that are important to the Western states in considering a "national vision" for water policy. (*superceded by more recent position*)

2011

#297 Strong support for legislation to establish a National Drought Council to improve national drought preparedness, mitigation, and response efforts. (*There is no current legislation*)

#298 In cooperation with the Interstate Council on Water Policy expressing strong support for increased funding for the Cooperative Water Program and the National Streamflow Information Program. (*superceded by more recent position statements and letters*)

#299 Supporting S. 2842, the Aging Water Infrastructure and Maintenance Act. (*enacted*)

#300 Regarding introduction of the Cooperative Watershed Management Act of 2008 (S. 3085). (*enacted*)

#301 Commenting on H.R. 135, the "21st Century Water Commission," specifically declaring that the WSWC be involved in the selection of members and that it include State and Native American involvement. (*Bill has not been reintroduced*)

#302 Supporting the enactment of S. 895 to provide the Bureau of Reclamation with authority to assess rural water supply needs and for sufficient funding. (*enacted*)

#303 Revised resolution in support of the Weather Modification Research and Technology Transfer Act. (*No federal research program or legislation has been reintroduced*)

#306 Urging support for full funding of the USGS National Streamflow Information Program (NSIP) and sufficient funding for the Cooperative Water Program to match non-USGS contributions. (*outdated*)

#307 Letter to Senator Bingaman, Senate Energy and Natural Resources Committee, expressing interest in S. 3231, the Omnibus Public Lands Management Act. (*outdated*)

- #311 Letter to Steve Stockton offering assistance to the Corps in their water planning initiative. *(outdated)*

2010

- #287 Setting forth the Council's past perspectives on a proposed "Twenty-First Century Water Commission." *(outdated - see #301 above)*
- #289 Support of the proposed Water Conservation, Efficiency and Management Act, to specifically authorize the Bureau of Reclamation's water conservation programs. *(separately authorized)*
- #290 Concern over the Administration's decision to zero out funding for the U.S. Bureau of Reclamation's Technical Assistance to States (TATS) Program. *(outdated)*
- #291/#292 Regarding the proposed Agricultural Water Enhancement Program. *(enacted)*
- #295 Concern over budget request for federal funding for water and wastewater treatment, specifically EPA's State Revolving Fund (SRF) Capitalization Grants. *(combined with #296 and replaced with #330 – Apr 15, 2011)*
- #296 Concern with OMB directive to EPA disallowing the use of SRF revenues to repay bonds. *(combined with #295 and replaced with #330 – Apr 15, 2011)*

2009

- #276 Urging the Congress and Administration to Continue to Recognize State Primacy Regarding Water Rights and Water Quality Certification in the Federal Licensing of Hydroelectric Projects. *(supplanted by WGA resolution)*
- #277 Letter commending the American Indian Environmental Office of EPA for its efforts in establishing the Tribal Water Program Council and expressing a hope that it would "offer an ongoing opportunity for state-tribal cooperation on issues of mutual interest." *(outdated)*
- #279 Support for legislation (S. 2751 and H.R. 5136) to create a National Integrated Drought Information System within the National Oceanic and Atmospheric Administration. *(authority enacted)*
- #280 Strong support for federal legislation, the National Drought Preparedness Act, to establish a national policy for drought and coordinate "proactive measures at all levels of government to plan, prepare and mitigate the serious impacts of drought." *(deferred to WGA resolution)*
- #281 Support for Reclamation's Water Conservation Field Services Program and "Bridging-the-Headgate" Partnerships. *(outdated)*
- #282 Regarding Federal Non-Tribal Fees in General Adjudications asking the Congress to pass legislation requiring the Federal government, when a party to a general water rights adjudication, to pay fees for costs imposed by the state to conduct the proceedings to the same extent as all other users. *(deferred to WGA resolution)*
- #283 Reiterating strong support for maintaining a thermal band as part of the Landsat Data Continuity Mission, and the necessary funding. *(separately updated)*

2008

- #262 Support for the U.S. Geological Survey's Cooperative Water Program (CWP) and opposes any effort to force the privatization of related USGS services. (*separately updated*)
- #268 The Western States Water Council endorses policy resolutions adopted by the Western Governors' Association, and will allow these policies to guide the Council in matters relevant to implementation and potential reauthorization of the Clean Water Act. (*deferred to WGA resolution*)
- #269 Water Efficiency Standards for Plumbing Products (*subsequently enacted*)
- #270 Reauthorization of the Farm Bill. (*reauthorized*)
- #271 Support for the National Aeronautics and Space Administration's Landsat Data Continuity Mission and calling for continued funding to include a thermal infrared sensor. (*superceded by 2009 WSWC Position No. 283*)
- #273 Support for the Nonpoint Source Grant program administered by the U. S. Environmental Protection Agency under Section 319 of the Clean Water Act. (*outdated*)

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Tab D – Budget

Western States Water Council
Balance Sheet
As of August 31, 2014

	<u>Aug 31, 14</u>
ASSETS	
Current Assets	
Checking/Savings	
1000 · Cash	
1030 · Wells Fargo	64,818.86
1050 · Petty Cash	240.98
1130 · Investments Assess	601,652.87
1140 · Leave Payout Sinking Fund	131,032.65
1150 · Equip Replacement Fund	38,585.03
Total 1000 · Cash	<u>836,330.39</u>
Total Checking/Savings	836,330.39
Other Current Assets	
1300 · Prepaid Expenses	
1310 · Insurance	676.04
1320 · Postage	200.00
Total 1300 · Prepaid Expenses	<u>876.04</u>
Total Other Current Assets	<u>876.04</u>
Total Current Assets	837,206.43
Fixed Assets	
1500 · Fixed Assets	
1505 · Purchase amount	57,516.92
1510 · Accumulated Depreciation	(46,819.41)
Total 1500 · Fixed Assets	<u>10,697.51</u>
Total Fixed Assets	10,697.51
Other Assets	
1800 · Deposits	2,807.51
1900 · Amt for Compensated Absences	115,606.32
Total Other Assets	<u>118,413.83</u>
TOTAL ASSETS	<u><u>966,317.77</u></u>
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Accounts Payable	
2000 · Accounts Payable	1,160.84
Total Accounts Payable	1,160.84
Credit Cards	
2100 · Wells Fargo Credit Cards	
2110 · 1003 9842 / TW	2,570.48
2120 · 1004 1129 / CR	1,198.77
2140 · 1010 5866 / NB	27.24
2150 · 1010 9447 / SL	1,000.56
Total 2100 · Wells Fargo Credit Cards	<u>4,797.05</u>
Total Credit Cards	4,797.05

Western States Water Council
Balance Sheet
As of August 31, 2014

	<u>Aug 31, 14</u>
Other Current Liabilities	
2200 · Payroll Liabilities	
2220 · FICA	692.16
2230 · FICAE	692.34
2240 · FITW	1,288.00
2260 · MEDI	161.88
2270 · MEDIE	161.88
2280 · SITW	2,021.00
2290 · SUTA	65.68
2300 · 1099 Withholdings	350.00
2330 · Dental	1.06
2340 · Disability	165.56
2350 · Life	(0.18)
2370 · Pension	3,761.02
2390 · PrePaid P/R Liabilities	(3,827.95)
2395 · Workers Comp Ins	97.51
Total 2200 · Payroll Liabilities	<u>5,629.96</u>
Total Other Current Liabilities	<u>5,629.96</u>
Total Current Liabilities	11,587.85
Long Term Liabilities	
2500 · Oblig for Compensated Absences	115,606.32
2520 · Current Yr Budget Offset / Comp	250.00
2550 · HRA - Willardson	987.28
2600 · Investment in Fixed Asset	
2605 · Current value	48,015.44
2610 · Adjust for depreciation	<u>(46,819.41)</u>
Total 2600 · Investment in Fixed Asset	1,196.03
2670 · Current Yr Budget Offset / F/A	<u>500.00</u>
Total Long Term Liabilities	<u>118,539.63</u>
Total Liabilities	130,127.48
Equity	
3900 · Retained Earnings	560,875.27
Net Income	<u>275,315.02</u>
Total Equity	<u>836,190.29</u>
TOTAL LIABILITIES & EQUITY	<u><u>966,317.77</u></u>

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09/26/14

Accrual Basis

Western States Water Council
Profit & Loss Budget Performance
August 2014

	Aug 14	Budget	Jul - Aug 14	YTD Budget	Annual Budget
Ordinary Income/Expense					
Income					
4000 · Revenues					
4100 · Member States Assessments	87,000.00	42,500.00	372,000.00	85,000.00	510,000.00
4200 · Newsletter	200.00	316.67	300.00	633.30	3,800.00
4400 · WGA / WSWC Contracts	0.00	8,300.00	0.00	16,600.00	99,600.00
4550 · Council Meeting Sponsors	0.00	125.00	2,000.00	250.00	1,500.00
4600 · Miscellaneous Income	0.00	416.67	0.00	833.30	5,000.00
4800 · Interest Income					
4810 · Savings	242.55		423.96		
4820 · Sinking Fund	49.80		97.92		
4830 · Equipment Fund	15.33		30.52		
4800 · Interest Income - Other	0.00	333.33	0.00	666.70	4,000.00
Total 4800 · Interest Income	307.68	333.33	552.40	666.70	4,000.00
Total 4000 · Revenues	87,507.68	51,991.67	374,852.40	103,983.30	623,900.00
Total Income	87,507.68	51,991.67	374,852.40	103,983.30	623,900.00
Expense					
6010 · Contingencies	959.34	450.00	996.04	900.00	5,400.00
6020 · Contracted Services	0.00	833.33	0.00	1,666.70	10,000.00
6030 · Equip Replacement Fund	250.00	250.00	500.00	500.00	3,000.00
6040 · Furniture & Equipment	0.00	125.00	0.00	250.00	1,500.00
6060 · Insurance	0.00		0.00		1,000.00
6090 · Annual & Sick Leave Funding	125.00	125.00	250.00	250.00	1,500.00
6110 · Maintenance Contracts	204.90	625.00	2,246.39	1,250.00	7,500.00
6160 · Meetings & Arrangements	(564.81)	1,858.33	6,726.20	3,716.70	22,300.00
6300 · Office Supplies	0.00	291.67	227.04	583.30	3,500.00
6400 · Payroll - Salaries	22,123.62	23,575.00	44,043.12	47,150.00	282,900.00
6490 · Payroll Taxes & Benefits					
6500 · Benefits					
6510 · Dental Insurance	323.04		652.86		
6520 · Life Insurance	30.50		61.00		
6530 · LT Disability Insurance	165.33		329.73		
6540 · Medical Insurance	7,152.70		14,305.44		
6550 · Pension Plan	3,761.02		7,487.34		
6500 · Benefits - Other	0.00	12,333.33	0.00	24,666.70	148,000.00
Total 6500 · Benefits	11,432.59	12,333.33	22,836.37	24,666.70	148,000.00
6600 · Taxes					
6610 · FICAE	1,371.65		2,730.67		
6630 · MEDIE	320.79		638.62		
6640 · SUTA	30.76		65.68		
6650 · Worker's Comp	97.51		194.51		
6600 · Taxes - Other	0.00	2,000.00	0.00	4,000.00	24,000.00
Total 6600 · Taxes	1,820.71	2,000.00	3,629.48	4,000.00	24,000.00
Total 6490 · Payroll Taxes & Benefits	13,253.30	14,333.33	26,465.85	28,666.70	172,000.00
6700 · Pension Management	0.00	300.00	0.00	600.00	3,600.00
6750 · Postage & Freight	1,007.35	416.67	1,305.37	833.30	5,000.00
6780 · Printing & Reproduction	104.57	833.33	427.50	1,666.70	10,000.00

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Accrual Basis

Western States Water Council
Profit & Loss Budget Performance
August 2014

	Aug 14	Budget	Jul - Aug 14	YTD Budget	Annual Budget
6800 · Professional Fees					
6810 · Accounting	725.00	725.00	1,450.00	1,450.00	8,700.00
Total 6800 · Professional Fees	725.00	725.00	1,450.00	1,450.00	8,700.00
6850 · Rent	2,961.74	2,958.33	5,904.48	5,916.70	35,500.00
6890 · Reports & Publications	74.26	416.67	148.52	833.30	5,000.00
7020 · Telephone	239.33	291.67	423.67	583.30	3,500.00
7040 · Travel	4,830.62	3,750.00	8,131.88	7,500.00	45,000.00
Total Expense	46,294.22	52,158.33	99,246.06	104,316.70	626,900.00
Net Ordinary Income	41,213.46	(166.66)	275,606.34	(333.40)	(3,000.00)
Other Income/Expense					
Other Income					
8800 · Symposium Income					
8810 · AWMS	0.00		0.00		10,000.00
8820 · CDWR	0.00		0.00	13,000.00	13,000.00
8870 · WQ/WQ	0.00		0.00		5,000.00
8890 · Sponsors	0.00	250.00	0.00	500.00	3,000.00
Total 8800 · Symposium Income	0.00	250.00	0.00	13,500.00	31,000.00
Total Other Income	0.00	250.00	0.00	13,500.00	31,000.00
Other Expense					
9100 · Symposium Expenses					
9110 · AWMS	0.00		0.00	10,000.00	10,000.00
9120 · CDWR					
9122 · 2	0.00		291.32		
9120 · CDWR - Other	0.00		0.00	13,000.00	13,000.00
Total 9120 · CDWR	0.00		291.32	13,000.00	13,000.00
9140 · NARF	0.00		0.00		
9170 · WQ/WQ	0.00		0.00	5,000.00	5,000.00
Total 9100 · Symposium Expenses	0.00		291.32	28,000.00	28,000.00
Total Other Expense	0.00		291.32	28,000.00	28,000.00
Net Other Income	0.00	250.00	(291.32)	(14,500.00)	3,000.00
Net Income	41,213.46	83.34	275,315.02	(14,833.40)	0.00

Tab E – Western Governors' Association (WGA) Drought Forum



WESTERN GOVERNORS' ASSOCIATION

Serving the Governors of 19 States and 3 US-Flag Pacific Islands

Nevada Gov. Sandoval launches Western Governors Drought Forum

Nevada Gov. Brian Sandoval launched the [Western Governors' Drought Forum](#) on Thursday, Sept. 11, with the announcement of the regional initiative's first four meetings and the rollout of an online resource library to collect case studies and best practices.



Gov. Sandoval created the Drought Forum, his main initiative as Chairman of the [Western Governors' Association](#) (WGA), to foster a regional dialogue in which states and industry can share best practices on drought policy, preparedness and management.

The governor made the announcement at Lahontan Reservoir in Nevada, where low lake levels caused by extended drought conditions have forced the closing of all boat launches. As a result, the Lahontan State Recreation Area has seen a 75% decrease in visitation, and 70% decrease in revenue during the past three years.

"The impact of drought in the West is clear to everyone here today. But it extends far beyond what's happened at Lahontan Reservoir," Gov. Sandoval said. "California is experiencing 'exceptional drought,' the most severe measurement reported by the U.S. Drought Monitor. And 'extreme drought' conditions continue in much of Nevada, Arizona, New Mexico, Colorado, Kansas, Oklahoma and Texas."

Participants at [Drought Forum meetings](#) will identify ways to avoid and mitigate the impact of drought on communities, economies and the environment. Each meeting will feature experts from government, industry and other arenas. The participants will focus on a specific sector impacted by drought (see schedule below).

The governor also announced the launch of the Western

CONTACT

Learn more by contacting
Communications Director
Joe Rassenfoss at
303-803-8008 or [via email](#).

NOAA, WGA WORK TO SHARE DROUGHT DATA WITH STATES



Western Governors recently renewed an [MOU with NOAA](#) to continue sharing drought and extreme weather data with Western states.

Governors' Drought Forum [online resource library](#), a collection of [best practices](#), [case studies](#) and news about drought. It will also offer links to a wealth of [resources](#), such as state drought plans and current conditions in the West as reported by the U.S. Drought Portal. New content will continue to be added to the website after Gov. Sandoval concludes his year as WGA Chairman, so it will serve as a resource in the years to come.

Western Governors' Association **Executive Director Jim Ogsbury** joined Gov. Sandoval at the announcement to discuss the role of the bipartisan association, which is managing the Drought Forum. The Western Governor's Drought forum is being conducted in partnership with NOAA's [National Integrated Drought Information System](#).

Learn more about the Drought Forum and arrange an interview by contacting Joe Rassenfoss, WGA Communications Director, at 303-803-8008.

Drought Forum Meeting Schedule

The Western Governors' Drought Forum will stage four meetings in the months to come, with more planned for 2015. They include:

- **Managing Drought in the Energy Sector:** Sept. 18-19, Norman, Okla.;
- **Drought Impacts and Solutions in the Manufacturing, Mining and Industrial Sectors:** Oct. 7-8, Tempe, Ariz.;
- **Drought Impacts and Solutions in the Agricultural Sector:** Nov. 13-14, Sacramento, Calif.;
- **Drought Impacts and Solutions for Water Supply:** Dec. 8-9, Las Vegas.

Go to the [Drought Forum Meetings](#) page for more.

WGA on Social Media



About WGA

The Western Governors' Association represents the Governors of 19 Western states and 3 U.S.-flag islands. The association is an instrument of the Governors for bipartisan policy development, information exchange and collective action on issues of critical importance to the Western United States.

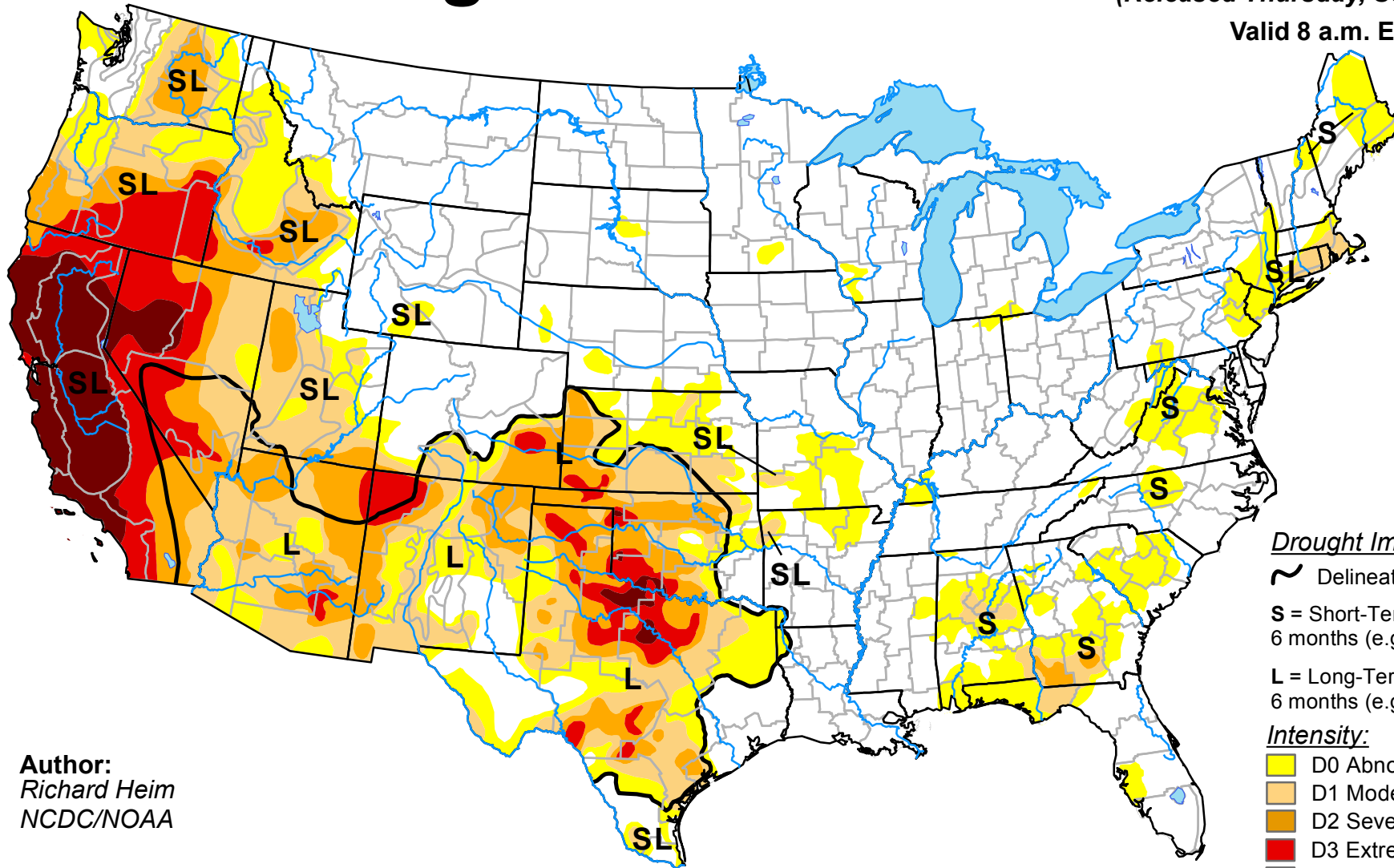
Tab F – Drought Map

U.S. Drought Monitor

September 23, 2014

(Released Thursday, Sep. 25, 2014)

Valid 8 a.m. EDT



Author:
Richard Heim
NCDC/NOAA

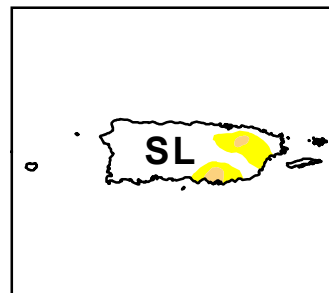
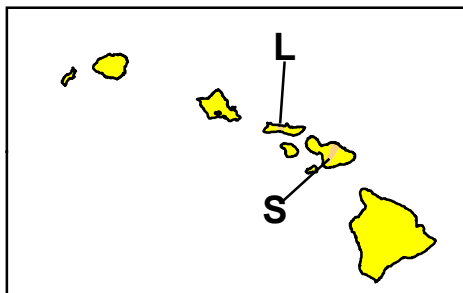
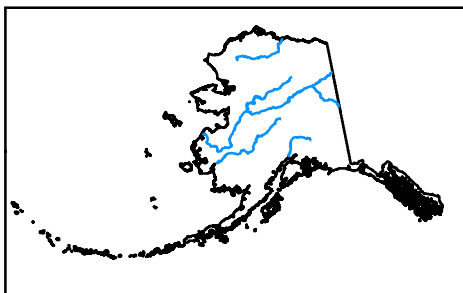
Drought Impact Types:

- ~ Delineates dominant impacts
- S** = Short-Term, typically less than 6 months (e.g. agriculture, grasslands)
- L** = Long-Term, typically greater than 6 months (e.g. hydrology, ecology)

Intensity:

- D0** Abnormally Dry
- D1** Moderate Drought
- D2** Severe Drought
- D3** Extreme Drought
- D4** Exceptional Drought

The Drought Monitor focuses on broad-scale conditions. Local conditions may vary. See accompanying text summary for forecast statements.



<http://droughtmonitor.unl.edu/>

Tab G – Landsat

National Geospatial Advisory Committee – Landsat Advisory Group¹

The Value Proposition for Landsat Applications – 2014 Update

Landsat imagery provides the United States and the world with continuous, consistent inventory and monitoring of critically important global resources. Supplying an unprecedented record of global land cover status and change for over 40 years, Landsat imagery is an essential “national asset” which has made and continues to make critical “contributions to U.S. economic, environmental, and national security interests.”² Because Landsat imagery is used most often by governmental and other non-commercial entities, the general lack of market forces makes estimating the economic value of Landsat data challenging. However, cost savings from operational efficiency improvements, avoided alternative replacement costs (assuming Landsat data were not available), and opportunity costs related to economic and environmental decision-support can be used to estimate the value of Landsat data.

To provide examples of the economic value of Landsat imagery, in 2012, the Department of the Interior requested that the Landsat Advisory Group (LAG) of the National Geospatial Advisory Committee (NGAC) provide advice to the Department “concerning the economic benefits of Landsat data.”³ The resulting paper, “The Value Proposition for Ten Landsat Applications,”⁴ was well received and in 2014 the Department requested that the LAG review and update “the examples used in the 2012 paper, refining the list of user applications within and beyond government agencies, and enhancing the Landsat value summary.”⁵

This paper first summarizes recent studies that estimate the total value of Landsat data. The second portion of the paper demonstrates the economic value of Landsat imagery by showcasing the economic value of Landsat imagery to 15 exemplary sustained programs within the government, NGOs and the private sector. **The paper establishes that the economic value of just one year of Landsat data far exceeds the multi-year total cost of building, launching, and managing Landsat satellites and sensors.**

1. Estimates of the Value of Landsat Data

In 2013, the National Research Council found that, “The economic and scientific benefits to the United States of Landsat imagery far exceed the investment in the system.”⁶ This finding echoes the results of studies done in 2007 by the American Society of Photogrammetry and Remote Sensing in support of the Office of Science and Technology Policy report⁷ and in 2012 by Booz Allen Hamilton’s work for a USGS study on Landsat.⁸

These studies were followed by a report by the USGS in 2013 with the results of their 2012 survey of 11,275 Landsat users on the uses and value of Landsat Satellite imagery.⁹ The design and methodology of the study are more scientifically grounded than its predecessors. Key findings include:

- 43% of the respondents were new users of Landsat data who started using Landsat after the Department of the Interior made the imagery *available at no cost on the web* in 2008.
- 77% of the respondents stated they were *dependent on Landsat imagery to do their job*.
- The economic benefit of Landsat data for the year 2011 is estimated to be \$1.70 billion for US users and \$400 million for international users resulting in a **total annual value of \$2.19 billion**.

Not only has Landsat’s overwhelming economic value been consistently established, its value relative to other civilian earth observing systems is also well recognized. In July of 2014, the Office of Science and Technology Policy identified 362 earth observation systems and had them ranked in order of impact by 300 Federal agency subject-matter experts. Landsat imagery was ranked as the 3rd highest, below only the GPS satellite constellation and the NEXRAD weather radar system.¹⁰

While Landsat’s economic value is irrefutable, its non-quantifiable uses are often even more compelling:

- Several humanitarian groups including the US Holocaust Memorial Museum’s Center for the Prevention of Genocide¹¹, Amnesty International¹², and the Satellite Sentinel Project¹³ use Landsat imagery to document human rights violations. Because of its frequent revisit time, regional scale, and free access, Landsat imagery can support large-scale operational human rights monitoring campaigns. For example, Holocaust Museum personnel employed Landsat imagery to detect, where and when villages were burned during the Darfur conflict from 2002 to 2008.¹⁴ Landsat imagery allows humanitarian organizations to monitor human rights violations at low cost and without incurring the burdens and risks of staff travel to inaccessible and dangerous regions of the world.
- To great media acclaim, Google released Landsat Timelapse in 2013 which allows anyone to easily zoom and browse through this interactive global animation, exploring phenomena such as urban growth in Las Vegas, the retreat of Alaska’s Columbia Glacier, the deforestation of the Brazilian Amazon and mountaintop removal in Appalachia. This is perhaps the most comprehensive picture of our changing planet ever made available to the public. It receives 80,000 views per month a year and a half after its release date. On May 5, 2014, Timelapse won the Webby People’s Choice Award¹⁵ for “Best Use of Video or Moving Images on the Web.”



Figure 1. Landsat views of Las Vegas from 1984 and 2012.

View the animation at <https://earthengine.google.org/#intro/LasVegas>.

- Landsat’s contribution to science is well documented and has sky-rocketed since the imagery has been freely accessible as shown on Figure 2. Since its first launch in 1972, over 22,384 scientific documents have referenced Landsat imagery.

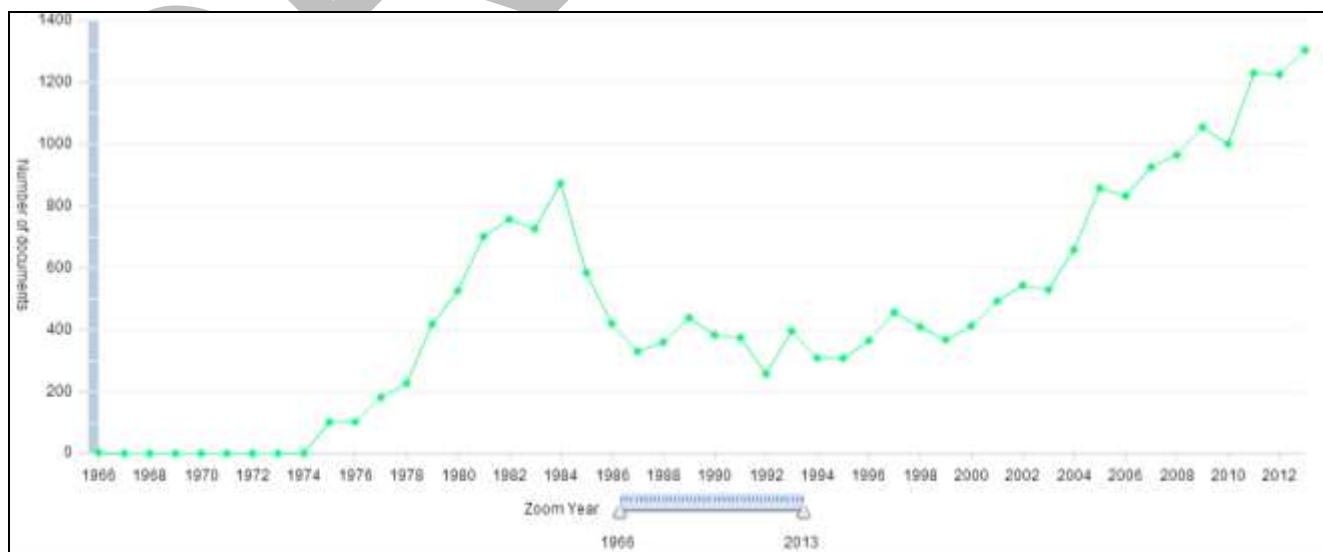


Figure 2. Analyzed search results from Scopus database on June 18, 2014.

2. Productivity Savings from Landsat

People use Landsat is because it is more efficient than any other technology to accomplish the same decision support requirement. The purpose of this document is to outline fifteen (15) decision processes that would be significantly more expensive without an operational Landsat-like program. Many of these processes are associated with the US government and save significant amounts of money compared to other methods of accomplishing the same objective. They also include non-governmental science applications where scarce research dollars cannot be wasted on inefficient technologies. The estimates of annual efficiency savings are conservative and can be substantiated upon request. These fifteen Landsat applications alone produce savings of \$280 million to over \$366 million per year for the Federal and State governments.

Summary Table: Estimated Productivity Savings from Uses of Landsat

Landsat Application	Estimated Annual Efficiency Savings
1. USDA Risk Management Agency	over \$100 million
2. U.S. Government Mapping	over \$100 million
3. Monitoring Consumptive Agricultural Water Use	\$20 - \$80 million
4. Landsat Support for Fire Management	\$28 - \$30 million
5. Forest Health Monitoring	\$12 million
6. Forest Fragmentation Detection	over \$5 million
7. Forest Change Detection	over \$5 million
8. World Agriculture Supply and Demand Estimates	over \$3 - \$5 million
9. Vineyard Management and Water Conservation	\$3-5 million/year
10. Flood Mitigation Mapping	over \$4.5 million
11. National Agricultural Commodities Mapping	over \$4 million
12. Waterfowl Habitat Mapping and Monitoring	\$1.9 million/year
13. Coastal Change Analysis Program	\$1.5 million
14. NGA Global Shoreline	over \$90 million (one time)
15. Wildfire Risk Assessment	\$25-50 million (one time)

1. USDA Risk Management Agency

The USDA RMA provides crop insurance to US growers. Over 1.2 million policies are issued resulting in premiums exceeding \$6 billion per year. About 20% of the policies are in areas subject to flooding and higher premiums are accordingly charged. Prior to using Landsat the crop flood zones were very broad. Some growers with little potential for flooding were paying the same premiums as those with higher probability of flooding. The RMA Insurance Services Unit uses the Landsat archive to get a much more detailed picture how flooding is distributed. They could see what areas had good levees and others with little protection. There was no other source for a systematic survey of agriculture flooding with sufficient historical evidence to refine the actuarial tables. With the Landsat evidence, RMA undertook a program (FCI-33) to create much more detailed flood rate maps based on the true risk of flood damage. This allowed many growers to have a lower rate. These flood maps are constantly being updated based on new Landsat observations reflecting changes in water course, levee protection and other mitigating factors. The provision of more detailed zones reduced the premium cost by over \$300 million annually. Without Landsat it is conservatively estimated RMA would have to raise premiums for more than 200,000 policies equal to \$300M annually.

See also: <http://gcn.com/articles/2013/10/18/usda-gis.aspx>

Result: Annual efficiency saving with Landsat: over \$100 million

2. U.S. Government Mapping

U.S. Government defense mapping agencies are estimated to spend over \$300 million annually to create digital maps of roads, buildings, airports, foreign military sites and other defense-related mapping applications. Until recently, the method of updating these maps was to simply redo them or to manually scan high resolution images for new features. Because of the very large areas (global) and associated high costs involved, it is conservatively estimated less than 5% of these maps were updated annually meaning most were more than 20 years old (average of 10 years). This situation created a significant problem in supporting overseas military activities with maps of this age. Consequently only the most urgent areas were updated. Recently a new technology called Correlated Land Change (CLC) has been developed by a U.S. company which locates these new features at a few pennies per sq. km. The primary input to CLC is new and archive Landsat images. With CLC, the analyst is targeted only to areas of recent change, where high resolution imagery is then used to identify and extract new features. Using this process, it is conservatively estimated that analysts can update 10 (ten) times the area in the same labor time, a 1,000% efficiency improvement. Agencies are adapting their map updating approach to take advantage of this process. Over 100,000 Landsat scenes going back 14 years and covering 2/3rd of the Earth's land area will be processed this year. Annual consumption of Landsat will be 20,000 scenes per year. It is expected that over time the average age of DoD/IC digital maps will decrease from over 10 years to just 1 year. To accomplish the same feat without Landsat would cost over \$1 billion annually; a fiscal improbability in the current economic climate. More likely the average age would stay or increase beyond 10 years. See also:

http://issuu.com/kmi_media_group/docs/gif_10-4_final?mode=window&pageNumber=24

Result: Annual efficiency saving with Landsat: over \$100 million

3. Monitoring Consumptive Outdoor Water Usage

In the West and the Nation, water is in short supply, requiring reductions in consumptive uses. Further, water and water rights are increasingly valuable commodities being bought and sold, based on Landsat thermal imagery that is essential for determining past and present water use and evapotranspiration (ET) at scales that reveal patterns of land use and water consumption to inform decision making. Western state water managers and others are increasingly turning to Landsat's thermal infrared sensor (TIRS) imagery to measure and monitor consumptive outdoor water uses. This data is used in hydrologic modeling, water planning, comparing water use when cropland is converted to urban uses, measuring agricultural water use, monitoring aquifer depletion, administering water rights (legal findings of fact, ensuring compliance with administrative orders, court decrees, and interstate compacts, as well as water right buy-back programs), Native American water rights settlements, and riparian endangered and invasive species monitoring.

The Idaho Department of Water Resources (IDWR) and the University of Idaho have partnered to pioneer these uses of TIRS data, which have been recognized with an award from the Harvard Kennedy School of Government. One of those uses is adjudicating, measuring and monitoring consumptive irrigation use by wells on the Snake River Plain Aquifer. IDWR used a power consumption coefficient method to estimate extraction and water use at an annual cost of about \$500,000/5,000 wells or \$100/well – before beginning to use Landsat TIR data through a process called METRIC (Mapping EvapoTranspiration with high Resolution and Internalized Calibration) to measure actual crop evapotranspiration on a field-by-field base. IDWR annual costs dropped to approximately \$53,500/year for the same 5,000 wells or less than \$11/well. These two options have also been compared with requiring installation of flow meters on each and every well at a capital cost of hundreds of dollars to over a thousand dollars per well.

Given IDWR's cost experience and extrapolating the cost savings compared to using the Power Consumption Coefficient (PPC) measurement method (\$100/well) or installing flow meters (\$1,000/well) for monitoring groundwater use from unmetered irrigation wells in the 17 western waters, the potential cost savings from using METRIC could mean annual cost savings of nearly \$20 million annually to measure irrigation from

groundwater extraction alone (with 219,013 unmetered irrigation wells). If similar savings could be achieved for measuring irrigation water use on surface water supplied acreage (77.5% of total irrigated acreage in the West), then total potential saving could be closer to \$80 million/per year.

These figures represent a conservative estimate using unpublished IDWR cost figures and West-wide unmetered irrigation well numbers, as well as total irrigated acreage estimates from USDA's 2007 Census of Agriculture, 2008 Farm and Ranch Irrigation Survey).

Idaho has also used Landsat thermal imagery in its water rights administration. In 2007, the A& B Irrigation District made a "call" on the Snake River, asking that IDWR curtail more junior uses in order to protect its senior surface water rights and diversions. Using Landsat thermal imagery and METRIC IDWR evaluated those fields the district claimed were water-short, and found that the crops were not stressed. The findings averted the possible shut off of water to some 1000 farms and approximately 214,000 irrigated acres, with a potential loss of over \$314 million in direct farm sales. IDWR's decision was appealed all the way to the Idaho Supreme Court, and was upheld without the METRIC analysis and use of Landsat thermal data ever challenged.

Similarly, in a 2012 case involving quantification of Wood River Valley water rights, IDWR used the same technology to demonstrate that only 20.2 acres of a 104-acre farm had been continuously irrigated as required *by law to establish a vested right*. IDWR was able to access the Landsat archive and compare land and water uses from 1984 to 2012. In the face of the evidence, the land owner withdrew his challenge seeking more water than his historic use. The value of the additional water claimed was \$2,514,000 (\$30,000/acre x 83.8 additional acres).

See also: http://www.westernstateswater.org/wp-content/uploads/2014/04/Morse_wswc-landsat-talk-san-diego3.pdf

http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Farm_and_Ranch_Irrigation_Survey/fris08_1_14.pdf.

http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Farm_and_Ranch_Irrigation_Survey/fris08_1_02.pdf.

Result: Annual efficiency saving with Landsat: potential of \$20 - \$80 million for groundwater monitoring, as well as avoided losses of hundreds of millions of dollars from surface water management and water rights administration.

4. Landsat Support for Fire Management

Landsat images are used for developing vegetation and wildland fuel data used in wildland fire management decision support systems. Currently 15 Western States are using a Landsat derived product called LANDFIRE to develop a wildfire risk assessment and planning system. Nine southern states already have a similar system in place fed by LANDFIRE data. Landsat is also commonly used in post-fire burn severity mapping.

Landsat data are also used to perform immediate post fire assessments of soil burn severity and vegetation mortality, usually by Burned Area Emergency Response (BAER) teams. The restoration work performed by BAER teams mitigates effects on hillslope stability, water quality and supply, and the spread of invasive species, as well as other ecosystem services, such as habitat for fish and wildlife. BAER teams use Landsat data as a geospatial foundation for plans that address emergency stabilization where post-wildfire effects pose immediate and significant threats to human life and property. This information helps define the short-term and possibly longer-term management needs of burned areas, such as erosion control, re-vegetation or seeding, and pasture deferment.

Both current and archived Landsat data are used to develop wildland fire atlases across the United States by evaluating differences in pre-fire and post-fire Landsat imagery. A national database of Landsat derived fire

information is maintained by the Monitoring Trends in Burn Severity (MTBS) project, a joint DOI and U.S. Forest Service activity. The MTBS database allows a national level evaluation of vegetation management practices used to mitigate hazardous fuels. These evaluations occur in two primary ways. First, wildland fires in treated areas are expected to have relatively lower burn severities. This can be determined for specific fires, over time, from MTBS data. Secondly, the effective duration for a hazardous fuel treatment can be determined by monitoring vegetation vigor indexes as surrogates to fuel condition (biomass accumulation and growth) and comparing this with untreated areas or areas with alternative treatment approaches. The Landsat archive is the only comprehensive and consistent data stream that provides this monitoring potential for the United States.

Landsat imagery is the foundation for the vegetation and fuels information in the LANDFIRE database. LANDFIRE data products are a foundational element used in the Federal Government's Wildland Fire Decision Support System (WFDSS). WFDSS is used to model fire behavior and is used to make tactical decisions during specific wildland fire incidents. LANDFIRE is also critical for the Interagency Fuels Treatment Decision Support System, a web-based software and data integration framework that organizes previously existing and newly developed fire and fuels software applications to make fuels treatment planning and analysis more efficient and effective. See also: http://www.landfire.gov/version_comparison.php

Result: Annual efficiency saving with Landsat: \$28-\$30 million

5. Forest Health Monitoring

The U.S. Forest Service (USFS) of the U.S. Department of Agriculture (USDA) uses an average of over 500 Landsat scenes per year to evaluate potential risk due to insects and diseases on forest lands in the U.S. Based upon this risk assessment, the USFS can allocate resources to mitigate the overall effect of the insect and disease losses. An alternative to Landsat would be a more expensive high resolution imagery costing at least \$300,000 or more per Landsat equivalent area. The additional analysis cost of higher resolution images would add over \$5,000 per Landsat equivalent area. With an average of over 500 Landsat scenes analyzed per year the increased cost to the U.S. Government without Landsat source data would be conservatively estimated at \$12,500,000 annually. See also: <http://www.fs.fed.us/rm/analytics/about/history/remotesensingafim.pdf>

Result: Annual efficiency saving with Landsat: \$12 million

6. Forest Fragmentation Detection

The University of Maryland is tracking worldwide forest fragmentation through time for biodiversity applications. Loss of forest has the effect of isolating some species from natural habitats leading to significant biodiversity issues. For this effort, global forests are being mapped at 5 year intervals involving a total of over 50,000 Landsat scenes. Lower resolution satellite imagery is too inaccurate. Higher resolution satellite imagery is orders of magnitude more expensive to acquire and process. Landsat provides the most efficient data for mapping global deforestation. See also: http://glcf.umiacs.umd.edu/library/pdf/rse78_p118.pdf

Result: Annual efficiency saving with Landsat: over \$5 million

7. Forest Change Detection

The University of Maryland is developing an annual data set for the US to track forest disturbance (fire, insect, harvest, etc.) through the lower-48 states for each of the last 26 years in an effort called North American Forest Dynamics (NAFD). This effort will ultimately require 25,000+ Landsat scenes. NAFD supports the North American Carbon Program and is funded through NASA Terrestrial Ecology. Landsat is the most cost efficient means to quantify forest changes covering the entire USA. See also:

[http://www.geog.umd.edu/projectprofile/US%20forest%20disturbance%20history%20from%20Landsat%3A%20North%20American%20Forest%20Dynamics%20\(NAFD\)%20-%20Phase%20III](http://www.geog.umd.edu/projectprofile/US%20forest%20disturbance%20history%20from%20Landsat%3A%20North%20American%20Forest%20Dynamics%20(NAFD)%20-%20Phase%20III)

Result: Annual efficiency saving with Landsat: over \$5 million

8. World Agriculture Supply and Demand Estimates

The USDA Foreign Agriculture Service (FAS) Production Estimates and Crop Assessment Division (PECAD) has used satellite imagery to assess agriculture in foreign countries since 1975 to support the USDA World Agriculture Supply and Demand Estimates (WASDE). The numbers produced by WASDE are critical to decision making by the USDA and US farmers/growers on when and at what price to sell crops for export. With the recent failure of Landsat 5, the effective ground observation increases from 40 to 60 days, an unacceptable level. USDA has estimated it will take \$1.5 to \$2.5 million per year to purchase foreign data to replace Landsat 5. If Landsat 7 fails, it would take \$3 to \$5 million per year to purchase replacement satellite imagery. See also: <http://www.usda.gov/oce/commodity/wasde/>

Result: Annual efficiency saving with Landsat: over \$3-\$5 million

9. Vineyard Management and Water Conservation

E&J Gallo Winery, the world's largest family-owned winery and the largest exporter of California wine, uses multi-temporal Landsat imagery to closely manage its vineyard irrigation schedules and its water use, and to monitor California vineyard production statewide. "At Gallo, everyone understands the value of Landsat in their operations, from the vineyard manager up to the Vice President level," states Martin Mendez-Costabel, Gallo's Manager of GIS and remote sensing.

During the grape growing season, Gallo downloads every available Landsat image captured over California's agricultural lands. While all Landsat bands are important to Gallo's efforts, it is the thermal bands that have the greatest value because they can be used to monitor evapotranspiration. "With grapes, we want to impose water stress because there is a strong correlation between water stress and good wine quality," states Mendez-Costabel. The thermal bands, Landsat's 8 day revisit time, and the high quality of Landsat image calibration are critical to supporting the fast paced and high precision management decisions made at Gallo.

Because only Landsat imagery provides weekly revisits of region-wide thermal imagery, Gallo would be unable to conduct their detailed water management and conservation efforts without creating a separate company to develop, build and collect airborne thermal imagery – an endeavor estimated to cost at least \$3-5 million/year.

Result: Annual efficiency saving with Landsat: of \$3-5 million/year

10. Flood Mitigation Mapping

FEMA spends over \$200,000,000 annually to update flood maps to mitigate losses from future flood events. Less than 3% of these maps are updated per year. While flood plain contours don't often change, the impervious surface adjacent to flood plains regularly increases due to new home and business construction. Increased impervious surface increases runoff into the flood plain and will increase the size of the flood zone near these new developments, and possibly put new homes at risk. Having an accurate, consistent, and cost-effective method to assess impervious surface change going back decades will help DHS/FEMA to target areas of highest potential flood zone change. FEMA has begun using a recently developed process called Correlated Land Change (CLC) to consistently map the lower 48 States for new construction going back over 25 years. FEMA calls the dataset the National Urban Change Indicator (NUCI). NUCI is completely compiled with over 12,000 Landsat images and will consume 1,500 Landsat images each year going into the future. The alternative to NUCI is a much more costly and time-consuming manual interpretation of historical aerial images. It is estimated that manual interpretation would cost in excess of \$5,000,000 per year. Not doing the prioritization based upon consistent empirical data could mean lower flood insurance premiums in potentially new flood zone extent. The cost to create NUCI for ½ CONUS is \$550,000 annually. See also:

Result: Annual efficiency saving with Landsat: over \$4.5 million

11. National Agricultural Commodities Mapping

The USDA National Agricultural Statistics Service (NASS) creates a Cropland Data Layer (CDL) for the Contiguous U.S. (CONUS) identifying crop type by farm field. "The purpose of the CDL is to (1) provide acreage estimates to the Agricultural Statistics Board for the state's major commodities and (2) produce digital, crop-specific, categorized geo-referenced output products." Major commodity acreage is used by farmers and manufacturers to better estimate crop yields to help in planting and selling decisions. Landsat is used because of its ability to identify crop type with sufficient accuracy at low-cost. With the demise of Landsat 5, the USDA must acquire supplemental imagery from foreign sources costing an additional \$1.2 million in FY12. Should the foreign sources fail, the accuracy of the CDL will plummet with consequences that are difficult to measure. Efficiency savings from Landsat are estimated at \$4 million per year. See also:

http://calval.cr.usgs.gov/JACIE_files/JACIE11/Presentations/TueAM/1135_Reynolds_JACIE2011.pdf

Result: Annual efficiency saving with Landsat: over \$4 million

12. Waterfowl Habitat Mapping and Monitoring

Ducks Unlimited, Inc. (DU), Ducks Unlimited Canada, and Ducks Unlimited de Mexico have been mapping and tracking land cover and land use patterns to identify, monitor and manage waterfowl habitats throughout North America for more than 20 years using Landsat products. DU's Landsat-derived map products cover more than 500 million acres throughout the 48 conterminous states, Alaska, Canada, and Mexico and coincide with the primary breeding and wintering grounds for a large majority of the North American waterfowl population. Their efforts include the first ever nation-wide wetland inventory in Mexico, which allows for long-term tracking of wetland gains and losses. In the U.S. and Canada the map products help guide the placement of protection, restoration, and enhancement of wetlands and associated upland habitats. They provide a basis for conservation planning efforts that result in protection of key habitat areas, and in collaboration on and implementation of improved Best Management Practices for wetlands by the industry and agricultural partners in working landscapes. The activities include partnerships and collaboration with Federal and State agencies, industry and agriculture partners, other NGOs and private landowners to restore and enhance thousands of acres of wetlands annually. DU's current efforts utilizing Landsat imagery include wetland mapping throughout the boreal forest of Canada and Alaska; reforestation modeling based on forest breeding bird habitat requirements in the Mississippi Alluvial Valley; annual mapping of water extent across large landscapes of the southern U.S. and Gulf coast region; mapping of winter-flooded rice agriculture in California's Central Valley, and mapping the availability of flooded habitats during drought conditions in California's Central Valley. DU processes an average of 80 to 90 Landsat scenes annually. The cost to acquire a similar footprint of moderate or high resolution satellite imagery to replace Landsat is estimated to be over \$1,900,000 annually. As a non-profit organization, that cost would preclude them from performing the majority of their currently active Landsat-based work and significantly reduce their ability to monitor and track landscape level trends in waterfowl and wetland habitats throughout North America.

Result: Annual efficiency saving with Landsat: of \$1.9 million/year

13. Coastal Change Analysis Program

The National Oceanic and Atmospheric Administration (NOAA) monitors land cover and land cover changes in the coastal regions of the United States, as part of its Coastal Change Analysis Program (C-CAP). This data is provided to coastal managers in order to better understand the effects of past management decisions, document recent trends, and provide a better baseline of current conditions to which they can consider

impacts of future planning decisions. This change analysis is often also used as a screening-level tool to provide other, more detailed mapping initiatives and information on where changes to their own products may have occurred and are likely to be in need of updating. C-CAP products are updated every five years.

Landsat is used because of its systematic collection of larger footprint imagery, the larger number of spectral bands it provides, and the historic archive of complimentary data available. This provides NOAA with a consistent, reliable source of image data that can be processed and classified in a consistent, repeatable, cost-effective way. This cannot be said of more commercial sensors that are tasked to acquire some areas and not others. Not only does this reduce the cost in creating C-CAP land cover, it improves the accuracy in several of the classes mapped, such as the improved discrimination of wetland features seen due to the infrared bands Landsat supplies (and that are not available elsewhere).

The 30 meter resolution of this imagery is about the coarsest that managers tasked with tracking changes in these coastal environments can utilize. NOAA spent \$3,200,000 on the original baseline mapping and currently spends approximately \$1,300,000 on each update cycle. Production of an equivalent C-CAP product using a smaller footprint sensor with fewer spectral bands are estimated to more than double these existing costs (\$4,000,000 over the same 5 year period) or would require that NOAA would decrease the specifications associated with these maps (i.e. coarser resolution, fewer categories, less accuracy), which would potentially impact their availability and/or usefulness. See also:

<http://www.cop.noaa.gov/stressors/resource/landuse/past/lu-ccap.aspx>

Result: Annual efficiency saving with Landsat: \$1.5 million

14. NGA Global Shoreline

From the NGA website: **Prototype Global Shoreline Data (Satellite Derived High Water Line Data)**. “NGA developed the current version of World Vector Shoreline® through digitization of a variety of hard copy map and chart products. The limited accuracy of these products resulted in a WVS® product at an accuracy of about 250-meters, which in this era of accurate satellite positioning is of limited utility. The Global Shoreline Data set (satellite derived High Water Line) compiled by NGA has been acquired from orthorectified NASA, 2000 era, LANDSAT GeoCover (multi-spectral imagery). ... The result of testing of the SWIR band approach showed that the resulting accuracy of shoreline derived in this manner is about 50-meter (RMS).”¹⁶ The resulting shoreline is the highest resolution continuous global shoreline. To date there is no other satellite which has complete coverage with the Short Wave Infrared detector which is essential to mapping the distinction between water and land sufficient to identify the high water line at low tide. To produce a similarly accurate continuous shoreline from other sources has been estimated to cost in excess of \$100 million. The production cost was less than \$10 million. Compared to all the nautical charts, the NGA Global Shoreline is the most authoritative map for more than 50% of the world’s shoreline. See also:

http://msi.nga.mil/NGAPortal/DNC.portal?nfpb=true&pageLabel=dnc_portal_page_72

http://wiki.openstreetmap.org/wiki/PGS_whitepaper

Result: Efficiency saving with Landsat: over \$90 million (one time)

15. Wildfire Risk Assessment

Verisk Analytics, working in association with the insurance industry, developed and deployed a wildfire risk assessment solution, FireLineTM, used for underwriting tens of millions of homes and businesses in 10 Western states (CA, NV, NM, AZ, UT, CO, ID, OR, WA and TX). The product scores individual addresses based on timely evaluation of factors underlying wildfire risk: vegetative fuels, topographical features, long-term weather patterns, and road networks in a geospatial framework. Landsat data are a key data source used in the assessment of fuels on a regular basis, typically every 1 to 2 years. The process uses Landsat scenes covering 10 states to update fuel assessments based on evaluation of areas of change, e.g. new developments

in the wildland urban interface/intermix, changes due to past wildfires, and vegetation re-growth. FireLine has helped insurers in both proper selection of risks and appropriately pricing, which in turn ensures that consumers pay a fair price consistent with the wildfire exposure of their respective properties. Over the past decade wildfires have caused over \$5 billion in losses to the insurance industry. For instance, in California alone, which is considered the prime market for wildfire insurance, FireLine has identified some 2 million properties to be at high to extreme wildfire risk. Analysis has shown that in California over 90% of wildfire losses have been historically associated with properties at high or extreme risk. It is estimated that conservatively the economic value of FireLine is \$50-100 million, and the Landsat contribution to this value is about 25% - \$25-50 million. See also: <http://verisk.com/underwriting/property/wildfire-risk.html>

Result: Landsat value of \$25-50 million.

Conclusion

These fifteen Landsat applications alone produce savings of \$280 million to over \$366 million per year for Federal and State governments, NGOs, and the private sector. It can be expected that these savings, and others not addressed here, will continue to accelerate.

¹ This paper was approved by the NGAC Landsat Advisory Group on xxxx xx, 2014 and adopted by the NGAC as a whole on xxxx xx, 2014. The members of the Landsat Advisory Group are: Kass Green, Kass Green & Associates (Co-Chair); Roger Mitchell, MDA Information Systems, Inc. (LAG Co-Chair, NGAC Member)' Peter Becker, esri; John Copple, Sanborn Mapping Company; Joanne Gabrynowicz, Univ. of Mississippi (NGAC Member); Jack Hild, Digital Globe (NGAC Member); Rebecca Moore, Google; Michele Motsko, NGA (NGAC Member); Tony Spicci, State of Missouri (NGAC Member); Cory Springer, Ball Aerospace & Technologies Corp.; Julie Sweetkind-Singer, Stanford (NGAC Member); Darrel Williams, Global Science & Technology, Inc.; Tony Willardson, Western States Water Council.

² Marburger, J. 2005. Landsat Data Continuity Strategy Adjustment. Executive Office of the President. Office of Science and Technology Policy. December 23, 2005.

³ NGAC Landsat Advisory Group Update. April, 2012. <http://www.fgdc.gov/ngac/meetings/april-2012/landsat-subcommittee-report-green-ngac-apr-2012.pdf>. Accessed September 22, 2014.

⁴ National Geospatial Advisory Committee – Landsat Advisory Group, The Value Proposition for Ten Landsat Applications. September 18, 2012. <https://www.fgdc.gov/ngac/meetings/september-2012/ngac-landsat-economic-value-paper-FINAL.pdf>. Accessed September 22, 2014.

⁵ FGDC Guidance to NGAC, March, 2014

⁶ National Research Council. 2013. Landsat and Beyond: Sustaining and Enhancing the Nation's Land Imaging Program. Committee on Implementation of a Sustained Land Imaging Program; Space Studies Board: Division on Engineering and Physical Sciences. 73pp.

⁷ OSTP – Future of Land Imaging Interagency Working Group. 2007. A Plan for a U.S. National Land Imaging Program.

⁸ V. Adams and E. Pindilli. 2012. Improving the Way Government Does Business. The Value of Landsat Moderate Resolution Imagery in Improving Decision-Making. http://calval.cr.usgs.gov/wordpress/wp-content/uploads/Pindilli_JACIE_Presentation_final.pdf

⁹ Miller, H.M., L. Richardson, S.T. Koontz, J. Loomis, and L. Koontz. 2013. Users, Uses, and Value of Landsat Satellite Imagery – Results for the 2012 Survey of Users. Open-File Report 2013-1269. US Department of the Interior. USGS. 51pp.

¹⁰ OSTP. 2014. National Plan for Civil Earth Observations. Executive Office of the President.

¹¹ Schutzberg, Adena. Directions Magazine. October 23, 2010. Using LANDSAT Data to Detect, Rather than Confirm, Mass Human Rights Violations. <http://apb.directionsmag.com/entry/using-landsat-data-to-detect-rather-than-confirm-mass-human-rights-vio/359550>. Accessed September 22, 2014.

¹² Butler, Declan. Nature, March 11, 2008. Satellite can spot razed villages in Darfur. <http://www.nature.com/news/2008/080311/full/news.2008.663.html>. Accessed September 22, 2014.

¹³ Satellite Sentinel Project, July 20, 2012. Match Battalion: Confirmation of the Razing of Bartumbu, South Kordofan, Sudan (Report). <http://www.satsentinel.org/report/match-battalion-confirmation-razing-um-bartumbu-village-south-kordofan-sudan-report>. Accessed September 22, 2014.

¹⁴ Marx, Andrew J. August 2013. "A new approach to detecting mass human rights violations using satellite imagery." <http://www.ushmm.org/m/pdfs/20130912-marx-cpgfellow-satellite-imagery-report.pdf>. Accessed September 23, 2014.

¹⁵ The Webby Awards, Best Use of Video or Moving Image. 2012. "Timelapse powered by Google." <http://www.webbyawards.com/winners/2014/web/website-features-and-design/best-use-of-video-or-moving-image/timelapse>. Accessed September 23, 2014.

¹⁶ National Geospatial-Intelligence Agency. (No date given). "NGA Global Shoreline Data white paper." Available from a link at <http://shoreline.noaa.gov/data/datasheets/pgs.html>. Accessed September 23, 2014.

Tab H – Water Data Exchange (WaDE) Interim Progress Report

INTERIM PROGRESS REPORT

Awardee Name: Western Governors' Association

Award Number: OE0000422

Sub-Award Number: 30-230-70

Sub-Recipient: Western States Water Council

Project Name: Interconnection Transmission Planning and Analysis

Project Director: Tony Willardson

Date of Report: Sept. 30, 2014

Period Covered (by the report): 01/01/14 to 9/30/14

Comparison of Accomplishments to Goals and Objectives: See attached.

Cost Status: Modified budget: \$ 353,445.00

Total sub-award funds received: \$ 311,541.74

Remaining unobligated balance: \$ 41,903.26

Schedule Status: See attached.

Changes in Approach: None.

Actual/Anticipated Problems or Delays: No anticipated delays from adjusted timeline.

Any Absence or Changes of Key Personnel: Sara Larsen has been on a modified schedule of 30 hours/week schedule through September of 2014. She is resuming a full-time schedule October 2014.

Description of Product: Please see the enclosed for more information about program progress, schedules and deliverables. Also, detailed information can be found on the WSWC website (<http://www.westernstateswater.org/wade>).

WSWC/WADE PROGRESS REPORT

January 1, 2014 – June 30, 2014

The following answers correspond to the specific tasks for the “Resource Assessment and Interconnection-Level Transmission Analysis and Planning” grant project (the Project) as set forth in the WSWC Scope of Work, which is found in Exhibit A of WGA Contract Number 30-230-70.

Task 1(a): The Western States Water Council (WSWC) has continued to assist Sandia National Laboratory to create a mapping application out of the state water data that Sandia acquired (pertinent to subtasks 3.1 and 4.1 of the national laboratories’ scopes of work).

After initial results were compiled and an extensive review period in 2013, WSWC members expressed concern over accuracy and long-term maintenance of the Sandia water availability metric results. Members were primarily concerned that Sandia data would be manipulated and misconstrued as state-generated water data. Moreover, changes could be added to Sandia data in conflict with the information to be shared by member states using the Water Data Exchange (WaDE) portal (see WaDE section below). As a result, at the WSWC Fall Council Meeting in Deadwood, South Dakota, members decided that the WSWC would not host the Sandia datasets or final mapping application on WSWC servers, but would instead provide support and training, assisting its personnel with uploading, customizing and hosting their own data.

Sandia has agreed to provide a link back to the WSWC’s WaDE central portal. A link to the Sandia mapping application and study will also be provided on the WSWC’s website. Sandia’s recently released mapping application can be found at <https://snlwm.maps.arcgis.com/home/>. The peer-reviewed journal Environmental Research Letters has also published the Sandia study findings in an article titled, “Mapping Water Availability, Projected Use and Cost in the Western United States.” (http://iopscience.iop.org/1748-9326/9/6/064009/pdf/1748-9326_9_6_064009.pdf). The WSWC is also working to assist Oklahoma to resolve concerns related to the mapping of their data.

Task 1(a) cont. – Water Data Exchange (WaDE) Project – In order to provide support for the Sandia effort and similar studies in the future, the WSWC has initiated a project to work with its member states to establish a framework that will allow for real-time access to state water allocation, availability, use, and planning data through a common portal. The project is referred to as the Water Data Exchange or WaDE Project.

As a preliminary step, the WSWC has conducted an inventory of the states’ current water planning program methodologies and data practices. All member states were asked to fill out a survey describing their programs and approach to hosting and managing water data. All eighteen member states submitted a survey response back to WSWC and the results were compiled in the WSWC’s State Capabilities Assessment (SCA) Report. The report underwent further review with the original survey respondents to increase accuracy and timeliness of the report. A short online presentation that highlights the report’s findings and recommendations, the final report itself, and links to companion maps that show related data about the states can be found on the WSWC’s SCA webpage, here:

<http://www.westernstateswater.org/state-capabilities-assessment-workgroup/>. This report is a significant turning point in the WaDE project, as it relays what types of information will be found within the WaDE portal, and other information that will be incorporated in the future. It also discusses current limitations to WaDE and the challenges to presenting a more uniform picture of water availability and use in the West.

The outreach phase of the WaDE project has been largely concluded, although meetings with some state agencies, especially pilot states, regarding their participation in WaDE are expected to continue in 2014. Fifteen of the eighteen member states have been personally visited and briefed on the project. The remaining states that could benefit from a WaDE briefing meeting include North and South Dakota, and possibly Alaska. An additional visit with water agency staff in Montana is planned that will coincide with the WSWC 2014 Summer Council Meetings in Helena, Montana on July 15-18th. Outreach visits have been essential for generating support for the project and for the refinement of the schema (format) of the WaDE targeted data. Revisions to the schema have been made to more accurately and easily accommodate the states' data products. These revisions are now available under Version 0.2 (v.0.2) via the WaDE website, under "Draft Items." (<http://www.westernstateswater.org/wade/draft-items/>)

Related to the outreach effort, WSWC received an invitation to speak about the WaDE project from the Universities Council on Water Resources (UCOWR)/National Institutes for Water Resources (NIWR) last year. The presentation included the submission of a peer-reviewed journal article to the UCOWR Journal of Contemporary Water Research and Education (Issue 153). (<http://www.ucowr.org/journal-of-contemporary-water-research-and-education/issue-153-water-data>) Other outreach efforts including a joint presentation between TCEQ and WSWC at the 2014 National Environmental Information Exchange Network (NEIEN) (See WaDE-EN Grant section below). This visit gave the WSWC a greater understanding of how the NEIEN functions and how it proposes to focus on publishing and sharing of common environmental datasets. WSWC also gave an informative talk at the National Water Quality Monitoring (NWQM) Conference and the American Water Resources Association (AWRA) GIS Specialty Conference. These visits have resulted in greater visibility and exposure for the WaDE program and valuable information regarding other data sharing and publishing initiatives.

WaDE project infrastructure components have been under continuous development during the most recent reporting period. In the fall of 2013, a discussion among state partners and WaDE developers ensued concerning the housing of methodology data. One of the recommendations of the State Capabilities Assessment Report and workgroup is the creation of a central repository for common terms, definitions and methodologies used by the states. Originally, the states intended to host their own methodology information which would be accessed with the related data, but this approach would not allow for an easy comparison of methodologies between states' planning programs. It was decided that a good solution would be to develop tables and functions within the WaDE database that would house and access the information at the state node, but also allow the WSWC to access the same information and incorporate it into a "Central Methodology Catalog," similar in nature to the "Central Data Catalog" concept.

Figure 1 shows the existing infrastructure format for the WSWC central database and also the format for pilot state nodes. The existing web services that extract data and return them to the client or the database are shown in green. The addition of a Central Methodology Catalog and related web service code are shown in red. All volunteer pilot states and EN Grant partners will be using SQL Server databases for their node implementation, with the exception of Oklahoma, which uses Oracle. In addition, most of these states also use Microsoft's IIS web server platform, not a Linux-Apache webserver that was anticipated by WaDE developers. The web services programming has been updated to reflect this change.

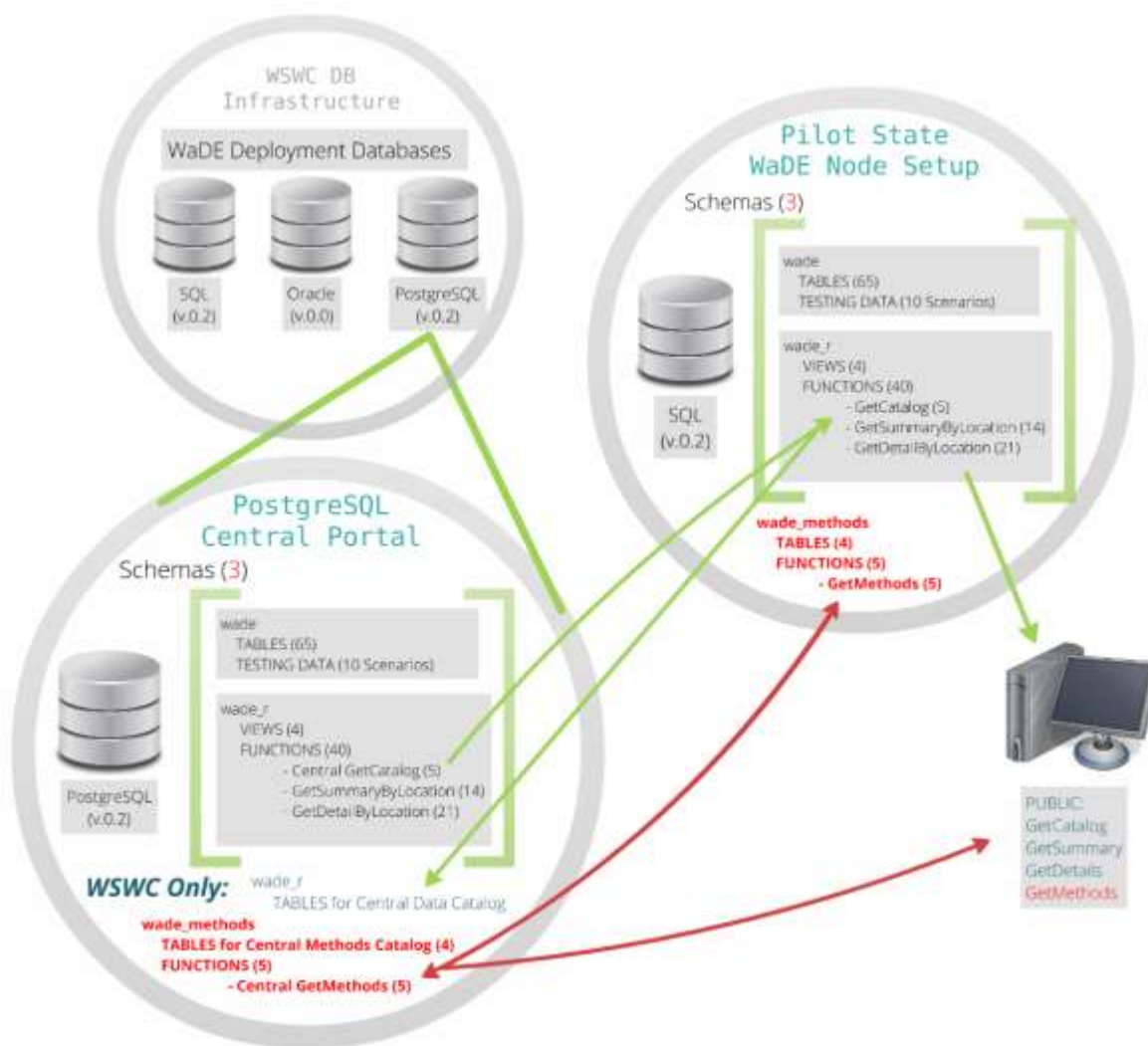


Figure 1. Diagram of WSWC Server and State Node Infrastructure

Public access to methodology information for all states would be accessed from the WSWC's Central Portal, similar to the Central Catalog. This adjustment in approach has required some additional development not originally planned in the WaDE project timeline. The WaDE database tables and programmed functions were also altered to fully support all GIS related features (points, lines and polygons). Prior to this, WaDE could only support point coordinates. While this approach worked for

points of diversion, it could not accommodate summary-related data presented in watersheds, and some places of use (often polygonal) could not be accessed. Infrastructure and schema changes have been reviewed by the US Geological Survey's Center for Integrated Data Analytics (CIDA) for robustness and workability with the US Water Census effort. CIDA has proposed to offer assistance to the WSWC with further WaDE infrastructure development. This might involve an MOU with CIDA for assistance with Oracle database development.

Utah and Wyoming have agreed to proceed with the data mapping effort with minimal financial assistance, with the exception of the purchase of server capacity with Utah's central IT department and a SQL Server database license. These first states have begun the process of deploying the WaDE database and migrating their data. Other states that have expressed an interest in deployment without financial assistance will be approached as these initial efforts proceed. The documentation to begin the database deployment within state IT environments has been written and made available as a password-protected WSWC webpage. States that interested in reviewing the database may inquire for access to the database/code downloads and online documentation.

During the outreach phase of the WaDE effort, a majority of state agencies expressed their support for the WaDE project but were also concerned about available resources. To address this concern, and leverage existing DOE support, the WSWC helped six states apply for and receive a grant from the National Environmental Information Exchange Network (NEIEN) program, commonly referred to as the Exchange Network (EN).

Six partner states are the recipients of the grant – Texas, Oklahoma, Idaho, Oregon, Washington and Utah. The partners agreed that the Texas Commission on Environmental Quality (TCEQ) would represent them as the grant partner lead state. EN funding will be disbursed to TCEQ, which will in turn reimburse the states for WaDE-related work as it is completed. The legal agreements needed between TCEQ and the states are currently under review; but once in place, the grant partners will be able to work on WaDE-related tasks and be reimbursed for their time and costs. EN WaDE Grant partners have formed a Steering Committee and finalized a Steering Committee Charter. This group is tasked with making decisions regarding funding and overseeing the progress of the partner states with fulfilling grant obligations. The WSWC will continue to work with both voluntary pilot states and EN grant partners to facilitate the WaDE “plug in” process. More information about the progress of the EN partners can be found on their webpage, hosted by the WSWC (<http://www.westernstateswater.org/wade/fy2013-en-grant/>).

The funding of the WaDE data schema as a primary data flow within the NEIEN is likely to establish it as a fully-fledged and rigorously documented web service within EPA's existing framework. With the news that the WaDE grant application has been funded, the EN has an interest in considering funding of WaDE-related efforts in future years, and may encourage remaining states to plug into the project. WSWC will assist states that have additional funding needs and wish to participate.

Task 1(b): Completed. The water demand and availability models discussed in Tasks 3 and 4 of the National Laboratories' Scopes of Work accomplished these objectives. The WSWC has continued to

assist Sandia in the development of these models and case studies. As indicated above, WSWC developed an application where state agency staff members could review the data, methods and metrics generated by the Sandia research team in 2012 and 2013, and then provide them with feedback and requests for adjustments to their estimates, the methodology used, or the parameters used to make assumptions in Sandia's models. The team of state agency representatives WSWC put together at the onset of 2012 was also reassembled in 2013 to review a particular metric for Argonne National Lab related to impacts of energy development on water for the environment. WSWC, Sandia National Lab, Argonne National Lab and the environmental metric team developed a "straw man" metric for these issues and anticipate publication of their results in the form of a mapping application, called "Ecorisk," in early 2014 as a subset of the data published by Sandia.

Task 1(c): Completed (but continuing). In late 2011, Sandia completed an analysis of the potential impact of drought on electric generation availability for input into long term transmission modeling and planning efforts by the WECC and Electric Reliability Council of Texas (ERCOT). Sandia performed the study with support from Argonne National Laboratory, Pacific Northwest National Laboratory, and the National Renewable Energy Laboratory. The study responds to a request that the WGA developed with input from the WSWC and in conjunction with the transmission modeling teams and participating interconnections. (The final report can be found here: <http://energy.sandia.gov/wp/wp-content/gallery/uploads/Drought-Analysis-Report-Final.pdf>). Only recently, Western Resources Advocates has approached the Western Electric Coordinating Council and the Western States Water Council about the possibility of working together under the Scenario Planning Steering Group on a climate/water availability/drought scenario as part of a study proposal. The Council is exploring the opportunity.

Task 1(d): See response to Task 3 below.

Task 2: To the extent possible, Sandia has worked to incorporate legal and institutional water availability into their metrics, including refining the metrics related to the availability of water in the future, and identifying what state-level water rights regulations are in place for surface water and groundwater, the extent to which water rights have been adjudicated, and what additional controls may apply. The WSWC has completed a draft analysis of legal and administrative issues associated with new permits or transfers of water for energy development in Texas and the states of the Western Interconnection. A final analysis/report, following review, is expected to be completed by mid-to late 2014.

Task 3: Throughout the course of the project, WSWC has worked to carry out the policy-related tasks set forth in Task 1(d) and Task 3, and review the status of Sandia's water data gathering effort discussed in the Task 1(a) response above. Some specific tasks are described below:

Task 3(a&b): Ongoing.

Task 3(c): Completed. WSWC hosted a Water/Energy Nexus Workshop on April 2nd, 2013 in Denver, Colorado. The meeting convened water managers, electricity generators and regulators and served as an information exchange, and as a means of evaluating how electricity and water providers can better coordinate and integrate their planning activities. A summary of the meeting and the initial discussion

results and recommendations has been published and can be found on the WSWC website (<http://www.westernstateswater.org/wswc-wga-waterenergy-symposium-april-2-2013-denver-colorado/>).

Task 4(a): WSWC Executive Director Tony Willardson serves as an alternate to WECC's State Provincial Steering Committee (SPSC) and as a member of the Environmental Data Task Force (EDTF) and the WSWC has participated in various meetings and webinars during the reporting period, including meetings of the Scenario Planning Steering Group (SPSG). The WSWC will continue to coordinate with the SPSC, SPSG and EDTF throughout the duration of the Project.

Task 4(b): The WSWC's Water Resources and Energy Subcommittee, under its Water Resources Committee, will continue to assist the WGA, the WECC and the national laboratories as discussed above. The Subcommittee consists of appointed WSWC members and water managers from Arizona, California, Idaho, North Dakota, Texas, and Wyoming. Separately, the WSWC adopted Position No. 355 on June 26th, 2013 – in support of water research and development programs at DOE national laboratories. The Subcommittee's continued support of the WaDE project ensures that if the Sandia analyses are repeated or if similar studies are being conducted that are looking to incorporate states' water data, these will be supported in a cost effective and efficient manner.

Interim Status Report – July 1st, 2014 – September 30th, 2014

Regarding NEIEN Grant Partners – A significant milestone for the WaDE project for this reporting period is the execution of a legal contract between WSWC and TCEQ that will allow Texas to become a pass-through agency for grant funding. With the signing of the grant agreement documents, WSWC will be able to continue its coordination of the WaDE project for approximately two years. With this legal and financial framework now developed with WSWC, other state partners on the NEIEN grant can utilize the documentation as a template for setting up the same pass-through relationship and begin the work to get plugged into the WaDE central portal. Grant partners that are interested in beginning WaDE deployment immediately following the contractual phase include Oregon, Idaho, and Oklahoma, with Texas and Washington following later next year.

Other State Deployments in Progress - Utah and Wyoming continue to work on the deployment steps as time allows and WSWC continues to assist with those deployments. As expected, the step of migrating existing data from native databases to the WaDE database is the most time-intensive task. A demo of Wyoming's data was anticipated for the fall council meeting, but is delayed due to their central IT departments' need to relocate physical server racks from one data center to another. Other states now have access to the deployment documentation and are beginning to plan their deployment timelines.

WaDE 'Cloud' Deployment Solution - Several states have expressed concern about the ability of their local network bandwidth to support a data-intensive application, which WaDE could eventually become. As one state partner suggested, "We share our network with other agencies and don't want to become the network hog." Other states have cited the difficulty they have with implementing applications in-

house due to hurdles with internal IT resource allocation (i.e., centralized IT dept. logistics). Using a cloud-hosted WaDE application allows these concerns to be addressed and offers a few additional advantages, such as a more streamlined deployment process, additional computing power, speed, and scalability during peak data request times, a possible reduction in long-term O&M hosting costs (especially if more than one or two states take this approach), caching and reduced outages, as well as an additional layer of security between the WaDE application and internal agency systems. All data published by the WaDE portal is intended for public consumption, so some of the usual security concerns with cloud applications are not applicable. A proof of concept (POC) implementation of the WaDE application is currently underway, provided by Redhat/Linux in Texas, via their OpenShift cloud solution. WSWC is also exploring the possibility of hosting instances of the WaDE application at the San Diego Supercomputer Center in California. Please contact Sara Larsen if this would be a preferred means of getting plugged into the WaDE central portal for your state agency.

WaDE Costs Worksheet - In addition to the current round of NEIEN funding, WSWC will be submitting a grant application for FY2015. If awarded, the grant funds will be to assist any remaining states that have costs in excess of what they are willing to contribute to the project. WGA has offered some assistance with the state deployments as well. WSWC issued a WaDE costs worksheet in August to determine how best to assist the remaining states that have not yet been directly involved in the WaDE project. Several states have either responded or returned their costs worksheets to WSWC at this time, but several are still outstanding.

WSWC Staff are also exploring new ways to assist with ongoing issues related to Clean Water Act Rulemaking/Guidance and the US Forest Service Groundwater Directive. A web map of state comments could make the WSWC's platform for coordinating statewide efforts and responses much more visual and compelling. As an example, comments related to the US Forest Service Groundwater Directive can be viewed in a mapped format [here](http://www.westernstateswater.org/wswc-and-comments-on-the-proposed-usfs-directive-on-ground-water-resource-management/) (<http://www.westernstateswater.org/wswc-and-comments-on-the-proposed-usfs-directive-on-ground-water-resource-management/>).

Tab I – WSWC Water Management Symposium Draft Agenda

Draft Agenda

WSWC Water Management Symposium Western Water Resources Infrastructure Development and Operations: Streamlining Regulatory Requirements

Location and Date TBD

Day One

- 9:00 am Registration/Continental Breakfast
- 10:00 am **Welcome and Introductions**
Chairman, Western States Water Council
- 10:30 am **Western Water Infrastructure Needs**

State and Federal estimates and projections
- 12:00 pm **Lunch** (Speaker?)
- 1:00 pm **Infrastructure Project & Regulatory Requirements**

Case Studies -

Prairie Waters Project Comparison
Other examples
- 5:00 pm Adjourn

Day Two

- 7:30 am Continental Breakfast
- 8:00 am **President Obama's Infrastructure Permitting Executive Order**
- 8:30 am **Regulatory Streamlining Needs & Opportunities**

Federal, State and Local authorities and private sector representatives

National Environmental Policy Act
- 10:00 am Break

Clean Water Act
- noon **Lunch** (Speaker?)

1:30 pm	Endangered Species Act
3:00 pm	Break
3:30 pm	Hydropower FERC/Federal Power Act
5:00 pm	Adjourn

Day Three

7:30 am	Continental Breakfast
8:00 am	Opening Plenary Speaker
8:30 am	BLM Rights-of-Way/USFS Special Use Permits
	Break
10:30 am	Small Group Discussions/Next Steps
11:30 am	Symposium Summary
noon	Adjourn

Additional Topics?

Davis-Bacon/Labor Laws

Other Non-Water Related Requirements?
Buy America
Green Set-asides

State Water Rights & Other Regulatory Requirements

Tab J – TMDL Update

Potential CWA 303(d) Vision Talking Points

State CWA 303(d) Staff to State Agency Management

Development of the Vision was driven by the desire of both EPA and the states for *greater efficiency* and more success in *achieving water quality*. It encourages states to:

- Prioritize waters or watersheds for restoration and protection
- Assess the quality of all priority waters or watersheds
- Identify protection planning priorities and approaches
- Use alternative approaches to achieve water quality, in addition to TMDLs
- Engage stakeholders and the public in water quality protection and restoration
- Foster integration across CWA programs, other programs, and other agencies

What is there to gain with the new CWA 303(d) program Vision?

- Greater efficiency
- More opportunity for environmental results
- A reorienting of the program toward state priorities
- New EPA program measures that count more than just the number of TMDLs developed

A Better Way without Changing CWA

- Until now, the national TMDL Program was driven by the pace of TMDL development
- The pace metric incentivized developing TMDLs for less-complicated problems
- But the simpler problems are rarer now and often not the most important to the public
- The Vision realigns CWA 303(d) program incentives to address a state's water quality priorities, all without altering state and EPA responsibilities or authorities under the CWA

Providing Flexibility

- The Vision puts states in the driver seat – to make commitments and take actions
- TMDLs are still important and required, but the new EPA program measures also give credit for trying alternative restoration efforts first; if standards are then met, a TMDL is not needed
- The new EPA measures also give credit for efforts to protect healthy but threatened waters
- The Vision encourages an iterative, adaptive approach to solving water quality problems

Expanding the Planning Horizon

- The Vision encourages states to look beyond the traditional two-year time frame – to consider all means of achieving water quality, and plan for the time period needed to do those tasks

Improving Collaboration

- The Vision can create a better bridge from the monitoring and standards programs to the permits and nonpoint source programs
- The prioritization process can improve partnerships with stakeholders, others within the agency, and other agencies, ideally creating unified goals

In a time when everyone is asked to do more with less, we may only be able to do less with less, but what we do is going to be the most important. The flexibility to set priorities, choose planning and implementation approaches, and operate with a longer time horizon in mind allows for better management of state resources. It is an offer we cannot refuse.

***This information is DRAFT and subject to change as final decisions on the Measure Computational Guidance are complete. ***

WQ-27: Extent of priority areas identified by each State that are addressed by EPA-approved TMDLs or alternative restoration approaches for impaired waters that will achieve water quality standards. These areas may also include protection approaches for unimpaired waters to maintain water quality standards. (cumulative) *[language from current working draft of measure guidance]*

- State Role
 - Business as usual – continue to submit TMDLs/alternatives for approval as in the past
 - One change: States will need to share GIS data for scheduled/completed plans with EPA
 - What can States do now
 - Ensure State has geospatial layer of 303(d) and 305(b) assessment units
 - Ensure assessment unit IDs in state geospatial layer match the assessment database
 - Inform EPA Region if State has limited or no GIS support
 - Start thinking about how to define priority areas and consult EPA Region
- EPA Role
 - EPA (HQ with contractor support) will use automated procedures to develop a correspondence between state assessment units and NHDPlus catchments
 - Using the catchments as a unit of measure, EPA (HQ with contractor support) will use automated procedures to then calculate the measures
 - State provided geospatial data would be used for display purposes and the catchment correspondence data would be used for national analyses
 - EPA Regions work with your states to define priority areas

Information Needed and Deadlines:

October 31, 2014: Progress on Prioritization Frameworks (via email or verbal) – 106 Deadline

December 31, 2014: Draft Prioritization Framework – 106 Deadline

February 27, 2015: Final Prioritization Framework – 106 Deadline

July – September, 2015 (expected timeframe): FY16 WQ-27 Target Discussions

- *Universe*: Complete group of priorities the state expects to address with plans (TMDLs or alternatives) between now and 2022. State will provide geospatial information, EPA (contractor) will correspond to catchments and determine area.
- *Baseline*: Area of catchments in the *universe* that already has plans complete. EPA (contractor) will determine this area from ATTAINS data.
- *Target*: Catchment area/percent of *universe* the state will be addressing with plans in a given FY. The state will provide EPA with the AUs and associated geospatial data for waters to be addressed in the next year (similar to the past, only now we need the geospatial information); EPA (contractor) will correspond this to catchments to determine the area to be covered and the percent of *universe*.

DeAngelo, Gregory

From: Feingold, Amy <Feingold.Amy@epa.gov>
Sent: Friday, May 23, 2014 3:43 PM
To: Johnson, Chris L; kminton@adem.state.al.us; DeAngelo, Gregory; Siemon, Debbie; Booth, Elizabeth; Amy Siewert; Greg Jackson; Cantrell, Wade; Stecker, Kathy; andy.painter@ncdenr.gov; Sherry Wang
Cc: Campbell-Dunbar, Shawneille; Melville, Bill; Singh-White, Alya; Howell, Amanda; DiMaio, Jennifer
Subject: Proposed Minimum Elements for States Prioritization Framework Document
Attachments: eli_-_menu_of_approaches.pdf; Iowa TMDL Vision Strategy - Prioritization.docx
Importance: High
Categories: 3

All-

As discussed on our call on May 21, this email contains the Region's proposed Minimum Elements for a Prioritization Framework Document. Implementing the new program Vision relies on collaboration and partnership, so I invite you all to provide any comments or questions you have on the information below. Please keep in mind that the DRAFT 106 Workplan requires you to have a draft Framework on or by December 31, 2014 and a final by February 27, 2015; we do not expect states to know all the necessary information to complete a Framework Document at this time. The proposed dates for Task 1 in the DRAFT 106 Workplan allow ample time for the state 303(d)/TMDL programs to work within the state agency to determine what tools and approach will be used for prioritization, collaborate with the Region to get an appropriate Framework in place and have priorities determined for inclusion in the 2016 Integrated Report.

The Elements below and attachments are provided to assist Region 4 states in preparing a Prioritization Framework Document in accordance with the Long-term 303(d)/TMDL Vision and Task 1 of the FY15 DRAFT 303(d)/TMDL 106 Workplan. The intent of Task 1 is to help get states in the right position to implement the Vision and report on the new program metric (WQ-27) in FY16. *All states will be expected to identify priority designations in their 2016 Integrated Report and provide a target/report progress for the metric in FY16.* The Priority Framework Document should describe how the state is going to prioritize, but does not have to list what the final priorities are going to be. The endpoint of the metric is, at 2022, to have the plan (TMDL, alternative, protection) final and approved for all priority designations. Restoration takes time; the priorities do not have to be restored and delisted by 2022.

FY15 DRAFT 303(d)/TMDL 106 Workplan Task 1 (minor edits based on all States discussion):

The State will provide to EPA a Priority Framework Document which clearly addresses how the State will implement the new CWA 303(d) Vision and work toward associated goals and metric. This document should include a description of the tool(s) and/or methods used for prioritization, how it differs from past prioritization efforts, and any additional information that facilitates transparency with the public.

The State commits to a collaborative process with the Region and other CWA programs in developing the Priority Framework. The State's prioritization approach should take into consideration EPA Regional and National priorities such as, but not limited to, controlling nutrient pollution, source water protection, and focus on effluent dominated waterbodies.

Proposed Minimum Elements of a Prioritization Framework Document:

- **Mechanism for prioritization** (e.g., Recovery Potential Screening Tool, Nutrient Framework (Stoner) Memo, cost/benefit analysis, etc. – See attached “ELI Menu of Approaches”)
- **Factors considered** in prioritization (such as indicators used in Recovery Potential Screening, pollutants/impairments, sources, etc.)
- **Consideration of EPA National and Regional Priorities.** The document should explain how the state collaborates with the Region on prioritization and how EPA’s priorities fit into the State’s Framework. This does not mean the state must choose EPA priorities as their designations, rather the state should recognize the Agency’s priorities as an important factor in this process.
- **Plan for where the state will begin work;** this may be very general, based on Rotating Basin Scheduling, monitoring or permitting cycle, or other appropriate process.
- **Statement on flexibility** and state’s approach to changing priorities (See example in Iowa’s document, page 6).
- **Description of shifts or changes** from the past prioritization scheme compared to what the state will be doing under the new Vision. Be clear about what’s different or new; highlighting what’s the same can be just as helpful to the public and other partners.
- **Public engagement approach.** How will the state involve the public in the decision process? How will the state share the final designated priorities with stakeholders? (Note: At a minimum, the public engagement on the state’s priorities should be the amount involved for the Integrated Report—however, more and earlier involvement is better.)

Other Elements to Consider:

-When and how the state will review and update the prioritization scheme. Assessment is a critical piece of the new Vision; states should consider how they will adapt to new information on the status of waters, interest and engagement from stakeholders and partners, and the effectiveness of their chosen scheme.

-Choice of priority designations. Once the state has completed the Framework Document and gone through the process to determine their priorities, it would be appropriate to include that information as an appendix/update to the document.

-Availability of Framework Documents to the public. Although these documents are not subject to public notice requirements or EPA approval, states should consider making documents available to the public, on their websites, or through other means to facilitate transparency and public engagement.

The Region recognizes that how states address these elements, both in their documents and in practice, will be different. The intent of including these minimum elements is ensure states have a document that your program can provide to other state programs, partner Agencies and public stakeholders that explains and defends your choices to provide limited state time and resources to one area versus another.

Please let me know your comments and questions. We invite the opportunity to have individual or all-states calls to discuss these Frameworks and any other part of the Vision implementation process.

Thanks,
Amy

Amy Feingold
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Tab K – “*Columbia Riverkeeper v. U.S. Army Corps of Engineers*” Settlement

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLUMBIA RIVERKEEPER,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS, ET AL.,

Defendants.

No. 2:13-md-2494-LRS

This document applies to:
2:13-cv-282-LRS; 2:13-cv-00418;
2:14-cv-00030-LRS

**[PROPOSED] ORDER
OF DISMISSAL WITHOUT
PREJUDICE PURSUANT TO
FED. R. CIV. P. 41**

1 The Court, having considered the Joint Motion for Dismissal Without
2 Prejudice ("Joint Motion"), and for good cause shown, hereby GRANTS the Joint
3 Motion.

4 Accordingly, IT IS HEREBY ORDERED that:

5
6 (1) Subject to and in accordance with the terms and conditions of the
7 Settlement Agreement attached hereto, these centralized cases (Nos. 2:13-md-
8 02494-LRS, 2:13-cv-00282-LRS, 2:13-cv-00418-LRS and 2:13-cv-00030-LRS)
9 are dismissed without prejudice; and

10 (2) Subject to and in accordance with paragraph 8.B of the above-referenced
11 Settlement Agreement, this Court shall retain jurisdiction over these centralized
12 cases for the purpose of resolving those disputes for which Plaintiff or Defendants
13 may petition the Court. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.
14 375 (1994).
15

16
17 Dated this ____ day of _____, 2014.
18

19
20 _____
21 United States District Judge
22
23
24

CERTIFICATE OF SERVICE

I certify that on August 4, 2014, I caused to be filed electronically the foregoing [PROPOSED] ORDER OF DISMISSAL WITHOUT PREJUDICE PURSUANT TO FED. R. CIV. P. 41 with the Clerk of Court using the Court's CM/ECF system, which sends a Notice of Electronic Filing to counsel of record.

/s/ Mark A. Nitczynski
Mark A. Nitczynski

SETTLEMENT AGREEMENT

This Settlement Agreement (“Settlement Agreement” or “Agreement”) is made by and between Columbia Riverkeeper (hereafter, “Plaintiff”) and the U.S. Army Corps of Engineers and Lieutenant General Thomas P. Bostick, in his official capacity as the U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers (hereafter, collectively, “Corps” or “Defendants”). In this Agreement, Plaintiff and Defendants may collectively be referred to as “Parties” and may be referred to individually as a “Party.”

WHEREAS, on July 31, 2013, Plaintiff filed in separate federal district courts three related Complaints, one each in the District of Oregon (No. 3:13-cv-01310-ST), the Western District of Washington (No. 3:13-cv-05640-RBL) and the Eastern District of Washington (No. 2:13-cv-282-LRS);

WHEREAS, the Complaints assert that the Corps discharges pollutants from eight (8) dams (collectively, “Dams”) that the Corps owns and operates in Washington and Oregon, allegedly in violation of section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a)¹;

¹ In this Agreement, a single one of the Dams may be referred to individually as “Dam.”

WHEREAS, the Complaint filed in the District of Oregon addressed alleged discharges of pollutants from the portions of the Bonneville, John Day and McNary dams located in the State of Oregon;

WHEREAS, the Complaint filed in the Western District of Washington addressed alleged discharges of pollutants from the portion of the Bonneville Dam located in the State of Washington;

WHEREAS, the Complaint filed in the Eastern District of Washington addressed alleged discharges of pollutants from The Dalles, Ice Harbor, Lower Monumental, Little Goose and Lower Granite dams, and also addressed alleged discharges of pollutants from the portions of the John Day and McNary dams located in the State of Washington;

WHEREAS, the Complaints seek similar relief regarding the Dams, including various injunctive relief and an award of Plaintiff's litigation costs as authorized by section 505(d) of the CWA, 33 U.S.C. § 1365(d);

WHEREAS, on September 12, 2013, Plaintiff filed its Motion to Transfer and Consolidate under 28 U.S.C. § 1407 ("Motion to Transfer") before the Judicial Panel on Multidistrict Litigation ("Panel");

WHEREAS, on December 13, 2013, the Panel issued a Transfer Order that centralized the three cases in the United States District Court for the Eastern District of Washington;

WHEREAS, the Eastern District of Washington has assigned one case number for the three centralized cases (No. 2:13-md-02494-LRS) and also has assigned separate case numbers for each of the three individual cases (Nos. 2:13-cv-00282-LRS, 2:13-cv-00418-LRS and 2:13-cv-00030-LRS);

WHEREAS, this Agreement resolves all of the related cases, collectively and individually, centralized in the Eastern District of Washington (Nos. 2:13-md-02494-LRS, 2:13-cv-00282-LRS, 2:13-cv-00418-LRS and 2:13-cv-00030-LRS);

WHEREAS, Defendants have in place Spill Prevention Control and Countermeasure (“SPCC”) plans at each of the Dams, which plans address oil spill prevention, preparedness, and response in order to prevent or minimize oil discharges to navigable waters and adjoining shorelines due to accidental oil spills, and Defendants conduct annual drills with other agencies to ensure that they have appropriate capability to respond to such spills;

WHEREAS, Defendants currently use Environmentally Acceptable Lubricants on portions of The Dalles and John Day dams;

WHEREAS, Defendants received a National Pollutant Discharge Elimination System (“NPDES”) permit, Number 102768, from the Oregon Department of Environmental Quality (“Oregon DEQ”) for discharges from the oil-water separator at Bonneville Dam, Powerhouse 1, which discharges are not at issue in any of the Complaints;

WHEREAS, Defendants have sought renewal of NPDES permit Number 102768 and the Corps continues to operate under the terms of that permit;

WHEREAS, the Corps submitted to the United States Environmental Protection Agency ("EPA") in 2008 an application for an NPDES permit for discharges from The Dalles Dam, which application remains pending;

WHEREAS, Plaintiff and Defendants have agreed to this Agreement without any admission of fact or law;

WHEREAS, Plaintiff and Defendants consider this Agreement to be a fair, adequate and reasonable resolution of the claims that were or potentially could have been raised in any of the centralized cases regarding alleged discharges of pollutants from the Dams; and

WHEREAS, Plaintiff and Defendants believe that it is in the interest of the public, the Parties and judicial economy to enter into this Agreement rather than engage in protracted litigation;

NOW THEREFORE, the Parties, by and through their undersigned counsel, hereby agree upon the following settlement terms and conditions:

I. Parties Bound.

1. This Agreement applies to, is binding upon and inures to the benefit of the Parties and their successors, assigns and designees.

II. The Corps' Obligations.

2. Within one (1) year of the Effective Date of this Agreement, the Corps shall apply for NPDES permits to address alleged discharges of pollutants, including, at a minimum, alleged discharges from powerhouse drainage sumps, unwatering sumps, spillway sumps, navigation lock sumps, wicket gate bearings, turbine blade packing/seals, and discharges of cooling water systems, at each of the Dams, unless an NPDES permit already addresses such discharges.² The Corps agrees to address these alleged discharges in the NPDES permit applications, but addressing such alleged discharges in the applications shall not constitute an admission by Defendants that such alleged discharges constitute the discharge of a pollutant(s) under the CWA. The Corps shall thereafter diligently respond to any requests from EPA and/or Oregon DEQ related to the permit applications. Following submission of the permit applications, the Corps shall submit written requests to EPA and/or Oregon DEQ every twelve (12) months, with copies provided to Plaintiff at the same time, requesting an update on the status of each

² This Agreement does not contain any requirement to apply for permits to address mere river flow through or over any of the Dams, or to address discharges from the oil-water separator at Bonneville Dam, Powerhouse 1. Furthermore, the "application" to be submitted for The Dalles Dam shall consist of amendments to the currently pending permit application to make it consistent with the requirements of this paragraph.

permit application that remains pending; the Corps' obligations to submit such requests shall terminate for each Dam or portion thereof when the Corps obtains NPDES permit coverage that addresses discharges of pollutants associated with operations at that Dam or portion thereof.

3. The Corps shall notify Plaintiff of those events that the Corps reports to the National Response Center pursuant to the Corps' Spill Prevention, Control and Countermeasure plan for each of the Dams; provided, however, that the Corps' obligations to provide such notification shall terminate for each Dam or portion thereof when the Corps obtains NPDES permit coverage that addresses discharges of pollutants associated with operations at that Dam or portion thereof. The Corps' notification to Plaintiff shall not constitute an admission by the Corps of a discharge of any pollutant in violation of the CWA.

4. The Corps shall take the actions set forth below to reduce potential pollution from the Dams:

(a) Environmentally Acceptable Lubricants ("EALs").

Recognizing that the Corps already uses EALs on certain "in-water" equipment at the The Dalles and John Day dams, within twelve (12) months of the Effective Date of this Agreement, the Corps shall complete an assessment of whether it is technically feasible to switch from using grease as a lubricant on certain "in-water" equipment, including wicket gates for the hydropower turbines, navigation locks

and certain fishway equipment, to using one or more EALs as a lubricant on such equipment at the Dams. The Corps' evaluation of technical feasibility will be confined to the question of whether one or more EALs can be used without risk of potential damage to the equipment. Within eighteen (18) months of the Effective Date of this Agreement, the Corps shall switch to using one or more EALs as a lubricant on the in-water equipment where the Corps has determined that doing so is technically feasible, and shall provide to Plaintiff at that time the Corps': (i) assessment of whether it is technically feasible to switch from using grease as a lubricant on certain "in-water" equipment; and (ii) decisions whether or not to switch to using EALs. As used in this paragraph, "Environmentally Acceptable Lubricants" (or "EALs") means those lubricants that have been demonstrated to meet standards for biodegradability, toxicity and bioaccumulation potential that minimize their likely adverse consequences in the aquatic environment compared to conventional lubricants, as set forth in Section 4 of EPA 800-R-11-002, "Environmentally Acceptable Lubricants" (November 2011), and includes, but is not limited to, products labeled as such by one or more of the following labeling programs: Blue Angel; Swedish Standard(s); Nordic Swan; European Eco-label; and OSPAR (Convention for the Protection of the Marine Environment of the North-East Atlantic).

(b) Oil Accountability Plans. Within twelve (12) months of the Effective Date of this Agreement, the Corps shall: (i) prepare a final regional Oil Accountability Plan ("OAP") for the Corps' Northwestern Division; (ii) apply that OAP to each Dam (including, if necessary to be consistent with the regional OAP, by modifying the OAPs that currently exist at the Bonneville, John Day, The Dalles, and McNary dams); and (iii) provide to Plaintiff a copy of the final regional OAP and notice of how the regional OAP was applied to each Dam. The OAPs are intended to account for oils and greases used at the Dams, including the oils and greases used in the turbines, wicket gate bearings, navigation lock systems and fish way equipment. The OAPs shall be designed to: (i) track the addition of oils and greases; (ii) track the removal and/or recovery of oils and greases; and (iii) account for any differences between such addition and removal and/or recovery. The OAPs shall include, at a minimum, inspection, monitoring, assessment, testing and transfer procedures. The Corps shall develop, and make publically available on a Corps website six (6) months after completion of the OAPs and annually thereafter, reports that include a description of the results of the monitoring and any assessments that occurred during the preceding reporting period (six (6) or twelve months (12), whichever is applicable). Plaintiff recognizes and agrees that the reports are for informational purposes only. The Corps' obligations to provide such reports shall terminate for each Dam or portion thereof when the Corps

obtains NPDES permit coverage that addresses discharges of pollutants associated with operations at that Dam or portion thereof.

5. Without any admission of law or fact, within one hundred twenty (120) days after Defendants' receipt of correct payment and deposit information from Plaintiff or the Effective Date of this Agreement, whichever is later, Defendants shall pay to Plaintiff the amount of \$ 143,500.00 by Electronic Funds Transfer ("EFT") . Plaintiff's counsel shall provide the following payment and deposit information to counsel for Defendants:

EFT Payable to
Bank name
Bank address
ABA number
Routing number
Account number
Name of Account
Taxpayer identification number

Plaintiff hereby releases any and all claims and/or potential claims under any statute or other authority, including but not limited to 33 U.S.C. § 1365(d), for costs of litigation, attorney fees, expert fees, court costs and other costs or fees accrued through the Effective Date of this Agreement in connection with the centralized cases.

III. Dismissal of Claims and Releases.

6. The Parties agree that this Agreement represents a good faith compromise of all matters addressed in this Agreement. Upon execution of this Agreement, the Parties shall file an agreed-upon joint motion and proposed order providing that the centralized cases (Nos. 2:13-md-02494-LRS, 2:13-cv-00282-LRS, 2:13-cv-00418-LRS and 2:13-cv-00030-LRS) shall be dismissed without prejudice pursuant to Fed. R. Civ. P. 41, subject to the provisions of this Agreement. This Agreement shall be null and void if the Court does not dismiss the centralized cases in accordance with the terms set forth in the agreed-upon joint motion and proposed order.

7. Notwithstanding dismissal of these cases without prejudice, Plaintiff hereby releases, discharges and covenants not to assert (by way of commencement or refile of any action, the joinder of any or all of the Defendants in an existing action, or in any other fashion) any and all claims, causes of action, suits or demands of any kind in law or in equity regarding alleged unpermitted discharges of pollutants from any of the Dams until either: (i) the Corps obtains NPDES permit coverage that addresses discharges of pollutants associated with operations at a particular Dam or portion thereof (at which time Plaintiff may assert a claim, cause of action, suit or demand regarding the Corps' compliance with the NPDES

permit coverage at that Dam or portion thereof); or (ii) seven (7) years after the Effective Date of this Agreement, whichever is earlier.

IV. Dispute Resolution.

8. The Parties agree that efforts shall be made to resolve any future dispute arising out of this Agreement (the "Dispute") in accordance with the procedures specified below.

(a) Negotiation. In the event of a disagreement between Plaintiff and Defendants concerning the interpretation or performance of any aspect of this Agreement, the dissatisfied party shall provide the other party with written notice of the Dispute and a request for informal negotiations. The parties shall meet and confer in a good faith effort to attempt to resolve the Dispute within thirty (30) days of receipt of the written notice or such time thereafter as is mutually agreed.

(b) Petition for Judicial Resolution. If the Parties are unable to resolve the Dispute informally within thirty (30) days of receipt of the written notice or such time thereafter as is mutually agreed, then either Plaintiff or Defendants may petition the Court to resolve the Dispute. The Court shall retain jurisdiction over this case for the sole purpose of resolving those disputes over which Plaintiff or Defendants may petition the Court. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994). Notwithstanding any other provision of this Agreement, however, Plaintiff and Defendants expressly preserve, and do not

waive or limit, any and all defenses relating to such litigation. Contempt of court is not an available remedy under this Agreement.

(c) Confidentiality of Negotiations and Mediation. All informal negotiations and related communications and proceedings conducted pursuant to paragraphs A and B of this Section IV are confidential and shall be treated as compromise and settlement negotiations for the purposes of applicable rules of evidence and any additional confidentiality protections provided by applicable law.

V. Force Majeure.

9. The possibility exists that circumstances outside the reasonable control of the Corps could delay compliance with the timetables set forth in this Agreement. Such circumstances include, but are not limited to, sufficient funds not being appropriated as requested, the unavailability of appropriated funds for expenditure, government shutdown, and significant events that are outside of normal fluctuations in Dam operations and that require an immediate and/or time-consuming response by the Corps, including but not limited to significant events related to electrical power needs, navigation requirements, or actual or potential flooding. Should a delay occur due to such circumstances, then any resulting failure to meet the deadlines or other terms set forth in this Agreement shall not constitute a failure to comply with those deadlines or other terms, and any deadlines so affected shall be extended one day for each day of the delay. The

Corps will provide Plaintiff with reasonable notice in the event that the Corps invokes this term of this Agreement. Any dispute regarding invocation of this provision shall be resolved in accordance with the Dispute Resolution provisions of Section IV above.

VI. Miscellaneous Provisions.

10. Any notice required or made with respect to this Agreement shall be in writing and shall be effective upon receipt. Any notice or other documents required pursuant to this Agreement shall be sent to the following contact persons:

For Plaintiff:

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Hood River, OR 97031
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Upon written notice to the other parties, any party may designate a successor contact person for any matter relating to this Agreement.

11. Upon fulfillment of the Corps' obligations under this Agreement, the Corps' obligations under this Agreement shall terminate.

12. Except as expressly provided herein, nothing in this Agreement shall be construed to limit or modify the discretion accorded to the Corps by any laws, including but not limited to the CWA or any other environmental statutes, or any principles of administrative law.

13. Nothing in this Agreement shall constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the Defendants, their officers or any person affiliated with them. The provisions, terms and conditions of this Agreement shall not be admissible in any judicial or administrative proceeding except: (i) in Defendants' defense of a claim, cause of action, suit or demand asserted by Plaintiff pursuant to paragraph 7 above; or (ii) in support or defense of a petition to the Court submitted by either party pursuant to paragraph 8.B above.

14. Plaintiff recognizes that the Corps' performance under this Agreement is subject to fiscal and procurement laws and regulations of the United States which include, but are not limited to, the Anti-Deficiency Act, 31 U.S.C. § 1341, et seq., and nothing in this Agreement shall be interpreted as or constitute a commitment or requirement that the Defendants obligate or pay funds in contravention of the Anti-Deficiency Act. In addition, nothing in this Agreement shall be interpreted as or constitute a commitment or requirement that the Defendants take actions in contravention of the Administrative Procedure Act, 5

U.S.C. §§ 551-559, 701-706, the CWA, or any other substantive or procedural law or regulation.

15. If, subsequent to the Effective Date of this Agreement, any change in the law goes into effect that alters or relieves the Defendants' obligations concerning matters addressed in this Agreement, then the Agreement shall be amended to conform to such changes. Any dispute regarding invocation or the applicability of this provision shall be resolved in accordance with the Dispute Resolution provisions of Section IV above.

16. Except as set forth in this Agreement, the Parties reserve and do not waive any and all other legal rights and remedies.

17. This Agreement shall be governed and construed under the laws of the United States.

18. This Agreement constitutes the final, complete and exclusive agreement and understanding between Plaintiff and Defendants with respect to the matters addressed in this Agreement. There are no representations, agreements or understandings relating to this settlement other than those expressly contained in this Agreement.

19. The Effective Date of this Agreement shall be the date upon which the Court enters the order of dismissal proposed by the Parties.

20. The Parties may, in a written document signed by all of the Parties, modify this Agreement.

21. The Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement.

22. Each undersigned representative of the Parties certifies that he or she is fully authorized by the Party to enter into this Agreement and to bind such Party to comply with the terms and conditions of this Agreement.

23. This Agreement may be executed in any number of counterparts, each of which shall be deemed to constitute an original, and such counterparts shall together constitute one and the same Agreement. The execution of one counterpart by any Party shall have the same force and effect as if that party had signed all other counterparts.

24. Nothing in this Agreement shall be construed to make any person or entity not executing this Agreement a third-party beneficiary to this Agreement.

WHEREFORE, after having reviewed the terms and conditions of this Agreement, Plaintiff and the United States on behalf of the Defendants hereby consent and agree to the terms and conditions of this Agreement.

DATE:

8.4.2014



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Tab L – Waters of the United States (WOUS) Rulemaking

Proposed “Definition of ‘Waters of the United States’ Under the Clean Water Act”
40 CFR 230.3

(s) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (t) of this section, the term “waters of the United States” means:

- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters identified in paragraphs (s)(1) through (3) and (5) of this section;
- (5) All tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
- (6) All waters, including wetlands, adjacent to a water identified in paragraphs (s)(1) through (5) of this section; and
- (7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (s)(1) through (3) of this section.

(t) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (s)(1) through (7) of this section—

- (1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- (2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.
- (3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- (4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section.
- (5) The following features:
 - (i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
 - (ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
 - (iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
 - (iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
 - (v) Water-filled depressions created incidental to construction activity;
 - (vi) Groundwater, including groundwater drained through subsurface drainage systems; and
 - (vii) Gullies and rills and non-wetland swales.

(u) Definitions—

- (1) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.”
- (2) *Neighboring*. The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (s)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(3) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (s)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (t)(3) or (4) of this section.

(6) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(7) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (s)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section.

The U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency propose to make identical changes as described in the preamble to the definition of “waters of the United States” at 33 CFR 328.3 and 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, part 300 App. E, 302.3 and 401.11. Read the full proposed rule at <http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf>.



WESTERN GOVERNORS' ASSOCIATION

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August 27, 2014

Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1101A)
Washington, D.C. 20460

Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
(Civil Works)
108 Army Pentagon
Washington, D.C. 20310

Dear Administrator McCarthy and Assistant Secretary Darcy,

The purpose of this letter is to request an additional extension of the comment period on the proposed rule regarding the jurisdiction of the Clean Water Act (79 FR 22187, published April 21, 2014).

Western Governors originally requested a 180-day extension of the comment period. While we appreciate the 91-day extension of the comment period announced on June 9, the time frame remains insufficient for states to formulate thorough and thoughtful commentary on the rule's extensive impacts, effects and implications. Moreover, a significant amount of confusion and new information regarding the proposed rule has emerged over the last several weeks thus further warranting an extra 89-day extension of the comment period.

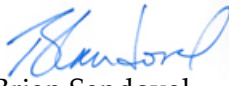
As stated in WGA's letter dated March 25, 2014, we are concerned that this proposed rulemaking could impinge upon state authority in water management. Given the potential impacts of the rule on management of water resources – a fundamental responsibility of the states – we hope you will respond favorably to our request.

In addition, our states need more time to review the streams and waterbodies and wetlands maps recently released by the Environmental Protection Agency. The additional extension of the comment period will provide states with adequate time to review these resources.

Again, we appreciate the initial extension of the comment period, as well as your accessibility to discuss the proposed rule since its publication.

With gratitude for your consideration of our request, we are

Respectfully,


Brian Sandoval
Governor, State of Nevada
WGA Chairman


John Kitzhaber
Governor, State of Oregon
WGA Vice Chairman

Honorable Gina McCarthy
Honorable Jo-Ellen Darcy
August 27, 2014
Page Two

cc: House Transportation and Infrastructure Committee Leadership
House Natural Resources Committee Leadership
Senate Environment and Public Works Leadership
Michael Boots, Acting Chairman, Council on Environmental Quality

**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
CLEAN WATER ACT JURISDICTION
Helena, Montana
July 18, 2014**

WHEREAS, the Clean Water Act (CWA) is built upon the principle of cooperative federalism in which Congress intended the states, the Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers to implement the CWA as partners, delegating co-regulator authority to the states;

WHEREAS, the CWA's cooperative federalism framework has resulted in significant water quality improvements since the law's enactment in 1972, and western states have made great strides in protecting water quality and coordinating water quality and water quantity decisions; and

WHEREAS, states are best positioned to manage the water within their borders because of their on-the-ground knowledge of the unique aspects of their hydrology, geology, and legal frameworks; and

WHEREAS, states have authority pursuant to their "waters of the state" jurisdiction to protect the quality of waters within their borders and such jurisdiction generally extends beyond the limits of federal jurisdiction under the CWA; and

WHEREAS, Section 101(b) supports the states' critical role in protecting water quality by stating: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution;" and

WHEREAS, Section 101(g) of the CWA further provides that the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act;" and

WHEREAS, current federal regulations, guidance, and programs pertaining to the CWA do not always recognize the specific conditions and needs in the West, where water can be scarce and a variety of unique waterbodies exist, including but not limited to small ephemeral washes, effluent-dependent streams, prairie potholes, playa lakes, and numerous man-made reservoirs, waterways, and water conveyance structures; and

WHEREAS, recent federal efforts to clarify the extent of CWA jurisdiction following the U.S. Supreme Court's decisions in *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006), have failed to include adequate state consultation in their development, despite repeated requests from the Western States Water Council to do so; and

WHEREAS, the considerable differences in hydrology, geology, and legal frameworks that exist among the western states mean that any effort to clarify CWA jurisdiction will invariably impact each state differently, thus underscoring the need to thoroughly involve states in developing regulatory language that clearly respects and avoids conflict with state authority over the regulation and allocation of waters within their respective borders; and

WHEREAS, any efforts to redefine or clarify CWA jurisdiction have, on their face, numerous federalism implications that have the potential to significantly impact states and alter the distribution of power and responsibilities among the states and the federal government, and therefore trigger federalism consultation with the states under Executive Order 13132; and

WHEREAS, as co-regulators, states are separate and apart from the general public, and deserve a unique audience with the federal government in the development and implementation of any federal effort to clarify or redefine CWA jurisdiction; and

WHEREAS, information-sharing does not equate to meaningful consultation, and the uncertainty and differences of opinion that exist regarding CWA jurisdiction requires EPA and the Corps to develop and implement federal CWA jurisdiction efforts in authentic partnership with the states;

NOW, THEREFORE BE IT RESOLVED that Congress and the Administration should ensure that any federal effort to clarify or define CWA jurisdiction:

1. Gives as much weight and deference as possible to state needs, priorities, and concerns;
2. Includes robust and meaningful state participation and consultation in its development and implementation. Such consultation should take place as early as possible and before the publication of any proposal for public comment, when irreversible momentum may preclude effective state participation and the consideration of alternate ways of meeting federal objectives. Federal CWA jurisdiction efforts should also acknowledge their inherent federalism implications and comply with Executive Order 13132's state consultation criteria.
3. Gives full force and effect to, and does not diminish or in any way detract from, the intent and purpose of CWA Sections 101(b) and 101(g).
4. Recognizes that Justice Kennedy's "significant nexus" test in *Rapanos* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. Federal CWA jurisdiction efforts should also quantify "significance" to ensure that the term's usage does not extend jurisdiction to waters with a de minimis connection to jurisdictional waters.
5. Complies with the limits Congress and the U.S. Supreme Court have placed on CWA jurisdiction, while providing clear and recognizable limits to the extent of CWA jurisdiction.
6. Specifically excludes waters and features generally considered to be outside the scope of CWA jurisdiction, including:
 - (a) Groundwater;
 - (b) Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA's agricultural exemption;
 - (c) Man-made dugouts and ponds used for stockwatering or irrigation in upland areas that are not connected to surface waters;
 - (d) Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement; and
 - (e) Prairie potholes and playa lakes.
7. Acknowledges that states have authority pursuant to their "waters of the state" jurisdiction to protect excluded waters, and that excluding waters from federal jurisdiction does not mean that they will be exempt from regulation and protection.

**United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment**

**Hearing:
“Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule”**

Testimony of

**J.D. Strong
Western Governors’ Association
Western States Water Council**

June 11, 2014

I. Introduction

Chairman Shuster, Ranking Member Rahall, and members of the Committee, my name is J.D. Strong, and I am the Executive Director of the Oklahoma Water Resources Board. I am testifying on behalf of the the Western Governors’ Association (WGA) and the Western States Water Council (WSWC) in my capacity as the Chairman of the WSWC’s Water Quality Committee. I appreciate the opportunity to testify regarding the WGA’s and WSWC’s perspectives on the Clean Water Act (CWA) rule the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) proposed on March 25, and published in the Federal Register on April 21. My testimony is based on a series of attached letters the WGA and WSWC have sent EPA and the Corps regarding the rulemaking. Separately, I am submitting testimony on behalf of the State of Oklahoma.

WGA is an independent, non-partisan organization comprised of the Governors of 19 western states and three U.S.-flag islands. The WSWC is a non-partisan government entity created by western Governors, which is affiliated with WGA and advises the Governors of eighteen western states on water policy matters. The WSWC’s members, including myself, are appointed by their respective Governors and include state natural resource directors, state engineers, water quality directors, assistant attorney generals, and others.

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

This is particularly true for the CWA because Congress intended for the states and EPA to implement the CWA in partnership, delegating authority to the states to administer the law as co-regulators with EPA. Such consultation will be critical in ensuring the effectiveness of this

particular rulemaking and in avoiding unintended consequences, especially in the West, which is defined by arid landscapes and unique hydrologic and geographic features not found in the East. As such, state water managers must have a robust and meaningful voice in the development of any rule regarding the jurisdiction of the CWA.

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

WGA and the WSWC are concerned that states were insufficiently consulted in the development of the proposed CWA rule and had no involvement in its drafting.

As indicated by the attached letters, the WSWC first wrote EPA and the Corps in 2011 to urge them to pursue formal rulemaking instead of the now withdrawn guidance.¹ At that time, the western states believed rulemaking, unlike guidance, would afford greater opportunities for early and ongoing state consultation and would better ensure the treatment of states as co-regulators. In making this request, the WSWC urged EPA and the Corps to consult with the states in the early phases of the rule's development, a request it reiterated in three subsequent letters dated April 10, 2013, November 20, 2013, and March 10, 2014 (attached).

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

In addition, the WSWC also urged the agencies to acknowledge the federalism implications of the rulemaking and to comply with the state consultation criteria set forth in Executive Order 13132. However, as noted in the preamble of the proposed rule, EPA and the Corps do not believe that Executive Order 13132 applies to this rulemaking and also believe that the rulemaking "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."² Contrary to this belief, any effort to redefine or clarify the term "waters of the U.S." has, on its face, numerous federalism implications that some western states believe will have very substantial and direct effects, thereby requiring robust state consultation and compliance with Executive Order 13132.

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

¹ U.S. Environmental Protection Agency and U.S. Department of the Army, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (May 2, 2011), available at: http://www.epa.gov/tribal/pdf/wous_guidance_4-2011.pdf.

² Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188, 22,220 – 22,221 (Apr. 21, 2014).

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

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

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

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

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

III. EPA's Science Advisory Board

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

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

committee to be “fairly balanced in terms of points of view represented and the functions to be performed.”

Despite the foregoing mandates and the tremendous value that would be added to SAB processes by state participation, state agency scientists are woefully and demonstrably under-represented on the SAB, as well as on its standing and *ad hoc* committees. This is particularly true for the SAB panel that is reviewing the EPA connectivity report that will serve to inform the final CWA rule.³ Of the 27 experts on the panel, not one is a state agency scientist or expert.⁴

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

Notably, some press reports have indicated that the SAB is still developing its comments on the connectivity report and has identified some preliminary areas that may require further changes to both the report and the rule. Although these comments are still in draft form, the SAB’s deliberations underscore the premature nature of the rule’s publication. Among other things, press reports have indicated that the SAB’s draft comments state that the report could be more useful to decision-makers if it brought more clarity to the interpretation of connectivity, especially regarding the quantification of the magnitude, degree, or consequences of connectivity, and the aggregate effects of streams and wetlands on downstream waters. The SAB’s deliberations further note that the report often treats connectivity as a binary property, either present or absent, rather than recognizing varying degrees of connectivity.⁵

The SAB’s preliminary comments speak directly to one of the concerns that the WSWC has expressed about the rule – that the rule should quantify “significance” as used in Justice Kennedy’s concurring opinion in *Rapanos v. United States*⁶ to ensure that the rule does not extend jurisdiction to waters that have a de minimis connection to jurisdictional waters.

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

³ U.S. Environmental Protection Agency, *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/660R-11/098B, (Sept. 2013), available at: [http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/\\$File/WOUS_ERD2_Sep2013.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf).

⁴ U.S. Environmental Protection Agency Science Advisory Board, *Members of the Panel for the Review of the EPA Water Body Connectivity Report, External Draft*, available at: <http://yosemite.epa.gov/sab/sabpeople.nsf/WebExternalSubCommitteeRosters?OpenView&committee=BOARD&subcommittee=Panel%20for%20the%20Review%20of%20the%20EPA%20Water%20Body%20Connectivity%20Report>.

⁵ Saiyid, Amena. “Science Panel Urges EPA to Address Cumulative Impacts of Isolated Waters.” *Bloomberg BNA* 7 Apr. 2014: n. pag. Web; Daily News, “EPA Plans Method for Determining Whether Waters’ Nexus is ‘Significant.’” *InsideEPA* (Apr. 8, 2014): n.pag. Web.

⁶ 547 U.S. 715 (2006).

IV. Additional Recommendations

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

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

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

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

V. Conclusion

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

Thank you for your leadership in addressing this important issue.



WESTERN GOVERNORS' ASSOCIATION

John Hickenlooper
Governor of Colorado
Chairman

Brian Sandoval
Governor of Nevada
Vice Chairman

James D. Ogsbury
Executive Director

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May 30, 2014

Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1101A)
Washington, D.C. 20460

Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil
Works)
108 Army Pentagon
Washington, D.C. 20310

Dear Administrator McCarthy and Assistant Secretary Darcy,

The purpose of this letter is to request an extension of the period for comment on the proposed rule regarding the jurisdiction of the Clean Water Act. As stated in our letter dated March 25, 2014, we are concerned that this proposed rulemaking could impinge upon state authority in water management.

The published 91-day public comment period is insufficient for states to thoroughly review the content and analyze the implications of the proposed rule. We request that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers issue a 180-day extension of the public comment period to provide states with reasonable time for the submission of comments.

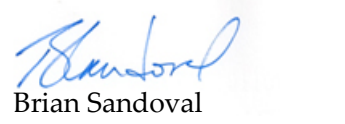
States are co-regulators of water quality and the primary managers of water resources within their borders. Before proceeding further with this proposal, your agencies should take the time to engage in true, substantive consultation with states. The Western States Water Council is coordinating conference calls with states and the EPA western Regional Offices to facilitate a dialogue on particular issues of concern to the western states. While we appreciate the willingness of the EPA regional offices to participate in these calls, we must stress that information-sharing does not equate to meaningful consultation; in this and future rulemaking processes, your agencies should pursue an authentic partnership with the states.

We are confident that such discussions could greatly enhance your efforts and ensure that the resulting rule is clear, scientifically sound and respectful of states' authority to manage water resources within their states.

Thank you for your consideration.

Sincerely,


John Hickenlooper
Governor, State of Colorado
WGA Chairman


Brian Sandoval
Governor, State of Nevada
WGA Vice Chairman

cc: House Transportation and Infrastructure Committee Leadership
House Natural Resources Committee Leadership
Senate Environment and Public Works Leadership
Michael Boots, Acting Chairman, Council on Environmental Quality



WESTERN GOVERNORS' ASSOCIATION

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March 25, 2014

Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil
Works)
108 Army Pentagon
Washington, DC 20310

Dear Administrator McCarthy and Assistant Secretary Darcy:

We are writing with respect to the pending rulemaking regarding the jurisdiction of the Clean Water Act. As Governors of Western states, we are concerned that this rulemaking was developed without sufficient consultation with the states and that the rulemaking could impinge upon state authority in water management.

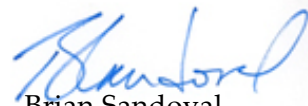
As co-regulators of water resources, states should be fully consulted and engaged in any process that may affect the management of their waters. While the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) have provided briefings to inform states that rulemaking is underway, the conversations to date have not been sufficiently detailed to constitute substantive consultation. Western Governors strongly urge both EPA and the Corps to engage states as authentic partners in the management of Western waters.

States have federally-recognized authority to manage and allocate water within their boundaries. Section 101(g) of the Clean Water Act (CWA) expressly states that, "the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act." The Western States Water Council, in its March 10, 2014, correspondence to you both, delineates the areas of concern states have with this rulemaking process. Western Governors urge you to engage with us, individually and through the Western Governors' Association, to resolve these important concerns in advance of any further action on this issue.

We appreciate your consideration and hope to remain productive partners in the management of waters in West.

Sincerely,


John Hickenlooper
Governor, State of Colorado
Chairman, WGA


Brian Sandoval
Governor, State of Nevada
Vice Chairman, WGA

Attachment



W E S T E R N S T A T E S W A T E R C O U N C I L

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Web Page: www.westernstateswater.org

March 10, 2014

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: EPA and Army Corps Draft Clean Water Act Rulemaking

Dear Administrator McCarthy and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing eighteen western governors on water policy issues, I am writing to provide additional comments to inform your agencies' efforts to develop a rule on Clean Water Act (CWA) jurisdiction. These comments are intended to build upon our previous correspondence and meetings with representatives from your agencies on this issue.

We have also received a letter dated February 10 from EPA Acting Assistant Administrator for Water Nancy Stoner, which responds to our November 2013 letters. As discussed in our comments below, the western states continue to have concerns about EPA's and the U.S. Army Corps of Engineers' coordination efforts, and request extensive interaction with the individual states and the state agencies that deliver and implement the CWA.

A. Connectivity Report

EPA has indicated that its draft connectivity report will serve to inform the final rule on CWA jurisdiction. However, the draft rule's submission to the Office of Management and Budget (OMB) before the finalization of the connectivity report raises concerns that the final report will have little or no influence on the final rule. Therefore, the connectivity report should be finalized before EPA and the Corps publish the draft jurisdictional rule in the Federal Register for public comment.

Additionally, many western states have submitted individual comments for the Environmental Protection Agency's (EPA) Science Advisory Board (SAB) to consider in its review of the draft connectivity report. EPA should carefully evaluate the SAB's consideration of these comments and any subsequent recommendations from the final report. Waiting until the report is finalized will give EPA more information to consider, and may possibly lead to revisions that improve the rule before its publication for public comment.

B. Deference to State Water Law

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

C. Groundwater

The Council understands that the draft rule would establish jurisdiction for waters that have a “shallow subsurface hydrologic connection” with jurisdictional waters. Congress did not intend for the regulatory reach of the CWA to apply to the management and protection of groundwater.

The Council understands that the preamble for the draft rule may include disclaimers that the rule is not intended to cause the shallow subsurface connections themselves to become jurisdictional, and that such connections would not be considered Waters of the United States (WOUS) in and of themselves. The Council supports the intent of such language. However, to fully clarify that groundwater is not subject to CWA jurisdiction, the text of the rule itself should expressly exclude groundwater and any subsurface flows used to establish shallow subsurface hydrologic connections between surface waters.

D. Exclusions

The Council understands that the draft rule may specifically exclude certain waters from its definition of WOUS. The Council supports the intent of such a provision and requests that your agencies also include other waters and features that are generally considered to be outside the scope of the CWA. In addition to groundwater, the following should also be excluded:

1. Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA’s agricultural exemption;
2. Man-made dugouts and ponds used for stock watering or irrigation in upland areas that are not connected to surface waters;
3. Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement;
4. Man-made pits and quarries that have been excavated in uplands and that fill with groundwater but are not connected to surface waters; and
5. Prairie potholes and playa lakes.

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

E. Significant Nexus

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

F. State Consultation

As noted in the Council’s prior correspondence and meetings with your agencies, the western states remain concerned about the process EPA and the Corps are using to develop this rule.

In 2011, the Council asked EPA and the Corps to pursue formal rulemaking instead of finalizing the now withdrawn guidance. At that time, the Council believed rulemaking, unlike guidance, would afford greater opportunities for early and ongoing consultation with the states. The Council also believed rulemaking would better ensure the treatment of states as co-regulators in the development of a draft rule.

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

While we recognize that EPA and the Corps have participated in various meetings and calls with the Council and other state organizations to discuss their goals and time lines for the rulemaking, such communication cannot take the place of substantive, collaborative engagement with the states and their respective water quality agencies on an individual basis. In particular, the substantial differences in hydrology, geography, and legal frameworks in the West will require significant consultation with each state to determine how the draft rule will be implemented in order to avoid misinterpretations and unintended consequences. The potential for unintended consequences further underscores the need for EPA and the Corps to avail themselves of the states' on-the-ground knowledge of their unique circumstances by giving as much weight and deference as possible to the states' collective and individual comments, concerns, priorities, and needs.

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

G. Conclusion

We appreciate your consideration of our concerns and look forward to continuing our work with EPA and the Corps to protect water quality in the West.

Sincerely,



Phillip C. Ward
Chairman, Western States Water Council



WESTERN STATES WATER COUNCIL

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December 23, 2013

Sent Via Fax: (202) 395-3888

The Honorable Sylvia Mathews Burwell, Director
Office of Management and Budget
725 17th Street N.W.
Washington, D.C. 20503

RE: Draft Clean Water Act Rule

Dear Director Burwell:

On behalf of the Western States Water Council, representing 18 western states on water policy issues, I am writing to ask that the Office of Management and Budget (OMB) ensure that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) comply with the state consultation criteria set forth in Executive Order (E.O.) 13132 as they formulate and implement their Clean Water Act (CWA) jurisdiction rule. These comments are based on our enclosed position dated July 29, 2011, as well as our letters to EPA and the Corps dated April 10, 2013, November 5, 2013, and November 20, 2013.

A. State Consultation and E.O. 13132

The submission of a draft rule on CWA jurisdiction to OMB without any state consultation raises significant concerns about how and when EPA and the Corps will consult with the states regarding the formulation of this rule. Congress intended that the states and EPA would implement the CWA as a federal-state partnership, delegating authority to the states to administer the law as co-regulators with EPA.

While EPA has conducted some outreach with the Council and other organizations, these efforts have consisted primarily of communicating EPA's and the Corps' goals and time lines for the rulemaking. There is a difference between communication and consultation, and EPA and the Corps have yet to engage the states regarding state needs, perspectives, or expertise in developing the draft rule. Ideally, EPA and the Corps would have conducted this type of consultation with the states prior to beginning the rulemaking process and before submitting a draft rule to OMB.

We are also concerned that EPA and the Corps apparently do not consider the rulemaking to have federalism implications requiring compliance with E.O. 13132, which sets forth specific state consultation criteria for federal agencies to follow when formulating and implementing policies that have federalism implications. According to Section 1(a) of the order, a policy will have federalism implications if it has "substantial direct effects on the States." Efforts to redefine or clarify the term "waters of the U.S." have, on their face, numerous federalism implications that many states believe will have very substantial and direct effects, thereby requiring compliance with E.O. 13132.

B. E.O. 13132's State Consultation Criteria

There is a considerable amount of uncertainty and significant differences of opinion regarding the extent of the CWA's authority and the impacts of any new rule. Such uncertainty underscores the need for EPA and the Corps to consult with the states as co-regulators regarding the formulation and implementation of this rule. Such consultation should be separate and apart from the general public comment period, and should give as much weight and deference as possible to state needs, priorities, and concerns. Indeed, numerous provisions of E.O. 13132 call for substantive state consultation, including among others:

- Section 2(i): "The national government should be *deferential to the States* when taking action that affects the policymaking discretion of the States and should act only with the *greatest caution* where State or local governments have identified *uncertainties regarding the constitutional or statutory authority* of the national government." (emphasis added)
- Section 3(b): "Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether *Federal objectives can be attained by other means*." (emphasis added)
- Section 3(c): "With respect to Federal statutes and regulations administered by the States, the national government shall grant the States *the maximum administrative discretion possible*. Intrusive Federal oversight of State administration is *neither necessary nor desirable*." (emphasis added)
- Section 6(b): Requiring federal agencies to consult with state and local officials "*early in the process* of developing the proposed regulation" where the regulation will impose "substantial direct compliance costs on State and local governments and that is not required by statute." (emphasis added)

C. Conclusion

As the Council has stated in its prior correspondence and interactions with EPA and the Corps, waiting until the publication of a proposed rule for public comment to solicit state input will not allow for meaningful consideration of state views, especially with respect to the consideration of alternative ways of meeting federal objectives.

Quite simply, it will be very difficult to develop a workable rule that resolves the considerable uncertainty regarding CWA jurisdiction and that leads to actual water quality improvements without meaningful, substantive consultation with the states. Changing the current trajectory of this rulemaking to include the states' views and concerns before seeking public comment is a needed first step. Promulgating this rule without complying with E.O. 13132's consultation criteria would be counterproductive and detrimental to building a positive and productive relationship with the states in implementing the CWA.

We respectfully request that OMB ensure that EPA and the Corps comply with E.O. 13132's state consultation criteria as they formulate and implement their CWA jurisdiction rule.

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

Sincerely,

A handwritten signature in dark ink, appearing to read "Phillip C. Ward". The signature is fluid and cursive, with the first name "Phillip" being more prominent and the last name "Ward" following in a similar style.

Phillip C. Ward
Chair, Western States Water Council

Enclosures

cc: Howard Shelanski, Administrator, Office of Information and Regulatory Affairs
Nancy Sutley, Chair, White House Council on Environmental Quality
Gina McCarthy, Administrator, Environmental Protection Agency
Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works)



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November 20, 2013

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Ms. Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: EPA and Army Corps Draft Clean Water Act Rulemaking

Dear Administrator McCarthy and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing 18 western states on water policy issues, I am writing to strongly urge your agencies to consult with the states as soon as possible in the development of their Clean Water Act (CWA) jurisdiction rule. These comments are based on our enclosed position and our letters dated April 10, 2013, and November 5, 2013.

A. State Consultation and Executive Order 13132

The submission of a draft rule on CWA jurisdiction to the Office of Management and Budget (OMB) without any state consultation raises significant concerns about how and when the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers will consult with the states regarding this rule. Congress intended the states and EPA to implement the CWA as a federal-state partnership, delegating authority to the states to administer the CWA as co-regulators with EPA. As such, your agencies must treat the states as co-regulators in the development of any proposed rule regarding CWA jurisdiction. Ideally, EPA and the Corps would have consulted with the states prior to beginning the rulemaking process and certainly prior to submitting a draft rule to OMB.

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

For example, aside from four states, including Idaho and New Mexico in the West, every state is primarily responsible for regulating discharges of pollutants to jurisdictional waters because they have delegated responsibility from EPA to operate approved National Pollutant Discharge Elimination System permitting programs under Section 402 of the CWA. Any

changes to the regulations and policies that govern which waters are jurisdictional will have a direct substantial impact to these programs. Specifically, changes limiting CWA jurisdiction could affect the states' ability to regulate waters previously considered to be jurisdictional, while changes that expand authority could require states to expend additional resources to permit discharges to previously unregulated waters.

Moreover, regardless of whether they have delegated authority under Sections 402 or 404, the requirements and limitations associated with jurisdictional waters will directly impact the ability of every state to enact policies regarding waters within their borders, as well as the allocation of their already limited resources. This is particularly true if the rule compels states to extend their Section 303(d) responsibilities to waters that are functionally marginal.

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

- Section 2(i): "The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government." (emphasis added)
- Section 3(b): "Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means." (emphasis added)
- Section 3(c): "With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable." (emphasis added)
- Section 6(b): Requiring federal agencies to consult with state and local officials "early in the process of developing the proposed regulation" where the regulation will impose "substantial direct compliance costs on State and local governments and that is not required by statute." (emphasis added)

As we have stated repeatedly in our prior correspondence and interactions with officials from your agencies, waiting until the publication of a rule for public comment to solicit state input will not allow for meaningful consideration of state views, especially with respect to the consideration of alternative ways of meeting federal objectives. Quite simply, it will be very difficult to develop a workable rule that resolves the considerable uncertainty regarding CWA jurisdiction and that leads to actual water quality improvements without changing the current trajectory of this rulemaking to include the states' views and concerns before seeking public comment. Further, promulgating this rule without complying with E.O. 13132's consultation criteria could threaten the historically positive and productive relationship that states have enjoyed with EPA and the Corps in implementing the CWA.

B. Concerns to Address Through Consultation

As stated in our prior correspondence, there are a number of issues that require state consultation to address, including but not limited to:

- State Deference: How the rule will ensure deference to the states' primary and exclusive authority over water allocation and water rights administration, as well as state-federal co-regulation of water quality as required under Sections 101(b) and 101(g).
- Groundwater: How to ensure that the rule will not be misinterpreted as extending CWA jurisdiction to groundwater, including state concerns regarding the use of "shallow subsurface hydrologic connections" to establish jurisdiction.
- Extent of CWA Jurisdiction: How the rule will comply with the limits Congress and the U.S. Supreme Court have established regarding the extent of CWA jurisdiction, including how the rule will provide clear and recognizable limits to such jurisdiction, especially pertaining to isolated wetlands.

C. Conclusion

In light of the above, we urge EPA and the Corps to recognize the significant federalism implications of this rulemaking and to comply with E.O. 13132's state consultation criteria. We also respectfully request additional information on how and when your agencies will consult with the states regarding the development of this rule, including how they will ensure the treatment of states as co-regulators.

We look forward to your response to these concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read "Phillip C. Ward".

Phillip C. Ward
Chair, Western States Water Council

Enclosure

cc: Robert Perciasepe, Deputy Administrator, Environmental Protection Agency
Let Mon Lee, Deputy Assistant Secretary for Policy and Legislation, U.S. Army Corps of Engineers



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November 5, 2013

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OA-2013-0582

Dear Administrator McCarthy:

On behalf of the Western States Water Council, and its members, representing the governors of 18 western states, I am writing to comment on your agency's draft science report titled *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (September 2013 External Review Draft, EPA/600/R-11/098B). Our understanding is that the final version of this report will serve as the scientific basis for rulemaking that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers are jointly developing to clarify the extent of Clean Water Act (CWA) jurisdiction in light of the U.S. Supreme Court's *SWANCC* and *Rapanos* decisions. Our comments are based on our attached position and related letter dated April 10, 2013, which we sent to your agency and the Corps regarding the now withdrawn CWA guidance.

We are concerned that the report may be misinterpreted inappropriately to suggest that a scientific connection between waters alone is sufficient to establish CWA jurisdiction. The report only discusses well-known scientific principles of hydrology and geohydrology regarding the interconnections between waters, but does not and cannot describe how these principles apply to the legal and institutional boundaries that Congress and the Supreme Court have placed on CWA jurisdiction.

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

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

As stated in our position regarding the draft CWA guidance, efforts to expand CWA authority beyond the limitations the Court established in *SWANCC* and *Rapanos* "would likely lead to further litigation" and would do little to resolve the current uncertainty regarding the extent of CWA jurisdiction.

We are also concerned about the lack of state expertise and state representation on the Science Advisory Board. Not a single member of the board is a state agency expert or administrator. As stated in our April letter, the states have on-the-ground expertise and knowledge of water quality conditions and challenges within their borders.

In light of the above, we urge you to recognize the limitations of the report as it does not address the legal limits of CWA jurisdiction and authority, and how those limits apply to the scientific principles discussed in the report.

We appreciate your consideration of our concerns and look forward to continuing our work with EPA and the Corps to protect water quality in the West.

Sincerely,

A handwritten signature in dark ink, appearing to read "Phillip C. Ward". The signature is fluid and cursive, with the first name "Phillip" being more prominent than the last name "Ward".

Phillip C. Ward
Chair, Western States Water Council

Enclosures

cc: Office of Environmental Information (OEI), Docket (Mail Code: 28221T),
Docket ID No. EPA-HQ-OA-2013-0582, U.S. Environmental Protection Agency,
1200 Pennsylvania Ave. NW, Washington, DC 20460



WESTERN STATES WATER COUNCIL

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April 10, 2013

Sent via email: Perciasepe.bob@epa.gov
ASACWPOC@conus.army.mil

Mr. Robert Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Ms. Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: EPA and Army Corps Draft Clean Water Act Guidance and Rulemaking

Dear Acting Administrator Perciasepe and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing the governors of 18 western states, I am writing to reiterate concerns regarding the *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, which the Council set forth in the enclosed comment letter dated July 29, 2011.

It is our understanding that your agencies are developing a proposed rule to clarify Clean Water Act (CWA) jurisdiction, as indicated in the Uniform Regulatory Agenda and Regulatory Plan published on December 21, 2012. As explained in our comment letter, the Council prefers rulemaking to clarify CWA jurisdiction instead of legally unenforceable guidance. Therefore, we urge you not to issue or apply the guidance to determine CWA jurisdiction while your agencies develop a new rule.

The vast majority of states have long worked as co-regulators with your agencies to protect water quality pursuant to the framework of cooperative federalism embodied in the CWA. Although states are responsible for implementing and administering most CWA programs, EPA and the Corps did not consult with the states in developing the draft guidance, nor did they share the document with the states prior to releasing it for public comment in April 2011. We understand your agencies have since revised the guidance after the public comment period and submitted it to the Office of Management and Budget for final review. Nevertheless, the revised guidance has not been made public nor has it been provided to the states for review.

We remain concerned about the lack of state consultation in developing the guidance and the potential that the final document may not adequately account for state needs and perspectives. The complexities of CWA jurisdiction and the broad ramifications for state and federal water quality programs warrant a formal and transparent rulemaking process. Unlike guidance, the notice and comment provisions of formal rulemaking facilitate early and ongoing engagement with states and other stakeholders. Formal rulemaking also triggers Executive Order 13132, which provides states with further opportunity to review a proposed regulation and offer perspectives prior to the publication of a rule.

Mr. Perciasepe and Ms. Darcy

April 10, 2013

Page 2

States bear the primary responsibility for preventing, reducing, and eliminating water pollution. By providing greater consultation with states, formal rulemaking is more likely than guidance to produce actual water quality improvements because it would better take into account state needs and perspectives, as well as the states' on-the-ground expertise and knowledge of water quality conditions and challenges within their borders. Issuing the guidance in the interim while EPA and the Corps pursue rulemaking would be a distraction that would create unnecessary conflict and uncertainty that would hinder the development of an effective rule.

Lastly, we urge you to continue to view the states as co-regulators and to ensure that state water managers have a robust and meaningful voice in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.

We appreciate your consideration of our concerns and look forward to continuing our work with EPA and the Corps to protect water quality in the West.

Sincerely,

A handwritten signature in dark ink, appearing to read "Phillip C. Ward". The signature is stylized with a large, looping initial "P" and a distinct "W" at the end.

Phillip C. Ward
Chair, Western States Water Council

Enclosure (WSWC Position #330.5)



WESTERN STATES WATER COUNCIL

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Web Page: www.westernstateswater.org

Position #330.5

July 29, 2011

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

RE: EPA-HQ-OW-2011-0409

To Whom It May Concern:

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

We understand that the intent of the draft guidance is to provide clearer, more predictable guidelines for determining which water bodies are subject to Clean Water Act (CWA) jurisdiction, consistent with the U.S. Supreme Court's *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC)¹ and *Rapanos v. United States (Rapanos)*² decisions. It is also our understanding that EPA and the Corps intend to undertake rulemaking after the guidance is final to provide further clarification regarding the extent of CWA jurisdiction. Indeed, Justice Kennedy's opinion in the *Rapanos* decision would appear to invite promulgation of a rule.

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

A. State Water Resources Allocation and Water Rights Administration

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

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

¹ 531 U.S. 159 (2001).

² 547 U.S. 715 (2006).

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

B. The Watershed Approach to Jurisdiction

The draft guidance sets forth a “watershed” approach for satisfying Justice Kennedy’s “significant nexus” test in which CWA jurisdiction is determined by reference to the nexus between the watershed and the closest traditional navigable water, not the nexus between the particular wetland or tributary in question and the navigable waters. Under this approach, virtually any tributary or wetland, or “other waters,” no matter how far removed, no matter how small or insignificant, could become jurisdictional if aggregated with all other tributaries and wetlands or other waters within a watershed. Such an outcome raises questions as to whether a watershed approach is consistent with *SWANCC* and *Rapanos*, which hold that the CWA’s jurisdiction is not without limits.³

Questions also remain as to whether the EPA and the Corps can use guidance to promulgate a “watershed” approach instead of a “case-by-case” determination. In particular, Justice Kennedy stated in his concurring opinion in *Rapanos* that “absent more specific regulations,” a “case-by-case” analysis is needed to determine jurisdiction for wetlands based upon adjacency to navigable tributaries.⁴ Kennedy further stated that such a showing is necessary to avoid “unnecessary application” of the CWA given the “potential overbreadth” of the federal regulations at issue in *Rapanos*.⁵ The draft guidance, while not a regulation, needs further clarification to ensure that it complies with this requirement.

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

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

C. Groundwater

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

³ See *Rapanos*, 547 U.S. at 739 (stating, “The Corps’ expansive interpretation of the ‘waters of the United States’ is thus not ‘based on a permissible construction of the statute.’”); *Id.* at 778 – 79 (J. Kennedy concurring) (stating that the deference owed to regulations at issue in *Rapanos* does not extend so far as to apply CWA jurisdiction “...whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.”). *Id.* at 778-79 (Kennedy concurring)

⁴ *Id.* at 782.

⁵ *Id.*

groundwater, tributary or alluvial groundwater, water stored in the bed and banks of streams, or even soil moisture, again expanding the jurisdictional reach without legal basis or limit, resulting in greater uncertainty and likely litigation.

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

D. States as Co-Regulators

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

E. Conclusion

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Weir Labatt III". The signature is fluid and cursive, with the last name "Labatt" being more prominent.

Weir Labatt, III
Chair, Western States Water Council

Tab M – Interpretive Agricultural Rule



W E S T E R N S T A T E S W A T E R C O U N C I L

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August 11, 2014

Position No. 370

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Jo Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: Interpretive Rule Regarding Applicability of the Exemption from Permitting under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices

Dear Administrator McCarthy and Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing 18 western states on water policy issues, I am writing to comment on the interpretive rule your agencies adopted in March regarding agricultural exemptions under Section 404(f)(1)(A) of the Clean Water Act (CWA).

On June 3, EPA and Corps officials participated in a conference call with the Council to discuss the interpretive rule. The Council greatly appreciates your agencies' willingness to hold this call, which helped provide further clarification and insight into the intentions and motivations behind the rule. Based on the call, the Council understands that the rule is intended to identify agricultural exemptions under Section 404(f)(1)(A) that are in addition to existing agricultural exemptions under the CWA.

After further consideration, the Council believes the CWA's agricultural exemptions are operating appropriately. Notwithstanding your agencies' intentions, the interpretive rule has created a significant amount of confusion and uncertainty about the scope and applicability of the CWA's agricultural exemptions and their interaction with state water quality programs. Consequently, the Council respectfully requests that your agencies withdraw the interpretive rule to remove this uncertainty.

Please also note that the Council stands ready to help facilitate further dialogue between your agencies and the western states on ways to clarify and provide further guidance on the CWA's agricultural exemptions in a manner that creates less confusion.

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

Sincerely,

A handwritten signature in black ink, reading "Patrick T. Tyrrell".

Patrick T. Tyrrell, Chairman
Western States Water Council

Tab N – Clean Water Act (CWA) Section
518 “Treatment as States” (TAS)
Proposal



W E S T E R N S T A T E S W A T E R C O U N C I L

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Web Page: www.westernstateswater.org

**WSWC-EPA CONFERENCE CALL:
POSSIBLE "TREATMENT AS STATES" REINTERPRETATION
August 12, 2014**

SUMMARY

IN ATTENDANCE

Alaska

- Andrew Sayers-Fay, Alaska Department of Environment of Environmental Conservation, Division of Water
- Brock Tabor, Alaska Department of Environment of Environmental Conservation, Division of Water
- Jackie Schafer, Alaska Attorney General's Office

Arizona

- Jeff Trembly, Arizona Department of Water Resources

EPA

- Diane Evans, EPA Region 6
- Shaun McGrath, EPA Region 8
- Joan Card, EPA Region 8
- Maja Tritt, EPA Region 8
- George Parrish, EPA Region 8
- Lisa Castanon, EPA Region 10
- Gretchen Giannelli, EPA Office of Water
- Fred Leutner, EPA Office of Water
- Roger Gorke, EPA Office of Water
- Gretchen Giannelli, EPA Office of Water
- Tod Siegal, EPA Office of General Counsel
- Peter Ford, EPA Office of General Counsel
- Mark Rupp, EPA Office of Congressional and Intergovernmental Relations
- Andrew Hanson, EPA Office of Congressional and Intergovernmental Relations

Idaho

- Jerry Rigby, WSWC Vice-Chair and Idaho representative to the WSWC

New Mexico

- Scott Verhines, New Mexico State Engineer, WSWC Secretary-Treasurer

North Dakota

- Dave Glatt, North Dakota Department of Health
- Meg Nielsen, North Dakota

Oklahoma

- J.D. Strong, Oklahoma Water Resources Board
- Shellie Chard-McClary, Oklahoma Department of Environmental Quality, Water Quality Division

South Dakota

- Kent Woodmansey - South Dakota Department of Environment and Natural Resources, Feedlot Permit Program

Washington

- Stephen Bernath, Washington Department of Ecology, Water Quality Program
- Tom Laurie, Washington Department of Ecology, Tribal and Environmental Affairs

WGA

- Carlee Brown

WSWC

- Tony Willardson
- Nathan Bracken

INTRODUCTIONS AND OVERVIEW

EPA Region 8 Administrator Shaun McGrath said the call would discuss the possible reinterpretation of requirements in Section 518 of the Clean Water Act (CWA) regarding steps tribes must take to receive "treatment as states" status to administer CWA regulatory programs. He said EPA has not issued a formal proposal and is still "early in the process," having heard concerns that the WSWC and others have expressed about the lack of sufficient, early state consultation in the development of other CWA proposals. Consequently, EPA is seeking informal dialog with states before issuing a formal proposal.

Fred Leutner with EPA's Office of Water said the reinterpretation would bring its CWA TAS policies in line with similar TAS policies under the Clean Air Act (CAA). Specifically, EPA is considering the possibility of removing the requirement that tribes must demonstrate inherent regulatory authority to be eligible to administer CWA regulatory programs.

Fred explained that EPA initially took a narrow approach to this requirement when it adopted its current policy in 1991, but "left the door open" for future reinterpretations pending later developments. EPA now believes that subsequent developments support a reinterpretation of Section 518 as an express delegation of authority by Congress to the tribes, which would not require the tribes to demonstrate "inherent authority." EPA believes this conclusion is supported by: (1) similar approaches that have been taken under the CAA; (2) EPA has gained more experience implementing its policy since 1991 and is unsure if requiring tribes to demonstrate inherent regulatory authority has yielded "much benefit;" (3) the plain language of Section 518 appears to support reinterpretation; and (4) judicial cases since 1991 appear to support reinterpretation. All other eligibility requirements would remain in place and states would still be able to comment and raise concerns.

Of note, Fred referenced a PowerPoint presentation EPA is using to explain the possible reinterpretation (enclosed). According to the presentation and other materials EPA has provided (enclosed), the agency will conduct "pre-proposal" consultation and coordination with states and tribes from April to July 2014. It will review the comments and views received and determine whether to proceed with a reinterpretation, which will take the form of an interpretive rule that likely would not be finalized before fall 2015. In the meantime, EPA will continue to implement the current interpretation of the CWA's TAS provisions.

GENERAL QUESTIONS AND COMMENTS

Prior to the call, the WSWC provided EPA with a series of “general” questions regarding the reinterpretation, which its CWA Workgroup developed. The questions and related discussion are as follows:

- (1) *Does EPA agree that the reinterpretation would not affect (neither expanding nor retracting) the geographic scope of where tribes are eligible for treatment as a state?*

Yes. Fred said Congress limited the scope of Section 518 to “federal Indian reservations” and that EPA cannot change this language.

- (2) *How would EPA determine whether activities fall under state or tribal jurisdiction? How would EPA address potential conflicts or differences of opinion regarding the extent of tribal jurisdiction?*

Fred said EPA’s current regulations require tribes to provide maps or legal descriptions of the areas they intend to regulate. The agency’s practice is to review these materials and analyze them in light of its own assessment, considering comments from states and other governmental activities. There have been cases where EPA and the states have found errors in a tribe’s application. EPA will not approve an application if it contains incorrect information.

- (3) *What about potential impacts to states if more tribes receive TAS authority, including the possibility that some tribes may enact standards that are more stringent than state standards? What would EPA do to address this type of situation when reviewing TAS proposals?*

Fred explained that this issue arose when Congress developed Section 518, with Congress adding a special clause requiring EPA to establish a dispute resolution process that tribes and states can initiate if they believe differences in standards will result in unreasonable consequences. This process is found in 40 CFR 131.7. The dispute resolution mechanism has never been invoked formally but its presence has led to a number of instances in which conflicts have been resolved informally.

Stephen Bernath with Washington asked for information on how tribal water quality standards could influence waters upstream from the point of jurisdiction. Fred said tribes with TAS status and states are treated in the same manner as upstream and downstream states, meaning that upstream standards must protect downstream waters. Tod Siegal with EPA’s Office of General Counsel added that EPA does not view this situation as an exercise of jurisdiction by a downstream entity in the upstream entity’s area. Instead, the CWA requires upstream discharges to meet downstream applicable water quality standards.

Andrew Sayers-Fay with Alaska noted that there are situations in which water flows from one state into another, and then back into the first state. Fred said any entities in this situation, including both states and tribes, would have the obligation to protect downstream water quality.

Tony Willardson with the WSWC noted that the Isleta Pueblo in New Mexico adopted a non-degradation standard but is located downstream of the outfall of Albuquerque wastewater treatment plant, which raised questions about the costs of complying with the Pueblo’s standards. Diane Evans with EPA Region 6 explained that the Pueblo adopted the standards in 1991 and there were some differences with New Mexico’s water quality standards, particularly with respect to arsenic and ammonia. With arsenic, the region was able to develop a solution for Albuquerque. For ammonia, the Pueblo adopted criteria based on EPA’s criteria and the state had documented a number of impairments for high ammonia levels in the Rio Grande as part of its surface water monitoring program. According to Diane, the river was on the state’s 303(d) list for a dozen years or more. EPA required Albuquerque to add advanced treatment to its wastewater treatment plant, consistent with technology that municipalities in Texas, Oklahoma, and Louisiana were using. The plant also expanded from 45 million gpd to around 76 million gpd. As a result

of the upgrades and the expansion, the state was able to delist the impaired water status for the Rio Grande.

(4) How would the reinterpretation define “reservation?”

Fred said the reinterpretation would use the definition for “reservation” found within Section 518 of the CWA, which defines the term as “all land within the limits of any Indian reservation under the jurisdiction of the United State Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation” (emphasis added) 33 U.S.C. § 1377(H)(1). Thus, Fred said Section 518’s definition of “reservation” encompasses all land within the boundaries of a reservation regardless of who may own it.

(5) How would the reinterpretation apply to trust lands? Would it apply to allotments?

Fred explained that trust lands have the same legal status as a reservation and qualify as an “informal” reservation. Indian country as a whole includes other types of tribal lands in addition to reservations, such as allotments or dependent-Indian communities, which are not part of 518’s definition of “reservation.” EPA is not proposing to change this definition.

Tom Laurie with Washington noted that his state is home to a number of off-reservation trust lands that are also allotments, and asked if a tribe would be eligible for TAS designation on off-reservation allotments. Tod explained that in order for tribal land to qualify for TAS status it must satisfy requirements under 18 U.S.C. 1151(a), meaning that it must be a formal Indian reservation or a tribal trust land that is off-reservation, which can qualify as an “informal reservation.” An allotment that is within a reservation would be eligible but an allotment outside of a reservation would not be eligible unless it is an allotment that is held in trust for a tribe as a whole, in which case it may qualify as an “informal reservation.” Allotments held by individual tribal members that only fall under 18 U.S.C. 1151(c) would not be eligible. This is the current process and EPA is not proposing any change to these requirements.

(6) Would the reinterpretation only apply to landed tribes?

Nathan Bracken with the WSWC provided some additional context for this question, explaining that some tribes, particularly in Alaska and Oklahoma, do not have reservations. For instance, Nathan explained that tribal reservations in Oklahoma were “allotted out” while Alaska has a large number of tribes but only one has a reservation.

Tod said the definition of “tribe” in 33 U.S.C. § 1377(H)(2) of the CWA refers to tribes that exercise governmental authority “over a federal Indian reservation.” As a result, a tribe seeking TAS authority would need to have reservation land. However, as noted previously, reservation land may include tribal trust lands, which could obtain TAS status as “informal reservations.” Tod further noted that while Oklahoma’s tribes do not have reservations, some tribal trust lands in the state could qualify as informal reservations for TAS purposes. Most remaining tribal lands in Alaska do not have the same identity as a tribal trust lands.

Andrew noted that the Department of the Interior is reconsidering of the types of lands it can take into trust. He asked if tribal land taken into trust by Interior would become eligible for TAS status. Tod said EPA is aware of this issue and that it would require more thought, but that for most states, land taken into trust by Interior would become “informal reservations” that could be eligible for TAS status. Further consideration would likely be needed for Alaska given the unique circumstances of its tribes.

(7) Will the approval mechanism for tribal water quality standards be the same as the mechanism for state water quality standards?

Fred said the answer is “yes” and that the underlying concept of the TAS process is to treat the

tribes in the same manner as states. This means that a tribe would need to adopt standards with the right designated uses, develop water quality criteria that protect those uses and are scientifically defensible, develop an anti-degradation policy, and notify the public and offer an opportunity for hearings on its standards, just as a state. Fred also said EPA has been using this process for years, noting that there are now 48 tribes that have received TAS approval for water quality standards, 39 of which have gone through the full process of adopting standards and have secured EPA approval.

Andrew asked if there will be appropriate notification “going both ways” between states and tribes when they make changes to their water quality standards. Fred said EPA facilitates tribal consultation when the state adopts state standards pursuant to an executive order and an EPA policy regarding tribal coordination and consultation. Diane in Region 6 said that when her region works with tribes to develop water quality standards, it works with the tribal staff to develop mailing lists, which include state agencies, federal agencies, and neighboring tribes. It also publishes notice in regional newspapers. George Parrish in Region 8 said states and tribes in his region develop distribution lists and disseminate notices electronically, a process that provides “pretty good back and forth” communication. The region is also able to resolve issues where someone is not receiving proper notice “well within” the public comment period.

J.D. Strong with Oklahoma commented on the executive order requiring formal tribal consultation, asking if there are any similar documents that require more formal consultation with the states when tribes propose water quality standards. J.D. also said the reinterpretation may be a good opportunity to ensure that states have “quid pro quo” with respect to coordination and consultation. Fred said this is an important question and that EPA will look into the issue further. Diane in Region 6, which includes Oklahoma, said J.D.’s agency, the Oklahoma Water Resources Board, would “certainly be on the mailing list” should and tribes in the state propose water quality standards. Shaun also said EPA will look into the issue further and provide a response.

(8) Other Questions

Jackie Schafer from Alaska asked if the interpretive rule will include an explicit statement that it is not intended to change jurisdictional rules as they currently exist. Fred said this is a “good” suggestion to consider because EPA is trying to be clear about what will change and what will not under the reinterpretation.

SPECIFIC STATE COMMENTS AND QUESTIONS:

South Dakota and Oklahoma provided the following specific comments and questions regarding the reinterpretation, which EPA addressed during the call.

(1) South Dakota:

We believe this proposal has the potential to have significant impacts in our state and anticipate our Attorney General’s Office will work together with other state Attorneys General on a response should a rule be proposed.

If a state is delegated or has an EPA approved environmental program, we are required to provide an Attorney General’s Statement documenting we have adequate authority to carry out the program. We believe it is reasonable for EPA to require and to review information on a tribe’s legal authority as part of this process.

It also appears that EPA wants to eliminate the requirement to seek comments on EPA’s factual findings concerning inherent tribal authority for treatment as a state from appropriate governmental entities and local parties. We would also not support this change to the process.

In addition, EPA's proposal is directly contrary to the requirements established by U.S. Supreme Court decisions concerning the assertion of tribal jurisdiction over non-members and non-Indians.

Tod addressed South Dakota's concern that the reinterpretation may be contrary to U.S. Supreme Court decisions. He explained that there is a line of cases that emerged from *Montana v. U.S.*, 450 U.S. 544 (1981), which set forth the so-called "Montana Test." This test applies to situations in which a tribe's reservation includes nonmember-owned fee lands and requires the tribe to demonstrate that nonmember activities on nonmember-owned fee lands could have a substantial, direct effect on the tribe's health or welfare. EPA has been applying this test over the years as tribes have sought TAS status for the water quality standards program. However, there is another line of Supreme Court cases that found that tribes can have delegated authority pursuant to direct Congressional delegation. Tod cited a Supreme Court case dealing with liquor licenses on a reservation, which he said confirmed the principle that Congress can delegate authority directly to tribes, providing a parallel and separate way for tribes to exercise authority over nonmembers. This is how EPA interpreted the CAA's TAS provisions – as a direct delegation from Congress to eligible tribes to run clean air programs over their entire reservations, including over nonmembers who may be acting on the reservation or on nonmember-owned lands. EPA views the two types of authority (inherent and delegated) as "separate bins" that exist parallel to each other. If there is a Congressional delegation of authority, which EPA believes to be the case for TAS determinations under the CWA, there is no need to "get into" the line of cases concerning the Montana Test. Therefore, Tod said the reinterpretation would be consistent with Supreme Court case law but is consistent with a separate line of cases that addresses a different type of authority.

Fred discussed South Dakota's concern that the reinterpretation would eliminate requirements for EPA to seek comments from states and other parties regarding the factual findings it makes when determining whether a tribe has inherent regulatory authority. He said EPA currently makes these findings when it carries out the Montana Test. However, under the reinterpretation, such findings would be unnecessary because tribes would not be required to show that they have inherent regulatory authority. Because there would be no factual findings, public comment would be unnecessary. However, this process would be different for tribes seeking authority under Section 402 of the CWA, because tribes in this situation make their TAS demonstration within their Section 402 applications.

J.D. noted that the reinterpretation would use an "automatic express delegation" approach, and asked how the states would appeal such a determination or participate in the decision-making process. Fred said the current notification process, which EPA would not change, provides notice to all appropriate governmental entities, including the state in which the tribe is located as well as adjacent states. EPA provides this notice when the application is complete. This process will not change and the states will have "full opportunity" to comment on "any aspect of the tribe's assertion of authority."

(2) Oklahoma:

Oklahoma noted that it has 39 tribes that do not have reservations, which Congress recognized when it established a special requirement that no TAS approvals can be granted without a cooperative agreement with the state. Its question was as follows:

How would the proposal affect the rather unique situation we have with regard to the additional requirements passed by Congress for tribes seeking TAS in Oklahoma?

Fred said the 2005 Transportation Equity Act included a provision that EPA can approve TAS for a tribe in Oklahoma for an environmental regulatory program only if the tribe and the appropriate state agency enter into a cooperative agreement approved by EPA to jointly plan and administer the program requirements. The reinterpretation would not and cannot change this requirement.

WRAP-UP

Based on the discussion, Shaun said EPA would follow up with the WSWC regarding: (1) whether there will be a process for adjacent state(s) to be notified about new or revised water quality standards that tribes have submitted to EPA for review; and (2) that the reinterpretation includes specific language stating that it will not expand (or reduce) the geographic scope of lands for which tribes may apply for TAS. He encouraged the states to provide questions and comments through their respective regions or to Fred directly. Fred's contact information is leutner.fred@epa.gov and (202) 566-0378.

UPDATE: On September 5, Shaun provided the following response to the above questions:

EPA Issue #1 Response: The Clean Water Act and EPA's regulations require that a state or authorized tribe conduct a public process before adopting water quality standards. This step alone ensures that the standards adoption process is open and transparent. In addition, our recently-posted FAQs on the subject of downstream protection (see Question 2 of the FAQs at <http://water.epa.gov/scitech/swguidance/standards/library/upload/downstream-faqs.pdf>) contain recommendations for how states and tribes can communicate and coordinate early between jurisdictions, programs, and agencies regarding shared watersheds when developing water quality standards. As you heard on the call, some Regions have taken the initiative to facilitate such interactions when tribes are involved. EPA will explore identifying, documenting, and encouraging best practices in this area.

EPA Issue #2 Response: Thank you for this recommendation. It was clear from your members' questions and from the discussion that this is a matter of broad interest, and your suggestion has merit. We will ensure it is considered as the proposed interpretive rule is drafted.



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**WSWC-EPA CONFERENCE CALL:
POSSIBLE "TREATMENT AS STATES" REINTERPRETATION
August 12, 2014**

SUMMARY

IN ATTENDANCE

Alaska

- Andrew Sayers-Fay, Alaska Department of Environment of Environmental Conservation, Division of Water
- Brock Tabor, Alaska Department of Environment of Environmental Conservation, Division of Water
- Jackie Schafer, Alaska Attorney General's Office

Arizona

- Jeff Trembly, Arizona Department of Water Resources

EPA

- Diane Evans, EPA Region 6
- Shaun McGrath, EPA Region 8
- Joan Card, EPA Region 8
- Maja Tritt, EPA Region 8
- George Parrish, EPA Region 8
- Lisa Castanon, EPA Region 10
- Gretchen Giannelli, EPA Office of Water
- Fred Leutner, EPA Office of Water
- Roger Gorke, EPA Office of Water
- Gretchen Giannelli, EPA Office of Water
- Tod Siegal, EPA Office of General Counsel
- Peter Ford, EPA Office of General Counsel
- Mark Rupp, EPA Office of Congressional and Intergovernmental Relations
- Andrew Hanson, EPA Office of Congressional and Intergovernmental Relations

Idaho

- Jerry Rigby, WSWC Vice-Chair and Idaho representative to the WSWC

New Mexico

- Scott Verhines, New Mexico State Engineer, WSWC Secretary-Treasurer

North Dakota

- Dave Glatt, North Dakota Department of Health
- Meg Nielsen, North Dakota

Oklahoma

-J.D. Strong, Oklahoma Water Resources Board

-Shellie Chard-McClary, Oklahoma Department of Environmental Quality, Water Quality Division

South Dakota

-Kent Woodmansey - South Dakota Department of Environment and Natural Resources, Feedlot Permit Program

Washington

-Stephen Bernath, Washington Department of Ecology, Water Quality Program

-Tom Laurie, Washington Department of Ecology, Tribal and Environmental Affairs

WGA

-Carlee Brown

WSWC

-Tony Willardson

-Nathan Bracken

INTRODUCTIONS AND OVERVIEW

EPA Region 8 Administrator Shaun McGrath said the call would discuss the possible reinterpretation of requirements in Section 518 of the Clean Water Act (CWA) regarding steps tribes must take to receive “treatment as states” status to administer CWA regulatory programs. He said EPA has not issued a formal proposal and is still “early in the process,” having heard concerns that the WSWC and others have expressed about the lack of sufficient, early state consultation in the development of other CWA proposals. Consequently, EPA is seeking informal dialog with states before issuing a formal proposal.

Fred Leutner with EPA’s Office of Water said the reinterpretation would bring its CWA TAS policies in line with similar TAS policies under the Clean Air Act (CAA). Specifically, EPA is considering the possibility of removing the requirement that tribes must demonstrate inherent regulatory authority to be eligible to administer CWA regulatory programs.

Fred explained that EPA initially took a narrow approach to this requirement when it adopted its current policy in 1991, but “left the door open” for future reinterpretations pending later developments. EPA now believes that subsequent developments support a reinterpretation of Section 518 as an express delegation of authority by Congress to the tribes, which would not require the tribes to demonstrate “inherent authority.” EPA believes this conclusion is supported by: (1) similar approaches that have been taken under the CAA; (2) EPA has gained more experience implementing its policy since 1991 and is unsure if requiring tribes to demonstrate inherent regulatory authority has yielded “much benefit;” (3) the plain language of Section 518 appears to support reinterpretation; and (4) judicial cases since 1991 appear to support reinterpretation. All other eligibility requirements would remain in place and states would still be able to comment and raise concerns.

Of note, Fred referenced a PowerPoint presentation EPA is using to explain the possible reinterpretation (enclosed). According to the presentation and other materials EPA has provided (enclosed), the agency will conduct “pre-proposal” consultation and coordination with states and tribes from April to July 2014. It will review the comments and views received and determine whether to proceed with a reinterpretation, which will take the form of an interpretive rule that likely would not be finalized before fall 2015. In the meantime, EPA will continue to implement the current interpretation of the CWA’s TAS provisions.

GENERAL QUESTIONS AND COMMENTS

Prior to the call, the WSWC provided EPA with a series of “general” questions regarding the reinterpretation, which its CWA Workgroup developed. The questions and related discussion are as follows:

- (1) *Does EPA agree that the reinterpretation would not affect (neither expanding nor retracting) the geographic scope of where tribes are eligible for treatment as a state?*

Yes. Fred said Congress limited the scope of Section 518 to “federal Indian reservations” and that EPA cannot change this language.

- (2) *How would EPA determine whether activities fall under state or tribal jurisdiction? How would EPA address potential conflicts or differences of opinion regarding the extent of tribal jurisdiction?*

Fred said EPA’s current regulations require tribes to provide maps or legal descriptions of the areas they intend to regulate. The agency’s practice is to review these materials and analyze them in light of its own assessment, considering comments from states and other governmental activities. There have been cases where EPA and the states have found errors in a tribe’s application. EPA will not approve an application if it contains incorrect information.

- (3) *What about potential impacts to states if more tribes receive TAS authority, including the possibility that some tribes may enact standards that are more stringent than state standards? What would EPA do to address this type of situation when reviewing TAS proposals?*

Fred explained that this issue arose when Congress developed Section 518, with Congress adding a special clause requiring EPA to establish a dispute resolution process that tribes and states can initiate if they believe differences in standards will result in unreasonable consequences. This process is found in 40 CFR 131.7. The dispute resolution mechanism has never been invoked formally but its presence has led to a number of instances in which conflicts have been resolved informally.

Stephen Bernath with Washington asked for information on how tribal water quality standards could influence waters upstream from the point of jurisdiction. Fred said tribes with TAS status and states are treated in the same manner as upstream and downstream states, meaning that upstream standards must protect downstream waters. Tod Siegal with EPA’s Office of General Counsel added that EPA does not view this situation as an exercise of jurisdiction by a downstream entity in the upstream entity’s area. Instead, the CWA requires upstream discharges to meet downstream applicable water quality standards.

Andrew Sayers-Fay with Alaska noted that there are situations in which water flows from one state into another, and then back into the first state. Fred said any entities in this situation, including both states and tribes, would have the obligation to protect downstream water quality.

Tony Willardson with the WSWC noted that the Isleta Pueblo in New Mexico adopted a non-degradation standard but is located downstream of the outfall of Albuquerque wastewater treatment plant, which raised questions about the costs of complying with the Pueblo’s standards. Diane Evans with EPA Region 6 explained that the Pueblo adopted the standards in 1991 and there were some differences with New Mexico’s water quality standards, particularly with respect to arsenic and ammonia. With arsenic, the region was able to develop a solution for Albuquerque. For ammonia, the Pueblo adopted criteria based on EPA’s criteria and the state had documented a number of impairments for high ammonia levels in the Rio Grande as part of its surface water monitoring program. According to Diane, the river was on the state’s 303(d) list for a dozen years or more. EPA required Albuquerque to add advanced treatment to its wastewater treatment plant, consistent with technology that municipalities in Texas, Oklahoma, and Louisiana were using. The plant also expanded from 45 million gpd to around 76 million gpd. As a result

of the upgrades and the expansion, the state was able to delist the impaired water status for the Rio Grande.

(4) How would the reinterpretation define “reservation?”

Fred said the reinterpretation would use the definition for “reservation” found within Section 518 of the CWA, which defines the term as “all land within the limits of any Indian reservation under the jurisdiction of the United State Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation” (emphasis added) 33 U.S.C. § 1377(H)(1). Thus, Fred said Section 518’s definition of “reservation” encompasses all land within the boundaries of a reservation regardless of who may own it.

(5) How would the reinterpretation apply to trust lands? Would it apply to allotments?

Fred explained that trust lands have the same legal status as a reservation and qualify as an “informal” reservation. Indian country as a whole includes other types of tribal lands in addition to reservations, such as allotments or dependent-Indian communities, which are not part of 518’s definition of “reservation.” EPA is not proposing to change this definition.

Tom Laurie with Washington noted that his state is home to a number of off-reservation trust lands that are also allotments, and asked if a tribe would be eligible for TAS designation on off-reservation allotments. Tod explained that in order for tribal land to qualify for TAS status it must satisfy requirements under 18 U.S.C. 1151(a), meaning that it must be a formal Indian reservation or a tribal trust land that is off-reservation, which can qualify as an “informal reservation.” An allotment that is within a reservation would be eligible but an allotment outside of a reservation would not be eligible unless it is an allotment that is held in trust for a tribe as a whole, in which case it may qualify as an “informal reservation.” Allotments held by individual tribal members that only fall under 18 U.S.C. 1151(c) would not be eligible. This is the current process and EPA is not proposing any change to these requirements.

(6) Would the reinterpretation only apply to landed tribes?

Nathan Bracken with the WSWC provided some additional context for this question, explaining that some tribes, particularly in Alaska and Oklahoma, do not have reservations. For instance, Nathan explained that tribal reservations in Oklahoma were “allotted out” while Alaska has a large number of tribes but only one has a reservation.

Tod said the definition of “tribe” in 33 U.S.C. § 1377(H)(2) of the CWA refers to tribes that exercise governmental authority “over a federal Indian reservation.” As a result, a tribe seeking TAS authority would need to have reservation land. However, as noted previously, reservation land may include tribal trust lands, which could obtain TAS status as “informal reservations.” Tod further noted that while Oklahoma’s tribes do not have reservations, some tribal trust lands in the state could qualify as informal reservations for TAS purposes. Most remaining tribal lands in Alaska do not have the same identity as a tribal trust lands.

Andrew noted that the Department of the Interior is reconsidering of the types of lands it can take into trust. He asked if tribal land taken into trust by Interior would become eligible for TAS status. Tod said EPA is aware of this issue and that it would require more thought, but that for most states, land taken into trust by Interior would become “informal reservations” that could be eligible for TAS status. Further consideration would likely be needed for Alaska given the unique circumstances of its tribes.

(7) Will the approval mechanism for tribal water quality standards be the same as the mechanism for state water quality standards?

Fred said the answer is “yes” and that the underlying concept of the TAS process is to treat the

tribes in the same manner as states. This means that a tribe would need to adopt standards with the right designated uses, develop water quality criteria that protect those uses and are scientifically defensible, develop an anti-degradation policy, and notify the public and offer an opportunity for hearings on its standards, just as a state. Fred also said EPA has been using this process for years, noting that there are now 48 tribes that have received TAS approval for water quality standards, 39 of which have gone through the full process of adopting standards and have secured EPA approval.

Andrew asked if there will be appropriate notification “going both ways” between states and tribes when they make changes to their water quality standards. Fred said EPA facilitates tribal consultation when the state adopts state standards pursuant to an executive order and an EPA policy regarding tribal coordination and consultation. Diane in Region 6 said that when her region works with tribes to develop water quality standards, it works with the tribal staff to develop mailing lists, which include state agencies, federal agencies, and neighboring tribes. It also publishes notice in regional newspapers. George Parrish in Region 8 said states and tribes in his region develop distribution lists and disseminate notices electronically, a process that provides “pretty good back and forth” communication. The region is also able to resolve issues where someone is not receiving proper notice “well within” the public comment period.

J.D. Strong with Oklahoma commented on the executive order requiring formal tribal consultation, asking if there are any similar documents that require more formal consultation with the states when tribes propose water quality standards. J.D. also said the reinterpretation may be a good opportunity to ensure that states have “quid pro quo” with respect to coordination and consultation. Fred said this is an important question and that EPA will look into the issue further. Diane in Region 6, which includes Oklahoma, said J.D.’s agency, the Oklahoma Water Resources Board, would “certainly be on the mailing list” should and tribes in the state propose water quality standards. Shaun also said EPA will look into the issue further and provide a response.

(8) Other Questions

Jackie Schafer from Alaska asked if the interpretive rule will include an explicit statement that it is not intended to change jurisdictional rules as they currently exist. Fred said this is a “good” suggestion to consider because EPA is trying to be clear about what will change and what will not under the reinterpretation.

SPECIFIC STATE COMMENTS AND QUESTIONS:

South Dakota and Oklahoma provided the following specific comments and questions regarding the reinterpretation, which EPA addressed during the call.

(1) South Dakota:

We believe this proposal has the potential to have significant impacts in our state and anticipate our Attorney General’s Office will work together with other state Attorneys General on a response should a rule be proposed.

If a state is delegated or has an EPA approved environmental program, we are required to provide an Attorney General’s Statement documenting we have adequate authority to carry out the program. We believe it is reasonable for EPA to require and to review information on a tribe’s legal authority as part of this process.

It also appears that EPA wants to eliminate the requirement to seek comments on EPA’s factual findings concerning inherent tribal authority for treatment as a state from appropriate governmental entities and local parties. We would also not support this change to the process.

In addition, EPA's proposal is directly contrary to the requirements established by U.S. Supreme Court decisions concerning the assertion of tribal jurisdiction over non-members and non-Indians.

Tod addressed South Dakota's concern that the reinterpretation may be contrary to U.S. Supreme Court decisions. He explained that there is a line of cases that emerged from *Montana v. U.S.*, 450 U.S. 544 (1981), which set forth the so-called "Montana Test." This test applies to situations in which a tribe's reservation includes nonmember-owned fee lands and requires the tribe to demonstrate that nonmember activities on nonmember-owned fee lands could have a substantial, direct effect on the tribe's health or welfare. EPA has been applying this test over the years as tribes have sought TAS status for the water quality standards program. However, there is another line of Supreme Court cases that found that tribes can have delegated authority pursuant to direct Congressional delegation. Tod cited a Supreme Court case dealing with liquor licenses on a reservation, which he said confirmed the principle that Congress can delegate authority directly to tribes, providing a parallel and separate way for tribes to exercise authority over nonmembers. This is how EPA interpreted the CAA's TAS provisions – as a direct delegation from Congress to eligible tribes to run clean air programs over their entire reservations, including over nonmembers who may be acting on the reservation or on nonmember-owned lands. EPA views the two types of authority (inherent and delegated) as "separate bins" that exist parallel to each other. If there is a Congressional delegation of authority, which EPA believes to be the case for TAS determinations under the CWA, there is no need to "get into" the line of cases concerning the Montana Test. Therefore, Tod said the reinterpretation would be consistent with Supreme Court case law but is consistent with a separate line of cases that addresses a different type of authority.

Fred discussed South Dakota's concern that the reinterpretation would eliminate requirements for EPA to seek comments from states and other parties regarding the factual findings it makes when determining whether a tribe has inherent regulatory authority. He said EPA currently makes these findings when it carries out the Montana Test. However, under the reinterpretation, such findings would be unnecessary because tribes would not be required to show that they have inherent regulatory authority. Because there would be no factual findings, public comment would be unnecessary. However, this process would be different for tribes seeking authority under Section 402 of the CWA, because tribes in this situation make their TAS demonstration within their Section 402 applications.

J.D. noted that the reinterpretation would use an "automatic express delegation" approach, and asked how the states would appeal such a determination or participate in the decision-making process. Fred said the current notification process, which EPA would not change, provides notice to all appropriate governmental entities, including the state in which the tribe is located as well as adjacent states. EPA provides this notice when the application is complete. This process will not change and the states will have "full opportunity" to comment on "any aspect of the tribe's assertion of authority."

(2) Oklahoma:

Oklahoma noted that it has 39 tribes that do not have reservations, which Congress recognized when it established a special requirement that no TAS approvals can be granted without a cooperative agreement with the state. Its question was as follows:

How would the proposal affect the rather unique situation we have with regard to the additional requirements passed by Congress for tribes seeking TAS in Oklahoma?

Fred said the 2005 Transportation Equity Act included a provision that EPA can approve TAS for a tribe in Oklahoma for an environmental regulatory program only if the tribe and the appropriate state agency enter into a cooperative agreement approved by EPA to jointly plan and administer the program requirements. The reinterpretation would not and cannot change this requirement.

WRAP-UP

Based on the discussion, Shaun said EPA would follow up with the WSWC regarding: (1) whether there will be a process for adjacent state(s) to be notified about new or revised water quality standards that tribes have submitted to EPA for review; and (2) that the reinterpretation includes specific language stating that it will not expand (or reduce) the geographic scope of lands for which tribes may apply for TAS. He encouraged the states to provide questions and comments through their respective regions or to Fred directly. Fred's contact information is leutner.fred@epa.gov and (202) 566-0378.

UPDATE: On September 5, Shaun provided the following response to the above questions:

EPA Issue #1 Response: The Clean Water Act and EPA's regulations require that a state or authorized tribe conduct a public process before adopting water quality standards. This step alone ensures that the standards adoption process is open and transparent. In addition, our recently-posted FAQs on the subject of downstream protection (see Question 2 of the FAQs at <http://water.epa.gov/scitech/swguidance/standards/library/upload/downstream-faqs.pdf>) contain recommendations for how states and tribes can communicate and coordinate early between jurisdictions, programs, and agencies regarding shared watersheds when developing water quality standards. As you heard on the call, some Regions have taken the initiative to facilitate such interactions when tribes are involved. EPA will explore identifying, documenting, and encouraging best practices in this area.

EPA Issue #2 Response: Thank you for this recommendation. It was clear from your members' questions and from the discussion that this is a matter of broad interest, and your suggestion has merit. We will ensure it is considered as the proposed interpretive rule is drafted.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF WETLANDS, OCEANS AND WATERSHEDS

September 19, 2014

Dear Intergovernmental Association Colleague:

The U.S. Environmental Protection Agency is considering a rulemaking to provide more opportunities for tribes to fully engage in the Clean Water Act (CWA) Section 303(d) Impaired Water Listing and Total Maximum Daily Load (TMDL) Program. This action would provide such opportunities by establishing the process for tribes to obtain Treatment in a Similar Manner as a State (TAS) authority for the Program. The purpose of this letter is to seek your input on this action at this early stage, prior to a formal proposal.

The CWA provides for states, territories, and authorized tribes to: 1) develop lists of impaired waters; 2) establish priority rankings for waters on the lists; and 3) develop TMDLs for these waters. Impaired waters are waters for which technology-based regulations and other required controls are not stringent enough to meet CWA water quality standards. A TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards with a margin of safety.

I would like to invite you to a meeting to be held on Wednesday, October 1, 2014 at 2:00-3:00 p.m. in room 1117A of the William Jefferson Clinton East Building (formerly "EPA East" Building). You may enter the building at 1201 Constitution Avenue, N.W. Please be sure to arrive at least 15 minutes in advance of the meeting time, and to bring a photo ID for entry. The purpose of this meeting is for EPA to provide background information and outline its plans for the action, solicit initial feedback from association representatives, and discuss approaches for conducting further outreach to and obtaining input from your associations' state members. If you or staff members of your association are not able to attend in person, participation is available by audio conference by dialing 1-866-299-3188, and entering code 202-566-1167# at the prompt.

This planned proposed rulemaking to establish a TAS process for Listing and TMDLs is separate from the EPA Office of Water's potential reinterpretation of the Agency's approach to tribal jurisdiction to administer CWA regulatory programs, a subject about which many state associations have recently been briefed. EPA is planning to proceed with the proposed rulemaking to establish a TAS process for listing and TMDLs irrespective of the reinterpretation.

I am enclosing a two-page description of this planned proposed action to provide more opportunities for tribes to fully engage in the CWA Section 303(d) Impaired Water Listing and TMDL Program, which we will discuss in more detail at the meeting on October 1. We are very interested to hear your views during the meeting, and points of contact will be provided to facilitate your comments and input after the meeting.

We are inviting the following intergovernmental associations to participate in this meeting: the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the Western Governors Association, the Southern Governors Association, the Midwestern Governors Association, the Coalition of Northeastern Governors, the Environmental Council of the States, the Association of Clean Water Administrators, and the Western States Water Council.

Please let us know if you will be able to participate in this meeting by contacting Andrew Hanson in the EPA's Office of Congressional and Intergovernmental Relations at hanson.andrew@epa.gov or (202) 564-3664.

If you have any questions regarding the planned proposed rulemaking, you may contact me at wall.tom@epa.gov or (202) 564-4179, or Sarah Furtak at furtak.sarah@epa.gov or (202) 566-1167.

Sincerely,

A handwritten signature in black ink that reads "Tom Wall". The signature is written in a cursive, slightly slanted style.

Tom Wall, Director
Assessment and Watershed Protection Division

Enclosure

Planned Proposed Rulemaking to Provide More Opportunities for Tribes to Fully Engage in the Clean Water Act Section 303(d) Impaired Water Listing and TMDL Program

Prepared by EPA Office of Wetlands, Oceans and Watersheds
September 2014

Issue

- There is tribal interest in obtaining Treatment in a Similar Manner as a State (TAS) for the Clean Water Act (CWA) Section 303(d) Impaired Water Listing and Total Maximum Daily Load (TMDL) Program.
- CWA section 518 provides that eligible tribes may seek TAS for CWA section 303; however existing regulations do not explicitly address how tribes obtain TAS for the 303(d) Program. Regulations are already in place expressly establishing a TAS process for each of the other relevant CWA programs available to Tribes (*e.g.*, Water Quality Standards (WQS), National Pollutant Discharge Elimination System (NPDES), section 404 permitting for the discharge of dredged or fill material).

Action and Purpose

- EPA is developing a proposed rulemaking to provide more opportunities for tribes to fully engage in the Impaired Water Listing and TMDL Program.
- In this rulemaking, EPA would propose a process for tribes to apply to EPA for authority to establish lists of impaired waters and TMDLs pursuant to section 303(d) of the CWA.

Background

- EPA conducted tribal consultation and coordination on the planned proposed rulemaking from April 8, 2014 to June 6, 2014.
- About 40 tribes, including tribal representatives participating on the National Tribal Water Council and the inter-tribal consortium United South and Eastern Tribes, provided comments.
- Comments were supportive of EPA's work on the proposed rulemaking.
- EPA is conducting pre-proposal consultation and coordination with intergovernmental associations and plans to further coordinate with the Association of Clean Water Administrators (ACWA) concurrently with the public comment period should we proceed with a proposed rule. EPA also plans to conduct additional tribal consultation during the public comment period should we proceed with a proposed rule.
- This planned proposed rulemaking to establish a TAS process for Listing and TMDLs is separate from the EPA Office of Water's potential reinterpretation of the Agency's approach to tribal jurisdiction to administer CWA regulatory programs, a subject about which many state associations have recently been briefed. EPA is planning to proceed with the proposed rulemaking to establish a TAS process for listing and TMDLs irrespective of the reinterpretation.

Working Time Frame and Next Steps

- April 8-June 6, 2014: Tribal consultation (Completed).
- Mid to Late 2014: EPA begins to draft preamble, rule and supporting documents; Intergovernmental association consultation.
- Late 2014: Publish proposed rule in Federal Register for 60-day public comment; Concurrent tribal consultation and coordination with ACWA.
- Late 2014 to mid-2015: Review / respond to comments; Draft preamble / any rule revisions.
- Late 2015: Publish final rule; Outreach / coordination with tribes.

For Further Information

- Further information on this planned proposed rulemaking is available at <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/policy.cfm>.
- To ask questions or provide comments, please email Sarah Furtak at furtak.sarah@epa.gov or write: Sarah Furtak, Watershed Branch (mail code 4503T), Assessment and Watershed Protection Division, Office of Water, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20460.

Planned Proposed Rulemaking to Address the Process for Tribes to Obtain Treatment in a Similar Manner as States for the Clean Water Act Impaired Water Listing and Total Maximum Daily Load Program

USEPA Office of Wetlands, Oceans and Watersheds
October 2014

1

Overview of Today's Meeting

- Issue & Purpose
- Basics of the Impaired Water Listing and Total Maximum Daily Load (TMDL) Program
- Treatment in a Similar Manner as a State (TAS) Background
- Consultation and Coordination
- Relationship to Potential Reinterpretation of Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs
- Working Schedule
- For More Information

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Issue

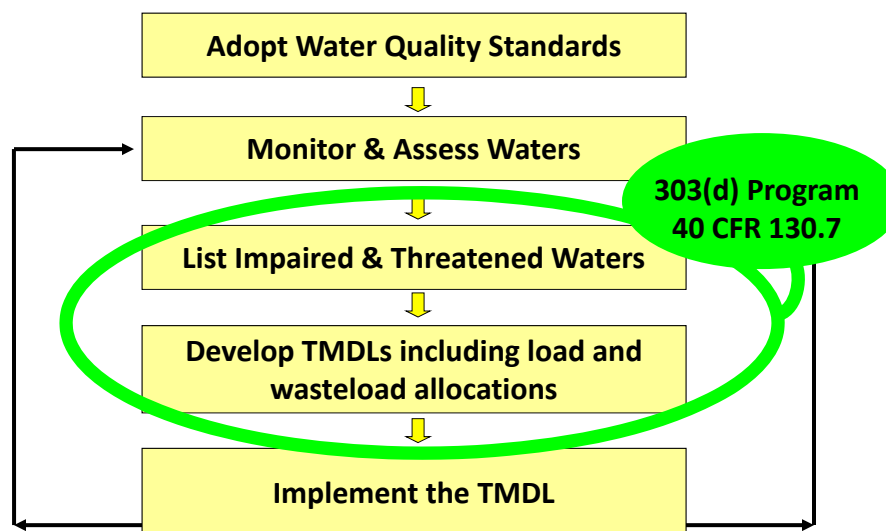
- Section 518 of the Clean Water Act (CWA) authorizes treatment of tribes in a similar manner as states for several programs – including the Section 303(d) Impaired Water Listing and TMDL Program – and directs EPA to promulgate TAS regulations.
- Because existing regulations do not explicitly address TAS for the 303(d) Program, EPA plans to propose a new regulation.
- With 48 tribes having obtained TAS for the Section 303(c) Water Quality Standards (WQS) Program, tribes are now expressing interest in obtaining TAS for section 303(d).

Purpose

To describe a planned proposed rulemaking to establish the process for tribes to obtain TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program, as required by the CWA.

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Clean Water Act Framework for Restoring Polluted Waters



4

What is the Impaired Waters Listing and TMDL Program?

- The CWA provides for states, territories, and authorized tribes to:
 - Solicit and compile existing and readily available water quality data and information
 - Develop lists of impaired waters every two years (2012, 2014, 2016...)
 - Establish TMDLs for waters on the list

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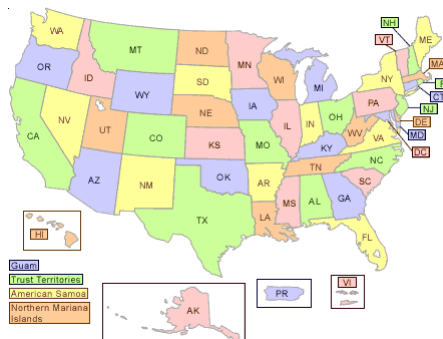
Developing a 303(d) List of Impaired and Threatened Waters

- Assemble all readily available water quality data
- Develop assessment methodology
 - Water quality data and applicable WQS used to make listing decisions
- Identify waters that do not meet WQS (impaired) or are not likely to meet WQS (threatened)
- Establish priority ranking of all listed waters
- Identify specific waters targeted for TMDL development (in next 2 years)
- Request and respond to public comments
- Submit final impaired and threatened waters list to EPA for approval (2 year cycle)

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The National Picture

- ~ 42,000 waters listed as impaired
- Top causes of impairments:
 - pathogens
 - metals
 - nutrients
 - low dissolved oxygen
 - sediment



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What is a TMDL?

- A calculation of the maximum amount of a pollutant that a waterbody can receive and still meet WQS, an allocation of that amount to the pollutant's sources, and a margin of safety.
- *The TMDL comes in the form of a technical document or plan.*



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Developing TMDLs

- TMDLs are established in accordance with priority rankings developed by a 303(d) program authority for each waterbody / pollutant combination.
- TMDLs often address multiple impairments within a watershed
- TMDLs and supporting documents typically include:
 - data summary / analysis,
 - pollutant source assessment,
 - pollutant loading targets,
 - calculations for loading capacity, wasteload allocation (WLA; point sources), load allocation (LA; nonpoint sources), margin of safety (MOS),
 - reasonable assurance demonstration, and
 - summary of and response to public comments
- TMDLs may be accompanied by an implementation plan designed to meet WQS and restore water quality

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Developing TMDLs, cont.

- The CWA provides for states, territories, and authorized tribes to develop TMDLs for waters on the 303(d) list, and in accordance with priority ranking
- Typically, a TMDL could take a year or two to develop, or more if it is very complex
- EPA guidance provides that TMDL development schedules for all impaired waters in a particular jurisdiction should be “expeditious” and “normally extend from eight to thirteen years in length, but could be shorter or slightly longer” depending on jurisdiction-specific factors
- TMDL alternatives may exist in some circumstances

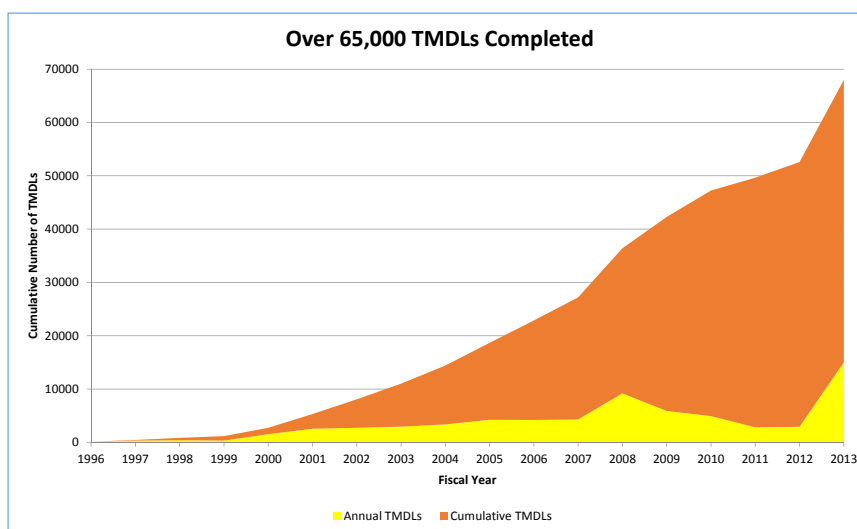
10

How is a TMDL Used to Reduce Water Pollution?

- National Pollutant Discharge Elimination System (NPDES) permits must include limits consistent with a TMDL's WLA
- Nonpoint sources are not directly regulated under the CWA. Therefore, TMDL LAs for nonpoint sources provide guidance to inform federal, state, or tribal action under other authorities



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TAS Background

There are 566 federally recognized tribes

Program	Number of Tribes with TAS
Pollution Control Program Grants (106)	268
WQS (303(c))	48 (40 tribes have approved WQS; 1 tribe without TAS has federally promulgated WQS)
Listing and TMDLs (303(d))	0
NPDES (402)	0
Nonpoint Source Grants and Planning (319)	180

Data as of September 5, 2014

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TAS Background

- Under the CWA, EPA shall promulgate final regulations that specify how Indian tribes shall be treated similar to states for purposes of the Act
- Other CWA programs (e.g., 106, 303(c), 319, 402) have promulgated final TAS regulations
- Existing regulations do not explicitly address steps to take for obtaining TAS for 303(d)

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Consultation and Coordination

- Through a rulemaking, EPA plans to propose a process for tribes to apply to EPA for TAS eligibility to establish lists of impaired waters and TMDLs pursuant to section 303(d) of the CWA
 - Statutory TAS criteria would apply
 - EPA is evaluating specific TAS application procedures
- EPA conducted tribal consultation and coordination on the planned proposed rulemaking from April 8 to June 6, 2014
- About 40 tribes provided comments, which were supportive
- EPA is now consulting with intergovernmental associations
- EPA plans to issue a *Federal Register* notice publication of a proposed rule and continue
 - coordination with the Association of Clean Water Administrators (ACWA)
 - tribal consultation and coordination

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Relationship to Potential Reinterpretation of Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs

- This planned proposed rulemaking to establish a TAS process for Listing and TMDLs is separate from the EPA Office of Water's potential reinterpretation of the Agency's approach to tribal jurisdiction to administer CWA regulatory programs, a subject about which many state associations have recently been briefed.
- EPA is planning to proceed with the proposed rulemaking to establish a TAS process for listing and TMDLs irrespective of the reinterpretation.

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Working Schedule

- Now to late 2014: EPA begins to draft preamble, rule and supporting documents
 - Intergovernmental Association Outreach Meeting
October 1, 2014; EPA requests PRE-PROPOSAL comments by November 1, 2014, or as soon as possible thereafter
- Late 2014: Publish proposed rule in Federal Register for 60-day public comment; Concurrent tribal consultation; Coordination with ACWA
- Late 2014 to mid-2015: Review / respond to comments; Draft preamble / any rule revisions
- Late 2015: Publish final rule; Outreach / coordination with tribes and others

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For More Information

- To view background materials:
<http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/policy.cfm>
- To ask questions or provide comments/views, please email Sarah Furtak at furtak.sarah@epa.gov by November 1, 2014

References:

- USEPA Impaired Waters and Total Maximum Daily Loads Home Page,
<http://epa.gov/owow/tmdl>
- USEPA New Vision for the CWA 303(d) Program,
<http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/programvision.cfm>
- USEPA "New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)" Memo,
<http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/ratepace.cfm>
- USEPA Indian Policies and 1984 Indian Policy,
<http://www.epa.gov/indian/basicinfo/presidential-docs.html>
- USEPA Assessment, TMDL Tracking, and Implementation Database,
http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T

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Questions?



Tab O – Water Transfers Litigation

14-1823(L)

14-1909(con), 14-1991(con), *To Be Argued By:*
14-1997(con), 14-2003(con) ROBERT WILLIAM YALEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 14-1823(L), 14-1909(con),
14-1991(con), 14-1997(con), 14-2003(con)



CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC.,
THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE
NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S
CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC.,

(Caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND GINA MCCARTHY

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ISLAND, ENVIRONMENT FLORIDA, STATE OF NEW YORK,
CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN,
MINNESOTA, MISSOURI, WASHINGTON,

Plaintiffs-Appellees,

GOVERNMENT OF THE PROVINCE OF MANITOBA, CANADA,

Consolidated Plaintiff-Appellee,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE
FEDERATION, SIERRA CLUB,

Intervenor Plaintiffs-Appellees,

—v.—

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA
McCARTHY, in her official capacity as Administrator of the United
States Environmental Protection Agency,

Defendants-Appellants-Cross Appellees,

STATE OF COLORADO, STATE OF NEW MEXICO, STATE OF
ALASKA, ARIZONA DEPARTMENT OF WATER RESOURCES,
STATE OF IDAHO, STATE OF NEBRASKA, STATE OF NORTH
DAKOTA, STATE OF NEVADA, STATE OF TEXAS, STATE OF
UTAH, STATE OF WYOMING, CENTRAL ARIZONA WATER
CONSERVATION DISTRICT, CENTRAL UTAH WATER
CONSERVANCY DISTRICT, CITY AND COUNTY OF DENVER,
by and through its BOARD OF WATER COMMISSIONERS, CITY
AND COUNTY OF SAN FRANCISCO PUBLIC UTILITIES
COMMISSION, CITY OF BOULDER [COLORADO], CITY OF
AURORA [COLORADO], EL DORADO IRRIGATION DISTRICT,
IDAHO WATER USERS ASSOCIATION, IMPERIAL IRRIGATION
DISTRICT, KANE COUNTY [UTAH] WATER CONSERVANCY
DISTRICT, LAS VEGAS VALLEY WATER DISTRICT, LOWER
ARKANSAS VALLEY WATER CONSERVANCY DISTRICT,
METROPOLITAN WATER DISTRICT OF SOUTHERN
CALIFORNIA, NATIONAL WATER RESOURCES ASSOCIATION,
SALT LAKE & SANDY [UTAH] METROPOLITAN WATER
DISTRICT, SALT RIVER PROJECT, SAN DIEGO COUNTY WATER
AUTHORITY, SOUTHEASTERN COLORADO WATER
CONSERVANCY DISTRICT, THE CITY OF COLORADO SPRINGS,
acting by and through its enterprise COLORADO SPRINGS

UTILITIES, WASHINGTON COUNTY [UTAH] WATER DISTRICT,
WESTERN URBAN WATER COALITION, [CALIFORNIA] STATE
WATER CONTRACTORS, CITY OF NEW YORK,

Intervenor Defendants-Appellants-Cross Appellees,

NORTHERN COLORADO WATER CONSERVANCY DISTRICT,

Intervenor Defendant,

—v.—

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Intervenor Defendant-Appellant-Cross Appellant.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket Nos. 14-1823(L), 14-1909(con),
14-1991(con), 14-1997(con), 14-2003(con)¹**

**BRIEF FOR DEFENDANTS-APPELLANTS
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY AND GINA McCARTHY**

¹ The government respectfully requests that the official caption in the clerk's docket be corrected as follows: (1) "Government of the Province of Manitoba, Canada" should be listed among the "Plaintiffs-Appellees" and not separately as a "Consolidated Plaintiff-Appellee"; (2) the parties listed as "Defendants-Appellants-Cross Appellees" should be listed simply as "Defendants-Appellants"; (3) the parties listed as "Intervenor Defendants-Appellants-Cross Appellees" should be listed simply as "Intervenor Defendants-Appellants"; (4) "South Florida Water Management District" should be listed among the "Intervenor Defendants-Appellants" and not separately as an "Intervenor Defendant-Appellant-Cross Appellant"; (5) "Catskill-Deleware Natural Water Alliance, Inc." should be appear as "Catskill-Delaware Natural Water Alliance, Inc."; and (6) "States of Colorado" should appear as "State of Colorado."

Preliminary Statement

Water transfers—in which water is conveyed from one body of water of the United States to another—are a critical part of the nation’s infrastructure. Water transfers are essential for moving water to where the public needs it: among other things, they bring drinking water from Catskill Mountains sources to the City of New York, prevent flooding throughout South Florida, and supply water to the arid West.

Under the Clean Water Act, permits are generally required for “any addition of any pollutant to navigable waters from any point source,” and “navigable waters” is defined to mean “the waters of the United States.” This statutory text can be read either to prohibit the unpermitted addition of pollutants to any individual water body that is part of the waters of the United States, or to prohibit the unpermitted addition of pollutants to the waters of the United States considered collectively.

Faced with this ambiguity, the Environmental Protection Agency (“EPA”) has never construed the statute to require a permit for water transfers except where the transfer itself introduces pollutants or the water is subjected to an intervening use. In 2008, EPA codified its interpretation in a regulation (the “Water Transfers Rule” or “Rule”) adopted through notice-and-comment rulemaking. EPA concluded that the structure and purpose of the Clean Water Act demonstrated Congress’s intent to address water transfers through means other than the permit program at issue here. In doing so, EPA reasonably exer-

cised its authority to resolve the statutory ambiguity—as the Eleventh Circuit has since held.

The district court erroneously reached the opposite conclusion. Although it found the statute to be susceptible to EPA’s interpretation, it nonetheless concluded that EPA did not give a “reasoned explanation” for adopting that interpretation. In doing so, the district court failed to apply the requisite high level of deference to EPA’s decisionmaking, instead undertaking a skeptical review of EPA’s reasoning, disregarding EPA’s explanations, and substituting its own judgments about the best reading of the statute for that of the agency. The district court then went on to speculate about other interpretations EPA might adopt and held them to be contrary to the statute—and on that basis partly vacated the Rule.

The Court should correct the district court’s multiple errors, join the Eleventh Circuit in upholding the Rule, and reverse the district court’s contrary judgment.

Jurisdictional Statement

Plaintiffs invoked the district court’s subject matter jurisdiction under 28 U.S.C. § 1331, as the action arose under the laws of the United States.² The dis-

² EPA initially contested jurisdiction, arguing the courts of appeals have exclusive jurisdiction over challenges to the Water Transfers Rule pursuant to 33 U.S.C. § 1369(b)(1)(E) and (F), and therefore the Administrative Procedure Act’s waiver of sovereign immunity—which permits review only when “there is

trict court entered final judgment on March 31, 2014 (Joint Appendix (“JA”) 47-48, 90), and EPA filed a timely notice of appeal on May 29, 2014 (JA 49, 91). Accordingly, this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Issue Presented

The Clean Water Act requires a National Pollutant Discharge Elimination System (“NPDES”) permit for “any addition of any pollutants to [the waters of the United States] from any point source.” EPA has promulgated the Water Transfers Rule, reflecting its interpretation of the Act that conveying or connecting waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use does not constitute an “addition” to “the waters of the United States” and therefore does not require an NPDES permit. The question is whether, applying *Chevron* deference, this Court should uphold the Rule.

no other adequate remedy in a court,” 5 U.S.C. § 704—does not apply. However, in a related case involving the government and many of the plaintiffs here, the Eleventh Circuit rejected that position. *Friends of the Everglades v. EPA (Friends II)*, 699 F.3d 1280, 1288 (11th Cir. 2012), *cert. denied*, 134 S. Ct. 421 (2013). EPA thereafter stipulated to the denial of its motion to dismiss for lack of jurisdiction, on the basis of collateral estoppel. (JA 192).

Statement of the Case

A. Procedural History

Two cases were consolidated in the district court: one brought by non-governmental organizations on June 20, 2008, the other brought by nine states and a Canadian province on October 2, 2008. (JA 13, 63). New York City, eleven states, numerous Western water districts and similar entities, and the South Florida Water Management District (“SFWMD”) intervened as defendants, while certain parties interested in water transfers in South Florida intervened as plaintiffs. (JA 16, 26, 190).

On April 29, 2009, the district court (Kenneth M. Karas, J.) stayed the proceedings pending the outcome of two Eleventh Circuit cases involving the Water Transfers Rule, *Friends of the Everglades v. South Florida Water Management District (Friends I)*, 570 F.3d 1210, 1227-28 (11th Cir. 2009), and *Friends II*. (JA 18). After those decisions were issued and the district court lifted its stay, the three groups of plaintiffs each filed motions for summary judgment on March 26, 2013. (JA 30, 31, 32). The EPA defendants (EPA and its Administrator) and the four groups of defendants-intervenors each cross-moved for summary judgment on June 7, 2013. (JA 34, 35, 36).

On March 28, 2014, the district court issued a memorandum and order granting plaintiffs’ motions for summary judgment and denying defendants’ cross-motions. (JA 47; SPA 6). It entered judgment on March 31, 2014. (JA 47-48, 90).

On May 29, 2014, the EPA defendants filed a timely notice of appeal. (JA 49, 91). Each group of defendants-intervenors also appealed. (JA 48-53, 91-94).³

B. Legal Background

1. The Clean Water Act

In 1972, Congress enacted the Federal Water Pollution Control Amendments of 1972, better known as the Clean Water Act (“CWA” or the “Act”). 33 U.S.C. §§ 1251-1387. “Congress passed the Clean Water Act in response to widespread recognition—based on events like the 1969 burning of the Cuyahoga River in Cleveland—that our waters had become appallingly polluted.” *Rapanos v. United States*, 547 U.S. 715, 809 (2006) (Stevens, J., dissenting). Congress’s focus was to address “industrial and municipal sources of pollutants,” which “were the worst and most obvious offenders of surface water quality.” *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993) (quotation marks omitted).

The Act’s “objective” is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). At the same time, Congress expressly sought “to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use (including restoration, preservation, and enhance-

³ SFWMD filed a notice of cross appeal, which it subsequently withdrew.

ment) of . . . water resources,” *id.* § 1251(b), and not to “supersede[], abrogate[], or otherwise impair[]” “the authority of each State to allocate quantities of water within its jurisdiction,” *id.* § 1251(g).

The Act provides that “the discharge of any pollutant by any person shall be unlawful,” except as authorized by certain provisions. 33 U.S.C. § 1311(a). One of those provisions is section 402, which establishes the NPDES permitting program. 33 U.S.C. § 1342. The term “discharge of a pollutant” is defined to mean “any addition of any pollutant to navigable waters from any point source,” *id.* § 1362(12)(A), and “navigable waters,” as relevant here, means “the waters of the United States,” *id.* § 1362(7).⁴ Thus, the Act generally requires an NPDES permit for an activity that causes “any addition of any pollutant to [the waters of the United States] from any point source.”⁵

⁴ A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged,” other than in the case of “agricultural stormwater discharges and return flows from irrigated agriculture.” 33 U.S.C. § 1362(14).

⁵ If required, an NPDES permit will contain “effluent limitations” restricting the “quantities, rates, and concentrations of chemical, physical, biological, and other constituents” that may be discharged. 33

The NPDES program, however, does not address all water quality concerns. The Act creates other programs, including “nonpoint source” programs, that generally address pollution from diffuse sources unlike typical industrial or municipal pollution, such as run-off. *See, e.g.*, 33 U.S.C. §§ 1288, 1314, 1329. In nonpoint source programs, states are required to propose for EPA’s approval, then to administer, water quality programs. *See id.* §§ 1288, 1329. EPA provides technical information to states for use in their nonpoint source programs, including information about control methods for “pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.” 33 U.S.C. § 1314(f)(2)(F).

Beyond these nonpoint source programs, the Act also authorizes states to impose permitting programs that are broader and more rigorous than NPDES. *See* 33 U.S.C. § 1370(1). The Act preserves other federal

U.S.C. §§ 1311(e), 1362(11); *see Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill II)*, 451 F.3d 77, 85-86 (2d Cir. 2006). As part of the cooperative federal-state framework established by the Clean Water Act, states have the option, with EPA approval, of administering the NPDES program within the state, 33 U.S.C. § 1342(b)-(c), and in most states it is the state environmental agency, rather than EPA, that issues NPDES permits. (SPA 53).

water regulation not inconsistent with the Act, *id.* § 1371, such as the federal Safe Drinking Water Act, which imposes treatment standards for drinking water provided by public water systems, including those that obtain water through water transfers, 42 U.S.C. §§ 300f–300j-26. (JA 1244-45).

2. Water Transfers and EPA’s Interpretation of the Act

The Water Transfers Rule defines a “water transfer” as “an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.” 40 C.F.R. § 122.3(i).

Water transfers play a critical role in our nation’s infrastructure. As EPA has explained:

Water transfers occur routinely and in many different contexts across the United States. Typically, water transfers route water through tunnels, channels, and/or natural stream water features, and either pump or passively direct it for uses such as providing public water supply, irrigation, power generation, flood control, and environmental restoration. . . .

Water transfers are administered by various federal, State, and local agencies and other entities. . . . Many large cities in the west and the east would not have adequate sources of water for their citizens were it not for the continuous redi-

rection of water from outside basins. For example, both the cities of New York and Los Angeles depend on water transfers from distant watersheds to meet their municipal demand. In short, numerous States, localities, and residents are dependent upon water transfers, and these transfers are an integral component of U.S. infrastructure.

73 Fed. Reg. 33,697, 33,698-99 (June 13, 2008).

The allocation of water among its many uses is generally set by state law, pursuant to longstanding federal policy. *See California v. United States*, 438 U.S. 645, 653 (1978) (noting Congress’s “purposeful and continued deference to state water law”). Water transfers are often the means by which states and water resource agencies “balance competing needs” for limited water supplies. 73 Fed. Reg. at 33,703. Congress has recognized the importance of these water allocations by including in the CWA an express “statement of policy” not to impair, supersede, or abrogate “the authority of each State to allocate quantities of water within its jurisdiction.” 33 U.S.C. § 1251(g).

a. Court Rulings Prior to the Water Transfers Rule

EPA’s view has long been that a water transfer does not constitute an “addition of any pollutants to navigable waters from any point source” and therefore does not need an NPDES permit. As EPA explained when promulgating the Rule, even where pol-

lutants are present in the conveyed water, as will typically be the case given the broad definition of the word “pollutant,” *see* 33 U.S.C. § 1362(6); 73 Fed. Reg. at 33,699, water transfers do not effect an “addition” to the waters of the United States “because the pollutant at issue is already part of ‘the waters of the United States’ to begin with,” 73 Fed. Reg. at 33,701 (quotation marks omitted); (JA 1262). Thus, since the enactment of the Clean Water Act, water transfers have been regulated under NPDES only in response to judicial decisions or where the transferring activity itself introduces pollutants. 73 Fed. Reg. at 33,699-700.

In two earlier cases, EPA successfully advanced a similar view concerning the movement of water through dams. EPA argued that an “addition [of a pollutant] from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world,” and that whether there has been an “addition” is determined based on “when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river).” *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). The D.C. Circuit upheld EPA’s interpretation. *Id.* at 161. Although *Gorsuch* pre-dated *Chevron*, the court essentially applied the two-step *Chevron* analysis: first, it found the statute to be ambiguous, and second, it upheld EPA’s interpretation as “reasonable, not inconsistent with congressional intent, and entitled to great deference.” *Id.* at 166, 183. The Sixth Circuit later followed the *Gor-*

such ruling under *Chevron*. *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988).

However, in later cases not involving dams, other courts of appeals, including this Court, declined to apply *Chevron* deference and held that a permit was required for a water transfer between distinct water bodies. First, in *Dubois v. USDA*, the First Circuit declined to accord *Chevron* deference to the U.S. Forest Service's determination that water transfers do not require a permit, because the Forest Service is not the federal agency charged with interpreting the Clean Water Act. 102 F.3d 1273, 1285 n.15 (1st Cir. 1996). The court then held that a water transfer conveying pollutants between "distinct" water bodies, where the "transfer of water or its contents" between the water bodies "would not occur naturally," requires an NPDES permit. *Id.* at 1297, 1299.

In 2001, this Court adopted a similar interpretation in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskill I)*, 273 F.3d 481 (2d Cir. 2001). The Court held that *Chevron* did not apply to EPA's interpretation of the statute, because it was "based on a series of informal policy statements made and consistent litigation positions taken by the EPA over the years," which "do not deserve broad [*Chevron*] deference." 273 F.3d at 490 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000)). The Court stated, however, that "[i]f the EPA's position had been adopted in a rulemaking or other formal proceeding, deference of the sort applied

by the *Gorsuch* and *Consumers Power* courts might be appropriate.” *Id.* at 490-91.

Applying *Skidmore* deference, the Court rejected EPA’s views. *Id.* at 491. The Court concluded that the water transfer at issue—through a tunnel connecting a reservoir to a creek—“qualifies as an ‘addition’ under the plain meaning of that word.” *Id.* at 489. The Court agreed with *Gorsuch* and *Consumers Power* that “for there to be an ‘addition,’ a ‘point source must introduce the pollutant into navigable water from the outside world,’” but only when “‘outside world’ is construed as any place outside the particular water body to which pollutants are introduced.” *Id.* at 491 (quoting *Gorsuch*, 693 F.2d at 165). It thus rejected “the *Gorsuch* and *Consumers Power* courts’ understanding of ‘addition,’ at least insofar as it implies acceptance of what *Dubois* called a ‘singular entity’ theory of navigable waters, in which an addition to one water body is deemed an addition to all of the waters of the United States.” *Id.* at 493.

In 2004, the Supreme Court considered, but did not resolve, the applicability of the NPDES program to water transfers in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106-09 (2004). In the decision under review, the Eleventh Circuit had followed *Catskill I* and held that a permit was required for a water transfer. *See id.* at 98, *vacating* 280 F.3d 1364 (11th Cir. 2002). The Supreme Court held that, at a minimum, no permit is required where water is transferred between water bodies that are not “meaningfully distinct,” and remanded for further findings on that question. *Id.* at

109, 112. But the Court expressly left unresolved the question whether a permit would be required if the water bodies were “meaningfully distinct.” *Id.* at 108-09. The Court noted that the government as *amicus curiae* had advocated what the Court called the “‘unitary waters’ approach,” under which the statutory phrase “any addition of any pollutant to navigable waters from any point source” should be read to refer to “navigable waters” collectively. *Id.* at 106-07. The Court identified arguments for and against that approach but expressly declined to resolve the matter, leaving it open for litigation on remand. *Id.* at 105-09. The Court declined to accord deference to EPA’s interpretation because of the absence of any “administrative documents in which EPA has espoused” its position. *Id.* at 107.

b. The Water Transfers Rule

Taking up the Supreme Court’s invitation in *Miccosukee*, EPA began an administrative process to formalize its views. In August 2005, EPA’s Office of General Counsel and Office of Water issued a memorandum interpreting the statute to exclude water transfers from the NPDES program. (JA 271).⁶ In June 2006, EPA published a proposed rule to exclude

⁶ After the issuance of this interpretive memorandum, this Court declined to reconsider its holding in *Catskill I. Catskill II*, 451 F.3d at 81. The Court again noted that no formal rule eligible for *Chevron* deference was before it. *Id.* at 83 n.5.

water transfers from the NPDES permit program. 71 Fed. Reg. 32,887 (June 7, 2006).

On June 13, 2008, EPA published the final Water Transfers Rule. 73 Fed. Reg. at 33,697. The Rule added a new subsection (i) to 40 C.F.R. § 122.3:

Section 122.3 Exclusions

The following discharges do not require NPDES permits:

...

(i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

The preamble to the Rule explains EPA's rationale in depth, as does a lengthy "response to comments" document. 73 Fed. Reg. at 33,697-708 (preamble); (JA 1238-94) (response to comments). First, EPA sets out the ambiguity in the statute. It notes that some courts have held that an "addition" of pollutants to navigable waters occurs whenever pollutants are transferred to a particular water body. 73 Fed. Reg. at 33,700-01 (citing *Catskill I*, *Catskill II*, *Dubois*, and the Eleventh Circuit decision vacated in *Miccosukee*). But it also explains the government's contrary interpretation of the statute, advancing what some courts,

including the Supreme Court, have called a “unitary waters” reading of the statutory language:

“[T]he pollutants in transferred water are already *in* ‘the waters of the United States’ before, during, and after the water transfer. Thus, there is no ‘addition’; nothing is being added ‘*to*’ ‘the waters of the United States’ by virtue of the water transfer, because the pollutant at issue is already part of ‘the waters of the United States’ to begin with. Stated differently, when a pollutant is conveyed along with, and already subsumed entirely within, navigable waters and the water is not diverted for an intervening use, the water never loses its status as ‘waters of the United States,’ and thus nothing is added to those waters from the outside world.”

73 Fed. Reg. at 33,701 (quoting government’s brief in *Friends I*).

EPA adopted this latter interpretation of the statute. *See* 73 Fed. Reg. at 33,701. In choosing that view, EPA emphasized the importance of water transfers to the national infrastructure, and Congress’s intent reflected in 33 U.S.C. § 1251(b) and (g) and § 1370 to avoid burdening state authority over water allocations and water resources. 73 Fed. Reg. at 33,701-02. Although EPA acknowledged that water transfers typically carry pollutants, *id.* at 33,699, and that there may be “pollution associated with water management activities,” *id.* at 33,702, EPA explained that

Congress would have considered these effects of water transfers to be best treated through nonpoint source programs, *see, e.g., id.* at 33,702-03. EPA also emphasized that the Clean Water Act expressly authorizes states to develop permit programs that sweep more broadly than NPDES, *see id.* at 33,699, as well as that water conveyed in water transfers may also be regulated by other federal statutes such as the Safe Drinking Water Act (JA 1244-45).

As EPA summarized,

The Agency has concluded that, taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress generally did not intend to subject water transfers to the NPDES program. Interpreting the term “addition” in that context, EPA concludes that water transfers, as defined by today’s rule, do not constitute an “addition” to navigable waters to be regulated under the NPDES program. Instead, Congress intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities.

73 Fed. Reg. at 33,701.

c. The Eleventh Circuit’s Decision in *Friends I*

After the Rule was adopted, the Eleventh Circuit applied *Chevron* and held that the Rule was a reasonable construction of the Act. *Friends I*, 570 F.3d at

1228 (holding “we must give effect to [the Rule]” in rejecting contention that permit was required for particular discharge). The court explained that the Rule reflected the “unitary waters” theory “that it is not an ‘addition . . . to navigable waters’ to move existing pollutants from one navigable water to another” and that “[a]n addition occurs . . . only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters.” 570 F.3d at 1217. Although the court noted that, prior to the promulgation of the Rule, “[t]he unitary waters theory ha[d] a low batting average”—citing *Catskill I*, *Catskill II*, *Dubois*, and the Eleventh Circuit’s own vacated *Miccosukee* decision—it observed that those cases had neither held the statute to be unambiguous nor viewed the matter through the *Chevron* lens. *Id.* at 1217-18. As the court of appeals explained, “[d]eciding how best to construe statutory language is not the same thing as deciding whether a particular construction is within the ballpark of reasonableness” required under *Chevron*. *Id.* at 1221.

At *Chevron*’s step one, the Eleventh Circuit found the statute to be ambiguous because, among other things, the word “waters” can be understood either in an individual or a collective sense. *Id.* at 1223-24. The court also noted the absence of the word “any” before “navigable waters” in the phrase “[a]ny addition of any pollutant to navigable waters from any point source,” and the fact that Congress elsewhere uses the phrase “any navigable waters” when it refers to individual water bodies, supporting an understanding that in this provision “waters” are meant collectively. *Id.* at 1223-25. Holding that the statutory language

was susceptible to either interpretation, the court then concluded that the context of the statute as a whole did not resolve the ambiguity, but rather demonstrated conflicting purposes and a congressional understanding that not all pollution would be covered by the NPDES program. *Id.* at 1225-27.

At *Chevron* step two, the court concluded that “[b]ecause the EPA’s construction is one of the two readings we have found is reasonable, we cannot say that it is ‘arbitrary, capricious, or manifestly contrary to the statute.’” *Id.* at 1228 (quoting *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 844 (1984)). As the court explained, “[a]ll that matters is whether the regulation is a reasonable construction of an ambiguous statute. In other words, there must be two or more reasonable ways to interpret the statute, and the regulation must adopt one of those ways.” *Id.* at 1219 (citations omitted). Concluding that the Water Transfers Rule met this test, the Eleventh Circuit held it to be valid. *Id.* at 1228.⁷

C. The Current Action, and the District Court’s Decision

Plaintiffs in this action contend that the Rule is unlawful.

⁷ A district court in Oregon later followed *Friends I* and upheld the Water Transfers Rule under *Chevron*. *ONRC Action v. Bureau of Reclamation*, Civ. No. 97-3090-CL, 2012 WL 3526828 (D. Or. Aug. 14, 2012), *appeal pending*, No. 12-35831 (9th Cir.).

The district court granted summary judgment to plaintiffs and intervenor-plaintiffs, remanding the Rule to EPA and vacating it in part. Applying *Chevron*, the court agreed with EPA that the statute is ambiguous, following *Friends I* and its conclusion that “[t]he statutory context indicates that sometimes the term “navigable waters” was used in one sense [to refer to “the waters of the United States collectively,”] and sometimes in the other sense [to refer to “many individual water bodies”].’” (SPA 47 (quoting *Friends I*, 570 F.3d 1224-25; alterations in original)). The court further concluded that neither the statutory context nor legislative history removed the ambiguity. (SPA 59-60). Moreover, the district court held that this Court’s decisions in *Catskill I* and *Catskill II* did not control the interpretation of the statute, as this Court expressly left open the possibility of applying *Chevron* to an agency interpretation with the force of law. (SPA 41).

However, the district court rejected the Water Transfers Rule at *Chevron*’s step two, holding that EPA failed to provide a “reasoned explanation” for its adoption. (SPA 47, 104). Although the court acknowledged that EPA’s interpretation of the term “waters of the United States” was a “permissible” interpretation (SPA 92, 104-05), it criticized EPA’s methodology in choosing that interpretation (SPA 79-85), the application of that methodology (SPA 85-91), and the agency’s conclusions (SPA 91-103). The court rejected *Friends I*’s *Chevron* step two analysis because it believed that the Eleventh Circuit wrongly assumed that EPA had adopted a “unitary waters” view and failed to require a “reasoned explanation” for the

Rule. (SPA 104-10). The district court also held that the Rule implied EPA held a “status-based” view of the meaning of “waters of the United States” that was “manifestly contrary to the statute.” (SPA 111-14). The court then addressed and rejected an argument that the court thought EPA “might” adopt on remand in an “attempt to save its interpretation,” involving an application of the non-majority opinions in *Rapanos* to water transfers. (SPA 114-19). Ultimately, the court generally remanded the Rule without vacating it, but vacated it in part “to the extent it is inconsistent with the statute—and in particular the phrase ‘navigable waters’ as interpreted in *Rapanos* and in this Opinion.” (SPA 119-21).

These appeals followed.

Summary of Argument

The Water Transfers Rule is a reasonable interpretation of an ambiguous statute, and should be upheld under the deferential framework of *Chevron*.

The district court correctly held, at *Chevron* step one, that the Clean Water Act is ambiguous. The relevant phrase—“any addition . . . to navigable waters”—can be read to mean either the waters of the United States collectively, or individual bodies of water; under the former interpretation, no NPDES permit would be required for water transfers. *See infra* Point B.1.a. Nothing in the structure, purpose, or history of the statute compels the choice of one or the other of those readings: while the Clean Water Act plainly aims to preserve and restore the integrity of national waters, it also seeks to preserve states’ authority over

water use and allocation, and contains numerous other mechanisms for the regulation of water quality outside the NPDES program. *See infra* Point B.1.b. Nor do this Court’s prior decisions hold that the Act is unambiguous, and EPA’s Rule is therefore still entitled to *Chevron* deference. *See infra* Point B.1.c.

At *Chevron* step two, the district court correctly recognized that the Rule is based on a permissible interpretation of the statute: that an NPDES permit is only required in the case of an “addition” to the “waters of the United States” considered collectively. *See infra* Point B.2.a. It erred in nonetheless rejecting the Rule on the ground that EPA had not provided a “reasoned explanation” for adopting it. To the contrary, EPA carefully set forth numerous statutory and policy reasons for its decision. As Congress entrusted the agency to resolve those matters, EPA’s determination deserved judicial deference. But instead, the district court undertook a searching critique of EPA’s analysis, one that, among other errors, incorrectly perceived inconsistencies in the agency’s reasoning and disregarded EPA’s assessment of the best means of achieving the statute’s water quality goals. *See infra* Point B.2.b. The district court also misunderstood EPA’s interpretation in holding that the agency expanded the definition of “waters of the United States,” and improperly relied on what the court perceived to be an interpretation that EPA “might” adopt. *See infra* Points B.2.c, B.2.d.

Finally, the district court erroneously ordered that the Rule be vacated in part. The court's order was improperly vague, and relied on a hypothetical construction the agency never adopted. Moreover, vacatur is only proper if there are "serious doubts" that the agency can justify its decision, a standard that is not met when, as here, EPA has substantial bases for its action, and the only court of appeals to have considered the Rule has upheld it. *See infra* Point C.

This Court, like the Eleventh Circuit in *Friends I*, should conclude that the Rule reflects a reasonable reading of the statute and is therefore valid. Accordingly, the district court's judgment should be reversed.

ARGUMENT

The Water Transfers Rule Should Be Upheld as a Reasonable Interpretation of an Ambiguous Statute

A. Standard of Review

"On appeal from a grant of summary judgment in a challenge to agency action under the APA, we review the administrative record and the district court's decision de novo." *Bellevue Hospital Ctr. v. Leavitt*, 443 F.3d 163, 173-74 (2d Cir. 2006). The Court "accords no deference" to the district court, "but instead conducts de novo review of the administrative record and renders its own independent judgment." *Ward v. Brown*, 22 F.3d 516, 521 (2d Cir. 1994).

B. The Water Transfers Rule Should Be Upheld

As the Eleventh Circuit did in *Friends I*, this Court should uphold the Water Transfers Rule as a reasonable interpretation of an ambiguous statute.

Because EPA has adopted an interpretation of a statute it administers through notice-and-comment rulemaking, “the deferential framework of *Chevron*” applies. *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 979 (2005). At *Chevron* step one, “applying the ordinary tools of statutory construction, the court must determine ‘whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron*, 467 U.S. at 842-43).

But “if the statute is silent or ambiguous with respect to the specific issue,” then “‘the question for the court is whether the agency’s answer is based on a permissible construction of the statute.’” *Id.* (quoting *Chevron*, 467 U.S. at 843). At *Chevron* step two, the agency’s “view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts.” *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (citing *Chevron*, 467 U.S. at 843-84). In other words, “if ‘the agency’s answer is based on a permissible construction of the statute,’ that is the end of the matter.” *Ar-*

lington, 133 S. Ct. at 1874-75 (quoting *Chevron*, 467 U.S. at 842).

Here, at step one, the district court correctly concluded the statute is ambiguous, and that deference was therefore warranted. But the district court then failed to defer meaningfully at *Chevron*'s step two, applying a searching level of review wholly incompatible with *Chevron*'s premise that it is the role of the agency—not the courts—to resolve the ambiguity in the statute. See *Brand X*, 545 U.S. at 981 (“[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” (quotation marks omitted)). The district court’s judgment should therefore be reversed.

1. The Clean Water Act Is Ambiguous

The district court correctly held that the statute is ambiguous on the matters at issue in this case. Ambiguity exists where, as here, there are “two reasonable, competing interpretations.” *Friends I*, 570 F.3d at 1227 (quotation marks omitted); accord *Bell v. Reno*, 218 F.3d 86, 90 (2d Cir. 2000). That ambiguity is to be “resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.” *Arlington*, 133 S. Ct. at 1868.

In determining if a statute is ambiguous under *Chevron*, the Court first assesses the statutory text; “if its language is unambiguous, no further inquiry is necessary.” *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007). “When the text of a statute is ambiguous, [the Court looks] to structure,

purpose, and history to determine whether these construction devices can convincingly resolve the ambiguity at *Chevron* step one.” *Id.* at 120 (quotation marks omitted). “[A] court’s task is not to infer what Congress might have said about the issue in dispute if it had considered the matter; a court decides only ‘whether Congress has directly spoken to that precise question.’” *Id.* at 120-21 (quoting *Chevron*, 467 U.S. at 842) (alteration omitted).

This Court has held that the CWA can be read to prohibit any addition of any pollutant to a *particular* water body within the waters of the United States from any point source. *Catskill I*, 273 F.3d at 491. But the district court correctly held—as had the Eleventh Circuit in *Friends I*—that the statutory language may also be fairly read as prohibiting any addition of any pollutant to the waters of the United States *considered collectively* from any point source.

a. The Statutory Text is Ambiguous

The textual analysis begins with the phrase “any addition . . . to navigable waters.” The word “addition” is not defined, and, as the Eleventh Circuit has explained, the statutory term “waters” is ambiguous:

In ordinary usage “waters” can collectively refer to several different bodies of water such as “the waters of the Gulf coast,” or can refer to any one body of water such as “the waters of Mobile Bay.” An “addition . . . to navigable waters” could encompass any addition to a single body of navigable water regard-

less of source (like water pumped from one navigable body of water to another), or it could mean only an addition to the total navigable waters from outside of them (like a factory pumping pollutants into a navigable stream).

Friends I, 570 F.3d at 1223-24.

The surrounding text supports the conclusion that the statute may refer to waters collectively. In defining a “discharge of pollutants” to be “*any* addition of *any* pollutant to navigable waters from *any* point source,” 33 U.S.C. § 1362(12) (emphasis added), Congress omitted “any” in describing “navigable waters,” thus indicating that it was not considering individual bodies of water. In contrast, elsewhere in the Clean Water Act, Congress did modify “navigable waters” or “waters” when it intended to refer to only individual parts of the collective “waters.” *Friends I*, 570 F.3d at 1224-25 (“Congress knows how to use the term ‘any navigable water[s]’ when it wants to protect individual water bodies instead of navigable waters as a collective whole”; citing instances in CWA and other statutes). For example, the Act provides for the establishment of effluent limitations when discharges of pollutants threaten water quality “in a specific portion of the navigable waters.” 33 U.S.C. § 1312(a). Similarly, the Act directs “[e]ach State [to] identify those waters or parts thereof” for which thermal-discharge controls are required. *Id.* § 1313(d)(1)(B).

Additional examples abound in the statute,⁸ demonstrating that Congress frequently specified particular water bodies or subparts of the waters of the United States when that was its intention. Here, far from doing so, Congress used the unmodified term “navigable waters,” which is defined as “the waters of the United States.” “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.” *Dean v. United States*, 556 U.S. 568, 573 (2009) (quotation marks and alteration omitted). It is thus reasonable to construe “addition to . . . navigable waters”—*i.e.*, “addition to” “the waters of the United States”—as referring to those “waters” collectively. The existence of multiple reasonable interpretations demonstrates the statute’s ambiguity.

b. The Structure, Purpose, and Legislative History Do Not Resolve the Ambiguity

Where the text is ambiguous, this Court turns “to structure, purpose, and history to determine whether these construction devices can convincingly resolve the ambiguity at *Chevron* step one.” *Cohen*, 498 F.3d at 120 (quotation marks omitted). However, because “a court’s task is not to infer what Congress *might*

⁸ *E.g.*, 33 U.S.C. §§ 1311(m)(4) (“the receiving waters”), 1313(c)(2)(A) (“the navigable waters involved”), 1314(f)(2)(F) (“any navigable waters”).

have said about the issue in dispute if it had considered the matter,” these factors should be used only sparingly: “[a] high level of clarity is necessary to resolve textual ambiguity in this manner. . . . [The Court] employ[s] traditional tools of construction to determine only if they *compel* a particular conclusion as to Congress’s intent.” *Id.* at 120-21 (emphasis added). That test is not satisfied here; to the contrary, the statutory structure and purpose provide additional support for EPA’s interpretation.

The Act is a complex statute with a “welter of consistent and inconsistent goals.” *Catskill I*, 273 F.3d at 494. To be sure, the Clean Water Act’s stated objective is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). However, “it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.” *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). As this Court has acknowledged, the CWA also reflects Congress’s desire to limit interference with traditional state control of water use and allocation. *Catskill II*, 451 F.3d at 79. Thus, the statute states “the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired” by the Act. 33 U.S.C. § 1251(g). More broadly, Congress emphasized its policy “to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use (including restoration, preservation, and enhancement) of . . . water resources” *Id.* § 1251(b). Elsewhere in the statute,

Congress prohibits construction of the Act “as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” *Id.* § 1370(2). These provisions do not, of their own force, “limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.” *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 720-21 (1994). They do, however, show that one of Congress’s purposes was to avoid interference with state water allocation decisions.

Further, the Clean Water Act contains significant water quality regulatory programs other than the NPDES program and suggests that water transfers more naturally fit in those alternative programs, in particular the “nonpoint source programs” that states must establish. *See, e.g.*, 33 U.S.C. §§ 1288, 1329. In particular, the Clean Water Act refers to pollution from water transfers in the context of such a non-NPDES program: section 304(f) requires EPA to give states information regarding control of pollution resulting from “changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.” *Id.* § 1314(f)(2)(F). It is true that section 304(f) does not “explicitly exempt” a discharge otherwise subject to the NPDES program from the permit requirement. *Miccosukee*, 541 U.S. at 106-07. But Congress’s placement of its discussion of pollution

from water transfers in a section that generally “concerns nonpoint sources,” *id.*,⁹ supports an interpretation that Congress intended water transfers to be handled outside the NPDES program.

Additionally, Congress provided that states were free to adopt permitting programs that are broader than the NPDES program, *see* 33 U.S.C. § 1370(1), and knew that other federal laws existed that would apply to aspects of water quality potentially related to water transfers, *see* 33 U.S.C. § 1371; (JA 1244-45, 1269-70). Although not conclusive, Congress’s knowledge of these protections demonstrates the reasonableness of the view that Congress did not intend the NPDES program to apply to water transfers.

Any argument relying on the broad and ambitious purpose of the CWA is undercut by the fact that the NPDES program was not intended by Congress to address all water pollution. *See Friends I*, 570 F.3d at 1226-27 (noting “serious water quality” issues concededly not addressed under NPDES); *Gorsuch*, 693 F.2d at 176 (had “Congress wanted to apply the NPDES system wherever feasible . . . it could easily have chosen suitable language.”).

Nor does legislative history resolve the ambiguity. This Court has already explained that “[t]he legislative history is silent on the meaning of ‘addition,’” *Catskill I*, 273 F.3d at 494, and there is no legislative

⁹ *See also* H.R. Rep. No. 92-911, at 109 (1972) (“[t]his section . . . on . . . nonpoint sources is among the most important in the 1972 Amendments”).

history directly addressing whether “addition . . . to navigable waters” refers to “waters” in the individual or collective sense. In any event, the Court “has generally been reluctant to employ legislative history at step one of *Chevron* analysis, mindful that the ‘interpretive clues’ to be found in such history will rarely speak with sufficient clarity to permit us to conclude ‘beyond reasonable doubt’ that Congress has directly spoken to the precise question at issue.” *Cohen*, 498 F.3d at 122-23 (citations omitted).

Thus, as the district court correctly held, the statute is ambiguous on whether the NPDES program applies to water transfers.

c. Prior Judicial Decisions Do Not Control or Contradict EPA’s Interpretation

As the district court concluded, this Court’s prior decisions in *Catskill I* and *Catskill II* do not preclude *Chevron* deference to EPA’s interpretation of the Clean Water Act: those decisions did not hold the statute to be unambiguous, and therefore left room for EPA to exercise its *Chevron*-triggering power to make rules through notice and comment, as it has now done. *See Brand X*, 545 U.S. at 982-83 (“court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion”).

Although *Catskill I* and *Catskill II* referred to the “plain meaning” of the word “addition” and to what the Court perceived to be an “absurd” scenario in which polluted water would be transferred to a “pristine” water body, those decisions did not hold the statute to be unambiguous. (SPA 40-41); *Catskill I*, 273 F.3d at 489; *Catskill II*, 451 F.3d at 81. To the contrary, the Court distinguished *Gorsuch* and *Consumers Power* on the basis that those cases involved *Chevron*-level deference, which did not apply in *Catskill I* and *Catskill II* because EPA had not adopted its interpretation in a regulation having the force of law. *Catskill I*, 273 F.3d at 490; *Catskill II*, 451 F.3d at 82, 83 n.5. The *Catskill I* Court emphasized that “[i]f the EPA’s position had been adopted in a rulemaking or other formal proceeding, [*Chevron*] deference . . . might be appropriate.” 273 F.3d at 490-91. EPA has now adopted its position in just such a Rule, and *Chevron* now applies.

Moreover, *Catskill I* and *Catskill II* implicitly confirmed the ambiguity by applying *Skidmore* deference to EPA’s interpretation, 273 F.3d at 490-91; 451 F.3d at 82, 83 n.5—a level of deference that is employed only if a statute is ambiguous, see *Exxon Mobil Corp. v. Comm’r*, 689 F.3d 191, 200 n.13 (2d Cir. 2012) (“Under [*Skidmore*], an agency’s interpretation of an ambiguous statute is entitled to a degree of deference [depending on various factors of persuasiveness].”). *Catskill II* again confirmed the Court’s view that the statute is ambiguous, noting that the defendant there had based its position that no permit was required for water transfers on “a reasonable, albeit incorrect, interpretation of a statute.” 451 F.3d at 89.

In sum, nothing about *Catskill I* or *Catskill II* resolves the statutory ambiguity or precludes EPA's interpretation of the statute.

2. The Water Transfers Rule Is a Permissible Interpretation of the Statute and Supported by a Reasoned Explanation

At *Chevron's* second step, a court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Mead*, 533 U.S. at 229-30; accord *Entergy Corp.*, 556 U.S. at 218 (agency's "view governs if it is a reasonable interpretation of the statute"); *Cohen*, 498 F.3d at 116. To meet this standard, an agency interpretation need only be "rational and consistent with the statute." *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) (quotation marks omitted). At bottom, all that is required is that "there must be two or more reasonable ways to interpret the statute, and the regulation must adopt one of those ways." *Friends I*, 570 F.3d at 1219; accord *Sash v. Zenk*, 428 F.3d 132, 136 (2d Cir. 2005) (Sotomayor, J.) ("The [agency's] interpretation of the statute is one of at least two reasonable interpretations . . . and must therefore be upheld."), *opinion on denial of reh'g*, 439 F.3d 61 (2d Cir. 2006).

The district court's central error was in misapplying this standard. This Court and others have emphasized that this "reasonableness test" is "highly deferential." *Ciba-Geigy Corp. v. Sidamon-Eristoff*, 3 F.3d 40, 49 (2d Cir. 1993); accord *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660, 665

(D.C. Cir. 2011) (“highly deferential standard”); *National Rifle Ass’n v. Reno*, 216 F.3d 122, 137 (D.C. Cir. 2000) (same). That deference is rooted in the fact that Congress “‘understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.’” *Arlington*, 133 S. Ct. at 1868 (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996)). But instead of deferring to the agency’s authority to interpret ambiguous statutory provisions, the district court erroneously undertook a searching and skeptical examination of EPA’s reasoning.

The district court appeared to find license for its exacting review in the formulation of step two that asks whether an agency’s rule is “‘arbitrary or capricious in substance, or manifestly contrary to the statute.’” (SPA 36 (quoting *Mead*, 533 U.S. at 227)). But that formulation too requires “deference to an agency’s interpretation,” and ultimately asks the same question: “whether the . . . rule is a ‘reasonable interpretation’ of the enacted text.” *Mayo Found. for Medical Educ. v. United States*, 131 S. Ct. 704, 711-12, 714 (2011) (describing step two as asking whether rule is “arbitrary or capricious in substance,” then applying step two by asking whether the rule is a “reasonable interpretation” of the statute); accord *Mead*, 533 U.S. at 227, 229. Indeed, in any context, review under the arbitrary and capricious standard is “narrow and particularly deferential.” *Environmental Defense v. EPA*, 369 F.3d 193, 201 (2d Cir. 2004). The district court failed to apply this high level of deference re-

quired by *Chevron*, and instead subjected EPA's rationale to a searching critique.

a. The Water Transfers Rule Is Based on a Permissible Interpretation of the Clean Water Act

As discussed above, one of the permissible interpretations of "any addition of any pollutants to navigable waters" is that an addition occurs only when those pollutants are introduced from outside the waters of the United States considered collectively. Because the Water Transfers Rule is based on that reasonable interpretation, the Eleventh Circuit upheld it, *Friends I*, 570 F.3d at 1219, as should this Court.

EPA reasonably based the Water Transfers Rule on the importance of water transfers to the national infrastructure; Congress's intent reflected in 33 U.S.C. § 1251(b) and (g) and § 1370 to avoid unduly burdening state authority over water allocations and water resources, including for critical drinking water, agriculture, and flood control needs; and EPA's conclusion that Congress would have considered pollution effects of water transfers to be treated through nonpoint source programs. *See, e.g.*, 73 Fed. Reg. 33,698-99, 33,701-02; (JA 1245). The reasonableness of EPA's action is further supported by the authority of states to develop broader requirements than those required by the NPDES program, and by the existence of other federal statutes outside of the CWA that apply in appropriate cases notwithstanding the Water Transfers Rule. 33 U.S.C. §§ 1370, 1371(a); 73 Fed. Reg. at 33,699; (JA 1244-45, 1269-70).

Moreover, although *Chevron* does not require that agency interpretations be consistent over time, “agency interpretations that are of long standing come before [the Court] with a certain credential of reasonableness.” *Smiley*, 517 U.S. at 740-41. “While not conclusive, it surely tends to show that the EPA’s current practice is a reasonable and hence legitimate exercise of its discretion . . . that the agency has been proceeding in essentially this fashion for over 30 years.” *Entergy Corp.*, 556 U.S. at 224-25. EPA has never required permits for water transfers, and has never interpreted the CWA in a manner that would do so. That long and consistent history supports the conclusion that the agency’s interpretation is reasonable.

b. EPA Provided a Reasoned Explanation of Its Choice of a Permissible Interpretation

Although EPA chose one of the interpretations of the statute recognized as permissible by the district court, that court improperly required EPA to explain its choice in far more detail than the law requires.

i. An Agency’s Explanation of Choices at *Chevron* Step Two

The district court held that “to help courts ensure that an interpretation is permissible, an agency must ‘provide a reasoned explanation for its action.’” (SPA 62 (quoting *Judulang v. Holder*, 132 S. Ct. 476, 479 (2011))). But the district court misconstrued the scope of this requirement, which courts have repeatedly recognized requires “considerable deference” to

agencies. *Detsel v. Sullivan*, 895 F.2d 58, 59, 63 (2d Cir. 1990) (requiring agency to “articulate a logical basis” for decision at step two, but still recognizing “considerable deference”); *Barrington*, 636 F.3d at 660, 665 (noting “reasoned explanation” requirement, but upholding agency decision and recognizing “highly deferential” *Chevron* step two review asks only “whether the [agency] has reasonably explained how the permissible interpretation it chose is ‘rationally related to the goals of’ the statute”). Indeed, although the D.C. Circuit has several times held that it “cannot defer to [an agency interpretation] that is unexplained,” it has made clear that “unexplained” refers to extreme cases where an interpretation “contains no reasoning that [courts] can evaluate for its reasonableness” or “does not mention [the relevant factor] at all.” *Miller v. Clinton*, 687 F.3d 1332, 1342 (D.C. Cir. 2012) (quotation marks omitted); see *Detsel*, 895 F.2d at 63-66 (rejecting agency action as lacking “reasonable explanation” where agency did not explain purpose or basis of rule, which rested on outdated assumptions and contradicted current understandings).¹⁰

¹⁰ *Judulang*, cited by the district court, is inapplicable, as the Supreme Court expressly held that it was not a *Chevron* case. 132 S. Ct. at 483 n.7 (while recognizing that “analysis would be the same” in that case, holding that “the more apt analytic framework in this case is standard ‘arbitrary or capricious’ review under the APA” rather than *Chevron*). And the agency’s rule in that case was struck down for mak-

As the D.C. Circuit has explained, the requirement of a “reasoned explanation” is “quite a different enterprise” in a statutory-interpretation matter than in a standard arbitrary-and-capricious case. *Continental Air Lines, Inc. v. Dep’t of Transportation*, 843 F.2d 1444, 1452 (D.C. Cir. 1988). “‘Reasonableness’ in this context means . . . the compatibility of the agency’s interpretation with the policy goals . . . or objectives of Congress.” *Id.* Under this “less exacting standard,” even a “not particularly compelling” interpretation should be upheld if it is “not patently inconsistent with the statutory scheme”—only an “agency interpretation [that] actually frustrated the policies that Congress was seeking to effectuate” should be judicially disapproved. *Id.* (quotation marks omitted). And in determining that legislative purpose, courts must recognize that it is the agency’s role “to decide the exact trade-off among conflicting goals that ‘best promotes’ the Congressional ‘goal’ in question.” *Id.* at 1451. Thus, while it is clear that an agency may not decide policy by “picking a permissible interpretation out of a hat,” *Barrington*, 636 F.3d at 660, the “reasoned explanation” requirement sets a low threshold, recognizing the great deference Congress has granted implementing agencies.

ing deportation decisions turn on a “sport of chance,” the very definition of an arbitrary policy. *Id.* at 484, 487 (quotation marks omitted). In any event, nothing in *Judulang* contradicts the analysis here.

**ii. EPA Adequately Explained Its
Statutory Interpretation**

The district court misapplied these principles and reached the wrong result. The court criticized EPA's approach to determining and implementing Congress's intent regarding whether water transfers should be regulated under the NPDES program, chastising the agency for supposedly "ignor[ing]" certain of the statute's provisions, goals, or legislative history. (SPA 73). While EPA did not ignore these considerations, an agency may appropriately emphasize some of the statute's contradictory goals over others, as EPA did here. As the Supreme Court has recognized, "the resolution of ambiguity in a statutory text is often more a question of policy than of law," and "[w]hen Congress, through . . . introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited." *Pauly v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). In exercising its discretion, EPA only had to explain its actions reasonably, a threshold it easily cleared.

As reviewed in detail above, in its analysis, EPA first notes the statutory ambiguity—that is, the gap by which Congress delegated policymaking authority to the agency. The agency noted that some courts have accepted EPA's view that an "addition of pollutants" occurs "when the pollutant first enters the navigable water," but others have concluded that a water transfer to a distinct water body constitutes an "addition." 73 Fed. Reg. at 33,700.

To “resolve the confusion created by these conflicting approaches,” EPA looked to the statute as a whole to determine whether water transfers should require an NPDES permit. *Id.* at 33,701. The agency described the importance of water transfers to the national infrastructure, including for critical drinking water, agriculture, and flood control purposes. *Id.* at 33,698-99. It then emphasized the congressional policy, stated in the statute, to preserve primary state responsibility regarding water resources and not to unduly impair state authority over water allocations. *Id.* at 33,702. Although EPA acknowledged that water transfers typically convey pollutants and that such water management activities may be associated with pollution, *id.* at 33,699, 33,702, EPA also observed that the pollution potentially involved in water transfers is not the type of municipal and industrial pollution that Congress was focused on controlling at the source through the NPDES program, *see id.* at 33,702-03. EPA reviewed indications in the statute that Congress expected water transfers to be governed by the Clean Water Act’s nonpoint source program rather than NPDES, such as the reference to water transfers in 33 U.S.C. § 1314(f), and further emphasized that its interpretation of the statute was consistent with the fact that states were free to adopt broader permitting programs that covered water transfers if they believed it necessary. 73 Fed. Reg. at 33,699, 33,702. EPA also noted that other statutes may apply to water involved in water transfers, such as the federal Safe Drinking Water Act. (JA 1244-45, 1269-70). Based on these considerations, the agency concluded that “Congress generally did not intend to

subject water transfers to the NPDES program. Interpreting the term ‘addition’ in that context, EPA concludes that water transfers . . . do not constitute an ‘addition’ to navigable waters to be regulated under the NPDES program.” *Id.* at 33,703.

In short, in deciding between constructions of the ambiguous language “addition . . . to navigable waters,” EPA carefully justified its decision based on what the Clean Water Act showed about Congress’s intent and what EPA reasonably concluded were the pertinent policy concerns. These are “archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests.” *Arlington*, 133 S. Ct. at 1873. Nothing more is required, and the Court should uphold the Water Transfers Rule as a reasonable interpretation of the statute, backed by a reasoned explanation of the agency’s action.

iii. The District Court Erred in Its Analysis of Whether EPA Provided a “Reasoned Explanation”

In holding that EPA’s explanation was not “reasoned,” the district court departed from the deferential *Chevron* framework and applied a heightened scrutiny of the agency’s rationale that permitted the court to supplant the agency’s views with its own. Both in the degree of scrutiny the court applied, and in the specific conclusions it reached, the district court erred. While there is no need for EPA to refute each of the district court’s points as long as the agen-

cy's explanation, taken as a whole, was logical and reasonable—as it was here—in fact the district court erred in each of its criticisms.

First, the district court incorrectly perceived an inconsistency between EPA's treatment of different CWA permitting programs. (SPA 80-81). Section 301(a)'s ban on "the discharge of any pollutant" contains exceptions for both the NPDES permitting program and others, 33 U.S.C. § 1311(a), one of which is the section 404 permitting program for fill and dredged material being discharged to the waters of the United States, *id.* § 1344(a). The district court considered it to be inconsistent for EPA to provide that the Rule affects only NPDES permits and not permits under section 404, when in particular cases either type of permit may authorize a discharge of pollutants. But there is no inconsistency, and EPA's conclusions are reasonable. First, as noted by EPA, the "dredged spoil" at issue in a 404 permit "by its very nature comes from a waterbody." 73 Fed. Reg. at 33,703. The nature of such material is that it only *becomes* a pollutant once it is "excavated or dredged." 40 C.F.R. § 232.2; 33 C.F.R. § 323.2(c). It is therefore not a pollutant "already in 'the waters of the United States'" prior to a transfer activity, and it is therefore outside the scope of the Water Transfers Rule. 73 Fed. Reg. at 33,701 (quotation marks and emphasis omitted). Moreover, as EPA observed, "Congress explicitly forbade discharges of dredged material" without a section 404 permit. 73 Fed. Reg. at 33,703. Congress's more specific treatment of dredged material—and EPA's statement that 404 permits are unaffected by the Rule—make sense in light of the unique na-

ture of that material. *See Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014) (“a statute’s general permission to take actions of a certain type must yield to a specific prohibition found elsewhere”). Indeed, the Fifth Circuit has held that section 402 and section 404 permits must be treated separately, noting that the “outside world” analysis relevant to what requires a permit under section 402 does not apply in the context of dredged material. *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983). For those reasons, EPA’s limitation of its Rule to section 402 is both reasonable and consonant with the Clean Water Act.

The district court’s other critiques fail as well. The court suggested that it “might be more reasonable” for EPA to have concluded that Congress meant to exclude water transfers from the NPDES program based on the meaning of “point source” rather than “addition.” (SPA 77). But even if that were correct, it is irrelevant whether the same practical result would have occurred through a different interpretation. All that matters is that the agency adopted a permissible interpretation of an ambiguous statute—not the one the district court deemed most reasonable. *See Entergy Corp.*, 556 U.S. at 218. In any event, the district court did not suggest any reading of “point source”—defined as a “conveyance . . . from which pollutants are or may be discharged,” 33 U.S.C. § 1362(14)—that could accomplish this end.

Relatedly, the district court held that EPA could find no support for the rule in its conclusions that water transfers are “more sensibly addressed through

water resource planning and land use regulations” or through nonpoint source programs. 73 Fed. Reg. at 33,702. In the district court’s opinion, “whether it is more appropriate to use other statutory provisions—or even other statutes—to regulate water transfers does not answer the precise question whether Congress intended *this* provision of *this* statute to regulate water transfers.” (SPA 83). But it was appropriate, and reasonable, for EPA to consider the extent to which other provisions accomplish the statutory objective of “restor[ing] the . . . integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and to exercise its judgment as to the “more sensibl[e]” way to address water pollution in this context in light of the statutory ambiguity, 73 Fed. Reg. at 33,702. Similarly, it was appropriate for EPA, reading the statute as a whole and applying its expertise, to consider that “Congress generally intended that pollutants be controlled at the source whenever possible” and that the NPDES program generally targets municipal and industrial effluents, even while acknowledging that the NPDES program will in some instances extend further. 73 Fed. Reg. at 33,702-03 & n.7 (citing legislative history). It was reasonable, and within the agency’s discretion, for EPA to consider these factors to resolve an ambiguous provision.

The district court also faulted EPA for relying on section 304(f)—a provision concerning nonpoint sources that refers to pollution from water transfers—and its associated legislative history. (SPA 83-84); 73 Fed. Reg. at 33,703. EPA rationally observed that part of the legislative history that refers to water flow management—a House report—does so in the context

of nonpoint source programs, supporting EPA's view that water transfers are not covered by the NPDES program. 73 Fed. Reg. at 33,703. The district court called it "arbitrar[y]" for the agency to "ignore[]" a Senate report that does not mention water flow (SPA 83-84)—but no authority requires an agency to address every bit of legislative history, much less the ones that are silent on the topic being considered. And while the district court noted that agricultural and mining activities listed in section 304(f) have corresponding express statutory exemptions from the NPDES program, but water transfers do not, EPA does not contend that the mere mention of water transfer activities in section 304(f) exempts them from the NPDES program. *See Miccosukee*, 541 U.S. at 106-07. EPA's point—a reasonable one—is simply that this reference to pollution from water transfers in the Clean Water Act appears in a section that "concerns nonpoint sources," *id.* at 106, and is "focused primarily on addressing pollution sources outside the scope of the NPDES program," 73 Fed. Reg. at 33,702. It was reasonable for EPA to consider that fact.

Having criticized EPA for relying too heavily on these alternative means of achieving the environmental goals of the Clean Water Act, the district court then accused it of having "entirely ignored" those same goals. (SPA 86). To the contrary, EPA fully recognized that the "purpose of the CWA is to protect water quality," 73 Fed. Reg. at 33,701, and acknowledged both that water transfers "typically move pollutants from one waterbody (donor water) to another (receiving water)," *id.* at 33,699, and that "Congress

was aware that there might be pollution associated with water management activities,” *id.* at 33,702. EPA repeatedly emphasized that state authorities have many means to mitigate pollution caused by water transfers, including through the Clean Water Act’s nonpoint source programs, and further that other federal statutes (such as the Safe Drinking Water Act, which sets drinking water contaminant levels and treatment standards) will apply in specific cases. *Id.* at 33,699, 33,706; (JA 1244-45, 1269-70). EPA balanced those environmental purposes against the sometimes-conflicting goal of preserving state power concerning water use and allocation, and exercised its authority to “decide the exact trade-off among conflicting goals that ‘best promotes’ the Congressional ‘goal’ in question.” *Continental*, 843 F.2d at 1451; *accord id.* (it “will not do, when interpreting a statute embodying conflicting demands, for courts grandly to resort to a single ‘broad purpose’ of a statute and then employ a judicially idealized ‘goal’ to drive the interpretive process.”); *Arlington*, 133 S. Ct. at 1873 (*Chevron* accords the agency the power to decide “how best to construe an ambiguous term in light of competing policy interests”). But it is entirely inaccurate to state, as the district court did, that EPA “ignor[ed] the environmental side of the balance” or rested on an “unexplained predetermination that that side of the balance did not matter.” (SPA 90).

The district court also erred in criticizing EPA for giving insufficient consideration to two alternatives: requiring NPDES permits for water transfers and designating specific water bodies that would require NPDES permits. (SPA 91-97). As an initial matter,

Chevron does not require the agency to convince the courts that its chosen interpretation is the best; instead, the agency's interpretation must simply be among the permissible alternatives. See *Entergy Corp.*, 556 U.S. at 218. And "[t]he Chevron step two question . . . is not whether [a] proposed alternative is an acceptable policy option but whether the [agency's] rule reflects a reasonable interpretation of [the statute]." *Coalition for Common Sense in Government Procurement v. United States*, 707 F.3d 311, 317 (D.C. Cir. 2013). The only case cited by the district court for the proposition that an agency must review "alternatives" is *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29 (1983). (SPA 62-63, 96-97). But that case involved an agency's detailed technical and factual findings, not a statutory construction, *id.* at 38-39—and expressly held that "rulemaking 'cannot be found wanting simply because the agency failed to include every alternative device and thought,'" and the agency at issue was only required to consider "a technological alternative within the ambit of the existing standard," *id.* at 50-51.

In any event, EPA did actually consider and reject the two alternatives identified by the district court. As for requiring an NPDES permit for water transfers generally, the entire preamble to the Rule reflects EPA's consideration of that alternative. For all the reasons discussed above, EPA concluded that Congress envisioned that pollution from water transfers would be addressed similarly to nonpoint source pollution, and would have wanted ambiguities to be resolved in a manner protective of states' authority

over water use and allocations. (SPA 91-97). Although the district court suggested that including water transfers in the NPDES program might have some benefits for some states (*i.e.*, those that have difficulty resolving disputes regarding transfers of pollutants from upstream states) (SPA 101-02), for the reasons already discussed—including Congress’s stated policy to avoid undue burden to states’ water allocation regimes—EPA appropriately concluded the best effectuation of Congress’s intent is to treat water transfers not through the NPDES program but instead through the nonpoint source programs of the Clean Water Act and remedies under other laws.

With respect to the authority to “designate” specific waters bodies as requiring permits, EPA sought and received public comment on this issue, but ultimately rejected that approach. 73 Fed. Reg. at 33,706. Declining to adopt a designation approach was, as the agency said, consistent with its overall conclusion that the CWA does not require NPDES permits for water transfers. *Id.* Indeed, the district court did not suggest an interpretation of “addition to” “the waters of the United States” that would require permits only for some water bodies that are part of the waters of the United States but not others. EPA also explained that states retain “the ability to address potential in-stream and/or downstream effects of water transfers” through other programs and authorities. *Id.* Although the district court apparently believed these other regulatory tools would be insufficient (SPA 94-97), it was reasonable for EPA to point to the existence of applicable regulatory regimes as supporting its overall view of congressional intent.

Finally, the district court erroneously criticized the agency for failing to “articulate why water-transfer regulation is an ‘unnecessary’ interference” with state authority. (SPA 98). But application of concepts like “unnecessary” or “undue” is necessarily a line-drawing exercise, and it is within EPA’s discretion to draw that line. Here, EPA concluded that adopting the Water Transfers Rule drew the appropriate line to guard against undue interference. Nor did EPA need to explain further why it was not unduly burdensome on states to apply the NPDES program to water flows subject to intervening municipal or industrial use (*contra* SPA 98-99). As noted above, the Water Transfers Rule rests on EPA’s analysis that water transfers are part of the process of “allocat[ing]” water and “plan[ning] the development and use . . . of . . . water resources,” 33 U.S.C. § 1251, and are unlike the “industrial, commercial or municipal operation[s]” that Congress focused on in establishing the NPDES program. 73 Fed. Reg. at 33702. The exclusion of “intervening industrial, municipal, or commercial uses” flows directly from this rationale.

c. The District Court’s “Waters of the United States” Analysis Is Erroneous

As the final part of its *Chevron* step two analysis, the district court erroneously rejected the Rule in part for being “manifestly contrary” to the statute. (SPA 113). The court believed that, apart from its interpretation of the phrase “addition . . . to navigable waters,” the Rule “separately adopted” a “status-based” interpretation of “waters of the United States,” under which “waters that have been with-

drawn from navigable bodies of water but have not been subjected to an ‘intervening use’” remain “waters of the United States.” (SPA 110-11). The district court erred in holding the Rule unlawful on this ground.

At the outset, the district court misunderstood EPA’s reasoning. The agency did not adopt an interpretation of the statute based on the “status” of transferred water, nor was its use of the word “status” important to its statutory construction. Rather, EPA’s reference to the “status” of transferred water was merely a restatement of its interpretation that the waters of the United States are to be considered collectively. Indeed, the Rule’s preamble first states the basic interpretation, that an NPDES permit is not required for a transfer because “‘nothing is being added “to” “the waters of the United States” by virtue of the water transfer, because the pollutant at issue is already part of “the waters of the United States” to begin with.’” 73 Fed. Reg. at 33,701 (quoting brief in *Friends I*). It then notes, “[s]tated differently, . . . [transferred] water never loses its status as “waters of the United States,” and thus nothing is added to those waters from the outside world.’” *Id.* (quoting brief in *Friends I*; emphasis added). Similarly, EPA referred to water’s status in explaining why the addition of water subjected to an intervening industrial use requires a permit, relying on *Consumers Power*, where the court invoked the water’s “status” in accepting the same interpretation. *Id.* at 33,705 n.10 (citing 862 F.2d at 589).

Thus, the Rule makes clear that EPA's references to the "status" of water were made as another way of describing its interpretation that the waters of the United States should be considered collectively, rather than as individual water bodies. Moreover, the status of water while being transferred is substantively irrelevant to EPA's interpretation: whether a transfer of water from one water body to another constitutes an "addition" to "the waters of the United States" depends on whether the two water bodies are considered individually or collectively as part of the waters of the United States—but not on the "status" of the water while being transferred. There was accordingly no need for the district court, or this Court, to consider the question of transferred water's status.

In any event, the district court was incorrect that EPA's interpretation "expanded" the definition of "navigable water" (or "waters of the United States"). (SPA 111-12). To the contrary, the Rule expressly incorporates the existing definition at 40 C.F.R. § 122.2. 73 Fed. Reg. at 33,699 n.2. And if it were necessary to assess the status of transferred water, the view that water retains its status as waters of the United States while being transferred accords with *Consumers Power*, which held that water passing through a hydroelectric facility "never loses its status as water of the United States." 862 F.2d at 589. It is also consistent with *S.D. Warren Co. v. Maine Board of Environmental Protection*, where the Supreme Court rejected a state court's view—essentially the same as the district court's here—that "'water loses its status as waters of the United States' when diverted from its natural course, and becomes an addition to the

waters of the United States when redeposited into the river,” and held instead that one cannot “denationalize national waters by exerting private control over them.” 547 U.S. 370, 379 n.5 (2006) (quoting state court; alterations omitted).

The district court then erroneously speculated about another justification EPA had not advanced in its rulemaking, then rejected that hypothetical interpretation. Specifically, the court wrote that “EPA might attempt to save its interpretation . . . by interpreting water-transfer conveyances as defined in the rule to be navigable waterbodies.” (SPA 114). The court then held that this speculated EPA interpretation would be contrary to *Rapanos*, 547 U.S. 715—a decision of the Supreme Court addressing the meaning of “waters of the United States” but with no majority opinion. The district court violated basic rules of administrative law in purporting to adjudicate a potential legal theory that EPA had not advanced in support of its Rule. See *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (reversing judicial decision that reached out to address issue not yet resolved by agency).

**d. The District Court’s Criticisms of
Friends I and the “Unitary Waters”
Theory Were Unfounded**

For all these reasons, the district court rejected the Eleventh Circuit’s reasoning, and held the Rule unlawful. It should not have done so, and this Court should follow the Eleventh Circuit.

The district court took issue with *Friends I* primarily because it believed that the court of appeals “attributed to EPA an interpretation that it did not actually adopt.” (SPA 105). Specifically, the district court asserted that EPA did not adopt the “unitary waters” approach the Eleventh Circuit described. (SPA 107). But as *Friends I* explained, “[t]he unitary waters theory holds that it is not an ‘addition . . . to navigable waters’ to move existing pollutants from one navigable water to another. An addition occurs, under this theory, only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters.” 570 F.3d at 1217; *accord id.* (“the navigable waters of the United States are not a multitude of different pots, but one pot,” and accordingly no addition of pollutants to the “waters of the United States” occurs in a transfer). Although EPA did not use the phrase “unitary waters” in its justification for the Rule, the framework described by *Friends I* is precisely the construction that EPA adopted. *Compare* 73 Fed. Reg. at 33,699 (“water transfers,” meaning water “conveyed from one water of the U.S. to another water of the U.S.,” “do not result in the ‘addition’ of a pollutant”) *with* 570 F.3d at 1217 (under unitary waters theory, “it is not an ‘addition . . . to navigable waters’ to move existing pollutants from one navigable water to another”). And the interpretation that EPA adopted is precisely the construction that the district court itself said was permissible. (SPA 42 (“navigable waters” may be used “to refer to ‘the waters collectively’”). While the district court suggested that, absent express discussion of the “unitary waters” theory under

that label, the court would be compelled to “guess” as to the agency’s theory, as discussed above EPA adequately explained its rationale and the reasonableness of its statutory construction. (SPA 109).¹¹

Although the district court thus erred in numerous ways in its treatment of the “unitary waters” theory and *Friends I*, ultimately it is the substance of the Water Transfers Rule, rather than any label applied to it, that is before the Court. The Eleventh Circuit persuasively explained why the Water Transfers

¹¹ The district court cited a transcribed voicemail left by EPA’s General Counsel in 2005, well before promulgation of the Rule, in which, as described by the court, she “expressly disclaimed” relying on “unitary waters.” (SPA 107). As an initial matter, the mention of an undefined phrase by a single EPA official, informally left on a private party’s voicemail, is irrelevant. *Smiley*, 517 U.S. at 743 (doubting that informal statement or statement made by individual agency officer to particular constituents could establish binding policy); *Dunbar v. Glickman*, 90 F.3d 681, 687 n.11 (2d Cir. 1996) (same). In any event, in promulgating the Rule, EPA did adopt the “unitary waters” theory (in substance if not by label), see 73 Fed. Reg. at 33,701, 33,705 n.10; (JA 1262), and only the agency’s final action is under review. Indeed, the voicemail transcription itself is part of the administrative record only because it was submitted by a member of the public during the public comment period; it was not actually relied upon by EPA in promulgating the Rule. (JA 1127-34).

Rule embodies a permissible interpretation of the Clean Water Act and is a lawful exercise of EPA's authority. This Court should hold likewise.

C. The District Court Should Not Have Vacated the Rule

Finally, even if the district court were correct in holding the Water Transfers Rule invalid, it should not have vacated any part of the Rule. The court erred in vacating the Rule “to the extent it is inconsistent with the statute—and in particular the phrase ‘navigable waters’ as interpreted in *Rapanos* and in this Opinion.” (SPA 121); *see supra* Point B.2.c (describing errors in district court’s “navigable waters” analysis).

As an initial matter, the district court’s vacatur is so unclear as to be improper. *Cf.* Fed. R. Civ. P. 65(d) (injunctive order must “state its terms specifically” and “describe in reasonable detail . . . the act or acts restrained or required”); *Corning Inc. v. PicVue Electronics, Ltd.*, 365 F.3d 156, 158 (2d Cir. 2004) (a party must be able “to ascertain from the four corners of the [injunction] precisely what acts are forbidden” (quotation marks omitted)). The court did not specify any parts of 40 C.F.R. § 122.3(i) that it believed should be vacated. Rather, the court appeared to reject a legal theory on which the Rule might rest, not a portion of the Rule itself. Thus, the court’s decision to vacate the Rule “to the extent it is inconsistent with . . . the phrase ‘navigable waters,’” and to otherwise remand the Rule for further consideration (SPA 116), appears to mean that the agency must reconsider the

Rule without relying on a “status-based” or *Rapanos*-based interpretation—but not to actually vacate any part of the regulation. It was incorrect for the court to express this as a vacatur.

Regardless, vacatur was improper. As the district court recognized (SPA 120), “[w]hen a district court reverses agency action and determines that the agency acted unlawfully, ordinarily the appropriate course is simply to identify a legal error and then remand to the agency.” *Northern Air Cargo v. U.S. Postal Service*, 674 F.3d 852, 861 (D.C. Cir. 2012). Whether a court should also take the extraordinary step of vacating an inadequately explained agency action “depends on whether (1) the agency’s decision is so deficient as to raise serious doubts whether the agency can adequately justify its decision at all; and (2) vacatur would be seriously disruptive or costly.” *Id.* at 860-61 (citing *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

The district court appropriately concluded that the “disruption and costs” factor did not favor vacating the Rule (SPA 120), but nonetheless concluded that partial vacatur was warranted under the “serious doubts” prong of this test. This vacatur is improper because the court itself had held EPA’s interpretation to be permissible, and rejected only what the court perceived to be the agency’s justification for that interpretation, giving rise to no “serious doubts” about EPA’s ability to support the Rule on remand. To the extent the district court believed EPA had adopted a “status” interpretation of “waters of the United States” without sufficient consideration

(SPA 111-12 & n.30), EPA should have an opportunity on remand to evaluate the issue. Moreover, the district court itself recognized that the theory it rejected as contrary to *Rapanos* had never been advanced by the agency. (SPA 119). Lastly, the court erred in concluding that there were “serious doubts” about EPA’s ability to justify the vacated aspects of the Rule when the Eleventh Circuit has already held the regulation to be lawful.

CONCLUSION

The judgment of the district court should be reversed.

Dated: New York, New York
September 11, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 13,743 words in this brief.

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14-1823

Consolidated Cases: 14-1909, 14-1991, 14-1997, 14-2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., *et al.*,

Plaintiffs - Appellees,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, IN
HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants - Appellants - Cross Appellees,

(For the Complete Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF INTERVENOR DEFENDANTS-APPELLANTS-CROSS APPELLEES STATES OF COLORADO,
NEW MEXICO, ALASKA, ARIZONA (DEPARTMENT OF WATER RESOURCES), IDAHO, NEBRASKA,
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Plaintiffs - Appellees,

GOVERNMENT OF THE PROVINCE OF MANITOBA, CANADA,

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-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants - Appellants - Cross Appellees,

STATES OF COLORADO, STATE OF NEW MEXICO, STATE OF ALASKA, ARIZONA DEPARTMENT OF WATER RESOURCES, STATE OF IDAHO, STATE OF NEBRASKA, STATE OF NORTH DAKOTA, STATE OF NEVADA, STATE OF TEXAS, STATE OF UTAH, STATE OF WYOMING, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, CENTRAL UTAH WATER CONSERVANCY DISTRICT, CITY AND COUNTY OF DENVER, BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, CITY AND COUNTY OF SAN FRANCISCO PUBLIC UTILITIES COMMISSION, CITY OF BOULDER [COLORADO], CITY OF AURORA [COLORADO], EL DORADO IRRIGATION DISTRICT, IDAHO WATER USERS ASSOCIATION, IMPERIAL IRRIGATION DISTRICT, KANE COUNTY [UTAH] WATER CONSERVANCY DISTRICT, LAS VEGAS VALLEY WATER DISTRICT, LOWER ARKANSAS VALLEY WATER CONSERVANCY DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, NATIONAL WATER RESOURCES ASSOCIATION, SALT LAKE & SANDY [UTAH] METROPOLITAN WATER DISTRICT, SALT RIVER PROJECT, SAN DIEGO COUNTY WATER AUTHORITY, SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT, THE CITY OF COLORADO SPRINGS, ACTING BY AND THROUGH ITS ENTERPRISE COLORADO SPRINGS UTILITIES, WASHINGTON COUNTY [UTAH] WATER DISTRICT, WESTERN URBAN WATER COALITION, [CALIFORNIA] STATE WATER CONTRACTORS, CITY OF NEW YORK,

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PRELIMINARY STATEMENT

The Western States’ appeal is fundamentally about deference, specifically, historical federal deference to traditional state authority over management of their water resources, as properly recognized by the Environmental Protection Agency’s (“EPA”) interpretation of the Clean Water Act in its Water Transfers Rule.

“The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress” and the courts. *California v. United States*, 438 U.S. 645, 653 (1978). The Clean Water Act (or “Act”) did not alter this historical federal deference to the states in matters involving the management of their water resources. EPA’s Water Transfers Rule respects this deference, as well as the environmental goals of the Act. *See* 40 C.F.R. § 122.3(i)(2014).

The “Western States” – Colorado, New Mexico, Alaska, Arizona, Idaho, North Dakota, Nebraska, Nevada, Texas, Utah, and Wyoming – have vital interests in maintaining historical federal deference to traditional state authority to manage their water resources because of the importance of water transfers to their economies and the environment.

Most precipitation in the West falls as snow. The arid West must consequently capture water when and where the snow melts, in areas often remote

from places of need. Countless entities thus divert water from natural watercourses; many then transfer water into other streams, lakes, and reservoirs to meet essential domestic, commercial, agricultural and other needs.

Water transfers may be as simple as the diversion of water from one stream into an adjacent (but hydrologically separate) stream for irrigation of a nearby field, or as complex as the U.S. Bureau of Reclamation's interstate San Juan-Chama Project that transfers water through the Continental Divide and across the Colorado-New Mexico state line to serve New Mexico residents. Western States in fact depend upon thousands of daily water transfers to deliver billions of gallons of water to meet their residents' water supply needs. All of these transfers include the capture and transfer of water pursuant to state law.

Subjecting water transfers to federal NPDES program requirements would trump federal deference to the states' traditional authority over their water resources.¹ The states' management of their water resources would be superseded, abrogated or impaired because many individual water diversions would have to be curtailed because it would be cost prohibitive, impractical, or unworkable to

¹ Even for States such as Alaska where arid conditions generally are not an issue, the economic cost of regulating water transfers under the NPDES permit system would pose an impractical and unrealistic burden for the administering agency and an applicant, while at the same time usurping existing and adequate state authorities already governing water transfers.

construct the water treatment facilities necessary to comply with NPDES requirements.

This Court should reverse the District Court because Congress neither intended nor authorized altering historical federal deference to the states' traditional authority over their water resources.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, as a civil action raising questions of federal law, and pursuant to the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The order and judgment are appealable as of right pursuant to 28 U.S.C. § 1291 as the final judgment of the District Court. On May 27, 2014, the "Western States" timely filed their notice of appeal from the District Court's final Judgment, dated March 31, 2014, and Opinion and Order, dated March 28, 2014.

STANDARD OF REVIEW

Federal appellate courts review the grant of summary judgment *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *Guertin v. United States*, 743 F.3d 382, 385 (2d Cir. 2014). In the context of an agency rulemaking under the Administrative Procedure Act, the appellate court must "review the administrative record directly." *Gas Appliance Mfrs. v. Dep't of Energy*, 998 F.2d 1041, 1045 (D.C. Cir. 1993). Courts review an administrative agency's action under the

"arbitrary, capricious or abuse of discretion" standard. 5 U.S.C. § 706(2)(A); *United States v. Bean*, 537 U.S. 71, 77 (2002).

STATEMENT OF ISSUES

1. Whether the District Court erred by not applying the “clear statement rule” where the Clean Water Act lacks a “clear and manifest” statement from Congress to authorize an unprecedented intrusion into traditional state authority over their water resources.
2. Whether the District Court erred by not applying the “avoidance canon” to interpret the Clean Water Act in a manner that avoids constitutional problems, i.e., alteration of the established framework of federal deference to traditional state authority over their water resources.
3. Whether the District Court erred in failing to give meaning to §§ 101(b), 101(g) and 510(2) of the Clean Water Act, which expressly preserve traditional state authority over their water resources.
4. Whether the District Court erred in interpreting the Clean Water Act in a manner that will impermissibly interfere with the states’ capacity to meet their interstate obligations under interstate compacts, Supreme Court interstate water apportionments, and congressional acts.

STATEMENT OF CASE

This appeal questions whether the District Court erred by failing to respect historical federal deference to the states’ traditional authority over their water resources.

Nature of the Case

This is an appeal of an Opinion and Order vacating EPA’s Water Transfers Rule to the extent it is inconsistent with the statute and remanding the Rule to EPA. Special App. at 121. Judge Kenneth M. Karas, District Court Judge for the Southern District of New York, issued his Opinion and Order on March 28, 2014. Special App. at 6–21.

Procedural History

In 2008, EPA promulgated its Water Transfers Rule, 40 C.F.R. § 122.3(i), which clarifies that a water transfer – “an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use” – is not subject to regulation under the Clean Water Act’s National Pollutant Discharge Elimination System (“NPDES”) program as “a discharge of a pollutant.” 33 U.S.C. § 1311(a). Several groups of plaintiffs challenged this regulation, in both federal district and appellate courts, as impermissible under the Clean Water Act. Several groups of stakeholders sought to intervene as defendants in these challenges.

The two district court proceedings, in the Southern District of New York and the Southern District of Florida, were stayed pending resolution of the challenges filed in several federal courts of appeal. On October 26, 2012, the Eleventh Circuit held that it lacked jurisdiction to review the consolidated challenges and accordingly dismissed the petitions and the Supreme Court subsequently denied EPA's petition for *certiorari* on October 15, 2013. The stays lifted on December 17, 2012, and the plaintiffs in the Southern District of Florida voluntarily dismissed those proceedings.

The multiple challenges consequently became one, in the Southern District of New York. On January 30, 2013, Judge Karas granted, on the parties' consent, intervention to the Florida plaintiffs (Miccosukee Tribe of Indians, Friends of the Everglades, the Florida Wildlife Federation, and the Sierra Club) who joined a group of nine (mostly eastern) states and the Province of Manitoba, Canada as challengers, as well as eleven Western States, numerous Western Water Providers, and the South Florida Water Management District, who joined New York City as intervenor-defendants (and EPA) to defend EPA's Rule.

The parties briefed cross motions for summary judgment at the direction of the Court, which held oral argument on December 19, 2013. The District Court issued its Opinion and Order on March 28, 2014.

Summary of Decision Below

The District Court adopted the two-step *Chevron* framework for its analysis. Special App. at 35 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The Court noted that the first step was “whether Congress clearly answered the precise question whether a transfer of water and any pollutants contained therein is an ‘addition’ of those pollutants ‘to navigable waters.’” Special App. at 38. In this regard, the Court found that the “text alone” of the Clean Water Act was ambiguous and susceptible to the two constructions that treat navigable waters either collectively as a whole or as individual water bodies. Special App. at 41–47.

The District Court purported to undertake a “holistic” analysis of the statute’s structure, purpose, and history, and determined that none of those construction devices resolved the aforementioned ambiguity. Special App. at 54–60. The Court found that EPA’s Rule satisfied step one of *Chevron* review, holding that the statutory language was ambiguous as to whether Congress intended a water transfer to be considered an “addition” of pollutants to “navigable waters.” Special App. at 59–60.

The Court next proceeded to step two of *Chevron* to determine whether EPA’s Rule represents a permissible interpretation of the Act. Special App. at 60. After lengthy discussion, the District Court concluded that EPA did not satisfy step

two because the agency failed to provide a reasoned explanation for its interpretation of the statute. Special App. at 89.

The Court provided a separate discussion of EPA's "status-based" interpretation of the term "navigable waters." Special App. at 110. The Court found that EPA failed to provide a reasoned explanation for its interpretation, and further found EPA's interpretation inconsistent with the Act. Special App. at 111, 113.

In the Opinion and Order, the Court vacated the Water Transfers Rule to the extent it is inconsistent with the statute – and in particular the phrase "navigable waters" as interpreted in *Rapanos v. United States*, 547 U.S. 715 (2006) and in the Court's Opinion dated March 28, 2014. The District Court also remanded the Water Transfers Rule "to the extent EPA did not provide a reasoned explanation for its interpretation." Special App. at 121.

Relevant Facts

Federal deference to the states' authority to allocate their water resources is especially important in arid Western States that rely on water transfers to meet the water needs of their residents. Administrative Record [Doc. 119] (hereinafter "AR"), 1272.1, at 3. Subjecting water transfers to the NPDES permitting scheme could unnecessarily interfere with state management of their water resources. J.A. at 276 (EPA Interpretation); AR 0679.1, at 1.

States have sovereign authority to regulate water quality within their jurisdiction, 33 U.S.C. § 1370 (Act § 510), and have enacted statutory authority both to implement the Act and to supplement its provisions to address water quality, including effects from water transfers. J.A. at 1542. Further, this authority is redundant in all fifty states, that is, each state has multiple, overlapping authorities to regulate negative water quality impacts from water transfers.

State water quality authority, found in different combinations in the various states, includes:

- a. Broad authority for the state's water quality agency to prevent the pollution of the state's waters;
- b. Specific authority for the state's water quality agency to address particular pollution or threats of pollution;
- c. General authority to protect human health and wildlife, including aquatic life;
- d. Nuisance statutes to enjoin and abate pollution; and
- e. Common law nuisance to enjoin and abate pollution.

Id. This authority allows the states to implement the environmental goals of the Act while exercising their traditional authority to manage their water resources. *Id.*

SUMMARY OF ARGUMENT

The Supreme Court employs a consistent analytic approach to statutory interpretations of the Act that may alter the traditional federal-state framework.

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs ("SWANCC"),

531 U.S. 159, 174 (2001); *Rapanos*, 547 U.S. at 738. The District Court followed a different analytic approach, one which overlooked the traditional federal-state framework of deference to the states’ authority over their water resources.

Federal deference to state water law has its origins in the “equal footing doctrine,” as explained in *Kansas v. Colorado*, 206 U.S. 46, 94 (1907). Congress has repeatedly reaffirmed deference to state water law by including express language in numerous pieces of federal legislation over the years, including the Clean Water Act. Likewise, the Supreme Court has been consistent in recognizing the states’ traditional authority over use of their water resources. *See, e.g., California v. United States*, 438 U.S. at 653.

The Clean Water Act lacks a “‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority” over water uses. *See, e.g., Rapanos*, 547 U.S. at 738. Moreover, the “canon of constitutional avoidance” militates against extending NPDES program jurisdiction over water transfers, thus avoiding a constitutional problem posed by impinging on the states’ traditional and primary power over land and water use. *Id.*; *Clark v. Suarez Martinez*, 543 U.S. 371, 380–81 (2005). EPA’s Rule is consistent with these Supreme Court doctrines.

Rather than expressing a desire to alter the federal-state balance, Congress chose to “recognize, preserve and protect the primary responsibilities and rights of

States . . . to plan the development and use . . . of land and water resources.”

33 U.S.C. § 1251(b). Consistent with this notion, Congress expressed its intent “that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired” by the Act, and that nothing in the Act “shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.” *Id.* at § 1251(g). Congress further mandated that nothing in the Act shall “be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” *Id.* at § 1370(2). The District Court erred in failing to give effect to these “state deference” provisions.

Furthermore, NPDES requirements may impermissibly abrogate interstate compacts, Supreme Court interstate water apportionments, and congressional acts if states are not able to use their full legal entitlement to scarce water due to technically or economically infeasible program requirements that prevent the transfer of legally available water from one basin to another.

NPDES permitting authority is not necessary to deal with rare instances of water quality problems associated with water transfers. Congress gave the states specific tools in the Act, such as § 208, to address nonpoint source pollution from water management activities such as water transfers. States also have the ability to address water transfer-related issues where they deem it necessary and appropriate

under state law. Moreover, states may enter into compacts to address interstate pollution, while international treaties speak to cross-boundary pollution. If necessary, remedies in common law are also available to downstream states adversely impacted by water transfers.

In short, Congress did not intend the NPDES program to intrude on historical federal deference to the states' traditional authority to manage their water resources. This Court should give effect to Congress' intent and reverse the District Court.

ARGUMENT

I. The Court Should Uphold EPA's Water Transfers Rule Pursuant to the Supreme Court's Clear Statement Rule and the Constitutional Avoidance Doctrine.

In a footnote halfway through its opinion, the District Court summarily dismissed historical federal deference to the states' traditional authority to manage their water resources. *See* Special App. at 60 n.18. The District Court thus erred by failing to consider the federal-state constitutional issues inherent in water transfers. Specifically, the decision below is inconsistent with the Supreme Court's "clear statement rule" and with the related "avoidance doctrine," which command statutory interpretations that avoid constitutional problems such as infringing on states' authority to manage their water resources. The District Court failed to give meaning to the provisions in the Act that convey congressional intent

to maintain the states' traditional authority over their water resources.

A. Congress and the Supreme Court Historically Defer to Traditional State Authority to Manage Their Water Resources.

The origins of federal deference to state water allocation law lie in the “equal footing” doctrine. Under that doctrine, Congress granted the Western States, upon their admission into the Union, sovereignty over the unappropriated waters in their streams. *See Kansas v. Colorado*, 206 U.S. at 94; *Fox River Paper Co. v. R.R. Comm’n of Wisc.*, 274 U.S. 651, 655 (1927).

Congress affirmed its deference to states' water allocation laws when it passed the Desert Land Act of 1877, ch. 107, 19 Stat. 377 (1877). *See Cal. Ore. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935) (explaining that the Desert Land Act effected a severance of all waters upon the public domain and reserved such water for use under the laws of the states); *see also* Mining Act of 1866, ch. 262, 14 Stat. 253 (codified at 43 U.S.C. § 661); Mining Act of 1870, ch. 235, 16 Stat. 218 (codified at 30 U.S.C. §§ 51, 52). Moreover, Congress repeatedly reaffirmed federal deference to state water law when it ratified Western States' constitutions in their acts of admission.²

² For example, Wyoming's Constitution, art. VIII, § 1 states “[t]he water of all natural streams, springs, lakes or other collections of still water . . . are hereby declared to be the property of the state.” *See* The Act to provide for the Admission of the State of Wyoming into the Union, ch. 664, 26 Stat. 222 (1890). New Mexico's Constitution, art. XVI, § 2, provides “[t]he unappropriated water of every

In 1978, the Court cemented federal deference to state water law in the case of *California v. United States*. In that litigation, the United States challenged California’s authority to impose conditions on the operation of New Melones Dam and Reservoir, a federal facility. The Court rejected the United States’ arguments and concluded that Section 8 of the Reclamation Act required the federal government “to comply with state [water] law in the ‘control, appropriation, use, or distribution of water.’” *California*, 438 U.S. at 675.

In another opinion issued the same day, the Supreme Court similarly highlighted the Federal Government’s consistent deference to the states on water allocation matters. Indeed, “[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.” *United States v. New Mexico*, 438 U.S. 696, 702 & n.5 (1978) (noting the existence of 37 statutes in which Congress has expressly recognized the importance of deferring to state water law). Congress’

natural stream . . . is hereby declared to belong to the public and to be subject to appropriation for beneficial use.” See Joint Resolution to Admit the Territories of New Mexico and Arizona as states into the Union, Pub. Res. 8, 37 Stat. 39 (1911). North Dakota’s Constitution, art. XI, § 3, states “[a]ll flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.” An Act to Provide for the Division of Dakota into Two States and to Enable the People of North Dakota, South Dakota, Montana, and Washington to Form Constitutions and State Governments and to be Admitted Into the Union, ch. 180, 25 Stat. 676 (1889).

deference to state authority over water allocation is underscored by the so-called “McCarran Amendment,” 43 U.S.C. § 666. The statute grants the United States’ consent to state jurisdiction in water adjudication proceedings, i.e., the allocation of water under state law also recognized by §§ 101(g) and 510(2) of the Act.

It is important to note that the Supreme Court is also clear that federal deference is not unique to the West, but applies across the country.

While arid lands are to be found mainly, if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen.

California, 438 U.S. at 655 (quoting *Kansas*, 206 U.S. at 92).

And, in the context of the Clean Water Act, the Supreme Court has reiterated that land and water uses are traditionally and primarily state prerogatives, as long understood and applied by federal and state governments. *See, e.g., SWANCC*, 531 U.S. 159, 174.

B. The Clean Water Act Lacks a Clear Statement Authorizing Federal Encroachment Upon the States’ Traditional Authority Over Their Water Resources.

The Supreme Court’s “clear statement rule” upholds the principles underlying the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const., amend. X. Accordingly, this rule of

statutory construction is based on the principle that Congress must make its intention “clear and manifest” if it intends to override the historic powers of the states. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). It is therefore the duty of the courts in construing statutes to be certain of Congress' intent before finding that federal law disrupts the usual constitutional balance of federal and state powers. *Id.* at 460.

The Supreme Court has twice applied the “clear statement rule” in the context of the Clean Water Act – both times concluding that the statute lacks any statement by Congress to authorize federal encroachment upon traditional state authority over land and water resources. In *SWANCC*, the Court considered a challenge to EPA and the Corps’ definition of “waters of the United States” concerning isolated waters and § 404 permitting. The Court struck down the rule, warning against statutory interpretations that “alter[] the federal–state framework by permitting federal encroachment upon a traditional state power,” and reiterating applicability of the clear statement rule: “[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.” *SWANCC*, 531 U.S. at 173 (citations omitted).

Most recently in *Rapanos*, a plurality of the Court found that EPA had exceeded its authority through regulation of isolated wetlands under § 404 of the Act on the basis that the Act lacks a “‘clear and manifest’ statement from Congress

“to authorize an unprecedented intrusion into traditional state authority” over land and water resources. *See Rapanos*, 547 U.S. at 738. The plurality further observed, “rather than ‘preserv[ing] the primary rights and responsibilities of the States,’” extending federal jurisdiction would bring “virtually all plan[ning of] the development and use . . . of land and water resources’ by the States under federal control.” *Id.* at 737. The plurality declared that outcome to be “an unlikely reading” of the Act. *Id.*

The Supreme Court’s application of the “clear statement rule” in *SWANCC* and *Rapanos* to the Clean Water Act should guide the Court’s decision here.

C. Application of the Avoidance Canon Results in Upholding EPA’s Rule.

The Supreme Court has applied the separate “avoidance canon” – which calls for statutory interpretations that avoid constitutional problems – to the Clean Water Act in concert with the clear statement rule. *See, e.g., SWANCC*, 531 U.S. at 173. As the Supreme Court noted in *SWANCC*, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Id.*

When deciding which of two plausible statutory constructions to adopt, the “canon of constitutional avoidance” requires the Court to “consider the necessary consequences of its choice,” and rests on “the reasonable presumption that

Congress did not intend the alternative which raises serious constitutional doubts.” *Clark*, 543 U.S. at 380–81. “If one of them would raise a multitude of constitutional problems, the other should prevail” *Id.* Because there are arguably two plausible interpretations of the Act at issue here, as the Eleventh Circuit found in *Friends of the Everglades*, 570 F.3d 1210, 1227 (11th Cir. 2009), EPA’s interpretation should prevail because it avoids a constitutional problem, that is, alteration of the established framework of federal deference to traditional state authority over land and water resources. *SWANCC*, 531 U.S. at 174 (“[S]ignificant constitutional questions [are] raised by . . . impingement of the States’ traditional and primary power over land and water use.”).

II. The Court Should Uphold EPA's Water Transfers Rule Because it is Consistent with the "State Deference" Provisions in the Act.

Congress did not include a clear statement of intent in the Act to disrupt traditional deference to the states to manage their water resources. In fact, Congress expressly and repeatedly articulated its intention to preserve the established federal-state framework. *See* 33 U.S.C. §§ 1251(b) and (g), and § 1370(2). EPA recognized this in promulgating the Water Transfers Rule, stating that “[t]aken as a whole, the statutory language and scheme [of the Act] support the conclusion that [NPDES] permits are not required for water transfers.” J.A. at 172 (National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,700 (June 13, 2008) (later codified at 40 C.F.R. pt. 122)).

A. Congress Expressly Preserved Deference to State Water Resource Management in §§ 101(b), 101(g) and 510(2) of the Act.

In its initial adoption of the Act in 1972, Congress intended that primary authority over water would continue to rest with the states. Congress incorporated in § 510 of the Act its historical deference to traditional state authority over their water resources, mandating that “[e]xcept as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” 33 U.S.C. § 1370(2). At the same time, Congress also expressed in § 101(b) an overarching policy “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources” *Id.* at § 1251(b).

Just five years later, in the 1977 amendments to the Act, Congress felt compelled to reiterate and clarify its intent with respect to state authority over matters of water allocation:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies

shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g) (emphasis added).

Section 101(g) includes a requirement that federal agencies cooperate with state and local governments to develop “comprehensive solutions” for “pollution,” “in concert with” “managing water resources.” *Id.* Congress thus explicitly acknowledged that state and local management of water resources involves “pollution” from nonpoint sources, which are not subject to the Act’s NPDES program, rather than “pollutants” from point sources, which are subject to the Act’s NPDES framework. *Id.*; 33 U.S.C. § 1342(a)(1).

B. The Legislative History of § 101(g) Confirms Congress’ Intent to Refrain from Interfering with State Water Resource Management.

The legislative history of § 101(g) confirms Congress’ dedication to long-standing federal deference to the states’ water allocation systems. Congress reacted swiftly to concerns over federal policy options contained in the federal “Issue and Option Papers for the Water Resource Policy Study.” Water Resource Policy Study, 42 Fed. Reg. 36,788, 36,788 (July 15, 1977) (“WRC Paper”). The WRC Paper exacerbated fears of federal interference in traditional state authority to manage their water resources. Several options in the WRC Paper challenged federal deference to the states in matters of water allocation, including the

suggestion that water diversions be reduced to solve water quality problems. *Id.* at 36,793.

In order to allay those concerns the Conference Committee for the 1977 reauthorization of the Act added a new subsection to § 101. During the floor debate, Conferee Senator Wallop explained that §101(g):

is an attempt to recognize historic allocation rights contained in State constitutions. . . .[and] the States [sic] historic rights to allocate quantity, and establish priority of usage remains inviolate because of this amendment.

S. DEB.: Dec. 15, 1977, *reprinted in* Comm. on Env'tl. & Pub. Works, 95th Cong., 2d Sess., 3 Legis. History of the Clean Water Act of 1977, at 532 (1978) (hereinafter “1977 Legislative History”). Senator Wallop further explained: “[§ 101(g)] . . . will reassure the State[s] that it is the policy of Congress that the Clean Water Act will not be used for the purpose of interfering with State water rights systems.” S. DEB.: Dec. 15, 1977, *reprinted in* 1977 Legislative History, at 531.

Senator Wallop clarified that the purpose of his amendment was “to insure that State allocation systems are not subverted” *Id.* Contrary to the stated intent and the plain language of § 101(g), state management of their water resources would be subverted by extending NPDES requirements to water transfer activities. Most of the Western States, for example, allocate significant quantities of water for complex systems of transbasin transfers through multiple individual

water rights. *See, e.g., City & Cnty. of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992 (Colo. 1954) (concerning the water rights of the cities of Colorado Springs and Denver to transfer water under the Continental Divide). Where a significant transbasin transfer becomes cost-prohibitive, impractical, or unworkable because of NPDES program requirements, the resulting curtailment would create widespread impacts to the State’s water allocation system as a whole, such as the forty trans-mountain diversions for 500,000 acre feet allocated by Colorado to serve more than half of the State’s residents. J.A. at 320; *see also* Western States’ Mem. of L. in Supp. or Cross-Mot. Summ. J. [Doc. 171], at 9; Western States’ Mem. of L. in Reply to Pls.’ Opp’n to Cross-Mot. Summ. J. [Doc. 204], at 11.

C. The District Court Erred in its Failure to Give Proper Meaning to the “State Deference” Provisions in the Act.

The District Court erred when it elevated the “environmental goals” and discounted the “state deference” goals of the Act.

1. State Deference

The District Court undervalued the Act’s numerous “state deference” provisions, stating that “[m]any of these general expressions of congressional recognition of the states’ role in water-allocation management are limited, however, by specific language qualifying that intent, and by specific provisions within the NPDES program indicating the precise balance that Congress intended

to strike.” Special App. at 51 (emphasis added). To the contrary, § 402 is silent with regard to the states’ role in water allocation management: § 402 only discusses the states’ role in NPDES permitting. 33 U.S.C. § 1342. The District Court finessed this silence by importing § 301(a)’s general prohibitions on discharges and §§ 502(12) and 502(7)’s definitions regarding “addition” of pollutants to “navigable waters.” Even if the District Court’s conflation of these provisions was not error, §§ 301(a), 502(12) and 502(7) do not amount to “specific language,” as underscored by the Court’s own finding that they are ambiguous. Special App. at 59. On the other hand, the language in §§ 101(b), 101(g) and 510(2) is specific in its intent to preserve the states’ primary responsibilities over water resource management, to which water transfers are fundamental.

Surprisingly, the Court read the Act’s state deference provisions as conferring authority on the federal government over the states’ management of their water resources. For example, the Court surmised that Congress’ use of “primary responsibilities” to describe the states’ rights in § 101(b) means that both §§ 101(b) and (g) “implicitly contemplate that the federal government might have a secondary role in both regulating and supporting states’ resource-management rights.” Special App. at 92 (emphasis in original); *see also* Special App. at 52–55. The Court then concluded that EPA’s “implicit” “secondary role” in state water management created federal authority to regulate water transfer activities. Special

App. at 92. The “secondary role” for EPA that Congress intended, however, was oversight of the states’ implementation of the NPDES program. 33 U.S.C. §§ 1342(b) and (d). But § 510 of the Act requires “express” language to construe the Act in a way that would “impair[] or in any manner affect[]” the states’ jurisdiction over their waters. *See* 33 U.S.C. § 1370(2). The District Court thus erred in reading §§ 101(b) and 101(g) as containing an “implicit” role for EPA in state water resource management because this would supersede, abrogate, or impair the states’ traditional authority to manage their water resources. 33 U.S.C. §§ 1251(b) and (g).

2. Legislative History

The District Court referenced a 1972 House Report – notably prior to Congress’ 1977 addition of § 101(g) – to support its notion that the Act authorizes the Federal Government to exercise a heightened role in state water resource management. Special App. at 51–53. The 1972 House Report actually expresses the logical notion that “[t]o avoid duplication, . . . a State which has an approved program . . . under [§] 402, and which has a program for water resource allocation, should continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system.” H.R. Rep. No. 92-911, at 96 (1972). But the District Court concluded that the 1972 Report “implies that states should have control over water-resource allocation only where they have an EPA

approved § 402 program and a water-resource-allocation program.” Special App. at 53 (emphasis added). In other words, the Court asserted that responsibility over water allocation systems lies with the federal government unless and until a state has an approved NPDES program – the antithesis of federal deference.

3. “Environmental Goals”

The District Court focused on the Act’s “environmental goals,” while downgrading Congress’ “state deference” goals. Special App. at 88–89, 101. (discussing §§ 101(a), 101(b), 101(g) and 510). It is ironic that after admonishing EPA for a perceived failure to balance the Act’s environmental goals the Court itself committed that very error by failing to balance the Act’s states’ rights goals. The Supreme Court has warned courts about this potential pitfall in construing statutes, explaining that

[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (emphasis omitted). The District Court’s devaluation of the Act’s objectives related to state authority over water allocation and management fails to effectuate the balance that Congress intended.

4. NPDES Exemptions

The District Court also found it significant that “water transfers” are not enumerated in the Act’s exemption provisions at § 402(l) (“[l]imitation on [NPDES] permit requirement”). Special App. at 58. That conclusion, however, fails to give significance to the provisions in the Act that have the closest relationship to water transfer activities. The “secondary role” for EPA that Congress intended under the Act was oversight of the states’ implementation of the NPDES program. 33 U.S.C. §§ 1342(b) and (d). The Court’s approach, in contrast, violates a fundamental principle of statutory construction: “The words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989).

Furthermore, the court must “construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.” *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991). The District Court’s focus renders superfluous sections of the Act that are as important to its goals as § 402 and more relevant to the issue – namely §§ 101(b), 101(g), and 510(2), which require that the Act be construed in a manner that preserves state authority over their water resources. A specific “water transfers” exemption is not necessary given the clear language Congress included in the Act concerning the states’ traditional authority

to manage their water resources. In short, Congress’ policies and directives in §§ 101(b), 101(g), and 510(2) must be given effect.

D. The District Court Erred in Extending *PUD No. 1* to Justify Federal Regulation of Water Transfers.

The District Court incorrectly extended *PUD No. 1 of Jefferson County v. Washington Department of Ecology* – a case involving state certification under § 401 of a federal action – to assert that “the Supreme Court has conclusively rejected the argument that §§ 101(g) and 510(2) exclude the regulation of water quantity from the coverage of the Act.” Special App. at 51–52 (citing 511 U.S. 700, 720 (1994)). The Court’s statement highlights the importance of reading the Supreme Court’s holding in *PUD No. 1* in the proper context.

In *PUD No. 1*, the issue before the Supreme Court was whether the State of Washington could exercise the state’s § 401 certification authority to impose minimum stream flow requirements on a federally-licensed hydroelectric facility to protect water quality standards. *PUD No. 1*, 511 U.S. at 709. The Court explained that “[s]ections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed [by a state under § 401] on users who have obtained, pursuant to state law, a water allocation.” *Id.* at 720. The District Court erroneously extended this holding to § 402 (NPDES permitting). The Western States agree that § 401 of the Act gives the states broad authority to impose

conditions on the exercise of state-allocated water rights in order to protect water quality standards, but *PUD No. 1* does not authorize the federal government to intrude on traditional state authority over their water resources in § 401.

Similarly, in *S.D. Warren Co. v. Maine Board of Environmental Protection*, the State of Maine issued certifications that required an industry to maintain a minimum stream flow in the bypassed portions of a river in order to allow passage for migratory fish and eels. 547 U.S. 370, 375 (2006). As in *PUD No. 1*, the Supreme Court recognized that “State certifications under § 401 are essential in the scheme to preserve State authority to address the broad range of pollution.” *Id.* at 386. The *S.D. Warren* Court also acknowledged that state imposition of water pollution controls on state water allocations under § 401 is entirely consistent with Congress’ policy in § 101(b) of the Act. *Id.* (citations omitted) (referring to the state deference provisions of the Act to recognize that “[c]hanges in the [flow of a river] . . . fall within a State’s legitimate legislative business, and the Clean Water Act provides for a system that respects the States’ concerns”). *PUD No. 1* and *S.D. Warren* thus support the longstanding authority of states to manage their water resources as recognized in §§ 101(b), 101(g) and 510(2) of the Act. The District Court erred in extending the holding of *PUD No. 1* concerning state discretionary authority under § 401 to the mandatory requirements of § 402.

Even if appropriately applied in the § 402 context, the holding from *PUD No. 1* – that “[s]ections 101(g) and 510(2) do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation” – cannot be extended to support NPDES permitting of water transfer activities. Many industrial and municipal wastewater facilities (those that the NPDES program was intended to cover) utilize state-authorized water rights in their operations. Discharges of wastewater from such facilities remain subject to the § 402 NPDES permitting scheme despite their being associated with a water right.

To illustrate, an industrial discharger may have the right to divert water for industrial uses pursuant to a state water allocation, but after use, the discharges from such industrial facilities are subject to NPDES requirements. Similarly, a municipal (domestic) wastewater discharger might have the obligation under a state water allocation to discharge a certain amount of water from its facility for downstream users. But this does not mean that the municipal discharger is exempt from NPDES requirements. Requiring industrial and municipal dischargers to obtain § 402 NPDES permit coverage does not violate §§ 101(g) and 510(2) because imposing permit requirements on such facilities does not affect state water allocation systems, *per se*. EPA recognized this in its Rule, which does not apply when there is an intervening industrial, municipal, or commercial use.

In contrast with industrial and municipal wastewater discharges, regulating the transfer of raw water through NPDES would have the direct effect of superseding, abrogating or impairing the states' management of their water resources. *See* 33 U.S.C. §§ 1251(g) and 1370(2). This is because water transfers are often essential to the waters' use; water transfers are necessary to the states' management of their water resources. *See generally, City & Cnty. of Denver*, 276 P.2d at 992. If water transfers are curtailed because of NPDES requirements, then the states' management of their water resources is inevitably superseded, abrogated or impaired, contrary to §§ 101(g) and 510(2). For this reason the *PUD No. 1* holding concerning these provisions of the Act cannot be used to extend § 402 to water transfer activities.

III. Extension of the NPDES Program to Water Transfers Would Supersede State Water Law and Interfere with Interstate Compacts, Supreme Court Water Apportionments, and Congressional Acts.

Extending the NPDES program to water transfers would supersede the Western States' prior appropriation systems because it would effectively alter individual water rights established by the states. NPDES requirements might also have the effect of impermissibly limiting interstate transfers, thus interfering with interstate compacts, water apportionments determined by the Supreme Court, and Congressional Acts concerning interstate water obligations.

A. Extension of the NPDES Program to Water Transfers Would Supersede, Abrogate or Impair the Authority of Each State to Allocate Quantities of Water Within its Jurisdiction.

The Western States follow the prior appropriation doctrine – “first in time, first in right” – to allocate quantities of water within their jurisdictions. Joseph L. Sax, et al., *Legal Control of Water Resources: Cases and Materials*, 111 (3d ed. 2000). In these states, water is a public resource, subject to appropriation and use by individuals under state law. Dean David H. Getches, *Water Law in a Nutshell*, 77–78, 86 (4th ed. 2008). All prior appropriation states have constitutionally or statutorily asserted their sovereign prerogative to regulate the appropriation and use of water for the benefit of their citizens. *Id.* at 86.

The date of appropriation determines the user’s right to use water, with earlier appropriators having priority over later appropriators. *Id.* at 78. When the water supply is insufficient to meet all appropriators’ rights, those earliest in time of appropriation will typically obtain all of their quantity of water established by the state for their beneficial use, and those who appropriated later may receive only some or none of the water to which they have rights established by the state, depending on the amount of water available. *Id.*

In contravention of § 101(g), “the authority of a State to allocate quantities of water within its jurisdiction” would be “superseded, abrogated or otherwise impaired” whenever a senior individual water right established by the state curtails

diversions because it cannot comply with NPDES program requirements. The consequence of an individual water right's curtailment to comply with NPDES requirements would be to reduce that appropriator's diversions, thereby making every junior appropriator's rights senior, and thereby turning the prior appropriation doctrine on its head: "later in time, first in right." That result is contrary to § 101(g), as well as §§ 101(b) and 510(2).

Finally, the District Court erred by not recognizing that extension of NPDES program requirements to water transfers would unnecessarily and unduly interfere with state authority because individual water rights holders would have no alternative but to curtail their water transfers, as it would be cost prohibitive, impractical or unworkable to construct the water treatment facilities necessary to comply with NPDES requirements. Special App. at 98.³ Colorado, for example, has over 40 major transbasin water transfers that transfer over 500,000 acre-feet of water per year between major river basins, and thereby form a critical component of Colorado's water supplies. J.A. at 320. Many of these transbasin transfers would be in jeopardy, threatening Colorado's allocation of water supplies to meet the needs of the State's largest cities and to irrigate nationally important agricultural lands. J.A. at 1141, 1146–48.

³ The Court, however, recognized these potential effects in deciding to remand rather than vacate the Rule. Special App. at 120.

B. Extension of the NPDES Program to Water Transfers Would Interfere With Interstate Compacts, Supreme Court Water Apportionments, and Congressional Acts.

A significant number of water transfers occur on interstate stream systems, the waters of which are allocated among the states by interstate compact, Supreme Court decree, or congressional act, often affirmed by state statutes.⁴ States may not be able to fully use their legal entitlement to scarce water under these authorities if—due to technically or economically infeasible NPDES requirements—they cannot transfer legally available water from one basin to another to meet demands. Vacating the Water Transfers Rule could make such interstate allocations ineffective without a clear statement that Congress intended to do so. Indeed, the Tenth Circuit has recognized that if a state could not obtain a permit under the Act, or if the permit imposed infeasible conditions or restrictions, such an eventuality might have the impermissible effect of abrogating an interstate compact and denying the state its water use rights thereunder. *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985).

For example, Congress authorized construction of the San Juan-Chama Project, which transfers water from the Colorado River Basin to the Rio Grande

⁴ See, e.g., Colorado River Compact [between Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming], ch. 72, 42 Stat. 171 (1921); *Colorado v. New Mexico*, 459 U.S. 176 (1982) (Vermejo River); and Boulder Canyon Project Act, 43 U.S.C. § 617 (allocating the lower Colorado River among Arizona, California, and Nevada); see also, e.g., Colo. Rev. Stat. §§ 37-61-101 through 37-61-104. (Colorado River Compact).

Basin. Act of June 13, 1962, Pub. L. No. 87-483, 76 Stat. 96, § 8 (1962). New Mexico relies on interstate transfers by the Project to receive its full entitlement to water under the Upper Colorado River Compact, Pub. L. No. 37, 63 Stat. 31, art. XIV (1949). New Mexico then uses this Colorado River Basin water to satisfy its needs in the Rio Grande Basin, thus ensuring that the state has adequate native water to meet its obligations to Texas under the Rio Grande Compact, Pub. L. No. 96, 53 Stat. 785 (1939).

Similarly, pursuant to *New Jersey v. New York*, 347 U.S. 995 (1954), New York City may take up to 800 million gallons of water per day from the Delaware River Basin, subject to certain conditions. *Id.* at 997. The City diverts this water, which constitutes a substantial portion of the City's daily needs, to reservoirs outside the Delaware River Basin. The Decree also authorizes the State of New Jersey to take up to an annual average of 100 million gallons of water per day out of the Basin, also subject to conditions. *Id.* at 1001–02.

Subjecting such transfers to NPDES requirements may impermissibly abrogate an interstate compact or Supreme Court decree and deny the state its water use rights thereunder. *See, e.g., Riverside*, 758 F.2d at 513.

IV. States Are Free to Utilize the Act's Nonpoint Source Control Program to Address Potential Problems Caused by Water Transfers.

The practical effect of EPA’s Water Transfers Rule is to recognize water transfers as nonpoint sources. Congress left direct regulation of nonpoint pollution sources to the States because controlling them “was so dependent on . . . site-specific factors . . . that uniform federal regulation was virtually impossible.” *Shanty Town Assocs., Ltd. P’Ship v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988).

Congress gave the states specific tools in the Act to address nonpoint sources and to control “pollution resulting from— . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities,” such as water transfers. 33 U.S.C. § 1314(f)(2)(F) (emphasis added).

A. Section 208 Requires States to Prepare Areawide Waste Treatment Management Plans to Control Nonpoint Source Pollution.

Section 208 requires states to identify geographic areas with substantial water quality control problems and to designate “208 planning agencies” to prepare areawide wastewater treatment management plans. 33 U.S.C. § 1288(a)(2). So-called “208 plans” must include processes to identify agricultural, silvicultural, mining, and construction sources of pollution, and “procedures and methods (including land use requirements)” to control such sources. *Id.* at § 1288(b)(2). Areawide plans thus prioritize water quality problems, and recommend control measures.

Courts have indeed recognized the appropriateness of using § 208 in the context of water management issues. “[D]ams are a major component of state water management, providing irrigation, drinking water, flood protection, etc. In light of these complexities, which the NPDES program was not designed to handle, it may well be that [§ 208] state areawide water quality plans are the better regulatory tool.” *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 182 (D.C. Cir. 1982). Like dams, water transfers are an integral part of the states’ water allocation systems, and thus § 208 is an effective mechanism to address any water quality issues associated with such transfers. Areawide plans can address not only pollution problems in the receiving waters, but also control water quality problems in source waters before it is transferred. Areawide plans thus provide an effective tool that states can use to control pollution associated with water transfers.

B. Section 319 Requires the States to Develop Management Programs for Controlling Pollution Added by Nonpoint Sources.

The Act “imposes on the states planning responsibilities, including the preparation of a non-point source management plan, commonly referred to as a § 319 report.” *Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002); 33 U.S.C. § 1329(a)(1). In the report, states must identify waters that can reasonably meet water quality standards only through additional action to control nonpoint source pollution, and identify the categories, subcategories and particular sources

of such pollution. *Id.* States must then prepare a management program that identifies best management practices and measures that will be undertaken to reduce pollution from the identified sources. *Id.* at § 1329(b)(2). Section 319 authorizes the states to obtain federal funding to manage nonpoint source pollution, with oversight from EPA. *Id.* at § 1329(h).

C. States May Establish Total Maximum Daily Loads to Control Nonpoint Sources of Pollution.

States bear primary responsibility for assessing the quality of their waters. 33 U.S.C. § 1313(d). Every two years states must submit § 303(d) Lists that identify “water quality limited segments” that fail to meet any water quality standard. 40 C.F.R. § 130.7(d)(1). States must also develop “total maximum daily loads” (“TMDLs”) for any waters identified as not meeting applicable water quality standards and then implement TMDLs through waste load allocations to point sources and load allocations to nonpoint sources. 33 U.S.C. § 1313(d)(1)(A) – (D).

EPA has interpreted § 303(d) as requiring TMDLs for both point and nonpoint sources. 40 C.F.R. § 130.2(g)–(i); *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1132–33 (9th Cir. 2002). Implementation of load allocations on nonpoint sources is at the discretion of the states, however. *Id.* at 1140. Load allocations for nonpoint sources within TMDLs are implemented through a wide variety of state, local, tribal, and federal programs (which may be regulatory, non-

regulatory, or incentive-based), as well as voluntary action by committed citizens. *See, e.g.*, Memorandum from Robert Perciasepe, Assistant [EPA] Administrator, *New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs)* (Aug. 8, 1997), available at <http://www.epa.gov/lawsregs/lawsguidance/cwa/tmdl/ratepace.cfm>. Colorado, for example, uses its “control regulation” authority to address nutrient loads from nonpoint sources into impaired reservoirs. *See* Colo. Rev. Stat. § 25-8-205(1)(a). Thus, TMDLs are yet another tool states can use to address any water quality problems posed by water transfers.

V. The Act Recognizes that States May Impose Their Own Pollution Controls on Water Transfers.

Despite the District Court’s implications to the contrary, NPDES permitting authority is not necessary to address potential water quality issues posed by water transfers. In addition to the option of using the Act’s nonpoint source management program, states can and do use their own laws to address such issues where they deem it is appropriate. Congress explicitly recognized this state authority in the Act. *See, e.g.*, 33 U.S.C. § 1370. Moreover, as discussed previously, the Supreme Court affirmed the authority of states at their option to impose water pollution controls through § 401 on state water allocations. *PUD No. 1*, 511 U.S. at 712–13; *S.D. Warren*, 547 U.S. at 386.

A. States Have Independent Legal Authority to Regulate the Quality of Water Transfers.

The states are free to exercise their own legal authority – independent authority that extends beyond the federal Act – to address potential water quality issues associated with water transfers. *See* 33 U.S.C. § 1370. In fact, there exist multiple, overlapping authorities of each State to regulate water transfers. *See, e.g.,* J.A. at 1542. The District Court acknowledged this separate state authority, Special App. at 77, but erred in failing to recognize that § 510 of the Act contemplates that states may exercise such independent authority in areas where a state feels the need to be more stringent or to regulate more broadly than the federal Act.

For example, since 1981 Colorado has had its own mechanism in place for regulating the quality of water transfers: the State Water Quality Control Commission’s authority to promulgate “control regulations” to describe any mandatory or prohibitory precautionary measures relative to any activity that causes the quality of state waters to be in violation of any water quality standard. J.A. at 321 (citing Colo. Rev. Stat. §§ 25-8-503(5); 25-8-205(1)(c)). New Mexico provides another example of the type of regulation that extends beyond the Act that Congress authorized by § 510. 33 U.S.C. § 1370. The New Mexico State Engineer has authority under state law to deny a transfer of surface or ground water if he finds that the transfer will impair existing water rights or be detrimental

to the public welfare of the State, which includes the protection of water quality.

N.M. Stat. Ann. §§ 72-5-23, 72-5-26, 72-12-7; *see also Stokes v. Morgan*, 680 P.2d 335, 341 (N.M. 1984) (State Engineer could deny permit where “intrusion of poor quality water could result in impairment of existing rights.”).

In addition to these examples, each state has authority under its own laws to protect water quality, as well as to provide for the vital transfer of water for beneficial use.⁵ J.A. at 1542. Much of this state authority has a broader reach than the Act. All but one of the Appellee states extends state authority beyond the Act’s “navigable waters” to ground water, *inter alia*. *See, e.g.*, N.Y. Env’tl. Conserv. Law § 17-0105(2); Conn. Gen. Stat. § 22a-423; Del. Code Ann. tit. 7, § 6003(a)(2); Me. Rev. Stat. tit. 38, § 361-A(7); Mich. Comp. Laws § 324.3101(z); Minn. Stat. § 103G.005 (17); Mo. Rev. Stat. § 644.016(27). These statutes demonstrate that the states can address specific water quality issues that are not

⁵ Additionally, the states’ common laws regard water pollution as a trespass against the complainant’s right to use water. The fundamental doctrine is that water quality cannot be impaired to an extent that would injure subsequent uses. For example, in Colorado, “a common law theory. . . prohibits the discharge of contaminants into streams where doing so makes the water unsuitable for an [other] appropriator’s normal use of water.” *In re Concerning Application for Plan for Augmentation of City and Ctny. of Denver*, 44 P.3d 1019, 1028 (Colo. 2002). Other states reach similar results. *See, e.g., Phillips v. Davis Timber Co., Inc.*, 468 So.2d 72, 79 (Miss. 1985) (Plaintiff “entitled to an injunction enjoining and prohibiting further PCP pollution into his lake”).

addressed by the Act but that are important to them, exactly as Congress intended and authorized in § 510. 33 U.S.C. § 1370.

B. States Have Authority to Address Water Transfers Affecting Interstate and International Waters.

The District Court criticized EPA for failing to demonstrate that the Rule would not frustrate state concerns with interstate water pollution. Special App. at 101. The administrative record and Western States’ briefing, however, contained substantial relevant material – discussed below – that supported EPA’s approach. J.A. at 309–11; AR 1415.20, at 23–26; AR 1433, at 13–14; Western States’ Mem. of L. in Supp. of Cross-Mot. Summ. J. [Doc. 171]; Western States’ Mem. of L. in Reply to Pls.’ Opp’n to Cross-Mot. Summ. J. [Doc. 204].

The District Court erroneously concluded that NPDES authority is the only meaningful mechanism to regulate water pollution that crosses state lines, finding fault with EPA’s “fail[ure] to explain how [the Water Transfers Rule] is consistent with Congress’s specific intent that the NPDES program would provide a forum for resolving [interstate] disputes” Special App. at 56–57, 96. The Court’s conclusion, however, presupposes that Congress intended for water transfer activities to be regulated under the permitting program as point sources. The Act does, indeed, provide for an administrative forum in which affected states may voice objections in the context of NPDES permits. 33 U.S.C. § 1342(b)(3). The Court ignored the fact that Congress included alternative – and effective –

mechanisms in the Act to provide a framework for resolution of cross-boundary disputes in the context of nonpoint sources such as water transfer activities.

1. Authority Over Transfers that Cross State Lines

Despite the District Court’s concerns regarding hypothetical scenarios, water transfers pose few if any interstate water quality issues. Indeed, the Appellees in the case below alleged only one water transfer with interstate implications: North Dakota’s transfers from Devils Lake into the Sheyenne River, which is a tributary to the Red River—North Dakota’s boundary with Minnesota—which then flows north into Canada’s Lake Winnipeg.

Appellees implied that North Dakota’s Devils Lake Drainage Project threatens to introduce harmful levels of naturally-occurring chemical constituents, as well as toxic algae and fish parasites into the Red River and Lake Winnipeg. The project, however, operates under a state “permit to drain waters,” which contains protective conditions. N.D. Cent. Code § 61-32-03. Another state statute requires water transfers to comply with the “state’s water quality standards established to protect aquatic life.” *Id.* at § 61-28-09(1). Violation of the state’s water quality standards would expose the project to civil and criminal enforcement and/or an injunction. *Id.* at §§ 61-28-08 and 61-28-09(1).

The District Court erred in its failure to acknowledge that there are alternative mechanisms – both under and independent of the Act – that may be

utilized to address nonpoint source pollution that affects a downstream State. In the Act, Congress directed EPA to “encourage cooperative activities by the States for the prevention, reduction and elimination of pollution . . . and encourage compacts between States for the prevention and control of pollution,” and gave its consent for such compacts. 33 U.S.C. § 1253(a). The District Court apparently does not believe that interstate compacts are sufficient in the realm of protecting downstream states from any negative impacts of water transfers. But this ignores the fact that there are more than a dozen compacts involving more than twenty-five states that facilitate interstate pollution control.⁶ The states must take responsibility in entering into and enforcing such compacts, just as they do with compacts involving interstate water allocations. *See, e.g., New Jersey v. Delaware*, 552 U.S. 597, 623–24 (2007) (action to enforce the 1905 Delaware River Compact); *Kansas v. Colorado*, 543 U.S. 86, 90–92 (2004) (action to enforce the 1949 Arkansas River Compact); *Virginia v. Maryland*, 540 U.S. 56, 79 (2003) (action to enforce the 1785 Potomac River Compact).

⁶ *See, e.g.,* Red River of the North Compact between the State of South Dakota, the State of North Dakota, and the State of Minnesota, Pub. L. No. 456, 52 Stat. 150, art. II (Apr. 2, 1938) (“Each of the States . . . undertake to cooperate . . . for the control of the flood waters of this [Red] river and for the prevention of the pollution of such waters.”); Delaware River Basin Interstate Compact, between the State of Delaware, the State of New Jersey, the State of New York, and the Commonwealth of Pennsylvania, Pub. L. No. 87-328, 75 Stat. 688, art. 3 (Sept. 27, 1961) (The Delaware River Basin Commission has a substantial role, consistent with the terms of the Supreme Court’s Decree, in the management of New York City and New Jersey’s diversions out of the Delaware River).

Congress included other provisions in the Act to encourage interstate cooperation as well, and in some instances mandated it. For example, the governors of interstate waters with substantial water quality control problems “shall consult and cooperate” to develop an area-wide waste treatment management plan. 33 U.S.C. § 1288(a)(4). Further, EPA “shall” make grants at the request of a majority of governors to develop a comprehensive water quality plan for an interstate basin or sub-basin. *Id.* at § 1252(c). EPA is also authorized to make grants to states or interstate agencies to demonstrate advanced treatment and environmental enhancement techniques to control pollution from all sources in an interstate basin or sub-basin. *Id.* at § 1255(b).

EPA must convene a management conference if requested by a state that is not meeting applicable water quality standards to address nonpoint source pollution originating in another State. 33 U.S.C. § 1329(g). The purpose of the conference is to develop an interstate agreement to reduce nonpoint source pollution and improve water quality. *Id.* Although the states must revise their nonpoint source management programs to implement such an agreement, they receive priority funding to control interstate pollution. *Id.*

It is worth noting that the mechanism in the Act touted as favorable by the Court for addressing permit issues does not guarantee final resolution in favor of downstream states. *See* 33 U.S.C. § 1342(b)(3). This provision simply provides a

forum for affected states to voice their objections to an NPDES permit through a public hearing, with the EPA Administrator having absolute discretion to make a final determination on the discharge permit at issue. *Id.*; see also *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987) (“Even though it may be harmed by the discharges, an affected State only has an advisory role [under the Act] in regulating pollution that originates beyond its borders.”).

In the very rare circumstance where a water transfer activity causes an interstate water quality problem, affected states also have the option of seeking relief under state or federal common law. See *Ouellette*, 479 U.S. at 490–91 (holding that remedies in state common law are available to entities affected by out-of-state sources); cf. *Milwaukee v. Illinois*, 451 U.S. 304, 319–20 (1981) (holding that the Act preempts federal common law claims where the claim was against a discharger covered by the Act’s NPDES provisions, as opposed to a nonpoint source of pollution).

In summary, state statutes can and do work in concert with interstate compacts and other provisions of the Act to address interstate water quality issues posed by water transfers, and affected states also have the option to pursue common law remedies for resolution of grievances related to nonpoint sources of pollution such as water transfers.

2. Authority Over Transfers that Cross International Boundaries

There are also long-standing mechanisms in place to address any problems with water transfers affecting international waters. For example, the North Boundary Waters Treaty of 1909 between the United States and Canada established an International Joint Commission (“IJC”) to assist governments *inter alia* in finding solutions to problems in waters that flow across the border between the United States and Canada, such as the Red River to which Devils Lake discharges (via the Sheyenne River).⁷ See *Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada*, Int’l Joint Comm’n, art. VII, (May 13, 1910), http://www.ijc.org/en_/BWT. The Treaty provides that “boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.” *Id.* at art. IV.

The IJC has set up more than twenty boards of experts from the two countries, including the International Red River Board (“IRRB”), to help it carry out its responsibilities. See *Mandate of IJC to IRRB*, Int’l Red River Bd. (Feb 7, 2001), http://www.ijc.org/en_/irrb/Mandate. IRRB members include

⁷ The Water Utilization Treaty of 1944 between the United States and Mexico similarly addresses water quality issues across the nation’s southern border. *Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande*, T.S. 994, 59 Stat. 1219 (Nov. 14, 1944).

representatives from North Dakota and Minnesota, in addition to the United States, Canada, and Manitoba. The IJC recommended, and the two nations approved, the establishment of water quality objectives for a number of constituents at the international boundary of the Red River. *See Status Report on the Activities of the International Red River Board*, Int'l Red River Bd., 2 (Apr. 1, 2009), <http://www.ijc.org/rel/boards/irrb/IRRBstatus09.pdf>.

Moreover, § 310 of the Act authorizes EPA, upon request of the Secretary of State, to abate international pollution, to notify the state(s) and interstate agencies where such pollution originates, and appoint a hearing board to consider the specific issue raised. 33 U.S.C. § 1320. The board must make findings and recommendations after a hearing, and EPA may institute enforcement proceedings to compel abatement of the pollution. *Id.*

In sum, the Boundary Waters Treaty and the Act function to address water quality problems alleged below by Appellees. Moreover, the IJC and IRRB are proactively addressing a broad array of water quality concerns, such as parasites, pathogens and invasive species that the NPDES program does not address because there are no corresponding water quality standards for these biological constituents.

CONCLUSION

The Western States respectfully urge the Court to respect historical federal deference to the states' traditional authority to manage their water resources, reverse the Opinion and Order of the District Court, and uphold EPA's Water Transfers Rule.

RESPECTFULLY SUBMITTED,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

**CATSKILL MOUNTAIN CHAPTER OF
TROUT UNLIMITED, INC., *et al.*,**

Plaintiffs-Appellees,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,**

Defendants-Appellants-Cross Appellees

On Appeal from the United States District Court
for the Southern District of New York

No. 7:08-cv-05606-KMK
Kenneth M. Karas, Judge

**BRIEF OF THE STATE OF CALIFORNIA BY AND
THROUGH THE CALIFORNIA DEPARTMENT OF
WATER RESOURCES AS *AMICUS CURIAE* IN
SUPPORT OF DEFENDANTS-APPELLANTS-CROSS
APPELLEES AND REVERSAL OF THE DISTRICT
COURT**

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The State of California by and through the California Department of Water Resources (DWR) submits this brief as *amicus curiae* in support of Defendants-Appellants-Cross Appellees United States Environmental Protection Agency (hereinafter Appellants or EPA) and reversal of the district court judgment. Fed. R. App. P. 29(a).

INTERESTS OF *AMICUS CURIAE*

California is a large state with a diverse geography, a nationally important agricultural sector, and a quickly growing population. The increasing demand for water by competing interests throughout the State requires an efficient and cost-effective delivery method for moving available supplies of this limited resource from the Sacramento-San Joaquin Delta and rivers of the mountainous north to the cities and expanding communities of the desert south and east. The substantial challenge of moving water efficiently and expeditiously from one end of this large State to the other is compounded in times of drought, now affecting California, when the need for water is even more acute.

To move this water from the north to the south, DWR, the state agency authorized to manage California's water resources,¹ depends upon inter-

¹ In 1956, the California Legislature passed a bill creating DWR to plan, design, construct, and oversee the building of the nation's largest state-built water development and conveyance system. Today, DWR protects,
(continued...)

basin water transfers. DWR supports Appellants' interpretation of the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq., to allow the Water Transfer Rule, which provides that inter-basin water transfers that do not add pollutants are exempt from the NPDES (National Pollutant Discharge Elimination System) permit requirements of section 402 of the CWA. The Water Transfer Rule ensures that water, to which no pollutants are added, traveling from one water basin to another is delivered quickly and economically to its final destination. Exemption of inter-basin transfers from the NPDES permit requirements is vitally important to DWR's efforts to reduce the added expense and delay that would be caused by applying for and obtaining such permits each and every time clean water is transferred between basins from point of origin to point of delivery.

The district court's decision invalidating the Water Transfer Rule was in error. This Court's correction of that error will preserve California's interests in managing its water resources through its State Water Project, and DWR's ability to transfer water to residential, commercial, and agricultural users across the State. Conversely, affirming the district court's decision will adversely affect California's efforts to provide state-wide water

(...continued)

conserves, develops, and manages much of California's water supply including the State Water Project which provides water for 25 million residents, farms, and businesses.

deliveries in an efficient, expeditious, and cost effective manner, by imposing a new federal permitting requirement on the State Water Project's operation and the potential abrogation of the State's sovereign authority over water allocation decisions within its jurisdiction.

SUMMARY OF ARGUMENT

California's water delivery system is based on inter-basin transfers from Northern California, where 75 percent of the State's natural run-off occurs, to Southern California, where 75 percent of its demand exists.² *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal.4th at 1152 (2008) (citing *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d 82, 98 (1986)); California State Water Project, Bulletin 132-10, June 2013, Chapter 1, pp. 1-6.³ DWR has existing long-term contracts for delivery of more than 4 million acre feet of water when available supply allows, and approximately 25 million of California's 37 million residents benefit from water delivered through the State Water

² In addition to inter-basin transfers from Northern to Southern California, Southern California obtains a significant portion of its water from the Colorado River system. See *In re Quantification Settlement Agreement Cases*, 201 Cal.App.4th 758, 777-785 (2011). However, DWR does not transfer Colorado River water through the State Water Project.

³ Bulletin 132-10 is available at <http://www.water.ca.gov/swpao/docs/bulletins/bulletin132/Bulletin132-10.pdf>.

Project. California State Water Project, Bulletin 132-10, June 2013, Chapter 1, pp. 3, 4.

California's water laws require the State Water Resources Control Board (State Water Board) to consider water quality requirements when acting upon water right applications. Cal. Water Code §§ 1257, 1258. In furtherance of these requirements, the State Water Board has included comprehensive water quality conditions in the water rights that underlie the State Water Project and the Central Valley Project. *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d at 127-131, 149-150. The State Water Board imposes the requirements independent of the CWA. *See, e.g., id.*; 33 U.S.C. § 1251(g); *Lake Madrone Water Dist. v. State Water Res. Control Bd.*, 209 Cal.App.3d 163, 168-175 (1989).

This Court should reverse the district court's judgment invalidating EPA's interpretation of the CWA, as embodied in the Water Transfer Rule, under the doctrine set forth in *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *See Friends of the Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1227-1228 (11th Cir. 2009).

The CWA must be read in light of the long-established and clear congressional policy to defer to state water law, and to not impair or abrogate the states' historic rights to allocate their water resources and establish priority of use. 33 U.S.C. §§ 1251(g), 1370; *California v. United*

States, 438 U.S. 645, 653-663 (1978). Application of the NPDES program to inter-basin water transfers between water bodies of the United States when no pollutants are added by the transfer is inconsistent with congressional direction because it significantly impairs California's sovereign interests in the allocation of the quantity and the priority of usage of its waters. 33 U.S.C. § 1370. In adopting the Water Transfer Rule, EPA appropriately harmonized the congressional direction in section 101(g) of the CWA (33 U.S.C. § 1251(g)) with the NPDES program requirements, so that the NPDES program would not inappropriately impair the states' sovereign interests.

Moreover, application of the NPDES program to inter-basin water transfers would make California's current inter-basin transfers more costly and technologically inefficient, and would potentially allow EPA to displace state management of state water resources. 33 U.S.C. §§ 1251(g), 1342(c)(3). Any ruling by this Court affirming the district court's order invalidating the Water Transfer Rule would be inconsistent with the longstanding congressional policy not to interfere in the sovereign States' decisions as to their respective water resources.

ARGUMENT

I. CALIFORNIA IS DEPENDENT UPON INTER-BASIN WATER TRANSFERS, FOR WHICH WATER QUALITY IMPACTS ARE ALREADY REGULATED UNDER STATE LAW.

A. California Has Developed a Complex Water Delivery System That Is Based on Inter-Basin Transfers from the Northern Region of the State to the Southern Region of the State.

“The history of California water development and distribution is a story of supply and demand. California’s critical water problem is not a lack of water but uneven distribution of water resources.”⁴ *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d at 98. As the State’s population grew rapidly in the early part of the 20th century and industrial and agricultural development replaced mining, an engineered fix for the unequal distribution of water in the northern and southern parts of the State was viewed as something that could benefit Californians as a whole. 25 Ops. Cal. Att’y. Gen. 8, 10 (1955). Thus, the State Water Resources Development System was born, ultimately resulting in the development of the federal Central Valley Project and California’s State Water Project.

⁴ In times of abundance, the critical problem is uneven distribution of water resources. However, in times of drought, as California is currently experiencing, lack of water supply is a more critical problem than uneven distribution. Edmund G. Brown Jr., A Proclamation of a State of Emergency (January 17, 2014), <http://gov.ca.gov/news.php?id=18368>.

In 1933, the California Legislature adopted the State Central Valley Project Act, with the intent to eventually transfer water from the northern part of the State to the San Joaquin Valley. Cal. Water Code §§ 11000-11855. However, the Great Depression made the State's revenue bonds unmarketable, resulting in the project's authorization as a federal reclamation project in 1937. *See United States v. State Water Res. Control Bd.*, 182 Cal.App.3d at 99.

The components of the Central Valley Project Act included,

Shasta Dam, the central feature, to store and regulate waters of the Sacramento River; Friant Dam, on the western edge of the Sierra, to divert water from the San Joaquin River to southern regions of the valley; and various other units designed to transfer water from the Sacramento River system to the San Joaquin Valley.

United States v. State Water Res. Control Bd., 182 Cal.App.3d. at 98-99

(citing Cal. Wat. Code §§ 1110-11855). The Bureau of Reclamation was “required to comply with state law and to acquire water rights for diversion and storage of water by the [Central Valley Project].” *Id.* at 106; *see also* 43 U.S.C. § 383. As a result:

For their initial operations in the Sacramento Valley and the Delta, federal authorities acquired appropriative rights. In 1927, the California Legislature had authorized the DWR's predecessor agency to file applications to appropriate water for use in the contemplated CVP [Central Valley Project]. ([Cal. Water Code] §§ 10500-10506.) Upon the federal government's assumption of the project, the DWR

assigned its applications to the U.S. Bureau. The CVP was actually completed and in operation before permits were issued: the first permits were issued to the U.S. Bureau in 1958 ([State Water Board] Decision 893), and the principal permits were issued in 1961 ([State Water Board] Decision 990).

United States v. State Water Res. Control Bd., 182 Cal.App.3d at 106; *see also State Water Res. Control Board Cases*, 136 Cal.App.4th 674, 691-693 (2006).

The development of the State Water Project followed shortly thereafter.

Following World War II, state authorities renewed their efforts to develop a comprehensive statewide water plan. In 1951, the Legislature authorized the Feather River and Sacramento-San Joaquin Delta diversion Project. ([Cal. Water Code] § 11260.) This project—referred to as the [State Water Project]—began operations in 1967 under management of the DWR.

United States v. State Water Res. Control Bd., 182 Cal.App.3d at 99-100 (footnote omitted).

The State Water Project is the nation's largest state-built water conveyance system.

Water from the Feather River is stored behind Oroville Dam and is released into the Feather River and its eventual confluence with the Sacramento River. The water flow continues through the Delta to the Clifton Court Forebay where a portion of it enters the South Bay Aqueduct for delivery to the Santa Clara Valley. A much greater portion is lifted into the California Aqueduct for transport through the San Joaquin Valley and eventually again lifted by a series of pumping stations over the Tehachapi Mountains for delivery and use in the Southern California region.

United States v. State Water Res. Control Bd., 182 Cal.App.3d at 100 (citations omitted); *see also State Water Res. Control Board Cases*, 136 Cal.App.4th at 691-693; California State Water Project, Bulletin 132-10, June 2013, Chapter 1, pp. 4-6. On its journey to the Southern California region, the water transferred by the State Water Project moves through more than four hundred miles of aqueducts, and several lakes and reservoirs. In addition, a portion of the water flow is delivered to other parts of the State including the central coast of California, Napa Valley, Solano County, Santa Clara County, and Alameda County. California State Water Project, Bulletin 132-10, June 2013, Chapter 1, pp. 4-6.

The hub of the State Water Project and the Central Valley Project is the Sacramento-San Joaquin Delta, near the cities of Sacramento and Stockton. California's two largest rivers, the Sacramento and the San Joaquin Rivers, meet to form the Delta. The combined waters of these rivers supply drinking water to two-thirds of California's residents and irrigation water for 7 million acres of farm land through the State Water Project and Central Valley Project. *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal.4th at 1151, 1154-1155. DWR has existing long-term contracts for delivery of more than 4 million acre-feet of water when available supply allows, and approximately 25 million of California's 37 million residents benefit from water delivered through the

State Water Project. California State Water Project, Bulletin 132-10, June 2013, Chapter 1, pp. 3, 4.

Similar to the federally operated Central Valley Project, DWR obtained appropriative rights for operation of the State Water Project from the State Water Board in 1967 in Water Board Decisions 1275 and 1291. *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d at 106. DWR and the Bureau operate the State Water Project and Central Valley Project in a coordinated manner, with some of the facilities jointly owned by the Federal government and DWR. Cal. Water Code § 11500(e); California State Water Project, Bulletin 132-10, June 2013, Chapter 1, pp. 4-6.

B. Inter-Basin Transfers Are Already Subject to Water Quality Regulation by the State Water Resources Control Board.

Because both the state and federal projects have appropriative rights under California's system of water law, both DWR and the Bureau must comply with state water quality requirements imposed by the State Water Board in the operation of their respective water projects. Cal. Water Code §§ 1257, 1258 ("in acting upon applications to appropriate water, the board shall consider water quality control plans . . . and may subject such appropriations to such terms and conditions as it finds are necessary to carry out such plans"). The State Water Board's powers include the power to re-open previously issued water rights permits to address newly discovered

water quality matters. *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d at 127-131, 149-150.

Moreover, California water quality law provides further water quality protection from the consequences of inter-basin water transfers. California water quality law authorizes the State's regional water quality control boards to regulate the discharge of waste affecting water quality through the issuance of water discharge requirements. Cal. Water Code § 13263. To the extent that State Water Project operations discharge waste into any water body that is part of the State Water Project's distribution system, California water quality law provides for a complete water quality remedy. This state law authority is fully independent of the federal NPDES permitting authority exercised by state water quality agencies under CWA section 402 (33 U.S.C. § 1342). *Lake Madrone Water Dist. v. State Water Res. Control Bd.*, 209 Cal.App.3d at 168-175.

II. CONGRESS HAS LONG EXPRESSED ITS CLEAR INTENT TO DEFER TO STATE WATER LAW, AND THE CLEAN WATER ACT EXPRESSLY LEAVES WATER ALLOCATIONS UNENCUMBERED BY FEDERAL REGULATION.

A. Historical Congressional Policy Is Deference to State Law Governing Water Allocations.

Even prior to the passage of the Clean Water Act, Congress has long expressed a clear intention not to interfere with the water allocation decisions of the sovereign states. In the complicated field of federal-state

relationships, Congress has spoken with a clear and consistent voice regarding the issue of water resource allocation. As the U.S. Supreme Court has observed:

The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful continued deference to state water law by Congress.

California v. United States, 438 U.S. at 653.

This policy first appeared under the equal footing doctrine. “In 1850, California was admitted as a state to the Union ‘on an equal footing with the original states in all respects whatever.’ 9 Stat. 452.” *Id.* at 654. Under this doctrine, Congress granted the Western States, upon their admission into the Union, exclusive sovereignty over the unappropriated waters in their streams. *Kansas v. Colorado*, 206 U.S. 46, 95 (1907); *Fox River Paper Co. v. R.R. Comm’n of Wisconsin*, 274 U.S. 651, 655 (1926); *Shively v. Bowlby*, 152 U.S. 1, 49 (1894); *Pollard v. Hagan*, 44 U.S. (3. How.) 212, 223-224 (1845).

Congress reaffirmed its policy of deference to state water law in the passage of the Desert Land Act of 1877. 43 U.S.C. § 321. The Desert Land Act authorized the entry to and cultivation of federal public land. *California v. United States*, 438 U.S. at 655-657. But the Act did not confer on the public the right to take the water flowing through these federal lands. Instead, the Act delegated to the states the power to allocate their water

resources. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164 (1935).

Congress again reaffirmed its policy of deference to state water law in the passage of the Federal Reclamation Act of 1902. 43 U.S.C. § 391. The Reclamation Act authorized the federal government to construct water resource development projects. *Id.* However, section 8 of the 1902 Reclamation Act specifically provided that:

Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws

43 U.S.C. § 383.

In 1978, the U.S. Supreme Court brought together the separate doctrines that establish congressional deference to state water law in *California v. United States*, 438 U.S. at 653-663. In that decision, the United States challenged the authority of the State Water Board to impose terms and conditions affecting the operation of New Melones Reservoir, a federal reclamation facility located on the Stanislaus River. The United States contended that the State Water Board lacked the power to impose any terms and conditions on the operation of a federal project. The Supreme

Court rejected that argument and concluded that section 8 of the 1902 Reclamation Act required the United States to comply with state water law unless it was directly inconsistent with clear congressional directives regarding the project. *California v. United States*, 438 U.S. at 678. In reaching this conclusion, the Court relied upon its earlier decisions describing the broad scope of state jurisdiction over intrastate waters:

The Court noted that there are two limitations to the States' exclusive control of its streams—reserved rights “so far at least as may be necessary for the beneficial uses of the government property,” and the navigation servitude. The Court, however, was careful to emphasize with respect to these limitations on the State's power that, *except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters.*

Id. at 662 (emphasis added) (citation omitted). It is in this context of longstanding congressional deference to state water law that Congress adopted section 101(g) of the Clean Water Act.

B. The Clean Water Act Reserves to the States the Authority to Allocate Water Unimpaired by the Clean Water Act.

The Clean Water Act continues Congress's deference to state water law by including section 101(g), which explicitly states that “the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter.” 33 U.S.C. § 1251(g). Section 101(b) also provides that “[i]t is the policy of Congress to

recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.” 33 U.S.C. § 1251(b). Section 510 also provides that the Clean Water Act shall not “be construed as impairing or in any manner affecting the right or jurisdiction of the States with respect to waters (including boundary waters) of such States.” 33 U.S.C. § 1370. The legislative history of section 101(g) discloses that Congress intended the section to make “inviolable” the “States’ historic rights to allocate quantity, and establish priority of usage.” August 4, 1977, Senate Debate, *reprinted in* Comm’n. on Environment and Public Works, 95th Cong., 2d Sess. *A Legislative History of the Clean Water Act of 1977*, vol. 4, at 1030 (1978).

III. THE DISTRICT COURT ERRED WHEN IT INVALIDATED THE WATER TRANSFER RULE AND REMANDED THE MATTER TO EPA FOR FURTHER PROCEEDINGS.

A. Application of the NPDES Permit Program to Inter-Basin Water Transfers Authorized Under State Law Would Fundamentally Change the Federal-State Balance on Water Resource Allocation Issues.

The Water Transfer Rule establishes that a water transfer that does not subject the transferred water to intervening use, and therefore does not add any pollutants to the transferred water, is not subject to NPDES permitting. 73 Fed. Reg. 33,697 (June 13, 2008). Without deciding the issue, the Supreme Court has recognized that application of the NPDES program to

water transfers could “raise the costs of water distribution prohibitively, and violate Congress’s specific instructions that ‘the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired’ by the [Clean Water] Act. *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004) (quoting 33 U.S.C. § 1251(g)). Invalidating the Water Transfer Rule, and requiring NPDES permits for inter-basin transfers when no pollutants are added during the transfer, at the very least would amount to a significant impairment of California’s sovereign interests in allocating the quantity and priority of usage of its waters, in violation of the CWA. 33 U.S.C. §§ 1251(g), 1370.

If such permits were required, DWR would have significant difficulty making inter-basin transfers in the State Water Project at the current levels because of prohibitive cost and technological obstacles to removing pre-existing impurities from the large quantities of water being transferred at times of water abundance.⁵ In that situation, requiring NPDES permits

⁵ In times of abundance, there is a short window of opportunity to transfer large quantities of water. A significant amount of the water supply stored and delivered by the State Water Project is snow melt that occurs during the spring of each year. California State Water Project, Bulletin 132-10, June 2013, Chapter 1, p. 3, Chapter 8, Table 8-1, p. 133.

would impair California's jurisdiction over its sovereign waters. 33 U.S.C. § 1251(g).

Moreover, application of the NPDES program to inter-basin transfers when no pollutants are added during the transfer could directly impair California's jurisdiction over its sovereign waters. For example, while authorized state water quality agencies typically administer the NPDES permitting program under the Clean Water Act, section 402 authorizes EPA to displace state management whenever EPA "determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of [section 402]." 33 U.S.C. § 1342(c)(3).

As another example, presently, California is responding to a critical drought situation. The Governor has issued a drought emergency proclamation and ordered DWR and the State Water Board to take action to address the critically dry conditions in California. Edmund G. Brown Jr., A Proclamation of a State of Emergency (January 17, 2014).⁶ DWR and the Bureau filed Temporary Urgency Change Petitions with the State Water Board seeking to temporarily modify requirements in their water rights permits and licenses to meet water quality objectives. On February 7, 2014,

⁶ <http://gov.ca.gov/news.php?id=18368>.

and in order to ensure conservation of the remaining water supply for health and safety purposes, the State Water Board issued an order approving a temporary urgency change, temporarily modifying certain water quality related requirements in DWR and the Bureau's permits and licenses. State Water Resources Control Board, Order Approving Urgency Change in License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions.⁷

During these critical drought conditions, had there been an NPDES permit in place governing California's inter-basin transfers, DWR and the State Water Board would have been prohibited from responding to the drought emergency by adjusting NPDES permit requirements. The CWA does not contemplate the type of response requested by the Governor. *See City of Burbank v. State Water Res. Control Bd.*, 35 Cal.4th 613, 626 (2005) ("To comport with the principles of federal supremacy, California law cannot authorize this state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of [the Clean Water Act]."). Such interference with the response by state authorities to a critical situation of

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http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/rev_tucp_order020714.pdf.

immense importance to many state interests would have significantly impaired California's jurisdiction over the allocation and priority of usage of its waters.⁸

B. Interpreting the Clean Water Act to Change the Federal State Balance on Water Allocation Issues Is Inconsistent With the Supreme Court's Clear Statement Rule.

The Supreme Court has consistently stated that neither an administrative agency nor the courts should construe a statute to extend the outer limits of Congress's power or "alter the federal-state framework by permitting federal encroachment upon traditional state power" without a "clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cty. (SWANCC) v. Army Corps of Eng'rs*, 531 U.S. 159, 172-173 (2001); see also *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997) ("[J]ust as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so.").

⁸ Application of the NPDES permit system to inter-basin water transfers would involve an even greater impairment of the State's sovereignty because citizen plaintiffs could bring suit to enforce the NPDES permit standards independent of any consideration by EPA. 33 U.S.C. § 1365(a).

In declining to extend federal government jurisdiction under section 404 of the Clean Water Act to a sand and gravel pit, the *SWANCC* court held that “[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in significant impingement of the States’ traditional and primary power over land and water use.” *Id.* at 174 (citing 33 U.S.C. § 1251(b)). “We thus read the statute as written to avoid the significant constitutional and federalism questions raised by the respondents’ interpretation.” *Id.*

Subsequent to its statements in *SWANCC*, the Supreme Court reaffirmed the clear statement rule of statutory interpretation.

To quote Frankfurter again, if the Federal Government would “‘radically readjust [] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit’” about it. Or as explained by Justice Marshall, when legislation “affect[s] the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Bond v. United States, 134 S.Ct. 2077, 2089 (2014). In *Bond* the Supreme Court also reaffirmed that water use and allocation is one of the “areas of traditional state responsibility.” *Id.* (citing *SWANCC*, 531 U.S. at 174.)

In other words, in the absence of any clear statement from Congress in the CWA altering the federal-state balance on issues of water allocation, an area of traditional state responsibility, “[t]he [EPA] remains free to adopt

any interpretation that doesn't come perilously close to the constitutional boundary." *Williams v. Babbitt*, 115 F.3d at 662. In this case, the EPA Water Transfer Rule rightly respects that boundary, properly refusing to alter the federal-state balance on water allocation decisions—an area of traditional state responsibility. *See id.*; *Bond v. United States*, 134 S.Ct. at 2089; 73 Fed. Reg. 33697, 33701-33702.

Contrary to the district court's decision, the Supreme Court's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) does not require a different result. The district court speculated that EPA might, on reconsideration, devise a different justification for the Water Transfer Rule by interpreting water-transfer facilities to be navigable water bodies, and opined that such an interpretation would be inconsistent with *Rapanos*. Doc. 221, 113.

California agrees with EPA that this use of *Rapanos* is inapposite because EPA did not support the Water Transfer Rule by contending that water-transfer facilities should be considered "navigable waters" under the CWA. Brief of Defendants-Appellants United States Environmental Protection Agency and Gina McCarthy, 53, 58.

California further notes that the agency action in *Rapanos* differed in at least two fundamental respects from EPA's Water Transfer Rule, and these differences militate in favor of judicial deference in this case. First, in *Rapanos*, the plaintiffs challenged a denial of a permit by the Army Corps of

Engineers, rather than a rulemaking as in this case. Chief Justice Roberts concurred separately to note that the Army Corp of Engineers and EPA had not completed any rulemaking to develop a definition of navigable waters. *Id.* at 757. The Chief Justice stated that “[g]iven the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.” *Id.* at 758 (emphasis in original). That rulemaking has now been completed, and deference to EPA’s reasonable interpretation of the CWA therefore is warranted.

Second, the outcome in *Rapanos* was based in part on the congressional intent embodied in the CWA to preserve areas of traditional state responsibility. *Id.* at 756 (plurality opinion). In *Rapanos*, respect for areas of traditional state responsibility precluded an expansive interpretation of “navigable waters” that would encompass intermittent flows and have the effect of regulating land use. *Id.* at 738. The plurality opinion is consistent with the clear statement rule of statutory interpretation, and the federal-state balance embodied in the CWA. *Id.* In this case, the clear statement rule supports EPA’s interpretation as embodied in the Water Transfer Rule, which respects the States’ sovereign authority over water allocation decisions within their jurisdictions.

In light of the clear statement rule of statutory interpretation, the district court erred when it invalidated the Water Transfer Rule, remanding the rule to EPA for further analysis and justification for its reasoning. The EPA's Water Transfer Rule is based on a reasonable legal interpretation of congressional intent which is consistent with the rules of statutory construction. No further explanation was required under *Chevron*. See *Friends of the Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d at 1227-1228.

CONCLUSION

For the foregoing reasons, because the Water Transfer Rule is consistent with congressional intent, the State of California, by and through the California Department of Water Resources, requests that the Court reverse the district court's ruling.

Dated: September 18, 2014 Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
ROBERT W. BYRNE
Senior Assistant Attorney General
GAVIN G. MCCABE
Supervising Deputy Attorney General

S/ WILLIAM JENKINS
WILLIAM JENKINS
Deputy Attorney General
Attorneys for Amicus Curiae
State of California by and through the
California Department of Water Resources

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR «Matter Primary Court Case #»

I certify that: (check (x) appropriate option(s))

☐ 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

☐ 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because

☐ This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

☐ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ pages or _____ words or _____ lines of text.

☐ 3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

☐ 4. **Amicus Briefs.**

- ☒ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,
- or is ☐ Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,
- or is ☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

September 18, 2014

Dated

/s/ WILLIAM JENKINS

WILLIAM JENKINS

Deputy Attorney General

Tab P – Surplus Water



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August 21, 2013

Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310-0108

Dear Assistant Secretary Darcy:

On behalf of the Western Governors' Association (WGA), I am writing to express interest and concerns related to the U.S. Army Corps of Engineer's pending rulemaking on the definition and treatment of surplus water in Corps reservoirs. It is critical that this important undertaking recognize the West's unique hydrology and legal doctrines, as well as Congress' longstanding deference to state law with respect to the allocation and use of water. Water belongs to the states, which have exclusive and Constitutional authority over its consumptive use and the allocation and adjudication of water rights.

WGA understands that the Administration is nearing completion of its review of a draft rule to address the policies by which it will determine prices for surplus water contracts. WGA is concerned that the Corps has not adequately engaged the states – which are responsible for the allocation and management of their water resources – in the development of this draft and that its release may be premature. Prior to publishing it in the *Federal Register* for public comment, WGA urges you to first initiate a substantive dialogue with the states.

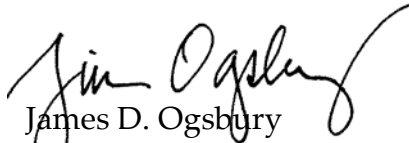
I have attached a letter recently sent to you by the Western States Water Council (WSWC), an affiliate organization of WGA, detailing the concerns of Western states. As requested in the letter, WGA asks you to work with the states, WSWC and WGA to address these concerns. I also urge you to attend the upcoming WSWC meeting in Deadwood, South Dakota (October 2-4, 2013) in order to discuss this matter with the state water managers that comprise the Water Council.

Honorable Jo-Ellen Darcy
August 21, 2013
Page 2

Releasing a proposed rule without first engaging in serious consultations with the states may significantly compromise our ability to reach a mutually acceptable solution that recognizes and balances both the rights and interests of the states and the responsibilities of the Corps as authorized by Congress.

Thank you for your consideration of this request. I look forward to your positive response and an opportunity to pursue a serious dialogue regarding this critical issue.

Sincerely,



James D. Ogsbury
Executive Director

cc: Steven Stockton, Director of Civil Works, U.S. Army Corps of Engineers
Howard Shelanski, Administrator, Office of Information and Regulatory Affairs

Attachment



W E S T E R N S T A T E S W A T E R C O U N C I L

5296 Commerce Drive, Suite 202 I Murray, Utah 84107 I (801) 685-2555 I FAX (801) 685-2559

Web Page: www.westernstateswater.org

August 6, 2013

Via Email: joellen.darcy@us.army.mil

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Dear Assistant Secretary Darcy:

On behalf of the Western States Water Council, representing the governors of 18 western states on water policy issues, I am writing to provide the Council's perspective on the U.S. Army Corps of Engineers' efforts involving surplus water and storage at Corps reservoirs. In particular, it is our understanding that the Corps is pursuing rulemaking intended to clarify definitions in its water supply policies and to specify the policies and methodology it will use to determine prices for surplus water contracts pursuant to Section 6 of the Flood Control Act (FCA) of 1944. We also understand that the Corps is conducting a system-wide analysis of storage water reallocation in the Missouri River Mainstem Reservoir System.

As the Corps pursues these efforts, we respectfully request that you consider the following comments and perspectives, as well as the enclosed position regarding the states' right to access the natural flows that would exist absent Corps reservoirs and dams.

A. State Primacy

Water belongs to the states which have exclusive authority over the allocation and administration of rights to the use of surface water within their borders. State granted water use permits, once put to beneficial use, also become property rights with constitutional protections, including due process and compensation if taken through government action.

The basis of the states' primary and exclusive authority over their water resources is rooted in the Equal Footing Doctrine in Article IV of the U.S. Constitution, under which states take title to the navigable waters within their borders upon admission to the Union. As the U.S. Supreme Court has noted, Congress has also demonstrated a "consistent thread of purposeful and continued deference to state water law"¹ through such laws as the Mining Acts of 1866 and 1870, the Desert Lands Act of 1877, the Federal Water Power Act of 1920, and others. One notable example of this deference is found in Section 8 of the Reclamation Act, which states:

¹ *California v. U.S.*, 438 U.S. 645, 653-664 (1978).

[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws....²

Congress was well aware of this deference when it enacted the laws that govern the use of surplus water and storage at Corps' reservoirs, namely the FCA and the Water Supply Act (WSA) of 1958. For example, it specified in the first sentence of the FCA in Section 1 that it is "the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control...."³ Similarly, Congress specified in Section 301(a) of the WSA that it is the policy of Congress to:

[R]ecognize the primary responsibilities of the States and local interests in developing water supplies...and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.⁴

Section 301(c) of the WSA further specifies that the law's water supply section "shall not be construed to modify the provisions" of Section 1 of the FCA or the provisions of Section 8 of the Reclamation Act of 1902.⁵

In light of the above, the Corps' surplus water rulemaking and storage reallocation study must recognize and defer to the states' legal right to allocate, develop, use, control, and distribute their surface waters, including but not limited to state storage and use requirements.

B. Stored Water

The Corps' efforts must acknowledge the difference between a reservoir's storage capacity and stored water. Stored water does not encompass all of the water in a reservoir. To the contrary, it represents the difference between water flowing into a reservoir and the water flowing out of the reservoir. Stated another way, if more water flows into the reservoir than leaves the reservoir, this is captured as stored water. If less water flows into the reservoir than leaves the reservoir, this water supply represents the release of stored water. In either event, the natural flows that would exist absent the Corps' dams and reservoirs should not be considered stored water. Nor should the natural flows be subject to interference or require a contract or fee by the Corps to be appropriated by the states.

² 43 U.S.C. § 383.

³ 33 U.S.C. § 701-1 (emphasis added).

⁴ 43 U.S.C. § 390b.

⁵ *Id.*

C. The Flood Control Act of 1944

We are especially concerned about the Corps' decision to condition access to the natural flows that run through six mainstem reservoirs along the Missouri River by requiring a determination that surplus water is available for withdrawal and requiring that applicants sign a water supply agreement to pay the Corps for the proportionate cost of storing the water. As discussed below, these additional and unnecessary requirements are based upon a misinterpretation of the Act and should not serve as the basis of any rulemaking or study.

Section 6 of the FCA states that the Corps "is authorized to make contracts...at such prices and on such terms as [it] may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir" under the Corps' control.⁶ The Corps has interpreted "surplus water" to mean any water in a Corps reservoir that is not required for federally authorized purposes "because the authorized use for the water never developed or the need was reduced by changes that occurred since authorization or construction."⁷ Corps officials in the Missouri River Basin have further indicated that once water reaches a reservoir, all water within the boundaries of that reservoir is subject to the Corps' authority and can be evaluated to determine whether it is "surplus" under the above definition, including the natural flows belonging to the states.

This interpretation ignores the distinction between storage capacity and stored water by improperly viewing the Missouri River as a series of reservoirs connected by free-flowing rivers. The more correct view is that there are reservoirs sitting on top of portions of the River. The Corps can evaluate the reservoir pool to determine whether there is water surplus for authorized needs and uses, but the natural flowing-river volumes that run beneath the reservoir system should not be considered stored water and may be permitted by the respective states without Corps interference or contract and fee requirements. Reasoning otherwise would be contrary to the protection of state "interests and rights in water utilization and control" provided under Section 1 of the FCA, as well as requirements under Section 6 that storage contracts for surplus water must not "adversely affect then existing lawful uses of such water."⁸ The states' use of natural flows was an existing lawful use prior to the Act's enactment and is therefore protected.

In light of the above, the Corps must recognize the states' rights by ensuring that its rulemaking and study do not consider natural flows to be surplus water or stored water. As stated in the enclosed position, any definition requiring a storage contract to access natural flows within a reservoir boundary would improperly expand the Corps' authority and violate the states' rights to develop, use, control, and distribute surface water. It would also conflict with state water laws relating to storage for water supply and the practices of other federal agencies that recognize western water laws, such as the Bureau of Reclamation.

⁶ 33 U.S.C. § 708 (emphasis added).

⁷ Engineer Regulation 1105-2-100, Planning Guidance Notebook at E-214 (Apr. 22, 2000).

⁸ 33 U.S.C. §§ 701-1, 708 (emphasis added).

D. Water Supply Act of 1958

We understand that some Corps representatives have cited Section 301(b) of the WSA as further justification for denying access to natural flows. Section 301(b) authorizes the Corps to include storage at any planned or existing Corps reservoir for municipal and industrial water supply, provided that “State or local interests shall agree to pay for the cost of such provisions....”⁹

We recognize the Corps’ authority under the WSA to require a contractual commitment to repay a portion of the cost of providing storage. However, as noted above, the amount of water stored in a reservoir does not include all of the water flowing through its boundaries. Requiring a fee to access natural flows that would otherwise be available absent the Corps’ facilities conflicts with the recognition of state primacy over water utilization and control found in Sections 301(a) and 301(c) of the WSA. Such a requirement also runs counter to Section 301(b)’s stated purpose of recouping expenses the Corps incurs in providing storage.

E. Flexibility

Any rulemaking to address surplus water contracts should be flexible enough to accommodate the various state laws, prior appropriation and riparian doctrines, and diverse physical conditions found throughout the country. In almost all cases, the most effective way to provide this flexibility is on a project-specific basis rather than with a “one-size-fits-all” approach. The Corps must also fully understand and follow its specific congressional authorizations and their supporting documentation, most of which recognize the unique elements of each basin and the differences in state law.

Additionally, the rulemaking must treat prior appropriation states differently than riparian states to account for the differences in their water laws and policies. For example, in riparian states, reasonable use of the water belongs to riparian owners. This means that the Corps, as the riparian owner, would have a user interest in the water captured in its reservoirs. However, prior appropriation states do not vest user rights based on land ownership. This means that the Corps has no user interest in the rivers flowing through its reservoirs unless it has received a grant of those rights from the state. Thus, while Congress has authorized the Corps to operate its dams for specified purposes in prior appropriation states, such authority does not mean that the Corps has Congressional authority to capture all water supply in a reservoir without an ownership interest or rights to consumptive use.

Furthermore, any rulemaking that fails to treat prior appropriation and riparian states differently could also conflict with Section 1(b) of the FCA, which protects beneficial uses in states west of the ninety-eighth meridian by stating:

[T]he use for navigation...of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any

⁹ 43 U.S.C. § 390b.

beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes....¹⁰

Other issues that require flexibility include but are not limited to:

- Many western states require a permit to impound and divert water, which may include the diversion of water from surplus storage.
- In some states, allocating return flows to all owners or users in a reservoir may result in water that is permitted to an existing water right being allocated in a way that violates state laws and state ownership of the water.
- The use or reuse of return flows may require a permit in some states, as well as a determination that the use of the water will not impair existing state-issued water rights.

F. Outreach with States

We respectfully urge your office and the Corps to engage the states as early as possible in its rulemaking and the development of the study. Given the implications these efforts could have on state water rights, state input will be most meaningful during the preliminary stages of development. Ideally, this engagement should happen before the proposed rule and study are published for public comment and too much momentum has built towards federal policy decisions that may not account for state rights and needs.

G. Conclusion

In sum, the Corps' surplus water rulemaking and storage water reallocation study should: (1) be developed with robust and meaningful state participation; (2) recognize and defer to the states' primary and exclusive authority over the allocation of surface water; (3) properly distinguish between stored water and storage capacity; and (4) ensure that natural flows are not considered to be surplus or stored water.

Moreover, the surplus water rulemaking effort should be flexible enough to accommodate the states' differing legal doctrines and physical conditions, and should treat prior appropriation and riparian states differently.

We would greatly appreciate the opportunity to have a dialog about these efforts, and invite you or a representative to join us at our upcoming fall meetings on October 2-4, in Deadwood, South Dakota.

¹⁰ 33 U.S.C. § 701-1(b).

Thank you for considering our comments and concerns, as well as our invitation. We look forward to continuing our collaborative relationship with the Corps to address these and other water management issues in the West.

Respectfully,

A handwritten signature in black ink, appearing to read "Phillip C. Ward". The signature is stylized with a large initial "P" and a long horizontal stroke.

Phillip C. Ward, Chairman
Western States Water Council

Encl.

Cc: Steven Stockton, Director of Civil Works, U.S. Army Corps of Engineers
David Ponganis, Regional Director of Programs, Northwestern Division, U.S. Army Corps of Engineers
John D'Antonio, WestFAST Representative, U.S. Army Corps of Engineers
The Honorable Barbara Boxer, Chairwoman, Senate Environment and Public Works Committee
The Honorable David Vitter, Ranking Member, Senate Environment and Public Works Committee
The Honorable John Hoeven, Senator, North Dakota
The Honorable Heidi Heitkamp, Senator, North Dakota
The Honorable Tim Johnson, Senator, South Dakota
The Honorable John Thune, Senator, South Dakota
The Honorable Bill Shuster, Chairman, House Transportation and Infrastructure Committee
The Honorable Nick Rahall, Ranking Member, House Transportation and Infrastructure Committee
The Honorable Markwayne Mullin, Representative, Oklahoma
The Honorable Kevin Cramer, Representative, North Dakota
The Honorable Kristi Noem, Representative, South Dakota

POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
STATES' WATER RIGHTS AND NATURAL FLOWS
San Antonio, Texas
October 12, 2012

WHEREAS, the Western States Water Council strongly supports preservation of the States' inherent right to develop, use, control, and distribute water; and

WHEREAS, States have exclusive authority over the allocation and administration of rights to the use of surface water located within their borders and are primarily responsible for protecting, managing and otherwise controlling the resource; and

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

WHEREAS, the Flood Control Act of 1944 specifically declared the policy of Congress to recognize the interests and rights of the Missouri River Basin States in determining the development of the watersheds within their borders and likewise their interests and rights in water use and control, and to preserve and protect to the fullest extent established and potential uses of the rivers' natural flows, those flows being the natural flows that would pass through the states in the absence of the U.S. Army Corps of Engineers dams; and

WHEREAS, the federal government has long recognized the right to use water as determined under the laws of the various states; and

WHEREAS, the various states have the authority and duty to manage permitting of stored water to supplement natural flows; and

WHEREAS, federal agencies in the western states, such as the Bureau of Reclamation, generally recognize western water laws and natural flows through reservoir operations, with releases from storage that supplement natural flows, and water service contracts that supplement natural flow; and

WHEREAS, representatives of the U.S. Army Corps of Engineers have indicated that all waters entering its Missouri River mainstem reservoirs are stored waters to be allocated and controlled by the U.S. Army Corps of Engineers without recognition of the States' rights to natural flows being separate from the captured floodwaters stored within those reservoirs.

NOW, THEREFORE, BE IT RESOLVED, that the Western States Water Council urge the Army Corps of Engineers to recognize the legal right of the States to the development, use, control, distribution and allocation of the States' surface waters.

BE IT FURTHER RESOLVED, that any policy of the U.S. Army Corps of Engineers to require storage contracts to access natural flows within a reservoir boundary would be a violation of the States' rights to develop, use, control, and distribute surface water.

BE IT FURTHER RESOLVED, that the Western States Water Council opposes any and all efforts that would diminish the primary and exclusive authority of States over the allocation of surface water.

**Nebraska abstained from voting on the position.*

Tab Q – Indian Water Rights

PROPOSED LANGUAGE
to extend
THE RECLAMATION WATER SETTLEMENTS FUND

1. IN GENERAL. – Section 10501 of the Omnibus Public Land Management Act of 2009 (42 U.S.C. 10364) is amended –
 - a. in subsection (b), paragraph (1) –
 - i. by striking “For each of fiscal years” and inserting “Beginning in fiscal year;” and
 - ii. by striking “through 2029;”
 - iii. by inserting “annually” after “the Secretary of the Treasury shall;” and
 - b. in subsection (c), paragraph (1)(A) –
 - i. by striking “of;”
 - ii. by striking “years” and inserting “year;”
 - iii. by striking “through 2034;”
 - c. in subsection (c)(3)(A)(i)(I), by striking “during the entire period in which the Fund is in existence;” and
 - d. by striking subsection (f).

SETTLEMENTS FUND

SEC. 10501. RECLAMATION WATER SETTLEMENTS FUND.

(a) ESTABLISHMENT.-There is established in the Treasury of the United States a fund, to be known as the "Reclamation Water Settlements Fund", consisting of –

(1) such amounts as are deposited to the Fund under subsection (b); and

(2) any interest earned on investment of amounts in the Fund under subsection (d).

(b) DEPOSITS TO FUND.-

(1) IN GENERAL. Beginning in fiscal year 2020  the Secretary of the Treasury shall annually deposit in the Fund, if available, \$120,000,000 of the revenues that would otherwise be deposited for the fiscal year in the fund established by the first section of the Act of June 17, 1902 (32 Stat. 388, chapter 1093).

(2) AVAILABILITY OF AMOUNTS.-Amounts deposited in the Fund under paragraph (1) shall be made available pursuant to this section-

(A) without further appropriation; and

(B) in addition to amounts appropriated pursuant to any authorization contained in any other provision of law.

(c) EXPENDITURES FROM FUND.-

(1) IN GENERAL. –

(A) EXPENDITURES.-Subject to subparagraph (B), for each fiscal year beginning January 1, 2020  the Secretary may expend from the Fund an amount not to exceed \$120,000,000, plus the interest accrued in the Fund, for the fiscal year in which expenditures are made pursuant to paragraphs (2) and (3).

Deleted: For each of fiscal years

Deleted: through
2029

Deleted: of

Deleted: years

Deleted: through 2034

(B) ADDITIONAL EXPENDITURES.—The Secretary may expend more than \$120,000,000 for any fiscal year if such amounts are available in the Fund due to expenditures not reaching \$120,000,000 for prior fiscal years.

Comment [NB1]: Same question.

(2) AUTHORITY.—The Secretary may expend money from the Fund to implement a settlement agreement approved by Congress that resolves, in whole or in part, litigation involving the United States, if the settlement agreement or implementing legislation requires the Bureau of Reclamation to provide financial assistance for, or plan, design, and construct—

(A) water supply infrastructure; or

(B) a project—

(i) to rehabilitate a water delivery system to conserve water; or

(ii) to restore fish and wildlife habitat or otherwise improve environmental conditions associated with affected by, or located within the same river basin as, a Federal reclamation project that is in existence on the date of enactment of this Act.

(3) USE FOR COMPLETION OF PROJECT AND OTHER SETTLEMENTS.—

(A) PRIORITIES.—

(i) FIRST PRIORITY.—

(I) IN GENERAL.—The first priority for expenditure of amounts in the Fund shall be for the purposes described in, and in the order of, clauses (i) through (iv) of subparagraph (B).

Comment [NB2]: This language seems unnecessary if the Fund is permanent.

(II) RESERVED AMOUNTS.—The Secretary shall reserve and use amounts deposited into the Fund in accordance with subclause (I).

Deleted: during the entire period in which the Fund is in existence

(ii) OTHER PURPOSES.—Any amounts in the Fund that are not needed for the purposes described in subparagraph (B) may be used for other purposes authorized in paragraph (2).

Effective dates.
Deadlines.
Expenditures.

(B) COMPLETION OF PROJECT.—

(i) NAVAJO-GALLUP WATER SUPPLY PROJECT.—

(D IN GENERAL.—Subject to subclause (II) effective beginning January 1, 2020, if, in the judgment of the Secretary on an annual basis the deadline described in section 10701(e)(1)(A)(ix) is unlikely to be met because a sufficient amount of funding is not otherwise available through appropriations made available pursuant to section 10609(a), the Secretary shall expend from the Fund such amounts on an annual basis consistent with paragraphs (1) and (2), as are necessary pay the Federal share of the costs, and substantially complete as expeditiously as practicable, the construction of the water supply infrastructure authorized as part of the Project.

(II) MAXIMUM AMOUNT.—

(aa) IN GENERAL.—Except as provided under item (bb), the amount expended under subclause

(I) shall not exceed \$500,000,000 for the period of fiscal years 2020 through 2029.

Comment [NB3]: My inclination is to leave this type of language because removing it could upset the queue for the other settlements, but I'd be interested in hearing what the other states have to say.

Comment [CMC4]: Do we want to modify this or leave it as is?

(bb) EXCEPTION.-The limitation on the expenditure amount under item (aa) may be exceeded during the entire period in which the Fund is in existence if such additional funds can be expended without limiting the amounts identified in clauses (ii) through (iv).

(ii) OTHER NEW MEXICO SETTLEMENTS.-

(I) IN GENERAL.-Subject to subclause (II), effective beginning January 1, 2020, in addition to the funding made available under clause (i), if in the judgment of the Secretary on an annual basis a sufficient amount of funding is not otherwise available through annual appropriations, the Secretary shall expend from the Fund such amounts on an annual basis consistent with paragraphs (1) and (2), as are necessary to pay the Federal share of the remaining costs of implementing the Indian water rights settlement agreements entered into by the State of New Mexico in the Aamodt adjudication and the Abeyta adjudication, if such settlements are subsequently approved and authorized by an Act of Congress and the implementation period has not already expired.

(II) MAXIMUM AMOUNT.-The amount expended under subclause (I) shall not exceed \$250,000,000.

(iii) MONTANA SETTLEMENTS.-

(iii) IN GENERAL.-Subject to subclause (II), effective beginning January 1, 2020, in addition to funding made available pursuant to clauses (i) and (ii), if in the judgment of the Secretary on an annual basis a sufficient amount of funding is not otherwise available through annual appropriations, the Secretary shall expend from the Fund such amounts on an annual basis consistent with paragraphs (1) and (2), as are necessary to pay the Federal share of the remaining costs of implementing Indian water rights settlement agreements entered into by the State of Montana with the Blackfeet Tribe, the Crow Tribe, or the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation in the judicial proceeding entitled "In re the General Adjudication of All the Rights to Use Surface and Groundwater in the State of Montana", if a settlement or settlements are subsequently approved and authorized by an Act of Congress and the implementation period has not already expired.

(II) MAXIMUM AMOUNT.-

(aa) IN GENERAL.-Except as provided under item (bb), the amount expended under subclause (I) shall not exceed \$350,000,000 for the period of fiscal years 2020 through 2029.

(bb) EXCEPTION.-The limitation on the expenditure amount under item (aa) may be

Comment [CMC5]: Same comment

exceeded during the entire period in which the Fund is in existence if such addition funds can be expended without limiting the amounts identified in clause (i), (ii), and (iv).

(cc) OTHER FUNDING.-The Secretary shall ensure that any funding under this clause shall be provided in a manner that does not limit the funding available pursuant to clause (i) and (ii).

(iv) ARIZONA SETTLEMENT.-

(!) IN GENERAL.-Subject to subclause (II), effective beginning January 1, 2020, in addition to funding made available pursuant to clauses (ii), and (iii), if in the judgment of the Secretary on an annual basis a sufficient amount of funding is not otherwise available through annual appropriations, the Secretary shall expend from the Fund such amounts on an annual basis consistent with paragraphs (1) and (2), as are necessary to pay the Federal share of the remaining costs of implementing an Indian water rights settlement agreement entered into by the State of Arizona with the Navajo Nation to resolve the water right claims of the Nation in the Lower Colorado River basin in Arizona, if a settlement is subsequently

123 STAT. 1380

PUBLIC LAW 111-11-MAR. 30, 2009

approved and authorized by an Act of Congress and the implementation period has not already expired.

(II) MAXIMUM AMOUNT.—

(aa) IN GENERAL.—Except as provided under item (bb), the amount expended under subclause (I) shall not exceed \$100,000,000 for the period of fiscal years 2020 through 2029.

(bb) EXCEPTION.—The limitation on the expenditure amount under item (aa) may be exceeded during the entire period in which the Fund is in existence if such additional funds can be expended without limiting the amounts identified in clauses (i) through (iii).

(cc) OTHER FUNDING.—The Secretary shall ensure that any funding under this clause shall be provided in a manner that does not limit the funding available pursuant to clause (i) and (ii).

Deadline.

(C) REVERSION.—If the settlements described in clause (ii) through (iv) of subparagraph (B) have not been approved and authorized by an Act of Congress by December 31, 2019, The amounts reserved for the settlements shall no longer be reserved by the Secretary pursuant to subparagraph (A)(i) and shall revert to the Fund for any authorized use, as determined by the Secretary.

(d) INVESTMENT OF AMOUNTS.—

(1) IN GENERAL.—The Secretary shall invest such portion of the Fund as is not, in the judgment of the Secretary, required to meet current withdrawals.

Comment [CMC6]: Same comment

(2) CREDITS TO FUND.-The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to, and form a part of, the Fund.

(e) TRANSFERS OF AMOUNTS.-

(1) IN GENERAL.-The amounts required to be transferred to the Fund under this section shall be transferred at least monthly from the general fund of the Treasury to the Fund on the basis of estimates made by the Secretary of the Treasury.

(2) ADJUSTMENTS. Proper adjustment shall be made in amounts subsequently transferred to the extent prior estimates were in excess of or less than the amounts required to be transferred.

Deleted: (f) TERMINATION.-On September 30, 2034-

(1) the Fund shall terminate; and

(2) the unexpended and unobligated balance of the Fund shall be transferred to the appropriate fund of the Treasury

113TH CONGRESS
2D SESSION

S. 2503

To direct the Secretary of the Interior to enter into the Big Sandy River-Planet Ranch Water Rights Settlement Agreement and the Hualapai Tribe Bill Williams River Water Rights Settlement Agreement, to provide for the lease of certain land located within Planet Ranch on the Bill Williams River in the State of Arizona to benefit the Lower Colorado River Multi-Species Conservation Program, and to provide for the settlement of specific water rights claims in the Bill Williams River watershed in the State of Arizona.

IN THE SENATE OF THE UNITED STATES

JUNE 19, 2014

Mr. FLAKE (for himself and Mr. MCCAIN) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

A BILL

To direct the Secretary of the Interior to enter into the Big Sandy River-Planet Ranch Water Rights Settlement Agreement and the Hualapai Tribe Bill Williams River Water Rights Settlement Agreement, to provide for the lease of certain land located within Planet Ranch on the Bill Williams River in the State of Arizona to benefit the Lower Colorado River Multi-Species Conservation Program, and to provide for the settlement of specific water rights claims in the Bill Williams River watershed in the State of Arizona.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Bill Williams River
 5 Water Rights Settlement Act of 2014”.

6 **SEC. 2. PURPOSES.**

7 The purposes of this Act are—

8 (1) to achieve a fair, equitable, and final settle-
 9 ment of certain claims among certain parties to
 10 water rights in the Bill Williams River watershed in
 11 the State of Arizona for—

12 (A) the Hualapai Tribe (acting on behalf
 13 of the Tribe and members of the Tribe); and

14 (B) the Department of the Interior, includ-
 15 ing, and acting on behalf of, the constituent bu-
 16 reaus of the Department and, as specified, the
 17 United States as trustee for the Hualapai
 18 Tribe, the members of the Tribe, and the
 19 allottees;

20 (2) to approve, ratify, and confirm—

21 (A) the Big Sandy River-Planet Ranch
 22 Water Rights Settlement Agreement entered
 23 into among the Hualapai Tribe, the United
 24 States as trustee for the Tribe, the members of
 25 the Tribe and allottees, the Secretary of the In-

1 terior, the Arizona department of water re-
2 sources, and others, to the extent the Big
3 Sandy River-Planet Ranch Agreement is con-
4 sistent with this Act; and

5 (B) the Hualapai Tribe Big Sandy River-
6 Planet Ranch Water Rights Settlement Agree-
7 ment entered into among the Tribe, the United
8 States, and the Freeport Minerals Corporation,
9 to the extent the Hualapai Tribe Agreement is
10 consistent with this Act;

11 (3) to authorize and direct the Secretary—

12 (A) to execute the duties and obligations of
13 the Secretary under the Big Sandy River-Planet
14 Ranch Agreement, the Hualapai Tribe Agree-
15 ment, and this Act;

16 (B)(i) to remove objections to the applica-
17 tions for the severance and transfer of certain
18 water rights, in partial consideration of the
19 agreement of the parties to impose certain lim-
20 its on the extent of the use and transferability
21 of the severed and transferred water right and
22 other water rights; and

23 (ii) to provide confirmation of those water
24 rights; and

1 (C) to carry out any other activity nec-
2 essary to implement the Big Sandy River-Plan-
3 et Ranch Agreement and the Hualapai Tribe
4 Agreement in accordance with this Act;

5 (4) to advance the purposes of the Lower Colo-
6 rado River Multi-Species Conservation Program;

7 (5) to secure a long-term lease for a portion of
8 Planet Ranch, along with appurtenant water rights
9 primarily along the Bill Williams River corridor, for
10 use in the Conservation Program;

11 (6) to bring the leased portion of Planet Ranch
12 into public ownership for the long-term benefit of
13 the Conservation Program; and

14 (7) to secure from the Freeport Minerals Cor-
15 poration non-Federal contributions—

16 (A) to support a tribal water supply study
17 necessary for the advancement of a settlement
18 of the claims of the Tribe for rights to Colorado
19 River water; and

20 (B) to enable the Tribe to secure Colorado
21 River water rights and appurtenant land, in-
22 crease security of the water rights of the Tribe,
23 and facilitate a settlement of the claims of the
24 Tribe for rights to Colorado River water.

1 **SEC. 3. DEFINITIONS.**

2 In this Act:

3 (1) ADWR.—The term “ADWR” means the
4 Arizona department of water resources, established
5 pursuant to title 45 of the Arizona Revised Statutes
6 (or a successor agency or entity).

7 (2) ALLOTMENT.—The term “allotment” means
8 any allotment that—

9 (A) was originally allotted to an individual
10 Indian in the allotting document;

11 (B) is located on land outside the bound-
12 aries of an Indian reservation within Mohave
13 County, Arizona; and

14 (C) as of the enforceability date, is held in
15 trust by the United States for the benefit of an
16 allottee.

17 (3) ALLOTTEE.—The term “allottee” means
18 any individual who holds a beneficial real property
19 interest in an allotment.

20 (4) ARIZONA GAME AND FISH COMMISSION.—
21 The term “Arizona Game and Fish Commission”
22 means the entity established pursuant to title 17 of
23 the Arizona Revised Statutes to control the Arizona
24 game and fish department (or a successor agency or
25 entity).

1 (5) BAGDAD MINE COMPLEX AND BAGDAD
 2 TOWNSITE.—The term “Bagdad Mine Complex and
 3 Bagdad Townsite” means the geographical area de-
 4 picted on the map attached as exhibit 2.9 to the Big
 5 Sandy River-Planet Ranch Agreement.

6 (6) BIG SANDY RIVER-PLANET RANCH AGREE-
 7 MENT.—

8 (A) IN GENERAL.—The term “Big Sandy
 9 River-Planet Ranch Agreement” means the Big
 10 Sandy River-Planet Ranch Water Rights Settle-
 11 ment Agreement dated **【_____**, 2014**】**
 12 and entered into among—

13 (i) the Tribe;

14 (ii) Department, including, and acting
 15 on behalf of, the constituent bureaus of the
 16 Department and, as specified, the United
 17 States as trustee for the Hualapai Tribe,
 18 the members of the Tribe, and the
 19 allottees;

20 (iii) the Arizona Game and Fish Com-
 21 mission;

22 (iv) ADWR; and

23 (v) the Corporation.

24 (B) INCLUSIONS.—The term “Big Sandy
 25 River-Planet Ranch Agreement” includes—

1 (i) all exhibits to the agreement re-
 2 ferred to in subparagraph (A);

3 (ii) any amendments necessary to
 4 make the agreement consistent with this
 5 Act; and

6 (iii) any other amendment approved
 7 by the parties to the agreement that are
 8 affected by the amendment (including the
 9 Secretary, acting on behalf of the United
 10 States).

11 (7) BILL WILLIAMS RIVER WATERSHED.—The
 12 term “Bill Williams River watershed” means the wa-
 13 tershed drained by the Bill Williams River and the
 14 tributaries of that river, including the Big Sandy
 15 and Santa Maria Rivers.

16 (8) CONSERVATION PROGRAM.—The term
 17 “Conservation Program” has the meaning given the
 18 term “Lower Colorado River Multi-Species Con-
 19 servation Program” in section 9401 of the Omnibus
 20 Public Land Management Act of 2009 (Public Law
 21 111–11; 123 Stat. 1327).

22 (9) CORPORATION.—

23 (A) IN GENERAL.—The term “Corpora-
 24 tion” means the Freeport Minerals Corporation,
 25 incorporated in the State of Delaware.

1 (B) INCLUSIONS.—The term “Corpora-
 2 tion” includes all subsidiaries, affiliates, succes-
 3 sors, and assigns of the Freeport Minerals Cor-
 4 poration (such as Byner Cattle Company, incor-
 5 porated in the State of Nevada).

6 (10) DEPARTMENT.—The term “Department”
 7 means the Department of the Interior.

8 (11) ENFORCEABILITY DATE.—The term “en-
 9 forceability date” means the applicable date de-
 10 scribed in section 9.

11 (12) FREEPORT GROUNDWATER WELLS.—

12 (A) IN GENERAL.—The term “Freeport
 13 Groundwater Wells” means the 5 wells identi-
 14 fied by ADWR well registration numbers—

15 (i) 55–592824;

16 (ii) 55–595808;

17 (iii) 55–595810;

18 (iv) 55–200964; and

19 (v) 55–908273.

20 (B) INCLUSIONS.—The term “Freeport
 21 Groundwater Wells” includes any replacement
 22 of a well referred to in subparagraph (A) drilled
 23 by or for the Corporation to supply water to the
 24 Bagdad Mine Complex and Bagdad Townsite.

(C) EXCLUSIONS.—The term “Freeport Groundwater Wells” does not include any other well owned by the Corporation at any other location.

(13) HUALAPAI TRIBE AGREEMENT.—

(A) IN GENERAL.—The term “Hualapai Tribe Agreement” means the Hualapai Tribe Bill Williams River Water Rights Settlement Agreement dated [_____, 2014] entered into among—

(i) the Tribe;

(ii) the United States, as trustee for the Tribe, the members of the Tribe, and the allottees; and

(iii) the Corporation.

(B) INCLUSIONS.—The term “Hualapai Tribe Agreement” includes—

(i) all exhibits to the agreement referred to in subparagraph (A);

(ii) any amendments necessary to make the agreement consistent with this Act; and

(iii) any other amendments approved by—

1 (I) each party to the agreement
2 that is affected by the amendment;
3 and

4 (II) the Secretary.

5 (14) HUALAPAI TRIBE WATER RIGHTS SETTLE-
6 MENT AGREEMENT.—The term “Hualapai Tribe
7 Water Rights Settlement Agreement” means the set-
8 tlement agreement in the process of negotiation as
9 of the date of enactment of this Act among the
10 Tribe, the United States, the State of Arizona, the
11 Central Arizona Water Conservation District, the
12 Salt River Agricultural Improvement and Power
13 District and Salt River Valley Water Users Associa-
14 tion, and the Corporation to resolve the claims of the
15 Tribe for rights to Colorado River water and Verde
16 River water.

17 (15) INJURY.—The term “injury”, with respect
18 to a water right, means any interference with, dimi-
19 nution of, or deprivation of the water right under
20 Federal, State, or other law.

21 (16) LINCOLN RANCH.—The term “Lincoln
22 Ranch” means the property owned by the Corpora-
23 tion described in the special warranty deed recorded
24 on December 4, 1995, at Book 1995 and Page

1 05874 in the official records of La Paz County, Ari-
2 zona.

3 (17) PARCEL 1.—The term “Parcel 1” means
4 the parcel of land that—

5 (A) is depicted as 3 contiguous allotments
6 identified as 1A, 1B, and 1C on the map at-
7 tached to the Big Sandy River-Planet Ranch
8 Agreement as exhibit 2.10; and

9 (B) is held in trust for certain allottees.

10 (18) PARCEL 2.—The term “Parcel 2” means
11 the parcel of land that—

12 (A) is depicted on the map attached to the
13 Big Sandy River-Planet Ranch Agreement as
14 exhibit 2.10; and

15 (B) is held in trust for certain allottees.

16 (19) PARCEL 3.—The term “Parcel 3” means
17 the parcel of land that—

18 (A) is depicted on the map attached to the
19 Big Sandy River-Planet Ranch Agreement as
20 exhibit 2.10;

21 (B) is held in trust for the Tribe; and

22 (C) is part of the Hualapai Reservation
23 pursuant to Executive Order 1368 of June 2,
24 1911.

1 (20) PARTY.—The term “party” means an indi-
2 vidual or entity that is a signatory to—

3 (A) the Big Sandy River-Planet Ranch
4 Agreement;

5 (B) the Hualapai Tribe Agreement; or

6 (C) an exhibit to the Big Sandy River-
7 Planet Ranch Agreement or the Hualapai Tribe
8 Agreement.

9 (21) PLANET RANCH.—The term “Planet
10 Ranch” means the property owned by the Corpora-
11 tion described—

12 (A) in the special warranty deed recorded
13 on December 14, 2011, at Book 2011 and Page
14 05267 in the official records of La Paz County,
15 Arizona; and

16 (B) as Instrument No. 2011–062804 in
17 the official records of Mohave County, Arizona.

18 (22) SECRETARY.—The term “Secretary”
19 means the Secretary of the Interior.

20 (23) SEVER AND TRANSFER APPLICATIONS.—
21 The term “sever and transfer applications” means
22 the applications filed or amended by the Corporation
23 and pending on the date of enactment of this Act to
24 sever and transfer certain water rights—

1 (A) from Lincoln Ranch and from Planet
 2 Ranch to the Wikieup Wellfield for use at the
 3 Bagdad Mine Complex and Bagdad Townsite;
 4 and

5 (B) from portions of Planet Ranch (as de-
 6 termined on the date on which the applications
 7 were filed or amended) to new locations within
 8 Planet Ranch.

9 (24) TRIBE.—The term “Tribe” means the
 10 Hualapai Tribe, organized under section 16 of the
 11 Act of June 18, 1934 (25 U.S.C. 476) (commonly
 12 known as the “Indian Reorganization Act”), and
 13 recognized by the Secretary.

14 (25) WATER RIGHT.—The term “water right”
 15 means—

16 (A) any right in or to groundwater, surface
 17 water, or effluent under Federal, State, or
 18 other law; and

19 (B) for purposes of subsections (d) and (e)
 20 of section 5, any right to Colorado River water.

21 (26) WIKIEUP WELLFIELD.—The term
 22 “Wikieup Wellfield” means the geographical area de-
 23 picted on the map attached as exhibit 2.10 to the
 24 Big Sandy River-Planet Ranch Agreement.

1 **SEC. 4. BIG SANDY RIVER-PLANET RANCH AGREEMENT.**

2 (a) IN GENERAL.—Except to the extent that any pro-
3 vision of, or amendment to, the Big Sandy River-Planet
4 Ranch Agreement conflicts with this Act—

5 (1) the Big Sandy River-Planet Ranch Agree-
6 ment is authorized, ratified, and confirmed; and

7 (2) any amendment to the Big Sandy River-
8 Planet Ranch Agreement executed to make the Big
9 Sandy River-Planet Ranch Agreement consistent
10 with this Act is authorized, ratified, and confirmed.

11 (b) EXECUTION.—To the extent that the Big Sandy
12 River-Planet Ranch Agreement does not conflict with this
13 Act, and in support of the purposes of this Act, the Sec-
14 retary shall execute—

15 (1) the Big Sandy River-Planet Ranch Agree-
16 ment (including all exhibits to the Big Sandy River-
17 Planet Ranch Agreement requiring the signature of
18 the Secretary);

19 (2) any amendment to the Big Sandy River-
20 Planet Ranch Agreement (including any amendment
21 to an exhibit of the Big Sandy River-Planet Ranch
22 Agreement requiring the signature of the Secretary)
23 that is necessary to make the Big Sandy River-Plan-
24 et Ranch Agreement consistent with this Act; and

25 (3) a conditional withdrawal of each objection
26 filed by the Bureau of Indian Affairs, the Bureau of

1 Land Management, and the United States Fish and
2 Wildlife Service to the sever and transfer applica-
3 tions in the form set forth in exhibit 4.2.1(ii)(b) to
4 the Big Sandy River-Planet Ranch Agreement.

5 (c) DISCRETION OF SECRETARY.—The Secretary
6 may execute any other amendment to the Big Sandy
7 River-Planet Ranch Agreement (including any amendment
8 to an exhibit to the Big Sandy River-Planet Ranch Agree-
9 ment requiring the signature of the Secretary) that is not
10 inconsistent with this Act, if the amendment does not re-
11 quire approval by Congress.

12 (d) PROHIBITION.—The Secretary shall not file an
13 objection to any amendment to the sever and transfer ap-
14 plications or any new sever or transfer application filed
15 by the Corporation to accomplish the sever and transfer
16 of 10,055 acre-feet per year of water rights from Planet
17 Ranch and Lincoln Ranch to the Wikieup Wellfield, sub-
18 ject to the condition that the form of such an amendment
19 or new application shall be substantially similar to a form
20 attached to the Big Sandy River-Planet Ranch Agreement
21 as exhibit 4.2.1(ii)(a)(1) or 4.2.1(ii)(a)(2).

22 **SEC. 5. HUALAPAI TRIBE AGREEMENT.**

23 (a) IN GENERAL.—Except to the extent that any pro-
24 vision of, or amendment to, the Hualapai Tribe Agreement
25 conflicts with this Act—

1 (1) the Hualapai Tribe Agreement is author-
2 ized, ratified, and confirmed; and

3 (2) any amendment to the Hualapai Tribe
4 Agreement executed to make the Hualapai Tribe
5 Agreement consistent with this Act is authorized,
6 ratified, and confirmed.

7 (b) EXECUTION.—To the extent that the Hualapai
8 Tribe Agreement does not conflict with this Act, and in
9 support of the purposes of this Act, the Secretary shall
10 execute—

11 (1) the Hualapai Tribe Agreement (including
12 all exhibits to the Hualapai Tribe Agreement requir-
13 ing the signature of the Secretary); and

14 (2) any amendment to the Hualapai Tribe
15 Agreement (including any amendment to an exhibit
16 of the Hualapai Tribe Agreement requiring the sig-
17 nature of the Secretary) that is necessary to make
18 the Hualapai Tribe Agreement consistent with this
19 Act.

20 (c) DISCRETION OF SECRETARY.—The Secretary
21 may execute any other amendment to the Hualapai Tribe
22 Agreement (including any amendment to an exhibit to the
23 Hualapai Tribe Agreement requiring the signature of the
24 Secretary) that is not inconsistent with this Act, if the
25 amendment does not require approval by Congress.

1 (d) CONTRIBUTION OF CORPORATION TO ECONOMIC
2 DEVELOPMENT FUND.—

3 (1) IN GENERAL.—The contribution of the Cor-
4 poration to the economic development fund of the
5 Tribe, as provided in section 8.1 of the Hualapai
6 Tribe Agreement—

7 (A) may be used by the Tribe for the lim-
8 ited purpose of enabling the Tribe—

9 (i) to acquire Colorado River water
10 rights with the intent to increase the secu-
11 rity of the water rights of the Tribe; and

12 (ii) to otherwise facilitate the use of
13 water on the Hualapai Reservation; and

14 (B) shall be considered to be a non-Federal
15 contribution that counts toward any non-Fed-
16 eral contribution associated with a settlement of
17 the claims of the Tribe for rights to Colorado
18 River water.

19 (2) LIMITATION ON TRANSFER OF WATER
20 RIGHTS.—The Colorado River water rights acquired
21 by the Tribe may be used off the Hualapai Reserva-
22 tion only for irrigation of acquired appurtenant land,
23 or for storage in accordance with Federal and State
24 law in a permitted recharge facility in the State of
25 Arizona, subject to the conditions that—

1 (A) the Tribe shall not seek to transfer or
 2 sell accumulated long-term storage credits gen-
 3 erated from the storage of the acquired Colo-
 4 rado River water rights; and

5 (B) the Tribe shall not seek approval to
 6 change the place of use of the acquired Colo-
 7 rado River water rights, except for the purposes
 8 of storing the water in accordance with sub-
 9 paragraph (A).

10 (3) EXPIRATION.—The authority provided
 11 under paragraph (2) expires on the earlier of—

12 (A) the date on which the Hualapai Tribe
 13 Water Rights Settlement Agreement becomes
 14 enforceable; and

15 (B) December 31, 2039.

16 (4) COLORADO RIVER WATER RIGHTS COUNTED
 17 AGAINST CLAIMS OF TRIBE.—

18 (A) IN GENERAL.—If the Hualapai Tribe
 19 Water Rights Settlement Agreement does not
 20 become enforceable by December 31, 2039, any
 21 Colorado River water rights acquired by the
 22 Tribe with the contribution of the Corporation
 23 to the economic development fund of the Tribe
 24 shall be counted, on an acre-foot per acre-foot
 25 basis, toward the claims of the Tribe for rights

1 to Colorado River water in any subsequent set-
 2 tlement or adjudication of those claims.

3 (B) EFFECT OF PARAGRAPH.—Nothing in
 4 this paragraph restricts any claim for rights of
 5 the Tribe to Colorado River water in any subse-
 6 quent settlement or adjudication.

7 (e) FUTURE LIMITATIONS ON LAND TAKEN INTO
 8 TRUST.—As provided in section 10.11 of the Hualapai
 9 Tribe Agreement, the parties to the Hualapai Tribe Agree-
 10 ment shall negotiate in good faith with other parties the
 11 terms under which any land within the State of Arizona
 12 held or acquired in fee by the Tribe may be taken into
 13 trust by the United States for the benefit of the Tribe,
 14 with any applicable terms to be incorporated into a future
 15 agreement settling the claims of the Tribe for rights to
 16 Colorado River water, and the Federal law approving the
 17 agreement, subject to approval by Congress.

18 **SEC. 6. WAIVERS, RELEASES, AND RETENTION OF CLAIMS.**

19 (a) CLAIMS BY DEPARTMENT UNDER BIG SANDY
 20 RIVER-PLANET RANCH AGREEMENT.—

21 (1) IN GENERAL.—Except as provided in para-
 22 graph (3), the Secretary is authorized to execute a
 23 waiver and release of all claims of the Department
 24 against the Corporation under Federal, State, or any
 25 other law for—

1 (A) all past and present claims for injury
2 to water rights resulting from the diversion of
3 water by the Corporation from the Wikieup
4 Wellfield or the Freeport Groundwater Wells
5 arising prior to the enforceability date;

6 (B) all claims for injury to water rights
7 arising after the enforceability date resulting
8 from the diversion of water by the Corporation
9 from the Wikieup Wellfield or the Freeport
10 Groundwater Wells in a manner not in violation
11 of the Big Sandy River-Planet Ranch Agree-
12 ment; and

13 (C) all past, present, and future claims
14 arising out of, or relating in any manner to, the
15 negotiation or execution of the Big Sandy
16 River-Planet Ranch Agreement.

17 (2) EFFECTIVE DATE.—The waivers and re-
18 leases of claims under paragraph (1) shall—

19 (A) be in the form set forth in exhibit
20 7.2(ii) to the Big Sandy River-Planet Ranch
21 Agreement; and

22 (B) take effect on the enforceability date.

23 (3) RETENTION OF RIGHTS.—The Department
24 shall retain all rights not expressly waived under
25 paragraph (1), including the right—

(A) to assert any claim for breach of, or to seek enforcement of, the Big Sandy River-Planet Ranch Agreement or this Act in any United States court or State court of competent jurisdiction; and

(B) to assert any past, present, or future claim to a water right that is not inconsistent with the Big Sandy River-Planet Ranch Agreement or this Act.

(b) CLAIMS BY TRIBE AND UNITED STATES AS TRUSTEE UNDER BIG SANDY RIVER-PLANET RANCH AGREEMENT.—

(1) IN GENERAL.—Except as provided in paragraph (3), the Tribe and the United States, acting as trustee for the Tribe and members of the Tribe, are authorized to execute a waiver and release of all claims against the Corporation for—

(A) any water rights of the Tribe or the United States as trustee for the Tribe and members of the Tribe with respect to Parcel 3 in excess of 300 acre-feet per year;

(B) all past and present claims for injury to water rights arising before the enforceability date resulting from the diversion of water by

1 the Corporation from the Wikieup Wellfield or
2 the Freeport Groundwater Wells; and

3 (C) all claims for injury to water rights
4 arising after the enforceability date resulting
5 from the diversion of water by the Corporation
6 from the Wikieup Wellfield or the Freeport
7 Groundwater Wells in a manner not in violation
8 of the Big Sandy River-Planet Ranch Agree-
9 ment or the Hualapai Tribe Agreement.

10 (2) EFFECTIVE DATE.—The waivers and re-
11 leases of claims under paragraph (1) shall—

12 (A) be in the form set forth in exhibit
13 7.1(ii) to the Hualapai Tribe Agreement; and

14 (B) take effect on the enforceability date.

15 (3) RETENTION OF RIGHTS.—The Tribe and
16 the United States, acting as trustee for the Tribe
17 and members of the Tribe, shall retain all rights not
18 expressly waived under paragraph (1), including the
19 right—

20 (A) to assert any claim for breach of, or to
21 seek enforcement of, the Big Sandy River-Plan-
22 et Ranch Agreement or this Act in any United
23 States court or State court of competent juris-
24 diction; and

1 (B) to assert any past, present, or future
 2 claim to a water right that is not inconsistent
 3 with the Big Sandy River-Planet Ranch Agree-
 4 ment or this Act.

5 (c) CLAIMS BY UNITED STATES AS TRUSTEE FOR
 6 ALLOTTEES UNDER BIG SANDY RIVER-PLANET RANCH
 7 AGREEMENT.—

8 (1) IN GENERAL.—Except as provided in para-
 9 graph (3), the United States, acting as trustee for
 10 the allottees, is authorized to execute a waiver and
 11 release of all claims against the Corporation for—

12 (A) any water rights of the allottees or the
 13 United States as trustee for the allottees with
 14 respect to—

15 (i) Parcel 1 in excess of 82 acre-feet
 16 per year; or

17 (ii) Parcel 2 in excess of 312 acre-feet
 18 per year;

19 (B) all past and present claims for injury
 20 to water rights arising before the enforceability
 21 date resulting from the diversion of water by
 22 the Corporation from the Wikieup Wellfield or
 23 the Freeport Groundwater Wells; and

24 (C) all claims for injury to water rights
 25 arising after the enforceability date resulting

1 from the diversion of water by the Corporation
 2 from the Wikieup Wellfield or the Freeport
 3 Groundwater Wells in a manner not in violation
 4 of the Big Sandy River-Planet Ranch Agree-
 5 ment.

6 (2) EFFECTIVE DATE.—The waivers and re-
 7 leases of claims under paragraph (1) shall—

8 (A) be in the form set forth in exhibit
 9 7.1(ii) to the Hualapai Tribe Agreement; and

10 (B) take effect on the enforceability date.

11 (3) RETENTION OF RIGHTS.—The United
 12 States, acting as trustee for the allottees, shall re-
 13 tain all rights not expressly waived under paragraph
 14 (1), including the right—

15 (A) to assert any claim for breach of, or to
 16 seek enforcement of, the Big Sandy River-Plan-
 17 et Ranch Agreement or this Act in any United
 18 States court or State court of competent juris-
 19 diction; and

20 (B) to assert any past, present, or future
 21 claim to a water right that is not inconsistent
 22 with the Big Sandy River-Planet Ranch Agree-
 23 ment or this Act.

24 (d) CLAIMS BY TRIBE AND UNITED STATES AS
 25 TRUSTEE UNDER HUALAPAI TRIBE AGREEMENT.—

1 (1) IN GENERAL.—Except as provided in para-
2 graph (3), the Tribe and the United States, acting
3 as trustee for the Tribe, members of the Tribe, and
4 the allottees, as part of the performance of obliga-
5 tions under the Hualapai Tribe Agreement, are au-
6 thorized to execute a waiver and release of all claims
7 that the Tribe or the United States as trustee for
8 the Tribe, members of the Tribe, or the allottees
9 may have against the Corporation under Federal,
10 State, or any other law, for—

11 (A) all past and present claims for injury
12 to water rights resulting from the diversion of
13 water by the Corporation from the Bill Williams
14 River watershed arising prior to the enforce-
15 ability date;

16 (B) all claims for injury to water rights
17 arising after the enforceability date resulting
18 from the diversion of water by the Corporation
19 from the Bill Williams River watershed in a
20 manner not in violation of the Hualapai Tribe
21 Agreement; and

22 (C) all past, present, and future claims
23 arising out of, or relating in any manner to, the
24 negotiation or execution of the Hualapai Tribe
25 Agreement.

1 (2) EFFECTIVE DATE.—The waivers and re-
2 leases of claims under paragraph (1) shall—

3 (A) be in the form set forth in exhibit
4 7.1(ii) to the Hualapai Tribe Agreement; and

5 (B) take effect on the enforceability date.

6 (3) RETENTION OF RIGHTS.—The Tribe and
7 the United States, acting as trustee for the Tribe,
8 the members of the Tribe, and the allottees, shall re-
9 tain all rights not expressly waived under paragraph
10 (1), including the right to assert—

11 (A) subject to paragraph 10.5 of the
12 Hualapai Tribe Agreement, a claim for breach
13 of, or to seek enforcement of, the Hualapai
14 Tribe Agreement or this Act in any United
15 States court or State court of competent juris-
16 diction;

17 (B) any claim for injury to, or to seek en-
18 forcement of, the rights of the Tribe under any
19 applicable judgment or decree approving or in-
20 corporating the Hualapai Tribe Agreement; and

21 (C) any past, present, or future claim to
22 water rights that is not inconsistent with the
23 Hualapai Tribe Agreement or this Act.

1 (e) CLAIMS BY TRIBE AGAINST UNITED STATES
2 UNDER BIG SANDY RIVER-PLANET RANCH AGREEMENT
3 AND HUALAPAI TRIBE AGREEMENT.—

4 (1) IN GENERAL.—Except as provided in para-
5 graph (3), the Tribe, on behalf of the Tribe and the
6 members of the Tribe, is authorized to execute a
7 waiver and release of all claims against the Depart-
8 ment and the agents and employees of the Depart-
9 ment for—

10 (A) all past, present, and future claims re-
11 lating to injury to water rights associated with
12 Parcel 3 in excess of 300 acre-feet per year that
13 the Department, acting as trustee for the Tribe,
14 asserted or could have asserted against any
15 party to the Hualapai Tribe Agreement, includ-
16 ing the Corporation;

17 (B) all past and present claims relating to
18 injury to water rights arising before the en-
19 forceability date associated with Parcel 3, in-
20 cluding any injury from withdrawal of a protest
21 to the sever and transfer applications;

22 (C) all claims relating to injury to water
23 rights arising after the enforceability date asso-
24 ciated with Parcel 3, except for injury to the

1 water right for 300 acre-feet per year associ-
 2 ated with Parcel 3; and

3 (D) all past, present, and future claims re-
 4 lating to any potential injury arising out of, or
 5 relating in any manner to, the negotiation or
 6 execution of the Big Sandy River-Planet Ranch
 7 Agreement or the Hualapai Tribe Agreement.

8 (2) EFFECTIVE DATE.—The waivers and re-
 9 leases of claims under paragraph (1) shall—

10 (A) be in the form set forth in, as applica-
 11 ble—

12 (i) exhibit 7.6(ii) to the Big Sandy
 13 River-Planet Ranch Agreement; or

14 (ii) exhibit 7.3(ii) to the Hualapai
 15 Tribe Agreement; and

16 (B) take effect on the enforceability date.

17 (3) RETENTION OF RIGHTS.—The Tribe shall
 18 retain all rights not expressly waived under para-
 19 graph (1), including the right—

20 (A) to assert any claim for breach of, or to
 21 seek enforcement of, the Big Sandy River-Plan-
 22 et Ranch Agreement, the Hualapai Tribe
 23 Agreement, or this Act in any United States
 24 court or State court of competent jurisdiction;
 25 and

1 (B) to assert any past, present, or future
 2 claim to a water right that is not inconsistent
 3 with the Big Sandy River-Planet Ranch Agree-
 4 ment, the Hualapai Tribe Agreement, or this
 5 Act.

6 **SEC. 7. ADMINISTRATION.**

7 (a) LIMITED WAIVER OF SOVEREIGN IMMUNITY.—

8 (1) IN GENERAL.—In the case of a civil action
 9 described in paragraph (2)—

10 (A) the United States or the Tribe, or
 11 both, may be joined in a civil action commenced
 12 by any party to the Big Sandy River-Planet
 13 Ranch Agreement or the Hualapai Tribe Agree-
 14 ment; and

15 (B) any claim by the United States or the
 16 Tribe to sovereign immunity from the civil ac-
 17 tion is waived for the sole purpose of resolving
 18 any issue regarding the interpretation or en-
 19 forcement of, as applicable—

20 (i) this Act;

21 (ii) the Big Sandy River-Planet Ranch
 22 Agreement; or

23 (iii) the Hualapai Tribe Agreement.

24 (2) DESCRIPTION OF CIVIL ACTION.—A civil ac-
 25 tion referred to in paragraph (1) is a civil action

1 filed by any party in a United States court or State
2 court that—

3 (A) relates solely and directly to the inter-
4 pretation or enforcement of this Act, the Big
5 Sandy River-Planet Ranch Agreement, or the
6 Hualapai Tribe Agreement;

7 (B) does not seek any award against the
8 United States or the Tribe for monetary dam-
9 ages, costs, or attorneys' fees; and

10 (C) names the United States or the Tribe
11 as a party.

12 (b) ANTIDEFICIENCY.—

13 (1) IN GENERAL.—Notwithstanding any author-
14 ization of appropriations to carry out this Act, the
15 expenditure or advance of any funds, and the per-
16 formance of any obligation by the Department in
17 any capacity, pursuant to this Act shall be contin-
18 gent on the appropriation of funds for that expendi-
19 ture, advance, or performance.

20 (2) LIABILITY.—The Department shall not be
21 liable for the failure to carry out any obligation or
22 activity authorized by this Act if adequate appro-
23 priations are not provided to carry out this Act.

24 (c) PUBLIC ACCESS.—Nothing in this Act prohibits
25 reasonable public access to Planet Ranch or Lincoln

1 Ranch in a manner that is consistent with all applicable
2 Federal and State laws and any applicable conservation
3 management plan implemented under the Conservation
4 Program.

5 **SEC. 8. ENVIRONMENTAL COMPLIANCE.**

6 (a) IN GENERAL.—In implementing the Big Sandy
7 River-Planet Ranch Agreement, the Hualapai Tribe
8 Agreement, and this Act, the Secretary shall comply with
9 all applicable Federal environmental laws (including regu-
10 lations), including—

11 (1) the National Environmental Policy Act of
12 1969 (42 U.S.C. 4321 et seq.); and

13 (2) the Endangered Species Act of 1973 (16
14 U.S.C. 1531 et seq.).

15 (b) EXECUTION OF AGREEMENTS.—The execution by
16 the Secretary of the Big Sandy River-Planet Ranch Agree-
17 ment and the Hualapai Tribe Agreement in accordance
18 with this Act shall not constitute a major Federal action
19 for purposes of section 102 of the National Environmental
20 Policy Act of 1969 (42 U.S.C. 4332).

21 (c) UNITED STATES ENFORCEMENT AUTHORITY.—
22 Nothing in this Act, the Big Sandy River-Planet Ranch
23 Agreement, or the Hualapai Tribe Agreement affects any
24 right of the United States to take any action (including
25 any environmental action) under any law (including regu-

lations and common law) relating to human health, safety,
or the environment.

SEC. 9. ENFORCEABILITY DATE.

(a) IN GENERAL.—Except as provided in subsection
(b), the enforceability date shall be the date on which the
Secretary publishes in the Federal Register a statement
of findings that—

(1)(A) to the extent that the Big Sandy River-
Planet Ranch Agreement or the Hualapai Tribe
Agreement conflict with this Act, the applicable
agreement has been revised by amendment to elimi-
nate the conflict; and

(B) the Big Sandy River-Planet Ranch Agree-
ment and the Hualapai Tribe Agreement have been
executed by all parties to those agreements;

(2) the Corporation has submitted to ADWR a
conditional amendment of the sever and transfer ap-
plications for the Lincoln Ranch water right and
amendments to the sever and transfer applications
for Planet Ranch and Lincoln Ranch water rights
consistent with section 4.2.1(ii)(a) of the Big Sandy
River-Planet Ranch Agreement;

(3) the Secretary and the Arizona Game and
Fish Commission have executed and filed with

1 ADWR a conditional withdrawal of each objection
 2 described in section 4(b)(3);

3 (4)(A) ADWR has issued a conditional order
 4 approving the sever and transfer applications of the
 5 Corporation; and

6 (B) all objections to the sever and transfer ap-
 7 plications have been—

8 (i) conditionally withdrawn; or

9 (ii) resolved in a decision issued by ADWR
 10 that is final and nonappealable;

11 (5) the Secretary has provided a notice to the
 12 parties to the Big Sandy River-Planet Ranch Agree-
 13 ment and the Hualapai Tribe Agreement that the
 14 Department has completed the legally required envi-
 15 ronmental compliance described in section 8;

16 (6) the steering committee for the Conservation
 17 Program has approved and authorized the manager
 18 of the Conservation Program to execute the lease in
 19 the form as set forth in exhibit 2.33 to the Big
 20 Sandy River-Planet Ranch Agreement; and

21 (7) the waivers and releases authorized by sec-
 22 tion 6 have been executed by the Tribe and the Sec-
 23 retary.

24 (b) RATIFICATION AND EXECUTION OF AGREE-
 25 MENTS.—Notwithstanding subsection (a), for purposes of

1 sections 4, 5, and 8, the Secretary shall carry out the re-
 2 quirements of this Act as promptly as practicable after
 3 the date of enactment of this Act.

4 (c) FAILURE OF ENFORCEABILITY DATE TO
 5 OCCUR.—If the Secretary does not publish a statement
 6 of findings under subsection (a) by December 15, 2015,
 7 or an extended date agreed to by the Tribe, the Secretary,
 8 and the Corporation, after providing reasonable notice to
 9 the State of Arizona—

10 (1) this Act is repealed effective beginning on
 11 the later of—

12 (A) December 31, 2015; and

13 (B) the date that is 14 days after the ex-
 14 tended date agreed to by the Tribe, the Sec-
 15 retary, and the Corporation, after providing
 16 reasonable notice to the State of Arizona;

17 (2) any action taken by the Secretary to carry
 18 out this Act shall cease, and any agreement executed
 19 pursuant to this Act, shall be void; and

20 (3) the Tribe, members of the Tribe, the
 21 allottees, and the United States, acting as trustee
 22 for the Tribe, members of the Tribe, and the
 23 allottees, shall retain the right to assert past,
 24 present, and future claims to water rights and

- 1 claims for injury to water rights in the Bill Williams
- 2 River watershed.



Tab R – U.S. Forest Service Proposed
Groundwater Resource
Management Directive



WESTERN STATES WATER COUNCIL

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Web Page: www.westernstateswater.org

October 2, 2014

Tom Tidwell, Chief
U.S. Forest Service
1400 Independence Avenue
Washington D.C. 20250-1111

Elizabeth Berger
U.S. Forest Service
WWFART, 201 14th Street SW
Washington D.C. 20250

RE: Proposed USFS Directive on Groundwater Resources – Forest Service Manual 2560

Dear Chief Tidwell and Ms. Berger:

On behalf of the Western States Water Council, I am writing to comment on the proposed U.S. Forest Service's (USFS) Proposed Directive on Groundwater Resource Management, published in the Federal Register for public comment on May 6 (FSM 2560). Attached to this letter are more specific comments. We appreciate the recognition of the importance of groundwater and the impact that USFS activities and USFS-permitted surface activities can have on this vital state resource, particularly in the West, where most USFS managed lands are located. Moreover, as any other landowner, we also recognize USFS authority to permit access to federal lands for lawful activities, including water resources development and operation of facilities to exercise state granted water rights.

While perhaps well intended, our member States have serious concerns over the lack of substantive state participation in the development of the directive, especially given that the States have primary, often exclusive authority, over the protection, development and management of waters within their boundaries, including surface waters arising on, and flowing across USFS lands, and groundwater below those lands. Groundwater is a state and not a federal resource. The problems that the directive may be intended to address are not apparent, nor is the protection of groundwater a primary USFS responsibility. Indeed, the U.S. Supreme Court held in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that states have exclusive authority over the allocation, administration, protection, and control of all non-navigable waters located within their borders.

We believe the USFS assertions of broad authority over groundwater and the potential interference with the lawful exercise of state water rights and permitted water uses on National Forest Service (NFS) lands are contrary to over 100 years of deference afforded state water laws by the Congress and the Supreme Court of the United States. Among other things, presumptive claims of any reserved right to groundwater are unsupported by legislation or opinions of the Court. Moreover, such claims are counterproductive and will only involve the USFS in extended litigation. Rather, USFS should partner with States to identify and address USFS needs. The existing compact between the State of Montana and USFS, as well as a Memorandum of

Understanding between USFS and the State of Wyoming, may serve as appropriate options that may be emulated by USFS in other States. The Council and our federal partners have, working through our Western Federal Agency Support Team, also entered into continuing discussion on how best to fulfill legitimate federal water needs within state water law.

The directive to “apply federal reserved water right to groundwater as well as surface water” is inappropriate and legally unsupportable as none of the USFS cited statutes and authorities mention groundwater, nor establish any basis to manage or allocate waters, nor reserve any federal rights to water. Further, no federal court has ever upheld a reserved right to groundwater. The U.S. Supreme Court in *United States v. New Mexico*, 438 U.S. 696 (1978) specifically denied USFS claims to implied reserved surface water rights claimed for fish, wildlife, and recreation uses and found that reserved rights made pursuant to the Act were limited to the minimum amount of water necessary to satisfy the “primary purposes” of the national forest reservation. These primary purposes include the production of timber and watershed protection to insure favorable surface water flows. Furthermore, the Court found that all other needs were secondary purposes that required state-issued water rights. The proposed directive cannot extend USFS authorities beyond the limits the Court has set. Even where reserved rights are recognized, the Congress has left it up to the States, under the McCarran Amendment, to quantify such rights in general state stream adjudications in state courts.

Limited USFS resources are already overextended, as evidenced by necessary “fire borrowing,” requiring careful consideration of national funding priorities. Even if it had the authority, the USFS is ill-equipped to undertake the extensive and costly processes and procedures that would be necessary to implement the directive. Moreover, much of the work the USFS envisions it would undertake or contract out would very likely duplicate existing capabilities of the States and other federal agencies.

Governors John Hickenlooper of Colorado and Brian Sandoval of Nevada, then Chair and Vice Chair of the Western Governors’ Association, wrote Secretary Tom Vilsack on July 2nd declaring, “Our initial review of the Proposed Directive leads us to believe that this measure could have significant implications for our states and our groundwater resources.” In an August 29th reply, Secretary Vilsack replied with an “open invitation to meet and discuss these directives.” The WGA and the Council are working closely together on this issue, and we would reiterate, as also stated in the Governors’ letter: “States are the exclusive authority for allocating, administering, protecting and developing groundwater resources....” This directive has significant negative federalism implications for the States.

We strongly urge you to take no final action on the directive until there has been an extended and extensive opportunity for USFS to work with our member States, the WGA, and the Council to identify and seek to resolve in a mutually acceptable manner the problems which the directive is intended to address. Notably, the directive mentions required consultation with the tribes, but not the States. We are prepared to enter into a substantive dialogue that would fulfill the requirements of Executive Order 13132 (“E.O.”) on Federalism. As stated therein, “One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems.” Sec. 2(f)

Moreover, the E.O. states: “National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and

the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means.” Sec. 3(b)

The E.O. continues: “When undertaking to formulate and implement policies that have federalism implications agencies shall...where possible, defer to the States to establish standards; in determining whether to establish uniform national standards, consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority....” Sec. 3(d)

Sec. 6 requires: “Each agency shall have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.”

We again request that the USFS enter into an authentic dialogue with the WGA, the Council, and the States towards achieving a mutually acceptable policy that reflects both the constitutional division of power and the on-the-ground realities of the West. The USFS should also recognize that a flexible and consistent state-by-state approach may be a more effective and more feasible way of addressing USFS needs than a national approach that does not account for the significant physical, hydrological, and legal differences that exist between the states. USFS should have consulted extensively with the States before publishing the proposed directive, and should now substantively engage the States, in order to define and remedy any perceived need to “clarify existing responsibilities and provide greater consistency and accountability....”

Thank you for your attention to our concerns, and we look forward to engaging in a productive dialogue with you and other USFS representatives.

Sincerely,

Patrick Tyrrell, Chairman
Western States Water Council

cc. Secretary Vilsack, Under Secretary Bonnie, OMB, and relevant Congressional Committees, Senators, and Representatives.

I. STATE PRIMACY OVER SURFACE WATER AND GROUNDWATER

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

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

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

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

Second, the directive would require the USFS to evaluate all water rights applications on National Forest System (NFS) lands, as well as applications on adjacent lands that could adversely affect groundwater resources the USFS asserts are NFS groundwater resources. As any other landowner or water user, USFS has the right to participate in state administrative processes to ensure that USFS interests are represented. USFS may also condition activities on National Forest lands and permit land surface disturbances. However, to the extent that the directive purports to interfere with or limit the exercise of state granted groundwater rights and state water use permitting authorities on USFS lands, and particularly pertaining to uses on non-USFS property, the proposed directive is beyond the scope of the agency’s authority. The directive’s requirement could also impose an unnecessary burden on USFS staff and other resources, as

state water right administrators not only have exclusive water use permitting authority, but also have the expertise to evaluate any and all impacts on water resources and water users. The directive raises the possibility of USFS actions interfering with the exercise of valid pre-existing property rights to the use of state waters. It is inappropriate for the USFS to attempt to extend its administrative reach to waters and adjacent lands over which it has no authority.

Third, the proposal's rebuttable presumption that surface water and groundwater are hydraulically connected raises another set of questions, including the standards and methods that may be used to rebut this presumption. In fact, groundwater and surface waters may or may not be hydrologically connected requiring extensive and expensive geohydrologic analyses, which the USFS is ill equipped to undertake on a large scale. Further, the management of groundwater and rights to the use of groundwater varies by state and is as much a legal question as it is a scientific question of connectivity. Moreover, if the USFS presumes to have authority to regulate groundwater uses, then their rebuttable presumption of a connection to surface water sources could lead to an unwarranted and contentious assertion of authority over surface water uses as well, which the U.S. Supreme Court has clearly rebuffed.

II. LEGAL BASIS OF THE PROPOSED DIRECTIVE

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

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

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

It is also important to note that the U.S. Supreme Court narrowly interpreted the Organic Act, which the USFS cites as one of the legal justifications for the proposal, in *United States v. New Mexico*, 438 U.S. 696 (1978). Namely, the Court denied USFS claims to implied reserved surface water rights claims for fish, wildlife, and recreation uses and found that reserved rights made pursuant to the Act were limited to the minimum amount of water necessary to satisfy "primary purposes" of the national forest reservation, such as the conservation of favorable surface water flows and the production of timber. Furthermore, the Court found that all other

needs were secondary purposes that required state-issued water rights. Similarly, the Court's other decisions regarding the reserved water rights doctrine have generally narrowed its scope by imposing "primary purpose" and "minimal needs" requirements. The proposal must ensure that it complies with the limits the Court has placed upon the recognition and exercise of implied federal reserved water rights.

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

III. THE LACK OF STATE CONSULTATION

The Council is especially concerned by the lack of state consultation in the development of the proposed directive and its assertion that it will not have substantial direct effects on the States, on the relationship between the federal government and the States, and the distribution of powers between the various levels of government. WSWC Position #371 (attached) notes that E.O. 13132 requires federal agencies to "have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications...."

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

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

IV. CONCLUSION

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

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

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
WATER-RELATED FEDERAL RULES, REGULATIONS, DIRECTIVES, ORDERS and
POLICIES
Helena, Montana
August 11, 2014

WHEREAS, Presidential Executive Order 13132, issued on August 4, 1999, requires federal agencies to “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications...”; and

WHEREAS, an increasing number of federal regulatory initiatives and directives are being proposed that threaten principles of federalism, an appropriate balance of responsibilities, and the authority of the states to govern the appropriation, allocation, protection, conservation, development and management of the waters within their borders; and

WHEREAS, taking such actions goes beyond the intent of the applicable laws; and

WHEREAS, a number of these recent proposals have been made with little substantive consultation with State Governments; and

WHEREAS, a Western Federal Agency Support Team (WestFAST) now comprised of twelve water-related federal agencies was created pursuant to a recommendation of the Western Governors’ Association and Western States Water Council to foster cooperation and collaboration between the federal agencies and States and state agencies in addressing water resource needs; and

WHEREAS, State consultation should take place early in the policy development process, with the States as partners in the development of policies; and

WHEREAS, federal agencies have inappropriately dismissed the need to apply this requirement to their rulemaking processes and procedures; and

WHEREAS, water quantity regulation and management are the prerogatives of States, and water rights are private property, protected and regulated under State law;

NOW, THEREFORE, BE IT RESOLVED, that nothing in any federal rule, regulation, directive, order or policy should affect, erode, or interfere with the lawful government and role of the respective States relating to: (a) the appropriation and allocation of water from any and all sources within their borders; and/or (b) the withdrawal, control, use, or distribution of water; and/or (c) affect or interfere with any interstate compact, decree or negotiated water rights agreement; and/or (d) application, development and/or implementation of rules, laws, and regulations related to water.

BE IT FURTHER RESOLVED, that federal agencies with water related responsibilities fully recognize and follow the requirements of Executive Order 13132 by establishing and implementing appropriate procedures and processes for substantively consulting with States, their Governors, as elected by the people, and their appointed representatives, such as the Western States Water Council, on the implications of their proposals and fully recognize and defer to States' prerogatives.



WESTERN GOVERNORS' ASSOCIATION

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Chairman

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July 2, 2014

Honorable Tom Vilsack
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Dear Secretary Vilsack:

Western Governors are concerned by the United States Forest Service's (USFS) recently released *Proposed Directive on Groundwater Resource Management* (hereafter "Proposed Directive"). As you know, states are the exclusive authority for allocating, administering, protecting and developing groundwater resources, and they are primarily responsible for water supply planning within their boundaries.

Congress recognized states as the sole authority over groundwater in the Desert Land Act of 1877. The United States Supreme Court reiterated the exclusive nature of state authority in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

Despite that legal and historical underpinning, the Proposed Directive only identifies states as "potentially affected parties," and asserts that the USFS's proposed actions would "not have substantial direct effects on the states." Our initial review of the Proposed Directive leads us to believe that this measure could have significant implications for our states and our groundwater resources.

For this Proposed Directive – as well as the Proposed Directives for National Best Management Practices for Water Quality Protection on National Forest System Lands – USFS should seek authentic partnership with the states to achieve appropriate policies that reflect both the legal division of power and the on-the-ground realities of the region.

We respectfully request your responses to the attached questions to help us better understand the rationale behind this new proposal.

Sincerely,


John Hickenlooper
Governor, State of Colorado
Chairman, WGA


Brian Sandoval
Governor, State of Nevada
Vice Chairman, WGA

Western Governors' Association
Questions Regarding Proposed United States Forest Service (USFS)
Water Quality-Related Directives

Proposed Directive on Groundwater Resource Management

Legal Basis for USFS Action:

Well over a century ago, Congress recognized states as the sole authority over groundwater in the Desert Land Act of 1877. The United States Supreme Court reiterated the exclusive nature of state authority in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), recognizing that states have exclusive say over the allocation, administration, protection and control of groundwater within their borders.

- What is the legal basis for U.S. Department of Agriculture (USDA) / USFS assertion of federal authority in the context of the Proposed Directive? What does the USDA / USFS recognize as the limits of federal authority?
- The Proposed Directive states that, when filing groundwater use claims during state water rights adjudications and administrative proceedings, Forest Service employees should "... [a]pply Federal reserved water rights (the Reservation or Winters doctrine) to groundwater as well as surface water to meet Federal purposes under the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act" (emphasis added).
 - o What is the legal basis for these claims?
 - o When and how will USFS assert reserved water rights claims to groundwater?
- The Proposed Directive states that the assertion of reserved rights to surface water and groundwater should be consistent with the purposes of the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act. In the 1978 case *United States v. New Mexico*, 438 U.S. 696 (1978), the U.S. Supreme Court denied USFS claims to reserved rights for fish, wildlife and recreation uses. Rather, the Court found that the Organic Act limits reserved rights to those necessary to meet the primary purposes of the Act – the conservation of favorable water flows and the production of timber – and that other secondary needs must be met by obtaining appropriation rights from the state.
 - o How does the Proposed Directive work within the legal framework required by the Court?
 - o Given the Supreme Court's finding, how does the Organic Act authorize USFS reserved rights to groundwater here?

State Authority:

- Given the federal statutory grant of state authority over ground water and U.S. Supreme Court case law discussed above:
 - o What will “cooperatively managing groundwater with states” mean in practice?
 - o How will the Department ensure that the Proposed Directive will not infringe upon, abrogate, or in any way interfere with states' exclusive authority to allocate and administer rights to the use of groundwater as well as the states' primary responsibility to protect, manage, and otherwise control water resources within their borders?
 - o Do the new considerations for groundwater under USFS' existing special use authorizations amount to a permit for groundwater use? If (as stated) groundwater and surface water are assumed to be hydraulically connected, could this special use authorization for groundwater amount to water rights permitting of both groundwater and surface water? Will there be an increase in regulatory responsibilities for states and water users? What will the new requirements for monitoring and mitigation entail?
- The Proposed Directive asserts that it does not trigger the requirements of E.O. 13132 on federalism – that it would not impose compliance costs on states or have substantial direct effects on states or the distribution of power.
 - o Given the changes this directive would make in the ways state-managed waters are permitted, why do USDA and USFS believe this action would not trigger E.O. 13132?

Scientific Assumptions and Definitions:

- How will definitions be established for the Proposed Directive? Particularly regarding the definition of “groundwater-dependent ecosystems,” states should be able to weigh in with information regarding the unique hydrology within certain areas.
- The Proposed Directive would require the Forest Service to, “[a]ssume that there is a hydrological connection between groundwater and surface water, regardless of whether State law addresses these water resources separately, unless a hydrogeological evaluation using site-specific data indicates otherwise.” The Federal Register notice for the Directive further states that, “this assumption is consistent with scientific understanding of the role and importance of groundwater in the planet’s hydrological cycle.” Yet without citing specific scientific evidence for specific areas, the assumption of connectivity opens new waters to permitting without sound evidence that takes site-

specific considerations into account.

- o What quantifiable science does USFS depend upon to justify this broad assertion of federal authority?

Application to Existing Permitted Uses:

- How will the Proposed Directive apply to existing, permitted activities on USFS lands? How will it affect existing uses that rely on state-based water rights?

Nexus to Forest Planning Rule:

- How is this Proposed Directive related to the Forest Planning Rule?

Process Concerns

- Given the Proposed Directive's potential impacts on states and stakeholders, why was this new policy released as a Proposed Directive rather than a rule?
- Why were states – the exclusive authorities over groundwater management – not consulted during USDA / USFS' development of this Proposed Directive?

Proposed Directives for National Best Management Practices for Water Quality Protection on National Forest System Lands

- How do the proposed BMP Directives relate to *NEDC v. Brown*, litigation overturned by the U.S. Supreme Court which would have identified forest roads as subject to permitting under the Clean Water Act (CWA)?
- How will the Proposed Best Management Practices (BMP) Directives relate back to the recent proposed rule regarding the scope of waters protected under the CWA and the related study on *Connectivity of Streams and Wetlands to Downstream Waters* from the Environmental Protection Agency's Scientific Advisory Board?
- What are the implications of using these BMP Directives as USFS' primary requirements to meet water quality standards?
- Will these become the basis for future regulatory action impacting specific activities on USFS lands (for example, energy production, mining, or grazing)?
- What is the legal basis of asserting that USFS needs to institute BMP Directives to "[maintain] water resource integrity?"



United States Department of Agriculture

Office of the Secretary
Washington, D.C. 20250

AUG 29 2014

The Honorable Brian Sandoval
Chairman
Western Governors' Association
1600 Broadway, Suite 1700
Denver, Colorado 80202

Dear Governor Sandoval:

Thank you for your letter of July 2, 2014, cosigned by Governor John Hickenlooper, regarding the proposed Department of Agriculture's Forest Service Directives, *Forest Service Manual (FSM) Chapter 2560—Groundwater Resource Management* and *FSM Chapter 2532—Water Quality Management*, and the new *Forest Service Handbook (FSH) Chapter 2509.19—National Best Management Practices Program Handbook*. I apologize for the delayed response.

These proposed directives were released in draft on May 6, 2014, to solicit feedback. The Forest Service recognizes and respects the role and authorities of the States in protecting water quality and allocating groundwater and surface water. The proposed directives do not change this longstanding relationship as we strive to be better partners with States by proposing a consistent approach for the Forest Service to evaluate and monitor effects to groundwater from Forest Service proposed actions.

Congress has authorized the Forest Service to administer National Forest System (NFS) lands and to manage the many uses of those lands, including uses that have the potential to affect water resources. Congress has directed the Forest Service to manage NFS lands to secure favorable conditions of water flow (Organic Administration Act of 1897), for navigable stream protection (Weeks Law of 1911), and to mitigate floods, conserve surface and subsurface moisture, and protect watersheds (Bankhead-Jones Act of 1935).

In addition, Congress has provided subsequent direction to the Forest Service regarding water, watersheds, and the management of those resources in a number of statutes, including the Multiple-Use Sustained-Yield Act of 1960 and the Federal Land Policy and Management Act of 1976. To implement these and other authorities, the Forest Service has discretion over the "formulation, direction, and execution of Forest Service policies, programs, and activities" (36 CFR 200.1 (b)). This is done in part through the issuance and revision of Forest Service Manuals and Handbooks (together termed "directives") that guide internal agency operations, such as the proposed directives referenced in your letter (7 CFR 2.7).

The Honorable Brian Sandoval
Page2

The Forest Service recognizes that many of its activities, and the activities of its authorization holders, have the potential to affect groundwater and surface water resources that are critical to maintaining healthy watersheds. By restoring and maintaining healthy watersheds, the Forest Service helps sustain the vital water resources that society depends on. In addition, under its special uses authority, the Forest Service evaluates proposed uses on NFS lands to make sure natural resources will not be significantly adversely affected by the activities.

The purpose of the proposed directive on groundwater is to clarify existing responsibilities and provide greater consistency and accountability in how the Forest Service carries out these obligations. The Forest Service evaluates effects on groundwater and surface water resources of activities on NFS lands by working closely with State agencies that have the responsibility for the allocation and protection of water resources, and the agency will continue to do so.

The proposed directive on groundwater resource management was published in the *Federal Register* on May 6, 2014. The original comment period closed on August 4, 2014, but a notice was published in the *Federal Register* on August 1, 2014, extending the comment period to September 3, 2014.

We would like to extend an open invitation to meet and discuss these directives. In addition, the Forest Service will consider your comments and questions and others received from the States during the comment period, and following its conclusion will evaluate them to determine the next steps for each proposed directive. Detailed responses to comments will be provided in the preamble to any final directive.

Again, thank you for writing. A similar response will be sent to Governor Hickenlooper.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Vilsack", written in a cursive style.

Thomas J. Vilsack
Secretary



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Thomas J. Vilsack
Secretary

16 U.S. Code § 475 - Purposes for which national forests may be established and administered

Current through Pub. L. [113-100](#). (See [Public Laws for the current Congress](#).)

All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section [471](#) ⁽¹⁾ of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

16 U.S. Code § 480 - Civil and criminal jurisdiction

The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

16 U.S. Code § 481 - Use of waters

All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder.

16 U.S. Code § 515 - Examination, location, and purchase of forested, cut-over, or denuded lands; consent of State legislature to acquisition of land by the United States

The Secretary of Agriculture is hereby authorized and directed to examine, locate, and purchase such forested, cut-over, or denuded lands within the watersheds of navigable streams as in his judgment may be necessary to the regulation of the flow of navigable streams or for the production of timber. No deed or other instrument of conveyance of lands referred to herein shall be accepted or approved by the Secretary of Agriculture under this Act until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams.

16 U.S. Code § 519 - Agricultural lands included in tracts acquired; sale for homesteads

Inasmuch as small areas of land chiefly valuable for agriculture may of necessity or by inadvertence be included in tracts acquired under this Act, the Secretary of Agriculture may, in his discretion, and he is authorized, upon application or otherwise, to examine and ascertain the location and extent of such areas as in his opinion may be occupied for agricultural purposes without injury to the forests or to stream flow and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and offer them for sale as homesteads at their true value, to be fixed by him, to actual settlers, in tracts not exceeding eighty acres, in area, under such rules and regulations as he may prescribe; and in case of such sale the jurisdiction over the lands sold shall, ipso facto, revert to the State in which the lands sold lie. And no right, title, interest, or claim in or to any lands acquired under this Act, or the waters thereon, or the products, resources, or use thereof after such lands shall have been so acquired, shall be initiated or perfected, except as in this section provided.

16 U.S. Code § 524 - Rights-of-way for dams, reservoirs, or water plants for municipal, mining, and milling purposes

Rights-of-way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the national forests of the

United States, are granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said forests are respectively situated.

16 U.S. Code § 526 - Establishment and protection of water rights

There are authorized to be appropriated for expenditure by the Forest Service such sums as may be necessary for the investigation and establishment of water rights, including the purchase thereof or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in connection with the administration and public use of the national forests.

16 U.S. Code § 528 - Development and administration of renewable surface resources for multiple use and sustained yield of products and services; Congressional declaration of policy and purpose

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections [528](#) to [531](#) of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section [475](#) of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

16 U.S. Code § 529 - Authorization of development and administration consideration to relative values of resources; areas of wilderness

The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of

the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections [528](#) to [531](#) of this title.

16 U.S. Code § 530 - Cooperation for purposes of development and administration with State and local governmental agencies and others

In the effectuation of sections [528](#) to [531](#) of this title the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

16 U.S. Code § 531 - Definitions

As used in sections [528](#) to [531](#) of this title the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

16 U.S. Code § 551 - Protection of national forests; rules and regulations

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set

aside or which may be hereafter set aside under the provisions of section [471](#) ^(m) of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section, sections [473](#) to [478](#) and [479](#) to [482](#) of this title or such rules and regulations shall be punished by a fine of not more than \$500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate judge specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section [3401](#) (b) to (e) of title [18](#).

16 U.S. Code § 552 - Consent to agreement by States for conservation of forests and water supply

Consent of the Congress of the United States is given to each of the several States of the Union to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact.

6 U.S. Code § 563 - Cooperation with States for fire protection on private or State forest lands upon the watersheds of navigable rivers

The Secretary of Agriculture is authorized, and on such conditions as he deems wise, to stipulate and agree with any State or group of States to cooperate in the organization and maintenance of a system of fire protection on any private or State forest lands within such State or States and situated upon the watershed of a navigable river. No such stipulation or agreement shall be made with any State which has not provided by law for a system of forest-fire protection. In no case shall the amount expended in any State exceed in any fiscal year the amount appropriated by that State for the same purpose during the same fiscal year.

Clarke-McNary Act (16 U.S.C. § 568 *et seq.*) not found

16 U.S. Code § 1001 - Declaration of policy

Erosion, floodwater, and sediment damages in the watersheds of the rivers and streams of the United States, causing loss of life and damage to property, constitute a menace to the national welfare; and it is the sense of Congress that the Federal Government should cooperate with States and their political subdivisions, soil or water conservation districts, flood prevention or control districts, and other local public agencies for the purpose of preventing such damages, of furthering the conservation, development, utilization, and disposal of water, and the conservation and utilization of land and thereby of preserving, protecting, and improving the Nation's land and water resources and the quality of the environment.

16 U.S. Code § 1006 - Cooperative programs

The Secretary is authorized in cooperation with other Federal and with States and local agencies to make investigations and surveys of the watershed of rivers and other waterways as a basis for the development of coordinated programs. In areas where the programs of the Secretary of Agriculture may affect public or other lands under the jurisdiction of the Secretary of the Interior, the Secretary of the Interior is authorized to cooperate with the Secretary of Agriculture in the planning and development of works or programs for such lands.

16 U.S. Code § 1010 - Data

State basis The Secretary shall collect and maintain data on a national and State by concerning—

- (1) expenditures for the individual flood control and conservation measures for which assistance is provided under this chapter; and
- (2) the expected flood control or environmental (including soil erosion) benefits that will result from the implementation of such measures.

16 U.S. Code § 1011 - Watershed restoration and enhancement agreements

(a) In general

For fiscal year 1997 and each fiscal year thereafter, appropriations made for the Bureau of Land Management including appropriations for the Wildland Fire Management account

allocated to the National Park Service, Fish and Wildlife Service, and Bureau of Indian Affairs may be used by the Secretary of the Interior for the purpose of entering into cooperative agreements with the heads of other Federal agencies, tribal, State, and local governments, private and nonprofit entities, and landowners for the protection, restoration, and enhancement of fish and wildlife habitat and other resources on public or private land and the reduction of risk from natural disaster where public safety is threatened that benefit these resources on public lands within the watershed.

(b) Direct and indirect watershed agreements

The Secretary of the Interior may enter into a watershed restoration and enhancement agreement—

- (1) directly with a willing private landowner; or
- (2) indirectly through an agreement with a state, local, or tribal government or other public entity, educational institution, or private nonprofit organization.

(c) Terms and conditions

In order for the Secretary to enter into a watershed restoration and enhancement agreement—

- (1) the agreement shall—

(A) include such terms and conditions mutually agreed to by the Secretary and the landowner;

(B) improve the viability of and otherwise benefit the fish, wildlife, and other biotic resources on public land in the watershed;

(C) authorize the provision of technical assistance by the Secretary in the planning of management activities that will further the purposes of the agreement;

(D) provide for the sharing of costs of implementing the agreement among the Federal government, ^[1] the landowner, and other entities, as mutually agreed on by the affected interests; and

(E) ensure that any expenditure by the Secretary pursuant to the agreement is determined by the Secretary to be in the public interest; and

- (2) the Secretary may require such other terms and conditions as are necessary to protect the public investment on private lands, provided such terms and conditions are mutually agreed to by the Secretary and the landowner.

16 U.S. Code § 1011a - Watershed agreements

(a) Watershed restoration and enhancement agreements

For fiscal year 2006 and each fiscal year thereafter, to the extent funds are otherwise available, appropriations for the Forest Service may be used by the Secretary of Agriculture for the purpose of entering into cooperative agreements with willing Federal, tribal, State and local governments, private and nonprofit entities and landowners for the protection,

restoration and enhancement of fish and wildlife habitat, and other resources on public or private land, the reduction of risk from natural disaster where public safety is threatened, or a combination thereof or both that benefit these resources within the watershed.

(b) Direct and indirect watershed agreements

The Secretary of Agriculture may enter into a watershed restoration and enhancement agreement—

- (1) directly with a willing private landowner; or
- (2) indirectly through an agreement with a State, local or tribal government or other public entity, educational institution, or private nonprofit organization.

(c) Terms and conditions

In order for the Secretary to enter into a watershed restoration and enhancement agreement—

- (1) the agreement shall—
 - (A) include such terms and conditions mutually agreed to by the Secretary and the landowner, state ^[1] or local government, or private or nonprofit entity;
 - (B) improve the viability of and otherwise benefit the fish, wildlife, and other resources on national forests lands within the watershed;
 - (C) authorize the provision of technical assistance by the Secretary in the planning of management activities that will further the purposes of the agreement;
 - (D) provide for the sharing of costs of implementing the agreement among the Federal Government, the landowner(s), and other entities, as mutually agreed on by the affected interests; and
 - (E) ensure that any expenditure by the Secretary pursuant to the agreement is determined by the Secretary to be in the public interest; and
- (2) the Secretary may require such other terms and conditions as are necessary to protect the public investment on non-Federal lands, provided such terms and conditions are mutually agreed to by the Secretary and other landowners, State and local governments or both.

(d) Applicable law

Chapter ^[2] 63 of title ^[3] 31 shall not apply to—

- (1) a watershed restoration and enhancement agreement entered into under this section; or
- (2) an agreement entered into under section ^[4] 565a-1 of this title.

(e) Reporting requirements

Not later than December 31, 1999, the Secretary shall submit a report to the Committees on Appropriations of the House and Senate, which contains—

- (1) A ^[2] concise description of each project, including the project purpose, location on federal ^[1] and non-federal ^[3] land, key activities, and all parties to the agreement.
- (2) the funding and/or other contributions provided by each party for each project agreement.

-
- [1] So in original. Probably should be capitalized.
- [2] So in original. Probably should not be capitalized.
- [3] So in original. Probably should be “non-Federal”.

16 U.S. Code § 1012 - Rehabilitation of structural measures near, at, or past their evaluated life expectancy

(a) Definitions

For purposes of this section:

(1) Rehabilitation

The term “rehabilitation”, with respect to a structural measure constructed as part of a covered water resource project, means the completion of all work necessary to extend the service life of the structural measure and meet applicable safety and performance standards. This may include:

- (A) protecting the integrity of the structural measure or prolonging the useful life of the structural measure beyond the original evaluated life expectancy;
- (B) correcting damage to the structural measure from a catastrophic event;
- (C) correcting the deterioration of structural components that are deteriorating at an abnormal rate;
- (D) upgrading the structural measure to meet changed land use conditions in the watershed served by the structural measure or changed safety criteria applicable to the structural measure; or
- (E) decommissioning the structure, if requested by the local organization.

(2) Covered water resource project

The term “covered water resource project” means a work of improvement carried out under any of the following:

- (A) This chapter.
- (B) Section 13 of the Act of December 22, 1944 (Public Law 78-534; [58 Stat. 905](#)).
- (C) The [pilot watershed program](#) authorized under the heading “Flood Prevention” of the Department of Agriculture Appropriation Act, 1954 (Public Law 156; [67 Stat. 214](#)).
- (D) Subtitle H of title XV of the Agriculture and Food Act of 1981 ([16 U.S.C. 3451](#) et seq.; commonly known as the Resource Conservation and Development Program).

(3) Structural measure

The term “structural measure” means a physical improvement that impounds water, commonly known as a dam, which was constructed as part of a covered water resource project, including the impoundment area and flood pool.

(b) Cost share assistance for rehabilitation

(1) Assistance authorized

The Secretary may provide financial assistance to a local organization to cover a portion of the total costs incurred for the rehabilitation of structural measures originally constructed as part of a covered water resource project. The total costs of rehabilitation include the costs associated with all components of the rehabilitation project, including acquisition of land, easements, and rights-of-ways, rehabilitation project administration, the provision of technical assistance, contracting, and construction costs, except that the local organization shall be responsible for securing all land, easements, or rights-of-ways necessary for the project.

(2) Amount of assistance; limitations

The amount of Federal funds that may be made available under this subsection to a local organization for construction of a particular rehabilitation project shall be equal to 65 percent of the total rehabilitation costs, but not to exceed 100 percent of actual construction costs incurred in the rehabilitation. However, the local organization shall be responsible for the costs of water, mineral, and other resource rights and all Federal, State, and local permits.

(3) Relation to land use and development regulations

As a condition on entering into an agreement to provide financial assistance under this subsection, the Secretary, working in concert with the affected unit or units of general purpose local government, may require that proper zoning or other developmental regulations are in place in the watershed in which the structural measures to be rehabilitated under the agreement are located so that—

(A) the completed rehabilitation project is not quickly rendered inadequate by additional development; and

(B) society can realize the full benefits of the rehabilitation investment.

(c) Technical assistance for watershed project rehabilitation

The Secretary, acting through the Natural Resources Conservation Service, may provide technical assistance in planning, designing, and implementing rehabilitation projects should a local organization request such assistance. Such assistance may consist of specialists in such fields as engineering, geology, soils, agronomy, biology, hydraulics, hydrology, economics, water quality, and contract administration.

.....

(j) Recordkeeping and reports

(1) Secretary

The Secretary shall maintain a data base to track the benefits derived from rehabilitation projects supported under this section and the expenditures made under this section. On the basis of such data and the reports submitted under paragraph (2), the Secretary shall prepare and submit to Congress an annual report providing the status of activities conducted under this section.

(2) Grant recipients

Not later than 90 days after the completion of a specific rehabilitation project for which assistance is provided under this section, the local organization that received the assistance shall make a report to the Secretary giving the status of any rehabilitation effort undertaken using financial assistance provided under this section.

7 U.S. Code § 1010 - Land conservation and land utilization

The Secretary is authorized and directed to develop a program of land conservation and land utilization, in order thereby to correct maladjustments in land use, and thus assist in controlling soil erosion, reforestation, preserving natural resources, protecting fish and wildlife, developing and protecting recreational facilities, mitigating floods, preventing impairment of dams and reservoirs, developing energy resources, conserving surface and subsurface moisture, protecting the watersheds of navigable streams, and protecting the public lands, health, safety, and welfare, but not to build industrial parks or establish private industrial or commercial enterprises.

7 U.S. Code § 1010a - Soil, water, and related resource data

In recognition of the increasing need for soil, water, and related source data for land conservation, use, and development, for guidance of community development for a balanced rural-urban growth, for identification of prime agriculture producing areas that should be protected, and for use in protecting the quality of the environment, the Secretary of Agriculture is directed to carry out a land inventory and monitoring program to include, but not be limited to, studies and surveys of erosion and sediment damages, flood plain identification and utilization, land use changes and trends, and degradation of the environment resulting from improper use of soil, water, and related resources.

16 U.S. Code § 1600 - Congressional findings

The Congress finds that—

- (1) the management of the Nation's renewable resources is highly complex and the uses, demand for, and supply of the various resources are subject to change over time;
- (2) the public interest is served by the Forest Service, Department of Agriculture, in cooperation with other agencies, assessing the Nation's renewable resources, and

developing and preparing a national renewable resource program, which is periodically reviewed and updated;

(3) to serve the national interest, the renewable resource program must be based on a comprehensive assessment of present and anticipated uses, demand for, and supply of renewable resources from the Nation's public and private forests and rangelands, through analysis of environmental and economic impacts, coordination of multiple use and sustained yield opportunities as provided in the Multiple-Use Sustained-Yield Act of 1960 (74 Stat. 215; 16 U.S.C. 528-531), and public participation in the development of the program;

(4) the new knowledge derived from coordinated public and private research programs will promote a sound technical and ecological base for effective management, use, and protection of the Nation's renewable resources;

(5) inasmuch as the majority of the Nation's forests and rangeland is under private, State, and local governmental management and the Nation's major capacity to produce goods and services is based on these nonfederally managed renewable resources, the Federal Government should be a catalyst to encourage and assist these owners in the efficient long-term use and improvement of these lands and their renewable resources consistent with the principles of sustained yield and multiple use;

(6) the Forest Service, by virtue of its statutory authority for management of the National Forest System, research and cooperative programs, and its role as an agency in the Department of Agriculture, has both a responsibility and an opportunity to be a leader in assuring that the Nation maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity; and

(7) recycled timber product materials are as much a part of our renewable forest resources as are the trees from which they originally came, and in order to extend our timber and timber fiber resources and reduce pressures for timber production from Federal lands, the Forest Service should expand its research in the use of recycled and waste timber product materials, develop techniques for the substitution of these secondary materials for primary materials, and promote and encourage the use of recycled timber product materials.

16 U.S. Code § 1601 - Renewable Resource Assessment

(a) Preparation by Secretary of Agriculture; time of preparation, updating and contents

In recognition of the vital importance of America's renewable resources of the forest, range, and other associated lands to the Nation's social and economic well-being, and of the necessity for a long term perspective in planning and undertaking related national renewable resource programs administered by the Forest Service, the Secretary of Agriculture shall prepare a Renewable Resource Assessment (hereinafter called the "Assessment"). The Assessment shall be prepared not later than December 31, 1975, and

shall be updated during 1979 and each tenth year thereafter, and shall include but not be limited to—

- (1) an analysis of present and anticipated uses, demand for, and supply of the renewable resources, with consideration of the international resource situation, and an emphasis of pertinent supply and demand and price relationship trends;
- (2) an inventory, based on information developed by the Forest Service and other Federal agencies, of present and potential renewable resources, and an evaluation of opportunities for improving their yield of tangible and intangible goods and services, together with estimates of investment costs and direct and indirect returns to the Federal Government;
- (3) a description of Forest Service programs and responsibilities in research, cooperative programs and management of the National Forest System, their interrelationships, and the relationship of these programs and responsibilities to public and private activities;
- (4) a discussion of important policy considerations, laws, regulations, and other factors expected to influence and affect significantly the use, ownership, and management of forest, range, and other associated lands; and ^[1]
- (5) an analysis of the potential effects of global climate change on the condition of renewable resources on the forests and rangelands of the United States; and
- (6) an analysis of the rural and urban forestry opportunities to mitigate the buildup of atmospheric carbon dioxide and reduce the risk of global climate change, ^[2]

(b) Omitted

(c) Contents of Assessments

The Secretary shall report in the 1979 and subsequent Assessments on:

(d) 3 Public involvement; consultation with governmental departments and agencies

In developing the reports required under subsection (c) of this section, the Secretary shall provide opportunity for public involvement and shall consult with other interested governmental departments and agencies.

(d) 3 Congressional policy of multiple use sustained yield management; examination and certification of lands; estimate of appropriations necessary for reforestation and other treatment; budget requirements; authorization of appropriations

(1) It is the policy of the Congress that all forested lands in the National Forest System shall be maintained in appropriate forest cover with species of trees, degree of stocking, rate of growth, and conditions of stand designed to secure the maximum benefits of multiple use sustained yield management in accordance with land management plans.

(e) Report on herbicides and pesticides

The Secretary shall submit an annual report to the Congress on the amounts, types, and uses of herbicides and pesticides used in the National Forest System, including the beneficial or adverse effects of such uses.

[1] So in original. The word “and” probably should not appear.

[2] So in original. The comma probably should be a period.

[3] So in original. Two subsecs. (d) have been enacted.

16 U.S. Code § 1603 - National Forest System resource inventories; development, maintenance, and updating by Secretary of Agriculture as part of Assessment

As a part of the Assessment, the Secretary of Agriculture shall develop and maintain on a continuing basis a comprehensive and appropriately detailed inventory of all National Forest System lands and renewable resources. This inventory shall be kept current so as to reflect changes in conditions and identify new and emerging resources and values.

**Proposed USFS Directive on Ground Water Resource Management
Forest Service Manual 2560**

Section-by-Section State-by-State Comments

September 23, 2014

The States “own” waters within their boundaries, and western states assign vested property rights to the use of waters, as well as temporarily permitting uses of Waters of the States.

Alaska

The U.S. Forest Service’s proposed groundwater directive is akin to the Forest Service requiring a person with a State issued driver’s license who wants to drive on or even near Forest Service System lands to also pass a U.S. Forest Service administered driver’s test and be issued a federal driver’s license before being allowed to operate their vehicle on or near Forest Service System land.

Section 2560.0 *Authorities - enumerates statutes, regulations, and executive orders*

Idaho

The USFS is governed by the Organic Administration Act ("Organic Act"). 16 U.S.C.A. §§ 473-475, 477-482,551. The Organic Act establishes the purposes of the national forest system: “No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber” 16 U.S.C.A. § 475. The Multiple Use Sustained Yield Act ("MUSYA") provides: “[T]he national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” 16 U.S.C.A. § 528. The MUSYA, however, merely supplemented the primary purposes of watershed preservation and timber supply. *U.S. v. New Mexico*, 438 U.S. 696,708 (1978). The purpose of the national forests is not water management, but the protection of watersheds for use by downstream users by preventing erosion through land use management practices such as preserving trees and underbrush. USFS limitation or prevention of downstream water use and control of state water resources was not contemplated by the USFS' organic statutes.

Nevada

We question the legal basis by which the USFS asserts it has authority for the actions proposed in the Directive. The Directive provides a lengthy recitation of statutes, executive orders and regulations, which it asserts provide it with the authority to “manage” groundwater; however, our review of those citations of authority do not support the USFS’ position, nor does the Directive contain analysis of how these cited authorities specifically authorize the activities set forth in the Directive. While many of the authorities stress the need to protect water resources and direct the USFS to do

through secondary activities which may be within the purview of the USFS, none of the authorities provide the USFS with water rights in groundwater or with any direct authority to “manage” groundwater.... Its authority is to manage the forest, which provides watershed protection by forest coverage... [T]here is simply no authority for the USFS to do what it proposes through the Directive.

In 1935, the United States Supreme Court in the case of *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935) interpreted three acts – the Mining Act of 1866, 1870 amendment to Mining Act and Desert Land Act of 1877 – and held these three acts effectively severed all waters upon the public domain from the land itself. The Court held that the three acts indicate congressional intent to defer to state water law. It held that the first two acts confirmed that the water laws in western states would determine rights in non-navigable water on public land and that the Desert Land Act of 1877 effectively severed all water upon the public domain from the land itself. The Court held that all water on the public domain is public juris [public right], and is subject to the plenary control of the designated states.

It is of great concern to us that the USFS in its Directive states that a number of Federal statutes direct or authorize water management on National Forest System lands. We believe this is a misstatement of the law, and thus the Directive in many instances, stands in direct contradiction to state law.

Montana

As you are aware, Montana is a prior appropriation state and manages water rights conjunctively for both surface water and groundwater. The DNRC is the agency tasked with administration of Montana’s exclusive jurisdiction over new water uses and changes in existing uses within the state of Montana. The authority and criteria for approval of new permits and changes in use are set forth in state statute.... The USFS Groundwater Directive along with the associated Key and Common Questions and Answers document recognize Montana’s authority with respect to allocation and appropriation of all groundwater in the state and confirm that the directive will not interfere with Montana’s exercise of its authority over water use including USFS lands.

North Dakota

Insofar as the United States Forest Service (USFS) may consider its land management authority to imply a right of ownership or control of the groundwater beneath federally owned lands, it will be in conflict with State authority defined under the North Dakota State Constitution and under State Century Code which reserves all water as “*Waters of the State*” to be held and appropriated for the beneficial use of its citizens.

The authority cited under Directive #2560.01 establishing a federal mandate for watershed management to protect and improve water resources for multiple uses and improvement of navigable streams, cannot be construed as federal ownership of groundwater. Watershed management is a land management practice for control of the movement and quality of runoff to streams. It does not constitute a federal authority

over groundwater beneath the land surface, which is a *Water of the State*. Compliance with State law, as cited in several sections of the Directive, must be based on a clear understanding of the primacy of State jurisdiction over the allocation of its waters.

Insofar as the Service is using its authority, rights and prerogatives as land managers to regulate the construction and operation of points of diversion on its lands it is not in conflict with State jurisdictions.

Directives requiring plans and documentation for proposed uses (#2363), monitoring of pumping (Directive #2564), cleanup of contaminated groundwater (Directive #2565), collaborative strategies for sustaining groundwater uses (#2568), and for cooperative monitoring of groundwater (#6 and #8 of Directive #2363) contain concepts that are consistent with current State law, policy and practice and are reasonable land management prerogatives of land managers if carried out by State authority.

Many of the priorities presented in the USFS Groundwater Resource Management Directives for USFS managed lands can be implemented cooperatively within the framework of State law.

South Dakota

The implementation of this proposed directive expands the authority of a federal agency with no Congressional authorization and without regard or deference to state water laws.

Washington

A tenet of western states water law is that states have primary authority regarding water allocation decisions within their boundaries. Historically, Congress has given substantial deference to states over decisions to allocate and assign property rights to surface and ground waters within their borders.

The Washington State Department of Ecology (Ecology) submits these comments in the interest of role clarity, and to extend an offer of cooperation regarding the Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560.

The state of Washington enacted its Groundwater Code in 1945, Wash. Rev Code 90.44. The groundwater code established a groundwater water right permitting system to be applied in conjunction with the existing surface water right permitting system, Wash. Rev Code 90.03. The groundwater code also establishes that certain withdrawals are exempt from the water right permitting system. Typical permit-exempt uses found within Forest Service boundaries are small withdrawals associated with domestic and seasonal residences, which may use up to 5,000 gallons per day. In addition, groundwater for stockwatering may be used without limitation, provided the water is not simply wasted. Other common uses include withdrawals associated with Forest Service facilities, campgrounds, water supply, and hydropower electric projects.

Wyoming

The USFS fails to cite any federal statute or court decision which provides for or describes

its authority to manage groundwater because there is no such explicit authority under federal law. After reviewing all the authority citations provided in Section 2560.0 I., we find none that provide explicit authority over groundwater.

Section 2560.02.1 Objectives - “To *manage* groundwater underlying NFS lands *cooperatively with States and Territories . . . and Tribes* to promote long-term maintenance or restoration of groundwater systems and their groundwater-dependent ecosystems....”

Idaho

The meaning of “manage” and “cooperatively” are unclear. The State is solely responsible for administering, allocating, and distributing the public water of Idaho.

Nevada

The USFS already has the right to participate as an applicant or protestant on water right applications for the use of groundwater on the USFS lands. It can apply for water rights itself for uses not covered under implied federal reserved water rights, but the objective set forth in FSM 2560-2, “to manage groundwater underlying USFS lands *operatively with States and Territories and Tribes*” misstates the law and proper role of the USFS. Groundwater resources are not USFS resources, despite that they may be located under USFS lands.

South Dakota

The proposed directive states the Forest Service will cooperatively manage resources with states and others with common responsibilities, yet the Forest Service has no authorized responsibility to manage ground water. Rather, the directive mandates the Forest Service to insert the agency into ground water issues on Forest Service and non-Forest Service land, effectively circumventing state processes. This is contrary to federal court decisions, which have never recognized a federal reserved water right to ground water.

The proposed directive contains a number of regulatory redundancies, requiring the Forest Service to conduct and provide oversight of activities regulated by other federal, state, and local entities and for which the Forest Service has no regulatory authority.

Washington

In addition, the State Legislature has directed Ecology to implement the Columbia River Water Management Act, Wash. Rev. Code 90.90. The purpose of this 2006 Legislation is to develop new water supplies “to meet the economic and community development needs of people and the instream flow needs offish.” The legislation directs Ecology to “aggressively pursue” the development of water supplies. This plan will include reservoir improvements to provide water supply to the Yakima River basin for fish, communities, and agriculture. These reservoirs have been in place and in use for many years as part of the United States Bureau of Reclamations’ Yakima Irrigation Project authorized by

Congress in 1905. As a member of the Yakima Basin Integrated Plan Workgroup it is our expectation that the U.S. Forest Service serve as a supportive and collaborative partner to implement this vital, innovative, and broadly supported water management plan, including already approved projects that will provide water for fish and habitat.

Section 2560.03.1 Policy – “Focus *Forest Service groundwater resource management* on those portions of the groundwater system that if depleted or contaminated would have an adverse effect on surface resources or present or future uses of groundwater.”

Idaho

The meaning of “Forest Service groundwater resource” is unclear. The USFS may hold water rights, but it does not own all groundwater underlying national forest lands. Ground water is a public water of the State of Idaho.

The meaning of “management” is unclear. The State is solely responsible for administering, allocating, and distributing the public water of Idaho.

Washington

Ecology understands the Forest Service has a legitimate interest in ensuring that these resources are managed in a manner that supports the purposes for which its federal lands are managed. As discussed below, Ecology believes this will best be accomplished by engaging with respective states directly to share your concerns and identify opportunities for information and data sharing.

Section 2560.03(2) Hydraulic Connectivity (see also 2561(1))

“*Manage* surface water and groundwater resources as hydraulically interconnected . . . unless it can be demonstrated otherwise.”

Idaho

The meaning of “manage” is unclear. The State is solely responsible for administering, allocating, and distributing the public water of Idaho.

Nevada

The Directive indicates that all surface water and groundwater resources will be presumed to be hydraulically interconnected, and should be considered as interconnected in all planning and evaluation activities, unless it can be demonstrated otherwise using site-specific information. Nevada does not assume that there is a single source unless proven otherwise. Therefore, this provision is contrary to Nevada law. Moreover, the policy appears to *expressly* recognize that some states treat it as different sources, but the Directive disregards that fact. This may be important in light of the fact that the Federal Register indicates that after adoption of the Directive, all state and local laws and

regulations that conflict with the directive or that impede its full implementation would be preempted. Nevada believes there has been no express or even implied preemption of state law. If it came to pass that Nevada were forced to adopt a presumption of hydraulic connectivity, it would prove problematic due to the fact that it will place additional burdens on water right applicants to *disprove* this presumption, including determining what standards and methods will be used to rebut the presumption.

Also, this broad treatment as a single source appears contradicted by other portions of the Directive where USFS wants to treat them as different sources for its own purposes. For example, Section 2560.03.7(b) provides that “[s]ince groundwater sources generally have more stable water quality and quantity than surface water sources, favor development of suitable and available groundwater sources rather than surface water sources for drinking water at Forest Service administrative and recreational sites (FSM 7420).” Here, the USFS wants to treat surface water and groundwater separately for its own interests, which is contrary to the broad policy it already indicated which would be to treat them as one source. In short, the Directive is internally inconsistent.

South Dakota

Assuming all surface water and ground water is connected as defined by "groundwater ecosystems" is simply not scientifically based. The proposed directive makes this across the board assumption and places the burden of proof on states and users of water. **The proposed directive should not include the requirement to consider all ground water and surface water connected.**

Wyoming

The proposed directive states that surface and groundwater shall be considered a single hydraulically interconnected resource, unless it can be demonstrated that they are not. Under Wyoming law, the burden lies with the USFS to prove a hydraulic connection sufficient to warrant conjunctive administration, not with individual appropriators to prove non-connection as the Proposed Directive appears to assert. In many cases, groundwater is not meaningfully connected to surface water, but regardless Wyoming's presumption of non-connection is superior. This is not to concede that there is even a legal basis for a debate on this subject, since Wyoming water law controls the permitting, adjudication, and regulation of surface and groundwater rights on USFS lands within the State.... At a minimum, absent site specific analysis establishing interconnectedness satisfying state law, we request that the USPS incorporate into the proposed directive language which states that the USFS will recognize and respect the laws of the state within which it is operating.

Section 2560.03.3 “Evaluate and *manage* the surface water-groundwater hydrological system. . .”

Idaho

The meaning of “manage” is unclear. The State is solely responsible for administering, allocating, and distributing the public water of Idaho.

Section 2560.03.4.d “*Require monitoring and mitigation* appropriate to the scale and nature of potential effects . . . when authorizing a proposed use or Forest service activity that has a significant potential to adversely affect *NFS groundwater resources*.”

Idaho

The USFS does not have authority to unilaterally require mitigation for ground water depletions. The State is solely responsible for administering, regulating, and distributing all water rights in Idaho and for determining injury to a water right.

The meaning of “NFS groundwater resources” is unclear. The USFS may hold water rights, but it does not own all ground water underlying national forest lands. Ground water is a public water of the State of Idaho.

Section 2560.03.6.a “*Manage groundwater quantity and quality* on NFS lands in cooperation with appropriate State agencies.”

Idaho

The meaning of “manage” is unclear. The State is solely responsible for administering, allocating, and distributing the public water of Idaho.

The USFS does not have authority to control the water quantity or water quality requirements for water rights in Idaho. The State is responsible for administering, regulating, and distributing all water rights in Idaho and for determining injury to a water right.

Nevada

This section indicates that the USFS should manage groundwater quantity on USFS lands in cooperation with appropriate state agencies, but in (6)(c) admits that others have the authority to regulate the resource and in (6)(e) that the USFS must obtain rights for many of its activities under state law. The authority for the management of groundwater rests with the states and is not done “cooperatively” with the USFS. As already stated above, the USFS’ rights extend to participating in the state process for acquisition and use of water as an applicant or protestant, but it goes too far to say that the USFS has jurisdiction or any role as a manager of groundwater resources.

Washington

Because we share an interest in protecting groundwater resources, it is incumbent upon the Forest Service and Ecology to collaborate in a manner that assures adequate review and oversight, while avoiding wasteful duplication of effort and over-regulation of water users. Like other states with water right permitting systems, Washington State has considerable expertise and experience in assessing the impacts of groundwater withdrawal proposals. Ecology believes that the Forest Service would benefit from consultation with the state water resources program to better understand how it can complement existing state processes without duplicating them.

The potential areas of cooperation include:

- 1) Communicating with each other regarding our respective review processes for actions with potential groundwater impacts, including process timing, key milestones, decision documents, and opportunities for each party to participate and comment.
- 2) Considering joint pre-proposal meetings with applicants and other interested parties regarding projects that would affect groundwater resources on Forest Service land.
- 3) Sharing information regarding existing groundwater data (e.g., state well log and water right databases, identification of water rights located on federal land, and available groundwater quality data) and discussing opportunities for data sharing.
- 4) Cooperating on studies to characterize groundwater water resources (including water quality) and impacts from actions undertaken on federal land.
- 5) Exploring opportunities to ensure that state and federal regulators do not place contradictory study and monitoring requirements on groundwater permit holders.
- 6) Including State water right and water resources experts in training of Forest Service staff regarding the management of groundwater.

These forms of cooperation may be anticipated in Section 2560.03(6) of the proposed directive. We support this expression of cooperation.

Section 2560.03.6.d *“Manage wellhead protection areas, source water protection areas, and critical aquifer protection areas that are designated pursuant to the ... SDWA ... or State equivalent.”*

Idaho

The meaning of "manage" is unclear. The State is solely responsible for administering, allocating, and distributing the public water of Idaho.

Section 2560.03.6.e “*Require written authorization holders operating on NFS lands to obtain water rights in compliance with applicable state law, FSM 2540, and the terms and conditions of their authorization.*”

Idaho

The State controls the terms and conditions that may be placed on a water right. If the USFS wants certain conditions to be placed on a water right issued under state law, it must participate in the state water right process.

North Dakota

Directive #2560.03.6.e should be modified as follows to accommodate State law: “*Obtain water rights when applicable under State law for groundwater and groundwater-dependent surface water needed by the Forest Service (FSM 2540).*”

Section 2560.03.6.f “*Evaluate all State applications for water rights on USFS lands and neighboring lands...and identify any potential injury...*”

North Dakota

This is within the right of any party under State law. The USFS is entitled to be notified of any water permit applications within one mile of its lands, or within twelve miles of its public water systems. Furthermore, USFS may request to be a party of record to any water permit application it considers may affect its management priorities. USFS should be aware, however, that while it has a right to present and defend its interests, and while they will be investigated as part of the permit process, USFS priorities will not necessarily be more highly weighted than those of the applicants and other parties, simply because USFS is a federal entity. Impediments to water permit requests must be deemed evident and not theoretical, and must be substantial vs. the applicants interests. North Dakota

In North Dakota a water right requires a point of diversion, and cannot be obtained for a natural flow, a spring, a water-table elevation or other natural outlet. The directive should be implemented with recognition that water table elevations are not normally protected under

State law, which is permissive of beneficial use. USFS has the right of every land manager to be a party of record to water permits affecting its interests and to defend its interests.

The protection of a water table elevation is not considered a right under State law, it is evaluated under public interest considerations in the permit process, and the value of the specific water-table resource must be “weighed and balanced” against other public interest considerations.

South Dakota

There are many items in the proposed directive requiring the Forest Service to independently assess and evaluate ground water use and impacts to Forest Service resources, conduct research of ground water, and issue new and renew existing special use permits, which may involve ground water use. However, there are no time constraints that the Forest Service is required to act and make a final decision. There are also no due process options for permit applicants. Delays to projects and plans by the water users could be devastating during water shortages and financially burdensome for applicants. **The proposed directive must include time limits for Forest Service reviews and other activities. It should also include a process through which an applicant can appeal any final Forest Service decision.**

Washington

Many of the Forest Service concerns can be addressed by engaging in existing state water right permitting and water resource planning processes, and Ecology would welcome the Forest Service' comments with respect to proposed water appropriations that affect Forest Service resources. There are approximately 400 pending applications for new water rights for locations within national forests in Washington State, as well as more than 7500 existing water right certificates, permits, and claims.

Ecology is the agency created to administer Washington State's Water Management Program, including its comprehensive water quality and water rights programs, and to present the views and recommendations of the state regarding any federal license or permit relating thereto at any proceeding, negotiation, or hearing in such regard conducted by the federal government

Wyoming

The Proposed Directive seeks to give the USFS an administrative and approval role on all applications on NFS and adjacent lands regarding groundwater resources. Under subparagraph (4d) and (5), the USPS appears to insert itself in groundwater permitting on and off forest lands. The Directive furthermore uses the term "adjacent" which is not defined in the Directive. Groundwater permitting decisions are a state function, not a USFS role, even on USFS lands. This section further seeks to provide a groundwater permit review and evaluation role for the USFS, without any indication of what may come from such review or evaluation, under what timeframe it might occur, or any standard of review.

Section 2560.03.7(c) "...encourage the use of water sources locate off NFS lands..."

Nevada

Section 2560.03.7(c) provides that the USFS will encourage the use of water sources located off USFS lands when the water use is largely or entirely off USFS lands, unless the applicant is a public water supplier and the proposed source is located in a designated municipal supply watershed for that supplier (FSM 2542). Although this section does not appear to directly attempt to usurp state authority, it is nonetheless troubling that the USFS would advance a

general position against having points of diversion on USFS land when the place of use is off USFS land, except for municipal suppliers. The water resources belong to the citizens of Nevada and Nevada rejects any broad-based policy of the USFS to block non-municipal suppliers from appropriating groundwater on USFS lands.

Section 2560.03.8.a *“Require measurement and reporting to the Forest Service in the corresponding written authorization of the quantity of water utilized for all public drinking water systems that withdraw groundwater from NFS lands and that are classified as community water systems under the SDWA.”*

Idaho

The term “corresponding written authorization of the quantity of water utilized” is unclear. To the extent this means a state-issued water right, the State controls the terms and conditions that may be placed on a water right. If the USFS wants certain conditions to be placed on a water right issued under state law, it must participate in the applicable state water right process.

Section 2560.03.8.b *“Require measurement and reporting to the Forest Service in the corresponding written authorization of the quantity of water utilized for all groundwater withdrawals from high- capacity wells located on NFS lands”*

Idaho – ditto

Section 2560.03.8.c *“Require measurement and reporting to the Forest Service in the corresponding written authorization of the quantity of water injected for those large water-injection wells located on NFS lands that open into a geological formation containing fresh water”*

Idaho – ditto

Section 2560.04(f)(1) – Responsibility - Instructs regional foresters to develop agreements as needed with States, Tribes, other Federal agencies, and private entities to investigate and assess USFS groundwater resources.

Nevada

Nevada Revised Statute § 532.170 provides that the State Engineer, for and on behalf of the State of Nevada, is authorized to enter into agreements with the United States Geological Survey, the United States Soil Conservation Service, and any state agency, subdivision or institution having jurisdiction in such matters, for cooperation in making stream measurements, underground water studies, snow surveys, or any investigations related to the development and use of the water resources of Nevada. The State Engineer has no authority to enter into agreements with the

USFS for this purpose.

South Dakota

The proposed directive also requires additional scientific personnel to conduct projects that are the responsibility of other federal and state agencies. For example, the Forest Service is now directed to do research and ground water evaluations and assessments through this proposal. This is commonly what the US Geological Survey and Environmental Protection Agency do. It is not only a redundancy of responsibilities it is doubling expenditures of these activities in an already overextended and unbalanced federal budget.

Section 2560.04(f)(3) instructs the USFS to develop standards for the use, conservation and protection of USFS groundwater resources.

Nevada

It is the states that develop the standards for use of groundwater, not the USFS and these groundwater resources are not USFS resources.

Section 2560.04(f)(5) instructs the USFS to ensure that training on groundwater resource management is available to regional and forest staff and ensure that qualified groundwater personnel are available to address groundwater issues, including authorization of appropriate groundwater uses, in the region.

Nevada

It is the states that have the authority to authorize appropriate groundwater uses and the USFS should ensure that training addresses matters factually and legally within the USFS jurisdiction.

Section 2560.04(h) 2560.04h.9 “Appropriately address adverse impacts on groundwater resources from proposed and *authorized activities* such as *by modifying the activities or adopting mitigation strategies.*”

Idaho

The State is responsible for administering, regulating, and distributing all water rights in Idaho. To the extent the USFS believes its water rights are being injured by existing authorized water use on national forest lands, it should seek administration of its water right through the applicable state process.

Wyoming

USFS insertion into the permitting process itself is inappropriate where it possesses no right or standing under state law. It is unknown what role the USFS intends to play as it determines

impact or injury from water right application review, when only the SEO, Board of Control, or state courts have authority to make an injury determination. By inserting itself in the “adjacent land” review process and otherwise, and through less-than-fully prescribed application of the definitions of “groundwater dependent ecosystems” and “sustainable use,” it is clear that the USFS intends to assert itself and influence state-permitted water right decisions within and beyond the reach of Forest Service boundaries regardless of whether or not it holds valid water rights.

Washington

Ecology can require permits for discharges-to-ground (in the context of groundwater) so that they do not pollute waters of the state. Typical activities that are regulated include permits to discharge industrial wastewater or stormwater to ground and registration of Underground Injection Control wells (dry wells, large septic systems, and aquifer injection remediation wells). Likely activities on Forest Service lands would include mines, stormwater dry wells, and wastewater treatment systems that discharge to ground. The Forest Service and Ecology's Toxic Cleanup Program also cooperate on toxic cleanup sites such as the Holden Mine in the context of contaminated groundwater.

Subsection 2560.04(5) instructs that all applications for water rights under state water law on USFS or adjacent lands should be evaluated for the potential to affect USFS groundwater resources.

Nevada

Here again, the Directive keeps repeating that the groundwater under the USFS lands is USFS water and this is again a misstatement of the law and the facts.

South Dakota

The proposed directive requires the Forest Service to evaluate all state water right applications on and adjacent to Forest Service lands. In South Dakota, there is a state regulatory process in which the Forest Service can intervene by petition in a water right application. **The Forest Service can participate in the process of any water right application by becoming a party to a contested case hearing.** There is concern, however, that the Forest Service will unnecessarily burden the state agency by questioning every permit on or near Forest Service land. This is especially concerning because the Forest Service believes all ground water and surface water is hydraulically connected, and ground water resources in South Dakota, especially those underlying Forest Service land in the Black Hills, are extensive in size. **The Forest Service needs to allow the state to do their job for which they have statutory authority and not disrupt water use appropriation for which the Forest Service has no statutory authority.**

Washington

See above for comment for Section 2560.04(h).

Subsection 2560.04(6) instructs the USFS to coordinate and implement agreements with Federal, State, and local agencies, Tribes, and other interested parties for management and restoration of groundwater resources.

Nevada

Again, “management” of groundwater resources is used broadly, where USFS does not have authority to manage over the jurisdiction of the state.

Section 2560.05 defines “ground water dependent ecosystems”

Alaska

The definition of “ground water dependent ecosystems” includes areas of cave & karst systems. Several factors make it imperative that individual national forests have latitude within the directive to adapt it to local conditions. Some of the most productive timber lands in the Tongass National Forest are within the extensive karst areas of the forest. To meet the requirement of the Tongass Timber Reform to “seek to meet the demand” for timber supply and support the region’s economic structure, the proposed regulations must allow Tongass National Forest managers to apply local expertise when considering forest management activities on karst topography.

The proposed directive effectively implements a redundant layer of government regulation over the allocation and use of State owned water resources (both groundwater and surface water, because of the assumption built into the proposed directive that groundwater and surface water are everywhere hydrologically connected unless proven otherwise), and effectively gives the federal government a veto power over State decisions to issue a water right for projects on or even near Forest Service System lands.

Section 2561.1

“Assume that there is a hydrological connection between groundwater and surface water, regardless of whether State law addresses these water resources separately, unless a hydrogeological evaluation using site-specific data indicates otherwise...”

Section 2561, paragraph 1 on page 22 of the draft manual

Alaska

The proposed directive mandates that groundwater and surface water be assumed to be the same source of water (assume a hydrological connection exists at every proposed project site) regardless of whether State law addresses these water resources separately and this assumption prevails unless a hydrological evaluation using site-specific data indicates otherwise.

Alaska does not agree that any assumptions should be made regarding connectivity, and further asserts that it is the State who leads this review as part of its inherent right to manage water resources. It will be problematic and far reaching if, without any direction or authority, the USFS attempts to require a project proponent to bear the cost of the hydrological evaluation. The assumption that groundwater and surface water are hydrologically connected at every proposed project site doesn't give any consideration to the physical and technical aspects of the hydro-geology as currently understood. For example, the depth of proposed groundwater withdrawal or injection is not even mentioned, and thus doesn't incorporate any discussion about different aquifer layers separated by impervious geologic layers, such as routinely found in Alaska.

North Dakota

Whenever groundwater/surface-water connections are important factors, they should be determined with due diligence. Section 2561.1 employs a value judgment rather than a hydrologic principle, which amounts to a policy of "rebuttable presumption against use." Groundwater is a Water of the State, and a permit for its use would not be denied unless a substantial impact on a resource of major importance is indicated with due diligence - not an assumption. The assumption of connectivity should be removed.

Section 2561, paragraph 3 on page 23 of the draft manual

Alaska

The proposed directive requires all new and reissued written authorizations the Forest Service issues to contain terms requiring the authorization holder to provide to the Forest Service all groundwater monitoring data **and information** collected in compliance with applicable local, State, or other Federal requirements. This doesn't make any exception for information that may be granted proprietary and confidential status under State law. This is further indication of an attempt to manage the use of groundwater. This also places a significant and unnecessary reporting burden upon applicants.

Section 2561.2 *"groundwater resources of NFS lands ... NFS groundwater resources"*

Idaho

The meaning of "NFS groundwater resources" is unclear. The USFS may hold water rights, but it does not own all ground water underlying national forest lands. Ground water is a public water of the State of Idaho.

Subsection 2561.21 - Locatable Mineral Mining. This section instructs that the USFS can apply terms and conditions for the reasonable use of groundwater for locatable minerals operations.

Nevada

It is not the jurisdiction of the USFS to condition the use of groundwater; the use of the groundwater is under the jurisdiction of the State. The USFS may have jurisdiction on how that water may be used on the land, but does not have jurisdiction over the appropriation of said groundwater.

Section 2561.22.2 *"Require or recommend, as appropriate, that . . . applicable State agencies appropriate lease terms, design modification, and approval conditions, as applicable, to protect NFS groundwater resources"*

Idaho

The USFS cannot require that a State agency use certain lease terms, design modifications, or approval conditions.

Section 2561.25.4 *"Provide to the authorizing entity recommendations or requirements, as appropriate, to protect NFS water resources, including whether the water produced from geothermal resource operations should be allowed to discharge into surface drainages."*

Idaho

The meaning of "NFS groundwater resources" is unclear. The USFS may hold water rights, but it does not own all ground water underlying national forest lands. Ground water is a public water of the State of Idaho.

To the extent the State is the authorizing entity in these matters, the USFS cannot require it take certain actions.

Section 2562.1 *"When issuing or reissuing an authorization or approving modification of an authorized use, require implementation of water conservation strategies to limit total water withdrawals from NFS lands..."*

Idaho

The State is solely responsible for administering, regulating, and distributing all water rights in Idaho. To the extent the USFS believes its water rights are being injured by existing authorized water use on national forest lands, it must seek administration of its water right through the applicable state processes.

Section 2563.1 *"Deny proposals to construct wells on or pipelines across NFS lands which can reasonably be accommodated on non-NFS lands and which the proponent is proposing to construct on NFS lands because they afford a lower cost and less restrictive location than non-NFS lands (FSM #2703.2)"*

North Dakota

This is unreasonable stated and should be modified. Section 2563.3.1 contrasts with Section 2560.7.c, which directs managers to *"Encourage the use of water sources located off NFS lands when the water use is largely or entirely off NFS lands, unless the applicant is a public water supplier and the proposed source is located in a designated municipal supply watershed for that supplier (FSM #2542)."*

Directive #2560.7.c, as cited, aligns much better with provisions of ND State law pertaining to water use and the public interest. Under NDCC 61-01-04, *"The United States, or any person, corporation, limited liability company, or association may exercise the right of eminent domain to acquire for public use any property or rights existing when found necessary for application of water to beneficial use."* Under ND State law land control may not be used to impair water access and use in projects involving the public interest. However, the cost-benefit prohibition in relation to private interests, as stated, is extreme. To unnecessarily cause private parties, industrial or agricultural uses, to incur additional costs in obtaining water access or infrastructure when harm is minimal would be irresponsible. It is suggested that the underlined portion be deleted, and that it be specified that benefits of access will be weighed against land use impact.

Section 2563.3, paragraph 2.a. on page 30 of the draft manual

Alaska

The proposed directive doesn't confine its requirements to just evaluating potential impacts to groundwater/surface water, but also requires an applicant's proposal (for water withdrawals) to the U.S. Forest Service to identify the beneficial uses of the water. If the U.S. Forest Service is requiring a statement of the beneficial use of the proposed water use, it is injecting itself into the State's jurisdiction to determine what constitutes a beneficial use of the water that is owned by the State.

Wyoming - Section 2563.3(2a)

The Proposed Directive puts an undue burden on Wyoming water users, from the proposed required measurement and reporting of produced groundwater, to the possible hydrogeologic studies needed to show that an aquifer is not connected to surface waters (paragraph 2561 (1) of the directive). Wyoming appropriators will be faced with a new slate of obligations and costs for water use on these public lands.

Section 2563.3, paragraph 2.e. on page 31 of the draft manual

"Obtain water rights under applicable State law for groundwater and groundwater-dependent surface water needed by the Forest Service (FSM #2540)"

Alaska

The proposed directive requires an applicant's proposal to identify existing water withdrawals in the vicinity of the proposed project to allow for evaluation of its potential to adversely affect NFS water resources and facilities **and neighboring non-NFS water supplies**. It appears from this wording that the U.S. Forest Service is injecting itself into the State's jurisdiction to determine if a proposed new water use will affect existing water right holders, even those existing water right holders not located on Forest Service System lands.

The proposed directive attempts to require notifying the U.S. Forest Service (and thus invoking the proposed federal oversight and potential federal veto of proposed groundwater/surface water uses) of water use applications to the State in situations where the State may not have otherwise felt the need to notify the U.S. Forest Service (e.g. where the proposed project is outside of but near Forest Service System lands).

As noted earlier, Alaska asserts that the USFS has no jurisdiction over the management and use of groundwater. Alaska also asserts that it has primary jurisdiction over the management of surface waters. The Forest Service states that by implementing the proposed directive it will not be interfering with the State water right issuance process, and thus implying that the FS will not be usurping State jurisdiction over water use allocation. However, even if the proposed directive is not based on any new federal authority, or in fact a new interpretation of existing authority, in practice, the USFS proposed changes can, and likely will, change what was effectively an exclusive State process for allocating the use of water within each State's borders into a process of concurrent federal and State oversight and allocation of water (surface and subsurface water) within and near Forest Service System lands. Further, Alaska unequivocally rejects the USFS attempt to manage groundwater under lands near USFS boundaries.

North Dakota

Section 2563.3.6.e "may be problematic in principle, in that North Dakota cannot grant a water right for a natural flow, a water table elevation, or a groundwater contribution to a spring or other natural outlet. A North Dakota State water right must have a point of diversion. The State Engineer will consider the impact on surface-water depletions as part of evaluating a water permit affecting downstream permitted beneficial uses, or protection of local surface water levels (under "public interest") in case of a major resource (such as the Chase Lake Refuge, which has very high value for wildlife habitat). However, State law is permissive of "beneficial use," and except in the case of a demonstrable high value, the State does not treat surface water exposures of aquifers as a protected priority over pumping diversions for beneficial use.... To establish a policy by which water-table exposures are given primary protection over other uses would be to render the freshwater supplies unusable under most circumstances and, if protected water elevations were established under wet conditions, would furthermore give regulatory protection to flooding of agricultural lands during the wettest phases of the climatic cycles..... USFS cannot assume controlling authority over the decision of the ND State Engineer, which weighs and balances the public interest in all applications."

Section 2563.4, paragraph 6 on page 32 of the draft manual

Alaska

The manual specifically states that “the authorized officer shall deny the application if NFS groundwater resources would be compromised, **despite mitigation**, if the proposed use were authorized....” Although the Forest Service documents refer to working with project applicants to come up with mitigation measures that would allow a project to be approved in spite of perceived groundwater/surface water impacts, this amounts to proposing a federal veto power over a State’s decision to issue a water right (for a project on or near Forest Service System lands) to allocate the use of the water that is owned by the State. The statement further seems to suggest Forest Service ownership of groundwater resources within the boundaries of Forest Service administered lands which is fundamentally NOT true.

Section 2563.7.2 “Ensure that all new and reissued authorizations...*provide for modification of their terms and conditions at the sole discretion of the authorized officer ... to prevent the authorized ground water withdrawals or injections from significantly reducing the quantity or unacceptably modifying the quality of surface or groundwater resources on NFS lands.*”

Idaho

The meaning of "NFS groundwater resources" is unclear. The USFS may hold water rights, but it does not own all ground water underlying national forest lands. Ground water is a public water of the State of Idaho.

The State is solely responsible for administering, allocating, and distributing the public water of Idaho. To the extent the USFS believes its water rights are being injured by existing authorized water use on national forest lands, it must seek administration of its water right through the applicable state processes.

Washington

See above for comment for Section 2560.04(h).

Section 2563.8.4 “If monitoring detects insufficiency of mitigation measures or additional or unforeseen adverse impacts on *NFS water resources* from groundwater withdrawals or injections ... *[a]dd monitoring or mitigation measures, change or limit the activities authorized, modify the holder's operations, or otherwise modify the terms and conditions* of the authorizations if deemed necessary ... to prevent the authorized groundwater withdrawals or injections from significantly reducing the quantity or unacceptably modifying the quality of surface or *groundwater resources on NFS lands.*”

Idaho

The meanings of "NFS groundwater resources" and "groundwater resources on NFS lands" are unclear. The USFS may hold water rights, but it does not own all ground water underlying national forest lands. Ground water is a public water of the State of Idaho.

The State is responsible for administering, regulating, and distributing all water rights in Idaho. To the extent the USFS believes its water rights are being injured by existing authorized ground water use on national forest lands, it must seek administration of its water right through the applicable state processes.

Section 2564 - Measuring & Reporting Volume of Extracted or Injected Water

North Dakota

This requirement is met by current State use requirements. All permitted use is reported at least annually (in some cases real time telemetric data is required), and available for USFS examination. Injected water is regulated by the ND Health Department.

Section 2567.3 “Apply federal reserved water rights (the Reservation or Winters doctrine) to groundwater as well as surface water to meet Federal purposes under the organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act.”

Idaho

The USFS may hold federal reserved or state-based water rights, but it does not own all ground water underlying national forest lands. Any USFS claim to the ground water resources of the State of Idaho must either be established under state law or determined through a general stream adjudication.... Any USFS claim to the ground water resources of the State of Idaho has been or will be determined in these general stream adjudications or through the state administrative process. The USFS' water rights are subject to state administration in priority with all other water rights.

Congress and the courts have consistently recognized the authority of states to manage, control, and administer water within each state's boundaries. State administration of water should not be encumbered with a parallel, duplicative, shadow administration of water by the USFS.

Montana

The USFS Groundwater Directive indicates that the USFS intends to assert that federal reserved water right principles apply to groundwater as well as surface water. While not expressly addressed in the USFS Groundwater Directive, the associated Key and Common

Questions and Answers states that the directive will not affect the provisions of water compacts or settlements negotiated between a state and the federal government. On April 17, 2007, Montana entered into a compact with the USFS settling all federal reserved water rights and state based water rights claimed by the USFS in Montana. That compact is codified under Section 85-20-1401, MCA. The compact establishes the extent of all USFS claims for federal reserved water rights to both surface water and groundwater. As a result, the compact precludes any future claim to federal reserved water rights by the USFS in Montana. For that reason and considering the time and resources expended by the USFS and the state of Montana negotiating the compact, the DNRC would like to see the USFS Groundwater Directive expressly acknowledge that the USFS is bound by any compacts entered prior to the date of the directive.

Nevada

Section 2567 subsection 3 – Legal Considerations in Managing Groundwater Resources instructs USFS personnel to apply State law when filing groundwater claims during a state water rights adjudication and administrative proceedings. However, it further instructs them to file claims under the implied federal reserved rights doctrine (*Winters*) to groundwater as well as surface water to meet Federal purposes under the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act. The Directive instructs USFS personnel to assert claims to groundwater which is not a settled question of law.

North Dakota

In this statement USFS is proposing to employ reserved rights intended to allow federal facilities to achieve their purposes (water needs in national parks, etc.) in an expansive manner to create a federal control over the waters themselves. Groundwater has never been included as a federal reserved water right. To claim control over water-table elevations on USFS lands as a federal reserve right would constitute a serious encroachment on State groundwater authority, and a clear attempt at federal overreach. USFS is reminded that it has no authority over groundwater. Groundwater is *Water of the State*, and its appropriation and protection are under State authority. USFS authorities are related to land use. The State would oppose any attempts at establishing a federal Reserve Water Rights for purpose of limiting or federally regulating groundwater use.

Wyoming

Specifically, it states, The USFS does not have federal authority over groundwater, nor does it have a general, federal reserved right to groundwater. There is no ability to “apply” federal reserved water rights by any method other than congressional action, as a result of U.S. Supreme Court or McCarren Amendment decisions, or through properly approved agreement with the States. It certainly cannot occur through simple assertion or application as the proposed directive appears to suggest.

Section 2568 - Strategies for Sustaining Groundwater Resources

North Dakota

Collaborative local State, Federal and Tribal efforts to sustain the availability and usability of groundwater over the long term; encouraging conjunctive uses (like artificial recharge), and water transfer when necessary are completely in line with State "sustainable use" policy and a highly developed water use and monitoring program that has been developed by the State over many years.

Washington

See above for comment for Section 2560.04(h).

Other Miscellaneous Comments

USFS “Technical Guide to Managing Ground Water Resources” (FS-881 May 2007)

Alaska

The Forest Service states that it hasn't in the past adequately evaluated potential groundwater impacts from its own projects or for other project applicants to which it grants authorizations, and thus the proposed directive will be the basis of a consistent federal assessment process to evaluate potential groundwater quantity and quality impacts.

Alaska believes that current USFS groundwater planning guides are more than adequate. Further, the USFS only has to look to its current groundwater planning documents to see the fallacy of the argument that a new directive is needed to adequately evaluate potential groundwater impacts. USFS “Technical Guide to Managing Ground Water Resources” (FS-881 May 2007) is a 281 page document which gives clear guidance to staff on the framework of hydrogeologic principles, methods of investigation and for managing ground water resources. This manual clearly outlines the USFS role as the land manager and also appropriately acknowledges the state's role as the groundwater use regulator. This manual does what the new Directive is purported to be doing.

USFS Land Management Responsibilities

Alaska

Alaska also believes that in Alaska the USFS does and will continue to have a role in the water right or water authorization process as the land manager.⁶ They also may have secondary jurisdictions as related to some water issues, so Alaska looks to the USFS for their approval on issues such as possessory interests, and also seeks USFS input as to permit conditions to be placed on State issued water use permits and authorizations (in the same manner that the Alaska

Department of Fish and Game or Alaska Department of Environmental Conservation are consulted). If the USFS changed the proposed directive to require USFS field staff to utilize state water law and permitting processes to achieve their land management objectives and to cooperate and coordinate with each State, this directive would likely meet the goals as stated by Chief Peña, and in the latest expanded question and answer paper.

USFS Staffing/Expertise Inadequate

Alaska

The states all have a much larger number of technical staff trained in the fields of hydrology and water management. It is unrealistic to think that the USFS is going to get increased federal funding in a time of budget deficits for staff to perform a function which is primarily, and at times exclusively, the jurisdiction of the states. In reality, this will likely have the effect of either cursory review by the USFS staff, or lengthy delays in the processing of USFS special use permits. Further, it would make more sense for the USFS to consider the state experts' opinions as a primary resource, instead of considering the need for "contract services".

Alaska respectfully requests that the USFS convene a working group of state and tribal water use managers to assist in developing a new draft directive.

Conflict with recent USFS/Wyoming Memorandum of Understanding

Wyoming

In January 2012, the USFS and the State of Wyoming entered into a Memorandum of Understanding (MOU) that runs through calendar year 2016. In this MOU, the USFS agreed to recognize and respect the laws and Constitution of the State of Wyoming and to honor permitting practices that applied equally to the United States and to water right applications by Wyoming citizens. The Proposed Directive, creating a federal reach into an area where states have been recognized as the exclusive entity for water right permitting and administration, would conflict with the recent MOU....

Treated Like any Other Landowner

Wyoming

It is important to remember that not only is the USFS already treated the same as other landowners when it applies for permits to appropriate water, or when it satisfies statutory standing requirements for protest or other contested case procedures, it is immune from condemnation actions to which private landowners are not when access to water is concerned (Wyo. Const. art. 1, § 32). In this regard, the USFS is already in a more favorable position when acquiring or influencing water use facilities than is the typical Wyoming landowner.

Lack of State Consultation

Nevada

We are troubled by the lack of state consultation in the development of the Directive. The Directive asserts that it will not have substantial direct effects on the states, on the relationship between the Federal government and the states, and the distribution of powers between the various levels of government, which would require compliance with the state consultation criteria set forth in Executive Order 13132. However, as amply demonstrated above, we believe the Directive implicates serious federalism concerns and significantly impacts the states by infringing on state water rights. The assertion of implied federal reserved water rights to groundwater has the ability to significantly impact state water rights and state water management. We find it disturbing that the USFS found it significant enough to consult with the tribes under Executive Order 13175, but determined that the states do not warrant similar consultation under Executive Order 13132. The lack of consultation by the USFS is particularly poignant in light of Section 3 of that Order, which states in pertinent part that “the national government shall grant the states the maximum administrative discretion possible. Intrusive Federal oversight of state administration is neither necessary nor desirable.” Waiting until the public comment period to solicit state input does not allow for meaningful consideration of Nevada’s views and concerns.

South Dakota

The Forest Service has not sufficiently engaged states in its development of the ground water directive. The process your agency has pursued ignores the required state consultation criteria established in Executive Order 13132. This order specifically directs federal agencies to act in strict accordance with governing law and to only preempt state law where there is clear evidence that Congress intended such preemption. The order also requires federal agencies to consult with states to determine whether federal objectives can be obtained by other means in instances, such as this, where there is significant uncertainty as to whether national action is authorized or appropriate. Waiting until a public comment period to solicit state input ignores states' primary water management responsibilities and does not allow for meaningful state input, including consideration of alternative ways of meeting federal objectives. The proposed directive should be withdrawn until such time as the above issues can be resolved with the input of state agencies with the authority to regulate ground water use.

Lack of Due Process

South Dakota

There are many items in the proposed directive requiring the Forest Service to independently assess and evaluate ground water use and impacts to Forest Service resources, conduct research of ground water, and issue new and renew existing special use permits, which may involve ground water use.

However, there are no time constraints that the Forest Service is required to act and make a final decision. There are also no due process options for permit applicants. Delays to projects and plans by the water users could be devastating during water shortages and financially burdensome for applicants. **The proposed directive must include time limits for Forest Service reviews and other activities. It should also include a process through which an applicant can appeal any final Forest Service decision.**



FOREST SERVICE MANUAL
NATIONAL HEADQUARTERS (WO)
WASHINGTON, DC

FSM 2500 – WATERSHED AND AIR MANAGEMENT

CHAPTER 2560 – GROUNDWATER RESOURCE MANAGEMENT

Amendment No.: The Directive Manager completes this field.

Effective Date: The Directive Manager completes this field.

Duration: This amendment is effective until superseded or removed.

Approved: NAME OF APPROVING OFFICIAL **Date Approved:** mm/dd/yyyy
Title of Approving Official

Posting Instructions: Amendments are numbered consecutively by title and calendar year. Post by document; remove the entire document and replace it with this amendment. Retain this transmittal as the first page(s) of this document. The last amendment to this title was 2500-2000-2 to 2520.

New Document	2560	39 Pages
Superseded Document(s) (Amendment Number and Effective Date)	None	0 Pages

Digest:

2560 – Establishes new chapter and sets forth direction on managing groundwater resources associated with National Forest System lands and clarifies roles, responsibilities, and procedures for addressing groundwater resource management. Refers to the National Forest System by using the acronym NFS throughout the chapter.

FSM 2500 – WATERSHED AND AIR MANAGEMENT
CHAPTER 2560 – GROUNDWATER RESOURCE MANAGEMENT

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2560.01 – Authority

1. Statutes. A number of Federal statutes direct or authorize water or watershed management on National Forest System (NFS) lands (FSM 2501). Several of these statutes grant authority or provide direction to the Forest Service for the management of groundwater resources:

- a. Organic Administration Act (16 U.S.C. §§ 473-475, 477-482, 551). This act contains the basic authority for watershed management on NFS lands. The act provides for improvement and protection of the national forests and securing favorable conditions of water flows. The act also authorizes use of water within national forests for domestic, mining, milling, and irrigation purposes under applicable State or Federal law.
- b. Weeks Act (16 U.S.C. §§ 480, 500, 513-19, 521, 552, 563). This act authorizes the Secretary of Agriculture to acquire forested, cut-over, or denuded lands in the watersheds of navigable streams as necessary to regulate the flow of navigable streams.
- c. Clarke-McNary Act (16 U.S.C. § 568 *et seq.*). This act authorizes the Secretary of Agriculture to identify Federal lands that are primarily valuable for streamflow protection and that can be economically administered as part of the national forests.
- d. Bankhead-Jones Farm Tenant Act (7 U.S.C. §§ 1010-1012). This act authorizes the acquisition of damaged or non-productive agricultural lands and requires development of a program of land conservation to control soil erosion, preserve natural resources, protect fish and wildlife, mitigate floods, conserve surface and subsurface moisture, and protect the watersheds of navigable streams.
- e. Domestic Water Supply Act (16 U.S.C. §§ 552a-552d). This act provides for special management of watersheds on NFS lands to protect municipal water supplies.
- f. Multiple Use–Sustained Yield Act (MUSYA) (16 U.S.C. §§ 528-531). This act provides that watershed protection is one of the five co-equal purposes for which NFS lands were established and are to be administered.
- g. Forest and Rangeland Renewable Resources Planning Act (FRRRPA) (16 U.S.C. § 1600 *et seq.*). This act emphasizes the need for Forest Service programs to protect and improve the quality of soil, water, and air resources on NFS lands. This act defines the NFS to include all national forests and national grasslands and other lands and waters administered by the Forest Service. This act also requires the development and maintenance of a comprehensive inventory of all NFS lands and renewable resources, including water. Additionally, FRRRPA mandates

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consideration of the physical, biological, economic, and other applicable sciences in the development and maintenance of land management plans for units of the NFS.

h. Federal Land Policy and Management Act (FLPMA) (43 U.S.C. § 1701 *et seq.*). This act authorizes issuance of rights-of-way for water diversions, including wells, on NFS lands. This act requires terms and conditions in authorizations for these rights-of-way to minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment, Federal property, and the public interest.

i. Safe Drinking Water Act (SDWA) (42 U.S.C. § 300f *et seq.*). This act provides for the safety of public drinking water supplies. The SDWA establishes safe drinking water standards and protects surface and groundwater supplies from contamination (FSM 7420). Pertinent sections of the act include: Wellhead Protection (42 U.S.C. § 300h-7); Source Water Assessment (42 U.S.C. § 300j-13); Drinking Water Standards (42 U.S.C. § 300g-1(b)); and Underground Injection Control (42 U.S.C. §§ 300h-300h-5).

j. Clean Water Act (CWA) (33 U.S.C. § 1251 *et seq.*). This act provides for restoration and maintenance of the chemical, physical, and biological integrity of waters in the United States (FSM 7430 and 7440). The CWA regulates the discharge of pollutants into waters through point sources. In addition, the CWA provides for management of non-point source pollution by States. Pertinent sections of the act include: Water Quality Standards and Implementation Plans (33 U.S.C. § 1313); Certification (33 U.S.C. § 1341); National Pollutant Discharge Elimination System (33 U.S.C. § 1342); and Permits for Dredged or Fill Material (33 U.S.C. § 1344).

k. Resource Conservation and Recovery Act (RCRA) (42 U.S.C. § 6901 *et seq.*). This act regulates the generation, management, transportation, treatment, storage, and disposal of waste materials, including hazardous waste (FSM 2130, 2160, and 7460).

l. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. § 9601 *et seq.*). This act authorizes the U. S. Environmental Protection Agency (EPA) and other Federal agencies, including the U. S. Department of Agriculture (USDA), to respond to actual and threatened releases of hazardous substances, pollutants, and contaminants (FSM 2160). CERCLA can be used to assign liability to potentially responsible parties (PRPs) for response and restoration costs, including cleanup of water contamination.

m. Surface Mining Reclamation and Control Act (SMCRA) (30 U.S.C. § 1201 *et seq.*). This act provides authority to the U. S. Department of the Interior, Office of Surface Mining (OSM), and other Federal agencies to mitigate the environmental, health, and safety effects of abandoned surface mines, primarily those used to recover coal resources.

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2. Other Authorities.

- a. National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (40 CFR part 300). The NCP establishes procedures and standards for responding to oil spills and releases of hazardous substances, pollutants, and contaminants. The NCP implements the response and restoration provisions of the CWA, CERCLA, and the Oil Pollution Act (33 U.S.C. § 2701 *et seq.*). The NCP also defines “natural resources” to include water, groundwater, and drinking water and designates the responsible federal land management agency as the Federal trustee for the natural resources located on, over, or under lands administered by that agency.
- b. Compensatory Mitigation for Losses of Aquatic Resources (40 CFR part 230). These regulations establish performance standards and criteria for application of compensatory mitigation, mitigation banks, and in lieu programs by holders of a CWA Section 404 permit issued by the U.S. Department of the Army (principally, the Corps of Engineers) to improve the quality and success of compensatory mitigation projects. Planning, implementation, and management of compensatory mitigation projects are improved by emphasizing a watershed approach in selecting compensatory mitigation project locations; requiring measurable, enforceable ecological performance standards and regular monitoring for all types of compensation; and specifying the components of a complete compensatory mitigation plan, including assurances of long-term protection of compensation sites, financial assurances, and identification of parties responsible for specific tasks.
- c. Executive Order 12580. This Executive order delegates the President’s authority under CERCLA to the Secretary of Agriculture to perform investigations, conduct response actions, seek cost recovery, enter into agreements with PRPs to perform investigations and conduct response actions, and issue unilateral administrative orders, subject to certain conditions, with respect to actual and threatened releases on lands administered by USDA. This Executive order also delegates authority to the Forest Service, as the Federal trustee, to assess damages to natural resources on NFS lands, recover costs, and enter into agreements with PRPs to conduct restoration actions on NFS lands.
- d. Executive Order 11990. This Executive order requires Federal agencies in carrying out their responsibilities to minimize the destruction, loss, and degradation of wetlands and to preserve and enhance their natural and beneficial values.
- e. Executive Order 11988. This Executive order requires Federal agencies to restore and preserve the natural and beneficial values of floodplains.
- f. Executive Order 12088. This Executive order requires Federal agencies to comply with applicable pollution control standards and to take all necessary actions for the

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prevention, control, and abatement of environmental pollution with respect to Federal facilities and activities under their control.

g. Executive Order 13423. This Executive order requires Federal agencies to reduce the intensity of water consumption, implement environmentally sustainable practices affecting water quantity and quality, and implement environmental management systems to address aspects of agency operations that affect the environment. This Executive order also requires Federal agencies to ensure that all future written authorizations require the holder to address as appropriate provisions of the Executive order that fall within the scope of their operations.

h. Homeland Security Presidential Directive 7 (HSPD-7). This Presidential directive requires certain Federal agencies to identify and prioritize critical national infrastructure and resources for protection from terrorist acts that could cause catastrophic health impacts or mass casualties; undermine public confidence; or disrupt essential government functions, essential services, or the economy. HPSD-7 designates the EPA as the lead agency for the water sector (which includes water supply and wastewater management). EPA has required that other Federal agencies limit public access to information regarding the specific location of water sources and water and wastewater treatment facilities.

i. USDA Manual 5600-001 (DM 5600-001). This manual provides direction on prevention, control, and abatement of environmental pollution from all facilities and on all lands administered by USDA and from all activities conducted by USDA.

j. USDA Departmental Regulation 9500-8 (DR 9500-8). This Departmental regulation provides direction for all USDA agencies on protection and enhancement of groundwater quality. DR 9500-8 provides for protection of water users and the natural environment from exposure to harmful substances in groundwater and enhancement of groundwater quality where appropriate through prudent use and careful management of potential contaminants and promotion of programs and practices that prevent contamination.

k. Forest Service Directives. FSM 2540 and FSH 2509.16 establish procedures for complying with Federal policy and State water rights laws and FSM 2540 establishes procedures for management of watersheds on NFS lands that serve as a source of municipal water supplies. FSM 2880 provides direction on inventorying and monitoring groundwater resources. FSH 2709.11 establishes procedures for administering special uses.

2560.02 – Objectives

1. To manage groundwater underlying NFS lands cooperatively with States and Territories (hereafter “States”) and Tribes to promote long-term maintenance or

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restoration of groundwater systems and their groundwater-dependent ecosystems, including springs, seeps, lakes, ponds, rivers and streams, cave and karst or pseudokarst systems, riparian areas, and wetlands.

2. To gather and make available information on NFS groundwater resources and their uses to provide for informed decisions during Forest Service planning and development and implementation of Forest Service projects.
3. To consider the effects on NFS groundwater resources of all proposed activities on and uses of NFS lands and to avoid, minimize, or mitigate adverse effects to the extent practical or as required by law.
4. To authorize the use of NFS lands to access groundwater resources, including uses for water supply purposes, only when the use is conducted in a manner that complies with federal laws, regulations and policies and protects NFS water resources and when the use of water is authorized by the State.

2560.03 – Policy

1. Primary Focus of Groundwater Resource Management. Focus Forest Service groundwater resource management on those portions of the groundwater system that if depleted or contaminated would have an adverse effect on surface resources or present or future uses of groundwater.
2. Water Resource Connectivity. Manage surface water and groundwater resources as hydraulically interconnected, and consider them interconnected in all planning and evaluation activities, unless it can be demonstrated otherwise using site-specific information.
3. Scale of Hydrological Resource Management. Evaluate and manage the surface water–groundwater hydrological system on an appropriate spatial scale, taking into account surface water and groundwater watersheds, which may not be identical and relevant aquifer systems.
4. Effects of Proposals on Groundwater Resources.
 - a. Consider the effects of proposed actions on groundwater quantity, quality, and timing prior to approving a proposed use or implementing a Forest Service activity.
 - b. Use appropriate science, technology, models, information, and expertise to address groundwater resources when revising or amending applicable land management plans and evaluating project alternatives.

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- c. Require that written authorization holders provide to the authorized officer all groundwater monitoring data and information they collect in compliance with local, State, or other Federal requirements. Appropriately use the data and information while evaluating effects on groundwater resources from ongoing activities and proposed actions.
 - d. Require that monitoring and mitigation appropriate to the scale and nature of potential effects is conducted, evaluated, and reported when authorizing a proposed use or Forest Service activity that has a significant potential to adversely affect NFS groundwater resources.
5. Limiting Impacts on Groundwater Resources. Unless otherwise required by law, prevent, minimize, or mitigate, to the extent practical, adverse impacts from Forest Service actions on groundwater resources and groundwater-dependent ecosystems located on NFS lands.
6. Cooperation with Other Governmental Entities.
- a. Manage groundwater quantity and quality on NFS lands in cooperation with appropriate State agencies and, if appropriate, EPA.
 - b. Collaborate with other Federal agencies, such as experts from the U.S. Geological Survey, State, Tribal and local governments, State geological surveys, universities, and industry and other appropriate organizations when locating, investigating, or assessing the hydrogeology and groundwater resources of NFS lands (FSM 2880).
 - c. Provide comments on proposed activities either on or off NFS lands that may adversely affect groundwater resources on NFS lands to the proponents and to State, Tribal, or other Federal entities that have the authority to regulate those activities.
 - d. Manage wellhead protection areas, source water protection areas, and critical aquifer protection areas (“protection areas”) that are designated pursuant to the provisions of the SDWA (42 U.S.C. §§ 300h-6, 300h-7, and 300j-13) or State equivalent and by utilizing the procedures for municipal supply watersheds in [36 CFR 251.9](#) and FSM 2542.
 - e. Obtain water rights under applicable State law for groundwater and groundwater-dependent surface water needed by the Forest Service (FSM 2540). Require written authorization holders operating on NFS lands to obtain water rights in compliance with applicable State law, FSM 2540, and the terms and conditions of their authorization.
 - f. Evaluate all applications to States for water rights on NFS lands and applications for water rights on adjacent lands that could adversely affect NFS groundwater

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resources, and identify any potential injury to those resources or Forest Service water rights under applicable State procedures (FSM 2541).

7. Use of Groundwater.

- a. Efficiently use groundwater needed to meet NFS purposes, especially in water-scarce areas or during periods of drought.
- b. Since groundwater sources generally have more stable water quality and quantity than surface water sources, favor development of suitable and available groundwater sources rather than surface water sources for drinking water at Forest Service administrative and recreational sites (FSM 7420).
- c. Encourage the use of water sources located off NFS lands when the water use is largely or entirely off NFS lands, unless the applicant is a public water supplier and the proposed source is located in a designated municipal supply watershed for that supplier (FSM 2542).
- d. Require implementation of water conservation strategies in Forest Service administrative and recreational uses (FSM 7420). Ensure incorporation of water conservation strategies in operating plans for new and reissued special use authorizations involving groundwater withdrawals from high-capacity wells and new and reissued special use authorizations for public drinking water systems.

8. Measurement of Groundwater Withdrawals and Injections on NFS Lands.

- a. Require measurement and reporting to the Forest Service in the corresponding written authorization of the quantity of water utilized for all public drinking water systems that withdraw groundwater from NFS lands and that are classified as community water systems under the SDWA (FSM 7420). Include this requirement in written authorizations for affected public drinking water systems to be authorized, reauthorized, or modified. Include this requirement in existing written authorizations for affected public drinking water systems if the authorization allows for amendment to incorporate new terms required by a directive at the discretion of the authorized officer or if the holder consents.
- b. Require measurement and reporting to the Forest Service in the corresponding written authorization of the quantity of water utilized for all groundwater withdrawals from high-capacity wells located on NFS lands (including those sourced from springs). Withdrawals do not have to be measured or reported from wells equipped only with a hand or windmill pump. Include this requirement in written authorizations for affected wells to be authorized, reauthorized, or modified. Include this requirement in existing written authorizations for affected wells if the

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authorization allows for amendment to incorporate new terms required by a directive at the discretion of the authorized officer or if the holder consents.

c. Require measurement and reporting to the Forest Service in the corresponding written authorization of the quantity of water injected for those large water-injection wells located on NFS lands that open into a geological formation containing fresh water (less than 10,000 parts per million (ppm) total dissolved solids (TDS)). Include this requirement in written authorizations for affected water injection wells to be authorized, reauthorized, or modified. Include this requirement in existing written authorizations for affected water injection wells if the authorization allows for amendment to incorporate new terms required by a directive at the discretion of the authorized officer or if the holder consents.

9. Compliance with Groundwater Requirements.

a. Prevent groundwater contamination from all Forest Service activities involving transporting, storing, mixing, and applying pesticides and other potentially toxic or hazardous materials; cleaning, repairing and fueling equipment; and disposing of fuels, lubricants, pesticides, or other potentially toxic or hazardous materials by following applicable Federal, State, and local requirements and the hazardous materials provisions of the Health and Safety Code Handbook (FSH 6709.11) and applying best management practices.

b. For all Forest Service uses and activities authorized or to be authorized involving water wells (including monitoring wells), require compliance with applicable Federal, State, or local standards or, as applicable, American Society for Testing and Materials (ASTM), American Water Works Association (AWWA), National Ground Water Association (NGWA), or other water well industry standards for the design, construction, and abandonment of wells. Include this requirement in existing and new written authorizations for affected water wells.

c. For all Forest Service uses and activities authorized or to be authorized involving water wells (including monitoring wells), require that wells that are no longer needed or maintained be abandoned in compliance with applicable Federal, State, or local standards or, as applicable, ASTM, AWWA, NGWA, or other water well industry standards for decommissioning wells. Include this requirement in existing and new written authorizations for affected water wells.

d. For all Forest Service uses and activities authorized or to be authorized involving on-site wastewater systems, including septic systems and holding tanks, require compliance with applicable Federal, State, or local standards for the design, construction, operation, and maintenance of wastewater systems. Include this requirement in existing and new written authorizations for affected on-site wastewater

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- systems. For Forest Service facilities, follow the direction in FSM 2330, 7410, and 7430 and the Sanitary Engineering and Public Health Handbook (FSH 7409.11).
- e. Install appropriate water conservation equipment and utilize suitable water conservation practices at all Federally owned facilities (FSM 7420).
 - f. Ensure that Forest Service-operated drinking water systems that use groundwater comply with EPA's National Primary Drinking Water Regulations, including the National Primary Drinking Water Standards (40 CFR parts 141-142) (FSM 7420). Require holders that operate public drinking water systems using water wells located on NFS lands to comply with the National Primary Drinking Water Standards and to submit the results of any required monitoring to the Forest Service.
 - g. Follow applicable State and EPA SDWA regulations for evaluating whether a groundwater source of drinking water is under the direct influence of surface water (FSM 7420).
 - h. Comply with applicable Federal, State, Tribal, and local requirements (FSM 7420) for wellhead and critical aquifer protection (40 CFR part 149), and underground injection control, including for septic systems (40 CFR part 144). Additionally, ensure that all underground injection wells (Classes I through V under the SDWA) on NFS lands are inventoried with the appropriate State agency or EPA and meet all applicable requirements.
 - i. Manage groundwater resources in municipal supply watersheds per 36 CFR part 251.9 and FSM 2542.
10. Cleanup of Contaminated Groundwater.
- a. Use the procedures in FSM 2160 to conduct the appropriate response to contaminated groundwater or a potential threat of contamination of groundwater. Notify the National Response Center, as appropriate (FSM 2165).
 - b. Use the Forest Service's delegated authority under CERCLA to ensure cleanup of contaminated groundwater or otherwise respond to a potential threat of contamination resulting from a release or threatened release of a hazardous substance, as defined in 42 U.S.C. § 9601(14), or a pollutant or contaminant, as defined in 42 U.S.C. § 9601(33), that presents an imminent and substantial danger to the public health or welfare.
 - c. Where exercise of the Forest Service's CERCLA authority may not be appropriate, work with EPA or other Federal agencies under other applicable authorities such as RCRA, SMCRA, or CWA, or work with States under applicable State authority to clean up contaminated groundwater or otherwise respond to a potential threat of

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contamination resulting from a release or threatened release of a hazardous substance, as defined in 42 U.S.C. § 9601(14), a pollutant or contaminant, as defined in 42 U.S.C. § 9601(33), or petroleum or petroleum products excluded from the definition of “hazardous substance” in 42 U.S.C. § 9601(14).

11. Land Valuation and Groundwater. Require that an appropriate assessment of potential groundwater availability be conducted by qualified groundwater personnel as part of the appraisal process when water availability may be of significance on NFS lands proposed for a land exchange.

2560.04 – Responsibility

2560.04a – Washington Office, Staff Directors

It is the responsibility of all Washington Office, staff directors to:

1. Ensure that policy development in their area of responsibility with the potential to affect groundwater resources involves consideration of the potential impact on the quantity, quality, and timing of groundwater.
2. Formulate and maintain policies and procedures to minimize, to the extent practical, the impact of program activities in their area of responsibility on groundwater quantity, quality, and timing.

2560.04b – Washington Office, Directors of Watershed, Fish, Wildlife, Air, and Rare Plants and of Minerals and Geology Management

It is the responsibility of the Washington Office, Directors of Watershed, Fish, Wildlife, Air, and Rare Plants and of Minerals and Geology Management to:

1. Formulate and maintain groundwater policy and procedures within the NFS (FSM 1230.5).
2. Coordinate training on groundwater policy and management.
3. Coordinate development and maintenance of Servicewide data management capabilities for groundwater, including hydrogeology and soils, well construction and development, and water quantity and quality.
4. Coordinate groundwater policy and management with other Forest Service staffs, as appropriate.

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2560.04c – Washington Office, Director of Engineering

It is the responsibility of the Washington Office, Director of Engineering to:

1. Formulate and maintain policy and procedures for the use and protection of groundwater related to drinking water and wastewater infrastructure and SDWA Class V and RCRA injection wells, including compliance with applicable Federal and State regulations governing construction, maintenance, and waste and wastewater disposal (FSM 1230.5 and FSM 7400).
2. Formulate and maintain policy and procedures for implementation of Forest Service-delegated authority under CERCLA for cleaning up contaminated groundwater or otherwise responding to a release or threatened release of hazardous substances, pollutants, or contaminants into groundwater (42 U.S.C. § 9601; FSM 1230.5 and 2160).
3. Coordinate groundwater policy and management with other Forest Service staffs, as appropriate.

2560.04d – Washington Office, Directors of Recreation and Heritage Resources and Lands

It is the responsibility of the Washington Office, Directors of Recreation and Heritage Resources and Lands to:

1. Develop and maintain policy and procedures for processing special use applications and administering special use authorizations affecting NFS groundwater resources.
2. Coordinate development and maintenance of appropriate clauses in the Special Uses Handbook (FSH 2709.11) addressing special use authorizations involving groundwater uses with the Watershed, Fish, Wildlife, Air and Rare Plants; Minerals and Geology Management; and Engineering Staffs.
3. Coordinate implementation of groundwater policy and management with other Forest Service staffs, as appropriate.

2560.04e – Washington Office, Director of Environmental Sciences Research

It is the responsibility of the Washington Office, Director of Environmental Sciences Research to:

1. Formulate and maintain groundwater policy and procedures for all Forest Service research and development projects and facilities (FSM 1230.5).

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2. Incorporate research on significant groundwater issues, including groundwater-dependent ecosystems, into the environmental sciences program and enhance the capacity of the program to conduct that research.
3. Coordinate groundwater research with other Forest Service staffs, as appropriate.

2560.04f – Regional Foresters

It is the responsibility of regional foresters to:

1. Develop agreements as needed with States, Tribes, other Federal agencies, and private entities to investigate and assess NFS groundwater resources. Focus efforts on groundwater resources that are now or are reasonably expected to be developed or adversely affected by development.
2. Obtain water rights to groundwater and groundwater-dependent surface water that are needed by the Forest Service. Require written authorization holders operating on NFS lands obtain necessary water rights in compliance with applicable State law and the terms and conditions of their authorization. Consult with the local Office of the General Counsel prior to filing (FSM 2541).
3. Develop and implement standards for the use, conservation, and protection of NFS groundwater resources (FSM 2541).
4. Approve plans for the cleanup of contaminated groundwater on NFS lands in accordance with FSM 2160.
5. Ensure that training on groundwater resource management is available to regional and forest staff and ensure that qualified groundwater personnel are available to address groundwater issues, including authorization of appropriate groundwater uses, in the region.
6. Maintain cooperative relationships with other entities having an interest in groundwater in the States in their region.
7. Maintain adequate and readily accessible records of groundwater requirements and uses on and withdrawals from NFS lands.
8. Monitor program results and assist with reviews and oversight by higher line and staff officers.
9. Ensure that all legal requirements are met and best practices followed for transporting, storing, mixing, and applying pesticides and other potentially toxic or hazardous

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materials; for cleaning, repairing, and fueling equipment; and for disposing of fuels, lubricants, pesticides, or other potentially toxic or hazardous materials (FSH 6709.11).

2560.04g – Station Directors and Directors of the International Institute of Tropical Forestry, the Forest Products Laboratory, and the Job Corps National Field Office

It is the responsibility of station directors and Directors of the International Institute of Tropical Forestry, the Forest Products Laboratory, and the Job Corps National Field Office to:

1. Develop agreements as needed with States, Tribes, Federal agencies, and private entities to investigate and assess groundwater resources inside and outside the boundaries of experimental forests, ranges, grasslands, and watersheds (EFRGWs), Research Natural Areas (RNAs), and Job Corps Centers (JCCs) under their jurisdiction. Focus efforts on groundwater resources that are now or are reasonably expected to be developed or adversely affected by development. Where EFRGWs, RNAs, and JCCs are located in an NFS land management unit, consult with the regional forester in execution of these responsibilities.
2. Foster the development of research programs on groundwater issues, as appropriate to their jurisdiction.
3. Fulfill the same responsibilities enumerated for regional foresters in FSM 2543.04f, paragraphs 2 through 9, as applicable.

2560.04h – Forest and Grassland Supervisors

It is the responsibility of forest and grassland supervisors to:

1. Address in planning documents the long-term protection and sustainable use of groundwater and groundwater-dependent resources on NFS lands. Appropriately protect groundwater resources on NFS lands that are critically important to surface water resources or to natural features, ecosystems, or organisms.
2. Evaluate the quantity, quality, and probable yields of groundwater resources under their jurisdiction (FSM 2880). Focus efforts on groundwater resources that are now or are reasonably expected to be developed or adversely affected by development.
3. Inventory connections between the groundwater and surface water resources under their jurisdiction. Focus efforts on groundwater resources that are now or are reasonably expected to be developed or adversely affected by development.
4. In consultation with the regional forester and the local Office of the General Counsel, prepare or evaluate claims for water rights under applicable State law that are needed for

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beneficial uses of groundwater and groundwater-dependent surface water by the Forest Service and authorization holders operating on NFS lands (FSM 2541).

5. Evaluate all applications for State water rights on NFS lands and those on adjacent lands with the potential to affect NFS groundwater resources. Identify any injury to NFS water rights and groundwater resources in applicable Federal, State, and local proceedings (FSM 2541).
6. Coordinate and implement agreements with Federal, State, and local agencies, Tribes, and other interested parties for management and restoration of groundwater resources.
7. Safeguard drinking water by complying with:
 - a. Applicable requirements for wellhead, source water, and critical aquifer protection areas designated by a State or local government by utilizing procedures for municipal supply watersheds in 36 CFR part 251.9 and FSM 2542.
 - b. Underground injection control regulations of Federal, State, and local governmental agencies.
 - c. EPA's National Primary Drinking Water Standards (40 CFR parts 141-142), other SDWA regulations, and FSM 7420 at all Forest Service-owned drinking water systems with a groundwater source.
8. Use qualified groundwater personnel to address groundwater issues on NFS lands under their jurisdiction and to evaluate all Forest Service activities and proposed and authorized uses with the potential to adversely affect groundwater and groundwater-dependent resources.
9. Ensure that the effects on groundwater resources from authorized activities involving groundwater withdrawals are monitored and evaluated. Require that all groundwater monitoring data and information collected in compliance with local, State, or other Federal requirements are provided to the Forest Service by the holder and are included in monitoring and evaluating those effects. Appropriately address adverse impacts on groundwater resources from proposed and authorized activities, such as by modifying the activities or adopting mitigation strategies.
10. Ensure that all applicable legal requirements are met and all best practices are followed in all agency activities involving transporting, storing, mixing, and applying pesticides and other potentially toxic or hazardous materials; cleaning, repairing and fueling equipment; and disposing of fuels, lubricants, pesticides, or other potentially toxic or hazardous materials (FSH 6709.11).

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11. Collect appropriate land use fees for groundwater extraction, injection, and water pipeline operations authorized as special uses in accordance with FSM 2715 and FSH 2709.11, chapter 30. Land use fees do not apply to groundwater extraction or injection conducted as part of approved mineral or energy operations.

2560.04i – Research and Development Project, Program, and Team Leaders and Job Corps Center Directors

It is the responsibility of Research and Development project, program, and team leaders and Job Corps Center Directors to:

1. Include in land management plan revisions and amendments appropriate provisions for the long-term protection and sustainable use of groundwater resources in EFRGWs, RNAs, and JCCs under their jurisdiction. Protect groundwater resources under their jurisdiction that are critically important to surface water resources or natural features, ecosystems, or organisms. Where EFRGWs, RNAs, or JCCs are located in an NFS land management unit, consult with the forest supervisor in execution of these responsibilities.
2. Develop a research program to address groundwater issues, as appropriate to their jurisdiction.
3. Fulfill the same responsibilities enumerated for Forest Supervisors in FSM 2543.04h, paragraphs 2 through 8, as applicable.

2560.05 – Definitions

Aquifer. A geological formation or deposit that contains or transmits significant quantities of water (for example, to wells and springs). The term is usually restricted to those water-bearing geological units capable of yielding water sufficient to meet normal household needs.

Aquifer test. A field experiment, including a slug, packer, or pump test, designed to yield information on the *in-situ* hydraulic characteristics of an aquifer.

Artesian condition. Groundwater in an aquifer that is under pressure significantly greater than that of the atmosphere, due to the presence of an overlying confining unit, leading to a pressure sufficient to raise water in a well above the bottom of the overlying layer.

As-Built report. A written report submitted by a licensed professional engineer documenting that a water well or water pipeline has been constructed in compliance with the applicable engineering plans, special use authorization, and Federal, State, and local laws and regulations.

Confined aquifer. An aquifer that is bounded above and below by confining units.

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Confining unit. A geological formation or deposit that does not contain or transmit significant quantities of water relative to the hydraulic characteristics of adjacent formations. A type of geological unit that is a confining unit in one area may be an aquifer in another.

Community water system. Defined under the SDWA (33 U.S.C. § 300f(15)) as a public water system that serves 25 or more year-round residents or has 15 or more service connections used by year-round residents (40 CFR 141.2; FSM 7420.05).

Conjunctive use. Combined or coordinated usage of surface and groundwater to meet water supply needs.

Critical aquifer protection area. A sole source aquifer that a State may designate under a groundwater quality protection plan that has been approved by EPA under Section 208 of the CWA prior to June 19, 1986, or a sole or principal source aquifer for which a designation under the SDWA is pending before or has been approved by EPA (42 U.S.C. § 300h-6).

Epikarst. The relatively thick portion of bedrock in karst areas that extends downward from the base of the soil zone and is characterized by extreme fracturing and enhanced dissolution.

Flowpaths. Routes taken by groundwater, governed principally by the hydraulic gradient and the permeability of the geological media, as it moves through the subsurface from aquifer recharge areas, including injection wells and infiltration basins, to natural discharge areas or water production wells.

Groundwater. Subsurface water contained in unconsolidated deposits and bedrock.

Groundwater-dependent ecosystems (GDEs). Communities of plants, animals, and other organisms whose existence and life processes depend on access to or discharge of groundwater, such as springs, fens, seeps, areas of shallow groundwater, cave and karst systems, hyporheic and hypolentic zones, and groundwater-fed lakes, streams, and wetlands.

Groundwater resources. The groundwater systems and the groundwater-dependent ecosystems linked to those systems that are associated with one or more parcels or units of land.

Hydraulic head. A measurement at a location within an aquifer or body of surface water of water pressure, or total energy per unit weight, above a datum, usually measured as a water surface elevation. The distribution of hydraulic head through an aquifer determines where groundwater will flow, with flow occurring from higher to lower head.

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High-capacity well. A well or a set of wells located within a limited area and accessing the same aquifer or spring system, or a spring development that is or is capable of withdrawing water at a continuous rate of 35 gallons per minute (equivalent to 50,400 gallons per day, 6,737 cubic feet per day, or 0.15 acre-feet per day) or greater based upon a capacity test, pumping test, or measured or estimated daily water usage. Non-artesian wells accessed only using a hand or windmill pump are not high-capacity wells.

Hydraulic gradient. The ratio of the difference in the hydraulic head between two points and the distance between those points, typically determined through measurement of water-level elevations in two wells of a known separation distance.

Hydrogeology. The science that addresses subsurface waters and related geological aspects of surface waters.

Hyporheic zone and hypolentic zone. The interface between the groundwater system and surface water bodies (in streams, referred to as hyporheic; in lakes and wetlands, referred to as hypolentic) where an active exchange of water, solutes, and colloids takes place and often consists of multiple flowpaths connecting surface waters and their groundwater catchments.

Injection well. A well that puts water or other fluids into the ground.

Karst. Terrain created by the chemical solution of the bedrock, including carbonate rocks, gypsum, and to a minor extent other rocks, and characterized by disrupted surface drainage, abundant enclosed depressions, and a well-developed system of underground drainage, which may include caves and epikarst.

Large water injection well. An injection well that is utilized for water or wastewater and that has a casing with an inside diameter of 4 inches or more.

Monitoring. For purposes of FSM 2560 only, all procedures used to collect samples, data, and information on NFS resources, including groundwater and surface water.

Municipal supply watershed. A watershed that serves a public water system as that term is defined in the SDWA (42 U.S.C. § 300f(4)), as amended, or as defined in state safe drinking water statutes or regulations (FSM 2542.05).

Produced water. Groundwater withdrawn as a byproduct by an oil and gas or geothermal production operation.

Pseudokarst. Karst-like terrain formed in non-carbonate bedrock.

Publicly accessible water supply. A water supply that is used to provide drinking water or water of potable or near-potable quality to a business or organization; to a water

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distribution system that serves more than one property, facility, or lease; or to a governmental facility, and that is not to be confused with a “public water system” as defined in FSM 7420 and the SDWA.

Qualified groundwater personnel. Forest Service staff or contractors with appropriate education, training, and experience in groundwater science to satisfy project needs and, if applicable, licensed or registered to practice geology, hydrology, soil science, or engineering, as appropriate, in the State in which the project is located.

Recharge. The infiltration of water into the groundwater from the ground surface, the bottom of a surface water body, or a man-made feature, such as a storage pond.

Saturated zone. Layers of unconsolidated deposits or bedrock in which all of the voids are filled with water.

Source water protection area. A contributing area surrounding a public water system supply intake that is designed to protect the integrity of the water source and that has been formally designated under the SDWA (42 U.S.C. §§ 300h-6, 300h-7, and 300j-13), the CWA, or State equivalent, such as critical aquifer or wellhead protection areas.

Spring. The area on the surface of the land where a localized flow of groundwater emerges to become surface water. including seeps, limited areas within many fens, and other groundwater-fed wetlands.

Sustainable use. The rate of groundwater usage that can be maintained indefinitely without substantial adverse consequence to groundwater resources.

Timing. The availability of water at any specific place for a particular purpose, which is temporally variable and affected by seasonality, storm frequency, and upstream or upgradient water uses (both natural and anthropogenic).

Unconfined aquifer. An aquifer that is bounded below by a confining unit, but is open to the atmosphere above.

Unsaturated zone, vadose zone, or zone of aeration. Layers of unconsolidated deposits or bedrock that typically extend upward from a saturated zone to the surface of the land and in which the voids are filled with a combination of air and water, where the water is at less than atmospheric pressure.

Water production well. A well that is used to remove water from the subsurface and that is not associated with the extraction of hydrocarbons.

Water right. A legally recognized usufructuary right to divert, store, or use water for a State-accepted beneficial use that confers no property right or ownership interest in the

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physical access to the water source across property owned by adjacent or overlying landowners, even when access is needed for the physical withdrawal of the water. Access to the water source occurs pursuant to federal law on federal lands or pursuant to state real property laws on non-federal lands.

Water table. The upper surface of an unconfined aquifer where the water in the voids is at atmospheric pressure, and which is typically identified by mapping the elevations of the water levels in shallow wells extending a few feet into the zone of saturation and measuring the water level in those wells.

Well. Any drillhole, borehole, or other excavation or opening deeper than it is wide that extends more than 3 feet into the ground and that is constructed for the purpose of accessing or injecting liquids.

Wellhead protection area. The surface and subsurface area surrounding a water well or wellfield which supplies a public water system and through which contaminants are reasonably likely to reach that water well or wellfield (SDWA, 42 U.S.C. § 300h-7(e)).

Written authorization. A grazing permit, plan of operations, special use authorization, or other type of written instrument issued by the Forest Service that authorizes the use and occupancy of NFS lands and resources subject to certain terms and conditions set forth in the instrument.

2560.08 – References

USDA Forest Service, 2007. “Technical Guide to Managing Ground Water Resources,” FS-881, US Government Printing Office, 281p.
<http://www.fs.fed.us/biology/resources/pubs/watershed/index.html>.

2561 – CONSIDERATION OF GROUNDWATER RESOURCES IN FOREST SERVICE PROJECTS, APPROVALS, AND AUTHORIZATIONS

1. Assume that there is a hydrological connection between groundwater and surface water, regardless of whether State law addresses these water resources separately, unless a hydrogeological evaluation using site-specific data indicates otherwise. This type of connection means that cross-contamination and reductions in quantity can occur unless natural geological barriers exist or prevention strategies are in place.
2. Prior to implementation or approval, assess the potential for proposed Forest Service projects, approvals, and authorizations to affect the groundwater resources of NFS lands. If there is a high probability for substantial impact to NFS groundwater resources, including its quality, quantity, and timing, evaluate those potential impacts in a manner appropriate to the scope and scale of the proposal and consistent with this chapter.

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3. Include in all new and reissued written authorizations terms that require the holder to provide to the Forest Service all groundwater monitoring data and information collected in compliance with applicable local, State, or other Federal requirements.

2561.1 – Conjunctive Uses of Groundwater and Surface Water

For proposed actions that involve conjunctive uses of groundwater and surface water, including aquifer storage and recovery (ASR):

1. Consider effects from the combined use of surface and groundwater and the effects of one upon the other, including but not limited to quantity, quality, timing, and spatial distribution.
2. Where conjunctive uses are proposed, evaluate groundwater, surface water, and watershed issues, including potential effects on groundwater-dependent ecosystems, by conducting appropriate hydrological assessments of the geographic area.

2561.2 – Minerals and Energy Development

Work with appropriate State agencies or EPA, depending on whether the State has received delegated authority from EPA under the SDWA, to ensure that all holders of written authorizations for minerals or energy development appropriately address compliance with EPA's Underground Injection Control Program (40 CFR parts 144 and 146) or State equivalent to protect underground sources of drinking water.

2561.21 – Locatable Mineral Mining

The Forest Service can apply terms and conditions for the reasonable use of groundwater for locatable minerals operations. Reasonable use of either surface or groundwater in connection with locatable mining must be authorized in an approved mining Plan of Operations.

1. Existing Locatable Mineral Mines.
 - a. Manage groundwater resources at existing locatable (hardrock) mineral mines (placer, underground, and open pit) on NFS lands consistent with 36 CFR part 228, subpart A; FSM 2810 and 2880; and this chapter. Ensure that operating procedures, facility designs, construction oversight, bonding, and groundwater monitoring are appropriately addressed in any required plan of operations.
 - b. Evaluate the groundwater contamination potential and ensure appropriate monitoring of adits, shafts, underground workings, open pits, overburden and waste rock storage and disposal areas, and associated facilities, such as tailings impoundments, leach pads, and process ponds. As necessary, request the operator to

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furnish a modification of the plan of operations, or, if the operations were under a notice of intent, require a plan of operations to address critical issues.

2. Proposed Locatable Mineral Mines.

- a. Evaluate potential groundwater problems at proposed locatable mineral mines on NFS lands consistent with 36 CFR part 228, subpart A; FSM 2810 and 2880; and this chapter. Ensure that terms governing appropriate operating procedures, facility design, construction oversight, bonding, and groundwater monitoring are included in any required plan of operations or special use authorization for proposed locatable mineral mines prior to their approval.
- b. In reviewing a plan of operation for a proposed locatable mineral mine, evaluate the potential for the mining activity to disrupt the natural groundwater flow regime (hydraulic gradients, flowpaths, quantity, and timing) or adversely affect groundwater or surface water quality or groundwater-dependent ecosystems.

2561.22 – Leasable Mineral Mining

1. In reviewing proposals for leasable mineral mining (not including oil and gas or geothermal), consider the potential for underground and surface coal, phosphate, sodium, potassium, sulfur, and other leasable mineral mining and related activities to interrupt natural groundwater flow regimes, adversely affect groundwater-dependent ecosystems, or the quantity, quality, and timing of groundwater and surface water.
2. Require or recommend, as appropriate, that the Bureau of Land Management (BLM), Office of Surface Mining (OSM), and applicable State agencies appropriate lease terms, design modifications, and approval conditions, as applicable, to protect NFS groundwater resources consistent with FSM 2820 and 2880 and this chapter.

2561.23 – Mineral Materials Development

1. Prior to issuing a request for bids, contract, or authorization for a mineral materials (such as common varieties of sand, gravel, stone, and aggregate) removal operation, consider the potential effects of the proposed operation upon the quantity, quality, and timing of area surface water and groundwater, the morphology of adjacent stream channels, the interaction of groundwater and surface water, and the integrity of groundwater-dependent ecosystems.
2. Include terms in any contract or authorization for mineral materials to protect groundwater resources appropriately based upon the scope and scale of the project.

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2561.24 – Oil and Gas Operations

1. Evaluate potential effects of oil and gas exploration and development on surface and groundwater quality and quantity and groundwater-dependent ecosystems before authorizing BLM to proceed with leasing on NFS lands, and ensure those effects are evaluated and appropriately addressed during review of any surface use plan of operations.
2. Utilize the provisions of any applicable memorandum of understanding (MOU) between the BLM and the Forest Service to facilitate gathering of relevant information and completion of needed assessments for oil and gas development and operations.
3. Assess geological and hydrogeological conditions in an area on or adjacent to NFS lands proposed for coal-bed natural gas (CBNG) or other non-traditional shallow natural gas leasing or development. Notify BLM and appropriate State or EPA officials, depending on whether the State has received delegated authority from EPA under the CWA, if:
 - a. Local springs, seeps, and water supply wells depend on groundwater associated or hydraulically connected with the production zone.
 - b. Anticipated produced well water quality is likely to be unsuitable for irrigation or livestock watering.
 - c. Enlarged saline seeps, damage to vegetation, or other reclamation problems are likely to occur.
4. Work with BLM and the State or EPA, depending on whether the State has received delegated authority from EPA under the CWA and SDWA, to provide BLM with appropriate conditions of approval, when necessary, for protection of groundwater resources on NFS lands during oil and gas exploration and production operations.
5. Establish terms and conditions requiring appropriate monitoring and protection of groundwater resources on NFS lands, consistent with FSM 2820, and 2880 and this chapter, for inclusion in surface use plans of operations for oil and gas production operations on NFS lands. Share these terms and conditions with operators.
6. Using the National Pollution Discharge Elimination System (NPDES) or equivalent adopted by the State, evaluate potential discharges of produced water from proposed oil and gas exploration and production operations into surface drainages. Provide to the authorizing entity appropriate recommendations to protect NFS water resources, including a recommendation regarding whether water produced from oil and gas exploration and production operations should be allowed to discharge into surface drainages.

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7. Assist BLM and the State or EPA, depending on whether the State has received delegated authority from EPA under the SDWA, in evaluating the capability of local geological formations to accept produced water from oil and gas operations introduced using groundwater injection wells. Where available, use studies of existing groundwater quality and quantity.

2561.25 – Geothermal Resource Operations

1. Utilize the provisions of any applicable MOU between BLM and the Forest Service to facilitate gathering of relevant information and completion of needed assessments for geothermal resource development and operations.
2. Evaluate potential effects on groundwater quality and quantity and groundwater-dependent ecosystems on NFS lands proposed for leasing by BLM. If the Forest Service grants consent to BLM for leasing of geothermal resources on NFS lands, include appropriate lease terms to protect those resources as a condition of the Forest Service's consent to BLM for its issuance of geothermal resource leases.
3. Prior to BLM's issuance of an authorization for geothermal resource activities on NFS lands, provide recommendations to BLM regarding conditions needed in the authorization to appropriately protect NFS groundwater resources.
4. Using the NPDES or equivalent adopted by the State for point source discharges and the nonpoint source requirements of the State, evaluate potential discharges of produced water from proposed geothermal resource operations. Provide to the authorizing entity recommendations or requirements, as appropriate, to protect NFS water resources, including an assessment as to whether the water produced from geothermal resource operations should be allowed to discharge into surface drainages.
5. Assist BLM and the State or EPA, depending on whether the State has received delegated authority from EPA under the SDWA, in evaluating the capability of local geological formations to accept produced water from geothermal resource operations introduced using groundwater injection wells. Where available, use studies of existing groundwater quality and quantity.

2561.3 – Tunneling Operations

1. During both the construction and operational phases, evaluate proposed transportation tunnels and other tunneling projects that would be on or beneath NFS lands and that would not be authorized as part of minerals or energy development for their potential to impact ground and surface water quality and quantity and groundwater-dependent ecosystems.

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2. Ensure that appropriate environmental studies are conducted of proposed transportation tunnels and other tunneling projects that would be on or beneath NFS lands and that would not be authorized as part of minerals or energy development, and that they include, as appropriate, analyses of the geology, hydrology, geochemistry, hydrogeology, and potentially affected biota; groundwater and geochemical modeling; and test borings and observation wells.
3. Utilize personnel with the requisite qualifications and expertise in appropriate scientific and technical disciplines, such as mining engineering and fracture flow hydrology, to address the issues likely to be associated with proposed transportation tunnels and other tunneling projects.

2561.4 – Effects of Authorized and Administrative Uses on Groundwater Quality

The following provisions do not apply to authorized minerals or energy development on NFS lands.

1. Authorize or conduct activities on NFS lands with a significant potential to adversely affect the quality of groundwater, including new waste containment facilities developed as part of environmental cleanup actions, only after appropriate levels of analysis have been completed, the range of potential groundwater resource impacts are adequately understood, and appropriate mitigation measures and an appropriate monitoring program have been developed.
2. Whenever possible, encourage siting on non-NFS lands of activities with a significant potential to adversely affect the quality of groundwater (FSM 2703).

2562 – SOURCE WATER PROTECTION AND WATER SUPPLIES

1. Work with EPA, State and local governments, Tribes, drinking water providers, and holders of special use authorizations to protect drinking water systems located entirely or partially on NFS lands through delineation and appropriate management of source water protection areas under the SWDA and applicable State law.
2. Manage NFS lands designated as source water protection areas under the SWDA or applicable State law in accordance with 36 CFR 251.9 and FSM 2542, governing management of municipal supply watersheds.
3. See FSM 2563.5 for direction regarding the requirement to submit a water supply development and operation plan in an application for a publicly accessible water supply that utilizes one or more high-capacity wells.

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2562.1 – Authorizations for Water Supply Facilities

1. In lieu of accessing water from NFS lands, encourage public water suppliers and other water users to employ new treatment technology to meet water supply needs when water quality in an existing water source has degraded or become polluted.
2. Ensure that public water suppliers and other proponents and applicants for authorizations involving water supply facilities on NFS lands provide an evaluation of all other reasonable alternatives to the Forest Service before authorizing access to new water sources or increased capacity at existing water sources on NFS lands, unless the proposed use is entirely on NFS lands or the proponent or applicant is a public water supplier and the proposed water source is located in a designated municipal watershed (FSM 2542).
3. When issuing or reissuing an authorization or approving modification of an authorized use, require implementation of water conservation strategies to limit total water withdrawals from NFS lands (FSM 2541.21h) deemed appropriate by the authorized officer, depending on the type of authorized use; existing administrative and other authorized uses in the area; the physical characteristics of the setting; and other relevant factors. If the holder of the authorization consents, amend the authorization to include this requirement.

2562.11 – Siting of Water Supply Facilities in Response to Water Supply Emergencies

Ensure that local public water suppliers develop safeguards, contingencies, and, when possible, plans that can serve as an acceptable permanent solution when proposing to develop new or expanded water supply facilities on NFS lands in response to emergency water supply shortages.

1. Evaluate potential hydrological impacts of large groundwater withdrawals on NFS lands proposed as part of an emergency response, where possible, integrating technical evaluation (FSM 2563) with construction of additional water supply facilities.
2. Allow hydraulic, injection, or aquifer testing (FSM 2563.3) to be performed only if adequate safeguards are in place during drilling of pilot boreholes and construction and testing of wells or piezometers. The adequacy of safeguards depends on the specifics of the proposal, the geology and hydrology of the site, the proximity to and importance of groundwater-dependent ecosystems, and other relevant factors. If safeguards are inadequate, delay construction until safeguards are sufficient.
3. Where possible, increase the staffing and frequency of oversight activities during emergency situations.

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2563 – AUTHORIZATIONS INVOLVING WATER WELLS OR WATER PIPELINES

This section addresses proposals, applications, and special use authorizations that involve water extraction or injection wells on NFS lands or water pipelines crossing NFS lands (36 CFR part 251, subpart B).

2563.1 – General Requirements for Authorizing Water Wells and Water Pipelines

1. A special use authorization issued under 36 CFR part 251, subpart B, is required for all individuals or entities other than the Forest Service to develop water wells or construct water pipelines on NFS lands, other than water wells or water pipelines that are authorized under U.S. Department of the Interior (DOI) or USDA regulations for mineral or energy exploration, development, or production (36 CFR 251.56; FSM 2729, 2810, 2820, and 2850; FSH 2709.11, ch. 10).
2. The authorized officer has the discretion to determine whether to authorize new water wells or water pipelines that are not expressly authorized under DOI or USDA regulations for mineral or energy exploration, development, or production (36 CFR 251.56; FSM 2729 and 2820; FSH 2709.11, ch. 10).
3. All special use authorizations involving water wells and water pipelines must have a fixed term. Authorizations involving water wells and water pipelines that have a term of more than 30 years must provide for revision of their terms and conditions at specified intervals to reflect changed circumstances (36 CFR 251.56(b)(1)(v)).

2563.2 – Pre-Proposal Meetings for Proponents of New Water Wells or Water Pipelines

At a pre-proposal meeting, advise proponents of authorizations involving new water wells or water pipelines that:

1. When a State-issued water right or one or more State or local approvals are needed for a water development, the process for securing State water permits, licenses, registrations, certificates, or rights should proceed concurrently with the Forest Service process for authorizing use and occupancy of NFS lands for a water development.
2. Proponents must comply with applicable Federal, State, and local laws and regulations governing water wells and water pipelines, including:
 - a. State and local requirements regarding:
 - (1) Notifications to undertake an action.

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- (2) Drilling permits.
- (3) Boring and well logs.
- (4) Well completion and abandonment.
- (5) Filing of applications for water rights, permits, licenses, and certificates.
 - b. Federal requirements and recommendations for well construction, development, sampling, and abandonment.
3. A copy of all documents required for other water-related permits and approvals and for compliance with laws and regulations governing water wells and pipelines must be submitted to the authorized officer and included in the project file.

2563.3 – Requirements for Proposals Involving New Water Wells or Water Pipelines

1. Deny proposals to construct wells on or pipelines across NFS lands which can reasonably be accommodated on non-NFS lands and which the proponent is proposing to construct on NFS lands because they afford a lower cost and less restrictive location than non-NFS lands (FSM 2703.2).
2. The following additional requirements apply to second-level screening of proposals for new high-capacity water wells or large water injection wells; new water wells that may adversely affect groundwater-dependent ecosystems critical to land management goals established for the administrative unit; or new water pipelines crossing NFS lands and diverting water from adjacent non-NFS lands.
 - a. The quantity of water. The proposal must identify current and expected future quantities of water and, for water withdrawals, the beneficial uses of water. If the proponent seeks to inject water into a geological formation containing fresh water, the proposal must identify the quantity, sources, and quality of both the proposed source of the injection and the receiving waters and the likely effects of this action on NFS water resources. Proponents of all community water systems (FSM 7420), high-capacity wells, and large water injection wells that open into geological formations containing fresh water must propose to equip the water systems and wells with flow metering devices and to maintain the devices in good working order.
 - b. Water conservation. Any proposal to withdraw groundwater underlying NFS lands using a well or set of wells within a limited area or from springs on NFS lands must include the use of appropriate water conservation measures (FSM 2541.21h).

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- c. Drilling activities. The proposal must include sufficient information, including a description of the geological and hydrological setting and the drilling methods to be employed, to demonstrate that there is a reasonable likelihood of successfully completing any water wells proposed to be located on NFS lands and adequately mitigating any associated resource damage from drilling activities.
- d. Associated facilities. The proposal must identify anticipated associated facilities, such as roads, power lines, pipelines, water storage tanks, runoff control basins, and pumping stations, that are expected to be needed on NFS lands to produce, inject, or convey water on or across NFS lands.
- e. Key resources and existing water withdrawals. The proposal must identify water-dependent resources and existing water withdrawals in the vicinity of the proposed project to allow for evaluation of its potential to adversely affect NFS water resources and facilities and neighboring non-NFS water supplies.

2563.4 – Requirements for All Applications Involving Water Wells or Water Pipelines

1. Ensure that applicants for authorizations involving water wells or water pipelines identify all necessary State water rights and State and local water approvals in their application and to provide a copy of them to the authorized officer upon issuance.
2. If necessary State water rights or State or local water approvals have not been obtained by the time the authorized officer grants the application, issue the authorization contingent upon obtaining the necessary rights or approvals (36 CFR 251.56(a)(2)).
3. Evaluate the potential impacts upon groundwater and surface water resources from new water wells proposed to be drilled on NFS lands and new pipelines that would transport water across NFS lands that are not authorized as part of an approved minerals or energy operation, including potential impacts from well drilling, water extraction, and pipeline construction.
4. To the extent practicable, evaluate the impacts on groundwater quantity and quality of a water injection proposal involving one or more wells that open into a geological formation containing fresh water, taking into account:
 - a. The addition of non-native water of a different quality from the aquifer; and
 - b. The impact that added liquid volume would have on aquifer structure and function.
5. Do not subject water developments related to a CERCLA response action to environmental review under Forest Service NEPA procedures. Rather, in accordance with the NCP, utilize the engineering evaluation/cost analysis procedure for non-time-

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critical removals and the remedial investigation/feasibility study procedure for remedial actions.

6. After a proposal involving water wells or water pipelines has passed first and second-level screening (36 CFR 251.54(e)(1)-(e)(5); FSH 2709.11, sec. 11.2) and an application for that project has been accepted, the authorized officer shall deny the application if NFS groundwater resources would be compromised, despite mitigation, if the proposed use were authorized (36 CFR 251.54(g)(2)(i), (g)(4); FSH 2709.11, sec. 12.62).

2563.5 – Additional Requirements for Applications for Certain Water Supplies

Ensure that all applicants (including holders whose authorizations are expiring) for a special use authorization involving a publicly accessible water supply that utilizes one or more high-capacity wells provide a water supply development and operation plan to the Forest Service with a level of detail commensurate with the scale of the existing or proposed withdrawal. The water supply development and operation plan must be approved in writing by the authorized officer.

1. Ensure that a water supply development and operation plan:
 - a. Addresses development and implementation of source water protection plans for water supply wells and well fields used for drinking water in accordance with applicable State or local procedures.
 - b. Characterizes the groundwater systems from which the water is withdrawn and connections to surface water at a scale and resolution appropriate to the water withdrawal.
 - c. Provides for periodic water quality monitoring at each water source and, as appropriate, at nearby potential contaminant sources, including any CERCLA or equivalent State removal or remediation sites.
 - d. Provides for regular reporting to the Forest Service in an electronic format acceptable to the agency of the results of all monitoring and testing, including monitoring and testing required by local, State, or other Federal agencies.
 - e. Includes a copy of all other required Federal, State, or local water-related permits or approvals or, if pending, the applications for those permits or approvals.
 - f. Includes a contingency plan addressing safeguarding of facilities, provision of alternate water supplies, and response to potential contamination events.
2. In reviewing a water supply development and operation plan, consider:

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- a. Advising the applicant to provide for phasing of separate applications for exploration and testing and final construction and production to allow for collection of additional project-specific information and adjustments based on that information.
- b. Including special terms and conditions, such as mitigation measures, in the special use authorization based on provisions in the plan.

2563.6 – Additional Analyses for Applications Involving Water Wells or Water Pipelines

The following provisions apply to evaluation of applications for new uses that include high-capacity water wells; large water injection wells; water wells with the potential to adversely affect groundwater-dependent ecosystems critical to land management goals established for the administrative unit; pipelines crossing NFS lands; and proposals for modification of an authorized use involving these water wells or pipelines.

1. Phasing. If an application includes a water removal or injection rate that has the potential for significant impacts on groundwater-dependent ecosystems critical to land management goals established for the administrative unit, substantial additional analyses may be necessary. Analyze potential effects of the proposed uses on NFS water resources and neighboring water withdrawals. Analyze the potential effects in two phases: (1) exploration and testing and (2) construction and production. When an applicant proposes to use existing wells, the procedures described in paragraphs 3a through 3d may still apply.
2. Advising Applicants.
 - a. Advise applicants that obtaining authorization for exploratory drilling or testing for new water sources does not guarantee that construction or operation of production-phase facilities will be authorized.
 - b. Advise applicants that substantial mitigation measures may be required under the authorization for production-phase facilities and that the scope of these measures may not be identified until the conclusion of appropriate analyses.
3. Additional Procedures.

Ensure that authorizations that involve utilization of any of the following additional procedures to evaluate site conditions have a term of no more than 10 years and contain terms and conditions that are necessary to minimize impacts on NFS water resources and that require that all applicable State and local water rights or approvals be obtained prior to project initiation (36 CFR 251.56(b)(1)). Complete environmental analyses appropriate to the scale of the proposed operations.

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- a. Exploratory drilling. If exploratory drilling is included in the application, require the applicant to submit a detailed project plan for the drilling. The project plan must be site-specific; must incorporate appropriate field procedures; must comply with all State and local requirements for drilling; must be prepared at a level of detail appropriate for the scale of the proposed project; and must clearly identify potential impacts on NFS water resources and nearby water withdrawals. Approve the project plan in writing prior to initiation of drilling.
- b. Hydraulic well testing. If existing wells or wells established during exploratory drilling appear to meet the applicant's needs, require the applicant to submit a project plan for hydraulically testing the sufficiency of the wells. The project plan must be site-specific; must use appropriate field test data; must be prepared at a level of detail appropriate for the scale of the proposed project; and must clearly identify potential impacts on NFS water resources and nearby water withdrawals. Approve the project plan in writing prior to initiation of hydraulic well testing.
- c. Injection testing. If the injection wells to be utilized open into geological formations containing fresh water, require site-specific analyses of the physical and chemical effects from any water introduced during exploration, testing, or operation of the wells. Approve the project plan in writing prior to initiation of injection testing.
- d. Aquifer testing. Require the applicant to submit a detailed aquifer testing plan if the proposed project may have a substantial impact on existing water withdrawals or on groundwater-dependent ecosystems critical to land management goals established for the administrative unit. Approve a project plan in writing prior to the initiation of any aquifer testing.
- (1) Wells. Require an appropriate level of aquifer testing in the absence of sufficient site-specific information to evaluate impacts on NFS water resources and nearby water withdrawals from proposed groundwater withdrawals or injections into geological formations containing fresh water on NFS lands. Aquifer testing involves pumping the preexisting water supply or monitoring wells or newly installed exploratory or monitoring wells and monitoring the surface and groundwater to assess impacts on NFS water resources and nearby water withdrawals from removing or injecting water at the anticipated production rates from the proposed wells.
- (2) Pipelines. Require aquifer testing for proposals that involve transporting water across NFS lands in the absence of sufficient site-specific information to evaluate impacts on NFS water resources from groundwater withdrawals or injections on nearby non-NFS lands associated with the proposed pipeline (40 CFR 1508.25).
- e. Construction documentation. Require submission of an as-built report for all well and pipeline construction on NFS lands. Ensure that the construction of the well or

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pipeline is conducted in accordance with the as-built report (FSH 1909.15, ch. 20, 30, and 40).

f. Data analysis. Analyze results from exploratory drilling, hydraulic well testing, injection testing, and aquifer testing to determine potential effects on NFS water resources and nearby water withdrawals.

2563.7 – Terms and Conditions in Special Use Authorizations for Water Wells and Water Pipelines

Ensure that all new and reissued authorizations involving a water well or water pipeline provide for modification of their terms and conditions at the sole discretion of the authorized officer:

1. If deemed necessary to comply with applicable laws or regulations, the applicable land management plan, or project decisions implementing a land management plan pursuant to 36 CFR part 215; or
2. If deemed necessary, based on a written analysis conducted by qualified groundwater personnel, an aquatic biologist, or another similarly trained professional of the results of monitoring, to prevent the authorized groundwater withdrawals or injections from significantly reducing the quantity or unacceptably modifying the quality of surface or groundwater resources on NFS lands.

2563.8 – Monitoring and Mitigation for Water Wells and Water Pipelines

1. Ensure that all new and reissued authorizations involving water wells or water pipelines that have a substantial potential to adversely affect NFS groundwater resources are monitored in a manner appropriate to the scale and nature of the potential effects.
2. Ensure that all new and reissued authorizations involving water wells and water pipelines include terms and conditions to minimize damage to scenic and aesthetic values and fish and wildlife habitat, as well as any mitigation measures necessary to comply with Federal and State law and to provide for the long-term protection of NFS water resources during construction and operation of water pumping, injection, storage, or transport facilities. Monitor and evaluate all mitigation measures for efficacy.
3. Ensure that the operating plan for all new and reissued authorizations involving water wells and water pipelines that contain monitoring or mitigation measures includes detailed information on implementation of those monitoring and mitigation measures and requires annual reporting of the status and results of those monitoring and mitigation measures. Require the holder to prepare the monitoring and mitigation provisions and all other parts of the operating plan in consultation with the authorized officer and to submit the operating plan to the authorized officer for written approval.

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4. If monitoring detects insufficiency of mitigation measures or additional or unforeseen adverse impacts on NFS water resources from groundwater withdrawals or injections, notify the holder and work with the holder to identify alternative mitigation measures that adequately protect NFS water resources. Add monitoring or mitigation measures, change or limit the activities authorized, modify the holder's operations, or otherwise modify the terms and conditions of the authorization if deemed necessary, based on an analysis conducted by qualified groundwater personnel, an aquatic biologist, or another similarly trained professional of the results of monitoring, to prevent the authorized groundwater withdrawals or injections from significantly reducing the quantity or unacceptably modifying the quality of surface or groundwater resources on NFS lands.
5. If monitoring or mitigation is not conducted as required by a special use authorization, provide notice and an opportunity to correct the deficiencies and take appropriate action in accordance with 36 CFR 251.60(a)(2) and the terms of the authorization.

2564 – MEASURING AND REPORTING VOLUME OF EXTRACTED OR INJECTED WATER

Provisions 1 through 3 of this section do not apply to authorized minerals or energy development on NFS lands.

1. Require measurement in gallons per day or liters per day, on a continuous basis, of the volume of groundwater extracted for all public water systems classified as community water systems (FSM 7420) and for all Forest Service and Forest Service-authorized uses that involve a high-capacity well. Measurement of withdrawals from wells equipped only with a hand or windmill pump is not required.
2. Require measurement in gallons per day or liters per day, on a continuous basis, of the volume of water injected into the ground from large water injection wells on NFS lands authorized by the Forest Service.
3. Require quarterly reporting in an electronic format acceptable to the Forest Service of groundwater withdrawals and injections that must be measured under this section. More frequent reporting may be required if necessary to evaluate effects on water resources critical to land management goals established for the administrative unit or nearby water supplies.
4. Require reporting on the same timetable to the Forest Service in an electronic format acceptable to the agency of any groundwater withdrawal, injection, or use that is reported to local, State, or other Federal authorities.
5. Require measurement and reporting of groundwater withdrawals and injections as follows:

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- a. For new uses and activities, at the time of the issuance of the authorization.
- b. For authorized uses and activities, at the time of reissuance of the authorization or approval of modification of the authorized use. If the holder of the authorization consents, amend the authorization to include this requirement.
- c. For Forest Service administrative uses, at the time of a significant upgrade to or maintenance of a water system or expansion of water system capacity.

2565 – CLEANUP OF CONTAMINATED GROUNDWATER

1. Ensure that cleanup of groundwater on NFS lands contaminated with hazardous substances, petroleum products, pollutants, or contaminants is completed in a manner that protects human health and the environment and that provides protection from encumbrances on future land use (FSM 2160).
2. At a potential cleanup site on NFS lands determine whether:
 - a. A release of a hazardous substance, petroleum product, pollutant, or contaminant has occurred.
 - b. There is a significant threat to the public health or welfare.
 - c. Significant harm to the environment or natural resources has occurred or could reasonably be expected to occur.
3. Ensure that determinations are consistent with requirements of:
 - a. CERCLA and RCRA.
 - b. The NCP.
 - c. Departmental Manual 5600-1, Chapter V.
4. Comply with other applicable Federal and State laws and regulations.
5. Before authorizing a response action or an investigation or assessment of potential damage to natural resources, consult with the USDA Hazardous Materials Management Division Director, the Forest Service National Environmental Engineer, and the local Office of the General Counsel and determine whether there are any potentially responsible parties who can perform or fund a response action.

**FSM 2500 – WATERSHED AND AIR MANAGEMENT
CHAPTER 2560 – GROUNDWATER RESOURCE MANAGEMENT**

2565.1 – Collection of Data for Groundwater Cleanup Activities

1. Collect data regarding water quality and quantity, water uses, and potentially impacted ecological systems, if needed. Consider post-cleanup data needs.
2. Employ safeguards during data collection to protect:
 - a. Water quality and quantity.
 - b. Potentially affected water users.
 - c. Sensitive ecological systems.

2566 – INFORMATION AND DATA MANAGEMENT FOR GROUNDWATER

1. Conform to current Forest Service data system standards (the Forest Service Natural Resource Applications (FSNRAs)), such as the National Resource Information System (NRIS) or INFRA, and to applicable Servicewide GIS data standards in managing and storing groundwater data and information.
2. Store groundwater data and information in operational FSNRA databases. Data on groundwater quality should be managed in a format compatible with STORET (an EPA database) until FSNRA water quality applications are available. Data management requirements for drinking water are specified in FSM 7420.
3. Develop a comprehensive record of authorized uses affecting groundwater resources to support future decisions, including but not limited to documentation of:
 - a. The impacts on NFS resources.
 - b. The rationale for mitigation measures required to protect those resources.
 - c. The reasons why the activity in question is consistent or inconsistent with the applicable land management plan.

2567 – LEGAL CONSIDERATIONS IN MANAGING GROUNDWATER RESOURCES

1. Work cooperatively with appropriate State agencies to ensure that applicable State and Federal water-related laws and regulations are implemented on NFS lands to protect groundwater for such purposes as outdoor recreation, authorized special uses, permitted livestock grazing, and fish and wildlife management. Whenever possible, establish a process for mutual consultation with appropriate State agencies regarding groundwater-related issues on NFS lands.

FSM 2500 – WATERSHED AND AIR MANAGEMENT
CHAPTER 2560 – GROUNDWATER RESOURCE MANAGEMENT

2. Use the regulations promulgated under the SDWA, including the Underground Injection Control Rule (42 U.S.C. §§ 300h–300h-5), and other applicable Federal laws and regulations to protect groundwater resources on NFS lands.
3. Follow the direction in FSM 2541 and applicable State law when filing groundwater claims during State water rights adjudications and administrative proceedings. Apply Federal reserved water rights (the Reservation or Winters doctrine) to groundwater as well as surface water to meet Federal purposes under the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act.
4. Recognizing Tribal treaty and reserved rights, work cooperatively with DOI and affected tribes during tribal water settlement negotiations involving NFS groundwater resources.
5. Consult the local Office of the General Counsel whenever specific questions arise regarding groundwater laws and regulations. Additional guidance and information on laws, regulations, and case law related to groundwater in the 43 States and Territories that contain NFS lands can be found in a sourcebook at this Forest Service Web site:
<http://www.fs.fed.us/biology/resources/pubs/watershed/index.html>.

2568 – STRATEGIES FOR SUSTAINING GROUNDWATER RESOURCES

1. Collaborate with local, State, and other Federal agencies and Tribes to sustain the availability and usability of groundwater over the long term through the use of conventional and innovative approaches.
2. Consider conjunctive use of surface and ground waters; artificial recharge of groundwater, such as infiltration ponds or water injection wells; and appropriate use of recycled and reclaimed water where those approaches also protect the quality of the receiving water and affected water-dependent ecosystems.
3. To protect local groundwater resources, encourage utilization of one or more of the following conventional strategies where impacts on surface and groundwater resources are deemed acceptable:
 - a. Modify the rates, timing, or spatial patterns of groundwater withdrawal.
 - b. Use sources of water other than local groundwater, or import surface or groundwater from outside the basin where laws, water quality, and hydrological conditions in both the source and receiving areas allow.

Tab S – WSWC/WestFAST Federal Non-Tribal Water Rights



WESTERN STATES WATER COUNCIL

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Web Page: www.westernstateswater.org

MEMORANDUM

To: WSWC-WestFAST Federal Non-Tribal Workshop Participants

From: Nathan Bracken, WSWC Assistant Director and General Counsel

Date: August 5, 2014

Re: Summary of Workshop Proceedings

I. INTRODUCTION

On July 15-16, the Western States Water Council (WSWC) and WestFAST held a workshop to discuss ways to improve the resolution of federal non-tribal water rights claims. The workshop also discussed the development of a clearinghouse of information to help support states and federal agencies as they work to address these claims. Participants included over 40 water experts representing eleven states and seven federal agencies, as well as a handful of experts from academia and the private sector.

Going forward, workshop participants identified two key next steps.

First, workshop participants recommended the establishment of a workgroup of state and federal experts that will hold regular conference calls to discuss ways to improve the resolution of federal non-tribal water rights claims. The calls would be relatively informal in nature and would serve to foster relationship building among participants, share information, and foster communication among state and federal participants. From time to time, the workgroup could also hold webinars or other meetings to discuss specific topics of interest.

Secondly, workshop participants recommended that the clearinghouse be searchable and publically available through the Internet. To begin the process of developing the clearinghouse, it was agreed that a literature review is needed to identify relevant documents, such as settlements, compacts, and decrees. As an initial first step, the WSWC will review its reports and publications and work with WestFAST to identify other relevant documentation. To be included in the clearinghouse, relevant information must be public and final. The information listed on the clearinghouse must also comply with copyright laws.

Notably, the WSWC's Legal Committee met on July 17, and approved the above steps.

II. GENERAL THEMES AND KEY FINDINGS

The workshop generated a number of general themes and key findings that can serve as the basis for future discussion for the workgroup as well as the development of the clearinghouse.

These themes and findings emerged during the course of five panel presentations. The first panel discussed state-federal collaboration in Montana and included presentations from Tim Davis with the Montana Water Resources Division, Jeff Hughes with the National Park Service, and Brent Esplin with the Bureau of Reclamation. The second panel consisted of Jack Peterson with the Idaho Water Resources Board and Joseph Cole with the Air Force, who discussed a recent efforts by Idaho to secure water rights for the Mountain Home Air Force Base as well as the water needs of the Department of Defense and the Air Force. The latter presentations consisted of three case studies on: (1) issues associated with state general stream adjudications; (2) accommodating federal water needs within state legal frameworks; and (3) issues associated with permitted activities on federal land.

General themes that emerged from these discussions include (in no particular order):

- Relationships are critical;
- Communicate early, on a regular basis, and possibly in a structured manner;
- Communicate before taking action;
- Process is key;
- Be flexible;
- Embrace uncertainty;
- Be ready to capitalize on situations that allow for agreement, because such situations may be fleeting;
- Litigation is a “blunt instrument” and negotiated agreements provide benefits not available in court;
- Continually educate and inform other parties and the public; and
- Use neutral parties (e.g., mediators and technical experts).

Breakout group discussions followed each of the three case studies. As discussed below, these discussions generated more specific findings for their respective topics.

A. Issues Associated with General Stream Adjudications

This topic included four breakout groups, each of which discussed a different aspect of general stream adjudications. A case study consisting of presentations on the U.S. Forest Service’s (USFS) compact with Montana preceded the breakout group discussions. Presenters included Chris Tweeten of the Montana Reserved Water Rights Compact Commission, Jody Miller with the USFS, and Faye Bergan, formerly of the Montana Reserved Water Rights Compact Commission.

Group A discussed the interpretation and application of the McCarran Amendment. Its instructions were as follows:

The McCarran Amendment waives the United States' sovereign immunity in lawsuits concerning the ownership or management of water rights, thereby requiring the federal government to submit to state court adjudication of its water rights claims. In some cases, states and federal agencies may have differing interpretations regarding the scope and application of the McCarran amendment. This breakout group will discuss ways states and federal agencies can resolve these differences, as well as ways to provide federal agencies with assurances that they will receive a fair hearing in state courts.

Based on this assignment, Group A made the following findings:

- Remember that the McCarran Act is procedural;
- There is a need to align federal interpretations; and
- Efforts are needed to improve state and federal understanding of the McCarran Act's administrative component.

Group B discussed ways to address concerns related to the time and cost needed to conduct general stream adjudications. Its instructions stated:

*Federal water rights claims are often the most time-consuming and costly claims to address in general stream adjudications. The U.S. Supreme Court held in *United States v. Idaho*, 508 U.S. 1 (1992), that the United States is not required to pay state general stream adjudication filing fees, which many states use to help pay for the costs of conducting adjudications. At the same time, many state budgets are strained, further limiting the ability of states to conduct general stream adjudications in an effective and timely manner. This breakout group will discuss ways to reduce the costs and time associated with general stream adjudications, including but not limited to ways to effectively quantify federal claims and address their merits.*

Group B recommended:

- Tweak state fee structures to facilitate federal payment of fees;
- Streamline state adjudication of de minimis uses, including domestic and other similar uses, which may not be directly related to federal claims but may strain the resources needed to adjudicate federal claims;
- Use new and emerging technologies, such as Landsat, to improve the adjudication process;
- Consultation between states and federal agencies should take place before action is taken; and
- Focus on "high priority" areas or regions.

Group C discussed how to manage water shortages and address conflicts in basins where general stream adjudications have not yet begun or are incomplete. Its assignment stated:

General stream adjudications often take decades to resolve, which can complicate or hinder the ability of federal agencies to carry out their missions and objectives, particularly in times of drought and shortage. This breakout group will discuss ways states and federal agencies can work together to address shortages and manage conflicts in situations where general stream adjudications have not yet begun or are incomplete.

Group C recommended:

- Federal agencies can notify states of what they think their rights are;
- States can develop basin-specific rules and requirements for shortages;
- States and federal agencies can use water banks, operating agreements, shared shortages, subordination, temporary leases, in-stream flow leases, and other similar efforts; and
- “Throw more money” at infrastructure (e.g., storage and pipeline projects).

Group D studied ways to develop effective working relationships between states and federal agencies as well as the general public. Its instructions stated:

Relationships play a key role in the successful resolution of federal water right claims. This breakout group will discuss how states and federal agencies can develop effective working relationships. The breakout group will also discuss how states and federal agencies can develop effective relationships with legislative bodies and the general public, as well as how to address public concerns in an era in which social media plays an increasingly important role in the dissemination of information and misinformation.

Group D found:

- Efforts to build trust among parties and other stakeholders are critical;
- Efforts to inform and educate parties, the public, and policy makers should begin early and should be ongoing; and
- Parties should maintain regular contact with each other in the face of challenges and disagreement.

B. Accommodating Federal Water Needs Within State Legal and Administrative Frameworks

This topic began with a case study consisting of presentations on the Platte River Recovery Implementation Program by Megan Estep of the U.S. Fish and Wildlife Service and Jim Schneider of the Nebraska Natural Resources Department. Four breakout group discussions followed the presentations.

Group A discussed issues associated with the use of state in-stream flow laws. Its instructions stated:

Many federal agencies seek in-stream flow rights to carry out federal missions and objectives. However, there is significant variation among the laws and programs that govern in-stream flow rights in the western states. This breakout group will discuss ways federal agencies can use state in-stream flow laws to accommodate federal purposes.

Group A found:

- There is a need to recognize federal limitations;
- Having a “re-open” clause that allows for consideration of changes in circumstances could help address some barriers to federal participation in state in-stream flow programs;
- In some cases, giving greater authority to state engineers may be helpful; and
- Not every state program allows for applications for the types of purposes that federal agencies may need and allowing for such applications could help facilitate federal participation in state in-stream flow programs.

Group B focused on state water right permitting processes. Its assignment stated:

The western states use similar but different processes to permit water rights. The degree to which these programs accommodate and affect federal needs and interests may vary. This breakout group will discuss how state water right permitting systems can be used to accommodate and account for federal water needs and interests.

Group B recommended:

- States can provide notice to federal agencies of water right applications and other activities that may affect federal interests and needs;
- Consider moving the point of diversion in some instances;
- List land ownership on applications; and
- Align federal interpretations.

Group C studied ways to address conflict. Its instructions read:

Federal water right claims can generate a significant amount of conflict, including conflict between states and federal agencies. This breakout group will discuss ways to effectively manage such conflict within the context of state court and administrative proceedings, as well as ways states and federal agencies can resolve conflicts through mediation, negotiation, and other means that do not involve litigation.

Group C found:

- Continued education and communication is needed at all levels and with the public;
- State and federal staff should be kept up to date on the law;
- Efforts to understand the challenges at hand should be taken before other actions, including efforts to develop an understanding of the other side's perspective and motivations; and
- Learn to speak the other party's language.

Group D discussed ways to address uncertainty through science, data, and government structures. Its instructions stated:

States and federal agencies require access to sound science and accurate and reliable data to resolve federal water rights claims and effectively manage water resources in the face of future uncertainty. Government structures, including structures developed through compacts and other negotiated agreements, also play a key role in planning for future uncertainties related to drought, climate, and other factors. This breakout group will discuss how states and federal agencies can use data, science, and government structures to address uncertainty.

Group D reported:

- Models should be flexible, iterative, calibrated, and dynamic;
- New science should be included and utilized;
- Use neutral 3rd parties to develop and assess data and science;
- Use models in the development and implementation of management scenarios; and
- Communication early and often regarding the development of science, data, and governance structures.

C. Water-Related Issues Associated with Permitted Activities and Uses on Federal Land

The case study for this topic focused on water issues associated with grazing permits in Oregon. It featured presentations from Racquel Rancier with the Oregon Department of Natural Resources and Jana Wilcox with the Bureau of Land Management's (BLM) Burns District in Oregon. Three breakout groups followed the presentations.

Group A analyzed conflicts between the exercise of state-issued water rights and federal oversight over activities on federal land. Its assignment stated:

Federal land management agencies are responsible for overseeing and regulating activities that take place on the federal lands they manage, such as grazing, the

operation of ski areas, mining, etc. These activities often require or involve state-issued water rights in addition to federally-issued special use permits, right-of-way authorizations, and other federal approvals. This breakout group will discuss how to address conflicts and other issues that may arise between the exercise of state-issued water rights and federal oversight of activities that take place on federal lands, including but not limited to conflicts related to conditions that federal agencies may require as part of their authorizations for certain activities.

Group A advised as follows:

- Do “pre-conflict” planning;
- Recognize that federal laws change but property rights do not;
- Look at track records to identify parties that want solutions and those that want conflict;
- Use the “right” messenger to communicate with conflict-oriented people and groups;
- Use shuttle mediation and negotiation to overcome impasses;
- Understand your limitations;
- Educate staff to make the same, consistent message;
- Be aware of the potential for politicization; and
- Use state permitting processes to develop “workaround” solutions.

Group B studied ways to coordinate and streamline state and federal permitting requirements for activities on federal lands. Its instructions stated:

Activities on federal lands often require permits or other forms of authorization from federal agencies, as well as water rights permits and water quality permits from state agencies. This breakout group will discuss ways states and federal agencies can better coordinate and streamline their permitting processes.

Group B found:

- Parties should recognize that states may treat water right holders and land owners differently;
- Parties should understand that states may impose different conditions when issuing permits and that each state has different requirements regarding such conditions;
- There may be inconsistencies between the different types of federal land use permits, which often evolve over time; and
- Consider developing state-specific memorandums of understanding (e.g., Wyoming’s MOUs with the BLM and the USFS).

Group C discussed water-related issues associated with the Federal Land Policy Management Act (FLPMA). Its assignment stated:

FLPMA is one of the principal laws governing the management of federal lands. Among other things, FLPMA authorizes the development of land use plans that consider present and future uses for federal lands while simultaneously trying to preserve the natural resources located within such lands. In turn, these plans guide how certain federal agencies with land management responsibilities oversee activities on the federal lands that fall under their purview. This breakout group will discuss ways to improve state-federal cooperation with respect to the development of land use plans under FLPMA.

Group C recommended:

- States and federal agencies need to develop a better understanding of the FLPMA to improve state-federal cooperation;
- States and federal agencies should be upfront with one another about their respective mandates; and
- Develop MOUs or review existing MOUs and similar agreements to see if such documents can be used to address the issue at hand.

III. POTENTIAL CLEARINGHOUSE INFORMATION

The breakout groups identified a number of documents and useful information to be included in the clearinghouse. Workgroup participants also recognized that the WSWC and WestFAST have limited resources and that it may take some time to develop and collect all of the documents and information discussed during the meeting.

In the near term, the following list of possible clearinghouse information will inform the WSWC and WestFAST as they carry out the previously mentioned literature review and take other initial steps to develop the clearinghouse, while also aiding in the selection of topics and work items for the state-federal workgroup:

- Copies of final settlements, decrees, MOUs, and similar documents;
- *U.S. v. Idaho*, 508 U.S. 1 (1992);
- A directory of relevant professionals working on federal non-tribal rights;
- Court and administrative orders regarding the McCarran amendment;
- A list of federal offices that states can work with when addressing issues relevant involving land use permits;
- How states adjudicate de minimis uses;
- A summary of the state fees that federal agencies can pay in general stream adjudications;
- A summary of how states fund adjudications;
- Information on the value of water;
- Hydrologic models (or relevant links);
- A list of relevant state and federal common laws, statutes, and regulations regarding water rights;
- A summary of how each western states addresses appurtenancy;

- A list of water uses in each western state that require a permit; and
- A summary of who can hold water rights in each state.

IV. POSSIBLE WSWC-WESTFAST ACTION

In addition to the above information, the breakout groups also identified various actions that the WSWC and WestFAST may consider taking to improve the resolution of federal non-tribal water rights. These actions are as follows:

- Facilitate dialogue on the administrative component of the McCarran Amendment, including a possible webinar organized by the state-federal workgroup;
- Take action (e.g., a WSWC position or letter) to encourage federal agencies to place a higher priority on understanding western water rights;
- Hold a regular conference or workshop, similar to the biennial Symposium on the Settlement of Indian Reserved Water Rights Claims that the WSWC co-sponsors with the Native American Rights Fund;
- Facilitate networking opportunities (e.g., phone conferences, webinars, workshops, etc.);
- Provide more information on “failures;”
- Develop white papers on specific issues that describe how the issues in question were addressed and/or resolved;
- Develop a catalog of relevant “upcoming” or “developing issues; and
- Study the Federal Energy Regulatory Commission’s re-authorization process and related experiences to see if there are lessons learned that states and federal agencies can use to address the differences between state water right permitting and federal land use permitting.

V. CONCLUSION AND NEXT STEPS

WSWC staff will work with the WestFAST Liaison to carry out the above actions under the direction of the WSWC’s Legal Committee and WestFAST, focusing initially on the establishment of a state-federal workgroup and the completion of a literature review of existing WSWC and other documents that can be considered for inclusion in the clearinghouse.

It is also proposed that the workgroup hold calls on a quarterly basis, with the first call taking place in the 4th quarter of 2014. The calls will serve as a forum for participants to discuss notable developments and will also help guide the development of the clearinghouse. Ideally, WSWC staff and the WestFAST Liaison will have been able to begin the literature review before the first workgroup call and will be able to report on the information currently available for inclusion in the clearinghouse. This information will hopefully inform the development of the clearinghouse.

Workgroup participants who are interested in participating in the workgroup should notify Nathan Bracken (nbracken@wswc.utah.gov) at their earliest convenience.

Workshop participants are also encouraged to provide any publicly available, final documents and information that they believe could be included in the clearinghouse, particularly final settlements, compacts, decrees, and court orders.

Tab T – Federal Legislation and Litigation Update

LITIGATION AND LEGISLATION UPDATE
176TH WSWC MEETINGS
SCOTTSDALE, ARIZONA – OCTOBER 9, 2014

Nathan Bracken
WSWC Assistant Director and General Counsel
nbracken@swc.utah.gov

This summary describes developments regarding notable legislation and litigation that pertain to WGA/WSWC policies or are otherwise of interest. It focuses mostly on litigation and federal legislative developments that took place during and after the WSWC's summer2014 meetings, which were held on July 16-18, 2014, in Helena, Montana. This update is current as of September 22, 2014, and begins with the most recently introduced legislation.

NOTABLE LEGISLATION

Bill Number(s)	Summary	Dates/Status	Sponsor(s)
H.J.Res.124	Issue – FY 2015 Appropriations Continuing Resolution Title – Continuing Appropriations Resolution, 2015: Continues the current \$1.012T federal funding level through December 11, 2015. The resolution also continues virtually all existing federal policies and funding provisions found in the current FY 2014 continuing resolution and does not include new riders or large changes to federal policy. However, the resolution does include a 0.0554% across-the-board cut to conform with FY 2014 spending levels.	9/19/14: Presented to President 9/18/14: Senate passes resolution 9/17/14: House passes resolution 9/9/14: Introduced in House	House Appropriations Committee Chair Hal Rogers (R-KY)

H.R. 5534	Issue – Drinking Water State Revolving Fund (SRF) Title – The Assistance, Quality, and Affordability Act (AQUA Act): Would reauthorize and increase funding for the Drinking Water SRF, providing \$1.2B for FY 2015, \$1.4B for FY 2016, and \$1.6B for FY 2017. The bill would also enact a number of requirements and other provisions regarding the use of Drinking Water SRF funds, including among others; (1) that laborers and mechanics employed under a project financed with SRF funds are paid no less than the prevailing wage in the area; (2) Buy American requirements for iron and steel; (3) requires that first priority for SRF funds should be water systems serving disadvantaged communities; and (4) increases the portion of SRF funds states can use to administer SRF programs. It would also require EPA to disseminate information on best practices for state agencies implementing SRF programs. For more on the bill, see: http://democrats.energycommerce.house.gov/index.php?q=news/rep-tonko-and-waxman-introduce-bill-reauthorizing-state-revolving-loan-fund-under-the-safe-dri <i>*WSWC Policy #364 supporting the SRFs and increased flexibility for state SRF management.</i> <i>**WGA Resolution #2014-04, paragraph B(8) supporting the SRFs.</i>	9/18/14: Bill introduced and referred to the Committee on Energy and Commerce	Rep. Paul Tonko (D-NY) with Rep. Henry Waxman (D-CA)
H.R. 5412	Issue – Permitting for Bureau of Reclamation Surface Water Storage Projects Title – Bureau of Reclamation Surface Water Storage Streamlining Act: Would streamline the environmental review process for Bureau of Reclamation surface water storage projects. In particular, the bill mirrors the process Congress applied to the Corps of Engineers in the recently enacted Water Resources Reform and Development Act of 2014 (WRRDA – H.R. 3080) by setting similar standards and expectations for the Bureau of Reclamation. The bill is intended to require Reclamation become more transparent and accountable in how it operates regarding storage water projects. <i>**WGA Resolution Resolution #2014-03, paragraph B(2)(d) regarding infrastructure planning and permitting.</i>	9/18/14: House Natural Resources Committee reports bill 9/10/14: House Natural Resources Subcommittee on Water and Power holds hearing on bill 9/8/14: Introduced in House and referred to Natural Resources	House Natural Resources Committee Chairman Doc Hastings (R-WA)

		Committee	
S. 2797 H.R. 3862	Issue – Water Infrastructure/SRFs Senate Title – Clean Water Affordability Act: Would update the Environmental Protection Agency’s (EPA) clean water affordability policy, which the bill’s sponsor believes does not provide for a full and accurate representation of the financial impacts of clean water investment programs on communities. The bill would authorize \$1.8B over five years for a grant program to help financially distressed communities update aging infrastructure. It would provide a 75-25 cost share for municipalities to use for planning, design, and construction of treatment works to control combined and sanitary sewer overflows. Other provisions would: (1) tailor the implementation schedule for water quality-related improvements to the affected community’s unique financial condition; (2) structure environmental improvements to mitigate the potential adverse impacts of their cost on distressed populations; (3) allow for reopening of approved Long Term Control Plans for green infrastructure projects; and (4) establish integrated permitting that would require EPA to prioritize the funding of the most cost-effective and most important water quality projects. House Title - Clean Water Affordability Act of 2014: Would amend the Clean Water Act (CWA) to update EPA’s clean water affordability policy to assist municipalities that cannot meet water quality standards. It would require states to provide at least 15% of SRF capitalization grants to assist municipalities with less than 10,000 individuals that meet certain eligibility criteria. Municipalities would have an extended repayment loan period from the current limit of 20 years to 30 years, as well as extra time for their implementation schedules of up to 30 years. Moreover, the bill would require that states use between 20% and 30% of the capitalization grants they receive to “provide additional subsidization” to eligible municipalities. <i>*WSWC Policy #364 supporting the SRFs and increased flexibility for state SRF management.</i> <i>**WGA Resolution #2014-03, paragraph B(4) regarding federal data programs.</i>	9/11/14: Introduced in Senate and referred to the Committee on Environment and Public Works 01/14/14: H.R. 3862 introduced and referred to Transportation and Infrastructure Committee	Senator Sherrod Brown (D-OH) introduced S. 2797 Rep. Robert Latta (R-OH) introduced the bill with three co-sponsors

	**WGA Resolution #2014-04 , paragraph B(8) supporting the SRFs.		
S. 2771 H.R. 5363	Issue – Water Conservation, Reuse, and Management Title – Water in the Twenty-First Century Act (W21): Would authorize provisions intended to provide new incentives and investments to support water conservation, reuse, and the management of limited water supplies. First, to promote conservation and efficiency, it would support EPA’s WaterSense program by authorizing \$50M to administer the program and \$700M for rebates through 2019, after which the rebate funding would continue at FY 2019 levels. It would also create a new EPA grant program for local water systems to conserve water, increase water efficiency or reuse, preserve water quality, and modify or relocate existing infrastructure that is or will be inoperable due to climate change. Second, it would leverage federal financing through loan guarantees and matching grants to support water recycling, ground water management, storage, and water conveyance structures by providing \$250M over five years for secured loans. It would also provide \$150M in grants for integrated regional water management, reclamation, and recycling projects. Third, to further research, data, and technology, the bill would establish an open water data system within the U.S. Geological Survey (USGS) to “...advance the availability, timely distribution, and widespread use of water data and information for water management, education, research, assessment, and monitoring purposes.” Among other things, the system would integrate water data and information into an “interoperable, national, geospatially-referenced water data framework,” and would leverage existing shared databases and other tools. Other data-related provisions would: (1) reauthorize the Water Resources Research Act (WRRRA), which established state water resources research institutes, at \$9M per year through 2020; (2) reauthorize the Water Desalination Act at \$3M per year through 2020; and (3) direct the U.S. Army Corps of Engineers to review reservoir operations and assess whether there is a benefit in adjusting operations to account for improved forecasting data.	7/31/14: S. 2771 introduced and referred to the Committee on Environment and Public Works 7/31/14: H.R. 5363 introduced and referred to the House Committees on Natural Resources, Transportation and Infrastructure, and Commerce, Justice and Science	Senate Environment and Public Works Committee Chair Barbara Boxer (D-CA) introduced S. 2771 along with Senate Majority Leader Harry Reid (D-NV) and Senator Barbara Boxer (D-CA) House Natural Resources Subcommittee on Water and Power Ranking Member Grace Napolitano (D-CA) introduced H.R. 5363

	Fourth, to support drought preparedness, the bill would establish drought resilience guidelines for state and local agencies through EPA in coordination with the Departments of Agriculture, Commerce, and Interior. It would also direct the U.S. Fish and Wildlife Service (FWS), in consultation with state and federal agencies, to prepare a salmon drought plan to address the impacts of drought on the salmon population in California. Fifth, the bill would allow Interior to transfer title of Bureau of Reclamation facilities and projects to non-federal entities under certain conditions. The provision is similar to legislation (S. 2034) from Brian Schatz (D-HI), who chairs the Senate Energy and Natural Resources Water and Power Subcommittee. Unlike Schatz’s bill, the provision would not require consultation with the governors of the affected states or conformity with state water laws. Nevertheless, it would require Interior to notify relevant congressional committees of proposed transfers and require that the committees not object for the transfer to proceed. <i>*WSWC Policy #368 supporting federal authorization and related support for the state water resources research institutes authorized under WRRRA.</i> <i>*WSWC Policy #362 supporting the “careful evaluation” of the transfer of federal water assets to non-federal ownership, with strong state involvement and protections for state water laws and water rights.</i> <i>**WGA Resolution #2014-03, paragraph B(2)(d) regarding infrastructure planning and permitting</i>		
H.R. 5189	Issue – Energy/Water Nexus Title – Energy and Water Research Integration Act: Would require the Department of Energy (DOE) to integrate water considerations into its energy development, research, and demonstration programs and projects. It would also require DOE to establish an Energy-Water Subcommittee, in coordination with other relevant federal agencies, to promote and enable improved energy and water resource data collection, reporting, and technical innovation.	7/24/14: Introduced in House and referred to the Science, Space, and Technology Committee	House Science, Space, and Technology Committee Ranking Member Eddie Bernice Johnson (D-TX) with Rep. Ralph Hall (R-TX)

	<i>*WSWC Policy #338 commending the introduction of an earlier “Energy and Water Research Integration Act” bill in the 112th Congress.</i> <i>**WGA Resolution #2014-03, paragraph B(3)(b) regarding energy development.</i>		
No Senate Bill Number Yet H.R. 5171	Issue – Senate FY 2015 Interior and Environment Appropriations for USGS, Bureau of Land Management (BLM), FWS, EPA, and the U.S. Forest Service (USFS) Senate Title – None: Would appropriate \$30.7B to fund a number of agencies within the Department of the Interior as well as EPA and the USFS. Within Interior, USGS would receive \$1B, an increase of \$14M over 2014 levels and \$27M below the President’s request. Funding for USGS’s Cooperative Water Program would increase by \$351,000 to \$59.8M, which is \$264,000 more than the request. Similarly, funding for the National Streamflow Information Program would be \$35M, which is \$1.3M more than current levels and even with the request. USGS’s land remote sensing activities, which include the Landsat program, would increase \$192,000 to \$68.1M, about \$1.5 above the request. Elsewhere in Interior, the BLM funding would rise \$6M to \$1.1B, about \$12.8M more than the request. The FWS would receive \$1.4B, a \$23.4M increase but \$25.4M less than the request. EPA funding would fall \$17.9M to \$8.2B, which is \$292M more than the President’s request. The Clean Water SRF would remain flat at \$1.4B, a \$430.1M increase over the request. Drinking Water SRF funding would also stay even at \$906.9M or \$149.9M more than the request. The USFS would get \$4.6B, \$853M less than last year and \$127M less than the President’s request. For more on the Senate’s recommendation, see:	8/1/14: Senate Appropriation Committee’s appropriations recommendation released 7/23/14: H.R. 5171 introduced and reported by the House Appropriations Committee	Senator Jack Reed (D-RI), Chairman of the Senate Appropriations Subcommittee on Interior, Environment, and Related Agencies developed the Senate recommendation with Ranking Member Lisa Murkowski (R-AK) House Appropriations Subcommittee on Interior, Environment, and Related Agencies Chair Ken Calvert introduced H.R. 5171

	http://www.appropriations.senate.gov/news/fy15-interior-subcommittee-bill-draft-report. House Title – Department of the Interior, Environment, and Related Agencies Appropriations Act: Would provide a total of \$30.2B in base funding for Interior and environment programs, representing an increase of \$162M above FY 2014 levels and a reduction of \$409M below the President’s request. The bill would cut EPA funding by \$717M, a 9% reduction that would give the agency \$7.5B. The Clean Water and Drinking Water SRFs would receive \$1B and \$757M respectively, which is on par with the President’s budget request, but represents a 23% cut in total SRF spending. Many of the other cuts to EPA’s budget target the agency’s administrative functions, including a 50% reduction to the Office of the Administrator, the Office of Congressional Affairs, and the Office of the Chief Financial Officer. The bill would also hold EPA staffing levels to 15,000, the lowest since 1989. According to Republicans, the cuts are intended to focus the agency’s activities on its core duties, rather than what they consider to be unnecessary regulatory expansion. To this end, many of the bill’s riders also target EPA efforts, including language that would prohibit the agency from finalizing its proposed CWA jurisdiction rule and from changing the definitions of “fill material” as used in its regulations regarding Section 404 of the CWA. Within Interior, USGS would receive \$1B, a \$4M increase above FY 2014 levels. The bill would also prioritize funding for a number of activities, including streamgages, groundwater monitoring, and mapping. BLM would receive \$1.1B, a decrease of \$13M from FY 2014 levels. USFS would receive \$5.6B, a \$85.7M increase over current levels. The bill also specifies that none of the funds it provides can be used to condition the issuance of any federal permit, license, or other land use agreement on the transfer of a water right. Notably, the bill would provide a total of \$4.1B for “wildland” firefighting and prevention programs, a \$149M increase. In particular, it would: (1) fully fund the 10-year average for wildland fire suppression costs for Interior and USFS; (2) appropriate another \$470M for USFS to help fill an expected shortfall in fire suppression funding this year; (3) provide a		
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	\$90M increase above current levels for hazardous fuel management; and (4) provide funding for two next-generation aircraft to replace aging planes that are used for large-scale fire suppression. For more, please see: http://appropriations.house.gov/news/documentsingle.aspx?DocumentID=386991. <i>*WSWC Policy #345 supporting federal water and climate data collection and analysis programs.</i> <i>*WSWC Policy #364 supporting the SRFs and increased flexibility for state SRF management.</i> <i>**WGA Resolution #2014-03, paragraph B(4) regarding federal data programs.</i> <i>**WGA Resolution #2014-04, paragraph B(8) supporting the SRFs.</i>		
H.R. 5077	Issue – CWA/State Water Quality Programs Title – The Coal Jobs Protection Act: Would preserve state authority to make determinations relating to a state’s water quality management program. The bill’s supporters also say the bill will restrict EPA’s ability to “second-guess” or delay state permitting and water quality standards decisions.	9/18/14: House Transportation and Infrastructure Committee reports H.R. 5077 7/16/14: House Transportation and Infrastructure Committee holds mark-up session on H.R. 5077 7/11/14: H.R. 5077 introduced in House and referred to the Transportation and Infrastructure	Rep. Shelley Moore Capito (R-WV) introduced H.R. 5077 with nine co-sponsors

H.R. 5071	Issue – CWA/Agricultural Exemptions Title – Agricultural Conservation Flexibility Act of 2014: Would require EPA and the Corps to withdraw the interpretive rule they finalized in March 2014 regarding agricultural conservation activities that are exempt from permitting under Section 404(f)(1)(A) of the CWA. The bill further specifies that EPA and the Corps could not use the rule as the basis for future rulemaking, decisions, or efforts regarding the scope of the CWA. In addition, the rule would amend the CWA to specify that Section 404(f)(1)(A) shall be applied without regard to the interpretive rule and that: (1) “all soil and water conservation practices shall be treated as normal farming, silviculture, and ranching activities under Section 404(f)(1)(A);” and (2) that “no soil and water conservation practices shall be treated as a new use of an area of navigable waters, an impairment of the flow and circulation of navigable waters, or a reduction in the reach of such waters under Section 404(f)(1)(A).” WSWC Policy #370, asking EPA and the Corps to withdraw the interpretive rule.	7/10/14: Bill introduced and referred to the Transportation and Infrastructure Committee	Reid Ribble (R-WI) introduced the bill with 68 co-sponsors
S. 2503 H.R. 4924	Issue – Indian Water Rights/Arizona Title – Bill Williams River Water Rights Settlement Act of 2014: Would authorize two related water rights agreements in Arizona’s Bill Williams River basin. The first settlement, the Big Sandy River-Planet Ranch Agreement, would facilitate the severance and transfer of water rights owned by Freeport Minerals Corporation along the Bill Williams River and resolve pending objections by the Department of the Interior and the Arizona Game and Fish Commission (AGFC). This will enable Freeport to move its rights and carry out mining activities along the Big Sandy River, an upstream tributary of the Bill Williams River. Under the agreement, Freeport would cap its withdrawals and other specified groundwater wells at their historic maximum pumping level of 10,055 acre-feet per year. Further, the Bureau of Reclamation would lease water rights and lands owned by Freeport to support the Lower Colorado River Multi-Species Conservation Program (MSCP). Freeport would then donate the lands that Reclamation leases to the AGFC.	9/19/14: House Natural Resources Subcommittee on Water and Power holds hearing on H.R. 4924 7/9/14: Senate Indian Affairs Committee holds hearing on S. 2503 6/20/14: H.R. 4924 introduced in House 6/19/14: S. 2503 introduced in the Senate	Senator Jeff Flake (R-AZ) introduced S. 2503 along with Senator John McCain (R-AZ) Rep. Paul Gosar (R-AZ) introduced the H.R. 4924, along with the entire Arizona delegation to the House

	The second agreement, the Hualapai Tribe Bill Williams River Water Rights Settlement Agreement, would resolve water rights claims the tribe has asserted for a small Executive Order reservation, as well as related objections Interior has filed on the tribe's behalf over Freeport's proposed water transfer at issue in the Big Sandy agreement. Under the Hualapai agreement, Freeport and the United States would acknowledge the tribe's right to 694 acre-feet of water per year in the basin. Freeport would also implement certain protections for the tribe's water uses on culturally significant lands, and make a financial contribution into the tribe's Economic Development Fund. The tribe would use this money to address water needs on its main reservation along the Colorado River. The settlement does not involve any federal funding and does not resolve the tribe's outstanding water rights claims regarding its main reservation.	and referred to the Committee on Indian Affairs	
S. 2496 H.R. 5078	Issue –CWA Rulemaking Senate Title – Protecting Water and Property Rights Act of 2014: To prevent EPA and the Corps from finalizing the proposed rule on CWA jurisdiction they issued in March. The bill would also prohibit the agencies from using the proposed rule "...as the basis for any rulemaking or any decision regarding the scope or enforcement of the [CWA]." House Title – Waters of the United States Regulatory Overreach Protection Act of 2014: Would prohibit EPA and the Corps from finalizing the proposed CWA jurisdiction rule. Among other requirements, the bill would require the agencies to "jointly consult with relevant State and local officials to develop a recommendation for a regulatory proposal" that would comply with U.S. Supreme Court rulings and identify the scope of waters covered under the CWA as well as the scope of non-jurisdictional waters. <i>*WSWC Policy #369 regarding CWA jurisdiction and related letters dated 3/10/14 12/23/13,11/20/13, 11/5/13, 4/10/13, and 7/29/11 (on filed with WSWC).</i> <i>**WGA Resolution #2014-04, paragraph B(1)(a) regarding CWA jurisdiction and related letters dated 8/27/14,5/30/14, and 3/25/14 and Congressional testimony before the Senate</i>	9/9/14: House passes H.R. 5078 262-152, with all but one Republican and 35 Democrats voting in favor of the bill 7/31/14: House Transportation and Infrastructure Committee reports H.R. 5078 7/11/14: H.R. 5078 Introduced in the House and referred to the Transportation and Infrastructure Committee	Senator John Barrasso (R-WY) introduced S. 2496 with 38 other Senate Republicans, including Environment and Public Works Committee Chair David Vitter (R-LA) Rep. Steve Southerland (R-FL) with 120 co-sponsors

	<i>Appropriations Subcommittee on Interior, Environment, and Related Agencies on 5/23/14 and before the House Appropriations Subcommittee on Interior, Environment, and Related Agencies on 4/10/14.</i> <i>***Joint WSWC-WGA Congressional testimony dated 6/11/14 before the House Transportation and Infrastructure Subcommittee on Water Resources and Environment.</i>	6/19/14: S. 2496 introduced and referred to the Committee on Environment and Public Works	
H.R. 4854	Issue – CWA Section 404 Permits Title – The Regulatory Certainty Act: Would require the Corps to notify EPA that it has completed all procedures for processing an application for a permit under Section 404. EPA would then have 30 days to revoke or modify the permit. The bill would also clarify that EPA does not have the authority to retroactively veto a 404 permit after the Corps has completed its review and issued a permit.	7/16/14: Committee reports bill 6/12/14: Introduced in House and transferred to the Transportation and Infrastructure Committee	House Transportation and Infrastructure Subcommittee on Water Resources and Environment Chair Bob Gibbs (R-OH) with 20 co-sponsors
H.R. 3981	Issue – Storage Water Title – Accelerated Revenue, Repayment, and Surface Water Storage Enhancement Act: Would require the Secretary of the Interior to allow for the prepayment of repayment contracts between water users and the U.S.	9/18/14: House and Natural Resources Committee reports bill 02/05/14: Subcommittee on Water and Power hearing 01/31/14: Introduced and referred to House Natural Resources Committee	House Natural Resources Committee Chair Doc Hastings (R-WA) introduced the bill
S. 2427 H.R. 3980	Issue – Storage Water Infrastructure Title – Water Supply Permitting Coordination Act: Would authorize the Secretary of the Interior to coordinate federal and state permitting processes regarding the construction	9/18/14: House Natural Resources Committee reports H.R. 3980	Senator John Barrasso (R-WY) introduced S. 2427 with Senator Mike

	of new surface water storage projects that are located on lands falling under the jurisdiction of the Secretaries of Agriculture and Interior. The legislation would also designate Reclamation as the lead agency for permit processing. <i>**WGA Resolution #2014-03, paragraph B(2)(d) regarding infrastructure planning and permitting.</i>	6/04/14: S. 2427 introduced and referred to Senate Committee on Energy and Natural Resources 2/05/14: House Subcommittee on Water and Power holds hearing on H.R. 3980 1/31/14: H.R. 3980 introduced in House and referred to Natural Resources Committee	Enzi (R-WY) House Subcommittee on Water and Power Chair Tom McClintock (R-CA) introduced H.R. 3980 with co-sponsor Cynthia Lummis (R-WY)
S. 2226 H.R. 5150	Issue: Conservation/WaterSense Title – WaterSense Efficiency, Conservation, and Adaptation Act of 2014: Would permanently authorize EPA’s existing WaterSense program, providing a dedicated source of funding for the water equivalent of EnergyStar. The bill would also establish a grant program called the “Blue Bank” to provide water and sewer utilities with grants to improve water supply management, efficiency and encourage reuse.	7/17/14: H.R. 5150 introduced in the House and referred to the Committees on Energy and Commerce, Transportation and Infrastructure, and Natural Resources 4/09/14: S. 2226 introduced in the Senate and referred to the Environment and Public Works Committee	Senator Tom Udall (D-NM) introduced S. 2226 with two co-sponsors, including Senator Barbara Boxer (D-CA) Rep. Jerry McNerney (D-CA) introduced H.R. 5150
S. 2225 H.R. 5149	Issue – Conservation Title – Smart Water Resource Management Conservation and Efficiency Act of	7/17/14: H.R. 5149 introduced in the House and referred to the	Senator Tom Udall (D-NM) introduced S. 2225 with

	2014: Would fund “smart” water system pilot projects in three to five cities across the country. Communities would compete for grant funding to develop innovative demonstration projects and to create a “smart-grid” for water - detecting leaks as soon as they happen, or even before they happen. The pilots would serve as models for other communities to replicate and build on.	Committees on Energy and Commerce, Science Space, and Technology, Natural Resources; and Transportation and Infrastructure 7/16/14: Senate Environment and Public Works Subcommittee on Water and Wildlife holds hearing on S. 2225 4/09/14: Introduced and referred to the Senate Environment and Public Works Committee	Senator Saxby Chambliss (R-GA) Rep. Jerry McNerney (D-CA) introduced H.R. 5149 with Rep. Adam Kinzinger (R-IL)
S. 2010 H.R. 1963	Issue – Hydropower Title – Bureau of Reclamation Conduit Hydropower Development Equity and Jobs Act: Would amend the Water Conservation and Utilization Act (WCUA) to authorize small, non-federal hydropower development at facilities constructed under the WCUA. The bill is similar to legislation (H.R. 678) Congress passed last year to facilitate small hydropower development at other federal projects authorized under Reclamation law. <i>*WSWC Policy #351, supporting renewable hydropower development.</i> <i>**WGA Resolution #2014-03 B(2)(c) regarding hydropower development.</i>	7/31/14: Senate Committee on Energy and Natural Resources reports H.R. 1963 and S. 2010 2/27/14: Senate Subcommittee on Water and Power hearing held on H.R. 1963 and S. 2010 2/10/14: S. 2010 introduced in the Senate and referred to Energy	Senator John Barrasso (R-WY) introduced S. 2010 Rep. Steve Daines (R-MT) introduced H.R. 1963 with co-sponsors Reps. Doug LaMalfa (R-CA), Scott Tipton (R-CO), Kevin Cramer (R-ND), and Cynthia Lummis (R-WY)

		and Natural Resources Committee 12/09/13: H.R. 1963 received in the Senate and referred to the Energy and Natural Resources Committee 12/03/13: House passes H.R. 1963 by voice vote 10/22/13: House Natural Resources Committee reports H.R. 1963 5/14/13: H.R. 1963 introduced and referred to House Natural Resources Committee	
S. 1818 H.R. 3716	Issue – Indian Water Rights Title – Pyramid Lake Paiute Tribe – Fish Springs Ranch Settlement Act: Would authorize and ratify a settlement agreement between the Pyramid Lake Paiute Tribe and the Fish Springs Ranch in Nevada. The agreement would resolve the tribe’s objections to a project the ranch is developing to import up to 8,000 acre-feet of groundwater per year to the Reno, Nevada area. As part of the settlement, the ranch would make a number of payments to the tribe for various purposes. While the agreement does not involve any federal funding, it does require Congressional authorization for the tribe to execute certain waivers and releases of claims.	9/18/13: Senate passes H.R. 3716 by unanimous consent 7/22/14: House passes H.R. 3716 by voice vote 7/22/14: Senate Indian Affairs Committee reports S. 1818 7/17/14: House Natural Resources Committee	Senator Harry Reid (D-NV) introduced S. 3716 with co-sponsor Senator Dean Heller (R-NV) Rep. Mark Amodei (R-NV) introduced H.R. 3716 with Rep. Steven Horsford (D-NV)

		reports H.R. 3716 12/12/13: H.R. 3716 introduced in the House and referred to Natural Resources Committee 12/12/13: S. 1818 introduced in the Senate and referred to Indian Affairs Committee	
S. 802 H.R. 935	Issue – CWA/Federal Insecticide Fungicide and Rodenticide Act (FIFRA)/Pesticides Senate Title – Sensible Environmental Protection Act of 2013/House Title – Reducing Regulatory Burdens Act of 2014: Would amend the CWA and FIFRA to clarify that pesticide applications made in compliance with FIFRA do not need National Pollutant Discharge Elimination System (NPDES) permits. The bill would also overturn the 6th Circuit Court of Appeals decision in <i>National Cotton Council v. EPA</i>, 553 F.3d 927 (6th Cir. 2009), which held that pesticide applications require NPDES permits. <i>*WSWC Policy #359, supporting legislation to amend FIFRA and the CWA to clarify that FIFRA-compliant pesticide applications do not require NPDES permits.</i> <i>**WGA Resolution #14-04, paragraph B(2)(d), supporting primary role of FIFRA in regulating pesticide applications.</i>	7/31/14: House passes H.R. 935 by a vote of 267-161 6/2/14: House Agriculture Committee reports H.R. 935 6/2/14: House Transportation and Infrastructure Committee reports H.R. 935 4/24/13: S. 802 introduced in Senate and referred to Environment and Public Works Committee 3/04/13: H.R. 935 introduced in House and referred to Agriculture	Sen. Kay Hagan (D-NC) introduced S. 802 with 13 co-sponsors, including Environment and Public Works Committee Ranking Member David Vitter (R-LA) and western Senators Mike Crapo (R-ID), James Risch (R-ID), Deb Fischer (R-NE), Heidi Heitkamp (D-ND), and James Inhofe (R-OK) House Transportation and Infrastructure Subcommittee on Water Resources

		and Transportation and Infrastructure Committees	and Environment Chair Bob Gibbs (R-OH) introduced H.R. 935 with 61 co-sponsors
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NOTABLE LITIGATION

Case Names	Issue – EPA’s Water Transfers Rule
<i>Friends of the Everglades v. EPA</i>, 699 F.3d 1280 (11th Cir. 2009) <i>Catskills Mountains Chapter of Trout Unlimited, et al v. EPA</i>, 2014 U.S. Dist. LEXIS 42535 (March 2014)	In 2008, EPA promulgated its “Water Transfers Rule,” clarifying that certain water transfers do not require NPDES permits under the CWA. When EPA finalized the rule in 2008, opponents immediately challenged it in the Southern U.S. District Court of New York (SDNY) and the Southern U.S. District Court of Florida (SDFL). However, in issuing the rule, EPA opined that judicial review of the rule could only take place before the U.S. Circuit Courts of Appeal, and not the federal district courts. Given this position, opponents filed protective challenges in multiple circuits, which were consolidated in the 11th Circuit. The district court challenges were then stayed pending the 11th Circuit's decision. The 11th Circuit subsequently stayed the consolidated rules challenge case pending the outcome of a related case that was also before the court, commonly known as the “Lake Okeechobee Case,” 570 F.3d 1210 (11th Cir. 2009). That case upheld the rule in 2009 as a reasonable interpretation of the CWA entitled to deference. The U.S. Supreme Court subsequently denied certiorari in 2010, allowing the consolidated rules challenge to proceed before the 11th Circuit. In August 2012, a three-judge panel of the 11th Circuit heard oral argument on the consolidated petitions. The panel addressed two arguments raised by the petitioners: (1) whether the Courts of Appeal have jurisdiction under the CWA to review the rule; and (2) whether the rule is valid. On October 26, 2012, the 11th Circuit held that it did not have original subject matter jurisdiction to hear the consolidated challenge under the plain language of the CWA. As a result, the 11th Circuit dismissed the consolidated rules challenge without addressing the rule’s validity. The U.S. Solicitor asked the U.S. Supreme Court to review the decision, a request the Court denied on October 15, 2014. The 11th Circuit’s dismissal of the consolidated rules challenge and the Court’s refusal to review that decision allowed the challenges pending before the SDNY and the SDFL to proceed. However, petitioners subsequently dismissed their challenge in SDFL, presumably given the precedent favoring the rule that the 11th Circuit’s set forth in its “Lake
Courts	
Southern U.S. District Court of New York (SDNY) 2nd Circuit Court of Appeals	
Relevant Dates	
03/12/12: Challenges to EPA’s rule	

filed 06/04/09: 11th Circuit issues “Lake Okeechobee” decision, upholding EPA’s water transfers rule 11/29/10: U.S. Supreme Court denies certiorari for the 11th Circuit’s “Lake Okeechobee” decision, allowing consolidated rules challenge to proceed in the 11th Circuit 10/26/12: 11th Circuit finds that it does not have original jurisdiction to hear the consolidated rules challenge and dismisses the action 11/14/12: Petitioners move to dismiss their challenge in SDFL, leaving only the challenge before the SDNY 07/28/13: EPA files petition for certiorari to the U.S. Supreme Court regarding 11th Circuit dismissal of the consolidated rule challenge due 10/15/14: U.S. Supreme court denies certiorari for the 11th Circuit’s dismissal of the consolidated rules challenge	Okeechobee” decision. Given the above developments, the SDNY because the only action left standing. As it proceeded, the court approved requests by the following intervenors to join: • A coalition of western states led by Colorado and New Mexico, which also includes Alaska, the Arizona Department of Water Resources, Idaho, Nebraska, Nevada, North Dakota, Texas, Utah, and Wyoming; • A coalition of over 20 western water providers; • The South Florida Water Management District (SFWMD); and • New York City. On March 28, 2014, SDNY issued its decision, vacating the rule and remanding back to EPA for further action consistent with its ruling. In reaching this decision, the court rejected EPA’s reasoning for the rule, namely that moving unaltered water from one “navigable” water to another does not constitute an “addition” of pollutants requiring an NPDES permit, because the conveyance does not cause the transferred water to lose its status as a “navigable” water. The court reasoned that “...many of the types of conveyances contemplated by [the rule] would not be considered a ‘navigable water’ under any of the...standards used in <i>Rapanos</i>.... Therefore, because EPA may expand the scope of ‘navigable waters’ only within the limits defined in <i>Rapanos</i>, and because...[the rule] goes beyond those limits, the Court rejects EPA’s interpretation.” SDNY also said some of the CWA’s language regarding state rights and state primacy over water allocation “...support an interpretation allowing for meaningful federal regulation of water transfers. For example [Section] 101(b)’s statement of a policy ‘to recognize, preserve, and protect the <i>primary</i> responsibilities and rights of States’...implicitly recognizes a <i>secondary</i> role for the federal government, which...could include regulation of water transfers.” The court also said a 1972 House report discussing Section 208 of the CWA “...implies that states should have control over water-resource allocation <i>only</i> where they have an EPA approved 402 program and a water-resource allocation program.... Where a state has neither, the [report’s] language implies that the federal government should exercise primary responsibility.” EPA has appealed the SDNY’s decision to the 2nd Circuit, as have the 11 western intervening states. In its opening brief, EPA argues that it has never construed the CWA to require permits for water transfers except where the transfer itself introduces pollutants or the water is subjected to an intervening use. It also states that the CWA is ambiguous and that the agency “reasonably exercised its authority to resolve the statutory ambiguity.” The agency further challenges the district court’s conclusion that the agency did not provide a “reasoned explanation” for the rule. “In doing so, the district court failed to apply the requisite high level of deference to EPA’s decisionmaking, instead undertaking a skeptical review of EPA’s reasoning, disregarding EPA’s explanations, and substituting its own judgments about the best
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03/28/14: SDNY vacates rule 05/12/14: WGA and WSWC write EPA, urging it to appeal SDNY decision 05/29/14: EPA filed a notice of appeal of the SDNY decision. 09/09/14: Western intervenors file their opening appellate brief 09/11/14: EPA files its opening appellate brief. 09/18/14: California files amicus brief in support of rule. 12/15/14: Response briefs due from Plaintiff-Appellees	reading of the statute for that of the agency,” EPA said. “The district court then went on to speculate about other interpretations EPA might adopt and held them to be contrary to the statute.... The Court should correct the district court’s multiple errors, join the Eleventh Circuit in upholding the Rule, and reverse the district court’s contrary judgment.” EPA’s brief also addresses prior 2nd Circuit rulings that rejected the underlying reasoning for the rule. EPA notes that these decisions took place before it finalized the rule and addressed informal policy statements that were not entitled to the same level of deference as final regulations. Moreover, EPA said the decisions did not find the CWA to be unambiguous and therefore do not preclude EPA’s regulatory interpretation of the statute, which it said is a reasonable interpretation that is entitled to deference. The western states that intervened in the SDNY have also filed an opening brief in support of the rule, which argues that requiring NPDES permits may make many transfers technically or economically infeasible, potentially abrogating state water allocation, interstate compacts, interstate water apportionments, and congressional acts. “The [CWA] lacks a ‘clear and manifest statement from Congress to authorize an unprecedented intrusion into state authority’ over water uses,” the brief argues, citing Section 101(g) and other provisions in the CWA that state explicitly that the act will not abrogate state water allocation authority. Of further note, California has filed a separate amicus brief asking the 2nd Circuit to reverse the SDNY decision, stating: “The CWA must be read in light of the long-established and clear congressional policy to defer to state water law, and to not impair or abrogate the states’ historic rights to allocate their water resources and establish priority of use. Application of the NPDES program to inter-basin water transfers between water bodies of the United States when no pollutants are added by the transfer is inconsistent with congressional direction because it significantly impairs California’s sovereign interests in the allocation of the quantity and the priority of usage of its waters.” The Plaintiff-Appellees’ response briefs are due by December 15. <i>*WSWC Policy #342, generally supporting EPA’s rule.</i> <i>**WGA Resolution #14-04, Paragraph B(2)(c), generally supporting EPA’s rule.</i> <i>***Joint letter from WGA and WSWC urging EPA to appeal the SDNY decision dated 5/12/14.</i> <i>Special thanks to Peter Nichols, Special Asst. Attorney General for Colorado and New Mexico, who provided much of the information used in the summary of this litigation. For more information, see Peter’s 7/17/14 presentation to the WSWC, available at: http://www.westernstateswater.org/wp-content/uploads/2013/12/Nichols_WSWC-WTR-Update-17-July-14-Revised.pdf.</i>
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Case Name	Issue – NPDES Permits and Dams
<i>Columbia Riverkeeper v. U.S. Army Corps of Engineers</i> , Case No. 2:13-md-02494-LRS	On August 4, 2014, the U.S. Army Corps of Engineers filed a settlement agreement in the U.S. District Court for the Eastern District of Washington to resolve a lawsuit Columbia Riverkeeper filed over discharges from eight dams the Corps operates on the Columbia and Snake Rivers in Oregon and Washington, which the group argued require NPDES permits under the CWA. Under the settlement, the Corps will apply for NPDES permits for pollutants leaking from the gates, turbines, and other equipment in the dams. While the Corps admits no wrongdoing, it also agreed to disclose the amount of pollutants coming from the dams and to pay over \$140,000 in attorney’s fees. The settlement marks the first time the Corps has agreed to monitor and disclose the chemicals released from its dams. To read the settlement, see: http://columbiariverkeeper.org/blog/summary-of-columbia-riverkeeper-dams-settlement/.
Court	
U.S. District Court for the Eastern District of Washington	
Relevant Dates	
7/31/13: Columbia Riverkeeper filed complaint 8/4/14: Corps files settlement agreement	

Columbia Riverkeeper has hailed the agreement as a “victory,” stating that the dams have discharged oil pollution for years, including 1,500 gallons of transformer oil that one of the dams released in 2012. A press release from the organization also cited a number of CWA experts on the possible impact of the settlement, including Lewis and Clark Law Professor Melissa Powers, who said the settlement “...has implications for dams operating without pollution permits across the country. Like any industrial facility, dams are prohibited from discharging pollution until they obtain pollution permits.” To read the press release, see: <http://columbiariverkeeper.org/featured/victory-new-era-of-accountability-for-some-of-nations-largest-dams/>.

However, House Natural Resources Committee Chair Doc Hastings (R-WA) wrote the Corps on August 6 to express “strong concerns” about the settlement. “Like an increasing number of the Obama Administrations ‘sue and settle’ agreements over the past few years, this settlement was negotiated behind closed doors...without consultation or input from those most directly impacted,” he said. “Of great concern is the likely precedent that this decision could have relating to the EPA’s enforcement of the [CWA] relating to the operation and maintenance of federal and non-federal dams.... This settlement would empower EPA to enforce stringent [NPDES] permit requirements that could slow down or impede the Army Corps’ operation or maintenance of the dams. It also sets a host of burdensome and fixed deadline requirements that could lead to even more litigation in the future.” See: <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=390429>.

Case Name	Issue – Endangered Species Act (ESA)
<i>San Luis & Delta Mendota Water Authority v. Jewell</i> , 747 F.3d 581 (9 th Cir. 2014)	This case involves a challenge to a 2008 Biological Opinion (BiOp) that the FWS issued regarding the impacts of the Central Valley Project (CVP) and the State Water Project (SWP) in California on the threatened Delta smelt. The BiOp concluded that the projects jeopardized the smelt and its habitat.
Courts	The California Department of Water Resources, federal and state water contractors, and other parties sued to overturn the BiOp. They argued, among other things, that the science used to justify the BiOp was not the “best available science,” which the ESA requires the FWS to use in developing BiOps. The plaintiffs also argued that the FWS did not consider economic and technological feasibility in crafting certain aspects of the BiOp, contrary to their interpretation of ESA regulations.
Eastern District of California	
9th Circuit Court of Appeals	
Relevant Dates	A federal district court agreed with the plaintiffs and struck down the BiOp, finding that the FWS did not use the best available science and that the BiOp was “arbitrary and capricious.” The district court relied in part on testimony from scientific experts retained by the parties and two independent court-appointed experts that found FWS’ methodologies to be flawed and unreliable. On appeal, the 9th Circuit issued a divided 2-1 decision that upheld all aspects of the BiOp. In reaching this conclusion, the 9th Circuit reasoned in part that the district court erred in admitting testimony from the experts the parties had retained and found that the lower court should have deferred to the FWS’ scientific judgment. Specifically, it found that deference should be given to FWS determinations under ESA §7(a)(2) and that the agency’s discretion to use available data should be given deference unless its reasoning is irrational. The court also held that the FWS was not required to consider economic and technological feasibility. Plaintiffs subsequently filed petitions for a rehearing before the full 9th Circuit. Alaska, Kansas, Oklahoma, Nebraska, South Carolina, and Wyoming also filed amicus briefs in support of a rehearing, along with various water, building industry, forestry, hydropower, and agricultural organizations. However, the 9th Circuit denied these requests in July, setting up a possible appeal to the U.S. Supreme Court. Plaintiffs are now in the process of appealing the case to the U.S. Supreme Court and are seeking amicus support. Amicus briefs are due on October 21. In requesting amicus support, plaintiffs have identified a number of possible national impacts, including: • The possibility that the case could be used to support an interpretation of the ESA in which wildlife agencies can invoke their discretion to exercise their expert scientific judgment and will be largely immune from meaningful
3/13/14: 9 th Circuit issues decision upholding BiOp	
7/23/14: 9 th Circuit denies petitions requesting a rehearing	
10/21/14: Amicus briefs supporting U.S. Supreme Court review are due	

	judicial review, thereby having wide discretion to decide not to use the “best available science;” • Holding that the FWS does not need to consider economic and technological feasibility is contrary to other circuit court decisions and will needlessly impose societal costs without any corresponding species benefit; • The holding will exacerbate conflict and bitterness regarding the ESA; and • The best strategy to protect and recovery listed species is through adherence to the best available science.
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Tab U – Future Council Meetings

WESTERN STATES WATER COUNCIL

FUTURE MEETINGS

Upcoming Council Meetings/Host States

2015 Meetings

- Spring – Tulsa, Oklahoma
April 2015 (Apr 8-10 or Apr 15-17)
- Summer – **WSWC 50th Anniversary** – Lake Tahoe, Nevada
July 2015 (July 8-10 or July 15-17)
- Fall – Manhattan, Kansas
October 2015 (Oct 7-9 or Oct 14-16)

2016 Meetings

- Spring – Washington, D.C.
- Summer – North Dakota (last hosted 7/11/2008 in Medora)
- Fall – Utah (last hosted 7/17/09 in Park City)

2017 Meetings

- Spring - Nebraska (last hosted 10/16/09 in Lincoln)
- Summer – California (last hosted 10/29/10 in San Diego)
- Fall – New Mexico (last hosted 4/15/11 in Santa Fe)

2014/2015 Symposia / Workshops

Water Management Symposium on Infrastructure: Sustainability, Storage & Streamlining
February (TBD)
(Water Quality and Water Resources Committee)

Water Quality / Water Quantity Workshop
in conjunction with ACWA in Washington, DC - Spring 2015
(Water Quality Committee)

WSWC/CDWR Drought Workshops
December 9, 2014 - Las Vegas, NV
May (TBD), 2015 - San Diego, CA
(Water Resources Committee)

WSWC/NARF Indian Water Rights Settlements Symposium
Fall 2015

MEETING SCHEDULE

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Tab W – Newsletter Index

WESTERN STATES WATER NEWSLETTER INDEX

January 3, 2014 – September 26, 2014

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	Extreme Weather	01-03 03-21	2068 2079
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Tab XYZ – Sunsetting Positions for Spring
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W E S T E R N S T A T E S W A T E R C O U N C I L

942 East North Union Avenue, Suite A-201 I Midvale, Utah 84047-1764 I (801) 561-5300 I FAX (801) 255-9642

Web Page: www.westgov.org/hwswc

Position #338

March 15, 2012

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

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

Dear Chairman Bingaman and Senator Murkowski:

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

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

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

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

Water conservation has always been a fundamental principle of western water law and policy. Often the related energy savings are important. In the West, interbasin transfers of water within states are common, often involving a considerable expenditure of energy to move water

significant distances. Energy and water use and related costs are a primary constraint when it comes to the West's economic well being, which has traditionally been based on agriculture, mining and other water intensive consumptive uses, as well as important water-based recreation and other non-consumptive instream uses. Water development, treatment, distribution and wastewater treatment consume substantial amounts of energy. Emerging and expanding technologies involving water recycling and reuse, and desalination, also are energy intensive. States must be appropriately involved in any authorized studies.

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

Sincerely,

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

Weir Labatt, Chairman
Western States Water Council

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

Washington, D.C.
March 15, 2012

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

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

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

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

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

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

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

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

WHEREAS, the U.S. Geological Survey (USGS) released its Circular 1331, *Climate Change and Water Resources Management: A Federal Perspective*, in February 2009,

identifying knowledge gaps, research needs, opportunities to improve planning capabilities, and other activities that would assist in climate change adaptation including those that could impact water quality and thus, available water supply; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(See also Position #337)



WESTERN STATES WATER COUNCIL

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March 15, 2012

Position #341

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

Dear Commissioner Connor,

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

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

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

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

We are also concerned that the proposed policy ignores the potential adverse impact on some state-issued water rights in those instances where Reclamation facilities deliver water pursuant to a water right held by a non-federal entity. Specifically, the proposed definitions could result in price increases that force existing users subject to a contracting action to forgo the

full exercise of their state-issued water rights. While we recognize that Reclamation has the right to determine the terms of contracts involving the use of project water, states still retain primacy in establishing and defining rights of use and any policy that impairs the full exercise of existing state-issued water rights abrogates or supersedes state law and the allocation of state water rights.

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

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

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

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

Sincerely,

A handwritten signature in black ink, reading "Weir Labatt III". The signature is written in a cursive, flowing style with a distinct "III" at the end.

Weir Labatt, III
Chair, Western States Water Council

cc: Owen Walker