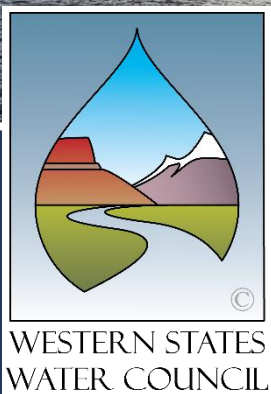
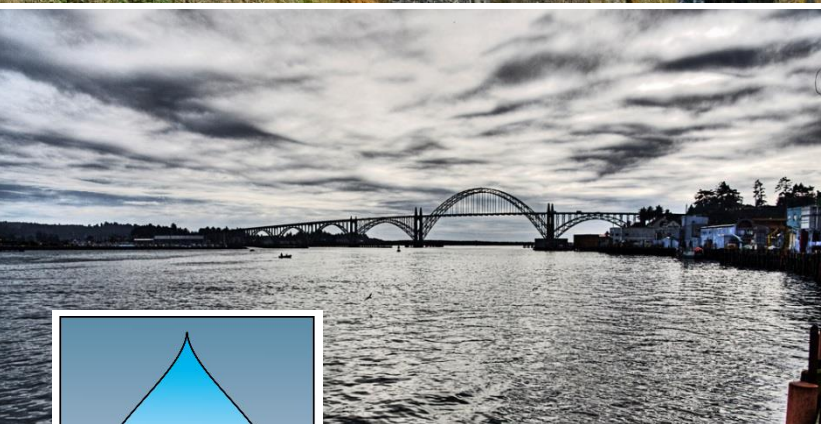


OREGON



Western States Water Council 187th Meeting

Newport, Oregon | August 1-3, 2018

Photo Credits (clockwise from top): Oregon Sunset by Jake Khoun; Yaquina Head Lighthouse by Rennett Stowe; Yaquina Head by Kirt Edblom; Crab pots by Alex Derr; Yaquina Bay Bridge by Gary Giddens. All photos obtained using the Creative Commons license. <https://www.flickr.com/creativecommons/>



WESTERN STATES WATER COUNCIL

682 East Vine Street, Suite 7 I Murray, Utah 84107-5501 I (801) 685-2555 I FAX (801) 685-2559

Web Page: www.westernstateswater.org

MEMORANDUM

TO: Council Members and Others
FROM: Tony Willardson, Executive Director
DATE: July 25, 2018
RE: Briefing Books for the 187th Council Meetings in Newport, Oregon

This is notification that the briefing book for our meetings scheduled in Newport, Oregon on August 1-3, 2018 is available on our [meetings webpage](#). The minutes from our last meetings held in Washington, D.C. are posted on our website (under Past Meetings) for your review.

For those arriving on Tuesday, July 31, a Waters of the United States (WOTUS) work group will meet from 4:00 – 6:00 p.m. to discuss the WSWC's position in Suite #614.

On Wednesday morning, August 1st, we'll hold a Water Quality/Water Quantity Nexus workshop starting at 8:00 a.m. and concluding around 11:45 a.m.

Council members and guests are invited to join our Oregon hosts for a half-day field trip Wednesday afternoon which will depart from the hotel at 12:45 p.m. A box lunch is included with the tour. The field trip cost is \$25.00 per person, and advance registration is requested. We anticipate returning to the hotel at about 6:00 p.m. We wish to express special thanks to our sponsor, *HDR*.

On Thursday, the meeting schedule will begin at 8:a.m with the Oregon host state presentation. WSWC Committee meetings will be held sequentially thereafter beginning with the Water Resources Committee at 9:00 a.m. The Executive Committee will meet over lunch from 11:45 a.m. – 1:15 p.m. All others will be on their own for lunch. The Water Quality Committee will meet in the afternoon starting at 1:30 p.m. and will be followed by the Legal Committee, which will start at 3:45 p.m.

A sponsored reception will be held at the hotel from 6:00 – 7:00 p.m., and all Council members and guests are invited to attend. Special thanks to our meeting and reception sponsors who include: *GSI Water Solutions, Inc.*; *HDR*; *Karnopp Petersen, LLP*; *Oregon Water Resources Congress*; and *Recharge Development Corporation*.

The meetings will conclude on Friday morning with the Full Council meeting, which begins at 8:00 a.m. In keeping with our usual practice, a group photo is scheduled to be taken Friday morning for the annual report.

For your information, teleconference and webinars will be available throughout the meetings, with the exception of the Executive Committee meeting. Call-in instructions and information on how to participate via webinar are attached, and are also posted online.

We look forward to enjoyable and productive meetings in Newport and hope you are able to join us. If you have any questions regarding these matters, please let us know.

CALL-IN AND WEBINAR INSTRUCTIONS

A. Call-In Information

The dates, times, and call-in information for each meeting are listed below. The below list also indicates which meetings will be available via webinar. Instructions on how to participate via webinar are contained in Section B, which follows.

For teleconference and webinar audio, **please use the dial-in numbers as indicated below.**

Pacific				
Day, Date	Time	Meeting	Dial-in Number	Webinar
Tues, July 31	4:00 pm	WOTUS Discussion	1-800-920-7487 Code: 25335968#	Telecon Only
Wed, Aug 1	8:00 am	WQ2 Nexus Workshop	1-800-920-7487 Code: 25335968#	Yes
Thurs, Aug 2	8:00 am	OR Host State Presentation	1-800-920-7487 Code: 25335968#	Yes
Thurs, Aug 2	9:15 am	Water Resources Committee	1-800-920-7487 Code: 25335968#	Yes
Thurs, Aug 2	1:30 pm	Water Quality Committee	1-800-920-7487 Code: 25335968#	Yes
Thurs, Aug 2	3:45 pm	Legal Committee	1-800-920-7487 Code: 25335968#	Yes
Fri, Aug 3	8:00 am	WSWC 187th Full Council Meeting	1-800-920-7487 Code: 25335968#	Yes
<i>Please send a request if you wish to participate via teleconference in the Executive Committee Meeting.</i>				
Thurs, Aug 2	11:45 am	Executive Committee	Upon Request	No

B. General Webinar Instructions

To join the webinar, click on the link (below) and you'll instantly be entered into the meeting through your browser.

- Go to <https://www.join.me/wswc-mtgs>
- To join via mobile phone or tablet, go to www.join.me/mobile and download the app to your device.

After joining the webinar meeting, you may add your name to the participant list by clicking your "bubble."

We recommend you place your phone on mute and under no circumstance place the call on hold. If you encounter troubles connecting to the audio (or other things), you may ask questions or communicate via the "chat" feature.

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

**WESTERN STATES WATER COUNCIL
187th COUNCIL MEETING
Newport, Oregon
August 1-3, 2018**

TABLE OF CONTENTS

TAB

- A. Schedule of Meetings - Agenda - 30-day Notice
- B. Membership List
- C. WSWC Policy Positions
Sunsetting Positions
 - Wat Resources #381 – Rural Water Supply Project/Infrastructure Needs
 - Wat Quality #382 – Water Transfers and National Pollutant Discharge Elimination System Discharge Permits
 - Executive #383 – A Vision on Water (was superceded with adoption of Position #384)

Proposed Position

 - Wat Res TBD - Endangered Species and State Water Rights
 - List of Current WSWC Policy Statements
 - List of Sunsetted Positions
- D. Budget
- E. Western Governors' Association (WGA) Policy Resolutions
- F. WGA Policy Letters
- G. Summaries of America's Water Infrastructure Act of 2018 and President's Infrastructure Initiative
- H. WSWC 2019 Water Infrastructure Symposium Potential Topics
- I. Washington Stream Restoration Act Program
- J. Water Data Exchange (WaDE) Update
- K. 2018 Western States Gubernatorial Elections
- L. WSWC Activities and Events
- M. Future WSWC Meetings
- Mc NOAA's Draft Outline on the Weather Research and Forecasting Innovation Act of 2017
- N. Kansas Governor's Executive Order regarding Sexual Harassment Policy
- O. Waters of the Unites States (WOTUS) / WSWC Clean Water Act Resolution (Position #410)
- P. U.S. Army Corps of Engineers' Elutriate Testing and Streambed Sovereignty
- Q. *Washington v. United States, et al*
- R. *Mississippi v Tennessee*
- S. WSWC/NARF Tribal Water Rights Ad Hoc Group Update
- T. Legislation and Litigation Update
- U. State Reports
- V. Newsletter Index
- W. -- intentionally blank --
- XYZ. Sunsetting Positions for 2018 Fall Meetings (#384 - #388)



SCHEDULE OF MEETINGS

WESTERN STATES WATER COUNCIL 187th COUNCIL MEETINGS

Best Western Agate Beach Inn
Newport, Oregon
August 1-3, 2018

<u>Date</u>	<u>Time</u>	<u>Meeting</u>	<u>Room</u>	<u>Adjournment</u>
<u>Tuesday, July 31</u>				
	4:00 pm	WOTUS Discussion	Suite #614	6:00 pm
<u>Wednesday, August 1</u>				
	8:00 am	Water Quantity/Quality Nexus Workshop	Jasper/Onyx Room	11:45 am
	12:00 pm	Field Trip Sponsored by HDR		5:30 pm
	6:00 pm	Management Subcommittee (<i>over dinner</i>)		
<u>Thursday, August 2</u>				
	8:00 am	Oregon Host State Presentation	Jasper/Onyx Room	9:00 am
	9:00 am	Water Resources Committee	Jasper/Onyx Room	11:30 am
	11:45 am	Executive Committee (<i>over lunch</i>)	Cove Gallery	1:15 pm
	1:30 pm	Water Quality Committee	Jasper/Onyx Room	3:30 pm
	3:45 pm	Legal Committee	Jasper/Onyx Room	5:45 pm
	6:00 pm	WSWC Reception Sponsors: GSI Water Solutions, Inc. HDR Karnopp Petersen, LLP Oregon Water Resources Congress Recharge Development Corporation	Rainbow/Moss	7:00 pm
<u>Friday, August 3</u>				
	8:00 am	Full Council Meeting <i>including Group Photo Session</i>	Jasper/Onyx Room	11:30 am

AGENDA
WATER RESOURCES COMMITTEE
Best Western Agate Beach Inn
Newport, Oregon
August 2, 2018

Called to Order at: 9:00 a.m. (Pacific Time)
Conducting: Tom Byler, Chair

Room: Jasper/Onyx

TABS

1. **Welcome and Introductions**
 2. **Approval of Minutes**
 - C 3. **Sunsetting Position –**
#381 WR 7/10/2015 Rural Water Supply Project/Infrastructure Needs
Proposed Position –
#TBD WR Draft Endangered Species and State Water Rights
 - E, F 4. **Western Governors' Association Annual Meeting Report/Policy Resolutions and Letters –** Ward Scott, WGA Policy Advisor
 - G 5. **America's Water Infrastructure Act of 2018 and President's Infrastructure Initiative –** John D'Antonio, Deputy District Engineer, Programs & Project Management, U.S. Army Corps of Engineers
 - H 6. **WSWC Water Infrastructure Symposium - 2019 –** Tom Byler
 - I 7. **Washington Stream Restoration Act Program/Eastern Washington Water Projects –** Mary Verner, Water Resources Program Manager; Buck Smith, Senior Hydrogeologist; and Mike Gallagher, Southwest Regional Office Section Manager, Washington Department of Ecology
 8. **Water-Use Data and Research Program (WUDR) –** Mindi Dalton, Acting Program Coordinator, Water Availability and Use Science Program, USGS
 9. **Privately Developed Ground Water Recharge –** Dave Tuthill, Recharge Development Corporation
 10. **WSWC/CDWR S2S Precipitation Forecasting Workshop Report –** Jeanine Jones
 - Mc 11. **NOAA's Draft Outline on the Weather Research and Forecasting Innovation Act of 2017 –** Jeanine Jones / Kevin Werner / Roger Pierce
 - J 12. **WaDE Update –** Sara Larsen
 13. **Instream Flow Council FLOW 2018 Report –** Christopher Estes, At Large Director
 - XYZ 14. **Sunsetting Positions for 2018 Fall Meetings –** #385 - #387
#385 WR 10/9/2015 Federal Water and Climate Data Collection & Analysis Programs
#386 WR 10/9/2015 Drought Preparedness, Prediction and Early Warning Programs
#387 WR 10/0/2015 Bureau of Reclamation Drought Response Program
 15. **Other Matters**
- Adjourn by 11:45 a.m.

AGENDA
EXECUTIVE COMMITTEE
Best Western Agate Beach Inn
Newport, Oregon
August 2, 2018

Call to Order at: 12:00 p.m. (Pacific Time)
Conducting: Jerry Rigby, Chair

Room: Cove Gallery

TAB

1. **Welcome and Introductions**
 2. **Approval of Minutes**
 - D 3. **Report on Budget and Finances** – Jeanine Jones
 - a. Audit - FY2015 and FY2016
 - b. FY2017-2018 Budget Update / Dues Report
 - c. FY2018-2019 Budget Proposed Revisions
 - d. Water Foundation Grant Status Report
 - C 4. **Proposed Position** – Jerry Rigby
WSWC Draft Position on Endangered Species and State Water Rights

Sunsetting Positions – Tony Willardson
 - #381 WR 7/10/2015 Rural Water Supply Project/Infrastructure Needs
 - #382 WQ 7/10/2015 Water Transfers and National Pollutant Discharge Elimination System (NPDES) Discharge Permits
 - #383 E 7/10/2015 A Vision on Water
 - #384 E 10/9/2015 A Vision on Water (superceded Position #383) - adopt as permanent mission statement?
 - E 5. **Western Governors' Association (WGA) Annual Meeting Report** – Tony Willardson
 - a. WGA Water Policy Resolutions
 - K b. 2018 Western States Gubernatorial Elections
 - B b. WSWC Representative Appointments
 6. **Nominating Subcommittee / Election of Officers** – Roland Westergard (by phone)
 - L 7. **Executive Director's Report/WSWC Activities and Events** – Tony Willardson
 8. **WestFAST Liaison Position** – Tony Willardson
 - M 9. **Future WSWC Meetings**
 - a. Fall Council Meetings and WSWC/WestFAST Non-Tribal Federal Water Rights Workshop – October 23-24, 2018 – Coeur d'Alene, Idaho
 - b. Water Information Management Systems Workshop – January 2019 - TBD
 - c. Infrastructure Symposium – February 2019 – Texas – TBD
 - d. Spring Council Meetings – March 2019 – Arizona – TBD
 - e. Summer Council Meetings – July 2019 – Washington – TBD
 - f. Indian Water Rights Settlement Symposium – August/September 2019 – TBD
 - XYZ 10. **Fall 2018 Meeting Sunsetting Positions** (adopted October 2015)
 - #384 E 10/9/2015 A Vision on Water
 - #385 WR 10/9/2015 Federal Water and Climate Data Collection and Analysis Programs
 - #386 WR 10/9/2015 Drought Preparedness, Prediction and Early Warning Programs
 - #387 WR 10/0/2015 Bureau of Reclamation Drought Response Program
 - #388 L 10/9/2015 States' Water Rights and Natural Flows
 - N 11. **Other Matters**
 - a. Kansas Governor Colyer's Executive Order regarding Sexual Harassment Policy
- 1:15 p.m. Adjourn

AGENDA

WATER QUALITY COMMITTEE MEETING

Best Western Agate Beach Inn

Newport, Oregon

August 2, 2018

Call to Order at: 1:30 p.m. (Pacific Time)
Conducting: Kevin Frederick, Vice-Chair

Room: Jasper/Onyx

TAB

1. **Welcome and Introductions**

2. **Approval of Minutes**

C 3. **Sunsetting Positions** – Kevin Frederick

#382 – Regarding Water Transfers and National Pollutant Discharge Elimination System (NPDES Discharge Permits)

4. **Washington WIFIA Loan Update** – Dan Kaplan, Financial Services Administrator, King County Wastewater Treatment Division

5. **EPA Update**

- a. Nutrients / Harmful Algal Blooms (HAB)
- b. Tribal Treatment As States (TAS) and Water Quality Standards
- c. Groundwater as a Conduit for Pollutants

E 6. **Western Governors' Association (WGA) Water-Quality Policy Resolution** – Ward Scott

O 7. **Discussion: WSWC WOTUS 2.0 Comments**

- a. Position #410
- b. Principles

8. **WSWC Water Quality/Quantity Nexus Workshop Report** – Dave Schade

9. **Sunsetting Positions for 2018 Fall Meeting**

- a. none

10. **Other Matters**

3:30 p.m. **Adjourn**

AGENDA

LEGAL COMMITTEE MEETING

Best Western Agate Beach Inn

Newport, Oregon

August 2, 2018

Call to Order at: 3:45 pm (Pacific Time)
Conducting: Jennifer Verleger, Chair

Room: Jasper/Onyx

TAB

1. **Welcome and Introductions**
2. **Approval of Minutes**
- P 3. **Army Corps of Engineers** – Jen Verleger
 - a. Surplus Water Rule
 - b. Elutriate Testing and Streambed Sovereignty
- Q 4. **Washington v. United States** – Laura Watson, Washington Assistant Attorney General, Ecology Division
- R 5. **Mississippi v. Tennessee** – Larry Moffett and Mike Ellingburg, Daniel Corker Horton & Bell, Attorneys for Mississippi
6. **Oregon Legal Issues** – Tom Byler
- S 7. **WSWC-NARF Tribal Water Rights Ad Hoc Group** – Tony Willardson
 - a. Reclamation Water Rights Settlement Fund
 - b. Fund-Based Settlements
8. **WSWC-WestFAST Non-Tribal Federal Water Rights Workgroup** – Roger Pierce
9. **Discussion: Calls and Curtailments**
- T 10. **Legislation and Litigation Update** – Michelle Bushman
- XYZ 11. **Sunsetting Positions for Fall 2018 Meetings** – Jen Verleger

#388 – States' Water Rights and Natural Flows
12. **Other Matters**
- 5:45 p.m. **Adjourn**

AGENDA

187th COUNCIL MEETING

Best Western Agate Beach Inn

Newport, Oregon

August 3, 2018

Call to Order at: 8:00 a.m. (Pacific Time)
Conducting: Jerry Rigby, Chair

Room: Jasper/Onyx

TAB

1. **Welcome and Introductions**
2. **Approval of Minutes**
3. **American Water Resources Association (AWRA) Activities** – Brenda Bateman, AWRA President and Administrator, Technical Services Division, Oregon Water Resources Department and Michael Campana, AWRA Technical Director and Professor, Oregon State University
4. **International Border Water Issues / Discussion**

Break ***Photo Session***

5. **Committee Reports** – Action Items
 - C a. Water Resources Committee – Tom Byler
 - C b. Water Quality Committee – Kevin Frederick
 - c. Legal Committee – Jennifer Verleger
 - C d. Executive Committee – Jeanine Jones
6. **WestFAST Report** – Kevin Werner, WestFAST Chair, and Roger Pierce, WestFAST Liaison
7. **WSWC Nominating Subcommittee Report / Election of Officers** –
- U 8. **State Reports**
- M 9. **Future Council Meetings** – WSWC Chair
- XYZ 10. **Sunsetting Positions for Fall 2018 Meetings** – #384 - #388
11. **Other Matters**



WESTERN STATES WATER COUNCIL

682 East Vine Street, Suite 7 I Murray, Utah 84107-5501 I (801) 685-2555 I FAX (801) 685-2559

Web Page: www.westernstateswater.org

MEMORANDUM

TO: Council Members
FROM: Tony Willardson, Executive Director
DATE: July 3, 2018
RE: **30-Day Notice of Summer (187th) Council Meetings in Newport, Oregon**

This memo is notification that the 187th meetings of the Western States Water Council (WSWC) will be held in Newport, Oregon on August 1-3, 2018. In keeping with our rules of organization, any external policy positions to be proposed for Council consideration must be included with the 30-day notice.

A newly proposed draft position related to the Endangered Species Act is attached for your consideration, and the following positions are scheduled to sunset at this meeting, if no further action is taken.

Position #381 – Rural Water Supply Project/Infrastructure Needs

Position #382 – Water Transfers and National Pollutant Discharge Elimination System Discharge Permits

Position #383 – A Vision on Water [was superseded with adoption of **Position #384**, attached]

We will consider revision and readoption of Positions #381 and #382, and any suggested changes should be forwarded to Council staff. Moreover, it is possible that EPA will release a new proposed Waters of the United States (WOTUS) rule prior to the meetings. A Council member state working group is considering related principles and processes that may form the basis for a revised position statement. **Our most current WOTUS Position #410** is attached, and this notice covers any action taken to revise that position.

We would encourage you to consult with your respective Governor's advisor and Western Governors' Association Staff Advisory Council (SAC) member, regarding the policy positions and bring any suggested changes to our attention. All current and sunseting positions are available on our [website](#).

An Executive Committee conference call to discuss the newly proposed and sunseting positions will be held on **Friday, July 13, at 10:30 a.m. Mountain Daylight Time** (9:30 a.m. Pacific; 11:30 a.m. Central). Committee Chairs are also invited to participate. Call details will be sent separately to Executive Committee members, who may designate an alternate to join the call and engage in the discussion.

The Council's internal policy specifies that for the purpose of the conference call and the meetings themselves, for participation by persons who are not Governor-appointed WSWC representatives, the Executive Committee member must provide written notification of any designee to act on behalf of a member. An email to Tony with the name of your designee is sufficient.

The Council meetings are being held at the Best Western Agate Beach Inn, located at 3019 North Coast Highway, Newport, Oregon 97365. The group room rate is \$131/night (single or double occupancy). Room reservations may be made by contacting the hotel directly at 1-541-265-9411 and specify the *Western States Water Council* group. Alternatively, reservations may be made online by selecting this link: <http://book.bestwestern.com/bestwestern/groupSearch.do?groupId>. The hotel reservations cutoff date has passed, although reservations may still be accepted on a space and rate available basis. Check in time is 4:00 p.m. and check out time is 11:00 a.m.

Registration is required for all meeting attendees, although there is no fee. The field trip requires separate registration and there is a nominal charge of \$25. Please complete the online [registration](#) at your earliest convenience.

Attached is a schedule of meetings. On Wednesday morning, the WSWC is holding a special Water Quantity/Quality Nexus workshop. The workshop is scheduled to begin at 8:00 a.m. and adjourn around 11:45 a.m. For those arriving on Tuesday, a Waters of the United States (WOTUS) work group will meet from 4:00 – 6:00 p.m. to discuss the WSWC's position in Suite #614.

Oregon will host a half-day field trip for Council members and guests on Wednesday, August 1st. Our charter bus will depart from the hotel at 12:45 p.m. and a box lunch is included. We plan to return to the hotel around 6:00 p.m. The cost is \$25.00 per person, and advance registration is requested by **July 13, 2018**. The tour consists of a visit to Beverly Beach Water District, which is one of many small water districts that dot the Oregon coast and supply domestic water from small streams, springs, and wells. While standing atop one of the oldest dams in the state, Big Creek Dam, we will learn how the City of Newport is working to replace and update its infrastructure, including the dam, to withstand a potential Cascadia earthquake. Next we will drive up the Siletz River, which provides water for the City of Newport, City of Toledo, and the Georgia Pacific Mill, as well as critical habitat for coho salmon. The demand for out-of-stream water is highest in late summer which is also when fish need ample cool water. We will finish the trip by visiting Gibson Farms. This farm draws water from the Siletz River to grow cattle and blueberries, but is cut off nearly every year to protect instream flows in the Siletz.

It is recommended participants wear comfortable closed-toe walking shoes or hiking boots, and bring a hat, lightweight jacket, sunglasses, sunscreen, and an umbrella in case of rain.

The WSWC Summer meetings will begin on Thursday, August 2nd at 8:00 am with the Oregon host-state presentation first on the agenda. The Water Resources Committee will follow immediately thereafter at 9:00 a.m. Our typical schedule will follow, with the Executive Committee invited to meet over lunch from 11:45-1:15 p.m., followed by the Water Quality Committee meeting from 1:30-3:30 p.m. The Legal Committee meeting will begin at 3:45 p.m. and will end around 5:45 p.m.

WSWC members and guests are invited to a hosted reception on Thursday evening from 6:00 -7:00 p.m. at the hotel. We wish to acknowledge with gratitude our meeting, reception, and field trip sponsors: *GSI Water Solutions, Inc.; HDR; Karnopp Petersen; Oregon Water Resources Congress; and the Recharge Development Corporation.*

You may recall it has been recommended that each state submit a brief one-page report on water issues and events in your state **in advance** of the meetings, **to be included in the briefing materials**. Written state reports should be submitted no later than **July 18, 2018**. As usual, state reports will also be presented orally during the full Council meeting.

The Full Council meeting will commence at 8:00 a.m. on Friday, August 3rd, and adjourn around 11:30 a.m. Meeting agenda will be posted on our [meetings webpage](#), and will be available to download. Furthermore, briefing books will be made available for download by about July 25th. To receive a hard copy of the briefing book, please contact Julie at jgroat@swwc.utah.gov by **July 20th** so that a book may be sent to you in advance of the meetings, or made available for pick-up on site. The WSWC meetings will also be accessible via teleconference and webinar. Dial-in and webinar participation information will be posted online prior to the meetings.

Please contact me at twillardson@swwc.utah.gov if we can be of any assistance or answer any questions. We hope you are planning to join us at the meetings in Newport, and express sincere appreciation to our Oregon hosts and our sponsors.

Tab B – Membership List

WESTERN STATES WATER COUNCIL

MEMBERSHIP LIST

July 20, 2018

OFFICERS

Chair - **Jerry Rigby**
Vice-Chair - **Jeanine Jones**
Secretary-Treasurer - **Tim Davis**

STAFF

Executive Director - **Tony Willardson**
Legal Counsel - **Michelle Bushman**
WaDE Program Manager - **Sara Larsen**
Office Manager - **Cheryl Redding**
Administrative Assistant - **Julie Groat**
Federal Liaison - **Roger Pierce**

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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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CALIFORNIA

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Tab C – WSWC Policy Positions



RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding the
RURAL WATER SUPPLY PROJECT/INFRASTRUCTURE NEEDS
[Stateline, Nevada](#)[Newport, Oregon](#)
[July 10, 2015](#)[August 3, 2018](#)

WHEREAS, in the West, water is indeed our “life blood,” a vital and scarce resource the availability of which has and continues to circumscribe growth, development, our economic and environmental well-being and quality of life; and

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

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

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

WHEREAS, there are ~~eight-six~~ authorized and active rural water projects located in Montana, New Mexico, North Dakota, and South Dakota that have yet ~~to~~ be completed at an estimated ~~federal~~ cost of around ~~\$1.2-6~~ billion – while costs continue to increase due to delays, inflation and the rising costs of materials and labor – and at current levels of funding ~~could~~ completion of some project could be delayed ~~by decades beyond 2063~~; and

WHEREAS, there is a Federal responsibility to complete authorized rural water projects, particularly those intended to fulfill in part a solemn Federal promise and trust responsibility to compensate States and Tribes for lost resources as a result of the construction of Federal flood control projects and other actions; and

WHEREAS, recognizing Federal budget constraints, a modest increase in Federal expenditures would expedite completion of authorized projects and in the long run save taxpayer money while inadequate funding levels and untimely appropriations only increase delays and Federal costs and perpetuates rural and tribal communities’ hardships; and

WHEREAS, authorizing the increased use of Reclamation Fund revenues to expedite completion of these projects fulfills both financial and moral obligations that some beneficiaries have waited decades to see honored; and

WHEREAS, the Congress enacted the Rural Water Supply Act of 2006 (P. L. 109-451) and established the Bureau of Reclamation’s Rural Water Supply Program authorizing the agency to work with rural communities, states and tribes, to assess potable water supply needs and identify options to address those needs through appraisal investigations and feasibility studies; and

WHEREAS, federal expenditures for rural water projects actually generate significant returns on the investment through increased national and local economic benefits, as well as improvements in quality of life; and

WHEREAS, Reclamation Fund receipts are largely derived from water and power sales, project repayments, and receipts from public land sales and leases, as well as oil and mineral-leasing and related royalties, from western lands adjacent to rural and tribal communities; and

WHEREAS, western States are committed to continuing to work cooperatively with the Department of Interior and Bureau of Reclamation to meet our present rural water needs in the West for present and future generations, within the framework of state water law, as envisioned in Reclamation Act of 1902; and

WHEREAS, under the Reclamation Act of 1902, the Reclamation Fund was envisioned as the principle means for financing federal western water and power projects with revenues from western resources – but these receipts are only available for expenditure pursuant to annual appropriation acts; and

WHEREAS, with growing receipts -- in part due to energy development and high energy prices across the rural West -- and declining federal appropriations for Reclamation Act purposes, the unobligated balance grows larger and larger (and is expected to soon exceed \$16 billion), while the money is actually spent elsewhere for other federal purposes contrary to the Congress' original intent; and

WHEREAS, the WSWC has a long-standing policy in support of using receipts accruing to the Reclamation Fund for authorized projects, including rural and tribal water supply projects;

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council strongly supports Administrative and Congressional action to expedite construction of authorized rural water supply projects in a timely manner, including projects that meet tribal trust and other federal responsibilities -- recognizing and continuing to defer to the primacy of western water laws and tribal settlements in allocating water among users.

BE IT FURTHER RESOLVED, that the Council recommend that the Administration and the Congress investigate the advantages of converting the Reclamation Fund from a special account to a true revolving trust fund with annual receipts to be appropriated for authorized purposes in the year following their deposit (similar to some other federal authorities and trust accounts).



(See also No. 342, revised and reaffirmed June 8, 2012)

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

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

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
WATER TRANSFERS
and
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
DISCHARGE PERMITS

Stateline, NevadaNewport, Oregon

July 10, 2015August 3, 2018

(revised and reaffirmed)

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

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

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

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

~~WHEREAS, on June 13, 2008, the EPA published in the Federal Register (Vol. 73, No. 115) a final amendment to its Clean Water Act regulations (40 CFR Part 122.3(i)) that~~ expressly excluding water transfers from regulation under the NPDES permitting program, and defining water transfers as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use; and

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

~~WHEREAS, water transfers and water quality are essential to the social, economic and environmental well-being of the Western States, and~~

~~WHEREAS, the United States Court of Appeals in the cases of Friends of the Everglades v. South Florida Water Management Dist., 570 F.3d 1210 (11th Cir. 2009), and New York State et al. v. Environmental Protection Agency, 846 F.3d 492 (2nd Cir. 2017), upheld EPA's Water Transfer Rule holding it to be a reasonable construction of the Clean Water Act and therefore entitled to deference by the Federal Courts, and on which decisions the United States Supreme Court subsequently denied a Petitions for Writ of Certiorari;~~

Position No. 382

(See also No. 342, revised and reaffirmed June 8, 2012)

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

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

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council generally supports EPA's amendment to its Clean Water Act regulations as codified in 40 CFR 122.3(i).

BE IT FURTHER RESOLVED that the Western States Water Council supports the use by a State of available authorities to protect the water quality of the receiving water body in a water transfer.

BE IT FURTHER RESOLVED that the Western States Water Council supports the codification of 40 CFR 122.3(i) into statute by the Congress.

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Position No. 383
Readopted
(formerly Position No. 344, June 8, 2012)

A VISION ON WATER

Adopted by the

Western States Water Council

July 10, 2015

Our Present Condition

Water in the West is an increasingly scarce and precious resource, given population growth and an expanding range of often competing economic and ecological demands, as well as changing social values. Surface and ground water supplies in many areas are stressed, resulting in a growing number of conflicts among users and uses. A secure and sustainable future is increasingly uncertain given our climate, aging and often inadequate water infrastructure, limited knowledge regarding available supplies and existing and future needs and uses, and competing and sometimes un-defined or ill-defined water rights. Effectively addressing these challenges will require a collaborative, cooperative effort among states and stakeholders that transcends political and geographic boundaries.

Our Vision

- State primacy is fundamental to a sustainable water future. Water planning, policy, development, protection, and management must recognize, defer to, and support state laws, plans, and processes. The federal government should streamline regulatory burdens and support implementation of state water plans and state water management.
- Given the importance of the resource to our public health, economy, food security, and environment, water must be given a high public policy priority at all levels.
- An integrated and collaborative approach to water resources management is critical to the environmentally sound and efficient use of our water resources. States, tribes, and local communities should work together to resolve water issues. A grassroots approach should be utilized in identifying problems and developing optimal solutions.
- Any approach to water resource management and development should accommodate sustainable economic growth, which is enhanced by the protection and restoration of significant aquatic ecosystems, and will promote economic and environmental security and quality of life.
- There must be cooperation among stakeholders at all levels and agencies of government that recognizes and respects national, regional, state, local and tribal differences in values related to water resources and that supports decision-making at the lowest practicable level.



Western States Water Council

A VISION ON WATER

Position #384 adopted on October 9, 2015

Our Mission

To ensure that the West has an adequate, secure and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.

Our Present Condition

Water in the West is an increasingly scarce and precious resource. Population growth, competing economic and ecological demands, and changing social values have left surface and ground water supplies stressed in many areas. This has increased the number and complexity of conflicts among users and uses. A secure water future is becoming more costly and increasingly uncertain given our unpredictable climate, aging and often inadequate infrastructure, data limitations regarding water supplies and demands, competing or poorly defined water rights, and a constantly evolving regulatory landscape. Effectively addressing these challenges will require stronger collaboration and cooperation that transcends political and geographic boundaries between states, federal agencies, tribes, and local communities.

Our Principles

- Water must be elevated to a higher public policy priority given the importance of the resource to our public health, economy, food security, environment, and western way of life. We must cultivate a western water conservation ethic through greater understanding of, and appreciation for, water's value.
- State primacy is fundamental to a sustainable water future. Federal water planning, policy development, regulation, protection, and management must recognize, defer to, and support state water laws, plans, policies, programs, water rights administration, adjudication and regulation, compacts and settlements. Rather than attempt to dictate water policy, the federal government should engage states early in meaningful consultation and contribute its fair share of funding to support implementation of state water planning and management, thus avoiding, or at least minimizing, the need for federal regulatory mandates.
- An integrated, collaborative, and grassroots approach to water resources management is critical to the environmentally sound and efficient use of our water resources. States, federal agencies, tribes, and local communities should work together to identify water problems and develop optimal solutions at the lowest appropriate level. Striving for cooperation rather than litigation, we must recognize and respect national, state, regional, local and tribal differences in values related to water resources.
- Sustainable water resource management and development should yield long term economic growth, enhanced protection and restoration of significant aquatic ecosystems, and improved economic and environmental security and quality of life.
- A secure and sustainable water future will be determined by our ability to maintain, replace, expand and make the most efficient use of critical water infrastructure. We must preserve and improve existing infrastructure, as well as encourage and support innovative water supply strategies and new storage options to better balance supplies with demands.
- All levels of government must prioritize the collection, analysis and open sharing of reliable data regarding water availability, quality, and usage given its importance to research for sound science and data driven decision making.



DRAFT RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
ENDANGERED SPECIES AND STATE WATER RIGHTS
Newport, Oregon
August 3, 2018

WHEREAS, Section 2(c)(2) of the Endangered Species Act declares it is the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species (16 U.S.C. 1531); and

WHEREAS, water in the West is often a scarce resource critical for both a healthy economy and healthy environment, including protected endangered and threatened species; and

WHEREAS, water is both a public and a private resource, with some uses reserved for the public good, while others are recognized as protected private property rights; and

WHEREAS, the States are primarily responsible for the allocation, administration, management and protection of the water resources and rights to the use of water within their borders, as well as the management and protection of diverse fish and wildlife species and the aquatic and terrestrial environments upon which they depend; and

WHEREAS, many if not most of the senior state-granted rights to the use of waters in western rivers and streams predate federal environmental protections by decades, and the certainty provided by early water rights continues to be the foundation for past, present and future investments; and

WHEREAS, the West and its flora and fauna, including protected species, are part of a unique and unparalleled heritage reflecting the Nation's value for wild and open spaces, as well as a western conservation ethic; and

WHEREAS, western States and many western water uses are also committed to the preservation of western species through reasonable, transparent and effective regulatory protections and restrictions, as well as conservation incentives for private property owners; and

WHEREAS, opportunities exist for greater cooperation to conserve threatened and endangered species, while recognizing state-granted water rights and addressing western water issues, without unmitigated or uncompensated "takings" of either resource.

NOW, THEREFORE, BE IT RESOLVED that the Council calls upon federal agencies to engage in a substantive discussion of past, present and future efforts to work with State agencies to implement Congress' intent to resolve water resource issues in concert with conservation of endangered species.

WSWC POLICY STATEMENTS

Position Number	Committee Oversight	Date Adopted	POSITIONS (Policy positions will be deactivated three (3) years after their adoption, unless extended by formal action of the Council.)
422	L	3/14/2018	State Primacy over Groundwater
421	WR	3/14/2018	Supporting Federal Research on Climate Adaptation
420	WR	3/14/2018	Regarding Integrating Water and Energy Planning and Policy
419	WR	3/14/2018	Supporting Water Infrastructure Funding
418	WR	3/14/2018	Supporting Weather Station Networks
417	WR	3/14/2018	Supporting the use of Forecast Informed Reservoir Operations and Innovations
416	L	10/20/2017	Outlining actions Federal agencies should take to expedite State General Stream Adjudications
415	L	10/20/2017	Supports the Dividing the Waters Program
414	WQ	10/20/2017	Asserting state primacy on Protecting Ground Water Quality
413	WR	10/20/2017	Regarding Farm Bill conservation programs and water resources
412	L	10/20/2017	Supporting Indian Water Rights Settlements
411	E	6/29/2017	Emphasizes state primacy over water resources and request that federal agencies establish and implement appropriate procedures and processes for substantively consulting with the states
410	WQ	6/29/2017	sections 101(b) and 101(g), as well as robust and meaningful state participation and consultation
409	WR	6/29/2017	Requests Congress maintain federal authorization and financial support for the U.S. Geological Survey (USGS) State Water Resources Research Institutes program
408	WR	6/29/2017	Requests Congress fully appropriate receipts accruing to the Reclamation Fund for their intended purpose
407	WR	6/29/2017	Supports federal research and the development of updated hydroclimate guidance for floods and droughts
406	L	6/29/2017	Opposes any federal legislation intended to preempt state water law
405	WR	4/14/2017	Regarding the Rural water and wastewater project/infrastructure needs and U.S. Department of Agriculture programs
404	WQ	4/14/2017	Regarding the clean and drinking water state revolving funds and state and tribal assistance grants
403	WR	4/14/2017	Regarding the National Levee Safety Act of 2007, levees and canal structures
402	WR	4/14/2017	Regarding the transfer of federal water and power projects and related facilities
401	WR	4/14/2017	Regading the Reclamation Safety of Dams Act of 1978
400	WR	4/14/2017	Regarding the Bureau of Reclamation's maintenance, repair and rehabilitation needs
399	WR	4/14/2017	Urging Congress to support subseasonal to seasonal weather research, forecasting, and innovation
398	L	9/30/2016	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
397	WR	9/30/2016	Continuing support for implementation of the SECURE Water Act
396	WR	9/30/2016	Urging the Administration and NASA to enhance focus on research for water resources applications
395	WR	7/15/2016	Urges the Administration and the Congress to support water research and development programs at the Department of Energy National Laboratories
394	WR	7/15/2016	Opposes removal of “fish and wildlife” as an authorized purpose for which the Corps can manage the Missouri River Mainstem Reservoir System
393	WR	7/15/2016	States 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.”
392	WR	7/15/2016	Supports federal efforts to prepare for and respond to extreme weather events, including an expanded and enhanced west-wide extreme precipitation monitoring system.
391	WR	3/22/3016	Supports renewable hydropower development
390	WR	3/22/2016	Supporting rural water infrastructure needs and projects
389	WR	3/22/2016	Urging the Administration and the Congress to prioritize federal programs that translate science on climate and weather extremes to water resources management actions
388	L	10/9/2015	Regarding States’ Water Rights and Natural Flows
387	WR	10/9/2015	Regarding Bureau of Reclamation Drought Response Program
386	WR	10/9/2015	Regarding Drought Preparedness, Prediction and Early Warning Programs
385	WR	10/9/2015	Regarding Federal Water and Climate Data Collection and Analysis Programs
384	E	10/9/2015	A Vision on Water
383	E	7/10/2015	A Vision on Water
382	WQ	7/10/2015	Regarding Water Transfers and National Pollutant Discharge Elimination System (NPDES) Discharge Permits
381	WR	7/10/2015	Regarding the Rural Water Supply Project/Infrastructure Needs

Sunsetted Positions

2017

- #373 Letter commenting on the proposed rule developed by the EPA and the USACE to clarify the scope of Clean Water Act jurisdiction. (*proposed rule became the 2015 Clean Water Rule*)
- #372 Letter sending comments on the USFS Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560. (*Forest Service has withdrawn their activity*)
- #370 The 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. (*proposed rule was withdrawn*)

2016

- #359 Opposing requiring pesticide applications for National Pollutant Discharge Elimination System (NPDES) discharge permits. (*outdated*)

2015

- #338 Energy and Water Integration Act of 2011. (*outdated*)
- #341 Letter regarding concerns with the Bureau of Reclamation's proposed changes to the Reclamation Manual. (*outdated*)

2013

- #323 A Shared Vision on Water Planning and Policy. (*superseded 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. (*superseded 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. *(superseded 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)*

Tab D – Budget

W S W C Proposed FY2018-2019 Budget

		FY 2017 Actual Total Income / Expense		Approved Budget FY2018	June Pro Forma Budget Performance		FY2019 Budget approved 3/15/2018	% Change from FY2018 Estimated Expenditures
<u>INCOME</u>								Over / -Under
Member States Assessments		\$ 510,000.00		\$ 510,000.00	\$ 510,000.00	1	\$ 510,000.00	0.00%
Newsletter		\$ 3,500.00		\$ 2,900.00	\$ 2,700.00		\$ 2,500.00	-7.41%
EPA EN Contracts		\$ 132,168.91		\$ 128,000.00	\$ 94,852.91		\$ 75,000.00	-20.93%
CDWR Contracts (S2S)		\$ 108,777.50		\$ 46,000.00	\$ -		\$ -	#DIV/0!
NASA JPL Contract		\$ -		\$ -	\$ -		\$ -	
Council Meeting Sponsors		\$ 6,376.06		\$ 7,000.00	\$ 7,950.00		\$ 6,000.00	-24.53%
Miscellaneous Income		\$ -		\$ -	\$ 3,181.00		\$ -	-100.00%
Symposium (WSWC / NARF)		\$ -		\$ 30,000.00	\$ 25,550.00		\$ -	
Symposium (Infrastructure)		\$ -		\$ -	\$ -		\$ -	
Symposium/Workshop Sponsors		\$ -		\$ 20,000.00	\$ 19,500.00		\$ 20,000.00	2.56%
Interest		\$ 6,163.81		\$ 4,000.00	\$ 7,102.72		\$ 6,500.00	-8.49%
Other - Water Foundation Agreement		\$ -		\$ -	\$ 50,000.00		\$ 50,000.00	
TOTAL INCOME		\$ 766,986.28		\$ 747,900.00	\$ 720,836.63		\$ 670,000.00	-7.05%
<u>EXPENSE</u>								
Accounting		\$ 8,700.00		\$ 9,000.00	\$ 8,290.00		\$ 9,000.00	8.56%
Annual & Sick Leave Funding (HRA)				\$ -	\$ 3,410.00		\$ -	
Audit		\$ 8,540.00		\$ 8,670.00	\$ 10,150.00		\$ -	
Contingencies		\$ 4,072.98		\$ 5,800.00	\$ 5,219.84		\$ 5,800.00	11.11%
Contract Services		\$ 8,401.65		\$ 58,310.00	\$ 17,480.00		\$ 29,000.00	65.90%
Equipment Replacement Fund		\$ 3,000.00		\$ 3,000.00	\$ 3,000.00		\$ -	-100.00%
Furniture-Equipment		\$ 1,791.13		\$ 1,000.00	\$ 454.00		\$ 1,000.00	120.26%
Insurance		\$ 727.00		\$ 1,000.00	\$ 924.00		\$ 1,000.00	8.23%
Mainten Contracts-Pitney/Comcast Inter		\$ 7,222.57		\$ 6,000.00	\$ 4,958.15		\$ 6,000.00	21.01%
Meeting Expenses (WGA & Arkadin)		\$ 24,315.58		\$ 35,000.00	\$ 19,839.38		\$ 25,000.00	26.01%
Office Supplies		\$ 2,205.20		\$ 2,800.00	\$ 2,200.00		\$ 2,000.00	-9.09%
Payroll Benefits		\$ 124,182.11		\$ 141,100.00	\$ 135,710.85		\$ 141,100.00	3.97%
Insurance								
Healthcare								
Pension								
Payroll Salaries		\$ 305,964.84		\$ 329,710.00	\$ 327,240.52		\$ 335,000.00	2.37%
Payroll Taxes		\$ 25,384.71		\$ 27,960.00	\$ 27,263.26		\$ 28,000.00	2.70%
Pension Management		\$ 3,370.05		\$ 3,400.00	\$ 7,917.88		\$ 3,400.00	-57.06%
Postage & Freight		\$ 4,556.88		\$ 2,000.00	\$ 2,317.87		\$ 1,500.00	-35.29%
Printing & Reproduction		\$ 3,628.21		\$ 5,000.00	\$ 4,485.13		\$ 4,200.00	-6.36%
Rent Expense/HOA Fees/Property Tax		\$ 36,483.61		\$ 5,915.00	\$ 5,552.03		\$ 6,000.00	8.07%
Storage		\$ -			\$ 3,014.00			-100.00%
Reports & Publications		\$ 5,704.10		\$ 6,500.00	\$ 5,800.00		\$ 6,200.00	6.90%
Symposium (CDWR)		\$ 3,967.01		\$ 7,500.00	\$ 2,868.65		\$ -	-100.00%
Symposium (WIMS/WaDE)		\$ -		\$ 7,500.00	\$ 5,564.29		\$ -	
Symposium (WSWC / NARF)		\$ 27,463.52		\$ 27,500.00	\$ 17,128.96		\$ -	
Symposium (Infrastructure)		\$ -		\$ -	\$ -		\$ -	
Telephone (UBS/Comcast/Cellphone)		\$ 2,285.43		\$ 3,800.00	\$ 3,525.27		\$ 3,800.00	7.79%
Travel		\$ 58,737.31		\$ 47,435.00	\$ 51,603.38		\$ 60,000.00	16.27%
Utilities (Questar & Murray Power)				\$ 2,000.00	\$ 1,562.46		\$ 2,000.00	28.00%
TOTAL EXPENSES		\$ 670,703.89		\$ 747,900.00	\$ 677,479.92		\$ 670,000.00	-1.10%
NET GAIN (LOSS)		\$ 96,282.39		\$ -	\$ 43,356.71		\$ -	

Reserve Funds

\$214,466

\$260,837

1 Full dues from 18 states

Tab E – Western Governors’ Association
Policy Resolutions (Water-Related)



Western Governors' Association Policy Resolution 2018-02

Public Lands Grazing

A. BACKGROUND

1. Range livestock operations were established decades ago, with many operations using forage on private, state and federal lands. These family-based operations are important contributors to the customs, cultures and rural economies of the West.
2. These operations also maintain open spaces and important habitat conditions (e.g., year-round water sources) benefiting wildlife and recreation. Water rights, which are granted by the states for livestock grazing, will not benefit other uses if the agricultural operation ceases to maintain the beneficial use.
3. Ranching operations provide valuable, active management of public lands including responsible grazing, maintenance of fences and other infrastructure, managing fuel loads, engaging in wildland fire monitoring and suppression, and cooperative management of noxious and invasive weeds.
4. Ranching operations and public land grazing provide needed food for a growing population.
5. Federal land management agencies' actions in recent years have resulted in reductions or removal of domestic livestock from federal lands.
6. The U.S. Forest Service (USFS) and Bureau of Land Management (BLM) have permanently closed, left vacant without reissuing a grazing permit, and converted into forage reserves or "grass banks" some grazing allotments in recent years. In many instances, the allotments are technically available based upon forage availability, but permits are not issued for reasons including unmaintained range improvements and uncompleted National Environmental Policy Act (NEPA) documentation by USFS or BLM.
7. USFS and BLM continue to receive pressure to close domestic sheep grazing allotments due to concerns about disease in bighorn sheep.
8. Restrictions and closures have dramatic negative economic impacts on ranchers and ranch dependent communities. Ranchers who have used the same federal grazing allotments for generations are abruptly forced to find new forage for their livestock when allotments are restricted or closed.
9. Restrictions and temporary closures, when implemented to mitigate natural events like drought, wildfires and wildlife impacts, should be factored into ongoing, regular reviews and renewals of individual livestock allotments, individual livestock operators' use of the allotments or the total amount of grazing allotments available for ranchers.
10. Inconsistent interpretation of operational policies across the West by local and regional federal land managers compounds difficulties in managing livestock grazing on public lands.

For example, federal policy on acceptable types of supplemental feed, feed placement, and watering of livestock is interpreted without regard for localized range conditions or the economics of local ranching operations. Failure to adapt policies to local conditions affects the ability of livestock grazing permittees to properly manage their livestock herds while achieving permit standards, goals, and objectives.

B. GOVERNORS' POLICY STATEMENT

1. Western Governors support the continued responsible use of federal lands for grazing.
2. We support sound, science-based management decisions for federal lands – including adaptive management – and believe these decisions should be based upon flexible policies that take into account local ecological conditions and state planning decisions for wildlife and other human needs.
3. Federal and state land managers should identify opportunities to improve flexibility and integration of grazing management and targeted grazing as tools to achieve restoration and land management goals, including wildlife habitat improvements, drought and wildfire mitigation and resilience, water quality and watershed health, soil health management, promotion of perennial plant health, and control of invasive species such as cheatgrass. They should also promote grazing allotment flexibility on federal lands, within USFS and BLM permitting systems and across ownership boundaries, to respond to changing range conditions and environmental considerations.
4. Livestock grazing on federal lands is compatible with recreation and wildlife management and fulfills the multiple use and sustained yield mission of both the USFS and BLM. Policies, analyses, or planning decisions that lead to closing allotments must be based on documented threats and causal factors consistent with state policies and programs as well as federal multiple use missions.
5. Decisions to reduce or suspend grazing should only be made assisted by an appropriate quantitative assessment of long- and short-term trends in range conditions on specific allotments. If, after consultation with the state, the federal agency decides to reduce, suspend, close, or modify an allotment due to documented harmful wildlife impacts, an alternative allotment, properly authorized pursuant to NEPA, must be made available to the displaced operator prior to adjustment of the original allotment. In order to fully implement this policy, the BLM and USFS must have alternative allotments properly authorized under relevant planning documents. This ensures that suspensions or modification of grazing permits will not result in a net loss of Animal Unit Months (AUMs) and that appropriate alternative allotments are available.
6. Grazing permit renewal decisions should be assisted by current site-specific, quantitative data. Federal agencies should engage in meaningful consultation, coordination and cooperation with livestock grazing permittees prior to initiation and throughout the entire permit renewal process.
7. Federal land management agencies' decisions to reduce or close allotments should only be based upon completion of a full and complete administrative review and analysis, including a complete review under the provisions of NEPA. The decision process must include opportunities for states, livestock grazing permittees and other stakeholders to provide

input. Allotments should not be closed due to a pending NEPA review without allowing authorized use of the allotment pending a final decision, or the use of an equivalent amount of forage at reasonably equivalent cost to the operator.

8. Federal range specialists should have an understanding of the economics and management of ranching operations dependent upon federal lands, and should receive the necessary training to comprehensively monitor rangelands, conduct objective analysis, and write sound environmental documents.
9. Clear directives and accountability throughout all levels of the USFS and BLM should be required so that interpretation and implementation is practical and predictable from office to office and individual to individual, and informed by an understanding of localized range and ecological conditions, and economic health of ranch operations.
10. Federal land management agencies should give interested state agencies an opportunity to fully participate in or provide input to grazing permit actions – prior to their initiation – including: generalized review of livestock operations on federal lands; any assessment of grazing conditions as part of a federal planning process; and individual allotment reviews. Grazing permit decisions should not be finalized until after this opportunity for meaningful consultation with the states, local governments, and the affected permittees.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution including any necessary funding, subject to the appropriation process, based on a prioritization of needs.
2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.

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Policy Resolution 2018-08

Water Resource Management in the West

A. **BACKGROUND**

1. Water is a crucial resource for communities, industries, habitats, farms, and western states. Clean, reliable water supplies are essential to maintain and improve quality of life. The scarce nature of water in much of the West makes it particularly important to our states.
2. States are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the management of their water resources and are best suited to speak to the unique nature of western water law and hydrology.
3. Many communities in the West anticipate challenges in meeting future water demands. Supplies are nearly fully allocated in many basins across the West, and increased demand from population growth, economic development, and extreme weather and fire events places added stress on those limited water resources. Sustainability of our natural resources, specifically water, is imperative to the foundations upon which the West was developed. Growth and development can only continue upon our recognition of continued state stewardship of our unique resources and corresponding responsibilities.
4. Strong state, regional and national economies require reliable deliveries of good-quality water, which in turn depend on adequate infrastructure for water and wastewater. Investments in water infrastructure also provide jobs and a foundation for long-term economic growth in communities throughout the West. Repairs to aging infrastructure are costly and often subject to postponement.
5. Western Governors recognize the essential role of partnership with federal agencies in western water management and hope to continue the tradition of collaboration between the states and federal agencies.
6. Tribal governments and western states also share common water resource management challenges. The Western Governors Association and Western States Water Council have had a long and productive partnership with tribes, working to resolve water rights claims.

B. **GOVERNORS' POLICY STATEMENT**

1. **State Primacy in Water Management:** As the preeminent authority on water management within their boundaries, states have the right to develop, use, control and distribute the surface water and groundwater located within their boundaries, subject to international treaties and interstate agreements and judicial decrees.
 - a. **Federal Recognition of State Authority:** The federal government has long recognized the right to use water as determined under the laws of the various states; Western

Governors value their partnerships with federal agencies as they operate under this established legal framework.

While the Western Governors acknowledge the important role of federal laws such as the Clean Water Act (CWA), the Endangered Species Act (ESA), and the Safe Drinking Water Act (SDWA), nothing in any act of Congress or Executive Branch regulatory action should be construed as affecting or intending to affect states' primacy over the allocation and administration of their water resources.

Authorization of water resources development legislation, proposed federal surplus water rulemakings, and/or storage reallocation studies should recognize natural flows and defer to the states' legal right to allocate, develop, use, control, and distribute their waters, including but not limited to state storage and use requirements.

- b. **Managing State Waters for Environmental Purposes:** States and federal agencies should coordinate efforts to avoid, to the extent possible, the listing of water-dependent species under the ESA. When ESA listings cannot be avoided, parties should promote the use of existing state tools, such as state conservation plans and in-stream flow protections, to conserve and recover species.
2. **Infrastructure Needs:** Aging infrastructure for existing water and wastewater facilities and the need for additional water projects cannot be ignored. Infrastructure investments are essential to our nation's continued economic prosperity and environmental protection, and they assist states in meeting federally-mandated standards.
- a. **Federal Support for Infrastructure Investment:** Congress should provide adequate support for the CWA and SDWA State Revolving Funds. Further, Congress should fully utilize the receipts accruing to the Reclamation Fund for their intended purpose in the continuing conservation, development and wise use of western resources to meet western water-related needs, including the construction of Congressionally-authorized Bureau of Reclamation rural water projects and facilities that are part of a Congressionally-authorized Indian water rights settlement.

Congress should authorize water resources development legislation on a regular schedule and appropriate funding so all projects and studies authorized in such legislation can be completed in a timely manner.

Congress also should consider facilitating greater investment in water infrastructure, utilizing such tools as loan guarantees, revolving funds, infrastructure banks and water trust funds.

Capital budgeting and asset management principles should be used to determine funding priorities based on long-term sustainability and not annual incremental spending choices. It should be accompanied by dedicated sources of funding with appropriate financing, cost-sharing, pricing and cost recovery policies.

- b. **Alternatives to Direct Federal Investment:** Federal and state policymakers should also consider other tools to promote investment in water infrastructure and reduce financing costs, including: public-private partnerships, bond insurance, risk pooling, and credit enhancements.

Congress should remove the state volume caps for private activity bonds used for water and wastewater projects, provide guaranteed tax-exempt status for bonds issued by state or local agencies to finance water infrastructure, provide loan guarantees, and otherwise support and encourage alternatives to direct federal investment of limited general funds.

- c. **Hydropower:** Congress and the Administration should authorize and implement appropriate hydropower projects and programs through efficient permitting processes that enhance renewable electric generation capacity and promote economic development, while ensuring protection of important environmental resources and indigenous people's rights.
 - d. **Infrastructure Planning and Permitting:** Infrastructure planning and permitting guidelines, rules and regulations should be coordinated, streamlined and sufficiently flexible to: (1) allow for timely decision-making in the design, financing and construction of needed infrastructure; (2) account for regional differences; (3) balance economic and environmental considerations; and (4) minimize the cost of compliance.
3. **Western States Require Innovative and Integrated Water Management:** Western Governors believe effective solutions to water resource challenges require an integrated approach among states and with federal, tribal and local partners. Federal investments should assist states in implementing state water plans designed to provide water for municipal, rural, agricultural, industrial and habitat needs, and should provide financial and technical support for development of watershed and river basin water management plans when requested by states.

Integrated water management planning should also account for flood control, water quality protection, and regional water supply systems. Water resource planning must preserve state authority to manage water through policies which recognize state law and financial, environmental and social values of water to citizens of western states today and in the future.

- a. **Water Transfers:** Western Governors recognize the potential benefits of market-based water transfers, meaning voluntary sales or leases of water rights. The Governors support water transfers that avoid or mitigate damages to agricultural economies and communities while preventing injury to other water rights, water quality, and the environment.
- b. **Energy Development:** Western Governors recognize that energy development and electricity generation may create new water demands. Western Governors recommend increased coordination across the energy and water management communities, and support ongoing work to assess the interconnection of energy and water through the Regional Transmission Expansion Planning Project for the Western Interconnection and similar efforts.
- c. **Conservation and Efficiency:** Because of diminished water resources and declining and inconsistent snowpack, Western Governors encourage adoption of strategies to sustain water resources and extend existing water supplies further through water conservation, water reuse and recycling, desalination and reclamation of brackish

waters, and reductions in *per capita* water use. The Governors encourage the use of and research into promising water-saving strategies.

- d. **Local Watershed Planning:** Western Governors encourage federal agencies and Congress to provide resources such as technical support to states and local watershed groups. States may empower these watershed groups to address local water issues associated with water quality, growth and land management to complement state water needs.
 - e. **Intergovernmental Collaboration and Conflict Resolution:** Western Governors support the negotiated settlement of interstate water disputes, Indian and Hawaiian water rights claims, and other federal water needs and claims, the settlement of which are in the best interest of western states.
 - f. **State-Federal Coordination:** Western Governors recognize the important role of federal agencies in water resource management in the western states. Governors appreciate the efforts of federal agencies to coordinate water-related activities, particularly through the Western States Water Council, and support the continuation of these key state-federal partnerships.
4. **Western States Need Reliable Water Resource Information:** Basic information on the status, trends and projections of water resource availability is essential to sound water management.
- a. **Basic Water Data:** Western Governors support the U.S. Geological Survey's Groundwater and Streamflow Information Program, the Natural Resources Conservation Service's Snow Survey and Water Supply Forecasting Program, the National Oceanic and Atmospheric Administration's weather and hydrology-related data collection, monitoring, and drought information programs, and the National Aeronautics and Space Administration's National Land Imaging (Landsat) Program with its thermal infrared sensor. Western Governors support federal efforts to coordinate water data gathering and information programs across multiple agencies.
 - b. **Extreme Weather Events Planning:** Western Governors recognize the significant potential impacts of extreme weather events and variability in water supplies. Western Governors urge Congress and the Administration to work closely with states and other resource managers to improve predictive and adaptive capabilities for extreme weather variability and related impacts. We specifically urge the federal government to place a priority on improving the sub-seasonal and seasonal precipitation forecasting capabilities that could support water management decision-making.
 - c. **Water Data Exchange:** The Western Governors' Association and the Western States Water Council have worked together to create the Water Data Exchange, an online portal that will enable states to share their water data with each other, federal agencies, and the public via a common platform. The Governors encourage the use of state water data in planning for both the public and private sectors.
5. **Drought Preparedness and Response:** As exceptional levels of drought persist across the West, Governors are leading on drought preparedness and response through the Western Governors' Drought Forum. The Drought Forum provides a

framework for leaders from states, businesses, non-profits, communities, research organizations and federal agencies to share best practices and identify policy options for drought management. The Governors have identified several areas in need of additional attention from Drought Forum partners, including:

- a. **Data and Analysis:** Basic data on snowpack, streamflow and soil moisture is essential to understanding drought. Though a great deal of information already exists, enhanced drought data collection and real-time analysis at a higher resolution is essential. Governors support state and federal efforts to maintain adequate collection of drought and water data, enhance data networks where appropriate, and facilitate better use of existing information.

The Governors appreciate the collaborative efforts on drought provided through NOAA's National Weather Service River Forecast Centers and Weather Forecast Offices, and the Office of Atmospheric Research's labs and programs, such as the National Integrated Drought Information System (NIDIS).

- b. **Produced, Reused, and Brackish Water:** Technology exists to use produced, reused, recycled and brackish water -sources traditionally considered to be marginal or wastewater. Adoption of this technology has been limited by inadequate data, regulatory obstacles, financial barriers, public attitudes and logistical uncertainties. Governors support regulatory streamlining and policy options to encourage use of produced, brackish, and reused water where appropriate.
- c. **Forest Health and Soil Stewardship:** Better land management practices for forests and farmland may help improve availability and soil moisture retention. Wildfires can cause sediment runoff in water systems, leading to problems for reservoir management and water quality. Governors support policies and practices that encourage healthy and resilient forests and soils in order to make the most of existing water supplies.
- d. **Water Use Efficiency and Conservation:** Public awareness of drought has directed increasing attention to water conservation strategies, both in-home and on-farm. Governors encourage municipal, industrial and agricultural water conservation strategies as drought management strategy.
- e. **Infrastructure and Investment:** Water infrastructure to store and convey water is crucial to drought management, but maintenance and expansion of that infrastructure is often difficult to fund. Governors support efforts to make the most of existing infrastructure, while seeking creative solutions to add more infrastructure with limited resources.
- f. **Working within Institutional Frameworks to Manage Drought:** Legal frameworks and regulatory regimes can sometimes limit the ability of state, local and federal agencies to respond quickly to drought conditions. Governors believe that innovative, flexible policy solutions, such as streamlined processing of temporary water transfers, should be considered when managing drought.

- g. **Communication and Collaboration:** Communication among state officials, federal agency representatives, water providers, agricultural users and citizens is a crucial component of effective drought response. The Western Governors' Drought Forum will continue to provide a framework for sharing best practices through its online resource library, informational webinars, and strategy-sharing meetings for the duration of this resolution.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution including funding, subject to the appropriation process, based on a prioritization of needs.
2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.

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Policy Resolution 2018-11

Cleaning Up Abandoned Mines in the West

A. BACKGROUND

1. Hardrock mining has a long history in the West, which is rich in hardrock minerals like gold, silver, and copper. As part of this past, the West contains historically mined and abandoned hardrock mines, which were abandoned prior to present day regulation and have no responsible or solvent party to perform the cleanup and reclamation.
2. The cleanup of abandoned hardrock mines is hampered by two issues – lack of funding and concerns about liability. These issues are compounded by complex land and mineral ownership patterns in mining districts and the operational histories associated with a given site.
3. There are numerous economic, environmental, and social benefits from remediating lands and waters impaired by abandoned hardrock mines. In recognition of these benefits, states, municipalities, federal agencies, volunteer citizen groups, and private parties that have no liability or responsibility requiring them to cleanup abandoned mines have engaged in or are interested in voluntarily cleaning up abandoned mines; these parties are referred to in this resolution as Good Samaritans. However, questions of liability stemming from this voluntary cleanup have stymied many of these efforts.
4. Good Samaritans currently have potential liability for their voluntary cleanup under Sections 301 and 402 of the Clean Water Act (CWA), because they can inherit liability for any discharges from an abandoned mine. In addition, Good Samaritans have potential liability for their voluntary cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA).
5. Good Samaritans are exposed to these liability risks despite the fact that: they did not previously operate or own the mine; they would voluntarily bear the costs of the cleanup; and they could provide numerous benefits if they were able to remediate the abandoned mine, such as improving water quality, facilitating beneficial land use, and securing the site.
6. Liability concerns also prevent mining companies from remining or voluntarily cleaning up abandoned mines. While remediation could result in an improved environment, companies that are interested are justifiably hesitant to incur liability for voluntary efforts.

B. GOVERNORS' POLICY STATEMENT

1. Western Governors call on Congress to legally protect Good Samaritans that cleanup abandoned mines, including local and state government agencies, from becoming legally responsible under Sections 301 and 402 of the CWA for any continuing discharges from the abandoned mine.

2. Western Governors call on Congress and federal agencies to develop legislative and administrative remedies to address potential CERCLA and RCRA liabilities for Good Samaritans. The federal government should also develop remedies for liabilities associated with re-mining, which deter those best-equipped with technology and expertise (i.e., state and local governments, non-governmental, the mining industry) from improving conditions at abandoned mines.
3. As the costs to clean up abandoned hardrock mines are significant, Western Governors support efforts by Congress and the Administration that would facilitate cleanups by Good Samaritans. To this end, the requirements for Good Samaritan project approvals and reviews should not deter cleanups, while still ensuring there are significant measurable environmental gains from the project. Governors would also support legislation establishing pilot projects to address liability issues for Good Samaritans at individual sites to help pave the way for comprehensive legislation, if comprehensive legislation addressing these issues is not possible in the short term.
4. Many states have agencies that administer the CWA, regulate and require financial assurance for reclamation of hardrock mines, remediate impacted waters, and implement abandoned mine programs. These states are best suited to determine what entities are eligible for Good Samaritan status and review and determine the adequacy of Good Samaritan reclamation plans.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct WGA staff to work with congressional committees of jurisdiction, the Executive Branch, and other entities, where appropriate, to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to consult with the Staff Advisory Council regarding its efforts to realize the objectives of this resolution and to keep the Governors apprised of its progress in this regard.

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Policy Resolution 2018-12

Water Quality in the West

A. **BACKGROUND**

1. Clean water is essential to strong economies and quality of life. In most of the West, water is a scarce resource that must be managed with sensitivity to social, environmental, and economic values and needs. Because of their unique understanding of these needs, states are in the best position to manage the water within their borders.
2. States have federally-recognized authority to manage and allocate water within their boundaries. The Clean Water Act (CWA) Section 101(g) expressly says 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.”
3. States and the Environmental Protection Agency (EPA) work together as co-regulators under the CWA and the Safe Drinking Water Act (SDWA). Congress has delegated to states, by statute, the authority to obtain approval to implement certain federal program responsibilities. When a state has been approved to implement a program and the state is meeting minimum program requirements, the role of federal agencies like EPA should be funding, technical assistance, and research support. States should be free to develop, implement, and enforce those requirements using an approach that makes sense in their specific jurisdiction, subject to the minimum requirements of the federal acts.
4. The CWA was last reauthorized in 1987; attempts to reauthorize the Act since then have failed. Current federal regulations, guidance, and programs pertaining to the CWA do not always recognize the specific conditions and needs of most of the West, where water is scarce and even wastewater becomes a valuable resource to both humans and the environment. The West includes a variety of waters; small ephemeral washes, large perennial rivers, effluent-dependent streams, and wild and scenic rivers. In addition to natural rivers, streams and lakes, there are numerous man-made reservoirs, waterways and water conveyance structures. States need more flexibility to determine how to best manage these varying resources.

B. **GOVERNORS' POLICY STATEMENT**

Clean Water Act (CWA)

1. **State Authority and Implementation of CWA:** States have jurisdiction over water resource allocation decisions and are responsible for how to balance state water resource needs within CWA objectives. New regulations, rulemaking, and guidance should recognize this state authority.
 - a) **CWA Jurisdiction:** Western Governors urge EPA and the Corps to engage the states as co-regulators and 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.

- b) **Total Maximum Daily Loads (TMDLs)/Adaptive Management:** States should have the flexibility to adopt water quality standards and set total maximum daily loads (TMDLs) that are tailored to the specific characteristics of Western water bodies, including variances for unique state and local conditions.
 - c) **Anti-degradation:** CWA Section 303 gives states the primary responsibility to establish water quality standards (WQS) subject to EPA oversight. Given the states' primary role in establishing WQS, EPA should directly involve the states in the rulemaking process for any proposed changes to its existing regulations. Before imposing new anti-degradation policies or implementation requirements, EPA should document the need for new requirements and strive to ensure that new requirements do not interfere with sound existing practices.
 - d) **Groundwater:** States have exclusive authority over the allocation and administration of rights to use groundwater located within their borders and are primarily responsible for allocating, protecting, managing, and otherwise controlling the resource. The regulatory reach of the CWA was not intended to, and should not, be applied to the management and protection of groundwater resources. The federal government should not develop a groundwater quality strategy; instead, it must recognize and respect state primacy, reflect a true state-federal partnership, and comply with current federal statutory authorities.
2. **Permitting:** Actions taken by EPA in its CWA permitting processes should not impinge upon state authority over water management or the states' responsibility to implement CWA provisions.
- a) **State Water Quality Certification:** Section 401 of the CWA requires applicants for a federal license to secure state certification that potential discharges from their activities will not violate state water quality standards. Section 401 is operating as it should, and states' mandatory conditioning authority should be retained without amendment.
 - b) **General Permits:** Reauthorization of the CWA must reconcile the continuing administrative need for general permits with their site-specific permitting requirements under the CWA. EPA should promulgate rules and guidance that better support the use of general permits where it is more effective to permit groups of dischargers rather than individual dischargers.
 - c) **Water Transfers:** Water transfers that do not involve the addition of a pollutant have not been subject to the permitting requirements of the CWA's National Pollutant Discharge Elimination System (NPDES). States already have authority to address the water quality issues associated with transfers. Western Governors believe that transporting water through constructed conveyances to supply beneficial uses should not trigger NPDES permit requirements simply because the source and receiving water contain different chemical concentrations and physical constituents. Western Governors support EPA's current Water Transfers Rule, which exempts water transfers between waters of the United States from NPDES permitting requirements.
 - d) **Pesticides:** Western Governors generally support the primary role of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in regulating agriculture and public

health related pesticide applications to waters of the U.S. and will seek state-based solutions that complement rather than duplicate FIFRA in protecting water supplies.

3. **Nonpoint Source Pollution:** Nonpoint source pollution requires state watershed-oriented water quality management plans, and federal agencies should collaborate with states to carry out the objectives of these plans. The CWA should not supersede other ongoing federal, state, and local nonpoint source programs. Federal water policies must recognize that state programs enhanced by federal efforts could provide a firm foundation for a national nonpoint source policy that maintains the non-regulatory and voluntary nature of the program. In general, the use of point source solutions to control nonpoint source pollution is also ill-advised.
 - a) **Forest Roads:** Stormwater runoff from forest roads has been managed as a nonpoint source of pollution under EPA regulation and state law since enactment of the CWA. Western Governors support solutions that are consistent with the long-established treatment of forest roads as nonpoint sources, provided that forest roads are treated equally across ownership within each state.
 - b) **Nutrient Pollution:** Nitrogen and phosphorus (nutrient) pollution is a significant cause of water quality impairment across the nation, and continued cooperation between states and EPA is needed. However, nutrients produced by non-point sources fall outside of NPDES jurisdiction and should not be treated like other pollutants that have clear and consistent thresholds over a broad range of aquatic systems and conditions.

States should be allowed sufficient flexibility to utilize their own incentives and authorities to establish standards and control strategies to address nutrient pollution, rather than being forced to abide by one-size-fits-all federal numeric criteria. Successful tools currently in use by states include best management practices, nutrient trading, controlling other water quality parameters, and other innovative approaches.
4. **CWA Reauthorization:** The Western Governors support reauthorization of the CWA, provided that it recognizes the unique hydrology and legal framework in Western states. Further, any CWA reauthorization should include a new statement of purpose to encourage the reuse of treated wastewater to reduce water pollution and efficiently manage water resources.
5. **Good Samaritan Legislation:** Congress should enact a program to protect volunteering remediating parties who conduct authorized remediation of abandoned hardrock mines from becoming legally responsible under the CWA and/or the Comprehensive Environmental Response, Compensation, and Liability Act for any continuing discharges after completion of a remediation project, provided that the remediating party – or “Good Samaritan” – does not otherwise have liability for that abandoned mine or inactive mine site.
6. **Stormwater (Wet Weather) Pollution:** In the West, stormwater discharges to ephemeral streams in arid regions pose substantially different environmental risks than do the same discharges to perennial surface waters. The Western Governors emphasize the importance of state primacy in water management, including management of ephemeral streams. State water agencies are well-equipped to provide tailored approaches that reflect the unique management needs of ephemeral streams.

7. **State-Tribal Coordination:** Western Governors endorse government-to-government cooperation among the states, tribes and EPA in support of effective and consistent CWA implementation. While retaining the ability of the Governors to take a leadership role in coordination with the tribes, EPA should promote effective consultation, coordination, and dispute resolution among the governments, with emphasis on lands where tribes have treatment-as-state status under Section 518 of the CWA.

Safe Drinking Water Act (SDWA)

8. **Federal Assistance in Meeting SDWA Standards:** Western Governors believe that the SDWA and its standards for drinking water contaminants have been instrumental in ensuring safe drinking water supplies for the nation. It is essential that the federal government, through EPA, provide adequate support to the states and water systems to meet federal requirements. Assistance is particularly needed for small and rural systems, which often lack the resources needed to comply with federal treatment standards.
9. **Drinking Water Standards:** Contaminants such as arsenic, chromium, perchlorate, and fluoride often occur naturally in the West. Western Governors support EPA technical assistance and research to improve both the efficiency and affordability of treatment technologies for these contaminants. In any drinking water standards that the EPA may revise or propose for these and other contaminants, including disinfection byproducts, EPA should consider the disproportionate impact that such standards may have on Western states and give special consideration to feasible technology based on the resources and needs of smaller water systems.
10. **Risk Assessments:** Analysis of the costs of treatment for drinking water contaminants should carefully determine the total costs of capital improvements, operation, and maintenance when determining feasible technology that can be applied by small systems. These costs should be balanced against the anticipated human health benefits before implementing or revising drinking water standards.
11. **Emerging Contaminants/Pharmaceuticals:** The possible health and environmental impacts of emerging contaminants and pharmaceuticals are of concern to Western Governors. Although states have existing authorities to address possible risks associated with emerging contaminants and pharmaceuticals, there is a need for more reliable science showing impacts on human health as more information regarding these contaminants becomes available.
12. **Hydraulic Fracturing:** States currently employ a range of effective programmatic elements and regulations to ensure that hydraulic fracturing does not impair water quality, including but not limited to requirements pertaining to well permitting, well construction, the handling of exploration and production waste fluids, the closure of wells, and the abandonment of well sites.

Federal efforts to study the potential impacts of hydraulic fracturing on water quality should leverage state knowledge, expertise, policies, and regulations. Such efforts should also be limited in scope, based upon sound science, and driven by the states. Western Governors oppose efforts that would diminish the primary and exclusive authority of states over the allocation of water resources necessary for hydraulic fracturing.

Compliance with Federal Water Quality and Drinking Water Requirements

13. **State Revolving Funds:** Western Governors support EPA's Clean Water State Revolving Fund (SRF) and Drinking Water SRF as important tools that help states and local communities address related water infrastructure needs and comply with federal water quality and drinking water requirements. Western Governors also urge Congress and the Administration to ensure that the SRF Programs provide greater flexibility and fewer restrictions on state SRF management.
14. **Restoring and Maintaining Lakes and Healthy Watersheds:** Historically, the Section 314 Clean Lakes Program and the Section 319 Nonpoint Source Management Program provided states with critical tools to restore and maintain water quality in lakes and watersheds. Western Governors urge the Administration and Congress to support these programs. Such support should not come at the expense of other federal watershed protection programs.
15. **EPA Support and Technical Assistance:** The federal government, through EPA, should provide states and local entities with adequate support and technical assistance to help them comply with federal water quality and drinking water requirements. EPA should also collaborate with and allow states to identify and establish priority areas, timelines, and focus on programs that provide the largest public health and environmental benefits.
16. **EPA Grant Funding for Primary Service - Rural Water Programs:** Some rural communities still lack basic water and sanitary services needed to assure safe, secure sources of water for drinking and other domestic needs. Adequate federal support, including but not limited to the Rural Utilities Service programs of the Department of Agriculture and SRFs through EPA, are necessary to augment state resources.

Water Quality Monitoring and Data Collection

17. **Water Data Needs:** Western water management is highly dependent upon the availability of data regarding both the quality and quantity of surface and ground waters. EPA should provide support to the states in developing innovative monitoring and assessment methods, including making use of biological assessments, sensors and remote sensing, as well as demonstrating the value to the states of the national probabilistic aquatic resource surveys.

B. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct WGA staff to work with Congressional committees of jurisdiction, the Executive Branch, and other entities, where appropriate, to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to consult with the Staff Advisory Council regarding its efforts to realize the objectives of this resolution and to keep the Governors apprised of its progress in this regard.

Western Governors enact new policy resolutions and amend existing resolutions on a bi-annual basis. Please consult www.westgov.org/policies for the most current copy of a resolution and a list of all current WGA policy resolutions.



Policy Resolution 2018-15

Modernizing Western Infrastructure

A. **BACKGROUND**

1. Western states depend on a safe, reliable and resilient network of infrastructure to move goods, people, energy, and agricultural products to meet growing demands across our nation and world. Investments to modernize our state's infrastructure, including ports, water systems, bridges, pipelines, highways, airports, electric generation and transmission, communications facilities, recreational assets and railways not only support the economic well-being of our communities, they also serve to position our economies to attract and retain investment through maintaining our competitive advantage in a growing global marketplace. Because a significant portion of the West is federally-owned, federal processes impact the region's infrastructure.
2. Modernizing and maintaining the West's network of infrastructure relies upon permitting and review processes that require close coordination and consultation among state, federal and tribal governments. State and federal coordination is necessary to ensure that infrastructure projects are designed, financed, built, operated and maintained in a manner that meets the needs of our economies, environment, public health, safety and security. Early, ongoing, substantial, and meaningful state-federal consultation can provide efficiency, transparency, and predictability for states, as well as prevent delays, in the federal permitting and environmental review process.
3. Western Governors applaud the principles and intent of the National Environmental Policy Act (NEPA) which, since its enactment in 1970, has required that federal agencies consider how proposed federal actions may impact natural, cultural, economic and social resources for present and future generations of Americans. The process by which NEPA is implemented has been defined over time through regulations and guidance issued by the Council on Environmental Quality (CEQ).
4. Congress recognized the need for improved state-federal coordination in the NEPA process in the Fixing America's Surface Transportation (FAST) Act, passed in December 2015, which implements reforms regarding cooperating agency status and coordination with state and local governments. This statute should be consistently implemented.
5. NEPA mandates federal agency cooperation with state and local governments through the designation of qualified "cooperating agencies." Under existing law, an entity shall: (i) participate in the NEPA process at the earliest possible time; (ii) participate in the NEPA scoping process; (iii) assume, at the lead agency's request, responsibility for developing information and preparing environmental analyses; (iv) provide staff support upon request of the lead agency; and (v) use its own funds in its participation as a cooperating agency.¹

¹ 40 CFR § 1501.6(b).

6. The manner in which cooperating agencies are selected by a lead agency to participate in the NEPA process is unclear and inconsistently implemented. Additionally, a lead agency's determination of whether or not to grant cooperating agency status to a federal or non-federal governmental entity is not subject to judicial review.
7. State and local governments often have the best available science, data and expertise related to natural resources within their borders. In cases where the states have primary management authority, such as wildlife and water governance, states also possess the most experience in managing those resources and knowledge of state- and locality-specific considerations that should inform infrastructure siting decisions.

B. GOVERNORS' POLICY STATEMENT

1. Western Governors support improved infrastructure permitting and environmental review processes that result in more efficient reviews without shortening timelines for state input and consultation, or compromising natural resource, wildlife, environmental quality or cultural values.
2. Western states have a diverse mix of infrastructure needs spanning rural and urban areas and across multiple sectors of our economies. Infrastructure financing reforms should recognize this diversity and should avoid shifting costs to states or creating undue or disproportionate impacts to the infrastructure that connects the West's cities and rural communities with the nation and world. Federal infrastructure financing appropriations should acknowledge and support the diverse infrastructure needs facing western states.
3. The federal infrastructure permitting and environmental review process must be transparent, predictable and consistent for states and project developers. Federal processes must ensure that agencies set, and adhere to, timelines and schedules for completion of reviews and develop improved metrics for tracking and accountability.
4. Federal programs that increase bottom-up coordination among agencies, state and local governments and that foster collaboration among diverse stakeholders and project proponents can create efficiency and predictability in the NEPA process, including reducing the risks of delays due to litigation.
5. State, local and tribal governments, as well as their political subdivisions, have unique and critical duties to serve their citizens and should not be considered ordinary "stakeholders" for purposes of the NEPA process.
6. Federal agencies should be required to engage with states and state agencies in early, meaningful, substantive and ongoing consultation. Federal agencies should be required to invite all qualified state governmental entities to participate in the NEPA process as "cooperating agencies" and promulgate regulations to clarify consultation procedures and states' roles as cooperating agencies. The denial of any *bona fide* request for cooperating status should be accompanied by a clear and thorough explanation from the lead agency denying such request, citing specific factors the agency used in its determination. Such information should be recorded and maintained by the lead federal agency and collected by the Office of Management and Budget.

7. Western Governors encourage consistency in the implementation of NEPA within and among agencies and across regions. The federal government should identify and eliminate inconsistencies in environmental review and analysis across agencies to make the process more efficient.
8. Federal NEPA regulations should allow for existing state environmental review processes to supplement and inform federal environmental review under NEPA. Federal agencies, in their NEPA implementation guidelines, should encourage joint reviews with the states where possible.
9. The federal government should consider and apply peer-reviewed environmental science in a consistent manner across agencies as each undertake their NEPA reviews of different projects' impacts on and contributions to environmental quality. Federal agencies should work directly with states to obtain and use up-to-date state data and analyses as critical sources of information in the NEPA process.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct WGA staff to work with Congressional committees of jurisdiction, the Executive Branch, and other entities, where appropriate, to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to consult with the Staff Advisory Council regarding its efforts to realize the objectives of this resolution and to keep the Governors apprised of its progress in this regard.

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Tab F – Western Governors' Association
Letters Advocating for Policy

**Written Testimony of James D. Ogsbury, Executive Director
Western Governors' Association**

**Submitted to the United States House of Representatives
Committee on Appropriations
Subcommittee on Energy and Water Development, and Related Agencies
April 18, 2018**

Fiscal Year 2019 Appropriations

Mr. Chairman and Members of the Subcommittee, the Western Governors' Association (WGA) appreciates the opportunity to provide written testimony on the appropriations and activities of the federal agencies under the Subcommittee's jurisdiction, including the Department of Energy (DOE), Bureau of Reclamation (BOR) and U.S. Army Corps of Engineers (Corps). WGA is an independent organization representing the Governors of 19 western states and three U.S. territories in the Pacific. The Association is an instrument of the Governors for bipartisan policy development, information-sharing and collective action on issues of critical importance to the western United States.

The agencies within the Subcommittee's jurisdiction wield significant influence over the American West and its development of energy and water resources. Western Governors recognize the importance of a close and productive working relationship between states and the federal government and understand that more effective cooperation depends on the treatment of states as full and equal partners with the federal government. The promotion of a greater partnership between states and the federal government is central to the mission of WGA and is reflected in our Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, which I commend to your attention.

States possess the primary legal authority for the allocation, management, protection, and development of water resources within their respective borders. Congress and the federal judiciary have consistently and expressly recognized, and deferred to, this state authority. Federal policy must respect and preserve states' authority to manage water, as well as recognize state law and the financial, environmental and social values of water resources to citizens of the western states.

The following recommendations are intended to ensure that taxpayers realize a meaningful return on the investment of limited discretionary resources. This goal will be more readily achieved to the extent that federal agencies better leverage state authority, resources and expertise.

Jurisdictional Scope of Clean Water Act: Some Western Governors have previously expressed concern regarding the development of the Environmental Protection Agency (EPA) and Corps' 2015 Clean Water Rule, including concerns that their states were not adequately consulted during the rulemaking process. EPA and the Corps have begun efforts to promulgate new language to clarify the jurisdictional scope of the Clean Water Act and have taken positive steps to engage WGA and individual states in the renewed rulemaking process. Western Governors look forward to working with the agencies to develop a new rule that effectively protects our nation's

water quality, while adequately protecting states' primary authority over the management and allocation of water resources. Any assistance the Subcommittee can provide in facilitating this result would be greatly appreciated.

State Authority Over Groundwater: States have exclusive authority over groundwater located within their borders and are primarily responsible for protecting, managing, and otherwise controlling the resource. WGA encourages the Subcommittee not to permit the use of appropriated funds for any activity that would, or has the potential to, usurp states' authority over groundwater resources. Federal agencies should work with the states to address their groundwater-related needs and concerns.

Water Supply Rule: The Corps' proposed Water Supply Rule concerning surplus waters within Missouri River Basin impoundments would infringe upon states' inherent primary authority over water resources, particularly over the natural flows within traditionally navigable waterways falling under state jurisdiction. The administration of water supply contracts by the Corps should not have any negative effect on states' primary authority over the management, allocation, planning, and protection of water resources within their boundaries. This authority over water extends to all naturally-occurring waters, including those impounded in Corps reservoirs. The rights of states to access and appropriate such waters must not be precluded by any federal regulation, including the Corps' proposed Rule. WGA requests that the Subcommittee withhold funding to implement the proposed Water Supply Rule as it applies to any federal actions that may infringe upon states' historic authority over natural flows within the Missouri River Basin.

Water Data: Western States need reliable water resource information on the status, trends, and projections of water availability. Accordingly, Western Governors support the funding of improved predictive and adaptive capabilities for extreme weather variability and related impacts, with a priority on improving sub-seasonal and seasonal precipitation forecasting capabilities to support water management decision-making. Data collection, monitoring, and communications should be coordinated across federal agencies and with state agencies.

Water Infrastructure: Aging infrastructure for existing water, wastewater and hydropower facilities and the need for additional water projects are becoming increasingly urgent considerations. Infrastructure investments are essential to our nation's continued economic prosperity, electric generation capacity and environmental protection, and they assist states in meeting federally-mandated environmental standards.

The Subcommittee should fully utilize the receipts accruing to the Reclamation Fund for their intended purpose for the conservation, development and use of resources to meet western water-related needs. Western Governors support the construction of Congressionally-authorized BOR rural water projects and facilities that are part of Congressionally-authorized Indian water rights settlements.

The Subcommittee should also consider facilitating greater investment in water infrastructure, utilizing such tools as loan guarantees, revolving funds, infrastructure banks and water trust funds. Capital budgeting and asset management principles should be used to determine funding priorities based on long-term sustainability and not annual incremental spending choices.

These investments in infrastructure should be accompanied by dedicated sources of funding with appropriate financing, cost-sharing, pricing and cost recovery policies.

The Subcommittee should take steps to ensure that infrastructure planning and permitting guidelines, rules and regulations are coordinated, streamlined and sufficiently flexible to: 1) allow for timely decision-making in the design, financing and construction of needed infrastructure; 2) account for regional differences; 3) balance economic and environmental considerations; and 4) minimize the cost of compliance. Any authorization for hydropower facilities should, however, ensure that the federal government does not replace or impede existing state authority in the certification of hydropower licensing. Section 401 of the Clean Water Act is operating as it should, and states' mandatory conditioning authority should be retained.

Aquatic Invasive Species: The spread of invasive quagga and zebra mussels continues to be a major threat to western water resources. To help combat this threat, Western Governors request that BOR, in partnership with states and regional coordinating bodies of states, be provided with both the resources and statutory authority required to implement mandatory inspection and decontamination of all high-risk watercraft infested with quagga and zebra mussels leaving waterbodies under their jurisdiction, conduct early detection monitoring, participate in rapid response exercises, and maintain a ready reserve of rapid response containment equipment for regional application in the event of a detection.

Waste Isolation Pilot Project: Continued funding for the Waste Isolation Pilot Plant (WIPP) Transportation Safety Program is essential to the expeditious cleanup and disposal of transuranic (TRU) waste from U.S. nuclear weapons complex facilities located in several western states, including Idaho National Laboratory, Los Alamos National Laboratory in New Mexico, and the Hanford Site in Washington. DOE must continue to provide sufficient and timely in-kind, financial, technical and other appropriate assistance to any state or Indian tribe through whose jurisdiction TRU waste will be transported. This assistance is integral to planning, developing and implementing the WIPP Transportation Safety Program. The safe and uneventful transportation of TRU waste through the WIPP Transportation Safety Program continues to be a priority of Western Governors, and we encourage the Subcommittee to provide adequate funding to ensure that this important work continues.

Western Governors and federal agencies deal with a complex web of interrelated energy and water resource issues. It is an enormous challenge to judiciously balance competing needs in this environment, and Western Governors appreciate the difficulty of the decisions this Subcommittee must make. The foregoing recommendations are offered in a spirit of cooperation and respect, and WGA is prepared to assist you as you discharge these critical and challenging responsibilities.

June 18, 2018

The Honorable John Barrasso
Chairman
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Thomas Carper
Ranking Member
Committee on Environment and Public Works
United States Senate
456 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper:

On behalf of the Western Governors' Association (WGA), we wish to commend the Committee for its leadership in advancing S. 2800, America's Water Infrastructure Act of 2018. We strongly support Congressional action on this legislation, which is so vital to our region. WGA Policy Resolution 2015-08, Water Resource Management in the West, calls upon Congress to pass water resources development legislation on a regular schedule in order to provide states and local governments with certainty in meeting water infrastructure needs. For this reason, we applaud Congress's renewed commitment to develop and pass water resources development legislation every two years.

Water is a precious resource everywhere, but especially in the arid West, where many communities anticipate challenges in meeting future water demands. Current water resources are fully allocated in many basins across the West, and increased demand from population growth, economic development, and extreme weather and fire events places added stress on limited supplies. Whether for purposes of drought mitigation, flood control or supply allocation, proper water management is essential. WGA believes that S. 2800 addresses several water management issues that are critical to western states and that its enactment would provide substantial benefits to western water management practices.

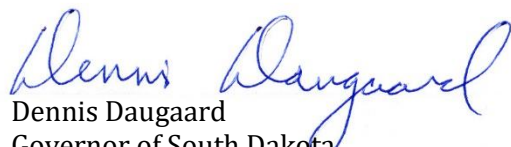
Strong state, regional and national economies require reliable deliveries of good-quality water, which in turn depend on adequate infrastructure for water and wastewater. Investments in water infrastructure also provide jobs and a foundation for long-term economic growth in communities throughout the West. Repairs to aging infrastructure are costly and have often been unnecessarily delayed.

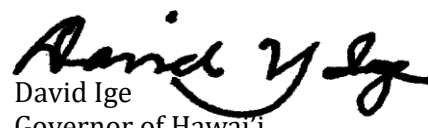
Western Governors recognize the essential role of partnership with federal agencies in western water management and hope to continue the tradition of collaboration between the states and federal agencies. We ask that you consider addition of the following language to address several issues of special concern to the West, where water management is unique because of legal structures and hydrology:

- **U.S. Army Corps of Engineers' Assertion of Authority over Surplus Water, Including Natural Flows:** Western Governors ask Congress to continue to recognize and protect states' primary authority over the management and allocation of water resources within their boundaries, including water stored at U.S. Army Corps of Engineers reservoirs. In particular, WGA requests that the legislation expressly prohibit the Corps from asserting jurisdiction over natural flows of impounded rivers when defining and managing "surplus waters" stored within Corps projects.
- **Aquatic Invasive Species:** Western Governors urge Congress to provide federal agencies with the authorities necessary to effectively combat aquatic invasive species in the West, including invasive mussels. Senator Michael Bennet highlighted these issues in a letter to the Committee dated February 26, 2018. In the letter, Senator Bennet requests that the Committee consider, "authorizing the BOR, NPS, and USFS to participate and cooperate with aquatic nuisance species prevention efforts, so that we keep our nation's headwaters free of invasive mussels that can harm our infrastructure, environment, and economy." Western Governors appreciate Senator Bennet's attention to this important issue, and we encourage you to include these recommendations in the legislation.
- **Water Transfers Rule:** Western Governors support the legislative codification of EPA's Water Transfers Rule, 40 C.F.R. § 122.3(i), which has historically exempted certain transfers of waters from permitting under the Clean Water Act's National Pollutant Discharge Elimination System. The Rule is critical to the social and economic health of the arid West, which must rely on thousands of intrastate and regional transfers to move billions of gallons of water to satisfy domestic, agricultural and industrial needs.

On behalf of WGA, thank you again for your leadership in the development of this bipartisan legislation. We hope that you will consider Western Governors as a resource on this and other water-related matters.

Sincerely,


Dennis Daugaard
Governor of South Dakota
Chair, WGA


David Ige
Governor of Hawai'i
Vice Chair, WGA

**Written Testimony of Ward J. Scott, Policy Advisor
Western Governors' Association**

**Submitted to the United States Senate
Committee on Environment and Public Works
Subcommittee on Superfund, Waste Management, and Regulatory Oversight
June 13, 2018**

Oversight of the Army Corps' Regulation of Surplus Water and the Role of States' Rights

Chair Rounds, Ranking Member Booker, and Members of the Subcommittee, I appreciate the opportunity to testify today on behalf of the Western Governors' Association (WGA). My name is Ward Scott and I am a Policy Advisor with the Association, where my work focuses on western water policy and state-federal relations.

WGA represents the Governors of 19 western states and three U.S. territories and is an instrument of the Governors for bipartisan policy development, information-sharing, and collective action on issues of critical importance to the western United States. The elected and appointed officials of the western states have a long history of responsible land and water resource management and of working collaboratively with the administrative agencies of the federal government.

My testimony will focus on the Western Governors' concerns with the U.S. Army Corps of Engineers (Corps) proposed rule, "Use of [Corps] Reservoir Projects for Domestic Municipal & Industrial Water Supply" (Proposed Rule).¹ Western Governors have consistently expressed their opposition to the Proposed Rule and to any agency rule or policy that would – or has the potential to – interfere with, subordinate, or in any way diminish states' well-established legal authority over water resources within their boundaries.

Western Governors' concerns regarding the Proposed Rule focus on three primary elements. First, the Proposed Rule may have preemptive effects on states' sovereign authority over water resources and corresponding state laws. Second, the Corps' overly-broad proposed definition of the term "surplus waters" includes natural, historic river flows, which should remain under state jurisdiction. Third, the Corps' has not adequately consulted with potentially-affected states, nor has it properly assessed potential federalism implications as required by Executive Order 13132, in its development of the Proposed Rule.²

Water is precious everywhere but especially in the West, where consistently arid conditions, diverse landscapes and ecosystems, and growing populations present unique challenges in the allocation and management of scarce water resources. State water laws have developed over the course of decades, and vary greatly to account for local hydrology, the interplay between Tribal, state, and federal legal rights, and complicated systems of water allocation. In the West, water must generally be appropriated under state-granted water rights and is often transferred long distances from its point of diversion to its point of use. Additionally, western water users often possess vested private property rights in water, which are granted and administered by the states. Western

¹ 81 Fed. Reg. 91556 (Dec. 16, 2016).

² WGA Comments, Feb. 27, 2017. Available at:
http://westgov.org/images/editor/USACE_Surplus_Waters_Rule_-_final.pdf.

state water laws – and the regulatory frameworks within which they operate – are complex and diverse and must be accounted for in the development of any Corps rule or policy.

State Authority over Water Resource Management and Allocation

Western Governors have adopted policy (WGA Policy Resolution 2015-08, Water Resource Management in the West) that articulates a fundamental principle recognized by both Congress and the United States Supreme Court:

States are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the management of their water resources and are best suited to speak to the unique nature of western water law and hydrology.³

This well-established state authority is rooted in the U.S. Constitution's Tenth Amendment, which guarantees that, "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."⁴ States, upon their admission to the Union, established their sovereign authority over water resources under the Equal Footing Doctrine⁵ and continue to maintain this broad authority, unless preempted by federal law.⁶ Federal statutes addressing western water management have consistently expressed that states possess primary authority over their water resources and that it is the intent of Congress to preserve and respect such authority and corresponding state laws.⁷

No federal laws cited by the Corps that may be applicable to Proposed Rule expressly or impliedly preempt state's authority to manage and allocate water resources. Rather, the two federal statutes relied upon by the Corps in its Notice of Proposed Rulemaking (NPRM)⁸ – the Flood Control Act of 1944 and the Water Supply Act of 1958 – clearly recognize and defer to state law.

Section 1 of the Flood Control Act of 1944 begins with the following: "[I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control..."⁹ Similarly, in the Water Supply Act of 1958, Congress declared its intent "to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies

³ WGA Policy Resolution 2015-08, Water Resource Management in the West. Available at: http://westgov.org/images/editor/RESO_Water_Resources_Final_Version_08.pdf

⁴ U.S. Const. amend. X.

⁵ *Pollard v. Hagan*, 44 U.S. 212 (1845).

⁶ *Martin v. Lessee of Waddell*, 41 U.S. 367, at 410 (1842) ("[T]he people of each state became themselves sovereign; and in that character hold the absolute right to all of their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."); see also, *Kansas v. Colorado*, 206 U.S. 46 (1907); *California Oregon Power v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *PPL Montana v. Montana*, 565 U.S. 576 (2012).

⁷ See, e.g., the 1866 Mining Act (43 U.S.C. § 661); the 1877 Desert Land Act (43 U.S.C. §321); the 1920 Federal Power Act (16 U.S.C. §§ 802, 821); the Clean Water Act (33 U.S.C. § 1251(b) and (g)); the 1902 Reclamation Act (43 U.S.C. § 383); *Pollard v. Hagan*, 44 U.S. 212 (1845); *California v. United States*, 438 U.S. 645 (1978).

⁸ 81 Fed. Reg. 91556 (Dec. 16, 2016).

⁹ 43 U.S.C. § 701-1.

in connection with the construction, maintenance, and operations of Federal navigation, flood control, irrigation, or municipal purpose projects.”¹⁰ Although the Corps cites various statements of Congressional intent to justify certain provisions of the Proposed Rule in its NPRM, no intent of Congress is more repeatedly and clearly expressed throughout the controlling statutes than the preservation of, and respect for, states’ authority over their water resources.

The Corps’ Proposed Rule

Through its Proposed Rule, the Corps seeks to establish policies governing the use of its reservoir projects within the Upper Missouri River Basin and the treatment of “surplus water” within that system.¹¹ Although the Proposed Rule attempts to address “specific issues that have arisen most notably in the Corps’ Northwestern and South Atlantic Divisions,” the Corps has stated that it “is also intended to provide greater clarity, consistency, and efficiency in implementing [the Flood Control Act of 1944 and the Water Supply Act of 1958] nationwide.”¹²

Western Governors have expressed their concerns regarding both the substance of the Proposed Rule and the process by which it was developed, both through WGA and individually¹³ and remain concerned that the procedural, legal, and technical issues cited in comments and letters, as well as the views and concerns expressed by individual states, have still not been addressed by the Corps or incorporated into its decisionmaking processes. These concerns were heightened by the Corps’ listing of the Proposed Rule in the Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions’ as currently in its “Final Rule Stage” with a “Final Action” date estimated as January 2019.

Definition and Treatment of “Surplus Waters”

Through the Proposed Rule, the Corps seeks to address the use of its reservoir projects for domestic, municipal, and industrial water supply, and clarify its use of water supply contracts to authorize the withdrawal of “surplus waters” from Corps reservoirs. The Corps’ administration of water supply contracts at its reservoirs should not have any negative effect on states’ primary authority over the management and allocation of their water resources or state laws enacted for such purposes. The Proposed Rule, however, fails to distinguish between “surplus water,” which is defined in relation to storage and authorized purposes, and “natural flows,” which is defined as waters that would have been available for use in the absence of federal dams and reservoirs.

Section 6 of the Flood Control Act of 1944 authorizes the Corps to enter into agreements “for domestic and industrial uses of surplus water that may be available at any [Corps] reservoir,” provided such uses do not “adversely affect then-existing lawful uses of such water.” The statute does not provide a definition for “surplus waters.” Under the Proposed Rule, the Corps would define “surplus water” to mean any water available at a Corps reservoir that is not required during a specified time period to accomplish an authorized purpose or purposes of that reservoir.

¹⁰ 43 U.S.C. § 390b.

¹¹ 81 Fed. Reg. 91556 (Dec. 16, 2016).

¹² 81 Fed. Reg. 91558-59.

¹³ Western states submitting individual comments to the Corps include: The [State of Idaho](#); the [State of Nebraska](#); the [State of North Dakota](#); the [State of Oklahoma](#); and the [State of South Dakota](#). Comments were also submitted by the [Western States Water Council](#); [North Dakota Water Commission](#); [North Dakota Water Users Association](#); [Association of California Water Agencies](#); and the [Texas Commission on Environmental Quality](#).

The Corps does not claim that federal law preempts state authority over natural flows through the Flood Control Act of 1944, the Water Supply Act of 1958, or any other relevant statute. Nor have states transferred or ceded any rights to, or authority over, the allocation and management of natural flows to the Corps. In its NPRM, the Corps acknowledges that some portion of waters to be defined as “surplus” would exist without Corps’ water storage: “The Corps also recognizes that some withdrawals that it may authorize from a Corps reservoir pursuant to Section 6 could have been made from the river in the absence of the Corps reservoir project, and in that sense may not be dependent on reservoir storage.”¹⁴

The proposed definition of “surplus waters” is beyond the scope of the Corps’ statutory authority and would usurp states’ well-established sovereign authority over the natural flows of water through Corps reservoirs. As a result, the Proposed Rule would conflict with Congress’s clear intent to preserve state water law. Western Governors believe that any definition of “surplus waters” must plainly exclude natural historic flows from any quantification of waters subject to the Proposed Rule. Additionally, natural flows should be exempt from any monetary charges imposed by the Corps for water storage, as such waters would exist within the streambed in the absence of Corps reservoirs and would not be subject to federal management or the imposition of federal fees.

Rulemaking Process

In addition to the substance of the Proposed Rule, Western Governors are concerned about the process by which it was developed. States should be afforded the opportunity to consult with federal agencies as part of the development of any federal rule, policy or decision which may have significant impacts on states’ authority – both inherent and delegated. Nowhere is state consultation more important than in the context of water resource management.

Western Governors emphasize in WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship, that federal agencies should, “have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications.”¹⁵ State consultation should be an ongoing process and should continue from the development stage of any proposed rule throughout its promulgation. As the agencies receive additional information, Governors and the state officials they designate should have the opportunity for ongoing engagement with the agencies to develop refinements to any rule.

Consistent with this policy, Executive Order 13132, Federalism, 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.”¹⁶ These policies include “regulations, legislative comments or proposed legislation, and other policy statements or actions that 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.”¹⁷ In its NPRM, the Corps declares that it “do[es] not believe that the

¹⁴ 81 Fed. Reg. 91556 (Dec. 16, 2016).

¹⁵ WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship. Available at: http://westgov.org/images/editor/PR_2017-01_State_Federal_Relationship.pdf.

¹⁶ 64 Fed. Reg. 43255 (Aug. 10, 1999).

¹⁷ *Id.*

proposed rule has Federalism implications.”¹⁸ WGA disagrees with this assertion. The Proposed Rule clearly qualifies for further review under Executive Order 13132, as its provisions would have substantial direct effects on the states and their authority over the management and allocation of their waters. The Proposed Rule would also have a preemptive effect on state water laws (*i.e.*, a substantial effect “on the distribution of power and responsibilities among the various levels of government.”).

Proper state consultation in an agency’s decisionmaking process produces more durable, informed, and effective policy and allows for genuine partnerships to develop between federal and state officials. Providing states with an opportunity to submit written comments – which is already required under the Administrative Procedures Act – is not the same process as “consultation.”¹⁹ Federal courts have relied on an ordinary definition of “consultation” and have concluded that state consultation requires a meaningful opportunity for dialogue between state and federal officials, where federal decisionmakers “seek information or advice from” states or “have discussions or confer with [states], typically *before* undertaking a course of action.”²⁰

While WGA has submitted written comments under the normal procedures for public input, Western Governors have asserted that states should have been consulted throughout this rulemaking process. In addition to written comments submitted in response to the Corps’ Notice of the Proposed Rule, WGA issued letters in August 2013 and again in October 2017 regarding the Corps’ failure to adequately engage with states in the development of the Proposed Rule. It is our understanding that Corps officials have conducted little to no outreach to Governors’ offices in response to their expressed concerns regarding the Proposed Rule. This failure to consult with states has resulted in a rule that largely ignores state concerns that have been consistently communicated to the Corps.

The Corps should develop rules and policies establishing comprehensive procedures for state consultation, requiring its officials to conduct pre-decisional – as well as ongoing – government-to-government engagement with states through their Governors’ offices. Such measures should be implemented prior to any decision in which the Corps asserts jurisdiction over matters traditionally under state authority.

Conclusion

Western Governors have a history of responsible and comprehensive water management within their states and of working with federal agencies on water-related matters. The Proposed Rule has a substantial likelihood of interfering with, impairing, and/or subordinating states’ well-established authority to manage and allocate the natural flows of rivers within their boundaries and to implement state water laws.

Any definition of “surplus water” must account for, and exclude, natural flows of the river from waters that would be subject to Corps control. The Corps should not deny access to divert and appropriate such natural flows, nor should the Corps charge storage or access fees where users are making withdrawals of natural flows from Corps reservoirs. No federal statute purports to assert federal jurisdiction over these waters or to preempt state law.

¹⁸ 81 Fed. Reg. 91556 (Dec. 16, 2016).

¹⁹ *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072, 1087 (9th Cir. 2011).

²⁰ *The New Oxford Dictionary* 369 (2001).

The Corps should consult with states, on a government-to-government level, to better understand the impacts the Proposed Rule may have on states' authority over water resources and ways in which the Corps can partner with states to effectively manage its projects and resources.

This concludes my testimony. Thank you again for providing the opportunity to testify and for bringing attention to these important issues of states' rights and federal responsibilities. I will be happy to answer any questions you have.

June 6, 2018

The Honorable R.D. James
Assistant Secretary for the Army for Civil Works
U.S. Army Corps of Engineers
441 G Street, N.W.
Washington, D.C. 20314

Dear Assistant Secretary James:

We are writing to express the continued concerns of Western Governors regarding the U.S. Army Corps of Engineers' proposed rulemaking, Policy for Domestic, Municipal, and Industrial Water Supply Uses of Reservoir Projects Operated by the Department of the Army, U.S. Army Corps of Engineers ([RIN 0710-AA72](#), [Docket ID: COE-2016-0016](#)). The proposed rule, which would affect Corps water reservoir projects located in western states, threatens to interfere with those states' primary authority to manage and allocate water resources within their boundaries. [The Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions](#) schedules "Final Action" on the proposed rule for January 2019 and "Final Action Effective" for March 2019. It remains unclear to Western Governors how the Corps plans to engage with, and respond to, states as it moves forward in its rulemaking process.

On December 16, 2016, the Corps issued a [Notice of Proposed Rulemaking](#) (NPRM) to address its policies governing the use of Corps reservoir projects within the Upper Missouri River Basin and the treatment of "surplus water" within that system. In response to the NPRM, the Western Governors' Association (WGA) submitted [comments](#) expressing concerns about both the substance of the proposed rule and the process by which it had been developed.

Specifically, the Governors' comments cited: (i) the Corps' failure to conduct adequate consultation with potentially-affected states, or to include a proper assessment of the proposed rule's potential federalism implications as required by Executive Order 13132, Federalism; (ii) the various potential preemptive effects of the proposed rule on state authority over water resources; (iii) the Corps' overly-broad definition of the term "surplus waters" to include natural, historic river flows over which states possess primary legal authority; and (iv) the denial of, or interference with, access to Corps projects for the lawful diversion and appropriation of water under state law. Several other western states also submitted [comments](#) to the Corps in response to its NPRM, largely reiterating and expanding upon the concerns expressed by WGA.¹

¹ Western States that submitted comments to the Corps in response to the NPRM include: The [State of Idaho](#); the [State of Nebraska](#); the [State of North Dakota](#); the [State of Oklahoma](#); and the [State of South Dakota](#). Comments were also submitted by the [Western States Water Council](#); [North Dakota Water Commission](#); [North Dakota Water Users Association](#); [Association of California Water Agencies](#); and the [Texas Commission on Environmental Quality](#).

Western Governors' concerns regarding this issue were initially raised in an August 21, 2013 letter to then-Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy. We cited the Corps' failure to adequately engage with states in its then-pending rulemaking relating to surplus waters. Similarly, on August 6, 2013, the Western States Water Council (WSWC) sent a letter to Assistant Secretary Darcy citing shortcomings in the rulemaking process and a lack of regulatory clarity on several critical implementation issues. Western Governors are concerned that the procedural, legal, and technical issues cited in comments and letters, as well as the views and concerns expressed by individual states, have still not been addressed by, or incorporated in, the Corps' decision-making processes in the development of the proposed rule.

States have an historic and unique relationship with the Corps and a vital role in the implementation of several Corps programs, due to states' inherent and sovereign authority over water resources, as well as their statutory role as co-regulators under the federal Clean Water Act. As stated in WGA Policy Resolution [2017-01](#), *Building a Stronger State-Federal Relationship*, federal agencies "should be required to have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications."

In its 2016 NPRM, the Corps states that the proposed rule is "intended to enhance the Corps' ability to cooperate with state and local interests in the development of water supplies in connection with the operation of its reservoirs," and that it "endeavors to operate its projects for their authorized purposes in a manner that does not interfere with the States' abilities to allocate consumptive water rights, or with lawful uses pursuant to State, Federal, or Tribal authorities." As of this date, the Western Governors are unaware of any meaningful outreach on the part of the Corps to engage with states – or respond to their expressed concerns – as part of this rulemaking effort.

Western Governors have a history of responsibly exercising their authority for comprehensive water management within their states and of working cooperatively with various federal agencies in connection with that responsibility. We reiterate our concerns about the Corps' proposed rule, as described in its NPRM, for the following reasons:

- Western Governors continue to believe that the proposed rule does, in fact, have federalism implications which trigger the expanded state consultation requirements of Executive Order 13132.
- As the primary authority over water management and allocation within their borders, states must not be required to relinquish or subordinate their sovereign authority over the natural flows of rivers impounded by the Corps or any other federal agencies.
- Legally, the Corps must define "surplus water" to expressly exclude natural flows (and any quantification of such flows) which would have occurred without the development of federal water projects. Natural flows must remain subject to states' authority to allocate water resources for beneficial uses.

The Honorable R.D. James

June 6, 2018

Page 3

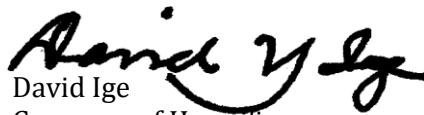
- The Corps should not deny, or interfere with, access to divert and appropriate natural flows (*i.e.*, water which would have been available without the construction of Corps impoundments) in its reservoir projects. Similarly, the Corps should not charge storage fees to water users where such users are making withdrawals of natural flows within Corps reservoirs.

Western Governors strongly urge you to engage in meaningful, substantive, and ongoing consultation with states before moving forward with any efforts to develop the proposed rule and to respond to our consistently expressed concerns regarding this matter.

Sincerely,



Dennis Daugaard
Governor of South Dakota
Chair, WGA



David Ige
Governor of Hawai'i
Vice Chair, WGA

June 5, 2018

The Honorable Lisa Murkowski
Chairman
Committee on Energy and Natural Resources
United States Senate
304 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Maria Cantwell
Ranking Member
Committee on Energy and Natural Resources
United States Senate
304 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Murkowski and Ranking Member Cantwell:

Western Governors recognize the important role the Committee on Energy and Natural Resources plays in addressing federal water resource management issues. We understand that S. 2563, the Water Supply Infrastructure and Drought Resilience Act of 2018, has been referred to the Committee for its consideration. Western Governors offer the following comments communicating policy positions of the Western Governors' Association (WGA) relevant to the legislation.

Water is a precious resource everywhere, but especially in the arid West, where many communities anticipate challenges in meeting future water demands. Current water resources are fully allocated in many basins across the West, and increased demand from population growth, economic development, and extreme weather and fire events places added stress on limited supplies. Sustainability of our natural resources, especially water, is imperative to the foundations upon which the West was developed.

As the primary authority for the recognition and management of water rights, states have reserved sovereign authority to manage and allocate water resources located within their boundaries, subject to international treaties, interstate agreements, and judicial decrees. Additionally, states have federally delegated statutory authority for the implementation of various federal environmental programs, including those authorized by the Clean Water Act, Safe Drinking Water Act, National Environmental Policy Act, Clean Air Act, and Endangered Species Act.

The bill focuses on several issues Western Governors have addressed in WGA policy resolutions.

TITLE I – WATER SUPPLY INFRASTRUCTURE

Subtitle A – Water Supply Permit Coordination

Western Governors support the development and implementation of efficient permitting processes for the construction, operation and maintenance of water infrastructure facilities. WGA Policy Resolution 2015-08, *Water Resource Management in the West*, expresses that:

Infrastructure planning and permitting guidelines, rules, and regulations should be coordinated, streamlined, and sufficiently flexible to: (1) allow for timely decision-

making in the design, financing, and construction of needed infrastructure; (2) account for regional differences; (3) balance economic and environmental considerations; and (4) minimize the cost of compliance.

Any federal legislation intended to streamline infrastructure permitting processes must not impair, interfere with, or subordinate states' sovereign authority over either the management and allocation of water resources or states' delegated authorities to implement federal environmental statutory programs. WGA Policy Resolution 2017-08, *Water Quality in the West*, emphasizes that, "Section 401 of the [Clean Water Act] is operating as it should and states' mandatory conditioning authority should be retained without amendment." Western Governors support language in Subtitle A authorizing states to determine whether their participation in "one-stop" permitting is appropriate.

Subtitle B – Modifications to Existing Programs

Western Governors generally support innovative and integrated water management approaches among states and with federal, tribal, and local partners. Accordingly, they support extending eligibility in the Cooperative Watershed Management Program to groups that are sponsored by states and conservation districts, as proposed in Section 113. WGA Policy Resolution 2015-08, *Water Resource Management in the West*, expresses Western Governors' support for the increased dedication of federal resources to assist states and local watershed groups in addressing, "local water issues associated with water quality, growth, and land management to complement state water needs."

Subtitle C – Bureau of Reclamation Transparency

Western Governors support transparency from all federal administrative agencies, including the Bureau of Reclamation. WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, expresses that:

Each Executive department and agency should be required to have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful and substantive input in the development of regulatory policies that have federalism implications. This includes the development, prioritization and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets and strategic planning.

TITLE II – WATER MANAGEMENT IMPROVEMENT

Subtitle A – Review of Flood Control Rule Curves Pilot Project

Western Governors recognize that basic information on the status, trends and projections of water resource availability is essential to sound management. Consequently, they support the consideration of forecast-informed reservoir operations and improved hydrologic forecasting in the adjustment of the flood control rule curve at eligible Army Corps of Engineers projects. WGA Policy

Resolution 2015-08, *Water Resource Management in the West*, includes following applicable policy statement:

Basic data on snowpack, streamflow, and soil moisture is essential to understanding drought. Though a great deal of information already exists, enhanced drought data collection and real-time analysis at a higher resolution is essential. Governors support state and federal efforts to maintain adequate collection of drought and water data, enhance data networks where appropriate, and facilitate better use of existing information.

TITLE III – WATER SUPPLY CERTAINTY

Subtitle A – Water Rights Protection

WGA Policy Resolution 2015-08, *Water Quality in the West*, articulates the well-established legal principle that:

States are the primary authority for allocating, administering, protecting and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the management of their water resources and are best suited to speak to the unique nature of western water law and hydrology.

Certain previously proposed agency rules, regulations and directives have threatened to disrupt the traditional balance of state and federal power over water management and preempt state water resource authority. Such proposals have been developed and published without consultation with states. Western Governors have repeatedly apprised federal agencies of their concerns regarding the preemption of, and interference with, state water authority. Such concerns are typically communicated through the submission of public comments – the only avenue of communication sometimes opened to the states by federal agencies during the administrative rulemaking process.

Western Governors support the language proposed in Section 302 prohibiting the interference with, or usurpation of, states' primary authority over the management and allocation of water resources by federal departments and agencies. Western Governors also support Section 303's requirement that any rule, policy, directive, management plan, or similar federal action relating to the issuance, renewal, amendment, or extension of any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement: (i) recognize the long-standing authority of the states relating to evaluating, protecting, allocating, regulating, permitting, and adjudicating water use; (ii) be developed in coordination with the states to ensure consistency with state law; (iii) shall not adversely affect state authority or water law; and (iv) shall not assert any connection between surface and groundwater that is inconsistent with such a connection recognized by state water laws.

Subtitle B – Permits for Water Transfers

Western Governors support language, included in Section 311, which proposes to codify EPA's Water Transfers Rule. The Rule is critical to the social and economic health of the arid West, which must rely on thousands of intrastate and regional transfers to move billions of gallons of water to

satisfy domestic, agricultural and industrial needs. WGA Policy Resolution 2017-04, *Water Quality in the West*, expresses Western Governors' long-standing support for the Rule and that:

transporting water through constructed conveyances to supply beneficial uses should not trigger permit requirements under the National Pollutant Discharge Elimination System (NPDES) simply because the source and receiving water contain different chemical concentrations and physical constituents.

Requiring NPDES permits for these transfers would be prohibitively expensive and technically impractical and could compel curtailment of certain transfers with little if any water quality benefit. Such a requirement would increase the already considerable uncertainty regarding the West's future water supplies by hindering states' ability to provide water to their growing populations and economies, or plan for droughts and extreme events. Codification of the Rule would add a welcome measure of stability and certainty to water planning efforts.

Conclusion

Water is a crucial resource for the communities, industries, habitats and agriculture of western states. Clean, reliable water supplies are essential to maintain and improve quality of life. The scarce nature of water in much of the West makes it particularly important to our states. Strong state, regional and national economies require reliable deliveries of high-quality water, which in turn depend on adequate infrastructure for water and wastewater. Repairs to aging infrastructure are costly and often subject to postponement. Investments in water infrastructure provide jobs and a foundation for long-term economic growth in communities throughout the West.

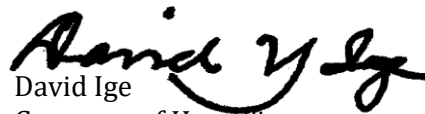
We recognize the essential role of partnership with federal agencies in western water management and hope to improve the relationship between states and federal agencies. For its part, the federal government has long recognized the authority and precedence of the water laws of the various states. Western Governors value collaboration with federal agencies and hope to work ever more cooperatively on the development and execution of policy.

Thank you for your consideration of these policy positions adopted by the Western Governors. Please contact us anytime if you have any questions or require further information.

Sincerely,



Dennis Daugaard
Governor of South Dakota
Chair, WGA



David Ige
Governor of Hawai'i
Vice Chair, WGA

June 4, 2018

The Honorable Paul Ryan
Speaker of the House
U.S. House of Representatives
H-232 U.S. Capitol
Washington, D.C. 20515

The Honorable Mitch McConnell
Majority Leader
U.S. Senate
S-230 U.S. Capitol
Washington, D.C. 20510

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204 U.S. Capitol
Washington, D.C. 20515

The Honorable Charles Schumer
Minority Leader
U.S. Senate
419 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators McConnell and Schumer, and Representatives Ryan and Pelosi:

Western Governors are concerned about various proposals to alter the state certification process under Section 401 of the federal Clean Water Act (CWA). Western Governors urge Congress to reject any effort that may diminish, impair or subordinate our ability to protect water quality within the boundaries of our states.

States have primary legal authority over the allocation, administration, protection and development of water resources within their boundaries. In the West, water is a scarce resource that must be managed with sensitivity to social, environmental, and economic values and needs. Sustainability of our natural resources (especially water) is imperative to the West. Responsible growth and development, as well as proper environmental management, depend upon the recognition and preservation of state stewardship.

Western Governors recognize the importance of partnerships between states and federal agencies. To implement the CWA, Congress designated states as co-regulators under a system of cooperative federalism that recognizes state interests and authority.

Congress recognizes states' legal position in the CWA; Section 101 clearly expresses Congress's intent:

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, and to consult with the Administrator in the exercise of his authority under this chapter...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.

The Honorable Paul Ryan
The Honorable Mitch McConnell
The Honorable Nancy Pelosi
The Honorable Charles Schumer
June 4, 2018
Page 2

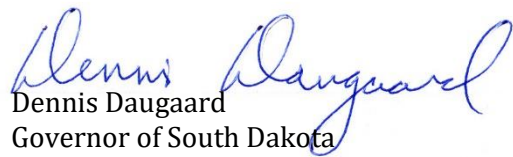
A balanced system of cooperative federalism has enabled states to implement the CWA with flexibility. The Act recognizes that a one-size-fits-all approach to water management and protection does not accommodate the practical realities of geographic and hydrologic diversity.

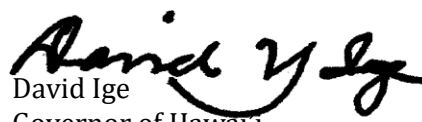
A vital component of the CWA's system of cooperative federalism is state authority to certify and condition federal permits of discharges into waters of the United States under Section 401. This authority has helped ensure that activities associated with federally-permitted discharges will not impair states' water quality. The U.S. Supreme Court has addressed this issue of state authority and concluded that, "[s]tate certifications under [Section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution." *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), citing 116 Cong. Rec. 8984 (1970).

Western Governors understand the importance of regulatory efficiency and welcome efforts to streamline federal infrastructure permitting processes. We have actively pursued reforms that would incorporate early, meaningful, substantive, and ongoing consultation with states, through their Governors' offices, so that material impediments to efficient infrastructure development may be properly identified and addressed.

Reducing the authority and vital role of states in maintaining water quality within their borders would inflict serious harm to the division of authority established by the Constitution and recognized statutorily in the CWA. Any legislative or regulatory effort to streamline environmental permitting should be developed in consultation with states and must not be achieved at the expense of state authority under the CWA – nor impair states' sovereign authority over the management and allocation of their water resources. Western Governors implore you to ensure that the CWA continues to effectively protect water quality while maintaining the proper balance between state and federal authorities.

Sincerely,


Dennis Daugaard
Governor of South Dakota
Chair, WGA


David Ige
Governor of Hawaii
Vice Chair, WGA

May 14, 2018

David Ross
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Docket ID No. EPA-HQ-OW-2018-0063, Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water

Dear Deputy Administrator Ross:

The Western Governors' Association (WGA) submits the following comments to the U.S. Environmental Protection Agency (EPA) in response to the February 20, 2018 Federal Register (83 FR 7126, Feb. 20, 2018) request for comment on whether EPA should consider clarification or revision of its previous statements regarding the Clean Water Act (CWA) and whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow with a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation.

STATEMENT OF INTEREST

WGA is an independent organization representing the Governors of 19 western states and three U.S. territories in the Pacific. The Association is an instrument of the Governors for bipartisan policy development, information-sharing, and collective action on issues of critical importance to the western United States. Western Governors recognize that clean water is essential to strong economies and quality of life. In most of the West, water is a scarce resource that must be managed with sensitivity to social, environmental, and economic values and needs. Because of their unique understanding of these needs, states are in the best position to manage and protect their water resources.

As sovereigns, states have reserved their primary authority for managing and allocating water resources and are primarily responsible for water supply planning within their boundaries. The U.S. Supreme Court has clearly recognized a, "consistent thread of purposeful and contained deference to state water law by Congress," and that states have exclusive authority over non-navigable waters, including groundwater resources, after the passage of the Desert Land Act of 1877. *California v. United States*, 438 U.S. 645 (1978); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

Section 101 of the 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."

33 U.S.C. § 1251(g). It is imperative that any policies developed by EPA to define or clarify the jurisdictional scope of the CWA and its programs be consistent with, and respectful of, state laws and authority over water resources.

WESTERN GOVERNORS' ANALYSIS AND RECOMMENDATIONS

Consultation with States: As stated in WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, federal agencies should:

have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications.

Due to states' vast authorities, both sovereign and delegated, over water resources, any EPA policies concerning the scope and implementation of the CWA will likely have federalism implications and should be developed through consultation with Governors (or their designees). Western Governors have been encouraged by EPA's recent outreach to states in its current Waters of the United States, and Lead and Copper Rule rulemaking processes and urge EPA to afford states similar opportunities throughout the full range of its regulatory processes.

Limits on Federal Regulatory Authority and Discretion: Congress has clearly expressed that the scope of federal authority under the CWA is not without limit and that it was Congress's intent 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..." 33 U.S.C. § 1251(b). In WGA Policy Resolution 2017-04, *Water Quality in the West*, Western Governors cite the well-established legal principle that the, "regulatory reach of the CWA was not intended to, and should not, be applied to the management and protection of groundwater resources." Any changes to, or clarifications of, EPA policy concerning the Agency's authority to require National Pollutant Discharge Elimination System (NPDES) permitting over any discharges to groundwater must acknowledge, and in no way impair, states' exclusive authority to manage and allocate groundwater resources within their boundaries. EPA policy should also recognize that there are other protective measures outside of the NPDES permitting system – under federal, as well as state, law – to ensure that discharges to groundwater do not impair water quality.

Inclusion and Utilization of State Science and Expertise: If EPA determines that it will continue to analyze, on a case-by-case basis, discharges of pollutants to groundwater that has a "direct hydrologic connection" to jurisdictional surface waters to determine whether NPDES permitting requirements will be triggered, EPA should include the expertise and data of state officials when making determinations of "connectivity." Both hydrology and laws vary from state to state. The best policy when considering the intersection of science and law is one that allows for regional flexibility and acknowledges the role of state experts who live with – and intimately understand – the issue at hand.

Clear Standards for Case-by-Case Analyses: If EPA determines that it will continue to analyze, on a case-by-case basis, discharges of pollutants to groundwater that has a "direct hydrologic connection" to jurisdictional surface waters to determine whether NPDES permitting requirements

will be triggered, EPA's policy should establish – in consultation with states – clear criteria, processes, and parameters for such case-by-case determinations.

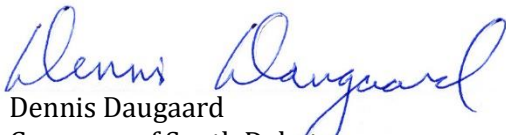
CONCLUSION

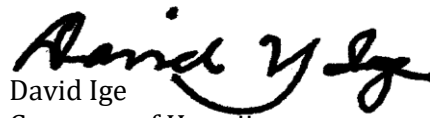
States possess primary jurisdiction over water resource allocation decisions and are responsible for balancing state water resource needs within the objectives of the CWA. EPA's rules and policies affecting water resource management and protection should recognize, and not interfere with, this historic and well-established authority. Such recognition is even more critical in the context of groundwater, where Congress and the Supreme Court have consistently taken the position that state authority is exclusive.

Western Governors support early, meaningful, and substantive involvement with EPA throughout the development, prioritization, and implementation of any policy or rule intended to define or clarify the scope of the CWA. Because of the clear and significant federalism implications of any potential changes to the state-federal roles in implementing the CWA, the agency should engage with Governors in the earliest possible stages of any such efforts.

Western Governors recognize the essential role of partnerships between the states and EPA and the role of cooperative federalism in protecting our nation's waters. We request that you pursue future state consultation with diligence and carefully consider the comments submitted in this letter, as well as those submitted by individual states. Furthermore, we appreciate your recognition of the authority and unique role of states in the implementation of the CWA and the NPDES permitting program for the protection of water resources.

Sincerely,


Dennis Daugaard
Governor of South Dakota
Chair, WGA


David Ige
Governor of Hawaii
Vice Chair, WGA

May 14, 2018

Honorable Mitch McConnell
Majority Leader
U.S. Senate
S-230 U.S. Capitol
Washington, D.C. 20510

Honorable Charles Schumer
Minority Leader
U.S. Senate
419 Hart Senate Office Building
Washington, D.C. 20510

Dear Majority Leader McConnell and Minority Leader Schumer:

On behalf of the Western Governors' Association (WGA), we are writing to express the Governors' support for the National Integrated Drought Information System Reauthorization Act of 2018 ([S. 2200](#)), sponsored by Senate Commerce, Science and Transportation Committee Chair John Thune and Ranking Member Bill Nelson. We urge you to make consideration by the full Senate of this bipartisan legislation a priority early in 2018.

Western Governors were instrumental in the creation of the National Integrated Drought Information System (NIDIS) in 2006, and WGA has since worked with the National Oceanic and Atmospheric Administration (NOAA) and other partners to champion the system's implementation, as well as its prior reauthorization. The NIDIS program represents a vital tool in western water management by promoting a coordinated and integrated approach to coping with future drought. Rather than creating a new bureaucracy, the program draws from existing capacity in states, universities and multiple federal agencies, as called for in the original authorizing legislation. NIDIS continues to serve as a cost-effective model for federal-state collaboration in shared information services.

Western Governors are well-acquainted with the significant environmental, economic, and social impacts of drought cycles on the West and its communities. The repetitive nature of drought conditions, as well as increased populations and their dependence on limited water resources, continue to push drought to the forefront of western water issues. Adequate measures to manage western water resources in the face of inevitable future drought conditions must be prioritized and implemented. Drought contributes to forest and rangeland fires, impairs ecosystems, degrades agricultural productivity, and poses threats to municipal and industrial water supplies.

The NIDIS program's forecasting and monitoring provides the authoritative, objective, and timely drought information that farmers, water managers, decision-makers, and local governments require for effective preparedness and response. NIDIS has established a "drought portal" on its website (www.drought.gov) where information from state, federal, and academic partners is integrated into a single online source of information. Through NIDIS, NOAA is also building a network of early drought warning systems and working with local resource managers to identify and address unique regional drought information needs. S. 2200 further strengthens the NIDIS program with new focus on soil moisture retention and sub-seasonal forecasting, critical factors in

Honorable Mitch McConnell
Honorable Charles Schumer
May 14, 2018
Page 2

understanding and predicting drought conditions that had been identified by the recent Western Governors Drought Forum.

Water users throughout the West – including farmers, ranchers, tribes, land managers, business owners, recreationalists, wildlife managers, and decision-makers at all levels of government – must be able to assess the risks of drought before its onset to make informed decisions and implement effective mitigation measures. Western Governors support the reauthorization of the NIDIS program and urge consideration and passage of S. 2200 by the full Senate.

Sincerely,


Dennis Daugaard
Governor of South Dakota
Chair, WGA


David Ige
Governor of Hawaii
Vice Chair, WGA

cc: Honorable John Thune
Honorable Bill Nelson

April 18, 2018

Honorable Rob Bishop
Chairman
Speaker's Intergovernmental Task Force
United States House of Representatives
123 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Bishop:

On behalf of Western Governors, thank you for your dedicated efforts to restore federalism and improve the institutional relationship between the states and the federal government. This letter responds to your invitation to provide specific actions that Congress could take to improve the state-federal relationship. We are pleased to provide these recommendations, which build upon, and are consistent with, shared federalism principles communicated to congressional leadership in a December 15, 2016 [letter](#), as well as with WGA Policy Resolution [2017-01](#), *Building a Stronger State-Federal Relationship*.

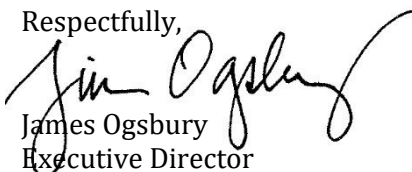
As you are well aware, under the American version of federalism, the powers of the federal government are narrow and defined, while those of the states are vast and innumerable. State governments are co-sovereigns and co-regulators with the federal government. The relationship of the federal government to the states is especially important in the West, where the federal government is by far the largest landowner.

As the chief elected officials of sovereignties, Western Governors expect to engage with federal officials on the formulation and execution of public policy. Governors have specialized knowledge of their states' environments, resources, laws, culture, and economies that is essential to informed decision-making. In partnering with states (and recognizing their authority as sovereigns), the federal government will be positioned to utilize state knowledge and competency to produce federal policy that is more efficient, cost-effective, and defensible.

The attached recommendations are designed to ensure legislative drafting: accounts for this unique relationship; memorializes agency procedures for consultation and engagement with states; and removes perceived barriers to state-federal communication. These concrete steps will improve federal agency decision-making and federal legislation.

The Task Force should seize this historic opportunity to develop a more functional policy-making paradigm. The implementation of these recommendations will have meaningful, enduring impacts on the state-federal relationship and enable us to better serve our common constituencies. Western Governors are ready and able to assist the Task Force in this critical endeavor.

Respectfully,



James Ogsbury
Executive Director



Recommendations for Congress: Process Improvements to Build a Stronger State-Federal Relationship

The constitutional relationship among sovereign governments, state and national, is inherent in the structure of the Constitution and is formalized and protected by the 10th Amendment.¹ Many statutes expressly recognize state primacy or delegate federal authority to states; and/or require the federal government to consult, coordinate, or cooperate with states on specific issues or actions. Despite this clear and careful balance, the federal government has increasingly infringed on or ignored states' sovereign and co-regulator status. The recommendations for Congress provided below, which build on the principles in WGA Policy Resolution [2017-01](#), *Building a Stronger State-Federal Relationship*, will help realign our federalist system, enhancing the U.S. government's service to its citizens at all levels and resulting in better public policy.

Ensure Federalism Principles are Incorporated in Legislative Drafting	
Recommendation	Rationale
States are Sovereigns Ensure that states are not treated as equivalent to stakeholders, interested parties, public or private organizations, industry, or the public in legislation or by federal agencies. Rather, states should be treated as sovereign entities and engaged in a government-to-government manner. Amend the House of Representatives Office of Legislative Counsel Guide to Legislative Drafting to add a fourth important convention in Section VII to distinguish states from stakeholders.	Many statutes currently – and inaccurately – include states as stakeholders, interested parties, public or private organizations, industry, or the public (“entities”); treat states as equivalents to these entities; or do not distinguish between states and these entities. States, as sovereigns, are distinguished from other entities by the Constitution, the 10th Amendment, and U.S. Supreme Court cases. As a result, legislative drafters should not include states, state officials, or state agencies in a list with these entities and should always distinguish the treatment of states, state officials, and state agencies.
10th Amendment Amend Clause 7 of Rule XII the Rules of the House of Representatives for the 116th Congress (and Protocol 8, Constitutional Authority Statements), to read: “(c) A bill or joint resolution may not be introduced unless the sponsor has submitted for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution <i>and an explanation why the bill or joint resolution does not infringe on the rights reserved to the states by the 10th Amendment.</i>”	Pursuant to the Constitution, the powers of the federal government are narrow, enumerated and defined, while the powers of the states are vast and indefinite. The presumption of sovereignty should rest with states and uncertainties regarding federal authority should generally be resolved in favor of state authority and regulation. This requirement will ensure that bill or resolution sponsors carefully consider state authority before proposing legislation.

¹ U.S. CONST., amend. 10; *Alden v. Maine*, 527 U.S. 706, 714 (1999).

Preemption and State Authority Recognize states' sovereign status and authority in legislation. Avoid preemption of state authority in legislation. Ensure legislation grants states the maximum administrative discretion possible and does not create undue burdens on state resources. Explicitly state that preemption is disfavored and require agencies to specify where preemption is warranted. In such cases, agencies must provide affected states notice and an opportunity to participate in proceedings at which the agency must demonstrate the preemption of state authority is needed to accomplish a national purpose.	Our constitutional system encourages a healthy diversity in the public policies adopted by states according to their own conditions, needs, and desires. Effective public policy is achieved when there is competition among states in fashioning different approaches to public policy issues. One-size-fits-all national approaches to public policy problems can inhibit the creation of effective solutions to those problems. In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states. Uncertainties regarding the legitimate authority of the federal government should generally be resolved in favor of state authority and regulation. EO 13132 directs agencies to not seek legislation that preempts state law, unless preemption is consistent with the fundamental federalism principles outlined in the EO and is the only method of achieving a clearly legitimate national purpose. The EO also requires agencies to construe preemption narrowly – where it is express, clearly evidenced, or state authority conflicts with federal statutory authority – and to provide notice to states and an opportunity to participate in proceedings where an agency is attempting to preempt state authority. This requirement should be codified with associated accountability measures.
Direct Agencies to Improve the State-Federal Relationship	
Recommendation	Rationale
Definitions Define “consultation” to: • Include early, meaningful, substantive, ongoing, government-to-government communication and exchange with states through Governors or their designees. • Require procedures separate from and beyond the stakeholder or public process. • Clarify that notice and comment rulemaking procedures do not satisfy agencies’ requirements to consult with states where required by law. Define “policies with federalism implications” to include: federal regulations, proposed federal legislation, policies, rules, non-legislative	Each Executive department and agency should have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state governments as he or she may designate – with early, meaningful and substantive input in the development of regulatory policies that have federalism implications. This includes the development, prioritization, and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets, and strategic planning. Many statutes require federal agencies to consult with states (as well as coordinate or cooperate with states) without defining the term(s). Executive Order 13132, <i>Federalism</i> (EO 13132) also does not define consultation. A definition of the term “consultation” would clarify what Congress intended. Even where consultation is statutorily required, agencies often

rules, guidance, directives, programs, reviews, plans, budget proposals, budget processes and strategic planning efforts that have either: (1) substantial direct effects on the states or on their relationship with the federal government; or (2) the distribution of power and responsibilities, between the federal government and state governments.	direct states to comment on their actions through the stakeholder process, in the same manner as a member of the public. Or agencies argue that state consultation can be fulfilled through typical notice-and-comment rulemaking, which would otherwise be required by law, and which does not involve any meaningful government-to-government exchange with states.
Consultation Regulations Require all federal departments and agencies, including independent regulatory agencies, to codify in regulation a clear, consistent, and accountable process for state consultation on policies with federalism implications. Such processes should include a remedy for states where agencies fail to do so. These regulations should also require: • Federal agencies to provide written notification to and an invitation to consult with Governors of all potentially-affected states (or their designees) of policies with federalism implications within the area affected by the proposed federal action. • Federal agencies to provide procedures for written response to Governors' or their designees' input prior to a final federal decision. • Federal agency decision-makers to hold regular, ongoing consultation meetings with Governors or their designees regarding policies with federalism implications.	The principles in EO 13132 are helpful in describing how the relationship between states and the federal government should operate. However, the lack of accountability mechanisms in the EO have resulted in infrequent application of these principles by federal agencies. Requiring and ensuring that federal agencies codify the consultation process in regulation will help improve accountability, but so is providing consequences for the failure to do so. Providing accountability mechanisms on individual actions with federalism implications will further ensure that federal agencies continue to comply with constitutional, statutory, and regulatory requirements.
Rulemaking Prior to promulgation of a rule with federalism implications, require federal agencies to: • Ensure that new funds sufficient to pay the direct costs incurred by the state in complying with the regulation are provided by the federal government; and • Provide OMB with a description of the extent of agency's consultation with states, a summary of their input, the agency's	The Regulatory Flexibility Act (RFA) requires agencies to publish regulatory flexibility agendas in October and April of each year that include: (1) a brief description of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities (which include small businesses, small organizations, and small government jurisdictions); (2) a summary of the objectives and legal basis for the issuance of the rule; and (3) an approximate timeline for the rule.² Small entities are notified and given an opportunity to comment on the proposed actions.

² 5 U.S.C. §602.

response to that input, and any written communications submitted by states. Provide an opportunity for Governors or their designees to review agencies' regulatory agendas.	A similar process should exist for Governors and their designees to be consulted on all policies with federalism implications, including all types of guidance documents and expected rulemakings. Involving states at this early stage would facilitate coordinating regulations, maximizing consultation, resolving conflicts, and involving states in regulatory planning.
Non-legislative Rulemaking/Guidance Require agencies to consult with affected states prior to issuing guidance documents with federalism implications – including memoranda, directives, notices, bulletins, manuals, handbooks, opinions, and letters. Require agencies to develop a transparent and accountable process for determining whether a proposed agency action requires notice-and-comment rulemaking procedures prescribed under Section 553 of the Administrative Procedures Act. Require agencies to publish all existing guidance documents at a single location on their agency's website and publish new and rescissions of guidance documents at the same location on the date they are issued.	To be legally binding, agency rules must be promulgated through notice-and-comment rulemaking. Federal agencies often categorize their proposed rules and regulations as “non-legislative,” which are not subject to the requirements of the APA for notice-and-comment rulemaking. This practice precludes transparency in the rulemaking process, as well as the opportunity for the public (in which agencies often include state governments) to provide input to the agency in the development and adoption of rules. Federal agencies are currently required to consult on policies with federalism implications, which include guidance, by EO 13132, but this rarely occurs.
Consistency and Avoidance of Conflicts Require federal agencies to: • Make all reasonable efforts to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs; and • Address and resolve all issues and concerns raised by states, unless precluded by federal law.	Federal agencies should have to document specifically how their regulatory actions seek to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs. They should also consider alternatives in NEPA analysis that would resolve any conflicts and the selection of a preferred alternative that eliminates or minimizes conflicts with state plans, policies, and programs for land use planning.
State Data Require agencies to incorporate state and local data and expertise, subject to existing state requirements for data protection and transparency, into their decisions. This data should include scientific, technical, economic, social, and other information on the issue the agency is trying to address.	Congress is currently focused on streamlining many types of agency decisions. Federal agencies often do not utilize state data in their decision-making or evaluate their decisions against an accurate baseline. Requiring agencies to use existing state data where possible will reduce burdens on federal agencies and potential duplication and result in better-informed decisions.

Settlement Negotiations In settlement negotiations impacting policies with federalism implications, require federal agencies to provide notice of the action to affected states, consult with affected states on any negotiations, and seek state concurrence regarding the settlement.	Agencies are often driven by deadlines or requirements established by litigation or adjudication – not statute or regulation. In negotiations regarding litigation or adjudication that has federalism implications, states are often left out of the process. Involving states in such negotiations would prevent conflicts from arising as the agencies implement the outcomes of those negotiations.
Congressional Oversight Establish a Federalism Office within the White House or reestablish the U.S. Advisory Committee on Intergovernmental Relations to ensure federal agencies meet their federalism obligations. Request a report on existing federalism requirements and/or require regular and ongoing reporting on federalism requirements.	Such an office would work solely on federalism issues and ensure adequate oversight over executive agencies and provide advice to the President. A comprehensive analysis of all requirements on federalism currently applicable to federal agencies would help identify gaps and inform legislation. For example, there is little to no information on how often federal agencies perform federalism assessments pursuant to EO 13132. Either the Government Accountability Office or OMB could conduct this analysis.
Eliminate Perceived Barriers to the State-Federal Relationship	
Recommendation	Rationale
<i>Ex Parte</i> Communications Require agencies to revise or establish their <i>ex parte</i> rules or policies in accordance with current case law, which permits these communications in informal rulemaking proceedings; and/or exempt communications with states and state officials from the definition of <i>ex parte</i> communications.	Many federal agencies have adopted policies which restrict communications with non-agency personnel during the rulemaking process. However, there is no statutory authority or other law that prohibits these communications. Many of the federal policies on <i>ex parte</i> communication were hastily adopted in response to overly-restrictive federal case law, which was subsequently overturned.³ A 2014 report by the Administrative Conference of the United States contradicted the restrictive approach taken by agencies upon reviewing relevant statutes and case law.⁴ In addition, there are major discrepancies between federal agencies' policies on <i>ex parte</i> communications. For example, the Federal Emergency Management Agency (FEMA) has proposed a rule that requires restrictions on <i>ex parte</i> communications for the entire development of a rule: from publication of the notice of proposed rulemaking, until issuance of a final action. The FEMA proposed rule exempts tribal consultation from these

³ See *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

⁴ Administrative Conference of the United States, [Ex Parte Communications in Informal Rulemaking](#) (May 1, 2014).

	restrictions but makes no similar exception for states.⁵ In contrast, the Surface Transportation Board has promulgated a final rule that permits <i>ex parte</i> communications in informal rulemaking proceedings.⁶ Congress could clarify that communications with sovereigns and co-regulators is exempt from the definition of <i>ex parte</i> communications. Restrictions on communications with states throughout the rulemaking process have a chilling effect on consultation and coordination with states. This clarification would ensure consistency in the application of <i>ex parte</i> communication policies.
Federal Advisory Committee Act (FACA) Exemptions Exempt all meetings held exclusively between federal personnel and non-federal elected officials (or their designees) acting in their official capacities or in areas of shared intergovernmental responsibilities or administration from FACA.	The Unfunded Mandate Reform Act (UMRA) exempts the following intergovernmental communications from FACA: (1) meetings are held exclusively between federal officials and elected officers of state, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and (2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.⁷ A similar exemption is not currently contained in FACA, which creates confusion. The rationale for exempting such consultation from FACA in the UMRA extends to state-federal meetings unrelated to federal intergovernmental mandates. An exemption in FACA will encourage intergovernmental communication, which is an essential element of our system of federalism and is often statutorily required.
Freedom of Information Act (FOIA) Create statutory exceptions to FOIA disclosure for state data and analysis in instances where publication of state data provided to federal agencies would be violation of existing state statutes.	FOIA mandates the disclosure of records held by a federal agency, unless the documents fall within enumerated exemptions.⁸ Under FOIA, an “agency record” is a record that is (1) either created or obtained by an agency; and (2) under agency control at the time of the FOIA request.⁹ FOIA also does not contain an exemption for data that would otherwise be protected under a state open records act. If a state open records act

⁵ Update to FEMA’s Regulations on Rulemaking Procedures, [82 FR 26414](#) (June 7, 2017).

⁶ Ex Parte Communications in Informal Rulemaking Proceedings, [83 FR 9222](#) (March 5, 2018).

⁷ 2 U.S.C. §1534(b).

⁸ 5 U.S.C. §522.

⁹ *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

Investigate and develop solutions for other barriers to state-federal communication presented by FOIA.	prohibits disclosure of certain types of information, that information should not be disclosed except as required by law. There are also concerns that confidentiality agreements between states and federal agencies will not protect state data from disclosure under FOIA. These concerns can prevent states from exchanging valuable state data with federal agencies.
Make the Unfunded Mandates Reform Act (UMRA) Relevant	
Recommendation	Rationale
UMRA Threshold Eliminate the \$100 million threshold for the application of the UMRA to federal intergovernmental mandates.	Over the past 10 years, only five agency rules have met the threshold of the UMRA for federal mandates that may result in the expenditure by state, local, or tribal governments, in the aggregate, or by the private sector of \$100 million in any one year.¹⁰ A federal mandate is defined as a federal intergovernmental mandate or federal private sector mandate.¹¹ A federal intergovernmental mandate is defined as a regulation that “would impose an enforceable duty upon State, local, or tribal government” with two exceptions.¹² The application of the UMRA to intergovernmental mandates is limited by the definition of federal mandate and the \$100 million threshold. Eliminating the \$100 million threshold for federal intergovernmental mandates would require OMB to report to Congress on a greater proportion of federal intergovernmental mandates, providing accountability and requiring agencies to adhere to the UMRA’s consultation procedures for more federal intergovernmental mandates.
State Input and Data Require agencies to incorporate state government input and data, including social and economic data, in their qualitative and	Although UMRA currently requires agencies to assess the costs and benefits of a rule to state governments and consult with them on the rule, it does not require agencies to incorporate state input and data into this assessment.

¹⁰ 2017 Draft OMB [Report](#) to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, pp. 36-37.

¹¹ 2 U.S.C. §1502, incorporating the definitions of 2 U.S.C. §658 by reference.

¹² The definition of “Federal intergovernmental mandate” excludes “a condition of Federal assistance” and “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority” and would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decreases the Federal Government’s responsibility to provide funding” in a situation in which the State, local, or tribal governments “lack authority” to adjust accordingly. 2 U.S.C. §658(5).

quantitative assessment of anticipated costs and benefits of qualifying rules under the UMRA.	Adding this requirement will reinforce the need for meaningful consultation, as well as provide more informed assessments with locally-generated data. The UMRA could be amended to require assessments to include state input and data on the costs and benefits of the rule, including social and economic costs.
Consultation on Intergovernmental Mandates Strengthen the consultation requirements for federal intergovernmental mandates.	The current language of the UMRA does not provide a clear standard for what is an “effective process” to permit input from state officials. However, Section 1532 refers to this effective process as consultation.¹³ OMB Memorandum M-95-09 specifies that “intergovernmental consultations should take place as early as possible, and be integrated into the ongoing rulemaking process.” The UMRA should be amended to specify that an effective process should ensure early, substantive, meaningful, and ongoing consultation with state officials in the development of regulatory proposals containing federal intergovernmental mandates.
Review of Failures to Implement Authorize a court to compel substantive, meaningful consultation with elected officers of state governments if an agency fails to develop or implement the effective process under the UMRA.	A remedy currently exists in the UMRA for an agency’s failure to prepare a written statement. However, it does not exist for an agency’s failure to allow meaningful input from state governments, despite UMRA’s requirement to do so for federal intergovernmental mandates. Providing a remedy for failure to allow meaningful input from states will provide accountability for agencies to make a good faith effort to consult with these governments. The statute’s existing limitations on judicial review of the failure to prepare a written statement could extend to the failure to consult.

¹³ 2 U.S.C. §1532(a)(5)(A).

April 18, 2018

Douglas L. Hoelscher
Special Assistant to the President and
Deputy Director of Intergovernmental Affairs
1600 Pennsylvania Avenue N.W.
Washington, D.C. 20500

Dear Deputy Director Hoelscher:

On behalf of Western Governors, thank you for your dedicated efforts to restore federalism and improve the institutional relationship between the states and the federal government. This letter responds to your invitation to provide specific actions that the Administration could take to improve the state-federal relationship. We are pleased to provide these recommendations, which build upon, and are consistent with, shared federalism principles communicated to the White House in a December 15, 2016 [letter](#), as well as with WGA Policy Resolution [2017-01](#), *Building a Stronger State-Federal Relationship*.

As you are well aware, under the American version of federalism, the powers of the federal government are narrow and defined, while those of the states are vast and innumerable. State governments are co-sovereigns and co-regulators with the federal government. The relationship of the federal government to the states is especially important in the West, where the federal government is by far the largest landowner.

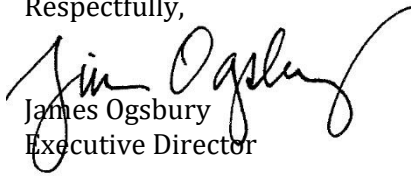
As the chief elected officials of sovereignties, Western Governors expect to engage with federal officials on the formulation and execution of public policy. Governors have specialized knowledge of their states' environments, resources, laws, culture, and economies that is essential to informed decision-making. In partnering with states (and recognizing their authority as sovereigns), the federal government will be positioned to utilize state knowledge and competency to produce federal policy that is more efficient, cost-effective, and defensible.

Thank you for commending our attention to the template Memorandum of Understanding for implementation of Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects." We appreciate that the document addresses the roles of cooperating agencies and lead agencies with respect to environmental and permitting reviews of major infrastructure projects. We will be pleased to provide comments on the template to the Office of Management and Budget (OMB), the Council on Environmental Quality and the White House upon completion of its review by Western Governors. In the meantime, be advised that Western Governors look forward to working with you to improve the cooperating agency-lead agency relationship.

The attachment to this letter provides recommendations to improve the state-federal relationship more broadly. These recommendations are designed to: eliminate actual or perceived barriers to state-federal communication; memorialize federal agency procedures to facilitate a more effective partnership; and improve federal agency decision-making. These recommendations could be implemented through a new or revised executive order or memorandum, an OMB or Office of Information and Regulatory Affairs memorandum or other guidance, a legal opinion, or on an agency-by-agency basis.

This Administration should seize this historic opportunity to develop a more functional policy-making paradigm. The implementation of these recommendations will have meaningful, enduring impacts on the state-federal relationship and enable us to better serve our common constituencies. Western Governors are ready and able to assist the Administration in this critical endeavor.

Respectfully,



James Ogsbury
Executive Director

cc: Honorable Ryan Zinke, Secretary of the Interior
Honorable Sonny Perdue, Secretary of Agriculture
Honorable Scott Pruitt, Administrator, Environmental Protection Agency
Honorable Mick Mulvaney, Director, Office of Management and Budget
Neomi Rao, Administrator, Office of Information and Regulatory Affairs
Mary Neumayr, Chief of Staff, Council on Environmental Quality



Recommendations for the Executive Branch: Process Improvements to Build a Stronger State-Federal Relationship

The constitutional relationship among sovereign governments, state and national, is inherent in the structure of the Constitution and is formalized and protected by the 10th Amendment.¹ Many statutes expressly recognize state primacy or delegate federal authority to states; and/or require the federal government to consult, coordinate, or cooperate with states on specific issues or actions. Despite this clear and careful balance, the federal government has increasingly infringed on or ignored states' sovereign and co-regulator status.

The recommendations for the White House provided below, which build on the principles in WGA Policy Resolution [2017-01, *Building a Stronger State-Federal Relationship*](#), will help realign our federalist system, enhancing the U.S. government's service to its citizens at all levels and resulting in better public policy. These recommendations could be implemented through a new or revised executive order or memorandum, an Office of Management and Budget (OMB) or Office of Information and Regulatory Affairs (OIRA) memorandum or other guidance, a legal opinion, or on an agency-by-agency basis.

Uphold the Principles of Federalism	
Recommendation	Rationale
States are Sovereigns Ensure that states are not treated as equivalent to stakeholders, interested parties, public or private organizations, industry, or the public by federal agencies. Rather, states should be treated as sovereign entities and engaged in a government-to-government manner.	Agencies often inappropriately regard states as stakeholders, interested parties, public or private organizations, industry, or the public ("entities"); treat states as equivalents to these entities; or do not distinguish between states and these entities. Even where consultation is statutorily required, agencies often direct states to comment on their actions through the stakeholder process, in the same manner as a member of the public. States, as sovereigns, are distinguished from other entities by the Constitution, the 10 th Amendment, and U.S. Supreme Court cases. As a result, the Administration should ensure that federal departments and agencies do not describe states as stakeholders in policy statements, including rules and guidance.
Preemption and State Authority Recognize states' sovereign status and authority in regulation and policy. Avoid preemption of state authority in regulation and policy.	Our constitutional system encourages a healthy diversity in the public policies adopted by states according to their own conditions, needs, and desires. Effective public policy is achieved when there is competition among states in fashioning different approaches to public policy issues. One-size-fits-all national approaches to public policy problems can inhibit the creation of effective solutions to those problems.

¹ U.S. CONST., amend. 10; *Alden v. Maine*, 527 U.S. 706, 714 (1999).

Ensure regulation and policy grants states the maximum administrative discretion possible and does not create undue burdens on state resources.	In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states. Uncertainties regarding the legitimate authority of the federal government should generally be resolved in favor of state authority and regulation.
Consistency and Avoidance of Conflicts Require federal agencies to: • Make all reasonable efforts to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs; and • Address and resolve all issues and concerns raised by states, unless precluded by federal law.	Federal agencies should have to document specifically how their regulatory actions seek to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs. They should also consider alternatives in National Environmental Policy Act (NEPA) analysis that would resolve any conflicts and the selection of a preferred alternative that eliminates or minimizes conflicts with state plans, policies, and programs for land use planning.
Ensure Federalism Principles are Incorporated in Agency Decision-making	
Recommendation	Rationale
Definitions and Clarifications Define “consultation” to: • Include early, meaningful, substantive, ongoing, government-to-government communication and exchange with states through Governors or their designees. • Require procedures separate from and beyond the stakeholder or public process. Clarify: • Notice and comment rulemaking procedures do not satisfy agencies’ requirements to consult with states where required by law. • What types of federal actions require state consultation and include policy statements with federalism implications that are not subject to notice and comment rulemaking.	Each Executive department and agency should have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state governments as he or she may designate – with early, meaningful and substantive input in the development of regulatory policies that have federalism implications. This includes the development, prioritization, and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets, and strategic planning. Many statutes require federal agencies to consult with states (as well as coordinate or cooperate with states) without defining the terms. EO 13132 requires state consultation in the development of all federal policies that have federalism implications. The definition of “policies with federalism implications” is very broad; yet, this consultation requirement is often not viewed as a mandatory requirement by agencies for many federal actions that would qualify. EO 13132 also does not define consultation. Even where consultation is statutorily required, agencies often direct states to comment on their actions through the stakeholder process, in the same manner as a member of the public. Or agencies argue that state consultation can be fulfilled through typical notice-and-comment rulemaking, which would otherwise be required by law, and which does not involve any meaningful government-to-government exchange with states.

Consultation Regulations Require all federal departments and agencies, including independent regulatory agencies, to codify in regulation a clear, consistent, and accountable process for state consultation on policies with federalism implications. Such processes should include a remedy for states where agencies fail to do so. These regulations should also require: • Federal agencies to provide written notification to and an invitation to consult with Governors of all potentially-affected states (or their designees) of policies with federalism implications within the area affected by the proposed federal action. • Federal agencies to provide procedures for written response to Governors’ or their designees’ input prior to a final federal decision. • Federal agency decision-makers to hold regular, ongoing consultation meetings with Governors or their designees regarding policies with federalism implications. • Federal agencies to provide an opportunity for Governors or their designees to review and comment on agencies’ regulatory agendas. Require updates to agencies’ federalism official designations and descriptions of the state consultation process and make this information publicly available.	The principles in EO 13132 are helpful in describing how the relationship between states and the federal government should operate. Executive Order 12866, <i>Regulatory Planning and Review</i> (EO 12866) requires agencies to seek views of appropriate state, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities, as well as to avoid regulations that are inconsistent, incompatible, or duplicative with state regulations. However, there is limited guidance on what this entails and there is no oversight mechanism in EO 12866 to ensure these requirements are fulfilled. For tribal consultation, President Obama issued a Memorandum for the Heads of Executive Departments and Agencies (Nov. 5, 2009), which required the development of agency plans to effectuate Executive Order 13175, <i>Consultation and Coordination with Indian Tribal Governments</i>, in consultation with tribes. In response to this Memorandum, most federal agencies refined or developed rules and policies to implement the tribal consultation process envisioned in EO 13175. EO 12866 requires agencies to meet annually to discuss priorities and coordinate regulatory efforts for the upcoming year. There is currently no opportunity for states to comment on agencies’ Unified Regulatory Agendas as they are developed. Involving states at these early stages would help meet the EO’s objectives of coordinating regulations, maximizing consultation, resolving conflicts, and involving states in regulatory planning. OMB/OIRA should regularly require updates to agencies’ federalism official designations and descriptions of consultation processes, which were initially required 90 days after the issuance of the EO (and at no point since then). This information should also be publicly available to provide necessary transparency. Memorializing agency procedures for state consultation in agency rules will establish an accountable process for ensuring the meaningful input of states in all federal decision-making that has substantial direct effects on states, the state-federal relationship, or the distribution of powers or responsibilities.
Federalism and EO 12866 Assessments Require federalism assessments for all rulemakings with federalism implications and EO 12866 assessments for all significant regulatory actions that that is likely to result in a rule that may significantly or uniquely affect states.	OMB/OIRA guidance on the implementation of EO 13132 is very limited and has not been updated in almost 20 years, <i>see</i> OIRA Guidance for Implementing EO 13132 (Oct. 28, 1999). EO 13132 limits the requirement for agencies to submit a federalism summary impact statement for OMB review (“federalism assessment”) to regulations that either: have federalism implications and impose substantial direct compliance costs on state and local governments that are not required by statute; or have federalism implications

Provide a mechanism for states to seek OMB review if agencies do not perform these assessments. Clarify the contents and process for assessments in consultation with Governors. Provide an opportunity for Governors to comment on assessments before they are submitted to OMB.	and preempt state law. The requirements for assessments under Executive Order 12866, <i>Regulatory Planning and Review</i> (EO 12866) are restricted to significant regulatory actions, which include actions that have an annual effect on the economy of \$100 million or more or adversely affect in a material way state, local, or tribal governments or communities. Requiring agencies to preform federalism assessments for all rulemakings with federalism implications and EO 12866 assessments for significant regulatory actions significantly or uniquely affecting states will provide accountability. It will also reduce potential confusion on determining what actions require these assessments. Authorizing states to petition OMB for review for agency failure to perform these assessments or comply with the EO's requirements will provide the necessary oversight for these processes.
Non-legislative Rulemaking/Guidance Require agencies to consult with affected states prior to issuing guidance documents with federalism implications – including memoranda, directives, notices, bulletins, manuals, handbooks, opinions, and letters. Require agencies to develop a transparent and accountable process for determining whether a proposed agency action requires notice-and-comment rulemaking procedures prescribed under Section 553 of the Administrative Procedures Act. Require agencies to publish all existing guidance documents at a single location on their agency's website and publish new and rescissions of guidance documents at the same location on the date they are issued.	To be legally binding, agency rules must be promulgated through notice-and-comment rulemaking. Federal agencies often categorize their proposed rules and regulations as “non-legislative,” which are not subject to the requirements of the APA for notice-and-comment rulemaking. This practice precludes transparency in the rulemaking process, as well as the opportunity for the public (in which agencies often include state governments) to provide input to the agency in the development and adoption of rules. Federal agencies are currently required to consult on policies with federalism implications, which include guidance, by EO 13132, but this rarely occurs.
State Data Require agencies to incorporate state and local data and expertise, subject to existing state requirements for data protection and transparency, into their decisions. This data should include scientific, technical, economic, social, and other information on the issue the agency is trying to address.	EO 12866 sets forth Principles of Regulation. These principles include: “Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.” The “best reasonably obtainable” data is often at the state or local level. However, the EO and its associated guidance do not specify that agencies should first look to data generated at the state or local level. This could save agency resources and result in better informed decisions.

Settlement Negotiations In settlement negotiations impacting policies with federalism implications, require federal agencies to provide notice of the action to affected states, consult with affected states on any negotiations, and seek state concurrence regarding the settlement.	Agencies are often driven by deadlines or requirements established by litigation or adjudication – not statute or regulation. In negotiations regarding litigation or adjudication that has federalism implications, states are often left out of the process. Involving states in such negotiations would prevent conflicts from arising as the agencies implement the outcomes of those negotiations. As an example, the Administrator of the Environmental Protection Agency (EPA) issued a directive requiring the involvement of states in agency negotiations, recognizing the benefits of early engagement with states (“EPA Directive”).² The EPA Directive requires EPA to: notify any affected states within 15 days of receipt of a notice of intent to sue, complaint, or petition for review; seek the concurrence of any state before entering into a settlement; and provide sufficient time for notice and comment, consideration, and consultation, if the settlement includes a deadline for a final rule.
Eliminate Perceived Barriers to the State-Federal Relationship	
Recommendation	Rationale
Ex Parte Communications Require agencies to revise or establish their <i>ex parte</i> rules or policies in accordance with current case law, which permits these communications in informal rulemaking proceedings; and/or exempt communications with states and state officials from the definition of <i>ex parte</i> communications.	Many federal agencies have adopted policies which restrict communications with non-agency personnel during the rulemaking process. However, there is no statutory authority or other law that prohibits these communications. Many of the federal policies on <i>ex parte</i> communication were hastily adopted in response to overly-restrictive federal case law, which was subsequently overturned.³ A 2014 report by the Administrative Conference of the United States contradicted the restrictive approach taken by agencies upon reviewing relevant statutes and case law.⁴ In addition, there are major discrepancies between federal agencies’ policies on <i>ex parte</i> communications. For example, the Federal Emergency Management Agency (FEMA) has proposed a rule that requires restrictions on <i>ex parte</i> communications for the entire development of a rule: from publication of the notice of proposed rulemaking, until issuance of a final action. FEMA’s proposed rule exempts tribal consultation from these restrictions but makes no similar exception for states.⁵ In

² [EPA Directive](#), Promoting Transparency and Public Participation in EPA’s Settlement Process (October 16, 2017). The Administrator also issued a [memorandum](#) explaining the reasons for the directive, which include safeguarding the processes required by the Administrative Procedure Act, adhering to the rule of law and directives of Congress, and embracing cooperative federalism.

³ See *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

⁴ Administrative Conference of the United States, [Ex Parte Communications in Informal Rulemaking](#) (May 1, 2014).

⁵ Update to FEMA’s Regulations on Rulemaking Procedures, [82 FR 26414](#) (June 7, 2017).

	contrast, the Surface Transportation Board has promulgated a final rule that permits <i>ex parte</i> communications in informal rulemaking proceedings.⁶ The White House could clarify that communications with sovereigns and co-regulators is exempt from the definition of <i>ex parte</i> communications. Restrictions on communications with states throughout the rulemaking process have a chilling effect on consultation and coordination with states. This clarification would ensure consistency in the application of <i>ex parte</i> communication policies.
Federal Advisory Committee Act (FACA) Exemptions Exempt all meetings held exclusively between federal personnel and non-federal elected officials (or their designees) acting in their official capacities or in areas of shared intergovernmental responsibilities or administration from FACA.	The Unfunded Mandates Reform Act (UMRA) provides an exemption from FACA for intergovernmental consultations held exclusively between federal officers and employees and non-federal elected officials (or their authorized designees) relating solely to intergovernmental responsibilities or administration. OMB guidance currently directs federal agencies to apply this exemption broadly and to the entire range of intergovernmental responsibilities, not just those required by the UMRA.⁷ Examples of covered meetings include meetings to seek consensus; exchange views, information, advice, and/or recommendations; or facilitate any other interaction relating to intergovernmental responsibilities or administration. The guidance also directs federal agencies to consult with the highest levels of elected officials (the Governor’s Office for state governments). Despite this clear directive that FACA does not apply to many types of intergovernmental meetings, many federal agencies use FACA to avoid their responsibilities to consult with states. The OMB guidance could be amended to require federal agencies to incorporate its interpretation of the FACA exemption – as broadly applying to intergovernmental meetings and those beyond the UMRA – in their regulations.
Freedom of Information Act (FOIA) Investigate ways to address state and federal concerns about the disclosure of exchanged data and information that would otherwise be protected pursuant to FOIA and state open records acts.	FOIA mandates the disclosure of records held by a federal agency, unless the documents fall within enumerated exemptions.⁸ Under FOIA, an “agency record” is a record that is (1) either created or obtained by an agency; and (2) under agency control at the time of the FOIA request.⁹ FOIA also does not contain an exemption for data that would otherwise be protected under a state open records act. If a state open records act prohibits disclosure of certain types of information, that information

⁶ Ex Parte Communications in Informal Rulemaking Proceedings, [83 FR 9222](#) (March 5, 2018).

⁷ [Memorandum](#) from Alice M. Rivlin, Director, Office of Management and Budget, Guidelines and Instructions for Implementing Section 204 State, Local, and Tribal Government Input: of Title II of P.L. 104-4 (Sept. 21, 1995).

⁸ 5 U.S.C. §522.

⁹ *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

	should not be disclosed except as required by law. There are also concerns that confidentiality agreements between states and federal agencies will not protect state data from disclosure under FOIA. These concerns can prevent states from exchanging of valuable state data with federal agencies, as well as federal agencies from sharing their data with states.
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Tab G – President’s Infrastructure Initiative



WESTERN STATES WATER COUNCIL

682 East Vine Street, Suite 7 / Murray, Utah 84107 / (801) 685-2555 / FAX (801) 685-2559

Web Page: www.westernstateswater.org

June 27, 2018

The Honorable John Barrasso, Chairman
Committee on Environment & Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Thomas Carper, Ranking Member
Committee on Environment & Public Works
United States Senate
456 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper:

As a government entity created by western governors to advise them on water policy issues, the Western States Water Council (WSWC) has addressed the importance of federal financial assistance for critical water infrastructure in the West. Water infrastructure projects can provide reliable water supplies, drought resilience, important national and local economic benefits, as well as environmental benefits, an improved quality of life, and protection for human life and property.

The WSWC has long supported efforts to provide the U.S. Bureau of Reclamation with loan guarantee authority for water projects. Senator Feinstein's amendment to the America's Water Infrastructure Act (WIFIA) to allow Reclamation to recommend projects for funding under the WIFIA program is consistent with the attached WSWC Positions #390 and #419. We recognize WIFIA program demands and funding limits.

The WSWC supports federal legislative actions to authorize and implement programs and projects to address water supply needs, enhance water supplies, and promote economic development, through appropriate financing instruments, while also protecting taxpayers. Opportunities exist to leverage non-federal and federal funding through federal loan guarantees and other financial instruments to ensure that water districts can access private sources of financing. Water districts and individual water users depend on federal and non-federal infrastructure for their livelihood and the risk of default is minimal.

There is no one-size-fits-all program, but several federal financial and technical assistance programs, grants, loans, credit enhancements, cost-share programs, and federal-state-local or public-private partnerships have proven beneficial to the timely completion and ongoing maintenance of infrastructure projects at all scales.

The WSWC supports appropriate federal investments in water-related infrastructure projects and programs that provide jobs and economic security while protecting the environment. The WSWC supports collaboration and leadership at all governmental levels – federal, state, tribal, and local – and the private sector – to address the Nation's infrastructure needs and establish water infrastructure improvements as a public policy priority.

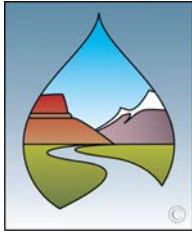
Thank you for your consideration of the WSWC's positions.

Sincerely,

Jerry Rigby
Chairman
Western States Water Council

Tony Willardson
Executive Director
Western States Water Council

Attachments



**POSITION STATEMENT
of the
WESTERN STATES WATER COUNCIL
in support of
RURAL WATER INFRASTRUCTURE NEEDS & PROJECTS
Washington, D.C.
March 22, 2016**

WHEREAS, much of the West is characterized by its aridity and drought which highlights the fact that water availability is an ever present constraint defining our economic and environmental well-being and quality of life; and

WHEREAS, this is particularly true for many small rural communities struggling to meet future water supply needs and comply with present federal mandates; and

WHEREAS, the Bureau of Reclamation's rural water program, USDA's Rural Utilities Service water and wastewater programs and other continuing efforts seek to identify rural water needs and evaluate rural water supply projects and the demand for new projects; and

WHEREAS, there is an important role for the States in the conduct of appraisal investigations and feasibility studies, preparation of feasibility reports, and identifying funding sources; and

WHEREAS, with respect to funding sources, we continue to strongly support the expenditure of Reclamation Fund revenues for their intended purposes, including rural water projects, as authorized by the Congress; and

WHEREAS, existing federal and state rural water and wastewater programs must be coordinated to facilitate the most efficient and effective solution to meeting the water needs of non-Federal project sponsors; and

WHEREAS, upgrading and replacing inadequate rural water systems may require finding new water supplies, which will entail acquiring necessary state water rights; and

WHEREAS, continuing compliance with state water laws and interstate compacts is vital; and

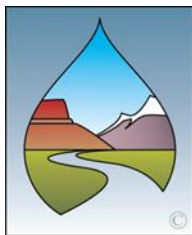
WHEREAS, opportunities exist to leverage non-federal funding through federal loan guarantees and other financial instruments to ensure that water districts can access private sources of financing; and

WHEREAS, water districts and individual water users depend on federal and non-federal infrastructure for their livelihood and the risk of default is minimal.

NOW THEREFORE BE IT RESOLVED that the Western States Water Council supports federal and state legislative and administrative actions to authorize and implement rural water supply projects and programs that enhance water supplies and promote economic development, through streamlined permitting processes and appropriate financing instruments, while appropriately protecting environmental resources and taxpayers.

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

BE IT FURTHER RESOLVED that rural water project development should recognize and ensure consistency with state water law and regulatory authority.



**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
WATER INFRASTRUCTURE FUNDING
Arlington, Virginia
March 14, 2018**

WHEREAS, maintaining and delivering sufficient water supplies of suitable quality is key to the West's economic prosperity, environmental needs, and our quality of life, both now and in the future; and

WHEREAS, appropriate water-related infrastructure investments ensure our continued ability to store, manage, conserve, and control water during both floods and droughts – as well as protect and treat our water resources; and

WHEREAS, existing and new infrastructure is critical to meet drinking water, wastewater treatment, irrigation, hydropower, flood control, interstate compact, tribal and international treaty, fish and wildlife habitat needs; and

WHEREAS, the West depends on an intricate and aging system of weirs, diversions, dams, reservoirs, pipelines, aqueducts, pumps, canals, laterals, drains, levees, wells, stormwater systems and water and wastewater treatment, and hydroelectric power plants; and

WHEREAS, water infrastructure in the West is financed and maintained under a complex network of state, tribal, local, private, and federal ownership, benefitting a broad segment of water users and other stakeholders;

WHEREAS, inconsistent, inadequate, and untimely funding increases project construction and financing costs, as well as risk, including the failure of critical infrastructure; and

WHEREAS, substantial and sustained investments in water project construction, maintenance, rehabilitation and replacement is necessary and pays long-term dividends to the economy, public health and safety, and the environment; and

WHEREAS, water infrastructure systems require ongoing, thoughtful investments to account for life-cycle costs, and should be managed with planned retirement or replacement in mind; and

WHEREAS, existing federal, state and local programs to publicly finance water-related infrastructure projects are crucial, but insufficient to meet water quality and water resources management challenges related to future growth, including municipal, industrial, agricultural, environmental, and energy needs; and

WHEREAS, the federal government has a significant role to play in financing and cost-sharing for water-related infrastructure given federal economic and environmental objectives, federal tribal trust and treaty obligations, other past commitments, and federal regulatory mandates; and

WHEREAS, aging federal water infrastructure has deteriorated – due to underfunded and deferred maintenance, repair, and replacement needs – and in many cases has exceeded its useful lifespan, raising public health and safety issues, risking loss of life and threatening public and private property; and

WHEREAS, federal financial resources are limited and many authorized federal water infrastructure projects have not been started or remain incomplete for decades due to inconsistent, incremental, or insufficient appropriations; permitting and licensing backlogs; duplicative environmental reviews; litigation delays; and oversight by multiple federal agencies without adequate interagency coordination; and

WHEREAS, current federal budget scoring guidelines assess the full cost of infrastructure investments up front, while disproportionately discounting long-term economic, public health and safety, and environmental benefits – sometimes making new water project investments challenging to justify financially; and

WHEREAS, local water district and state agency investments, private capital markets, performance-based contracting, and other alternatives offer help to close the federal funding, delivery, and maintenance gaps, and meet some of our national water infrastructure needs in partnership with federal agencies; and

WHEREAS, such partnerships have the potential to reduce overall project development costs and risks associated with such capital investments, expedite project delivery and associated water resource benefits, improve efficiencies and cost effectiveness, and maximize the respective strengths of the public and private sectors; and

WHEREAS, opportunities exist to leverage federal and non-federal funding through grants, loans and credit enhancements, as well as provide greater access to private sources of financing; and

WHEREAS, there is no one-size-fits-all program, but several federal financial and technical assistance programs, grants, loans, cost-share programs, and federal-state-local or public-private partnerships have proven beneficial to the timely completion and ongoing maintenance of infrastructure projects at all scales; and

WHEREAS, federal agencies often lack legislative authority to dedicate a sustained revenue stream to assure non-federal investors are fairly compensated for the costs and risks of constructing or maintaining federal water projects, sometimes requiring approval through an act of Congress to proceed.

NOW, THEREFORE, BE IT RESOLVED that the Council supports collaboration and leadership at all government levels – federal, state, tribal, and local – and the private sector – to address the Nation’s infrastructure needs and establish water infrastructure improvements as a public policy priority.

BE IT FURTHER RESOLVED that the Council supports appropriate federal investments in water-related infrastructure projects and programs that provide jobs and economic security, while protecting the environment.

BE IT FURTHER RESOLVED, that the Administration and Congress should work together to ensure adequate, stable, and continuing federal appropriations for constructing, maintaining, and replacing critical federal water projects and to assist States and local governments as they address their water infrastructure needs.

BE IT FURTHER RESOLVED that the Council encourage Congress and the Administration to continue to work together and with States to streamline permitting processes and coordinate environmental and other regulatory reviews to eliminate duplicative procedures, reduce costs of compliance and construction, and ensure timely completion, maintenance, or relicensing of authorized infrastructure projects so vital to the West and the Nation.

BE IT FURTHER RESOLVED that the Council supports the creation and maintenance of dedicated water infrastructure funding through special accounts with dedicated receipts to be promptly appropriated for authorized purposes following their deposit, as well as a variety of grant, loan, credit enhancement and other financial incentive programs to help meet diverse needs at all scales.

BE IT FURTHER RESOLVED that the Council supports appropriate infrastructure asset management and capital budgeting.

BE IT FURTHER RESOLVED that the Council supports a method of congressional budget scoring that considers the unique timing of the costs and benefits of water infrastructure investments, and accounts for long-term public health and safety, economic and environmental benefits, with fair and appropriate discounting.

FACT SHEET

Building a Stronger America: President Donald J. Trump's American Infrastructure Initiative

Issued on: February 12, 2018

Find President Trump's Legislative Outline for Rebuilding Infrastructure in America (55 pages) at:

<https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf>

QUOTE

We will build gleaming new roads, bridges, highways, railways, and waterways all across our land. And we will do it with American heart, and American hands, and American grit.

President Donald J. Trump

BUILDING AMERICA'S INFRASTRUCTURE: Today, President Donald J. Trump released his legislative goals to rebuild our Nation's crumbling infrastructure. The six principles include:

- \$200 billion in Federal funds to spur at least \$1.5 trillion in infrastructure investments with partners at the State, local, Tribal, and private level.
- New investments will be made in rural America, which has been left behind for too long.
- Decision making authority will be returned to State and local governments.
- Regulatory barriers that needlessly get in the way of infrastructure projects will be removed.
- Permitting for infrastructure projects will be streamlined and shortened.
- America's workforce will be supported and strengthened.

STIMULATE INFRASTRUCTURE INVESTMENT: President Trump's plan will lead to at least \$1.5 trillion in investments to rebuild our failing infrastructure and develop innovative projects.

- \$200 billion in Federal funds will spur at least \$1.5 trillion in new infrastructure investments.
 - Federal infrastructure spending will promote State, local, and private investments and maximize the value of every taxpayer dollar.
- Of the \$200 billion, \$100 billion will create an Incentives Program to spur additional dedicated funds from States, localities, and the private sector.
 - Applications for the Incentives Program will be evaluated on objective criteria, with creating additional infrastructure investment being the largest factor.

- The Incentives Program will promote accountability, making Federal funding conditional on projects meeting agreed upon milestones.
- \$20 billion will be dedicated to the Transformative Projects Program.
 - This program will provide Federal aid for bold and innovative projects that have the potential to dramatically improve America's infrastructure.
 - The program will focus on projects that could have a significant positive impact on States, cities, and localities but may not attract private sector investment because of the project's unique characteristics.
- \$20 billion will be allocated to expanding infrastructure financing programs.
 - Of the \$20 billion, \$14 billion will go to expanding a number of existing credit programs: TIFIA, WIFIA, RRIF, and rural utility lending.
 - \$6 billion will go to expanding Private Activity Bonds.
- \$10 billion will go to a new Federal Capital Revolving Fund, which will reduce inefficient leasing of Federal real property which would be more cost-effective to purchase.
- A new fund will allow some incremental revenues from energy development on public lands to pay for the capital and maintenance needs of public lands infrastructure.

INVEST IN RURAL AMERICA: Rural America's infrastructure has been left behind for too long, and President Trump's plan will make sure it is supported and modernized.

- \$50 billion of the \$200 billion in direct Federal funding will be devoted to a new Rural Infrastructure Program to rebuild and modernize infrastructure in rural America.
 - The bulk of the dollars in the Rural Infrastructure Program will be allocated to State governors, giving States the flexibility to prioritize their communities' needs.
 - The remaining funds will be distributed through rural performance grants to encourage the best use of taxpayer dollars.

INCREASE STATE AND LOCAL AUTHORITY: President Trump's proposal will return decision-making authority to State and local governments, which know the needs of their communities.

- Funds awarded to State and local authorities, such as through the Incentives Program and the Rural Infrastructure Program, will be allocated to infrastructure projects they prioritize.
 - This empowers States and localities to make more infrastructure investment decisions and prioritize projects based on the needs of their communities
- The plan will expand processes that allow environmental review and permitting decisions to be delegated to States.
- The plan will also allow Federal agencies to divest assets that can be better managed by State or local governments or the private sector.

ELIMINATE REGULATORY BARRIERS: The President's plan would eliminate barriers that prevent virtually all infrastructure projects from being efficiently developed and managed.

- The President's plan will:
 - Provide more flexibility to transportation projects that have minimal Federal funding but are currently required to seek Federal review and approval.
 - Incentivize the efficient development and management of water infrastructure, in part, by providing more flexibility to the U.S. Army Corps of Engineers and its partners.
 - Give the Department of Veterans Affairs the flexibility to use its existing assets to acquire new facilities by allowing it to retain property sale proceeds and exchange existing facilities for construction of new facilities.
 - Expand funding eligibility for land revitalization projects through the Superfund program and establish tools to help manage their legal and financial matters.

STREAMLINE PERMITTING: President Trump's infrastructure proposal will shorten and simplify the approval process for infrastructure projects.

- Working with Congress, we will:
 - Establish a "one agency, one decision" structure for environmental reviews.
 - Shorten the lengthy environmental review process to two years while still protecting the environment.
 - Eliminate certain redundant and inefficient provisions in environmental laws.
 - Create two new pilot programs to test new ways to improve the environmental review process.

INVEST IN OUR COUNTRY'S MOST IMPORTANT ASSET – ITS PEOPLE: The President is proposing reforms so Americans secure good-paying jobs and meet the needs of our industries.

- The President's plan would reform Federal education and workforce development programs to better prepare Americans to perform the in-demand jobs of today and the future. This includes:
 - Making high-quality, short-term programs that provide students with a certification or credential in an in-demand field eligible for Pell Grants.
 - Reforming the Perkins Career and Technical Education Program to ensure more students have access to high-quality technical education to develop the skills required in today's economy.
 - Better targeting Federal Work-Study funds to help more students obtain important workplace experience, including through apprenticeships.

Rebuilding America's Infrastructure

2019
BUDGET
FACT
SHEET



Rebuilding America's Infrastructure: An American Budget

America's Infrastructure Deficit

As President Donald J. Trump has consistently emphasized, we need to permanently fix the Nation's infrastructure deficit to improve our quality of life and strengthen our economic competitiveness. America no longer has the best infrastructure in the world. For example, the World Economic Forum ranks the United States 10th internationally in quality of overall infrastructure. Our infrastructure problems are increasingly evident: America's urban drivers spent an estimated 6.9 billion hours stuck in traffic in 2014, costing an estimated \$160 billion in wasted time and fuel; there are an estimated 240,000 water main breaks every year in the United States; and nearly one in five domestic flights are delayed or canceled.

Root Causes of Our Infrastructure Deficit

The Federal Government inefficiently invests in infrastructure. In part, our lack of sustained progress in addressing our infrastructure deficit is due to confusion about the proper Federal role. For example, during the construction of the Interstate Highway System, the Federal Government played a key role—collecting and distributing tax revenue to fund a project with a national purpose. As we neared the completion of that system, those tax receipts were redirected to projects with substantially weaker nexus to Federal interests. The flexibility to use Federal dollars to pay for essentially local projects has created an unhealthy dynamic in which State and local governments delay projects in the hope of receiving Federal funds. Overreliance on Federal grants, whose non-Federal matching requirements have decreased over the years, has created a disincentive for non-Federal revenue generation. Further, while Federal funding represents a small share of overall spending, that investment results in Federal requirements being applied far beyond what the Federal financial and ownership share would suggest.

In addition, bureaucratic red tape causes infrastructure projects that can significantly improve our quality of life, safety, environmental quality, and economic competitiveness to languish for years. The overly complex, time-consuming, and uncertain environmental review process deters infrastructure investment, wastes resources, and delays important project benefits. For example, the median time to complete an environmental review process of complex highway projects was at least 7 years according to a 2014 report by the Government Accountability Office. This is why the President set an ambitious but achievable goal to complete environmental reviews in two years, while continuing to safeguard the environment.

The Administration's Plan: Address the Infrastructure Deficit's Root Causes

Through the following programs, the Budget provides necessary resources to close America's infrastructure gap by generating at least \$1.5 trillion in overall public and private investment during the next decade:

- Incentive Grants -- \$100 billion in competitive grants to applicants that demonstrate innovative approaches to generating new revenue streams, prioritizing maintenance, and modernizing procurement practices.
- Rural Formula Funds – \$50 billion in formula grants to address rural infrastructure needs, including broadband internet service. A bonus competition would also occur based on State performance in achieving goals outlined in State-developed rural infrastructure plans.

- Transformative Projects – \$20 billion in competitive funding for commercially viable transformative projects that are capable of generating revenue, provide net public benefits, and would have a significant positive impact on the Nation, a region, State, or metropolitan area.
- Expand Federal Leveraging Programs – \$14 billion in additional subsidy funding for key Federal credit programs that finance infrastructure projects, along with expanded eligibility to other sectors such as airports and ports. Private Activity Bonds (PABs), which often support regionally- and nationally-significant projects, would have broadened eligibility and flexibilities. The Budget estimates the cost of these policy expansions at \$6 billion.
- Federal Capital Revolving Fund – \$10 billion to establish a mandatory revolving fund to finance purchases, construction, or renovation of Federally-owned civilian real property. This fund would provide upfront funding needed for large Federal real property projects, and then require agencies to repay the Fund using discretionary appropriations.
- Real Property Reforms – The Administration supports proposals to increase opportunities to sell off Federal real property that is no longer needed, which will generate revenue to improve other Federal facilities and return sites to private use, helping spur local economic development. The Budget also supports flexibilities for Department of Veterans Affairs (VA) to right-size its real property inventory and construct new facilities to serve veterans.
- Reduce Deferred Maintenance on Public Lands —The Budget also proposes a new Department of the Interior Public Lands Infrastructure Fund to support infrastructure investments in public lands. The Fund would be supported by half of the incremental receipts from expanded energy development that exceed previous projections and are not allocated for other purposes.
- Streamline Permits – In addition to providing additional Federal funding, the infrastructure initiative includes several proposals to streamline permitting decisions to accelerate project delivery while maintaining environmental safeguards.

Seeking an Infrastructure Down-Payment in 2018 and 2019 Appropriations

The Administration looks forward to working with Congress to enact comprehensive legislation that: 1) provides \$200 billion over ten years to meet the President's goal of generating at least \$1.5 trillion in total infrastructure investment; 2) enacts needed agency policy reforms to support state and local investment and decision-making; 3) speeds the Federal permitting process; and 4) invests in rural America. Given the high priority of this effort and the recently announced two-year budget deal, however, the Administration is seeking \$21 billion in additional funding for infrastructure. This includes \$11 billion to kick-start the incentives proposal and \$5 billion for the rural grant proposal, to allow communities to compete for funds and begin needed improvements now in 2018. Additionally, the Administration is seeking approximately \$5 billion in funding increases in a number of high priority programs in FY 2018 and FY 2019 that are further emphasized in the President's infrastructure initiative.

Investing in Our Country's Most Important Asset – Its People

The President is proposing reforms so Americans secure good-paying jobs and meet the needs of our industries. The President's plan would reform Federal education and workforce development programs to better prepare Americans to perform the in-demand jobs of today and the future. This includes:

- Making high-quality, short-term programs that provide students with a certification or credential in an in-demand field eligible for Pell Grants.
- Reforming the Perkins Career and Technical Education Program to ensure more students have access to high-quality technical education to develop the skills required in today's economy.
- Better targeting Federal Work-Study funds to help more students obtain important workplace experience, including through apprenticeships.

President's infrastructure Initiative

On February 12, the President released an outline of legislative goals to rebuild America's infrastructure. The proposal includes \$200B in federal funds to leverage \$1.5T in infrastructure investments in partnership with states, tribes, local governments, and private entities. In addition to transportation, rural infrastructure, veterans affairs properties, and land revitalization for Brownfields and Superfund sites, the framework includes recommendations to improve financing and programs for water infrastructure and to streamline agency permit reviews.

Under the proposal, \$50B would be dedicated to a Rural Infrastructure Program, to address transportation, power and electric, broadband, as well as drinking water, wastewater, and stormwater needs. The program would provide 80% of the funds to the governors of each state to invest, at their discretion and in consultation with a designated federal agency, to meet each state's unique rural needs. A portion of those rural funds would also be set aside to meet tribal and territorial infrastructure needs.

The framework would establish an Interior Maintenance Fund, using a portion of revenues payable to the U.S. from expanded mineral and energy development on Federal lands and waters. "Such receipts would be deposited into the Fund until the cumulative amount deposited" reaches \$18B, and "would be made available to the Secretary of the Interior, without fiscal year limitation, to address the deferred maintenance and capital needs for infrastructure in national parks and wildlife refuges."

Over all, the water infrastructure provisions are intended to incentivize development that is effective and efficient, ensure that procurement is outcome-based, and improve full life-cycle asset management. The proposed changes are also meant to provide greater flexibility in the use of federal and non-federal funds; to provide targeted flexibility with respect to federal requirements for projects with a de minimis federal investment; to generate new revenues and retain certain revenues in support of project requirements; to make better use of contributed funds; and to allow for the innovative use of contracting tools.

The framework would expand eligibility for the Water Infrastructure Finance and Innovation Act (WIFIA) program to include remediation of water quality contamination by non-liaible parties at Brownfield and Superfund sites. "A separate account would be appropriate for individual eligibilities and ranking metrics because new revenues would be more speculative and would lower the leveragability ratio for all WIFIA loans." It would eliminate the requirement that water systems be "community water systems," allowing drinking water providers, desalination plants, and other public authorities that sell water directly to another water provider to participate in the WIFIA and Drinking Water State Revolving Fund (SRF) programs. It notes that WIFIA's authorized funding was determined when it was a pilot program, and that those funds "may not be sufficient to cover both administrative costs and the fronting of underwriting costs, especially with our proposed expansion of WIFIA." It would expand the use of WIFIA funds to acquire water systems after they are completed, enabling consolidation and restructuring in the water industry. It would authorize Corps defederalization and transfer of water resource projects, and make non-federal borrowers eligible for WIFIA funds on former federal projects.

The proposal would expand U.S. Environmental Protection Agency's (EPA) WIFIA authorization to include non-federal projects for flood mitigation, hurricane and storm damage reduction, navigation, and restoration of the environment and aquatic ecosystems. These projects have principally been within the U.S. Army Corps of Engineers (Corps) purview. "This creates unnecessary and arbitrary carve-out of integrated water projects to which EPA is unable to provide loans...." Expanding EPA's authorization "would allow EPA to service the full water cycle and provide one streamlined and integrated lending process to project sponsors."

Recommendations for privately owned, public-purpose treatment works include authorizing eligibility for financial assistance under the Clean Water SRF, similar to the way the Drinking Water SRF allows lending to private owners. It also would modify the Clean Water Act (CWA) to ensure regulatory requirements for privately owned, public-purpose treatment works are no more stringent or costly than for publicly owned treatment works (POTWs).

There are several goals relating to Corps projects, addressing construction and maintenance backlogs through a variety of funding, contractual, and regulatory changes. The framework recommends authorizing the Secretary of the Army to execute agreements with non-federal public or private entities to use funds from the Inland Water Ways Trust Fund or the Treasury's General Fund, derived in part from fuel taxes paid by commercial users of the inland waterway system. The agreements would address construction, repair, rehabilitation, maintenance and operation activities. Another proposed change is expanding the Corps' authority to engage in multi-year contracts, currently limited to five years, for periods up to fifty years under the public-private partnership (P3) pilot program in WRRDA §5014. Doing so would "...encompass the full life-cycle management of infrastructure assets..." with appropriate indemnification by non-federal interests.

For aging infrastructure at Corps-managed recreation sites and public facilities, it would authorize the Corps and non-federal service providers to collect and retain user fees to operate and maintain the site. Such user fees, where authorized, are typically sent to the Treasury. "Without a dedicated revenue source, innovative partnerships are nearly impossible to execute because third parties would be subject to appropriation risk. This risk makes transactions uneconomical and highly unlikely to close." It would also restore the authority of the Corps to determine whether operation and maintenance activities at hydropower facilities are designated as government or commercial activities, facilitating performance by non-federal entities, decreasing unnecessary bureaucracy, and increasing opportunities for open competition and more efficient operations and maintenance.

Corps projects approaching the end of their service life, or projects managed by non-federal interests that do not require federal oversight, should be deauthorized. "Currently, all USACE projects remain authorized in perpetuity.... Extensive regulatory and statutory compliance provisions apply to non-Federal sponsors associated with USACE projects, including Section 14 of the Rivers and Harbors Act of 1899, as amended (33 U.S.C. 408, commonly referred to as 'Section 408'). These provisions can make local alterations to federally constructed projects expensive and difficult, as even simple modifications to a Federal project by an applicant trigger a Section 408 review, which increases the costs to both the Government and the applicant. Amending the law to establish a streamlined deauthorization process...would release Federal and non-Federal resources to be used for other purposes."

The framework also proposes expanding authority to accept non-federal contributions for infrastructure projects, and allowing flexibility for the Secretary of the Army to waive cost limits where congressionally-authorized projects exceed their anticipated costs. Although current law allows non-federal contributions toward infrastructure, those investments face a protracted process with several limitations. "Amending the law (33 U.S.C. 701h) to expand authority for the acceptance of contributed funds even if no federal funds have been appropriated for the authorized project, changing individual notifications to an annual reporting requirement, and expanding applicability of advanced funds authority to all authorized water resources development studies and projects would increase non-Federal spending and expedite project execution."

There is also a section on streamlining environmental reviews, delegating more decision-making to states, and enhancing coordination between state and federal reviews. It would establish a "One Agency, One Decision" environmental review structure. The current inefficiencies of multiple federal agency reviews with counter-viewpoints and different timelines "prevents the American people from receiving the benefits of improved infrastructure and environmental protections in a timely manner." It would limit reviews and final permit decisions to a total of two years, with a single environmental review document and a single record of decision coordinated by the lead agency, to be signed and used by all the cooperating agencies.

Categorical exclusions established and documented by one agency would be used by other agencies, reducing duplication and unnecessary analyses for actions that do not create a significant environmental impact. Creating procedures for expediting environmental reviews for projects that demonstrate improvements to the environment through mitigation or design would incentivize the utilization of such project benefits. It would expand authority for project proponents to contribute funds to federal agencies to defray the costs of reviews for infrastructure projects, streamlining project delivery. Such authority already exists for Corps projects under 33 U.S.C. 2352. "This provision would include appropriate controls for potential conflicts of interest and would maintain the Federal agency's responsibility to conduct its review independently."

It would also eliminate consideration of project alternatives that are outside the scope of the agency's authority or the capability of the applicant. "Such alternatives are not feasible and do not need to be considered in an environmental review." This would "allow agencies and applicants to focus their resources and analyses on those alternatives that are actually legally, technically, and economically feasible."

A section on protecting clean water with greater efficiency proposes that federal agencies be authorized to use the Corps' existing nationwide permits (NWP) without further review. This would "streamline the process and allow USACE to focus on projects that do not qualify for NWPs, which have greater environmental impacts." It would remove EPA veto authority over the Corps CWA §404 permits. "USACE has decades of experience and expertise in jurisdictional matters, providing the public approximately 59,000 written jurisdictional determinations per year." Eliminating duplicative oversight would reduce delays and uncertainty. The two agencies "would continue to coordinate on rulemaking to ensure consistency in the definition of 'waters of the U.S.' under the Clean Water Act and to reconcile differences in determinations under other sections of the Clean Water Act." It proposes the use of a single NEPA document for actions implicating both CWA §404 and §408, rather than requiring duplicative environmental reviews.

For state CWA §401 certifications, the time period to issue a decision would be reduced by providing a deadline to make a determination on whether the application is complete. "In spite of the [one-year] statutory time frame, States increasingly do not issue permits within the applicable time frames, or they require applicants to re-file prior to the one-year lapse, which produces a loop of repeated lack of issuance and re-filing."

Water utility investments would be stabilized by lengthening the term of National Pollutant Discharge Elimination System (NPDES) permits from five years to fifteen years, and providing automatic renewals where water quality needs do not require more stringent permit limits. The current five-year limitation "serves as a disincentive to public and private investments in investor-owned and publicly owned utilities when major investments typically are financed over 20 to 30 years. Moreover, administrative resources in granting permit renewals can significantly impact the timeliness of permit renewal requests."

The Bureau of Reclamation would receive new transfer authority to streamline the process of executing title transfers on federally-owned facilities operated by non-federal partners that are the primary beneficiaries. "Obtaining authority from Congress to transfer title for each facility individually is arduous and very time consuming, often taking several years. Delays in obtaining title negatively impact[s] the ability of non-Federal partners to obtain private financing to perform required major rehabilitation and replacement needs. As a result, entities may need to request funding from the Federal Government to perform required work."

A pilot program with up to 10 projects would be used to experiment with environmental performance measures in lieu of complying with NEPA and other relevant permits and authorizations. The project sponsor would agree to meet design requirements and permitting standards, developed with public input and inter-agency cooperation. The program would still support the goals of NEPA, but would focus on good environmental outcomes and mitigation of project impacts, rather than a lengthy review process.

Judicial reforms would include limitations on injunctive relief for exceptional circumstances to reduce delays of public benefits on needed infrastructure projects. It would reduce the statutes of limitation on infrastructure permits or decisions from six years down to 150 days. It would direct agencies to establish guidelines regarding when new environmental studies and data are needed, precluding courts from reviewing the currentness of data. "With projects spanning several years, a project sponsor may need to conduct multiple studies to generate data on the same issue. While using complete and up-to-date data is necessary to make an informed decision, litigation risk should not be the primary driver in deciding whether to conduct a new study." Congress has already introduced bills and held hearings addressing some of these proposals.

(See WSW #2281 and #2278; Special Reports #2283 and #2281).

Tab H – WSWC 2019 Water Infrastructure Symposium Potential Topics

WSWC Water Management Symposium on Infrastructure

February 2019

TBD

Potential Topics

Water Infrastructure Needs

Maintenance & Replacement

New Projects

Financing and Cost Sharing

Congressional Funding / Budgeting

Leveraging Federal and State Resources

WIFIA, SRFs, and SRF_WIN

Public-Private and Public-Public
Partnerships

Multi-Agency and Multi-Stakeholder
Projects

Financing & Timing Barriers and Solutions

Regulatory Barriers and Solutions

Clean Water Act

Endangered Species Act

National Environmental Policy Act

Infrastructure Priorities and Alternatives

Completing Authorized Federal Projects

Corps, USBR, USDA, EPA

Rural Water Project Challenges

Indian Water Rights Settlement Projects

State Water Plans

State Project Identification and Financing

Water Conservation Project

The Value of Water

Water Rates, Pricing, and Markets

Tab I – Washington Stream Restoration Act
Program / Eastern Washington
Water Projects

Washington State Department of Ecology

Washington state has a new streamflow restoration law in response to the “Hirst decision.” Hirst was a 2016 Washington State Supreme Court decision that changed how counties approve or deny building permits that use permit-exempt wells for a water source. The law, [Engrossed Substitute Senate Bill 6091](#), was passed on Jan. 18, 2018, and signed by Gov. Inslee the next day.

The law helps protect water resources while providing water for families in rural Washington. We are in the early stages of getting started and look forward to working with communities to help find water supply solutions for homes and to protect streamflows for fish.

What does the law do?

- The law focuses on 15 watersheds that were impacted by the Hirst decision and also establishes standards for rural residential permit-exempt wells in the rest of the state. The law divides the 15 basins into those that have a previously adopted watershed plan and those that did not.
- The law allows counties to rely on our instream flow rules in preparing comprehensive plans and development regulations and for water availability determinations.
- It allows rural residents to have access to water from permit-exempt wells to build a home.
- It lays out these interim standards that will apply until local committees develop plans to be adopted into rule:
 - Allows a maximum annual average for new domestic water use, depending on the watershed.
 - Establishes a one-time \$500 fee for landowners building a home using a permit-exempt well in the affected areas.
- It retains the current maximum of 5,000 gallons per day limit for permit-exempt domestic water use in watersheds that do not have existing instream flow rules.
- It invests \$300 million over the next 15 years in projects that will help fish and streamflows.

Policy interpretation

We are working to interpret key provisions of the law.

- [Initial policy interpretation](#)
- [Recommendations for water use estimates](#)

Interim guidance documents

- [Streamflow Restoration Grants Fiscal Year 2019 Interim Funding Guidance](#)
- [Interim Guidance for Determining Net Ecological Benefit](#)

Questions and answers

Are counties that restricted building permits in response to the Hirst decision now issuing building permits?

Counties are evaluating the new law and may need to update their development codes to meet the new requirements. We are aware that these counties intend to respond quickly. After they do, then they can issue building permits and approve subdivisions accordingly.

Which wells are impacted by this law?

The law went into effect on Jan. 19, 2018. The Legislature wrote the bill to provide that wells constructed after this date are subject to the new law, and wells constructed prior to this date constitute evidence of adequate water supply.

When will information about plan evaluation and funding be available?

We want streams to benefit from this new law as soon as possible. Work is underway to develop a

transparent system for the prioritization and evaluation of basin plans and projects.

This spring, we expect to issue guidance to planning groups about the net ecological benefit standard that each plan must meet. We also plan to provide detailed information about accessing funding for projects identified by the plans. In the summer, we plan to begin accepting funding proposals for projects through our online system. Decisions on project proposals are anticipated in fall.

We will share updates here as more information is available.

What's the difference between basins with and without a watershed plan?

The law focuses on 15 basins that were impacted by the Hirst decision. It divides the basins into those that have a previously adopted watershed plan and those that did not.

In 1997, the Legislature passed the Watershed Planning Act. Of the 15 basins identified in Engrossed Substitute Senate Bill 6091, seven have adopted watershed plans. Of the seven, five still have active groups involved in watershed-related issues.

Watersheds with previously adopted plans

Watersheds with previously adopted watershed plans are the Nooksack, Nisqually, Lower Chehalis, Upper Chehalis, Okanogan, Little Spokane, and Colville ([see map](#)). For these seven basins, local watershed planning units are to update the watershed plan. We are obligated to assess if the plan results in a net ecological benefit.

- The law identifies the Nooksack and Nisqually basins as the first two to be completed. They have until February 2019 to adopt a plan; if they fail to do so, we must adopt related rules no later than August 2020.
- Planning units in the Lower Chehalis, Upper Chehalis, Okanogan, Little Spokane, and Colville basins have until February 2021 to develop their plans.
- For these seven watersheds, the maximum annual withdrawal is 3,000 gallons per day per connection.

Watersheds without previously adopted plans

Eight other watersheds do not have previously adopted watershed plans. They are Snohomish, Cedar-Sammamish, Duwamish-Green, Puyallup-White, Chambers-Clover, Deschutes, Kennedy-Goldsborough, and Kitsap ([see map](#)). For these eight basins:

- We will establish and chair watershed committees and invite representatives from local governments, tribes, and interest groups.
- The plans for these watersheds are due June 30, 2021.
- The maximum annual withdrawal is 950 gallons per day per connection. During drought, we may curtail this to be 350 gallons per day per connection for indoor use only.
- Counties in these areas have to ensure that building permit applicants adequately manage stormwater onsite.

When did the law take effect?

The law went into effect immediately when it was signed into law — Jan. 19, 2018.

How will the \$300 million be used?

The law provides \$300 million until 2033 for projects that will help fish and streamflows. Much of this funding will be passed through us to on-the-ground projects across the state.

What is the Hirst decision?

In the [Whatcom County vs. Hirst, Futurewise, et al. decision](#) (often referred to as the "Hirst decision"), the Washington State Supreme Court ruled that the county failed to comply with the Growth Management Act requirements to protect water resources. The ruling required the county to make an independent decision about legal water availability.

Read more on our [Hirst decision web page](#).

What counts as a permit-exempt use of groundwater?

You need a water right permit or certificate before withdrawing groundwater, but there are [four exceptions for small uses](#). Although these permit-exempt uses don't require a water right permit, you are still subject to state water law.

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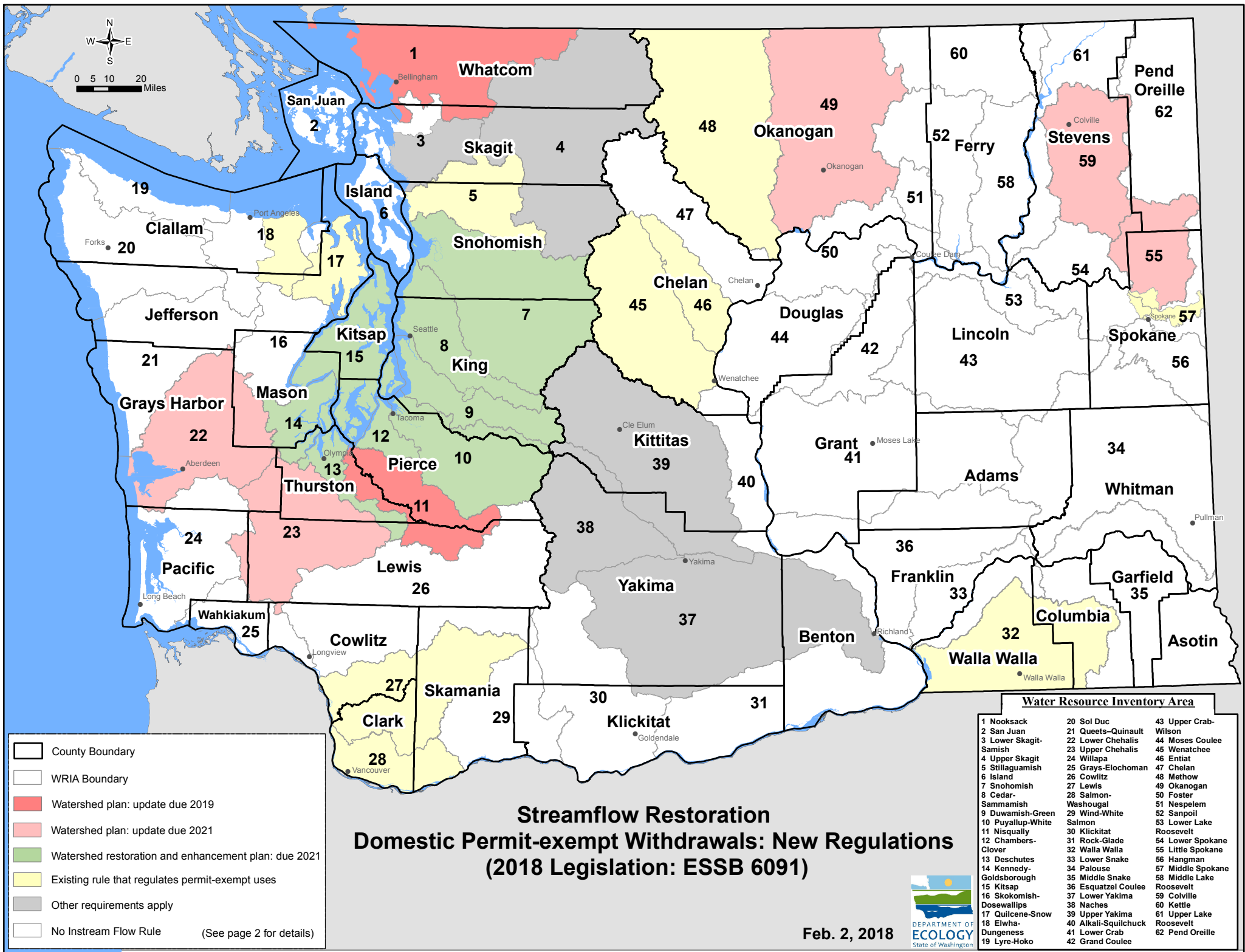
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**Streamflow Restoration
Domestic Permit-exempt Withdrawals: New Regulations
(2018 Legislation: ESSB 6091)**

Feb. 2, 2018



<u>Water Resource Inventory Area</u>		
1 Nooksack	20 Sol Duc	43 Upper Crab-
2 San Juan	21 Queets-Quinalt	Wilson
3 Lower Skagit-	22 Lower Chehalis	44 Moses Coulee
Samish	23 Upper Chehalis	45 Wenatchee
4 Upper Skagit	24 Willapa	46 Entiat
5 Stillaguamish	25 Grays-Elochoman	47 Chelan
6 Island	26 Cowlitz	48 Methow
7 Snohomish	27 Lewis	49 Okanogan
8 Cedar-	28 Salmon-	50 Foster
Sammamish	Washougal	51 Nespelem
9 Duwamish-Green	29 Wind-White	52 Sanpoil
10 Puyallup-White	Salmon	53 Lower Lake
11 Nisqually	30 Klickitat	Roosevelt
12 Chambers-	31 Rock-Glade	54 Lower Spokane
Clover	32 Walla Walla	55 Little Spokane
13 Deschutes	33 Lower Snake	56 Hangman
14 Kennedy-	34 Palouse	57 Middle Spokane
Goldsborough	35 Middle Snake	58 Middle Lake
15 Kitsap	36 Esquatzel Coulee	Roosevelt
16 Skokomish-	37 Lower Yakima	59 Colville
Dosewallips	38 Naches	60 Kettle
17 Quilcene-Snow	39 Upper Yakima	61 Upper Lake
18 Elwha-	40 Alkali-Squillchuck	Roosevelt
Dungeness	41 Lower Crab	62 Pend Oreille
19 Lyre-Hoko	42 Grand Coulee	

Map key

New regulations



WRIAs **1** (Nooksack) and **11** (Nisqually)

These watersheds:	As of 1-19-18, new permit-exempt wells for domestic use in these watersheds are:
- have adopted watershed plans - have instream flow rules that do not regulate permit-exempt wells - are directed by Section 202(7)(a) of the new law to update their watershed plans by 2/1/2019	- allowed 3,000 gallons per day as the maximum annual average - subject to a \$500 fee



WRIAs **22** (Lower Chehalis); **23** (Upper Chehalis); **49** (Okanogan); **55** (Little Spokane); and **59** (Colville)

These watersheds:	As of 1-19-18, new permit-exempt wells for domestic use in these watersheds are:
- have adopted watershed plans - have instream flow rules that do not regulate permit-exempt wells - are directed by Section 202(7)(b) of the new law to update their watershed plans by 2/1/2021	- allowed 3,000 gallons per day as the maximum annual average - subject to a \$500 fee



WRIAs **7** (Snohomish); **8** (Cedar-Sammamish); **9** (Duwamish-Green); **10** (Puyallup-White); **12** (Chambers-Clover); **13** (Deschutes); **14** (Kennedy-Goldsborough); and **15** (Kitsap)

These watersheds:	As of 1-19-18, new permit-exempt wells for domestic use in these watersheds are:
- do not have adopted watershed plans - have instream flow rules that do not regulate permit-exempt wells - are directed by Section 203 of the new law to adopt watershed restoration and enhancement plans by 2021	- allowed 950 gallons per day as the maximum annual average (350 gallons per day during drought) - subject to a \$500 fee

No new regulations



WRIAs **5** (Stillaguamish); **17** (Quilcene-Snow); **18** (Elwha-Dungeness); **27** (Lewis); **28** (Salmon-Washougal); **32** (Walla Walla); **45** (Wenatchee); **46** (Entiat); **48** (Methow); and **57** (Middle Spokane)

These watersheds have existing instream flow rules that regulate permit-exempt uses. The new water use limits, \$500 fees, and basin planning under the law do not apply in these watersheds.



WRIAs **37** (Lower Yakima), **38** (Naches), **39** (Upper Yakima), **3** (Lower Skagit), and **4** (Upper Skagit)

Other requirements apply in these watersheds. The new water use limits, \$500 fees, and basin planning under the law do not apply in these watersheds.



These watersheds are not regulated by an instream flow rule. Permit-exempt wells in these areas are regulated by [RCW 90.44.050](#). The new water use limits, \$500 fees, and basin planning under the law do not apply in these watersheds.

Washington State Department of Ecology

State law requires that enough water is kept in streams and rivers to protect and preserve instream resources and values such as fish, wildlife, recreation, aesthetics, water quality, and navigation. One of the most effective tools for protecting streamflows is to set instream flows, which are flow levels adopted into rule. Instream flows cover nearly half of the state's watersheds and the Columbia River.

About instream flows

Instream flows are an element of water and river management — finding ways to maintain healthy and diverse ecosystems that are part of Washington's high quality of life, while sustaining basic life functions and economies.

Setting instream flows protects the river from new withdrawals that would harm instream resources. Instream flows do not put water in the streams and do not affect existing (senior) water rights.

Setting instream flows in rule is a complex process, involving:

- Scientific flow studies to determine what flow levels are needed to preserve the uses and values of individual rivers and streams.
- Developing methods to allow for future development.
- Working with local agencies, tribes, businesses, environmental groups, and concerned citizens throughout the rule development and adoption process.

How do instream flows work?

Instream flows are a specific flow level measured at a specific location in a given stream. Seasonal changes cause natural stream flows to vary throughout the year, so instream flows usually vary from month to month rather than one flow rate year-round.

Once instream flows are set, when actual streamflows drop below the adopted instream flow levels, junior water rights (those established after the instream flow) can be temporarily interrupted to keep the water in the stream. There are ways for new uses to prevent interruption:

- Hooking up to an existing water system that has “senior” water rights (that predate the rule).
- Transferring a senior water right to the new use.
- Mitigating to prevent impacts to streams.

Why is protecting streamflows important?

The natural environment and communities rely on healthy streamflows:

- To support sustainable groundwater levels and surface water levels in wetlands, lakes, and ponds.
- To provide habitat for fish, support wildlife, and help maintain healthy ecosystems.
- To support recreation, stock watering, navigation, and scenic and aesthetic values of natural settings.
- To maintain water quality, including temperature, dissolved oxygen, and the concentration of impurities.
- To preserve existing farming, industry, and residential water supplies.

Many consider Washington a water-rich state, but water shortages often happen when and where it is needed the most. Many streams around the state often fall below critical levels, especially in late summer. In recent drought years, a large portion of the state's streams dropped to record-breaking lows. Population growth and effects of climate change continue to increase the stress on this crucial and finite resource.

How are instream flow levels chosen?

When deciding what flow levels to protect, a lot of the discussion centers on fish needs since there are state laws that specifically call for protecting fish. We have found that if the fish are doing well, then generally other instream resources are too. Fish needs are also easier to measure than some other instream values. This is why we usually start with instream flow or “fish-flow” studies to determine instream flows.

In Washington, the four most common instream flow study methods are:

- Instream flow incremental methodology (IFIM)
- Toe-width

- Wetted width (a.k.a. wetted perimeter)
- Hatfield and Bruce

See more information:

- [An introduction to: Instream flows and instream flow rules](#)
- [Instream flow study methods used in Washington State](#)
- [Instream flow study guidelines: Technical and habitat suitability issues](#)

Data from streamflow studies are used together with the known streamflow needs of key fish species at varying stages of their lives (i.e., spawning, incubating, rearing, juveniles, and adults, as well as in-migration and out-migration for anadromous species).

Once fish biologists have determined which seasonal flow levels in a stream provide the best fish habitat, other considerations are brought into discussions with local agencies, tribes, stakeholder groups, and the public.

Why not set instream flows lower than existing stream flows?

An instream flow is not the lowest amount of water that has occurred in the stream. Protecting only the lowest flows would over time result in fish always living in drought conditions. Fish populations would drop as streamflow and available habitat dropped. Eventually, the fish population would collapse.

State law is clear that instream flows are to protect and preserve fish and other instream resources over the long-term.

Why are instream flows sometimes higher than the flow in the stream?

If the instream flow number is high relative to the average summer streamflow, it means that the stream will provide more fish habitat in wet years than in dry ones.

Protecting the occasional “good water year” is needed to preserve a healthy population of fish. If we want to protect the habitat available in those good wet years, then the instream flow needs to be set at that higher flow level.

How could instream flows affect me?

Washington water law is based on the prior appropriation doctrine, or “first in time, first in right.” Each water right has a priority date, which determines its ranking in relation to all other rights from the same (or connected) source. In times of water shortage, older (senior) water right holders have the right to the full measure of their water right before later (junior) water rights are served.

Instream flows have a priority date like all other water rights. Therefore, adopting instream flows into rule has no effect on existing rights that predate the rule. This includes water rights established through water right permitting and existing uses of a “permit-exempt” well. (See [RCW 90.44.050](#).)

As most cities and towns hold enough water rights to serve many years of future growth, further development in urban and suburban areas is generally unaffected by instream flows. Adopting new instream flows is most likely to affect those wishing to build homes in rural areas that would rely on a permit-exempt well.

Although we have attempted to provide provisions in each instream flow rule to allow some level of future rural development, recent court decisions have restricted many of these provisions. We continue to work with the Legislature to find workable solutions to resolve this issue. Meanwhile, it is increasingly difficult to find adequate water supplies for new uses in many areas of the state — with and without instream flows.

Why is groundwater use affected by an instream flow rule?

Most groundwater in Washington is hydraulically connected to nearby lakes and streams. In fact, during much

of the year, groundwater discharge may make up most of the water in a stream.

When groundwater is pumped and water is put to use, this often leads to a decrease in streamflow. Many factors influence where and how much a groundwater use may affect a stream, such as the nature of the aquifer, the distance between the well and the stream, the well depth, and the type of water use (for example, lawn watering consumes much more water than in-house use that discharges to a septic system). However, at least some portion of the well water used in a home typically has a negative impact on nearby streams.

Washington State Department of Ecology

Our water supply and environmental enhancement projects are helping to ease water conflicts in Eastern Washington. We're responding to decades of competition for water that stymied new development and threatened several fish species listed as endangered along the Columbia River and its tributaries.

We are implementing water projects that meet current needs and future demands. We are now able to issue new water rights for municipal, domestic, and agricultural purposes, and release water for endangered fish species along the Columbia River and its tributaries when it's needed most.

In the Yakima River basin, we're seeking resiliency in the face of drought and climate change. This is an integrated approach to finding water solutions and enhancing the natural environment with projects that provide fish passage, promote water exchanges and efficiencies, and protect and improve water supplies and water quality.



Columbia River near Vantage, WA

Columbia Basin Water Project priorities

In 2006, bipartisan legislation was passed establishing the [Columbia River Water Management Program](#) to aggressively pursue water supplies that meet all water needs in Eastern Washington.

Our projects tap into stored water from existing reservoirs, improve and build needed infrastructure, and restore habitat and develop enhanced water conservation projects to make water available for:

- Farmers in the Odessa subarea, vineyards on Red Mountain, and throughout Eastern Washington.
- Fish migration and habitat in the Methow and Yakima river basins and other tributaries.
- Communities up and down the Columbia River system, including Bridgeport, Pasco, Pateros, Twisp, White Salmon, and Yakima.

Learn more about our [Columbia River projects](#).

Securing Odessa replacement water

One of our top priorities is to find alternatives to groundwater for agricultural users in the [Odessa subarea aquifer](#), where the aquifer is steadily declining. Partnering with the U.S. Bureau of Reclamation, we have secured enough water to allow 90,000 acres of land to be switched from deep water wells to Columbia Basin project surface water. This project is outlined in the Bureau of Reclamation's [Odessa subarea special study final environmental impact statement](#).



Workers inspect Lind Coulee Siphon, one of six new siphons needed to convey surface water to the Odessa Subarea.

Delivering Odessa water

A number of infrastructure improvements are helping us deliver water to the Odessa subarea. In 2012, the Weber Siphon Project made it possible to move water from Lake Roosevelt to farms south of Interstate 90. Ecology, the Bureau of Reclamation, and the East Columbia Basin Irrigation District completed work in 2015 to widen the East Low Canal and install a new siphon and gate at Lind Coulee. The irrigation districts are building the infrastructure to deliver irrigation water to farmers now relying on groundwater wells.

According to a Washington State University regional economic impact study, the economic and environmental benefits of this work include:

- Preserving \$630 million annually in regional potato production, processing, and sales.
- Protecting 3,600 jobs and \$211 million in regional income.
- Reducing long-term and irretrievable impacts to the declining Odessa subarea aquifer.

Learn more about our [Odessa groundwater replacement program](#).



Drip irrigation at a vineyard

Lake Roosevelt water for cities & farmers

We are focusing on projects that deliver water already stored behind Grand Coulee Dam in Lake Roosevelt based on a 132,500 acre feet storage right from 1938. This readily available water is supplying a portion of the

replacement water (30,000 acre feet) for farmers drawing on the declining Odessa subarea aquifer. Also, new water (25,000 acre feet) is being made available for cities and industries with pending applications. At the same time, one-third of the total water supply is released (27,500 acre feet) for Columbia River flow enhancement. In times of drought, an additional 33,000 acre feet of stored water will be released so irrigation water rights won't be interrupted, along with 17,000 additional acre feet to help fish.

The economic and environmental benefits include:

- New water users pay a fee of \$35 per acre foot of water per year to reimburse the taxpayer investment in the project.
- At full build-out, the project is estimated to add 35,000 jobs and \$3 billion in economic value.
- Helping fish by adding 27,500 acre feet to Columbia River flows every year. In drought years, 17,000 additional acre feet will be added for flows.

Learn more about [Lake Roosevelt water rights](#).



Sullivan Lake in Pend Oreille County

Sullivan Lake water for rural northern counties

A water right once used to generate power by the Pend Oreille Public Utility District for the City of Seattle is making 14,000 acre feet available from Lake Sullivan for water rights to rural communities in six Northeast Washington counties where water supply opportunities are scarce. Two-thirds of the water released will offset new wells or diversions for farms, cities, and towns in Douglas, Ferry, Lincoln, Okanogan, Pend Oreille, and Stevens counties, with the remainder released to enhance streams.

The economic and environmental benefits include:

- New water users pay \$60 per acre foot of water for 25 years to offset water costs.
- Up to \$1.4 billion total in new tax base at full allocation.
- 4,667 acre feet of water will enhance streamflows for fish.

Learn more about [Lake Sullivan water rights](#).



The first sockeye salmon hatched in the Yakima Basin in a century return to spawn in the Cle Elum River. The Yakima Integrated Plan provides increased streamflows, habitat improvements, and passage for fish in addition to increasing water supply for farms and communities.

Yakima basin integrated water solutions

Projects developed under [the Yakima River Basin Integrated Water Management Plan](#) work to enhance the water needs of a top agricultural-producing region and important fish-bearing watershed in our state. Responding to years of drought, fish extinctions, and changing climate, the plan takes a holistic approach to the Yakima basin's water needs, integrating water supply projects with fish and habitat enhancement efforts.

In 2013, the Legislature [authorized implementation](#) of the Yakima basin integrated plan, which:

- Supports a \$4.5 billion agricultural/food production industry.
- Enhances and restores a vital salmon and steelhead population.
- Provides many recreational activities, such as boating, fishing, hunting, and hiking.
- Protects senior water rights, advances, conservation, water markets, and exchanges.

Learn more about [Yakima River basin water supply projects](#).

Contact information

Tim Hill

Office of Columbia River web coordinator

tim.hill@ecy.wa.gov

509-454-4241

Tab J – Water Data Exchange Update

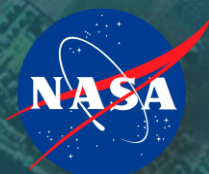
WESTERN STATE WATER RESOURCE AGENCY USE OF CLOUD COMPUTING TECHNOLOGY & PLATFORMS

EXECUTIVE SUMMARY

The ability to acquire, process, maintain, and publish data and metadata related to water resource management is a critical and foundational activity that supports administration and planning by western water resource agencies. Projects, models, and the number of observations related to hydrology and watershed dynamics are rapidly increasing in complexity, spatial, and temporal scale. They are also increasing in computational requirement due to the exponential proliferation of sensor-based data, the availability of free and low-cost remote-sensing imagery, and the variety of parameters that can now be brought into the modeling process.

High Performance Computing (HPC) and cloud computing platform technologies offer solutions to the challenge of maintaining distributed or massive datasets, but there are also barriers to their adoption by state water agencies. Cloud computing platform selection, staff training needs, mismatched funding regimes, and unclear security requirements continue to be an impediment to widespread adoption. The acceptance of standardized security solutions for large federal agencies and other entities has been a pivotal development for smaller government agencies experimenting with the idea of storing data or maintaining their applications in the cloud. While a handful of states have fully embraced the notion of using cloud vendors and platforms, there is much less clarity within others.

This report, sponsored by the Western States Water Council and NASA's Applied Sciences Program (ASP) and the Western Water Applications Office (WWAO), explores the advantages, challenges, current usage, and current policies regarding the use of cloud computing and related technologies among state water resource agencies in the West.



WSWC-NASA APPROACH

There is a growing need to understand how states and local water resource agencies can effectively use cloud computing resources to sustain the new tools and capabilities offered by WSWC and NASA ASP/WWAO research teams. Both organizations have a strong interest in 1) understanding existing policies and guidelines on use of cloud computing resources; 2) identifying barriers to development or implementation of these policies; and 3) identifying best practices and case studies that could inform and accelerate adoption of cloud computing resources to enhance and sustain newly developed services and tools. Via a survey, a targeted workshop, and this summary report, WSWC and NASA's ASP/WWAO have reviewed the policies and organizational constraints within western state water agencies that may tilt the scale for or against cloud solutions. Several case studies of agencies' experiences with the cloud illustrate its benefits and reveal its challenges and remaining barriers.

SURVEY RESULTS

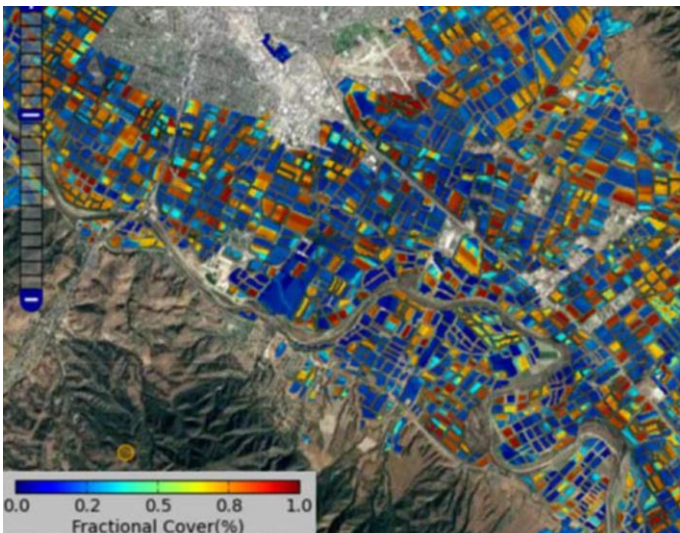
WSWC delivered a survey to the data program and IT managers of their membership to determine the extent of their reliance on centralized IT service groups, whether they currently use cloud services, why or why not, and what their experience has been with the cloud from budgetary, performance, and maintenance perspectives. All WSWC member states responded and provided a wealth of information regarding their data programs

WATER INFORMATION MANAGEMENT SYSTEM (WIMS)

To fully understand states' capabilities and limitations, additional questions were investigated regarding cloud usage, data formats, hosting, etc. These questions helped the NASA ASP and WWAO team achieve a greater understanding of how to transition large remote-sensing projects and tools into water agency operations and decision-making. Breakout sessions amongst the workshop participants were key to understanding how management practices vary within the states, and how partners on NASA projects require ongoing communication and collaboration. Early consultation, ease of data availability, use of standardized formats, and inter-office engagement and training were emphasized.



WSWC AND NASA PROJECTS: FUTURE OF CLOUD COMPUTING



State water resources agencies in the West face myriad challenges when working to complete mission-critical data programs. Many are taking their first tentative steps to include cloud computing and services in their suite of tools and strategies for water management. WSWC and the NASA's ASP and WWAO will continue to investigate what platforms and financial arrangements work well for their members and project co-sponsors. They will continue to strive for better relationships with project co-sponsors in support of their long-term data management needs. This may include governance bodies and partnerships that share in the benefits and costs when hosting and processing large datasets in a cloud environment.



Western States Water Council

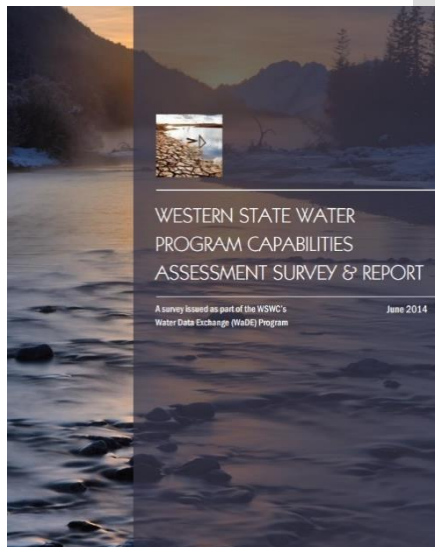
A Voice for Water in the West

"Without this forum we would all be reinventing every wheel. We would also miss out on the opportunity to refine and improve our own successes with ideas we garner from our sister states."

*-Jack Stultz, Montana
Department of
Conservation and Natural
Resources (retired)*

ABOUT THE COUNCIL. The Western States Water Council is an organization consisting of representatives appointed by the governors of eighteen western states. Since its creation, through adoption of a resolution at the Western Governors' Conference in 1965, the Council has striven to fulfill its chartered mission, to ensure the West has an adequate supply of water of suitable quality to meet present and futures needs. While the emphasis and focus of the Council have changed over the years, its essential purposes remain: to foster cooperation among its member States and provide a forum for discussion of a broad spectrum of water resource challenges facing the West.

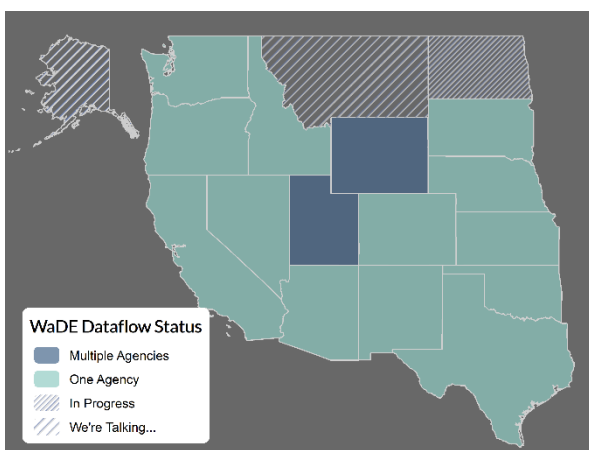
COLLABORATION AND COOPERATION ARE KEY. As States carry out their traditional roles regarding water allocation and management, conservation and protection, challenges are increasing. With changing values and ever-greater demands on limited water resources, complicated by an increasingly complex overlay of federal laws and regulations, the importance of cooperative efforts and exchanges by and among States and federal agencies has likewise been magnified.

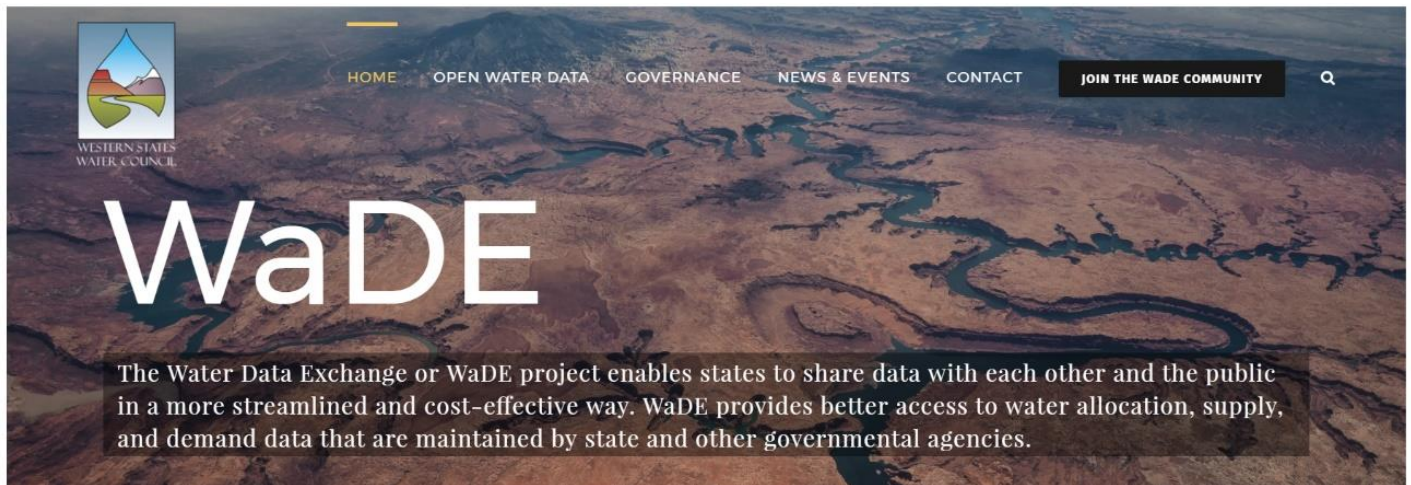


A FOCUS ON BASIC DATA. As the Council works to advance water policies that address these challenges, the value and importance of basic hydrologic monitoring and water use data is clear. The Council has long-supported water data programs at federal and state levels, advocated for increased funding for essential water science, data-gathering, and monitoring programs, and encouraged greater data-sharing and transparency among its members.

A PRINCIPLES-BASED APPROACH. The Council has sought to articulate its vision for sharing water data. These include:

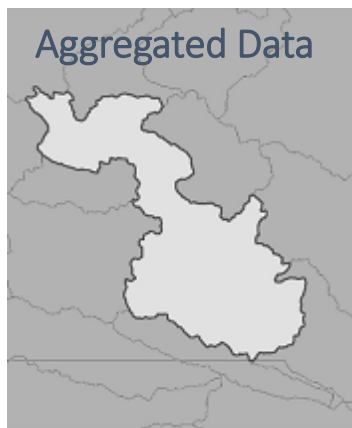
- Making transparency, openness, discoverability, and accessibility the default for public water data, while also ensuring the highest levels of security and privacy for stakeholders where needed.
- Whenever possible, sharing data using developed standards and machine-readable formats, including thoroughly documented metadata, which will promote interoperability, regional analyses, and user flexibility.
- Taking a federated/distributed approach where data-producers maintain control over and responsibility for their information. This allows them the freedom to share what they wish (or not) at any point in time.





Web Services and Data Targeted by WaDE

- GetCatalog: A list of the datasets by year and by area hosted by the agency
- GetSummary: State-agency generated planning and administration datasets that are summarized/aggregated by a watershed or other delineation – estimated water supply, water use, return flows – components of a typical “water budget” and regulatory information.
- GetDetail: Site-specific, detailed water right, diversion, consumptive use, and return flow information
- GetMethod: Metadata and best management practices used to create the data products



Water Supply Examples...

- Annual Streamflow estimates (dry, normal, wet water years)
- Annual Snowpack, Reservoir Storage/Groundwater Availability

Water Use Examples...

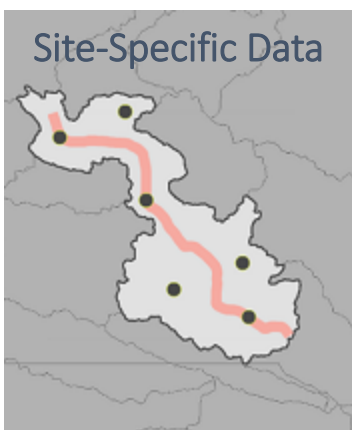
- Summary of Water Withdrawals by Beneficial Use Category
- Summary of Consumptive Use by Beneficial Use Category
- Agriculture - Crop Type Acreage Summary
- Agriculture - Irrigation Method Summary
- Public Water Supply – Population, GPCD

Return Flow Examples

- Agricultural Returns
- Permitted Discharges

Regulatory Examples in the Basin

- Managed Groundwater Area
- Endangered Species Area
- Compact Area/Endangered Species Area



Water Rights Data

- Owner
- Beneficial Use Categories
- Legal Status
- Priority Data
- Amounts Allocated

Diversion Data

- Location – Timestamp/Amount Withdrawn

Consumptive Use Data

- Location – Timestamp/Amount Consumptively Used

Return Flow Data

- Location – Timestamp/Amount Returned to Stream

Looking Forward Through 2019

- The program has increased funding to really ramp up development
- Bringing our remaining member states into the WaDE portal
- More datasets – some states only have one primary dataset (e.g. only water rights data) in WaDE
- Work with states to achieve better coverage and water availability “metrics,”
- Better and more metadata and data quality grading
- More agile development is needed. Faster turnaround on WaDE tech and components. Better architecture for more security, performance monitoring, ease of updates, and usage monitoring
- **If you are a Techie Water Data Wonk (TWDW) and want to help with suggestions, please join our**

WaDE Github Community (<https://github.com/WSWCWaterDataExchange>)

WSWCWaterDataExchange / WaDESchemav0.3

Watch 3 Star 0 Fork 1

Code Issues 2 Pull requests 0 Projects 0 Insights

The proposed next iteration of the WaDE schema. Will include more geospatial information, support for NHD indexing, and data quality control indicators.

7 commits 1 branch 0 releases 1 contributor

Branch: master New pull request Find file Clone or download

wadewswc Schema Revisions Per Feedback		Latest commit f2d7ee2 on Aug 23, 2017
SchemaXSDs	Schema Revisions Per Feedback	9 months ago
README.md	Initial commit	9 months ago
WaDE - NHDPlus Indexing - Data Element Cross-Mapping.x...	Rename and move files	9 months ago
WaDE_DET_v0.3_Oct2017.txt	Schema Revisions Per Feedback	9 months ago
WaDE_DET_v0.3_Oct2017.xlsx	Schema Revisions Per Feedback	9 months ago

Download this file to view existing data elements and proposed changes in Orange.

Planning to Add

- Interoperability with CUAHSI Hydroclient
- NHD tie-in support (lat/long, MeasureID, etc.) for Open Water Data Initiative (NLDI)
- Interbasin transfer data
- Data quality grading, coverage, and completeness
- Centroid support for summarized data
- More compact XML formatting
- Support for JSON, CSV downloads, etc.
- Better API documentation – “How to Make an Application” guidance
- More beautiful and useful visualization products

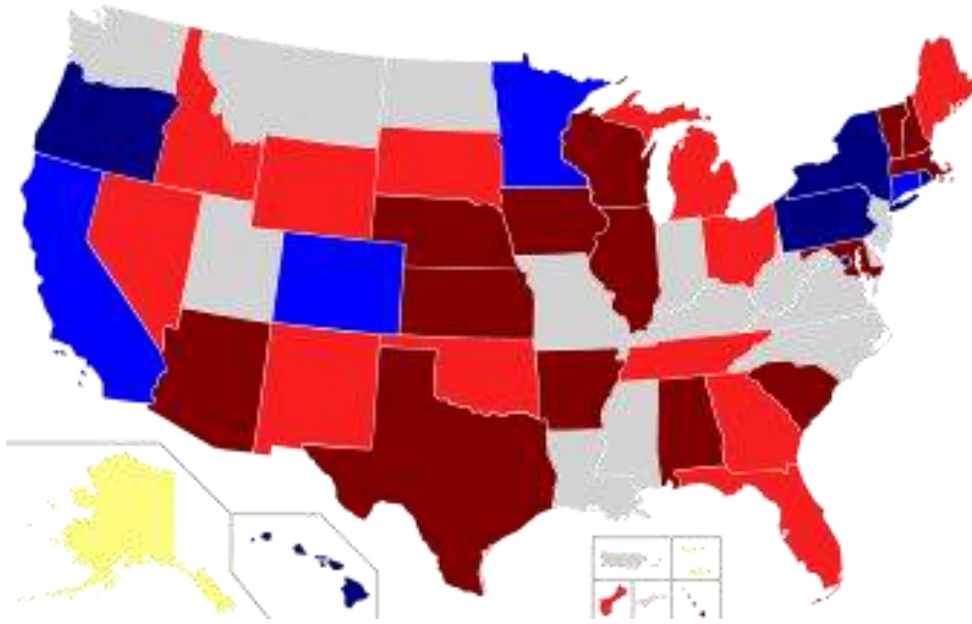
ADAPTATION FOR OTHER STATES

- What state datatypes are we missing?
- What’s your preferred format for data?
- Architectural solutions for hosting distributed networks, while still maintaining states’ autonomy
- Should this be strictly Open Source? If so, what backend/frontend is your favorite?
- If not, what vendor options are out there for hosting that are performant, but not super expensive?

You can add these as “Issues” in the GitHub repo above or email Sara at saralarsen@wswc.utah.gov

Tab K – 2018 Western States Gubernatorial Elections

2018 Gubernatorial Elections



from the [Wikimedia Commons](#)

- Democratic incumbent eligible for re-election
- Term-limited or retiring Democrat
- Republican incumbent eligible for re-election
- Term-limited or retiring Republican
- Independent incumbent eligible for re-election
- No election

State	Governor	Party	Election Status
Alaska	Bill Walker	I	Incumbent, running
Arizona	Doug Ducey	R	Incumbent, running
California	Jerry Brown	D	Termed out
Colorado	John Hickenlooper	D	Termed out
Hawaii	David Ige	D	Incumbent, running
Idaho	Butch Otter	R	Not running
Kansas	Jeff Colyer	R	Incumbent, running
Nebraska	Pete Ricketts	R	Incumbent, running
Nevada	Brian Sandoval	R	Termed out
New Mexico	Susana Martinez	R	Termed out
Oklahoma	Mary Fallin	R	Termed out
Oregon	Kate Brown	D	Incumbent, running
South Dakota	Dennis Daugaard	R	Termed out
Texas	Greg Abbott	R	Incumbent, running
Wyoming	Matt Mead	R	Termed out

Tab L – WSWC Activities and Events

Western States Water Council

Summary of Activities

March 2018 – July 2018

WASHINGTON, DC VISITS

April 18, 2018 – WSWC Executive Director Testified before the House Committee on Natural Resources Subcommittee on Energy and Mineral Resources regarding the use of Reclamation Fund receipts and H.R. 3846 – POWER Counties Act, in Washington, D.C.

May 22-25, 2018 – WSWC Executive Director attended by invitation a GAO workgroup on Agricultural Technologies and Management Practices for Reducing Demand on Water Supplies in Washington, D.C. He also made several visits focused on funding tribal water rights settlements.

WSWC CALLS, MEETINGS, SYMPOSIA AND WORKSHOPS

March 14-15, 2018 – the WSWC held its 186th WSWC Spring Council Meetings and Washington Roundtable, cosponsored with the Interstate Council on Water Policy (ICWP) in Arlington, Virginia.

May 14-17, 2018 – the WSWC and the California Department of Water Resources (CDWR) cosponsored a S2S Precipitation Forecasting Workshop in San Diego, California.

April 4, April 24, May 4, May 25 and July 16 - WOTUS Workgroup Conference Calls.

WGA COORDINATION

WGA Water Policy Advisor Ward Scott and WSWC Executive Director have frequent calls.

June 25-27, 2018 – WSWC Executive Director attended the Western Governors' Association Annual Meeting in Rapid City, South Dakota.

WaDE DEVELOPMENT

April 9-12, 2018 – WaDE Program Manager attended the USGS Water Availability & Use Science Program Water Use Workshop in Boise, Idaho.

April 15-18, 2018 – WaDE Program Manager attended the Texas Water Data Workshop/TWDB IT Meeting in Austin, Texas

COORDINATION WITH WESTFAST AGENCIES

March 8-9, 2018 – WSWC state representatives and the Executive Director attended an EPA/States WOTUS Consultation Meeting in Washington, D.C.

April 17, 2018 – WSWC Executive Director attended the NIDIS Executive Council Meeting in Washington, D.C.

COORDINATION WITH OTHER ORGANIZATIONS

February 27, 2018 – WSWC Executive Director attended the State and Local Governmental Associations Summit, coordinated by the WGA.

April 17-18, 2018 – WSWC Legal Counsel attended the ABA Water Law Conference in Orlando, Florida.

April 24-26, 2018 – WSWC Executive Director attended the Instream Flow Council: Flow 2018 - Managing Rivers, Reservoirs, and Lakes in the Face of Drought in Fort Collins, Colorado.

July 9-12, 2018 – WSWC Executive Director presented as part of a panel on infrastructure needs at the National Association of Flood and Stormwater Management Agencies (NAFSMA) in Santa Fe, New Mexico.

COMMITTEES, TASK FORCES AND WORK GROUPS

Ad Hoc Group on Indian Water Rights Settlements – WSWC Executive Director and Legal Counsel

Advisory Committee on Water Information (ACWI) – WSWC Executive Director

Climate Adaptation Workgroup – WSWC Member Jeanine Jones of California

Subcommittee on Spatial Water Data, USGS Groundwater and Streamflow Information Program

Collaborative Working Group, Open Water Data Initiative (OWDI) Technical Development Workgroup – WaDE Program Manager

American Bar Association Water Law Conference Planning Committee – WSWC Legal Counsel

American Water Resources Association (AWRA) – WSWC Executive Director and WaDE Program Manager

National Geospatial Advisory Committee, Landsat Advisory Group – WSWC Executive Director and WaDE Program Manager

National Integrated Drought Information System (NIDIS) Executive Council – WSWC Executive Director

National Water Census Ad Hoc Group – WaDE Program Manager

National Drought Resilience Partnership – WSWC Executive Director

USGS Water Use Strategic Planning Team – WaDE Program Manager

Western Electricity Coordinating Council (WECC) Scenario Planning Steering Group and Environmental Data Work Group – WSWC Executive Director

Western Policy Network – WSWC Executive Director

Tab M – Future WSWC Meetings

WESTERN STATES WATER COUNCIL

FUTURE MEETINGS

Upcoming Council Meetings/Host States

2018 Meetings

Fall – Coeur d’Alene, Idaho
The Coeur d’Alene Resort
October 23-26, 2018

2019 Meetings

Spring – Arizona
Summer – Washington
Fall – Colorado

Last Hosted

10/10/14 in Scottsdale
6/8/12 in Seattle
4/5/13 in Denver

2020 Meetings Projections

Spring – Washington, D.C.
Summer – Wyoming
Fall – Texas

6/26/13 in Casper
10/12/12 in San Antonio

2021 Meetings Projections

Spring – Oklahoma
Summer – Montana
Fall – South Dakota

4/17/15 in Tulsa
7/18/14 in Helena
10/4/13 in Deadwood

2018 Symposia/Workshops

WSWC Water Quality-Quantity Nexus Workshop
Newport, Oregon
Best Western Agate Beach Inn
August 1, 2018

WSWC/WestFAST Non-Tribal Federal Water Rights Workshop
Coeur d’Alene, Idaho
The Coeur d’Alene Resort
October 23-24, 2018

2019 Symposia/Workshops

WSWC WIMS Workshop	Jan
WSWC Water Management Symposium on Infrastructure	Feb (tentative)
WSWC/NARF Indian Water Rights Settlement Symposium	August

MEETING SCHEDULE

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[illegible]

	Alaska	Arizona	California	Colorado	Idaho	Kansas	Montana	Nebraska	Nevada	New Mexico	North Dakota	Oklahoma	Oregon	South Dakota	Texas	Utah	Washington	Wyoming	Other
171				Denver 4/5/13															
172																		Casper 6/26/13	
173														Deadwood 10/4/13					
174																			Wash. DC 4/3/14
175							Helena 7/18/14												
176		Scottsdale 10/10/14																	
177												Tulsa 4/17/15							
178									50 th Anniversar y Stateline 7/10/15										
179						Manhattan 10/9/15													
180																			Wash. DC 3/22/16
181											Bismarck 7/15/16								
182																St. George 9/30/16			
183								Nebraska City 4/14/17											
184			Eohmert Park 6/29/17																
185										Albuquerque 10/20/17									
186																			Wash. DC 3/14/18
187													Newport 8/3/2018						

Tab Mc – NOAA's Annotated Outline on Subseasonal to Seasonal Forecasting

NOUS41 KWBC 161925
PNSWSH

Public Information Statement PNS18-19
National Weather Service Headquarters Silver Spring MD
325 PM EDT Mon Jul 16 2018

To: Subscribers:
 -NOAA Weather Wire Service
 -Emergency Managers Weather Information Network
 -NOAAPort
 Other NWS Partners and NWS Employees

From: Dave DeWitt, Director
 NCEP/Climate Prediction Center,
 Fred Toepfer, Director, Model Program Division
 Office of Science and Technology Integration

Subject: Soliciting comments on the annotated outline of NOAA's
 Subseasonal and Seasonal Forecasting Innovation: Plans
 for the 21st Century, a report to Congress though
 August 10, 2018

NWS is requesting comments through August 10, 2018, on its annotated outline of the Subseasonal and Seasonal Forecasting Innovation: Plans for the Twenty-First Century Report.

The report is being prepared for submission to Congress in accordance with Title II, Section 201, of the Weather Research and Forecasting Act of 2017, Public Law 115-25. Section 201 authorizes NOAA's Subseasonal and Seasonal (S2S) forecast responsibilities and defines subseasonal as the period from 2 weeks to 3 months and seasonal as the period from 3 months to 2 years. Over the past 20 years, the demand for S2S forecast information has been steadily increasing as federal, state, local, and tribal authorities seek to prepare for and reduce risk from meteorological events well in advance.

The report will serve as a guidepost for NOAA planning and execution as well as to inform the public and NOAA's stakeholders on its efforts on subseasonal and seasonal forecasting. The report will trace the continuum of effort for S2S, from products and services to the innovations needed to enable and improve them. The report is being organized around two main goals: improving the skill of the S2S forecasts and enhancing the value of S2S products for stakeholders.

The NWS will consider all substantive comments and information provided during the public comment period as the agency finalizes this report. In particular the NWS seeks feedback on the scope of the outline and potential utility of this report from relevant federal, regional, state, tribal, and local government agencies, research institutions, and the private sector.

The Annotated Outline can be found here:

https://www.weather.gov/sti/stimodeling_s2sreport

Send comments on this outline by August 10th, 2018 to:

s2sreport.reply@noaa.gov

For more information, contact:

Timothy Schneider

NWS Office of Science and Technology Integration

timothy.schneider@noaa.gov

National Public Information Statements are online at:

<https://www.weather.gov/notification/>

NNNN

Tab N – Kansas Governor's Executive
Order regarding Sexual
Harrassment

STATE OF KANSAS

CAPITOL BUILDING
ROOM 241 SOUTH
TOPEKA, KS 66612



PHONE: (785) 296-3232
FAX: (785) 368-8788
GOVERNOR.KS.GOV

GOVERNOR JEFF COLYER, M.D.

EXECUTIVE ORDER 18-04

Policy Regarding Sexual Harassment

WHEREAS, sexual harassment and retaliation for sexual harassment claims are unacceptable forms of discrimination that must not be tolerated in the workplace; and

WHEREAS, state and federal employment discrimination laws prohibit sexual harassment and retaliation in the workplace; and

WHEREAS, officers and employees of the State of Kansas are entitled to working conditions that are free from sexual harassment, discrimination, and retaliation; and

WHEREAS, the Governor and all officers and employees of the State of Kansas should seek to foster a culture that does not tolerate sexual harassment, retaliation, and unlawful discrimination.

NOW THEREFORE, pursuant to the authority vested in me as Governor of the State of Kansas, I hereby order as follows:

1. All Executive Branch department and agency heads shall have available, and shall regularly review and update at least every three years or more frequently as necessary, their sexual harassment, discrimination, and retaliation policies. Such policies shall include components for confidentiality and anonymous reporting, applicability to intern positions, and training policies.

2. All Executive Branch department and agency heads shall ensure that their employees, interns, and contractors have been notified of the state's policy against sexual harassment, discrimination, and retaliation, and shall further ensure that such persons are aware of the procedures for submitting a complaint of sexual harassment, discrimination, or retaliation, including an anonymous complaint.
3. Executive Branch departments and agencies shall annually require training seminars regarding the policy against sexual harassment, discrimination, or retaliation. All employees shall complete their initial training session pursuant to this order by the end of the current fiscal year.
4. Within ninety (90) days of this order, all Executive Branch employees, interns, and contractors under the jurisdiction of the Office of the Governor shall be provided a written copy of the policy against sexual harassment, discrimination, and retaliation, and they shall execute a document agreeing and acknowledging that they are aware of and will comply with the policy against sexual harassment, discrimination, and retaliation.
5. Matters involving any elected official, department or agency head, or any appointee of the Governor may be investigated by independent legal counsel.
6. The Office of the Governor will require annual mandatory training seminars for all staff, employees, and interns in the office regarding the policy against sexual harassment, discrimination, and retaliation, and shall maintain a record of attendance.
7. Allegations of sexual harassment, discrimination, or retaliation within the Office of the Governor will be investigated promptly, and violations of law or policy shall constitute grounds for disciplinary action, including dismissal.
8. This Order is intended to supplement existing laws and regulations concerning sexual harassment and discrimination, and shall not be interpreted to in any way diminish such laws and regulations. The Order provides conduct requirements for covered persons, and is not intended to create any new right or benefit enforceable against the State of Kansas.
9. Persons seeking to report violations of this Order, or guidance regarding the application or interpretation of this Order, may contact the Office of the Governor regarding such matters.

This document shall be filed with the Secretary of State as Executive Order No. 18-04 and shall become effective immediately.

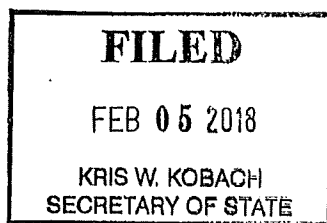
THE GOVERNOR'S OFFICE

BY THE GOVERNOR

DATED

Kris Kobach
Secretary of State

Greg McElroy
Asst. Secretary of State



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9. Persons seeking to report violations of this Order, or guidance regarding the application or interpretation of this Order, may contact the Office of the Governor regarding such matters.

Agreement to Comply with the Policy Against Sexual Harassment, Discrimination, and Retaliation.

I hereby acknowledge that I have received a copy of the State of Kansas Policy Against Sexual Harassment, Discrimination, and Retaliation established by Executive Order 18-04 and agree to comply with the provisions of this policy.


Signature and Date


Printed Name

Tab O – Waters of the United States
(WOTUS) / WSWC Clean Water
Act Resolution (Position #410)



RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
CLEAN WATER ACT JURISDICTION
Rohnert Park, California
June 29, 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WSWC "Strawman" Poll – WOTUS Statements/Principles

The following list of draft statements/principles, related to any future EPA Waters of the U.S. (WOTUS) rulemaking, are for discussion purposes only. They have been developed as we have discussed the unique regulatory and geographic/ hydrologic challenges each of our states face. These principles may provide a foundation for a later consensus WSWC position and comment letter to EPA and the Corps' on an anticipated proposed WOTUS 2.0 rule defining terms and federal jurisdiction. (07/19/2018 draft)

1. States have inherent authority to regulate and protect water quality and waters not under federal jurisdiction remain subject to regulation and protection under states' authorities as "waters of the state."
- 2.a Give full force and effect to Congressional intent and the purposes of CWA §101(b), which states: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution...."
- 2.b Give full force and effect to Congressional intent and the purposes of CWA § 101(g), which 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...."
3. Give as much weight and deference as possible to state needs, priorities, and concerns.
4. Continue to provide States with technical and financial assistance to protect all "waters of the state," not just those determined to also be WOTUS.
5. Waters in the arid West are distinct from other waters, and many streams are intermittent or seasonal, as well as ephemeral.
6. There are physical, biological and chemical differences between waters, and hydrologic differences, both spatially and temporally.
7. There are very different legal doctrines that continue to govern the development and use of western water resources.
8. Private property rights, including rights to the use of water, can not be taken without just compensation.
9. Only WOTUS, defined as jurisdictional for purposes of the CWA, are subject to related federal regulation and permitting.
10. WOTUS 2.0 should provide greater certainty through a clearer definition of the limits of federal jurisdiction.
11. Perennial streams are presumed to be under CWA jurisdiction, consistent with Justice Scalia's opinion, as providing a "relatively permanent surface water connection" to navigable waters.
12. Navigable waters are navigable in fact and now support or in the past supported commercial transportation.
13. It is presumed that intermittent or seasonal streams do not meet Justice Scalia's test and are therefore not WOTUS and fall under State protection and regulation.

14. Regarding the exclusion of intermittent and seasonal streams (above), this is a rebuttable presumption, subject to Justice Kennedy's "significant nexus" test, requiring a connection to a navigable water that is not speculative or insubstantial, to be considered on a case-by-case basis.
- 14.a The "significant nexus" test applies to an individual water (and not all waters in a watershed).
15. Intermittent streams include those fed by snowmelt runoff and seasonal precipitation and are otherwise dry at some time during the year (i.e., spatial and temporal connections to groundwater baseflow are not continuous).
16. Ephemeral streams are not WOTUS and are subject only to State regulation and control.
17. Ephemeral streams are defined as having no baseflow from groundwater and flow only in response to precipitation events.
18. Ephemeral streams include washes, arroyos, coulees, and similar features.
19. Streams are dynamic hydrologic features the nature of which may change over time, but for jurisdictional purposes should be evaluated "as is," with any determination subject to rebuttal now or in the future.
20. Certain reaches of streams may exhibit different characteristics and might be appropriately segmented and categorized accordingly as ephemeral, intermittent or perennial.
21. Groundwaters, defined as any subsurface waters, fall exclusively under the jurisdiction of the States and are not WOTUS.
22. Discharges to groundwater are regulated under State law, as well as the federal Safe Drinking Water Act, and Clean Water Act NPDES permits should not be required.
23. Effluent dependent streams are presumed to be ephemeral and are not WOTUS.
24. Effluent dominated streams, unless otherwise perennial, are not WOTUS.
25. The transfer of water from any water body to another, in compliance with state law, may not be used in the WOTUS jurisdictional determination of the receiving water(s) or the waters of origin (i.e. waters that would otherwise be ephemeral or intermittent except for the transfer of water from one watershed or basin to another, in compliance with state law, are not WOTUS).
26. Non-navigable, isolated, intrastate waters and related wetlands are not WOTUS subject to CWA jurisdiction.
27. Regarding non-navigable, isolated, intrastate water, these include playa lakes, prairie potholes and intrastate terminal lakes.
28. Man-made conveyances and impoundments, unless constructed on or in a navigable waterway or perennial stream, are not WOTUS and are not subject to CWA regulation (but are subject to regulation by the States).

29. Man-made conveyances not subject to WOTUS include both water supply, stormwater and flood water management and control features, such as:
- 29.a -agricultural irrigation canals, laterals and ditches and drains;
 - 29.b -municipal pipelines, conduits, and aqueducts;
 - 29.c -municipal and urban storm drains, storm sewers, and flood flow bypass features;
 - 29.d -roadside barrow pits, ditches, and culverts.
30. Small impoundments not on perennial streams are not WOTUS, such as dugouts, stock and farm ponds, dip ponds and similar man-made structures.
31. Reservoirs not located on navigable or interstate waters or perennial streams are not WOTUS.
32. Wetlands adjacent to or abutting waters that are navigable in fact or along perennial streams are presumed to be WOTUS.
33. Wetlands dependent on a perennial stream are presumably WOTUS.
34. Wetlands immediately adjacent to or abutting perennial streams that are separated by a man-made obstruction such as a berm, are presumed to be WOTUS.
35. Wetlands on intermittent or seasonal streams are presumed not to be WOTUS, subject to rebuttal.
36. Permanent wetlands will not be found on ephemeral streams.
37. Physical, chemical or biological criteria may be used to rebut any presumption that a water is or is not a WOTUS, or that there is a “significant nexus” to waters that are navigable in fact.
38. The burden of proof, based on a preponderance of evidence, lies with the party rebutting the presumption, and should be considered in an appropriate administrative forum, subject to judicial review, on a case-by-case basis (and not considering similarly situated waters in a watershed).
39. For jurisdiction purposes, tribes should be treated as states, and EPA should clearly delineate a process for resolving differences between states and tribes, tribes and other tribes, or states and other states.
40. Any newly proposed WOTUS rule should include an appropriate delay in its effective date, so as to allow States to take such actions as may be necessary to address any gaps in regulation and protection.
41. Appropriate mapping tools should be developed indicating the presumed extent of WOTUS, as well as water of the States, to provide more clarity and certainty.
42. Mapping should be a joint federal/state effort employing the best available data and tools.

Tab P – Letters regarding Elutriate Testing and Streambed Sovereignty



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

May 22, 2018

Civil Works Branch

John A. Paczkowski, P.E., CFM
Assistant State Engineer
North Dakota State Water Commission
900 E Boulevard Ave.
Bismarck, ND 58505-0850



Dear Mr. Paczkowski:

The U.S. Army Corps of Engineers (USACE) intends to construct an Emergent Sandbar Habitat (ESH) project on the Missouri River near Washburn, ND as part of the Missouri River Recovery Program (MRRP). This small scale project (~25 ac) will provide nesting and foraging habitat needed for piping plovers and least terns and provide for important learning on a number of issues pertinent to ESH construction in the Garrison reach. This will support important habitat for species and the Science and Adaptive Management Plan which is the basis for the "no jeopardy" Biological Opinion (BiOP) issued by the U.S. Fish and Wildlife Service (USFWS) for the MRRP.

We sincerely appreciate your willingness to meet with us on several occasions over the last six months, as we prepared this document. Your comments and insights have been carefully considered and are reflected in Draft Project Implementation Report with Integrated Environmental Assessment (PIR/EA). We understand the State Water Commission's obligations to be aware of activities occurring on the Missouri River. In support of our relationship with you as a valuable interagency partner and in the spirit of continued collaboration with your office, we have outlined below where the substantive information provided in permit applications to your office can be found to help inform comments from your office.

Specific information identified on the permit application is available at the following locations in the PIR/EA:

- a. Plans and specifications: A plan view and typical cross-section are shown in Appendix B. The specifications are being reviewed and are still preliminary. We will provide the State Water Commission with a final copy when they are available.
- b. Project location: Paragraph 1.5 on page 4. The project is primarily located in the McLean County Water Resource Board and may be of interest to the Oliver County Water Resource District due to the location on the Missouri River.
- c. Dredging volume and project description: Paragraph 3.2.4 on page 21.
- d. Water Body: Missouri River at River Mile 1348.
- e. Purpose: Paragraph 2 on page 7.



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- f. Contractor: Unknown; the intended acquisition strategy is the MRRP Multiple Award Task Order Contract (MATOC).
- g. Anticipated construction start date: Paragraph 7.8 on page 65.

The draft PIR/EA will be available for review on May 21, 2018 at:
<http://www.nwo.usace.army.mil/Missions/Civil-Works/Planning/Project-Reports/>.

A public meeting is also scheduled for June 12, 2018 at the Lewis and Clark Interpretive Center, 2576 8th Street SW, Washburn, North Dakota 58577 from 6:00 to 8:00 pm. We are also able to meet with you in person or over a webinar as needed.

The Omaha District Commander, Colonel John L. Hudson, received your letter on May 10, 2018, dated April 26, 2018, regarding *North Dakota Sovereign Land on the Missouri River*. To ensure an appropriate and meaningful response to your letter, a formal response is being drafted and will be sent shortly. Thank you for your patience and your continued collaboration on these important issues.

If you have any questions or require additional information, please contact Mr. Randy Sellers, Omaha District Implementation Manager, at 402-995-2689 or randy.p.sellers@usace.army.mil or Mr. Jeremy Szynskie, ESH Program Manager, (402) 995-2468 or at jeremiah.j.szynskie@usace.army.mil.

Sincerely,



Mark Harberg
MRRP Program Manager
Civil Works Branch
Omaha District



State of North Dakota

Office of the State Engineer

Regulatory Division

900 EAST BOULEVARD AVE. • BISMARCK, ND 58505-0850

Regulatory Division (701) 328-2752 • FAX (701) 328-3696 • <http://swc.nd.gov>

April 26, 2018

Col. John L. Hudson
Commander
U.S. Army Corps of Engineers
1616 Capital Avenue
Omaha, NE 68102-4901

RE: North Dakota Sovereign Land on the Missouri River

Dear Col. Hudson:

Prior to North Dakota entering the Union in 1889, the United States held title to the beds and banks of navigable waters within the Dakota Territory, from high water mark to high water mark, in trust for the future State. Upon statehood, title to the beds and banks of navigable waters passed to the State under the equal footing doctrine. The equal footing doctrine accorded newly admitted states the same property interests in submerged lands as was enjoyed by the Thirteen Original States as successors to the British Crown.

In 1953, Congress confirmed states' equal footing rights to submerged lands beneath inland navigable waters when it enacted the Submerged Lands Act. The Act "confirmed" and "established" states' title to and interest in "lands beneath navigable waters within the boundaries of the respective States."

"Navigable waters" means any waters that were navigable in fact at the time of statehood; and they are navigable in fact when they were used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel were or could have been conducted using the customary modes of trade and travel.

It is well established that the Missouri River is navigable in fact and therefore sovereign to the State of North Dakota. The State Engineer is statutorily responsible for administration and management of the State's surface and non-hydrocarbon related mineral interests on sovereign lands. One of the State Engineer's duties is to reasonably assure that any projects occurring on sovereign lands will achieve its intended purpose, will not compromise the public's interest and use of sovereign lands, will not compromise the integrity or functionality of any existing authorized projects, and will not impact riparian landowner rights. Therefore, any projects occurring partially or wholly on

sovereign lands require authorization from the State Engineer prior to construction. Depending on the complexity of the proposed project, applicants are typically advised to budget from 60 to 90 days for the sovereign land permitting process.

Since 2007, the U.S. Army Corps of Engineers (Corps) has been applying for, and receiving, authorization from the State Engineer for projects on the Missouri River related to the Corps' efforts to improve emergent sandbar habitat (ESH) for, and recovery of, the Federally listed interior least tern and piping plover. Since that time, the Corps has applied for eleven sovereign land permits from the State Engineer to improve the quantity and quality of ESH through annual spraying of vegetation and large woody debris removal, and the placement of "Area Closed" and "No Trespassing" signs in an attempt to minimize human disturbances to nesting tern and plover adults and chicks. The "No Trespassing" signage utilized State Engineer authority pursuant to sovereign land management as a courtesy to the Corps and their ESH goals. Nine of the eleven applications have been authorized by the State Engineer, one application was withdrawn due to the 2011 flood event, and one application is currently pending.

The Corps has proposed constructing approximately twenty acres of ESH on the Missouri River in North Dakota in 2018, as part of its continued recovery efforts for the interior least tern and piping plover. On April 4, 2018, State Engineer staff met with the North Dakota Parks and Recreation Department, Corps-Riverdale, and Corps-Omaha staff in Bismarck to discuss the proposed project.

Corps staff indicated that in preparation for design and construction of the project, the Corps has proposed to conduct an elutriate study of the proposed project site and that the Corps is coordinating with the North Dakota Department of Health in the design and scope of that study. Corps staff also stated that the study would necessitate the collection of several borings within the bed of the Missouri River at the proposed ESH construction site for analysis. Corps staff further stated that the borings are to be collected as soon as weather and site conditions allow.

The Corps is reminded that authorization from the State Engineer in the form of a Sovereign Land Permit is required prior to collecting the borings. I ask that the Corps submit an application as soon as practicable in order to facilitate a timely implementation of the State's permitting process. The application should include a description of the collection methods, number and depth of borings to be collected, staging area, and location map.

Any work performed on sovereign land without authorization for the State Engineer is in violation of North Dakota state law.

Col. John L. Hudson

Page 3

April 26, 2018

The Corps is also reminded that it will need to obtain authorization from the State Engineer prior to construction of the ESH. That application should include a description of the project, design drawings, construction methods, access point, staging area, shoreline modifications, sediment containment plans, disturbed area restoration plans, and constructed ESH maintenance plans.

I have enclosed a copy of the State Engineer's *Application for Authorization to Construct a Project within Islands and Beds of Navigable Streams and Waters* form for your convenience. The application form can also be downloaded from our website at www.swc.nd.gov.

I believe the permitting process has served both agencies well by assisting the Corps in meeting its objectives while minimizing any potential impacts to the State's trust resources and responsibilities. I look forward to reviewing the Corps' applications expeditiously and assisting in its recovery efforts. North Dakota's sovereign lands, in particular the Missouri River, are valuable state and national resources. It is my hope that we can continue to work together cooperatively to meet the needs of our constituents and fulfill our respective agency duties.

If you have any questions relative to the permitting process, please contact Gerald Heiser by phone at (701) 328-4935 or by email at gheiser@nd.gov.

Sincerely,

Garland Erbele, PE
State Engineer

GE:GRH:pdh/1625

cc: Melissa Baker, Sovereign Land Advisory Board
Duane DeKery, Sovereign Land Advisory Board
Terry Steinwand, Sovereign Land Advisory Board
Mylynn Tufte, Sovereign Land Advisory Board
Jodi Smith, Sovereign Land Advisory Board
Wayne Stenehjem, Attorney General
Douglas Burgum, Governor
Michael Gunsch, Missouri River Advisory Council
Senator John Hoven
Senator Heidi Heitkamp
Representative Kevin Cramer



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

JUN 19 2018

District Commander

Mr. Garland Erbele
State of North Dakota
Office of the State Engineer
900 East Boulevard Ave.
Bismarck ND 58505-0850

Dear Mr. Erbele,

I received your letter concerning "North Dakota Sovereign Land on the Missouri River" on 10 May 2018, and echo your commitment to work together in a responsive manner to stakeholders' concerns in the state of North Dakota. The Omaha District staff, including the project offices, speak very highly of North Dakota State Water Commission and of your collaboration as a member of the Missouri River Recovery Implementation Committee (MRRIC). Input from your office, the other members of MRRIC, and the general public has provided important feedback on the Missouri River Recovery Management Plan Environmental Impact Statement, the inaugural Missouri River Recovery Program Strategic Plan, and most recently on the draft Environmental Assessment (EA) for Construction of Emergent Sandbar Habitat (ESH) in North Dakota.

The preferred alternative, if selected, would contribute to meeting the species objectives for the piping plover and least tern, enabling us to continue operation of the Missouri River Mainstem System for navigation, flood control and the other authorized purposes in compliance with the Endangered Species Act. The Omaha District has never constructed ESH at this location in the Missouri River in North Dakota. In an effort to continue meaningful collaboration, my team provided your office with a letter specifically identifying where the project information required by North Dakota's *Application for Authorization to Construct a Project with Islands and Beds of Navigable Streams and Waters* is located in the draft EA.

My team intends to move forward with necessary investigations described in the draft EA and in compliance with the law in July, which will inform the National Environmental Policy Act of 1969 (NEPA) process. The project will build up an existing sandbar by moving sand from the bed atop the existing sandbar so that the species may utilize the habitat during high flows. The proposed project is completely within the ordinary high-water mark of the Missouri River and is being proposed to support our important navigation mission. I greatly respect your office's role in protecting North Dakota's interests in the Missouri River bed. However, it is the Corps' position that all lands within the ordinary high water mark, including any transferred by the Federal Government under the Equal Footing Doctrine, are still subject to the Doctrine of Navigational Servitude.



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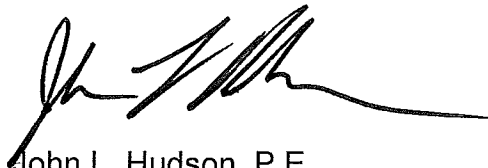
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For these reasons, we respectfully disagree with your position that the Omaha District, US Army Corps of Engineers (USACE) must obtain a North Dakota Sovereign Lands permit for this project to proceed.

Yet again, in the interests of fully sharing information and partnering with the state, we want to notify you of our intent to perform elutriate sampling as suggested by North Dakota Department of Health; apply for a water quality certification pursuant to Section 401 of Clean Water Act; and conduct cultural resource surveys pursuant to the National Historic Preservation Act. In your letter you specifically requested additional information regarding the elutriate sampling. Though the Corps has already provided all the information concerning the elutriate sampling required by North Dakota's sovereign land permit application, I am attaching the information you requested to this letter. We appreciate your engagement and hope we can find a reasonable and mutually acceptable resolution that is respectful of our various authorities and missions.

If you have any questions regarding this letter or attachments or any other aspect of the emergent sandbar habitat program, please contact Jeremy Szynskie, Emergent Sandbar Habitat Project Manager, or my staff at (402) 995-2468 or jeremiah.j.szynskie@usace.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read 'John L. Hudson', with a long horizontal flourish extending to the right.

John L. Hudson, P.E.
Colonel, Corps of Engineers
District Commander

Enclosures

Tab Q – *Washington v. United States, et al*

Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 17–269

WASHINGTON, PETITIONER *v.*
UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 11, 2018]

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE KENNEDY took no part in the decision of this case.

Washington v. United States

In 2001, 21 tribes—including the Suquamish, Klallam, Nisqually, Nooksack, Skokomish, Skagit, Tulalip, Lummi, Quinault, Puyallup, Yakima and others—filed a Request for Determination in the U.S. District Court for Western Washington to compel the State of Washington to repair or replace any culverts that are impeding salmon migration.

The tribes alleged that the barrier culverts modified and destroyed necessary habitat and prevented salmon from moving freely between the sea and upstream spawning grounds at various life stages, reducing the size of salmon runs. Between 1974 and 1986, Tribal harvests of anadromous fish (salmon and steelhead) rose dramatically, eventually reaching 5 million fish, but by 1999 had fallen back to 1974 levels. The tribes argued that the culverts were a significant reason in the decline of harvestable fish in violation of their rights secured under the Stevens Treaties. The District Court previously (1976) recognized the tribes' Treaty right to a fair and equitable share of harvestable fish.

Mediation was unsuccessful, and an early declaratory judgment was appealed and determined by the 9th Circuit to be too broad.

On August 22, 2007, the District Court held that the State of Washington violated tribal fishing rights. The court determined that the Stevens Treaties impose a "duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest." The court noted that the dispute was limited to culverts that block fish passage under state-owned roads, and that granting the narrow declaratory relief requested by the tribes "does not raise the specter of a broad 'environmental servitude' so feared by the State."

At issue was the placement of culverts where roadways cross rivers and streams. "According to the Tribes, culverts under State-owned or maintained roads block fish access to at least 249 linear miles of stream, thus closing off more than 400,000 square meters of productive spawning habitat, and more than 1.5 million square meters of productive rearing habitat... [and that] by the State's own estimates, removal of the obstacles ... would result in an annual increase in production of 200,000 fish, many of which would be available for Tribal harvest."

The State did not disagree with the tribes over the material facts. Washington estimated that 18% of culverts on land managed by its Department of Natural Resources were identified as barriers to anadromous fish passage in a 2000 inventory, and 120 barrier culverts have been identified out of the thousands passing under state roads. However, the State argued that the injunction placed a disproportionate burden on Washington to meet any treaty-based duties, and counterclaimed against the U.S. for creating the problem. The court found that it lacked jurisdiction over the State's counterclaims as the U.S. had not waived its sovereign immunity. The District Court entered an injunction directing the State of Washington to correct the culverts to allow streams to flow underneath roads within the next seventeen years; sooner for the approximately 1,000 culverts within a specific area of watersheds on former tribal lands that are still significant for fish. Washington appealed to the 9th Circuit.

The 9th Circuit ruled in *United States v. Washington*, 853 F.3d 946 (2017), that Washington's barrier culverts are a violation of its obligations relating to off-reservation fishing under tribal treaties, affirming the District Court's decision.

The 9th Circuit rejected Washington's argument that the treaty rights impose no obligations that prevent the state from making land use decisions that could incidentally impact fish. The Court held that an implicit promise of the treaty rights was that the number of harvestable fish would be sufficient to provide a moderate living to the tribes, not merely provide tribal access to usual and accustomed fishing places. The Court noted several alternatives to barrier culverts, including bridges that entirely span streams, culverts that allow unobstructed fish passage, or building roads away from streams. The Court also rejected Washington's request for an injunction requiring the U.S. to fix its culverts first, noting that Washington didn't have standing to bring the tribes' claims and that the U.S. didn't waive sovereign immunity. The 9th Circuit also held that because treaty rights belong to the tribes rather than the U.S., it is not the prerogative of the U.S. to waive those rights.

On August 17, 2017, the State of Washington appealed the 9th Circuit's decision to the Supreme Court. The petition for certiorari presented three questions: (1) whether the 9th Circuit's interpretation of the treaties, guaranteeing sufficient fish to provide a "moderate living," conflicts with the U.S. Supreme Court decision in *Washington v. Fishing Vessel*, 443 U.S. 658 (1979) that the tribes are guaranteed at most a 50% share of available fish; (2) whether the federal role in designing and permitting the culverts in question should require the court to consider a more equitable solution; and (3) whether the injunction to remove the culverts at great cost violates principles of federalism and comity, when there is no clear evidence of a connection to the tribal fisheries, or that culvert replacement will have an impact.

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

Washington also argued that the 9th Circuit's new interpretation of the treaty, requiring the state to ensure enough fish to enable a "moderate living" for the tribes, "is not only irreconcilable with precedent, it is also unworkable." It ignores natural fluctuations in salmon runs, salmon prices, non-salmon tribal incomes, and tribal population. Further, the court's broad decision could be used to attack a variety of development, construction, or farming practices perceived to diminish salmon harvest numbers, or to demand the removal of dams or the elimination of century-old

water rights, significantly affecting the state's natural resource management. Additionally, "the future reach of this decision extends far beyond the State of Washington, as the same fishing rights are reserved to tribes in Idaho, Montana, and Oregon."

On September 20, 2017, the States of Idaho, Kansas, Louisiana, Maine, Montana, Nebraska, and Wyoming filed an amicus brief in support of the petition for certiorari. The States argued that the 9th Circuit's decision creates an environmental servitude that goes far beyond the removal of culverts, writing "a script for subjecting a broad swath of regulation by States...to like servitudes." By way of example, the States point to recent EPA reliance on the 9th Circuit's decision to impose federal water quality standards in Maine and Washington. "It is a short step from [transforming the treaty right] to creating a claim for injunctive relief against States...[for] any diminishment of fish runs subject to harvest and human consumption." This has implications for dams, water diversions, increasing stream temperatures, timber harvests, grazing practices, and sediment-producing construction, among other things.

The States also noted the failure of the 9th Circuit to apply a more appropriate culvert-specific assessment of benefits and costs, or to take into consideration the fact that Washington is already two decades into the process of improving culvert fish passage.

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

On June 11, 2018, the U.S. Supreme Court issued a 4-4 per curium decision in *Washington v. United States*, that the decision of the 9th Circuit on the removal of state culverts "is affirmed by an equally divided court." Justice Anthony Kennedy recused himself from the decision due to his involvement in an earlier, related case while serving on the 9th Circuit.

Washington Attorney General Bob Ferguson said: "Today's ruling brings a resolution to a case that has gone on for nearly 20 years, defended by multiple attorneys general. It is unfortunate that Washington state taxpayers will be shouldering all the responsibility for the federal government's faulty culvert design. The Legislature has a big responsibility in front of it to

ensure the state meets its obligation under the court's ruling. It's also time for others to step up in order to make this a positive, meaningful ruling for salmon. Salmon cannot reach many state culverts because they are blocked by culverts owned by others. For example, King County alone owns several thousand more culverts than are contained in the entire state highway system. The federal government owns even more than that in Washington state. These culverts will continue to block salmon from reaching the state's culverts, regardless of the condition of the state's culverts, unless those owners begin the work the state started in 1990 to replace barriers to fish. I look forward to working with tribal governments to advocate for the funding necessary to comply with this court order, and to ensure other culvert owners do their part to remove barriers to salmon passage."

Tab R – *Mississippi v. Tennessee*

IN THE
Supreme Court of the United States

STATE OF MISSISSIPPI,
Plaintiff,

v.

STATE OF TENNESSEE, CITY OF MEMPHIS, TENNESSEE,
AND MEMPHIS LIGHT, GAS & WATER DIVISION,
Defendants.

On Bill of Complaint
Before the Special Master, Hon. Eugene E. Siler, Jr.

**MOTION OF DEFENDANTS STATE OF TENNESSEE, CITY OF
MEMPHIS, AND MEMPHIS LIGHT, GAS & WATER DIVISION
FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW
IN SUPPORT THEREOF**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
GLOSSARY	iv
I. INTRODUCTION	1
A. The Limited Issue Identified For The Hearing	1
B. Summary Judgment In Original-Jurisdiction Actions	4
II. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE AQUIFER IS INTERSTATE	5
A. The Aquifer Underlies Mississippi, Tennessee, And Six Other States	5
B. The Aquifer Is An Interstate Resource Because The Impact Of Pumping From The Aquifer Crosses State Borders	7
C. The Aquifer Is An Interstate Resource Because Groundwater Naturally Flowed Beneath And Across State Lines Before Pumping Began	9
D. The Aquifer Is An Interstate Resource Because It Is Hydrologically Connected To Interstate Surface Water Resources.....	11
III. PLAINTIFF’S RECENTLY DEVISED “TWO AQUIFER” THEORY IS FACTUALLY AND LEGALLY ERRONEOUS AND DOES NOT PRECLUDE SUMMARY JUDGMENT.....	12
IV. CONCLUSION.....	14
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page
CASES	
<i>Alabama v. North Carolina</i> , 560 U.S. 330 (2010).....	4, 5
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982).....	1
<i>Idaho ex rel. Evans v. Oregon</i> , 462 U.S. 1017	2, 10
<i>Kansas v. Colorado</i> , 206 U.S. 46 (1907).....	5, 7, 8
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986).....	4
<i>Nebraska v. Wyoming</i> :	
507 U.S. 584 (1993).....	4
515 U.S. 1 (1995).....	11
<i>Tarrant Reg’l Water Dist. v. Herrmann</i> , 569 U.S. 614 (2013)	1
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983).....	11
<i>Washington v. Oregon</i> , 297 U.S. 517 (1936).....	11
 RULES	
Fed. R. Civ. P.:	
Rule 30(b)(6)	5, 7
Rule 36(b)	13
Rule 56.....	4

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GLOSSARY

Branch Dep.	Deposition of Charles Thomas Branch, <i>Hood v. City of Memphis, et al.</i> , No. 2:05CV32-D-B (N.D. Miss.) (Oct. 1, 2007)
CMP	Case Management Plan (Dkt. No. 57)
Compl.	State of Mississippi’s Complaint in Original Action, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed June 6, 2014) (Dkt. No. 1)
Compl. App.	Appendix to Motion for Leave To File Bill of Complaint in Original Action, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed June 6, 2014) (Dkt. No. 1)
Crawford Dep.	Deposition of Jamie Crawford, <i>Hood v. City of Memphis, et al.</i> , No. 2:05CV32-D-B (N.D. Miss.) (July 30, 2007)
Joint Statement	Plaintiff’s and Defendants’ Joint Statement of Stipulated and Contested Facts, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed Feb. 28, 2018) (Dkt. No. 64)
Langseth Rep.	Expert Report of David E. Langseth on the Interstate Nature of the Memphis/Sparta Sand Aquifer (June 27, 2017)
Larson Rep.	Expert Report of Steven P. Larson (June 30, 2017)
Memphis Mot.	City of Memphis, Tennessee and Memphis Light, Gas & Water Division’s Motion for Judgment on the Pleadings, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed Feb. 24, 2016) (Dkt. No. 28)

Miss. <i>Hood</i> Br.	Plaintiff’s Response to Defendants’ (I) Motion to Dismiss for Lack of Ripeness/Lack of Standing, (II) Motion to Dismiss for Failure to Join Indispensable Party, (III) Motion to Dismiss the Tort Claims for Lack of Subject Matter Jurisdiction/Improper Venue, <i>Hood v. City of Memphis, et al.</i> , No. 2:05CV32-D-B (N.D. Miss. filed Apr. 11, 2005) (ECF No. 29)
MLGW	Memphis Light, Gas & Water Division
Op.	Memorandum of Decision on Tennessee’s Motion to Dismiss, Memphis and Memphis Light, Gas & Water Division’s Motion to Dismiss, and Mississippi’s Motion to Exclude, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. Aug. 12, 2016) (opinion of Special Master) (Dkt. No. 55)
Spruill Dep.	Deposition of Richard Spruill (Sept. 28, 2017)
Spruill Rebuttal Rep.	Expert Report Addendum #1 of Richard K. Spruill, Ph.D., P.G. (July 31, 2017)
Spruill Rep.	Expert Report of Richard K. Spruill, Ph.D., P.G. (June 30, 2017)
Tenn. Mot.	Motion of Defendant State of Tennessee for Judgment on the Pleadings, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed Feb. 25, 2016) (Dkt. No. 30)
U.S. Amicus Br.	Brief for the United States as Amicus Curiae Supporting Defendants, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed Mar. 3, 2016) (Dkt. No. 32)
USGS	United States Geological Survey
Waldron Rep.	Expert Report of Brian Waldron, Ph.D. (June 30, 2017)
Wiley Dep.	Deposition of David Wiley (Sept. 26, 2017)

Wiley Rep.	Update Report on Diversion and Withdrawal of Groundwater from Northern Mississippi Into the State of Tennessee (prepared by Leggette, Brashears & Graham, Inc.) (June 30, 2017) (expert report of David Wiley)
S__ D__ Resp. to D__	Citations to S__ and D__ refer to the numbered facts identified in the Joint Statement. In the Joint Statement, S__ refers to the facts to which the parties stipulated. D__ refers to the facts submitted by Defendants that Mississippi purports to dispute. Resp. to D__ refers to Mississippi's response to Defendants' fact, which often indicates Mississippi's agreement with a portion of the fact, and is therefore cited in the Motion.

Defendants, the State of Tennessee, the City of Memphis, Tennessee, and Memphis Light, Gas & Water Division (collectively, “Defendants”), move for summary judgment against Plaintiff, the State of Mississippi (“Mississippi”), and ask the Special Master to find that, as a matter of law, the aquifer at issue in this cause is an interstate aquifer. Because equitable apportionment is the exclusive remedy for disputes between States over rights to a shared interstate water resource, and because Mississippi has expressly disavowed the remedy of equitable apportionment, Defendants are entitled to judgment as a matter of law. Defendants are available for oral argument on this Motion if it would assist the Special Master.

I. INTRODUCTION

A. The Limited Issue Identified For The Hearing

On August 12, 2016, the Special Master issued his Memorandum of Decision (“Op.”) in response to Defendants’ Motions for Judgment on the Pleadings. The Special Master noted that “[e]quitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream.” Op. 19 (quoting *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982)) (alteration in original). It is the exclusive remedy for disputes between States over rights to use interstate water resources that are not subject to an interstate compact. See, e.g., *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 619 (2013).

The Special Master further acknowledged that the equitable-apportionment doctrine applies broadly “to a variety of interstate water disputes – and even to runs of anadromous fish” – when “‘the action of one State reaches through the agency of natural laws into the territory of another State.’” Op. 20 (quoting *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024 & n.8 (1983)). “[G]roundwater pumping,” the Special Master observed, “generally resembles surface water pumping; both could have an effect on water in another state through the operation of natural laws.” *Id.* Accordingly, “equitable apportionment appears to apply to disputes between States over interstate groundwater.” Op. 25. Yet Mississippi “has explicitly stated that it does not seek an equitable apportionment of the Aquifer.” Op. 19 (citing Compl. ¶¶ 38, 48).

Given the Special Master’s conclusion that equitable apportionment applies to interstate groundwater disputes, “the question then becomes whether Mississippi’s claims touch on . . . an interstate resource.” Op. 25, 35. Under the Supreme Court’s “functional approach to determining when water is subject to equitable apportionment,” the dispositive question is whether the Aquifer¹ “is such that the removal of water within a State’s borders can have a direct effect on the availability

¹ The aquifer at issue in this lawsuit is called the “Sparta Aquifer” in Plaintiff’s Complaint, but it is commonly referred to by many other names including, without limitation, the “Memphis Sand Aquifer,” “Sparta-Memphis Sand,” and the “Middle Claiborne Aquifer.” See discussion *infra* Part III. For purposes of this Motion, the aquifer at issue will be referred to as the “Aquifer.”

of water in another State.” Op. 31. Applying that approach to Mississippi’s Complaint at the pleading stage, the Special Master concluded that Mississippi failed to allege plausibly that the Aquifer at issue is not interstate and that “dismissal would likely be appropriate under Rule 12(c).” Op. 35. However, noting his “responsibility to prepare an adequate record for review,” the Special Master ordered a hearing on the threshold “limited issue of whether the Aquifer and the water constitutes an interstate resource.” Op. 36. “Evidence that would likely be relevant” to this limited issue “includes the nature and extent of hydrological and geological connections between the groundwater in Memphis and that in Mississippi, the extent of historical flows in the Aquifer between Mississippi and Tennessee, and similar considerations.” *Id.*

Discovery on that limited issue is now complete and has created an “adequate record for review” that warrants summary judgment. *Id.* As explained below, there is no genuine dispute that:

- The Aquifer lies beneath Mississippi, Tennessee, and six other States. *See infra* Part II.A.
- Groundwater pumping in one State can and does affect groundwater conditions in other States. *See infra* Part II.B.
- Before pumping began, groundwater in the Aquifer flowed naturally across state lines, including from Mississippi to Tennessee. *See infra* Part II.C.
- The Aquifer is hydrologically connected to interstate surface waters. *See infra* Part II.D.

With the benefit of a full discovery record on the threshold issue, any material factual questions that might have existed at the pleading stage have been answered conclusively in Defendants' favor. Nothing else is needed for the Special Master to dismiss Mississippi's claims under the functional approach he already established. Indeed, no reasonable trier of fact could now dispute that the Aquifer and its groundwater constitute an interstate resource subject to equitable apportionment.

B. Summary Judgment In Original-Jurisdiction Actions

In original-jurisdiction actions, summary judgment is proper “where there ‘is no genuine issue as to any material fact’ and the moving party is ‘entitled to a judgment as a matter of law.’” *Alabama v. North Carolina*, 560 U.S. 330, 344 (2010) (citation omitted). Rule 56 of the Federal Rules of Civil Procedure, though not binding, guides the determination. *See Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). To create a “genuine” dispute, a party “must do more than simply show that there is some metaphysical doubt as to the material facts”; it must “come forward with specific facts” demonstrating a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

Mississippi has asserted in the parties' Joint Statement that many facts are “disputed,” but Mississippi's assertions are factually unfounded, refuted by its own experts, and, most importantly, immaterial to the dispositive legal question the Special Master has articulated. *See infra* Part III. The facts supporting Defendants'

Motion for Summary Judgment are not genuinely disputed because they come directly from the testimony of Mississippi's experts and Mississippi's Rule 30(b)(6) witnesses. An evidentiary hearing will not reveal any additional facts material to whether the Aquifer is interstate; it will merely waste public resources. Indeed, Mississippi has had a full and fair chance to develop evidence showing that the Aquifer is not an interstate resource, and it has failed to do so. The Special Master should thus recommend that summary judgment be granted in order to "facilitate the efficient disposition of th[is] case." *Alabama v. North Carolina*, 560 U.S. at 353-54.

II. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE AQUIFER IS INTERSTATE

A. The Aquifer Underlies Mississippi, Tennessee, And Six Other States

As the Special Master recognized, "geological characteristics of a water resource are relevant to whether [the water at issue] should be considered interstate in nature"; for example, the Supreme Court has found it persuasive that a particular river "'ha[d] been recognized by geographers, explorers, and travelers'" as a single body of water. Op. 31-32 (quoting *Kansas v. Colorado*, 206 U.S. 46, 115 (1907)). The record shows that the Aquifer is a single, continuous hydrological body that lies beneath parts of Mississippi, Tennessee, and six other States.

The United States Geological Survey (“USGS”) confirms that the Aquifer extends beneath multiple States and is the “most widely used aquifer for industry and public supply . . . in Arkansas, Louisiana, Mississippi, and Tennessee.” Ex. 1 (Tony P. Schrader, *Potentiometric Surface in the Sparta-Memphis Aquifer of the Mississippi Embayment*, Spring 2007, USGS Scientific Investigations Map 3014 (2008)).² Further, Mississippi’s expert, David Wiley, concedes that the fact that the Aquifer underlies multiple States is “not really disputed” and “pretty well agreed upon by scientists.” Ex. 7 (Wiley Dep. 11:5-8, 12:4-13:12). Every relevant study, including scientific papers referenced or relied upon by all five experts in this case, describes the Aquifer as underlying multiple States including Mississippi and Tennessee and provides substantially identical maps of the Aquifer’s boundaries.³

² This USGS paper was referenced by all five experts in this case. See Ex. 2 (Waldron Rep. 25); Ex. 3 (Larson Rep. 22); Ex. 4 (Langseth Rep. 21); Ex. 5 (Wiley Rep. 22); Ex. 6 (Spruill Rep. 43).

³ *E.g.*, Ex. 8 (J.V. Brahana & R.E. Broshears, *Hydrogeology and Ground-Water Flow in the Memphis and Fort Pillow Aquifers in the Memphis Area, Tennessee*, USGS Water-Resources Investigations Report 89-4131, at 1-5, 26 (2001) (Exhibit 13 to Wiley Dep.)); Ex. 9 (Brian R. Clark & Rheannon M. Hart, *The Mississippi Embayment Regional Aquifer Study (MERAS): Documentation of a Groundwater-Flow Model Constructed to Assess Water Availability in the Mississippi Embayment*, USGS Scientific Investigations Report 2009-5172, at 1-2, 8 (2009) (“Clark & Hart MERAS Report”) (cited in Spruill Rep. 39)); Ex. 10 (J.E. Reed, *Analog Simulation of Water-Level Declines in the Sparta Sand, Mississippi Embayment*, USGS Hydrologic Atlas, HA 434 (1972) (cited in Spruill Rep. 43)); Ex. 11 (J. Kerry Arthur & Richard E. Taylor, *Ground-Water Flow Analysis of the Mississippi Embayment Aquifer System, South-Central United States: Regional Aquifer System Analysis – Gulf Coastal Plain*, USGS Professional Paper 1416-I, at I1-I2, I11-I12, I43 (1998) (cited in Wiley Rep. 21; Spruill Rep. 39)).

And Mississippi's own expert and Rule 30(b)(6) witnesses acknowledge that wells in Tennessee and Mississippi are drilled straight down and are pumping from the same "shared" resource. See Ex. 7 (Wiley Dep. 18:23-19:6, 132:6-10); Ex. 12 (Crawford Dep. 133:10-20, 138:16-139:1); Ex. 13 (Branch Dep. 45:24-46:8). The Aquifer's eight-state geological footprint, by itself, confirms that it is an interstate resource. See Op. 31-32.

B. The Aquifer Is An Interstate Resource Because The Impact Of Pumping From The Aquifer Crosses State Borders

The Special Master also concluded that a water resource is likely interstate if it is "such that the removal of water within a State's borders can have a direct effect on the availability of water in another State." Op. 31. Mississippi claims that pumping from the Aquifer from wells located entirely in Shelby County, Tennessee,⁴ has pulled groundwater in that same Aquifer from beneath Mississippi across their shared boundary into Tennessee. See Compl. ¶ 14; see also Resp. to D65 ("The pumping within Tennessee has . . . had a material impact on Mississippi's natural groundwater resource."). That core allegation, as confirmed by the discovery record, shows that this is a case in which "'the action of one State reaches through the agency of natural laws into the territory of another State.'" Op. 30-31 (quoting *Kansas v. Colorado*, 206 U.S. at 97-98).

⁴ Mississippi now has stipulated to the fact that "[a]ll of Memphis Light, Gas & Water Division's wells are physically located entirely within Tennessee." S34.

All of the parties' experts agree that, through the natural laws of hydraulics, pumping groundwater from any well creates a "cone of depression" that lowers the potentiometric head in the area surrounding an active pumping well, with the lowest potentiometric head being closest to the well. S18. This causes groundwater from surrounding higher-head areas to flow toward the pump. *See* Ex. 14 (Ralph C. Heath, *Basic Ground-Water Hydrology*, USGS Water-Supply Paper 2220, at 30 (2004 rev.)). In this case, Mississippi's experts agree that there is a cone of depression in the Aquifer extending beneath southwest Tennessee and northwest Mississippi that is the result of the cumulative pumping in both States. *See* Ex. 7 (Wiley Dep. 86:6-16, 87:21-88:1); *see also* Resp. to D81 ("Mississippi acknowledges that wells drilled within a specified distance of the Mississippi border will necessarily have some theoretical impact on the regional cone of depression . . ."). That cross-border cone of depression epitomizes "'one State reach[ing] through the agency of natural laws into the territory of another State'" and, therefore, supports the interstate character of the Aquifer. Op. 31 (quoting *Kansas v. Colorado*, 206 U.S. at 97-98).

Further, Mississippi has agreed that the cross-border effect of pumping goes both ways: pumping from the Aquifer in Tennessee affects the flow of groundwater in Mississippi, and pumping from the Aquifer in Mississippi affects the flow of groundwater into Tennessee. *See* Resp. to D72-D73, D77; Ex. 7 (Wiley Dep. 16:4-13). Finally, the parties agree that there have never been any physical barriers in the

Aquifer that impede or prevent the flow of groundwater across the Tennessee-Mississippi border. *See* Resp. to D48; Ex. 15 (Response to Tennessee’s Interrogatory No. 3). Interstate groundwater flow in the Aquifer is not limited to the Mississippi-Tennessee shared border. Unrebutted expert opinion shows that pumping from the Aquifer in certain areas of Mississippi affects groundwater in Arkansas and Louisiana, pumping in certain areas of Arkansas affects groundwater in Mississippi and Louisiana, and pumping in certain areas of Louisiana affects groundwater in Arkansas. *See* Ex. 4 (Langseth Rep. 21-22); Resp. to D78-D80. These cross-border “hydrological and geological connections” confirm that the Aquifer is an interstate resource. Op. 36.

C. The Aquifer Is An Interstate Resource Because Groundwater Naturally Flowed Beneath And Across State Lines Before Pumping Began

The Special Master also observed that “the extent of historical flows in the Aquifer between Mississippi and Tennessee” is relevant to the “limited issue of whether the Aquifer and the water constitutes an interstate resource.” Op. 36. This consideration likewise supports summary judgment. The record now establishes that groundwater in the Aquifer was continually flowing under pre-development conditions, and still is today. *See* Resp. to D35; Ex. 16 (Spruill Dep. 41:14-23); Ex. 17 (Spruill Rebuttal Rep. 27-28). It is also now undisputed that under pre-development conditions (*i.e.*, before the influence of pumping) some

groundwater in the Aquifer naturally flowed from Mississippi into Tennessee. *See* Resp. to D49-D50; Ex. 2 (Waldron Rep. 13-15); Ex. 3 (Larson Rep. 19-22); Ex. 4 (Langseth Rep. 16-17); Ex. 5 (Wiley Rep. 11); Ex. 6 (Spruill Rep. 35-36); Ex. 17 (Spruill Rebuttal Rep. 15-16).

In fact, both of Mississippi’s experts have now adopted the pre-development flow map that Mississippi attached to its Complaint, containing what Mississippi identified as an “Area of Limited Natural Flow from Mississippi to Tennessee,” defined by a yellow triangle adjoining the state border.⁵ Mississippi’s experts opined that, before pumping began, groundwater in the Aquifer within the yellow triangle area in Mississippi naturally moved into Tennessee. This is the same area of interstate flow that the Special Master has already noted “certainly do[es] not help” Mississippi’s contention that the water at issue is intrastate. Op. 33-34 (citing Compl. App. 20a, 70a). Mississippi’s own experts now conclusively establish the existence of “historical flows” in the Aquifer between Mississippi and Tennessee across their shared border. Op. 36. An evidentiary hearing is thus unnecessary – the Aquifer undisputedly is an interstate resource subject to equitable apportionment. *Id.*⁶

⁵ *See* Ex. 5 (Wiley Rep. 11 & Figure 9); Ex. 6 (Spruill Rep. 36, Figure 17).

⁶ Defendants do not waive, and hereby expressly reserve, their right to assert that Mississippi cannot state a viable claim for equitable apportionment because it cannot prove “by clear and convincing evidence some real and substantial injury or damage.” *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1027.

It is further undisputed that under pre-development conditions groundwater in the Aquifer naturally flowed across other state boundaries as well – following what Mississippi’s expert David Wiley acknowledged to be “an interstate flow path.” Ex. 7 (Wiley Dep. 142:3-8). For example, groundwater in the Aquifer naturally flowed from both Mississippi and Tennessee beneath the Mississippi River into Arkansas. See Ex. 6 (Spruill Rep. 36, Figure 17); Ex. 7 (Wiley Dep. 73:3-19, 96:19-23); Resp. to D52. Those undisputed historical cross-border flows further prove that the Aquifer is an interstate resource.

D. The Aquifer Is An Interstate Resource Because It Is Hydrologically Connected To Interstate Surface Water Resources

As the Special Master noted, “the Supreme Court has indicated that equitable-apportionment principles govern disputes between States over a body of interstate surface water with a groundwater component.” Op. 20 (citing *Texas v. New Mexico*, 462 U.S. 554, 556-58 & n.2 (1983)); see also *Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995); *Washington v. Oregon*, 297 U.S. 517, 524-26 (1936). Here, Mississippi’s experts agree that the Aquifer is hydrologically connected to surface streams such as the Wolf River and other tributaries of the Mississippi River. See Ex. 7 (Wiley Dep. 188:17-190:21); Ex. 16 (Spruill Dep. 40:2-41:10). The Wolf River is an interstate river that originates in Mississippi and flows into Tennessee before emptying into the Mississippi River. See Ex. 9 (Clark & Hart MERAS Report at 6, Figure 3). Moreover, both of Mississippi’s experts opined that a substantial amount

of the water in the Aquifer discharges now (and did under natural conditions) to the Mississippi River itself, the paradigmatic interstate river. See Ex. 6 (Spruill Rep. 19, 23-24); Ex. 5 (Wiley Rep. 9-11); Ex. 7 (Wiley Dep. 190:17-21). The Aquifer’s undisputed hydrological connections to interstate surface waters further support a finding that the groundwater at issue is interstate and therefore subject to equitable apportionment.

III. PLAINTIFF’S RECENTLY DEVISED “TWO AQUIFER” THEORY IS FACTUALLY AND LEGALLY ERRONEOUS AND DOES NOT PRECLUDE SUMMARY JUDGMENT

Since Mississippi filed its first complaint in federal district court against Memphis and MLGW in 2005, it has consistently taken the position that Memphis Sand and Sparta Sand were different names for the same resource – the Aquifer at issue in this case. Throughout, Mississippi and its experts have used these names interchangeably.⁷ Yet, after the close of discovery in this case, Mississippi, for the first time in the 12 years since this litigation began, appears to have changed its position to assert that the Memphis Sand and Sparta Sand are two “distinct” but “hydrologically connected” aquifers. Resp. to D25, D27. According to Mississippi’s new “two aquifer” theory, the Memphis Sand Aquifer exists beneath

⁷ For example, Mississippi represented to the district court and the Fifth Circuit that its claims related to a single aquifer underlying the two States. *E.g.*, Miss. Hood Br. 1 (“the so-called ‘Sparta’ Aquifer, also known as the Memphis Sand Aquifer across the state line (the ‘Aquifer’ or ‘Sparta Aquifer’)”); see *infra* note 8 (Mississippi’s experts explaining that these names refer to one aquifer).

Tennessee and northern Mississippi, whereas the Sparta Sand Aquifer exists beneath Mississippi, Louisiana, and Arkansas. *See* Resp. to D25.

As an initial matter, the Special Master should summarily reject Mississippi’s “two aquifer” theory because Mississippi has previously stipulated that there is only one Aquifer at issue that underlies both Tennessee and Mississippi. In its response to MLGW and Memphis’s Request for Admission No. 1, Mississippi admitted “that the general geologic formation known as the Sparta Sand underlies several states, including Mississippi, Tennessee, and Arkansas.” Ex. 18. Accordingly, that fact has been “conclusively established” under the Federal Rules adopted by the Special Master’s CMP. Fed. R. Civ. P. 36(b); *see* CMP ¶ 4(b).

Additionally, Mississippi’s “two aquifer” theory is squarely refuted by Mississippi’s own expert David Wiley, who testified that the various names used by the experts in this case for the resource – “Sparta Sand,” “Sparta/Memphis Sand,” “Middle Claiborne Aquifer,” “Memphis Sparta Sand Aquifer,” “MSSA,” “Sparta Memphis Sand” – all refer to the same aquifer, Ex. 7 (Wiley Dep. 9:14-11:4), and that Shelby County, Tennessee, and DeSoto County, Mississippi, “are [both] pumping from the same aquifer,” Ex. 7 (Wiley Dep. 132:6-10) (emphasis added).⁸

⁸ *See also* Ex. 6 (Spruill Rep. 2 (“The Sparta-Memphis Sand, also known as the Middle Claiborne Aquifer or the Memphis Aquifer, is an important source of potable groundwater within northwestern Mississippi and southwestern Tennessee.”); *id.* at 1-4); Ex. 5 (Wiley Rep. 7; *id.* at 5, 9-10).

The position taken by both of Plaintiff’s experts – that there is a single aquifer – is consistent with the views of the USGS and of the United States. *See, e.g.*, Ex. 1 (Schrader, USGS Scientific Investigations Map 3014 (“The most widely used aquifer for industry and public supply . . . in Arkansas, Louisiana, Mississippi, and Tennessee is the Sparta-Memphis aquifer.”))⁹; U.S. Amicus Br. 3 (“The Sparta Sand is hydrologically correlated to the Memphis Sand, and they are considered to be one and the same aquifer”) (citation omitted). There is only one Aquifer at issue. It underlies Tennessee, Mississippi, and six other States.

More important, even if the Special Master were to consider Mississippi’s “two aquifer” theory, it would not change the undisputed facts that the water beneath Tennessee is hydrologically connected to the water beneath Mississippi, that pumping in one State impacts the Aquifer in the other State, and that groundwater naturally flowed across the Mississippi-Tennessee border in pre-development times. These concessions are more than sufficient to establish that the water resource at issue is interstate.

IV. CONCLUSION

Discovery on the limited issue of whether the Aquifer is an interstate resource has now created an “adequate record for review” that warrants summary judgment. Based on Mississippi’s own proof, there is no genuine dispute that the Aquifer spans

⁹ This USGS paper was cited by all five experts in this case. *See supra* note 2.

multiple States, that pumping on either side of the Tennessee-Mississippi state boundary affects groundwater conditions in the other State, that groundwater flowed naturally across the shared Mississippi-Tennessee state border under natural conditions, and that the groundwater at issue is hydrologically connected to numerous bodies of interstate surface water. Nothing else is needed for the Special Master to dismiss Mississippi's claims under the framework he already established. An evidentiary hearing will not reveal anything new. For all of the above reasons, Defendants respectfully request that the Special Master recommend that their Motion for Summary Judgment be granted and that this cause be dismissed.

Respectfully submitted this 1st day of June, 2018,

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CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Special Master's Case Management Plan (Dkt. No. 57), I hereby certify that all parties on the Special Master's approved service list (Dkt. No. 26) have been served by electronic mail, this 1st day of June 2018.

/s/ David C. Frederick

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IN THE
Supreme Court of the United States

STATE OF MISSISSIPPI,
Plaintiff,

v.

STATE OF TENNESSEE, CITY OF MEMPHIS, TENNESSEE,
AND MEMPHIS LIGHT, GAS & WATER DIVISION,
Defendants.

On Bill of Complaint
Before the Special Master, Hon. Eugene E. Siler, Jr.

**PLAINTIFF’S RESPONSE TO DEFENDANTS’
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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
I. Introduction	2
A. The Limited Issue Identified For Hearing	2
B. Defendants Have Not Met The Summary Judgment Standard	4
C. Summary Of Material Facts	5
II. Defendants' Motion for Summary Judgment Should Be Denied ...	10
A. The Water at Issue Is Not All Groundwater in the Mississippi Embayment Underlying Eight States	10
B. The Technological Ability To Pump Groundwater Out Of A Neighboring State's Natural Groundwater Storage Does Not Make That Groundwater An Interstate Resource	12
C. The Incremental Natural Movement Of Small Amounts Of Groundwater Into Tennessee Over Centuries Does Not Make The Mississippi Groundwater At Issue An Interstate Natural Resource	14
D. Defendants' Argument Regarding Hydrological Connections To Surface Waters Is Incomplete and Irrelevant To The Stated Issue....	14
III. Conclusion.....	15

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	4
<i>AT&T Communications v. Mountain States, Inc.</i> , 778 P.2d 677 (Colo. 1989)	1
<i>City of Milwaukee v. Illinois and Michigan</i> , 451 U.S. 304 (1981)	3
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982)	3
<i>Florida Dept. of Revenue v. New Sea Escape Cruises, Ltd.</i> , 894 So.2d 954 (Fla. 2005)	1
<i>General Motors Corp v. Washington</i> , 377 U.S. 436 (1964)	2
<i>Idaho v. Oregon</i> , 462 U.S. 1017 (1983)	3
<i>Independent Warehouses v. Scheele</i> , 331 U.S. 70 (1947)	2
<i>Kansas v. Colorado</i> , 206 U.S. 46 (1907)	3, 12
<i>Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware</i> , 414 U.S. 117	2
<i>Missouri v. Illinois</i> , 180 U.S. 208 (1901)	12, 13
<i>Nebraska v. Wyoming</i> , 325 U.S. 589 (1945)	3
<i>New Jersey v. New York</i> , 283 U.S. 336 (1931)	3
<i>Norton Co. v. Dept. of Rev.</i> , 340 U.S. 534 (1951)	2
<i>South Carolina v. North Carolina</i> , 558 U.S. 256 (2010)	3
<i>Toolson v. New York Yankees, Inc.</i> , 346 U.S. 356 (1953)	2
<i>Wyoming v. Colorado</i> , 259 U.S. 419 (1922).....	3

Other

Merriam-Webster’s Collegiate Dictionary (1986)	1
Merriam-Webster’s Collegiate Dictionary (10th ed. 1999)	2

Defendants’ Motion for Summary Judgment only refers to “the Aquifer” as they define it,¹ and ignores the specific question in the Special Master’s Order for the hearing: “whether *the water that is at issue* in this case is *interstate in nature*.” Dkt. No. 56 (Case Management Order) (emphasis added)). Rather than address this question, Defendants selectively quote fragments of the Special Master’s Memorandum Decision (Dkt. No. 55), augmented only by immaterial and incomplete evidence and phrases that embody counsel’s conclusions on mixed questions of fact and/or law.

This case does not involve interstate river water rapidly flowing through multiple States on a path to the sea. It involves water in tiny pore spaces of the earth within Mississippi’s borders, where it naturally resided for thousands of years in the territory granted to Mississippi upon admission into the Union. The fact that it has “existed” and “occurred” exclusively within the land making up Mississippi for millennia, and would still “exist” and “occur” exclusively within Mississippi’s borders, absent Defendants’ pumping, makes it “intrastate” by definition.²

¹ Defendants’ definition ignores important distinctions in local geology and hydrology.

² Applying the plain and ordinary meaning of “intrastate,” the groundwater at issue, based on its residence time in Mississippi alone, is “intrastate water.” *AT&T Communications v. Mountain States, Inc.*, 778 P.2d 677, 683 (Colo. 1989) (“plain and ordinary meaning” of “intrastate” is “existing within a state”) *quoting Merriam-Webster’s Collegiate Dictionary* 1186 (1986); *Florida Dept. of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So.2d 954, 961 (Fla. 2005) (“the term “intrastate” is

Nevertheless, Defendants have knowingly taken in excess of 400 billion gallons of Mississippi groundwater by pumping in southwest Tennessee between 1965 and 2016. Exh. 1 at 5-6, 18, 20; S10; S11; S12; S14; S15; Exh. 2 at O16, O32, O47-49; Exh. 3 at F2, F28, F41; Exh. 4 at 126-40 and 237-38. This is not a dispute that should be decided on Defendants' broad generalizations of selective, incomplete, and immaterial evidence, but one that must be decided considering all material facts relating to the specific Mississippi groundwater at issue.

I. INTRODUCTION

A. The Limited Issue Identified For Hearing

The question defined for the January 2019 hearing is “[w]hether the *water that is at issue* in this case is *interstate in nature*.”³ The phrase “interstate in nature” is sometimes used in cases decided under the interstate commerce clause,⁴ and is best

commonly construed as meaning “existing or occurring within a state”) *citing Merriam-Webster's Collegiate Dictionary* 614 (10th ed. 1999).

³ The Special Master stated the same question slightly differently in the Memorandum Decision (Dkt No. 55) at page 36: “[W]hether the Aquifer and the water constitutes an interstate resource.”

⁴ This phrase appears in some Supreme Court cases, but not in original jurisdiction equitable apportionment cases independent of annual surface water contributions. *See Norton Co. v. Dept. of Rev.*, 340 U.S. 534 (1951) (state tax challenge on interstate commerce grounds); *General Motors Corp v. Washington*, 377 U.S. 436 (1964) (taxpayer case); *Independent Warehouses v. Scheele*, 331 U.S. 70 (1947) (state tax challenge on interstate commerce grounds); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (jurisdiction over antitrust suit brought by professional baseball players); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (conflict between Securities Exchange Act arbitration provision and

understood in terms of intrastate residence and interstate travel. In the seminal *Kansas v. Colorado* decision the Court addressed both issues. First, it affirmed the separate States’ “full jurisdiction [and authority] over the lands within its borders, including the beds of streams *and other waters*” residing within its borders. *Kansas v. Colorado*, 206 U.S. 46, 93-97 (1907) (emphasis added). Then, the Court addressed the specific problem of surface water flowing “under the agency of natural laws” in the Arkansas River, which was “a stream running through the territory which now composes Kansas and Colorado.” 206 U.S. 46 at 97-98. Nothing in that case, or any subsequent Court decision even remotely diminishes an individual State’s sovereign authority over water naturally residing only within its borders under the “agency of natural laws” to any degree,⁵ or purports to recognize any authority in the Court to

state law authorizing suit to recover wages notwithstanding arbitration provision); *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981) (federal common law action preempted by federal amendments to Clean Water Act).

⁵All of the Court’s equitable apportionment cases begin by tracing the interstate path of the water. *E.g.*, *Kansas v. Colorado*, 206 U.S. 46, 50, (1907) (Arkansas River from Colorado through Kansas, Oklahoma, Indian Territory, Arkansas, and to the sea); *Wyoming v. Colorado*, 259 U.S. 419, 456 (1922) (Laramie River from Colorado through Wyoming to North Platte River); *New Jersey v. New York*, 283 U.S. 336 (1931) (Delaware River from New York to Pennsylvania, New Jersey, and Atlantic Ocean); *Nebraska v. Wyoming*, 325 U.S. 589, 592 (1945) (North Platte River from Colorado through Wyoming, Nebraska, and into Missouri River near Iowa); *Colorado v. New Mexico*, 459 U.S. 176, 178 (1982) (Vermejo River from Colorado into New Mexico and the Canadian River); *Idaho v. Oregon*, 462 U.S. 1017 (1983) (tracing path of anadromous fish from Pacific Ocean up Columbia-Snake River through Wyoming, Idaho, Washington, Oregon, British Columbia); *South Carolina v. North Carolina*, 558 U.S. 256 (2010) (Catawba River flowing

authorize cross-border extractions of groundwater by pumping.⁶

B. Defendants Have Not Met The Summary Judgment Standard

Defendants' Motion is replete with characterizations and generalizations, but not with geological and hydrological facts qualifying as evidence supporting a summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The substantive law determines the facts that must be considered in determining the outcome of the case. The Special Master accurately identified geology and groundwater hydrology as some types of proof that are needed to determine the stated question; however, Defendants have not offered evidence addressing the specific geological and hydrological groundwater conditions that are necessary to make a recommendation on a matter of first impression before the Court. One example is Defendants' complete failure to address critically important groundwater hydrology issues of natural flow velocity, flow direction, and resulting residence time of the groundwater at issue in this case. The following summary provides an example of the types of material facts ignored in Defendants' Motion and arguments.

from North Carolina into South Carolina).

⁶ A few cases in which river water has been allocated between States involve questions of whether pumping from shallow aquifers in one State has denied the allocated river water to another, but these cases do not address groundwater independently, or water in a deep confined aquifer system like the one in the present dispute.

C. Summary Of Material Facts

This case does not involve a single continuous “body of water,” underground river, or lake underlying eight states touching the Mississippi Embayment as imagined by Defendants. P48-49; Exh. 5 at 95. The Mississippi Embayment includes an array of sedimentary materials deposited during the Eocene Epoch, approximately 40,000,000 years ago, and subsequently buried under additional deposits made in the later millennia. S9. The resulting subsurface geology is complex and diverse, with discontinuous deposits of natural “sands” and “clays”⁷ sometimes separated into confined formations that can store and transmit water, qualifying them as aquifers. These aquifers vary in geographic coverage, thickness, permeability, specific yield, water quality, and other characteristics which may vary dramatically over very short distances. S8; Exh. 6 at 19-21; 246-253.

The names of the geologic formations and hydrologic units in the Mississippi Embayment vary significantly in different states and in local and regional studies. *See* Exh. 7 at 15-26. However, the Sparta Sand and the Memphis Sand are consistently recognized as separate geologic formations and aquifers. The two share an upper confining unit, but in Mississippi near the Tennessee border, the thick

⁷ These are natural materials created and deposited over thousands of years of varying environmental conditions, and are invariably heterogeneous and anisotropic within the formation or in aerial distribution, and can have different hydrological properties over short distances.

Memphis Sand formation disappears, and is replaced by several distinct geological and hydrological units identified by the USGS, each having different sedimentary compositions and hydrologic characteristics. Exh. 8 at 16; Exh. 6 at 2; Exh 9 at Figure 5; Exh. 10 at 4-9; Exh. 11 at D15; Exh. 17 at 25; Defendants' Exh. 1. The deeper Memphis Sand continues to the north through west Tennessee.

The extension of the Memphis Sand a few miles into Mississippi, and its contact with the thinner Sparta Sand through complex facies changes in the Sparta's lower confining unit does not mean that groundwater has ever flowed in any meaningful quantities from Mississippi north into Tennessee under natural conditions; and it does not answer the hydrological and geological issues raised by the Special Master which are necessary to evaluate the competing States' claims under the United States Constitution. It is true that groundwater moves or "flows" within confined aquifers, but the rate of flow (velocity) and direction of groundwater movement in confined aquifers has nothing in common with surface water. The 2001 USGS Circular 1186 addresses this fact, explaining that river flow is measured in miles per day (e.g., 16 miles a day), while groundwater velocity is measured in inches per day, with groundwater movement of a foot a day considered a high velocity. Exh. 12 at 8. Further, natural groundwater movement in a confined aquifer is driven by gravity and pressure—both determined in nature by geology and hydrologic characteristics of the specific aquifer. Exh. 13 at 44.

The evidence will show that for thousands of years under natural conditions before both Mississippi and Tennessee were admitted to the Union, surface water entering the confined Memphis and Sparta Sand outcrops in Mississippi seeped downward moving very slowly in an east to west/southwest direction driven by gravity and natural pressures within the aquifer system at a velocity of about an inch a day, and remains in Mississippi groundwater storage for a period of 4,000 to 22,000 years. Exh. 1 at 7, 9-11; Exh. 14 at 4, 10-11; Exh. 8 at 23-24.⁸ This Mississippi groundwater naturally stored and residing in Mississippi would have remained in Mississippi at constant volumes and pressures created by nature, but for the introduction of Defendants' massive groundwater pumping operations near the Mississippi border. Exh. 1 at 9-11; Exh. 14 at 4.⁹

MLGW's groundwater production and sales operation is one of the largest in

⁸ The only exception is a small amount of groundwater residing in the northeast corner of DeSoto County, Mississippi, for hundreds of years before it would naturally move into Tennessee at the same rate under natural conditions. Exh. 4 at 143.

⁹ Defendants assert "the parties agree that there have never been any physical barriers in the Aquifer that impede or prevent the flow of groundwater across the Tennessee-Mississippi border" (Motion at 8-9); but Plaintiff's actual position, as reflected in Defendants' record citations (Joint Statement Response to D48, and Plaintiff's Response to Tennessee's Interrogatory No. 3), is that there is (obviously) no physical subterranean wall or dam underlying the border totally blocking groundwater movement between the states, but that natural hydrologic conditions in northwest Mississippi prevent groundwater from flowing from Mississippi into Tennessee under natural conditions. MLGW's mechanical pumping has altered those natural conditions and pulled Mississippi groundwater into Tennessee.

the world, and by its location of wells near the Mississippi border, it has dramatically reduced natural groundwater pressures in Mississippi, redirecting and capturing billions of gallons of Mississippi groundwater not naturally available in Tennessee.

Exh. 1 at 6; Exh. 5 at 97-98, 150-51. There is nothing natural about this pumping:

The withdrawal of ground water by pumping is the most significant human activity that alters the amount of ground water in storage and the rate of discharge from an aquifer. The removal of water stored in geologic materials near the well sets up hydraulic gradients that induce flow from more distant parts of the aquifer. ... The area of water-level decline is called the cone of depression, and its size is controlled by the rate and duration of pumping, the storage characteristics of the aquifer, and the ease with which water is transmitted through the geologic materials to the well.

Exh. 15 at 6. Overlapping cones of depression in areas of high density pumping pulls groundwater into the cones, and drives it into the well(s). Exh. 13 at 43.

But Defendants were simply never concerned about the impacts of MLGW groundwater pumping on Mississippi and its citizens. At the time MLGW designed and developed its Lichterman, Davis and Palmer well fields near the Mississippi border, it was fully aware that these fields would only increase the amount of groundwater MLGW was drawing out of Mississippi's natural groundwater storage into Tennessee. Exh. 2 at O16, O32, O47-49; Exh. 3 at F2, F28, F41. Defendants have intentionally captured an estimated 412 billion gallons of groundwater naturally residing only within Mississippi since 1965. *See* Exh. 1 at 6, 9-11, 17-18, 20; Exh. 6 at 16. These huge extractions of Mississippi groundwater have been

reported by federal and Tennessee groundwater scientists since the 1980s,¹⁰ but MLGW's pumping continued to increase until the year 2000 when its pumping peaked at approximately 163 million gallons a day, part of which was coming from Mississippi. Exh. 1, Tables 1 & 2.

This significant loss of Mississippi's natural groundwater storage and pressures within the cone of depression created by Defendants in Tennessee, and extending significantly into Mississippi, has materially decreased the amount of groundwater Mississippi can produce for the benefit of its citizens; and has increased the costs of producing Mississippi groundwater within the cone of depression. Exh. 6 at 3; Exh. 8 at 29. The drastic reduction of the natural pressures within the cone of depression created by Defendants has also converted parts of the Mississippi alluvial aquifer from an area naturally recharged by water from the Memphis Sand, to an area of recharge for the Memphis Sand; and is drawing much younger groundwater in shallower aquifer formations downward into the older, higher quality water in the Memphis and possibly Sparta sands through paleochannels in the upper confining layer in both States. Exh. 8 at 23-24; Exh. 5 at 70-75.

¹⁰ See Exh. 16 at 10, 14-15, 20-24, 28-43, 77-79, 130-31, 138-41 and Exhibits 2 and 3; Exh. 9 at MS SCT 002966-67; Exh. 17 at MS SCT 000305-08; Exh. 18 at MS SCT 000414; Exh. 19 at MS SCT 000640; Exh. 2 at MS SCT 000692, 000706-18; Exh. 20 at MS SCT 000991, 001033.

These losses and risks were needlessly imposed on Mississippi by Defendants, who could have obtained plenty of water without a material impact on Mississippi. The geographic extent and material impact of a cone of depression created by groundwater pumping is predictable and measureable. Placing MLGW wellfields in the same Memphis Sand to the north and east of Memphis within Tennessee; increasing the spacing between those commercial wells; and, limiting the duration of pumping from individual wells on a rotating cycle in accordance with good groundwater development practices would have avoided any material impact on Mississippi groundwater. Exh. 4 at 126-40 and 237-38; Exh. 5 at 156-57.¹¹

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED

A. The Water at Issue Is Not All Groundwater in the Mississippi Embayment Underlying Eight States

The *water at issue* is groundwater that was naturally residing in Mississippi but has been pumped into Tennessee by MLGW's massive groundwater pumping operations. *Defendants never address the residence time of this groundwater or its flow direction under natural conditions.* Instead, Defendants claim the water at issue

¹¹ The Parties' Joint Statement of Stipulated and Contested Facts (Dkt. No. 64) contains 141 contested statements of fact, over 50 of which were tendered by Mississippi on geology, hydrology, historical flows between States, and groundwater pumping impacts. Mississippi incorporates herein by reference all of its statements, responses to Defendants' statements, and the record evidence cited therein by Mississippi.

is all water in “a single, continuous hydrological body that lies beneath parts of Mississippi, Tennessee, and six other states.” Motion at 5. Defendants state “the Aquifer at issue” is called many different names, including the “Sparta Aquifer,” the “Memphis Sand Aquifer,” the “Sparta-Memphis Sand,” and the “Middle Claiborne Aquifer,” Motion at 1, 2 n. 1, 3, 5-7, and criticize Mississippi for its refusal to concede there is only one such aquifer “at issue.” Motion at 12-14.

In their criticism Defendants ignore the fact that the “Aquifer” to which Defendants refer is a group of formations, including the distinct Sparta Sand and Memphis Sand formations. It is well-recognized those are *separate* aquifers that are sometimes (not always) referred to collectively. For example, Defendants’ Exhibit 1 explains that what it refers to as “the Sparta-Memphis Aquifer,” is actually two different aquifers: the “Sparta aquifer” and the “Memphis aquifer.” *Id.* (“Herein, the sand layers within the Sparta Sand and Memphis Sand that comprise the Sparta aquifer and the Memphis aquifer will be referred to as the Sparta-Memphis aquifer.”).¹² Regardless, the “one aquifer” or “two aquifers” issue is a red

¹² The varying labels applied to these formations separately and/or collectively has led to confusion, both in scientific publications and, unfortunately, in this proceeding, where the parties and various witnesses have, at times, referred to the Sparta aquifer and the Memphis aquifer collectively, using a hodgepodge of terms. Such labels do not, however, change the undeniable fact that the Sparta Sand and the Memphis Sand are distinct formations/aquifers, with different locations, geologic properties, thicknesses, and hydrologic characteristics.

herring. The water in eight different states is not at issue. Instead, the critical inquiry is the location, hydrologic characteristics, and residence time of the water that is actually at issue: groundwater that resided within Mississippi for thousands of years and would not be available in Tennessee absent MLGW's pumping.

B. The Technological Ability To Pump Groundwater Out Of A Neighboring State's Natural Groundwater Storage Does Not Make That Groundwater An Interstate Resource

Cutting a partial quote out of *Kansas v Colorado*, Defendants argue that when “the action of one State reaches through the agency of natural laws into the territory of another State” equitable apportionment is the complaining State's exclusive remedy. Motion at 2 (citing Op. 2). This is not consistent with the Court's actual holding. The Court's actual language was

[W]henever, as in the case of *Missouri v. Illinois*, 180 U.S. 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

Kansas v. Colorado, 206 U.S. 46, 97 (1907). This was a holding declaring that the Court had jurisdiction in original actions between States to resolve their disputes to “establish justice between them,” *not* a proclamation that all such water-related disputes between States must be resolved by equitable apportionment. Indeed, *Missouri v. Illinois* was a nuisance (not equitable apportionment) suit seeking an

injunction stopping construction of an “unnatural channel” that would transport Chicago’s sewage to the Des Plaines and Illinois Rivers which, by the agency of natural laws would carry the sewage into the Mississippi River. *Missouri* at 241-48.

The agency of natural laws in the present case are the natural processes that created the formations under Mississippi and saturated them with high quality groundwater moving across northwest Mississippi where it exclusively resided for thousands of years; and MLGW’s groundwater pumping is the equivalent of the “unnatural channel.” The Court’s water cases do not limit its authority to fashion remedies appropriate for the facts in each case. This case is not about water rapidly flowing through and temporarily residing in multiple States on a journey to the sea. It is about Mississippi’s sovereign authority under the Constitution to manage, preserve, protect, and control the taking of high quality groundwater naturally occurring and residing in Mississippi for hundreds and thousands of years.

Defendants’ argument that groundwater pumping by MLGW is an “agency of natural laws” is convoluted and absurd. Such groundwater pumping is an “unnatural” force disrupting the natural forces under which the Mississippi groundwater was naturally stored and resided. The fact that the natural geology that kept the naturally occurring groundwater within Mississippi could be utilized as a conduit for Defendant’s pumping because there is not a “barrier” beneath the ground to counteract Defendants’ technological manipulation of the natural conditions does

not change Mississippi's rights in and sovereignty over the naturally occurring groundwater residing only within its territory under natural conditions.

C. The Incremental Natural Movement Of Small Amounts Of Groundwater Into Tennessee Over Centuries Does Not Make The Mississippi Groundwater At Issue An Interstate Natural Resource

The fact that groundwater moves and that a small amount of Mississippi groundwater could naturally travel from Mississippi into Tennessee over hundreds of years (Ex. 4 at 143) does not support Defendants' position. Defendants vigorously cross-examined Dr. Spruill (*see* Ex. 4) on Mississippi groundwater natural movement in a very small part of DeSoto County, Mississippi, that is not included in Mississippi's claims, and received a very clear response: under natural conditions groundwater in that area would ultimately make it to Tennessee after periods of six hundred to eight hundred years. *Id.* This merely emphasizes the fact that all the groundwater residing in Mississippi under natural conditions is intrastate groundwater falling under Mississippi's sole sovereign authority. The groundwater at issue and actually claimed in Mississippi's complaint is calculated to naturally reside in Mississippi absent pumping for 4,000 to 22,000 years. Exh. 14 at 4.

D. Defendants' Argument Regarding Hydrological Connections To Surface Waters Is Incomplete and Irrelevant To The Stated Issue

Defendants' argument relating to hydrological connections of groundwater to surface waters suffers from the same flaws as those above. It totally ignores

groundwater residence time. The shortest possible groundwater residence time between surface water entry into the confined aquifers in Mississippi and discharge into the “paradigmatic interstate” Mississippi River is 4,000 years. Exh. 14 at 4, 10-11. This evidence is undisputed. Under any definition the groundwater traveling across Mississippi is intrastate. While some unconfined groundwater originating in the Wolfe River may or may not ultimately find its way into Tennessee based on flow path model results provided by one of Defendants’ experts, no travel or residence time calculations were provided by any of Defendants’ witnesses, so there is no evidence contradicting the residence time calculations by Mississippi’s experts.

III. CONCLUSION

This is a matter of first impression for which a full record of scientific literature and expert testimony should be developed for the Supreme Court, not dismissed, as Defendants request, based on a few select and incomplete excerpts of documents that fail to address material facts such as the complexity of the groundwater systems’ geology and the storage, flow velocity, flow direction, and residence time of the water at issue under natural conditions. These types of facts are critical to the proper resolution of this proceeding. Defendants’ Motion should be promptly denied allowing the parties to proceed with preparation for the scheduled evidentiary hearing.

Respectfully submitted, this the 6th day of July, 2018.

THE STATE OF MISSISSIPPI

BY: /s/ C. Michael Ellingburg

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CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Case Management Plan (Dkt. No. 57), I hereby certify that all parties on the Special Master's approved service list have been served by electronic mail, this the 6th day of July, 2018.

/s/ C. Michael Ellingburg
C. Michael Ellingburg

IN THE
Supreme Court of the United States

STATE OF MISSISSIPPI,
Plaintiff,

v.

STATE OF TENNESSEE, CITY OF MEMPHIS, TENNESSEE,
AND MEMPHIS LIGHT, GAS & WATER DIVISION,
Defendants.

On Bill of Complaint
Before the Special Master, Hon. Eugene E. Siler, Jr.

**REPLY OF DEFENDANTS STATE OF TENNESSEE, CITY OF MEMPHIS,
AND MEMPHIS LIGHT, GAS & WATER DIVISION
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
GLOSSARY	iii
I. INTRODUCTION	1
II. DISCOVERY HAS CONFIRMED THAT THE AQUIFER AND THE WATER IN IT IS INTERSTATE.....	2
A. The Aquifer Is Interstate Because Pumping Water In One State Affects Water In Other States	2
B. The Aquifer Is Interstate Because Water Naturally Flowed Across State Lines Prior To The Start Of Pumping.....	3
C. The Aquifer Is Interstate Because The Water Is Hydrologically Connected With Interstate Surface Water	3
D. The Aquifer Is Interstate Because It Underlies Mississippi, Tennessee, And Six Other States	4
III. MISSISSIPPI’S ARGUMENTS CONFIRM THAT THERE ARE NO FACTUAL DISPUTES REQUIRING AN EVIDENTIARY HEARING	5
A. Mississippi Attempts To Relitigate Legal Arguments The Special Master Has Already Considered And Rejected.....	5
B. Mississippi’s Factual Additions Are Immaterial	6
IV. CONCLUSION.....	8
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page
CASES	
<i>Florida v. Georgia</i> , 138 S. Ct. 2502 (2018)	6
<i>Kansas v. Colorado</i> , 206 U.S. 46 (1907).....	2, 5, 6, 7
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983).....	3-4
RULES	
Fed. R. Civ. P. 30(b)(6).....	1
OTHER MATERIALS	
Tony P. Schrader, <i>Potentiometric Surface in the Sparta-Memphis Aquifer of the Mississippi Embayment</i> , Spring 2007, USGS Scientific Investigations Map 3014 (2008), available at https://pubs.usgs.gov/sim/3014/	5

GLOSSARY

Defs. Ex.	Exhibits to Motion of Defendants State of Tennessee, City of Memphis, and Memphis Light, Gas & Water Division for Summary Judgment and Memorandum of Law in Support Thereof, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed June 1, 2018) (Dkt. No. 70 (Exhibits))
Defs. Mot.	Motion of Defendants State of Tennessee, City of Memphis, and Memphis Light, Gas & Water Division for Summary Judgment and Memorandum of Law in Support Thereof, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed June 1, 2018) (Dkt. No. 70)
Joint Statement	Plaintiff’s and Defendants’ Joint Statement of Stipulated and Contested Facts, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed Feb. 28, 2018) (Dkt. No. 64)
Miss. Br.	Plaintiff’s Response to Defendants’ Motion for Summary Judgment, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed July 6, 2018) (Dkt. No. 71)
Miss. Ex.	Exhibits to Plaintiff’s Response to Defendants’ Motion for Summary Judgment, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. filed July 6, 2018) (Dkt. No. 71 (Exhibits))
MLGW	Memphis Light, Gas & Water Division
Op.	Memorandum of Decision on Tennessee’s Motion to Dismiss, Memphis and Memphis Light, Gas & Water Division’s Motion to Dismiss, and Mississippi’s Motion to Exclude, <i>Mississippi v. Tennessee, et al.</i> , No. 143, Orig. (U.S. Aug. 12, 2016) (opinion of Special Master) (Dkt. No. 55)

Resp. to D__	In the Joint Statement, D__ refers to the facts submitted by Defendants that Mississippi purports to dispute. Resp. to D__ refers to Mississippi's response to Defendants' fact, which often indicates Mississippi's agreement with a portion of the fact, and is therefore cited in the Motion and the Reply.
Spruill Rep.	Expert Report of Richard K. Spruill, Ph.D., P.G. (June 30, 2017)
Wiley Dep.	Deposition of David Wiley (Sept. 26, 2017)
Wiley Rep.	Update Report on Diversion and Withdrawal of Groundwater from Northern Mississippi Into the State of Tennessee (prepared by Leggette, Brashears & Graham, Inc.) (June 30, 2017) (expert report of David Wiley)
Wiley Rebuttal Rep.	David Wiley Rebuttal Expert Report Addendum #1 (July 31, 2017)

I. INTRODUCTION

Mississippi's Response to Defendants' Motion for Summary Judgment ("Response") confirms that an evidentiary hearing is not necessary to decide the threshold issue of whether the Aquifer is an interstate resource. Mississippi's Response is most notable for what it omits. For example, Mississippi ignores that the facts supporting Defendants' Motion are based on the testimony of Mississippi's own experts and Mississippi's own Rule 30(b)(6) witnesses. Mississippi does not even attempt to dispute the dispositive facts: that (1) the effects of pumping from the Aquifer cross state borders; (2) under pre-development conditions, some groundwater in the Aquifer flowed from Mississippi to Tennessee; and (3) the groundwater in the Aquifer is connected to interstate surface waters. Nor does Mississippi genuinely dispute that the Aquifer underlies Tennessee, Mississippi, and six other States, when the "facts" upon which it purports to rely contradict its own binding admission as well as its own experts' testimony. Instead, Mississippi attempts to revive legal arguments that the Special Master has already rejected and to cloud the record with immaterial facts. *See infra* Part III. An evidentiary hearing is not required to address Mississippi's recycled legal arguments or its immaterial factual assertions. The Special Master should find as a matter of law that the Aquifer is an interstate resource and grant Defendants' Motion for Summary Judgment.

II. DISCOVERY HAS CONFIRMED THAT THE AQUIFER AND THE WATER IN IT IS INTERSTATE

A. The Aquifer Is Interstate Because Pumping Water In One State Affects Water In Other States

Mississippi's Response does not dispute the cross-border effects of pumping groundwater from the Aquifer. Mississippi has conceded that pumping from wells located entirely in Shelby County, Tennessee, can and does affect groundwater in Mississippi, *see* Resp. to D65, and that the cross-border effect of pumping goes both ways, with pumping in Mississippi affecting the flow of groundwater into Tennessee, *see* Resp. to D77.¹ Thus, the discovery record conclusively establishes that "the removal of water within a State's borders can have a direct effect on the availability of water in another State." Op. 31; *see also* Miss. Br. 12-13. This fact alone confirms that the Aquifer is interstate because it demonstrates "'the action of one State reach[ing] through the agency of natural laws into the territory of another State.'" Op. 30-31 (quoting *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907)).²

¹ Mississippi also does not dispute that pumping in Mississippi affects groundwater in Arkansas and Louisiana, pumping in Arkansas affects groundwater in Mississippi and Louisiana, and pumping in Louisiana affects groundwater in Arkansas. *See* Defs. Mot. 9. These facts further support a finding that the Aquifer is interstate.

² Mississippi's contention that equitable apportionment does not apply because Tennessee's pumping is an "unnatural force," Miss. Br. 13, rather than an "agency of natural laws," misses the mark. The question is not whether a State's *action* is "natural." Every equitable-apportionment case involves an "unnatural" action by the defendant State – such as pumping water or capturing fish. Instead, the "agency of natural laws" refers to the *cross-border impact* of a State's "unnatural" actions.

B. The Aquifer Is Interstate Because Water Naturally Flowed Across State Lines Prior To The Start Of Pumping

Discovery has confirmed that, under pre-development conditions, groundwater in the Aquifer undisputedly flowed across state borders, including from Mississippi into Tennessee. Mississippi explicitly concedes the point. *See* Miss. Br. 7 n.8, 14; *see also* Defs. Ex. 5 (Wiley Rep. 11 & Figure 9); Defs. Ex. 6 (Spruill Rep. 36, Figure 17). Further, Mississippi's Response does not dispute that, prior to pumping, groundwater in the Aquifer naturally flowed across the Mississippi-Arkansas and Tennessee-Arkansas borders and that all of the groundwater in the Aquifer would eventually leave Mississippi. *See* Defs. Ex. 6 (Spruill Rep. 36, Figure 17); Defs. Ex. 7 (Wiley Dep. 73:3-19, 96:19-23); Resp. to D40, D52. Accordingly, "the extent of historical flows in the Aquifer between Mississippi and Tennessee" (Op. 36) also confirms that the Aquifer and its groundwater is interstate.

C. The Aquifer Is Interstate Because The Water Is Hydrologically Connected With Interstate Surface Water

The Special Master has observed that the Supreme Court applies "equitable apportionment principles [to] disputes between States over a body of interstate surface water with a groundwater component." Op. 20 (citing *Texas v. New Mexico*,

In this case, the "agency of natural laws" is the cone of depression that forms according to the laws of physics when groundwater is extracted from a well. Because Mississippi alleges that the cone of depression here extends across state lines, this case falls squarely within the Court's equitable-apportionment jurisprudence.

462 U.S. 554, 556-58 & n.2 (1983)). Mississippi's Response does not dispute that the Aquifer's groundwater is hydrologically connected to at least two interstate rivers: the Wolf and the Mississippi. *See* Defs. Mot. 11-12; Miss. Br. 14-15. These undisputed hydrologic connections further confirm that the Aquifer and groundwater at issue is interstate.

D. The Aquifer Is Interstate Because It Underlies Mississippi, Tennessee, And Six Other States

Based on the testimony of Mississippi's experts, it is undisputed that the Aquifer at issue underlies eight States, including Mississippi and Tennessee. It is further undisputed that the various names used locally and by the experts in this case – *i.e.*, Sparta, Memphis, Middle Claiborne, etc. – all refer to the same Aquifer. *See, e.g.*, Defs. Ex. 7 (Wiley Dep. 11:5-8, 12:4-13:12). Mississippi's attempt to contest this point lacks credibility and cannot defeat summary judgment. First, Mississippi is bound by its response to MLGW's Request for Admission No. 1 in which it admits that the Aquifer underlies Mississippi, Tennessee, and Arkansas. *See* Defs. Mot. 13. Second, Mississippi does not even attempt to explain how it now advances a position that squarely conflicts with its own experts, both of whom testified the Aquifer underlies eight States.³ Notably, the authority cited by Mississippi actually confirms

³ *See* Defs. Ex. 7 (Wiley Dep. 12:4-13:12); Defs. Ex. 6 (Spruill Rep. 2).

that the Aquifer exists beneath eight States⁴ or at most indicates that there are local variations within a single formation.⁵ The Aquifer’s existence underlying multiple States is not genuinely disputed and, therefore, confirms that the Aquifer is interstate.

III. MISSISSIPPI’S ARGUMENTS CONFIRM THAT THERE ARE NO FACTUAL DISPUTES REQUIRING AN EVIDENTIARY HEARING

A. Mississippi Attempts To Relitigate Legal Arguments The Special Master Has Already Considered And Rejected

The Special Master should reject the significant portion of Mississippi’s Response that re-asserts legal arguments that the Special Master considered and rejected at the pleading stage, which only emphasizes the lack of any material *factual* dispute.

For example, the Special Master already rejected Mississippi’s arguments that equitable apportionment does not apply because groundwater should be treated differently than surface water. Op. 20-24 (raised in Miss. Br. 4-6, 12-13). The Special Master correctly explained that *Kansas v. Colorado* and its progeny hold

⁴ See, e.g., Miss. Br. 6 (citing Miss. Ex. 6 (Spruill Rep. 2), which states: “The Sparta-Memphis Sand, also known as the Middle Claiborne Aquifer or the Memphis Aquifer, is . . . within northwestern Mississippi and southwestern Tennessee.”); *id.* at 7 (citing Miss. Ex. 14 (Wiley Rebuttal Rep.), which shows (in Figures 2 and 3) the “Middle Claiborne Aquifer” extending beneath eight States).

⁵ See, e.g., Miss. Br. 11 (citing Defs. Ex. 1 (Schrader, USGS Scientific Investigations Map 3014), which states that the Sparta Sand and Memphis Sand are “considered to be one hydrologic unit” because water levels in the two “generally correlate”).

that equitable apportionment applies where “‘the action of one State reaches through the agency of natural laws into the territory of another State’” – such as where “a body of water is such that the removal of water within a State’s borders can have a direct effect on the availability of water in another State.” Op. 30-31 (quoting *Kansas v. Colorado*, 206 U.S. at 97-98); see also, e.g., *Florida v. Georgia*, 138 S. Ct. 2502, 2514, 2517 (2018) (citing *Kansas v. Colorado*, 206 U.S. at 109). The Special Master has also rejected Mississippi’s attempts to limit its claim to only *part* of the groundwater in the Aquifer (raised in Miss. Br. 12, 14), noting that “no Supreme Court decision appears to have endorsed” such a claim. Op. 32. And the Special Master has already held that the geological formation of the Aquifer should not be considered separately from the groundwater in it (raised in Miss. Br. 12-15). Op. 31.

Mississippi’s attempt to re-argue these same failed legal positions further confirms that there are no material facts in dispute and therefore that an evidentiary hearing is not necessary to decide the threshold issue.

B. Mississippi’s Factual Assertions Are Immaterial

Mississippi erroneously contends that summary judgment is not appropriate because Defendants failed to address the groundwater’s slow rate of flow and resulting long “residence time” in Mississippi. Miss. Br. 4, 14-15. These facts are neither disputed (for purposes of this Motion) nor material. Mississippi does not

explain why these facts are relevant to whether the resource is interstate. In fact, the Supreme Court’s ruling in *Kansas v. Colorado* strongly indicates that they are immaterial; the Court found the river at issue to be interstate even though “at times the entire bed of the channel has been in places dry” – *i.e.*, the river was not flowing *at all*. 206 U.S. at 115. Nor does Mississippi explain why a long “residence time” is relevant – especially when it is undisputed that groundwater is, and always has been, continually flowing out of Mississippi each year. *E.g.*, Defs. Ex. 19 (Wiley Dep. 197:3-198:11). Accordingly, the fact that the Aquifer’s groundwater flows slowly, or even very slowly, is of no consequence to the determination that the Aquifer is an interstate resource.

Mississippi also raises its recently crafted “two aquifer” theory, claiming that the Memphis-Sparta Aquifer is actually two separate but interconnected aquifers. Mississippi is estopped from asserting that position because it is bound by its admission in discovery that a single “formation known as the Sparta Sand underlies several states, including Mississippi, Tennessee, and Arkansas.” Defs. Ex. 18. Moreover, whether there are one or two aquifers does not change the fact that pumping from the Aquifer in Tennessee affects the groundwater in the Aquifer across the state line in Mississippi, and vice-versa. Mississippi’s admission, along with undisputed facts set forth above in Part II, conclusively prove that the Aquifer, including the groundwater in it, is, as a matter of law, an interstate resource.

Finally, Mississippi raises arguments about MLGW's groundwater-management practices, MLGW's supposedly ill-intentioned development of pumping operations near the Mississippi border, and the alleged impact of pumping in Tennessee on Mississippi's ability to use the Aquifer. Defendants need not address these issues here because they are not material to whether the Aquifer and the water in it is interstate.⁶ Arguably, these factors might be among the myriad the Court might consider if Mississippi were asking for an equitable apportionment. Here, however, Mississippi's reliance on such equitable-apportionment principles merely confirms that the Aquifer, including the groundwater in it, is an interstate resource and that Mississippi's exclusive judicial remedy for its allegations is an equitable-apportionment action.

IV. CONCLUSION

The Special Master should grant summary judgment to Defendants.

⁶ Defendants reserve their right to address these issues if they become material.

Respectfully submitted this 24th day of July, 2018,

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CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Special Master's Case Management Plan (Dkt. No. 57), I hereby certify that all parties on the Special Master's approved service list (Dkt. No. 26) have been served by electronic mail, this 24th day of July 2018.

/s/ David C. Frederick

David C. Frederick
Special Counsel to Defendant
State of Tennessee

Tab S – WSWC/NARF Tribal Water Rights Ad Hoc Group

115TH CONGRESS
2D SESSION

S. _____

To amend the Omnibus Public Land Management Act of 2009 to make
the Reclamation Water Settlements Fund permanent.

IN THE SENATE OF THE UNITED STATES

_____ introduced the following bill; which was read twice
and referred to the Committee on _____

A BILL

To amend the Omnibus Public Land Management Act of
2009 to make the Reclamation Water Settlements Fund
permanent.

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 “Indian Water Rights
5 Settlement Extension Act”.

6 **SEC. 2. RECLAMATION WATER SETTLEMENTS FUND.**

7 Section 10501 of the Omnibus Public Land Manage-
8 ment Act of 2009 (43 U.S.C. 407) is amended—

9 (1) in subsection (b)(1), by striking “For each
10 of fiscal years 2020 through 2029” and inserting

1 “For fiscal year 2020 and each fiscal year there-
2 after”;

3 (2) in subsection (c)—

4 (A) in paragraph (1)(A), by striking “for
5 each of fiscal years 2020 through 2034” and
6 inserting “for fiscal year 2020 and each fiscal
7 year thereafter”; and

8 (B) in paragraph (3)(C), by striking “for
9 any authorized use” and all that follows
10 through the period at the end and inserting
11 “for any use authorized under paragraph (2).”;
12 and

13 (3) by striking subsection (f).

**SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE**

John E. Tubbs, Director
State of Montana
Department of Natural Resources and Conservation
July 18, 2018

**S. 3168 – A bill to amend the Omnibus Public Land Management Act of 2009
to make Reclamation Water Settlements Fund permanent.**

Chairman Hoeven, Vice Chairman Udall, and distinguished members of this committee, thank you for the opportunity to appear in front of you today in support of S. 3168.

I am John Tubbs, Director of the Department of Natural Resources and Conservation for the State of Montana. Governor Bullock sends his greetings. Today I appear on behalf of the State of Montana and the Western States Water Council.

My Department is made up of four divisions: Forestry; Trust Lands; Conservation and Resource Development; and, most relevant to this hearing, Montana's Water Resource Division. This topic today – water settlements – is very near and dear to my heart. Under President Obama, I was proud to serve as Deputy Assistant Secretary for Water and Science with the U.S. Department of the Interior.

The 1979 Montana Legislature established the Reserved Water Rights Compact Commission as part of the comprehensive state-wide adjudication process to negotiate settlements with Montana's tribal nations and federal agencies claiming reserved water rights within the State of Montana. Montana has eighteen compacts settling reserved water rights within our borders – including our seven reservations. These negotiations were massive

undertakings, and Montana is very proud that it was able to secure positive results, as well as avoid protracted and costly litigation. Just last month, Secretary Zinke and Blackfoot Tribal Chairman Barnes executed the Blackfoot Water Settlement that will enable clean drinking water and irrigation projects to go forward. As you know, the Confederated and Salish and Kootenai Tribes have a water settlement bill that is on deck. Thank you, leaders of this Committee, for giving these matters the time and attention they deserve.

The State of Montana and Western States supports any effort to provide a stable and appropriate funding source for water settlements. Of course you are aware that previously Western States asked the Administration and the Congress to fully appropriate the receipts and collections accruing to the Reclamation Fund subsequent to the Reclamation Act and other acts for their intended purpose of continuing conservation, development and wise use of resources to meet western water-related needs.

In regard to S. 3168, Montana and Western States support this effort to make the Reclamation Water Settlement Fund permanent. Congress, and this Committee in particular, has made impressive efforts to move water settlement bills, and it makes good sense for future water settlement dollars to be assured.

Montana and Western States are committed to continuing to work cooperatively with the Department of Interior and the Bureau of Reclamation to meet our present water needs in the West, and those of future generations, within the framework of state water law, as envisioned by President Roosevelt and the Congress in 1902.

I am happy to be here in support of S. 3168 and stand ready to answer any questions you may have related to my testimony.



Position No. 408
Revised and Readopted
(see former Position No. 367– 7/18/2014;
Position No. 333 – 7/29/2011;
and Position No. 304 – 7/11/2008)

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding the
THE RECLAMATION FUND
Rohnert Park, California
June 29, 2017

WHEREAS, in the West, water is indeed our “life blood,” a vital and scarce resource the availability of which has and continues to circumscribe growth, development and our economic well being and environmental quality of life – the wise conservation and management of which is critical to maintaining human life, health, welfare, property and environmental and natural resources; and

WHEREAS, recognizing the critical importance of water in the development of the West, the Congress passed the Reclamation Act on June 17, 1902 and provided monies “reserved, set aside, and appropriated as a special fund in the Treasury to be known as the ‘reclamation fund,’ to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semiarid land...” in seventeen western states, to be continually invested and reinvested; and

WHEREAS, then President Theodore Roosevelt stated, “The work of the Reclamation Service in developing the larger opportunities of the western half of our country for irrigation is more important than almost any other movement. The constant purpose of the Government in connection with the Reclamation Service has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent homemakers, to use and develop it for themselves and for their children and children’s children...;”¹ and

WHEREAS, the Secretary of the Interior was authorized and directed to “locate and construct” water resource projects to help people settle and prosper in this arid region, leading to the establishment of the Reclamation Service – today’s U.S. Bureau of Reclamation; and

WHEREAS, western states and the Bureau of Reclamation have worked in collaboration to meet the water-related needs of the citizens of the West, and protect the interests of all Americans, recognizing changing public values and the need to put scarce water resources to beneficial use for the “ultimate greatest good of the greatest number;” and

WHEREAS, the Bureau of Reclamation has facilities that include 338 reservoirs with the capacity to store 245 million acre-feet of water, irrigating approximately 10 million acres of farmland that produce 60 percent of the nation’s vegetables and 25 percent of its fruits and nuts, as well as providing water to about 31 million people for municipal and industrial uses, while generating more than 40 billion kilowatt hours of energy each year from 53 hydroelectric power plants, enough to serve 3.5 million households, while providing 289 recreation areas with over 90 million visits annually, and further providing flood control, and fish and wildlife benefits; and

WHEREAS, project sponsors have and continue to repay the cost of these facilities, which also produce power receipts that annually return some one billion in gross power revenues to the federal government, prevent millions in damages due to floods each year, and supports over \$45 billion in economic returns and supporting over 344,000 jobs; and

¹State of the Union Address, 1907

WHEREAS, the water and power resources developed under and flood control provided by the Reclamation Act over the last century supported the development and continue to be critical to the maintenance of numerous and diverse rural communities across the West and the major metropolitan areas of Albuquerque, Amarillo, Boise, Denver, El Paso, Las Vegas, Los Angeles, Lubbock, Phoenix, Portland, Reno, Sacramento, Salt Lake City, Seattle, Tucson and numerous other smaller cities; and

WHEREAS, western States are committed to continuing to work cooperatively with the Department of Interior and Bureau of Reclamation to meet our present water needs in the West and those of future generations, within the framework of state water law, as envisioned by President Roosevelt and the Congress in 1902; and

WHEREAS, according to the Administration's FY 2018 request actual and estimated receipts and collections accruing to the Reclamation Fund are \$ 1.969 billion for FY 2016, \$1.475 billion for FY 2017, and \$1.528 billion for FY 2018, compared to actual and estimated appropriations of \$996 million for FY 2016, \$ 1 billion for FY 2017, and \$878 million for FY 2018 and as a result the unobligated balance at the end of each year respectively is calculated to be \$15.133 billion, \$15.608 billion and \$16.308 billion; and

WHEREAS, this unobligated balance in the Reclamation Fund continues to grow at an increasing rate from an actual balance of \$5.67 billion at the end of FY 2006, to the estimated \$16.308 billion by the end of FY 2018, over a 187% increase; and

WHEREAS, under the Reclamation Act of 1902, the Reclamation Fund was envisioned as the principle means to finance federal western water and power projects with revenues from western resources, and its receipts are derived from water and power sales, project repayments, certain receipts from public land sales, leases and rentals in the 17 western states, as well as certain oil and mineral-related royalties – but these receipts are only available for expenditure pursuant to annual appropriation acts; and

WHEREAS, with growing receipts in part due to high energy prices and declining federal expenditures for Reclamation purposes, the unobligated figure gets larger and larger, while the money is actually spent elsewhere for other federal purposes contrary to the Congress' original intent;

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council asks the Administration and the Congress to fully appropriate the receipts and collections accruing to the Reclamation Fund subsequent to the Reclamation Act and other acts for their intended purpose in the continuing conservation, development and wise use of western resources to meet western water-related needs – recognizing and continuing to defer to the primacy of western water laws in allocating water among uses – and work with the States to meet the challenges of the future.

BE IT FURTHER RESOLVED, that such “needs” may include the construction of Reclamation facilities incorporated as part of a Congressionally approved Indian water right settlement.

BE IT FURTHER RESOLVED, that the Administration and the Congress investigate the advantages of converting the Reclamation Fund from a special account to a true revolving trust fund with annual receipts to be appropriated for authorized purposes in the year following their deposit (similar to some other federal authorities and trust accounts).



**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
INDIAN WATER RIGHTS SETTLEMENTS
Albuquerque, New Mexico
October 20, 2017**

WHEREAS, the Western States Water Council, an instrumentality of eighteen western states advising Western Governors on water policy, has consistently supported negotiated settlement of disputed Indian water rights claims; and

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

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

WHEREAS, the advantages of negotiated settlements include: (i) the ability to be flexible and to tailor solutions to the unique circumstances of each situation; (ii) the ability to promote conservation and sound water management practices; and (iii) the ability to establish the basis for cooperative partnerships between Indian and non-Indian communities; and

WHEREAS, the successful resolution of certain claims may require “physical solutions,” such as development of federal water projects and improved water delivery and application techniques; and

WHEREAS, the United States has developed many major water projects that compete for use of waters claimed by Indians and non-Indians, and has a responsibility to both to assist in resolving such conflicts; and

WHEREAS, the settlement of Native American water claims and land claims is one of the most important aspects of the United States’ trust obligation to Native Americans and is of vital importance to the country as a whole and not just individual tribes or States; and

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

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

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

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

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

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

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

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

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

**Originally adopted March 21, 2003
Revised and reaffirmed Mar 29, 2006, October 17, 2008, October 7, 2011 and October 10, 2014
(See also Nos. 250, 275, 310, 336 and 376)*

**Statement of
Alan Mikkelsen
Senior Advisor to the Secretary
Water and Western Resource Issues
Chair, Working Group on Indian Water Settlements
U.S. Department of the Interior
Before the

Committee on Indian Affairs
United States Senate**

S. 2154, Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act

July 18, 2018

Good afternoon Chairman Hoeven, Vice Chairman Udall, and Members of the Committee. My name is Alan Mikkelsen, and I am the Senior Advisor to Secretary Zinke for Water and Western Resource Issues and Chair of the Working Group on Indian Water Settlements at the Department of the Interior (Department). I am pleased to appear before you today to discuss Indian water rights settlements.

Thank you for the opportunity to provide the Department's views on S. 2154, the Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act, which would approve and provide authorizations related to a settlement agreement involving the water rights of the Kickapoo Tribe in Kansas (Tribe). The Tribe and the State of Kansas (State) executed this settlement agreement in September 2016. The Department has significant concerns about the scope of the settlement agreement between the Tribe and the State. As executed, the settlement agreement only partially resolves the Tribe's water rights and leaves unresolved critical aspects necessary to achieve a final settlement, such as anticipated federal funding, cost-sharing by the State or local parties, and waivers of claims against the United States.

For these and other reasons, the Department cannot support S. 2154 as introduced. That being said, the Department remains eager to work with all interested parties to develop and support a settlement that adheres to the principles outlined in the Department's 1990 *Criteria and Procedures* regarding the negotiation and resolution of Indian water rights claims.

I. Introduction

Before I begin discussing the Kickapoo settlement, I want to note that the Department continues to support the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Indian water rights settlements can resolve long-standing claims to water, provide certainty to water users, foster cooperation among water users within a watershed, allow for the development of water infrastructure, promote tribal sovereignty and self-sufficiency, and improve environmental and health conditions on reservations. Congress also plays an important role through reviewing and approving Indian water rights settlements as they typically involve federal spending, the ultimate resolution of the Tribe's reserved water rights, and the waiver of

the United States' sovereign immunity. We stand ready to work with this Committee and Members of Congress to advance Indian water rights settlements that adhere to the principles outlined in the Department's 1990 *Criteria and Procedures* regarding the negotiation and resolution of Indian water rights claims.

The policy framework the Department follows to guide the negotiation of Indian water rights settlements - and to support legislation authorizing these settlements - includes four general principles set forth in the *Criteria and Procedures* published in the Federal Register in 1990:

- (1) the Department participates in water settlements consistent with the federal government's responsibilities as trustee;
- (2) Indian tribes receive equivalent benefits in exchange for the rights they, and the United States as trustee, release as part of a settlement;
- (3) Indian tribes obtain the ability to realize value from confirmed water rights resulting from settlement, which ensures they do not receive legal rights to water supplies that never materialize in the delivery of water;
- (4) settlements contain an appropriate cost-share by all parties benefiting from the settlement.

The *Criteria and Procedures* also contain guidelines that the Department follows in determining whether to support a proposed settlement. One important guideline is the concept of finality contained in Criteria 3 discussed below.

Disputes over Indian water rights can be expensive and divisive. In many instances, these disputes last for decades, represent a tangible barrier to progress for tribes, and significantly hinder the rational and beneficial management of water resources. Indian water rights settlements can break down these barriers and help create conditions that improve water resources management by providing finality and certainty for all affected water users. When settlements can be reached, they often provide opportunities for economic development, improve relationships, and encourage collaboration among neighboring communities. Successful settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency. These ultimate outcomes and opportunities have been the basis for which the United States has pursued a policy of resolving Indian water rights disputes through negotiated settlements rather than litigation whenever possible.

II. Background

A. The Kickapoo Reservation and the Kickapoo Tribe

The Kickapoo Tribe originated in the Great Lakes region, but moved southwest over time. In 1832, the Tribe and United States entered into the Treaty of Castor Hill, which established the original Kickapoo Reservation in present-day northeast Kansas.

The current Reservation, reduced in size after subsequent treaties, encompasses about 30 square miles and has its headquarters in Horton, Kansas, roughly an hour north of the State capital in Topeka. Of the lands within the boundaries of the Reservation, nearly 8,000 of the

approximately 19,000 acres within the Reservation are currently owned either by the Tribe or individual Indians in trust or fee status, and the vast majority of these lands are used for agricultural purposes. The remaining 11,000 acres are owned by non-Indians, often interspersed in a “checker-boarded” pattern with lands held by the Tribe or individual Indians.

Total tribal membership, including members living off-Reservation, exceeds 1,600. According to the Tribe, roughly one-third of its members reside on-Reservation. The Tribe’s Golden Eagle Casino, its governmental operations, and farming activities provide the primary sources of employment for Tribal members. The Tribe lists economic development as its top priority.

B. Water Resources of the Kickapoo Reservation

The Reservation lies within the Upper Delaware River watershed, a basin that covers portions of Nemaha and Brown Counties in northeast Kansas. The basin's waters flow into Perry Lake, a U.S. Army Corps of Engineers facility, which then flow into the Kansas (or Kaw) River between Topeka and Lawrence (which then flow into the Missouri River at Kansas City). Precipitation averages between 35 to 37 inches per year, the vast majority of which falls as rain between April and October.

No reservoir or other storage facility currently exists on the Reservation. A low-head weir (dam) and associated water treatment facilities on the Delaware River built in the 1970s provide the primary water supply for the Reservation, diverting on average just over 100,000 gallons per day.

Drought conditions have occasionally led to crisis conditions on the Reservation. For example, the Department - through the Bureau of Indian Affairs and Bureau of Reclamation - provided nearly \$300,000 in 2003 to the Tribe to haul over 7 million gallons of water to the Reservation for domestic and fire prevention needs because the Delaware River and its tributaries were without flow for over sixty (60) days that year due to severe weather conditions.

C. 1994 Agreement and Subsequent Litigation

Between the 1970s and the 1990s, the Tribe worked with the State of Kansas and a local watershed district to develop a plan under the auspices of the Watershed Protection and Flood Prevention Act, Public Law 83-566 (PL-566 program, codified at 16 U.S.C. §1001 et seq.), now administered by USDA's Natural Resources Conservation Service (NRCS). In 1994, the parties completed an environmental impact statement and signed a Watershed Plan (1994 Agreement), which envisioned twenty (20) floodwater retarding dams off-Reservation and one multi-purpose dam (Plum Creek Reservoir) that would provide 5,700 acre-feet of water supply and recreation use for the Tribe's present and future needs. Congress authorized funding to implement portions of the 1994 Agreement in both 1996 and 1998, and the off-reservation dams have since been built.

Plum Creek Reservoir was not constructed, however, as it would have required the acquisition of more than 1,000 acres of non-Indian lands checker-boarded with Tribal lands. Most affected

non-Indian landowners refused purchase offers, and the local district refused to use its eminent domain authority.

In June 2006, the Tribe filed a complaint in federal district court against the Bureau of Indian Affairs, U.S. Department of Agriculture's Natural Resource Conservation Service (NRCS), the Kansas Department of Agriculture's State Conservation Commission, and the local watershed district. The complaint alleged that the Federal and State defendants had affirmative trust obligations to protect and preserve the Tribe's Federal Indian reserved water rights (*Winters* rights) and failed to do so. The complaint also alleged that the local watershed district breached its obligations under the 1994 Agreement. The complaint sought, among other things, a declaration of the existence and priority of the Tribe's *Winters* rights; an injunction preventing all defendants from violating the Tribe's *Winters* rights; and specific performance of the 1994 Agreement.

After the United States and other defendants filed motions to dismiss, the parties agreed to stay the litigation and to seek a negotiated settlement. The parties made significant progress toward resolving both the water and land acquisitions issues, but the local watershed district ultimately voted to reject the key land acquisition piece in 2011. The parties then agreed to restructure the litigation and focus on the district's obligations under the 1994 Agreement. In 2013, the federal district court ruled against the Tribe and found that the 1994 Agreement did not obligate the district to exercise its eminent domain authority to secure the land for Plum Creek Reservoir.

III. Proposed Kickapoo Legislation

As noted above, the Tribe's 2006 complaint asserted various claims related to its *Winters* rights in the Delaware River basin. Although the district court dismissed other claims related to the 1994 Agreement and the need to secure land for Plum Creek Reservoir, the Tribe, the State, and the United States (through the Department of Justice (DOJ) and the Department's Solicitor's Office (SOL)) continued working to resolve the underlying water rights issues and negotiated a potential water rights settlement. As directed by the court, the parties shared a draft settlement with the magistrate judge in December 2015. In September 2016, the Tribe and State - after making some critical revisions not shared with the United States - executed a revised settlement that forms the basis of S. 2154 and the subject of this hearing.

As introduced, S. 2154 would authorize and ratify the revised settlement executed by the Tribe and the State in September 2016; quantify the Tribe's water rights as outlined in the 2016 settlement; direct the Secretary of the Interior to enter into the 2016 settlement and take related actions consistent with the legislation; and direct the Secretary of Agriculture, through NRCS, to complete a study and make recommendations within two (2) years related to Plum Creek Project. S. 2154 would waive the Tribe's and United States' claims to water rights within the Delaware River Basin upon enactment, yet would retain the Tribe's claims against the United States related to its water rights. S. 2154 includes no federal appropriations at this time.

IV. Department of the Interior Positions on S. 2154

While the Department strongly supports Indian water rights settlements generally, the Department has significant concerns about S. 2154 and cannot support the bill as introduced.

As noted above, representatives from DOI and DOJ negotiated the basic structure of a proposed settlement in December 2015, one that the three sovereign parties submitted to the magistrate judge overseeing the litigation that began in 2006. The federal representatives cautioned the other parties and the magistrate judge, however, that any settlement would need to be submitted to and approved by the Working Group on Indian Water Rights and the Administration as a whole and that outstanding issues remained to be resolved, such as federal funding and associated cost-sharing as envisioned by the 1990 *Criteria and Procedures*. Rather than pursuing this course, the Tribe embarked on a separate process with the State, revising the December 2015 agreement -- without the involvement or approval of the United States -- and executing this revised settlement agreement in September 2016.

The Administration has significant concerns about the 2016 agreement and S. 2154. Criteria 3 of the 1990 *Criteria and Procedures* provides that “Settlements should be completed in such a way that all outstanding water claims are resolved and finality is achieved.” A critical goal for all Indian water rights settlements is achieving finality: resolving an Indian tribe’s water and related claims once and for all and providing certainty both to the Indian tribe and to affected State and non-Indian parties with respect to water allocations within a basin and related costs to achieve the settlement. Although S. 2154 and the underlying agreement take steps in this direction, they leave unresolved the ultimate cost of the settlement, how those costs should be shared, and how the water right will be realized for the Tribe. Moreover, S. 2154 explicitly retains the Tribe’s claims against the United States related to the issues this settlement is meant to resolve, the exact opposite of what an Indian water rights settlement is meant to achieve.

A critical piece of this puzzle, one that S. 2154 recognizes as unresolved, relates to the Plum Creek Project or similar infrastructure to meet the Tribe’s water right. The 2016 agreement defines the Tribal Water Right as the right to divert or redivert 4,705 acre feet year and gives the Tribe a right to store at least 18,520 acre feet in one or more yet to be constructed reservoirs. As introduced, S. 2154 would direct the Secretary of Agriculture and NRCS to commence a study and, within two (2) years, make recommendations on potential alterations to the Plan that authorized Plum Creek Project. It is unknown if such alterations will increase or reduce the amount of water that could be delivered to meet the Tribe’s water right, thus leaving uncertainty as to whether this project or other projects will be needed to address the Tribe’s water needs based on a reasonably foreseeable planning horizon. Although we generally support the amount of water quantified for the Tribe in the 2016 settlement executed between the Tribe and the State, the infrastructure needed to deliver reasonably foreseeable necessary water is unknown, and neither the United States nor anyone else should be exposed to unknown costs or potential liability as S. 2154 would allow.

In addition to the matters noted above, S. 2154 and the underlying agreement would alter other considerations developed as part of the original agreement - such as the timing of court proceedings and settlement enforceability - that had been structured based on previously enacted Indian water settlements.

After the Tribe and the State executed the revised agreement in September 2016, the Department and DOJ communicated concerns to the Tribe regarding these revisions, recommended that the Tribe follow the Indian water rights settlement process set forth in the *Criteria and Procedures* (including formation of a negotiation team), and urged the Tribe to dismiss the litigation. The Tribe agreed to dismiss the pending lawsuit, and the remaining parties to the litigation filed a joint stipulation requesting dismissal without prejudice, which the court approved in February 2017. The Department stands ready to work with the Tribe and the State through a Federal Negotiation Team and our established processes.

V. Conclusion

The Department recognizes that the Tribe and the State of Kansas want to achieve a Kickapoo water settlement and have devoted substantial efforts to reach that goal. The Department shares this goal and is committed to working with the Tribe and the State to reach a final and fair settlement of the Tribe's water rights claims that adheres to the principles of the *Criteria and Procedures* and that we can fully support. As proposed, however, the Department cannot support S. 2154.

**STATEMENT FOR THE RECORD
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON S. 3060**

July 18, 2018

Chairman Hoeven, Vice Chairman Udall, and Members of the Committee, thank you for the opportunity to present the Department of the Interior's (Department) views on S. 3060, a bill to repeal section 2141 of the Revised Statutes to remove the prohibition on certain alcohol manufacturing on Indian lands.

Background

The Department is aware that the Confederated Tribes of the Chehalis Reservation seek to venture into a new economic development project that will be 100 percent owned by the Tribe on its Tribal lands. This economic development project consists of the construction and operation of a distillery. The Tribe approached the Bureau of Indian Affairs (BIA) Northwest Regional Office regarding this economic development venture and the BIA identified a potential obstacle to the project: one section of the Trade and Intercourse Act of 1834 prohibited distilleries in Indian country. The ban as amended remains a part of Federal law. Current 25 U.S.C. 251 reads: "Every person who shall, within the Indian Country, set up or continue any distillery for manufacturing ardent spirits, shall be liable to a penalty of one thousand dollars; and the superintendent of Indian Affairs, Indian Agent, or sub-agent within the limits of whose agency any distillery of ardent spirits is set up or continued, shall forthwith destroy and break up the same."

Other sections of the 1834 law banned the sale and possession of liquor in Indian country, and those provisions also remain in the US Code at 18 U.S.C. Sections 1154, 1155, and 1156. In 1953, Congress enacted what is now codified at 18 U.S.C. Section 1161, waiving the application of those sections where a Tribe has enacted a liquor ordinance compliant with the terms of that section. The legislative history of Section 1161 makes it clear that Congress considered, and rejected, adding the distillery ban to the list of sections that would not apply where a Tribe had a liquor ordinance. The Department agrees that a legislative solution is the best avenue to remedy this situation and supports S. 3060.

S. 3060

S. 3060 would repeal Section 2141 of the Revised Statutes (25 U.S.C. 251). That section of the Code states that "Every person who shall, within the Indian Country, set up or continue any distillery for manufacturing ardent spirits, shall be liable to a penalty of one thousand dollars; and the superintendent of Indian Affairs, Indian Agent, or sub-agent within the limits of whose agency any distillery of ardent spirits is set up or continued, shall forthwith destroy and break up the same."

Conclusion

Thank you for the opportunity to appear before you today. I am happy to answer any questions the Subcommittee may have.

**Statement of Alan Mikkelsen
Senior Advisor to the Secretary
Water and Western Resources Issues
Chair, Working Group on Indian Water Settlements
U.S. Department of the Interior
Before the

Committee on Indian Affairs
U.S. Senate**

**On S. 3168, to amend the Omnibus Public Land Management Act of 2009 to make
Reclamation Water Settlements Fund permanent.**

July 18, 2018

Chairman Hoeven, Vice Chairman Udall, and Members of the committee, I am Alan Mikkelsen, and I am the Senior Advisor to Secretary Zinke and Chair of the Working Group on Indian Water Settlements at the U.S. Department of the Interior (Department). Thank you for the opportunity to discuss S. 3168, a bill to amend the Omnibus Public Land Management Act of 2009 (Title X, Part II of Public Law 111-11) to make the Reclamation Water Settlements Fund permanent. The Administration remains committed to implementing and adequately funding enacted settlements, and has ensured adequate funding to implement all authorized settlements through the annual Budget process.

The Department continues to strongly support Indian water rights settlements that adhere to the principles outlined in the Department's 1990 Criteria and Procedures that are grounded in the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation as a means of resolving water rights disputes. Negotiated settlements allow tribes, states, and local water users to achieve finality on difficult issues of title to water, freeing up surrounding communities to make critical management and development decisions. Settlements allow the parties to develop creative solutions to overarching water resources issues. One of the key factors in making settlements meaningful to the health and welfare of tribes and non-Indian communities, and to creating water certainty and economic-development opportunities in the West, has been funding. Funding is needed to secure new water supplies, build or rehabilitate infrastructure required to deliver water, and protect resources such as treaty fishing rights that are of critical importance to tribes. Settlements provide opportunities for local solutions, and because they have federal and local cost-share requirements, the settling parties share in the burdens, as well as the benefits, that can arise from investments in infrastructure. The FY 2019 Budget requests \$173 million for the implementation of Indian water rights settlements.

Background

To date, Congress has enacted 32 Indian water settlements, addressing the need for reliable water supplies in Indian country. There are over 280 federally recognized tribes in the West alone (excluding Alaska), and the Department continues to see an increase in requests from tribes and states to enter into water rights settlement negotiations. Many of these tribes need: clean,

reliable drinking water; repairs to dilapidated irrigation projects; and the development of other water infrastructure to bring economic development to reservations. States increasingly seek settlement of Indian water rights to provide certainty for holders of State-based water rights, clarify authority to manage water resources, and plan for the future.

Indian water rights settlements can however be costly, and costs have increased over the years. Within the last ten years, the Omnibus Public Lands Management Act of 2009 (P.L. 111-11), the Claims Resolution Act of 2010 (P.L. 111-291) and the Water Infrastructure Improvements for the Nation (WIIN) Act (P.L. 114-322) authorized seven new settlements that call for total Federal expenditures totally approximately \$2.5 billion. Although some mandatory funding was provided with the Claims Resolution Act, substantial discretionary funding is needed to meet the statutory settlement obligations. Each of these settlements contain deadlines by which funding must be completed or the settlement fails and long standing, expensive, and disruptive litigation resumes. In addition to the statutory requirements to fund these settlements within prescribed timeframes, the availability of funding has implications for economic development in Indian and non-Indian communities and raises other human considerations and equity concerns. For example, the availability of potable water can affect economic development, tribal health and welfare. Stalled funding would also delay the receipt of the economic benefits that are associated with settlements, which is why the Budget provides sufficient resources to implement enacted settlements. These benefits will not fully accrue until the physical infrastructure associated with settlements is complete and operational. Construction funding also provides short-term economic stimulus to localities or regions which is important given the high unemployment levels in Indian country.

The Department currently has 21 Federal negotiation teams working with tribes to achieve additional settlements, and 23 teams working on implementing enacted settlements. Two of the settlements included as priorities for the Settlement fund, Navajo Lower Colorado Basin and Fort Belknap, have not been enacted, and the Federal contributions to these settlements may approach a billion dollars based on similar enacted settlements. While allocation of funding among the priority settlements identified in the Settlements Fund is complicated by construction schedules and other matters and cannot be fully predicted, at this time it appears there will be little, if any, funding in the Settlement Fund for settlements not specifically listed as priorities. The Department has always given priority to funding settlements in the annual Budget.

Reclamation Water Settlements Fund

In 2009, Congress created the Reclamation Water Settlements Fund, which authorizes the deposit of funds that would otherwise be deposited into the Reclamation Fund, into a separate account within the U.S. Treasury. Currently, the Secretary of the Interior is authorized to expend from the Reclamation Water Settlements Fund, without further appropriation, up to \$120 million a year of the amounts deposited through FY 2029, plus accrued interest, in each of the years from FY 2020 to FY 2034. The Secretary may use money in the Reclamation Water Settlements Fund to implement congressionally approved water rights settlements, if the settlement requires the Bureau of Reclamation to provide financial assistance, or to plan, design or construct water supply infrastructure. In addition, the currently authorized Reclamation Water Settlements Fund

establishes certain funding priorities for settlements in the states of New Mexico, Montana, and Arizona.

Finally, the law includes a reversion clause providing that if any settlement identified in the above funding priority is not approved by an act of Congress by December 31, 2019, the Secretary has the discretion to use the reserved funds for any authorized use.

S. 3168

S. 3168 would make the Reclamation Water Settlements Fund permanent and would not prioritize settlements other than those currently prioritized. While the current Reclamation Water Settlement Fund will become available for expenditures in 2020, much of it is already committed to existing, enacted settlements. The Department looks forward to working with the Committee to determine the best approach for authorizing future settlements.

The Department takes into consideration the effects of growing populations and related water demands, widespread drought in the West, and the need for new infrastructure and water storage in many locations. These factors are certain to drive an increase in the demand for water settlements.

I want to underscore the importance of these settlements, and recognize the aim of the bill sponsor and this Committee in considering S. 3168. Disputes over Indian water rights can be expensive and divisive. In many instances, these disputes last for decades, represent a tangible barrier to progress for tribes, and significantly hinder the rational and beneficial management of water resources. Indian water rights settlements can break down these barriers and help create conditions that improve water resources management by providing finality and certainty for all affected water users. When settlements can be reached, they provide opportunities for economic development, produce critical benefits for tribes and non-Indian parties, and bring together communities to improve water management practices in some of the most stressed water basins in the country. Successful settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency.

As noted above, the Department supports Indian water rights settlements grounded in the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation as a means of resolving water rights disputes. The Department looks forward to working with the Committee and discussing the best means of achieving future settlements.

This concludes my written statement. I am pleased to answer questions at the appropriate time.

Tab T – Legislation and Litigation Update

H.R. LEGISLATION AND LITIGATION UPDATE

187TH WSWC MEETINGS

NEWPORT, OR – AUGUST 2, 2018

Compiled By:
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This summary describes developments regarding notable legislation and litigation that pertain to WGA/WSWC policies or are otherwise of interest. It focuses primarily on developments that have taken place since the beginning of the 115th Congress. This update is current as of June 20, 2018, and the legislative portion is organized in reverse chronological order according to bill number. For some bills, this document uses modified versions of summaries prepared by the Congressional Research Service.

NOTABLE LEGISLATION

Bill Number(s)	Summary	Dates/Status	Sponsor(s)
S. 3009	Issue: EPA Veto Authority, CWA §404 Title: Regulatory Certainty Act. The bill would limit the Environmental Protection Agency’s (EPA) ability to review Clean Water Act (CWA) §404 permits to a 30-day period between the Army Corps of Engineers’ (Corps) notice of the completed application and when the permit is issued.	6/6/18: S. 3009 introduced in the Senate, referred to Environment and Public Works	Senator Shelley Moore Capito (R-WV) introduced S. 3009, with co-sponsors John Barrasso (R-WY), John Boozman (R-AR), and Jim Inhofe (R-OK)
H.R. 8	Issue: WRDA, Infrastructure Title: Water Resources Development Act. Title I provides full use of funds from the Harbor Maintenance Trust Fund for harbor maintenance purposes (§102). It reauthorizes the Levee Safety Initiative and National Dam Safety program through 2023 (§104, §105). The bill requires a report on the pilot program at Coyote Valley Dam (California) for forecast-informed reservoir operations (FIRO), with an assessment of whether FIRO is viable for other Corps dams (§107). It also requires the Corps to directly engage stakeholders in the development of implementation guidance (§114). The bill directs the National Academy of Sciences, in consultation with Department of Defense (DOD), EPA, OMB, and other agencies, to study the ability of the Corps to carry out its mission, including the potential effects of moving the Corps from the DOD to a new or existing federal agency (§118). Title II authorizes studies for future water resources improvements included in the Corps’s annual reports to Congress (§201, §202). It directs the Corps to expedite feasibility studies for various projects, including (1) a flood diversion project in Seward, Alaska; (2) a flood control and flood risk management projects at Coyote Valley Dam, South San Francisco, and Tijuana River, California; (3) a project for ecosystem restoration at the Kansas River Weir, Kansas; (4) a water	5/18/18: H.R. 8 introduced in the House, referred to the Transportation and Infrastructure 6/1/18: T&I reported H.R. 8 with amendments 6/6/18: House passed H.R. 8 by a vote of 408-2 6/11/18: H.R. 8 received by the Senate 6/26/18: Placed on Senate calendar	

	resources improvements project at Willamette River Basin, Oregon; and (5) a navigation project at Tacoma Harbor, Washington (§203). Title III offsets new project authorizations by deauthorizing other projects, and sunsets inactive project authorizations (§301, §302). Title IV authorizes water resources infrastructure projects, consistent with the reports the Corps submitted to Congress. One amendment from Rep. Brian Mast (R-FL) authorizes a harmful algal bloom technology development demonstration at the U.S. Army Engineer Research and Development Center. Rep. Darren Soto (D-FL) included an amendment that directs the U.S. Army Corps of Engineers (Corps) to expand areas of consideration to include water storage. An amendment from California Representatives Jim Costa (D) and Jeff Denham (R) authorizes the Corps to accept contributed funds from the owners of non-federal Flood Control Act Section 7 reservoirs for the purpose of reviewing or revising operational documents, including flood control manuals and rule curves. <i>Notably, unlike S. 2800, the House bill does not include reauthorization for the Water Infrastructure Finance and Innovation Act (WIFIA).</i>		
S. 2800	Issue: WRDA, Infrastructure Title: America’s Water Infrastructure Act. Title I creates a new framework for budgeting Corps projects at the regional and local level with stakeholder input (§1001). It also clarifies non-federal cost obligations for operations, maintenance, and repairs in partnership agreements (§1009), and federal technical assistance obligations for feasibility studies (§1020). Section 1031 creates a state-federal Board of Appeals for water storage projects, creating a working relationship between agencies to improve communication and keep projects on schedule through the NEPA review and permitting process. Title II authorizes or reauthorizes water infrastructure programs, projects, and studies. Title III requires a report from the Corps on the extent it has used its authority to remove debris from federal channels and adjacent waters (§3121). It extends authorization of funds for the national levee safety program from FY2020-21 for a total of \$158M (§3206). It requires non-federal sponsors of high hazard dams to have an emergency action plan in place before receiving federal assistance (§3210). Section 3302 requires the Corps to price water storage projects at fair market value, limiting the price to 110% of the lowest contracted price of Corps facilities within 50 miles of the water source, adjusted for inflation. It authorizes full use of the Fontenelle Reservoir storage capacity (§3301), addresses sediment management at Corps and Reclamation projects (§§3401 to 3403), and requires coordination and development of a flood prevention action plan in the Snake River Basin (§3609). Section 3803 amends the allocation of appropriated funds for the Blackfeet Tribe water rights settlement to facilitate water infrastructure projects on Tribal lands. Title V reauthorizes the Water Infrastructure Finance and Innovation Act (WIFIA) through 2021 (§5002), with an additional \$100M in funding. It establishes a drinking water and wastewater pilot program for projects on Indian reservations located in the Upper Missouri River Basin and Upper Rio Grande Basin (§5003). It authorizes appropriations for technical assistant for small and medium publicly owned treatment works (§5004).	5/8/18: S. 2800 introduced in the Senate, referred to Environment and Public Works 5/9/18: EPW hearing 5/29/18: EPW reported S. 2800 by unanimous vote; S. Rept. 115-294	Senator John Barrasso (R-WY) introduced S. 2800 with 9 bipartisan co-sponsors.

	<i>The amended version incorporates S. 2364, the SRF WIN Act.</i>		
H.R. 5596	Issue: Climate Resilient Infrastructure Title: Water Infrastructure Resiliency and Sustainability Act. The bill would direct EPA to establish a cost-share grant program for water systems (surface, groundwater, reuse, stormwater, wastewater, watershed, desalination, reservoir operation, conjunctive use, banking, irrigation, floodplains, wetlands, uplands) to increase resiliency or adaptability to any ongoing or forecasted changes to regional hydrologic conditions (quality, quantity, reliability). The bill provides for public sponsorship of private entities to qualify for grant funds. It authorizes \$50M per fiscal year from 2018-2022.	4/24/18: H.R. 5596 introduced in the House, referred to T&I and Natural Resources	Rep. Salud Carbajal (D-CA) introduced H.R. 5596
H.R. 5548	Issue: Water Quality, SDWA Title: Water, Cosmetics, and Unwanted Pharmaceuticals Study Act. The bill amends the SDWA to require EPA to study pharmaceuticals and cosmetics in drinking water (presence, levels, origins, effects on humans and environment, methods of treatment)	4/18/18: H.R. 5548 introduced in the House, referred to Energy and Commerce	Rep. Janice Schakowsky (D-IL) introduced H.R. 5548
H.R. 2	Issue: Farm Bill Title: Agriculture and Nutrition Act. Title II contains provisions for conservation programs. Section 2302 maintains authorization for the Environmental Quality Incentives Program (EQIP) and increases funding to \$3B per year through FY2023. The bill eliminates the Conservation Stewardship Program (CSP) (§2801), but incorporates some CSP features, such as precision planning, cover crops and crop rotations, and irrigation scheduling technology, into the EQIP Working Lands Initiative (§2301). As of FY2016, the CSP had over 70M enrolled acres, with over a million acres each in Kansas, Montana, Nebraska, New Mexico, Oklahoma, and South Dakota. The existing contracts will continue, but would not be renewed, if the bill passes. See www.nrcs.usda.gov/Internet/NRCS_RCA/maps/cp_cstp_maps.html. Authorization is extended through FY2023 for the Grassroots Source Water Protection Program, with an additional \$5M in funding (§2402). Section 2404 reauthorizes Watershed Protection and Flood Prevention, including the Small Watershed Rehabilitation programs to address aging dams, erosion, floodwaters, and watershed protection and restoration with \$100M per year in addition to funds through the Commodity Credit Corporation (CCC) (§2404). Section 2102 provides \$10M of the CCC funds to carry out the Wetland Mitigation Banking Program (16 USC §3822(k)(1)(B)). The CCC is authorized at \$500M per year through FY 2023 (§2501). The bill authorizes \$250M per year for the Regional Conservation Partnership Program (RCPP) (§2704), but removes the additional project authority of the state-federal cooperation provisions of the Watershed Protection and Flood Protection Act (16 USC 1001 et seq.) for designating critical conservation areas (§2706). Section 2802 would eliminate the Terminal Lakes Assistance program (16 USC §3839bb-6), which provides 50% cost-share grants to states to purchase eligible flooded lands in closed basins. Section 2603 reauthorizes the Agricultural Conservation Easement Program (ACEP) with modifications to provisions on eligible non-federal cost-share contributions, criteria that account for geographic differences between states, localized mineral development, and technical assistance.	4/12/18: H.R. 2 introduced in the House, referred to Agriculture. 4/18/18: Agriculture Committee approved the bill 26-20 5/3/18: H. Rept. 115-661 5/18/18: Failed to pass the House 198-213 6/21/18: Passed the House 213-211 6/28/18: Passed the Senate 86-11 7/18/18: House requested conference to resolve differences	Rep. Michael Conaway (R-TX) introduced H.R. 2

	Section 2201 gradually increases acreage of land eligible for the Conservation Reserve Program (CRP) from 25M acres in FY2019 to 29M acres in FY2023, while capping rental rates and focusing the CRP toward fragile lands. Section 2202 reauthorizes the farmable wetlands program through FY2023, but reduces the total number of eligible wetland acres that may enroll in the CRP from 750,000 down to 500,000. The Committee approved an amendment by Rep. Mike Bost (R-IL) to include nutrient recovery systems in the definition of “new and innovative conservation approaches” in the Conservation Innovation Grants program (§2304). Title V reauthorizes the Conservation Loan and Loan Guarantee Program to help farmers and ranchers implement conservation measures on their lands, but reduces funding from \$150M to \$75M per year (§5102). Title VI covers rural development. It gives rural communities increased access to credit to finance critical infrastructure, including public water systems. Grants for water, waste disposal, and wastewater facilities are reauthorized, and maximum financing levels are increased from \$100,000 to \$200,000; however, overall funding for the program is reduced from \$30M a year down to \$15M a year (§6204). The Technical Assistance and Training Program is amended to include options for long-term sustainability of systems (§6205). The Circuit Rider Program is reauthorized, with an increase from \$20M to \$25M (§6202). Grants for NOAA weather radio transmitters (7 USC §2008p(d)) and the National Agricultural Weather Information System are reauthorized through FY2023 (§6220, §7206). Title VIII includes forest management activities. It reauthorizes the Landscape Scale Restoration Program for the U.S. Forest Service and state agencies to tackle forest health, wildfires, and drinking water protection (§8104). Sections 8311 to 8321 establish categorical exclusions from National Environmental Policy Act (NEPA) requirements for various forest management activities, including wildfire prevention and mitigation. Title X covers crop insurance provisions to manage risk from drought and other natural disasters.		
H.R. 5468	Issue: Judicial Review of Agency Decisions; Streamlining Permits Title: Permitting Litigation Efficiency Act. The bill would amend the Administrative Procedures Act (5 USC §706) to limit the length of time an agency has to make decisions on permit applications before a court must presume that the delay in final agency action is unreasonable and compel agency action. The bill would limit review of an agency decision to the matters included in the agency record, including matters within the limited scope of the environmental review. The bill would limit restraining orders and injunctions against permitted activities, requiring consideration of benefits and harms to public health, safety, the environment, and economic interests if the permitted activity is halted or continues forward, and allows an injunction to be conditioned on payment of a bond for the costs of delaying the project.	4/11/18: H.R. 5468 introduced in the House, referred to Judiciary Committee 4/12/18: Subcommittee on Regulatory Reform held a hearing	Rep. Tom Marino (R-PA) introduced H.R. 5468, with 7 co-sponsors, including from NV and TX
S. 2563	Issue: Infrastructure, Drought, Water Transfers Title: Water Supply Infrastructure and Drought Resilience Act. The bill would establish a pilot program to update flood-control curves at Bureau of Reclamation facilities. It would increase	3/22/18: S. 2563 introduced in the Senate, referred to the Committee	Senator Jeff Flake (R-AZ) introduced S. 2563, with co-sponsoring Senators John McCain (R-AZ), Cory Gardner

	Reclamation’s flexibility to recharge aquifers. The bill would increase access to Reclamation’s WaterSMART program by expanding eligibility to states and other organizations with water or power delivery authority, and allowing states and conservation districts to sponsor cooperative watershed management programs. For surface water storage projects, S. 2563 would streamline the permitting process and improve inter-agency coordination. Authorization to use the Upper Colorado River Basin Fund revenues for annual base funding of endangered fish recovery programs would be extended from 2019 through 2023. The bill also contains provisions prohibiting the Departments of Agriculture and the Interior from conditioning permits to require the transfer of water rights to the United States. It would require the agencies to “recognize the longstanding authority of the States relating to evaluating, protecting, allocating, regulating, permitting, and adjudicating water use,” and to coordinate with the States when developing any rule, policy, directive, management plan relating to permits, leases, or other land use agreements to ensure the applicable State water laws are not adversely affected. Notably, section 311 would codify EPA’s Water Transfers Rule (40 CFR §122.3(i)).	on Energy and Natural Resources 3/22/18: ENR hearing, Western Water Supply Outlook	(R-CO), James Risch (R-ID), and John Barrasso (R-WY)
H.R. 5264	Issue: Conservation Easements Title: Clean Water Partnership Act. Would authorize EPA \$750M/fiscal year for matching grants to states for acquisition of land to improve, preserve, or maintain water quality for an area in perpetuity. The land acquisition would include deed restrictions, and state matching could include in-kind contributions.	3/13/18: H.R. 5264 introduced in the House, referred to Natural Resources	Rep. Donald McEachin (D-VA) introduced H.R. 5264 with 14 Democratic co-sponsors
S. 2539	Issue: Colorado River Basin No Title: the bill would reauthorize water pilot projects in the Upper Colorado River Basin (43 USC §620) through 2022. Tim Petty, Assistant Secretary for Water and Science, U.S. Department of the Interior, provided details during the Committee hearing on the Pilot System Conservation Program, a voluntary, basin-wide approach to pool the financial resources of Reclamation and Colorado River Basin water agencies, providing \$20M so far. The projects are intended to increase storage levels in Lakes Mead and Powell as a benefit to the Colorado River System, but the program requires interstate cooperation and broad stakeholder support to be successful. Petty added that Reclamation is looking at opportunities to increase water resources and supply reliability by “expanding cost-effective water storage opportunities, paying attention to local water conflicts, making investments in modernizing existing infrastructure, and providing support for water development benefitting Native Americans in order to meet Reclamation’s core mission goals.”	3/13/18: S. 2539 introduced in the Senate, referred to the Committee on Energy and Natural Resources 3/22/18: ENR hearing, Western Water Supply Outlook	Senator Dean Heller (R-NV) introduced S. 2539
S. 2509	Issue: Reclamation Fund Title: National Parks Restoration Act. The bill would “help restore and rebuild our national parks by helping to pay for the \$11B maintenance backlog in our national parks,” according to Alexander during his floor speech. “The legislation will use revenues from energy production on federal lands to provide mandatory funding for the maintenance backlog at our national parks. This is a well-established conservation principle: taking some of the money created by an environmental burden and using it for an environmental benefit...The National Park Restoration Fund created by the legislation will receive 50% of revenues from energy production on federal lands over 2018 projections that are not already allocated to other purposes. The legislation includes revenues from all sources of energy production on federal land – oil, gas, coal, and	3/7/18: S. 2509 introduced in the Senate, referred to ENR	Senator Lamar Alexander (R-TN) introduced S. 2509, with bipartisan cosponsors Senators Steve Daines (R-MT), Cory Gardner (D-CO), and Martin Heinrich (D-NM), Senators Shelley Moore-Capito (R-WV), Angus King (I-ME), Joe Manchin III (D-WV) and Thom Tillis (R-NC)

	renewables and alternative energy. The legislation protects all existing obligations for revenues from energy production on federal lands, including payment to states, the Land and Water Conservation Fund, and the Reclamation Fund.”		
H.R. 5127	Issue: Water Reuse Title: Water Recycling Investment and Improvement Act. To establish a grant program to fund water recycling and reuse projects that are likely to provide reliable water supply for states and local governments, and increase water management flexibility and reduce impacts on environmental resources from projects operated by federal and state agencies. The bill would amend the Reclamation Wastewater and Groundwater Study and Facilities Act, 43 USC §390 et seq.	2/27/18: H.R. 5127 introduced in the House, referred to Natural Resources, Transportation and Infrastructure	Rep. Grace Napolitano (D-CA) introduced H.R. 5127 with 9 Democrat co-sponsors
H.R. 5073	Issue: Rural Infrastructure Title: Clean Water for Rural Communities Act. Would authorize the Dry-Redwater Regional Water Authority System and the Musselshell-Judith Rural Water System in the States of Montana and North Dakota.	2/20/18: H.R. 5073 introduced in the House, referred to Natural Resources	Rep. Greg Gianforte (R-MT) introduced H.R. 5073
H.R. 5030	Issue: CWA Technical Assistance Title: Small and Rural Community Clean Water Technical Assistance Act. To provide technical assistance for small treatment works that are publicly owned, serving under 10,000. Would authorize \$15M each year from FY2018-FY2022. For medium treatment works between 10,000 and 75,000, an additional \$10M per year is authorized. Assistance includes grants or cooperative agreements to provide onsite technical assistance, circuit rider technical assistance programs, multi-State, regional technical assistance programs, and onsite and regional training, to help treatment works achieve compliance with the CWA.	2/16/16: H.R. 5030 introduced in the House, referred to Transportation and Infrastructure	Rep. Gregg Harper (R-MS) introduced H.R. 5030
H.R. 4976	Issue: Forest Health Title: Empowering State Forestry to Improve Forest Health Act. The bill amends the Cooperative Forestry Assistance Act of 1978 to direct the Forest Service to establish a landscape-scale restoration program to provide financial and technical assistance for landscape-scale restoration projects on state and private forest lands. The program objectives would include protecting or improving water quality or quantity, reducing wildfire risk, addressing invasive species, or protecting ecosystems or habitat. The bill would authorize \$30M to be appropriated each year from FY2018-2021	2/14/18: H.R. 4976 introduced in the House, referred to Agriculture and Natural Resources Committees	Rep. Peter Welch (D-VT) introduced H.R. 4976
H.R. 4947	Issue: Rural Infrastructure, Circuit Riders Title: Rural Infrastructure Development and Partnership Act. The bill is intended to improve infrastructure (water, wastewater, transportation, public buildings, utilities) by establishing an office with a liaison to facilitate and coordinate technical assistance with federal agencies and rural partners. Among other programs, the office and technical assistance teams would coordinate with the Rural Water and Wastewater Circuit Rider Program.	2/6/18: H.R. 4947 introduced in the House, referred to Agriculture	Rep. Elizabeth Esty (D-CT) introduced H.R. 4947 with 3 bipartisan co-sponsors from NY and VT
H.R. 4908	Issue: SDWA, lead, school assistance No Title: The bill would amend the Safe Drinking Water Act to provide assistance to schools to replace drinking water fountains that may contain lead.	1/30/18: H.R. 4908 introduced in the House, referred to Energy and Commerce	Rep. Bobby Rush (D-IL) introduced H.R. 4908 with 2 co-sponsors

	<i>See also, H.R. 4907, establishing a grant program for the same purpose.</i>		
H.R. 4902/S. 2364	Issue: WIFIA Loans to State Financing Authorities Title: SRF WIN Act. The bill would amend the Water Infrastructure Finance and Innovation Act of 2014 to provide to State infrastructure financing authorities additional opportunities to receive loans under that Act to support drinking water and clean water State revolving funds to deliver water infrastructure to communities across the United States. The financial assistance may be used to pay the reasonable costs of administration related to that assistance, and the interest rates are equal to the Treasury security yield for similar maturity dates as the loan, with exceptions for states with a declared disaster or that received less than 2% of the total loan funds for the most recent fiscal year. States are limited to \$7B in loans per state between FY2019-2023. The bill would also remove the pilot project designation for the WIFIA program <i>Note: S.2800 was amended to incorporate S. 2364 into the Senate's WRDA bill.</i>	1/30/18: H.R. 4902 introduced in the House, referred to Transportation and Infrastructure, Energy and Commerce; S. 2364 introduced in the Senate, referred to Environment and Public Works	Rep. John Katko (R-NY) introduced H.R. 4902 with three bipartisan co-sponsors from IL, NY, and OR Senator John Boozman (R-AR) introduced S. 2364 with 9 bipartisan co-sponsors from CA, MS, NJ, OK, PN, WI, WV, WY
H.R. 4892	Issue: Source Water Protection Title: Collaborative Water and Soil Enhancement Act. The bill would encourage best practices relating to water quality and quantity that protect or improve source waters for drinking water while benefitting agricultural producers, under the direction of the Secretary of Agriculture in collaboration with drinking water utilities, community water systems, and State technical committees	2/8/18: H.R. 4892 introduced in the House, referred to Agriculture	Rep. Marcia Fudge introduced H.R. 4892
S. 2346	Issue: Water Infrastructure No Title. The bill is intended to establish an innovative water infrastructure workforce development program, investing federal resources into collaborating with States to improve water and wastewater utilities with a strong pipeline of skilled and diverse workers, with grants awarded to assist with training and education and improve community awareness.	1/25/18: S. 2346 introduced in the Senate, referred to Environment and Public Works	Sen. Cory Booker (D-NJ) introduced S. 2346
H.R. 4735	Issue: Gold King Mine Title: Gold King Mine Spill Accountability Act. The bill would provide compensation from the EPA's unobligated funds for injuries resulting from the August 2015 spill, including business, financial, and property losses brought under the Federal Tort Claims Act (FTCA). The bill also requires EPA to fund implementation of the long-term water quality monitoring program for the Animas and San Juan Rivers, but does not specify any funding amounts. In order to be funded, the program must provide full public disclosure of water quality and sediment data, enable meaningful comparison between the data and the relevant water quality standards, and meet any other EPA requirements to administer the program.	1/3/18: H.R. 4735 introduced, referred to Transportation and Infrastructure, Judiciary, Energy and Commerce, and Agriculture Committees	Rep. Steve Pearce (R-NM) introduced H.R. 4735
H.R. 4696	Issue: Hydropower Title: Promoting Hydropower Development at Existing Nonpowered Dams Act. The bill would amend the Federal Power Act to expedite the licensing process through coordination of regulatory processes at federal, state, and tribal agencies, ensuring interagency communication and final decisions on applications within 2 years of completed applications.	12/22/17: H.R. 4696 introduced in the House, referred to Energy and Commerce	Rep. Larry Bucshon (R-IN) introduced H.R. 4696
H.R. 4492/S. 2329	Issue: Water Infrastructure Loans	12/1/17: H.R. 4492 introduced in the House, referred to Transportation	Rep. Brian Mast (R-FL) introduced H.R. 4492, with 4

	Title: Water Infrastructure Finance and Innovation Reauthorization Act. The bill is designed to accelerate water structure investments, and would extend authorization for EPA's water infrastructure federal loan guarantee pilot program five years, through 2024. It would double authorization for appropriations to \$90M, with incremental annual increases. The bill shifts primary administration of the WIFIA program to EPA rather than sharing the responsibility with the U.S. Army Corps of Engineers (Corps). Projects under the jurisdiction of the Corps must submit concurrent applications to the Corps.	and Infrastructure, and Energy and Commerce Committees 1/23/18: S. 2329 introduced in the Senate, referred to Environment and Public Works	bipartisan co-sponsors from CA, NY, MI, and OH Sen. John Hoeven (R-ND) introduced S. 2329 with 2 bipartisan co-sponsors from IA and NJ
S. 2200	Issue: Drought Forecasting Title: National Integrated Drought Information System Reauthorization Act. The bill would authorize NIDIS program funding for FY2018-2023, in graduated amounts of \$13.5M to \$18.5M, and provides authority for soil moisture networks, cooperative partnerships, and improvements to seasonal, sub-seasonal, and low flow water predictions	12/13/17: S. 2200 introduced in the Senate, referred to Commerce, Science, and Transportation 5/22/18: Committee reported S. 2200 with an amendment in substitute; H.Rept. 115-256	Senator John Thune (R-SD) introduced S. 2200 with bipartisan co-sponsors from FL and NE
H.R. 4465	Issue: Upper Colorado River, Fish Recovery Title: Endangered Fish Recovery Programs Extension Act. The bill authorizes the Upper Colorado and San Juan River Basins Endangered Fish Recovery Programs Act (P.L. 106-392) passed by Congress in 2000. It would maintain base annual funding for the federal cost-share programs through FY2023, and extend the programs' authorization to use hydropower revenues. It would also require a report, prepared in consultation with program participants, on the implementation and effectiveness of those programs, including the listing status of four warm-water endangered fish, expenditures of appropriated funds broken down by activity categories, and contributions from States, Tribes, hydropower revenues, water users, and environmental organizations.	11/28/17: H.R. 4465 introduce, referred to Natural Resources Committee 2/16/17: Committee ordered reported by unanimous consent, H. Rept. 115-567 3/13/18: H.R. 4465 passed in the House by a vote of 392-6 3/14/18: H.R. 4465 received in the Senate, referred to ENR	Rep. John Curtis (R-UT) introduced H.R. 4465 with 14 bipartisan co-sponsors from AZ, CO, NM, UT, and WY
H.R. 4423	Issue: Judicial Review of NEPA Decisions on Reservoir Project Title: North Texas Water Supply Security Act. The bill would limit NEPA lawsuits for the environmental review for the Lower Bois d'Arc Creek Reservoir Project in Texas, requiring claims arising under federal law to be brought within 60 days of publication of the record of decision in the Federal Register. It also requires that the plaintiff have submitted comments during the public comment period, and that all actions be brought in the U.S. District Court for the Eastern District of Texas. To grant injunctive relief against federal or state agencies or the project sponsor, the North Texas Municipal Water District, the court must (a) consider the potential effects on public health, safety, and the environment, and the potential for significant negative economic effects of an injunction; (b) no presume that those harms are reparable; (c) not waive or limit the security requirement in FRCP 65(c) to pay the costs and damages sustained by any party wrongfully enjoined. The security must be posted within 15 days or the injunction would automatically terminate.	11/16/17: H.R. 4423 introduced in the House, referred to Judiciary 4/12/18: Subcommittee on Regulatory Reform held hearings. 6/13/18: Mark-up session and Judiciary reported an amended version by a vote of 16-11	Rep. Sam Johnson (R-TX) introduced H.R. 4423, with 4 Texas co-sponsors
H.R. 4417	Issue: Harmful Algal Blooms	11/16/17: H.R. 4417 introduced in the House,	Rep. Suzanne Bonamici (D-OR) introduced H.R. 4417, with 4

	Title: Harmful Algal Bloom and Hypoxia Research and Control Amendments Act. The bill would reauthorize the 1998 Act of the same name, which is currently set to expire at the end of FY2018, through FY2023. The bill would add the Corps to the algae bloom and hypoxia task force and would update some of the scientific language. It directs the National Oceanic and Atmospheric Administration (NOAA) to create a website to provide information to the public on program research and activities to monitor, mitigate, and intervene in HAB and hypoxia events. The bill directs future scientific assessments of HABs in marine coastal environments and freshwater lakes, rivers, and estuaries, and directs the program to accelerate the use of effective methods of intervention and mitigation. The bill requires the National Harmful Algal Bloom and Hypoxia Program to work cooperatively with and provide technical assistance to regional, state, tribal, and local government agencies and programs. It establishes a process for NOAA or the EPA to declare an “Event of National Significance” for HABs or hypoxia events with “a significant detrimental environmental, economic, subsistence use, or public health impact on an affected State.” The declaration may be made in the agencies’ discretion or at the request of a governor of an affected state, and would trigger access to disaster funds to assess and mitigate the damage. In making a national significance determination, the agencies are directed to consider toxicity, severity, potential spread, economic impact, size relative to past recurring events, geographic scope, and potential to cross municipal, state, or international boundaries. It limits the federal cost share to 50%, and allows private donations of funds, services, materials, or equipment to help with recovery. The bill authorizes appropriations of \$22M each year between FY2019 and FY2023.	referred to Natural Resources, Science, Space and Technology Committees	bipartisan co-sponsors from NY, OH, TX
S. 2154	Issue: Indian Water Rights Settlement Title: Kickapoo Tribe in Kansas Water Rights Settlement Act. The bill would approve the 2016 settlement agreement between the Tribe and the state of Kansas. The bill confirms the Tribal consumptive right of up to 4,705 acre-feet of water per year for any purpose. Allottee entitlements to water within reservation boundaries are to be fulfilled from the Tribe’s water. The Tribe would have the authority “to use, allocate, distribute, and lease the Tribal water rights on or off the Reservation” under a Tribal Water Code, the settlement agreement, or other applicable federal law. The Tribe is directed to enact a Tribal Water Code within three years of the enforceability date, with provisions for permitting and limitations on diversion, storage and use of water; a due process system for disputed claims or contested administrative decisions; irrigation delivery and associated charges to allottees; and other requirements. The state of Kansas will continue to administer all Kansas water rights in the Delaware River Basin. The bill also directs the Department of Agriculture’s Natural Resources Conservation Service and the Department of the Interior’s Indian Water Rights Office to study the Upper Delaware and Tributaries Watershed Project. It would require them to make recommendations about the Project to Congress within 2 years on any changes necessary to effectuate the water rights confirmed by S. 2154	11/16/17: S. 2154 introduced, referred to Indian Affairs Committee 7/18/18: Committee hearing held	Senator Jerry Moran (R-KS) introduced S. 2154
H.R. 4419	Issue: Water Infrastructure Title: Bureau of Reclamation and Bureau of Indian Affairs Water Project Streamlining Act. The bill applies “...the same streamlined water project development process for the [Bureaus] that the Water Resources Reform and Development Act (WRRDA) of 2014 (P.L. 113-121) provided for the U.S. Army Corps of Engineers. The goal of the legislation is to reform the current cumbersome, lengthy process so that there is a mechanism to build new water projects in the West.” The bill requires expedited completion of ongoing feasibility studies for surface water projects, Title XVI water reclamation and reuse program projects (P.L. 102-575), rural water	11/16/17: H.R. 4419 introduced 11/30/17: Subcommittee hearings 5/16/18: Mark-up session and ordered to be reported by a vote of 21-14	Rep. Dan Newhouse (R-WA) introduced H.R. 4419

	supply projects (P.L. 109-451), or the federal portion of integrated water resource management plans. For future projects, it limits the review period to three years, with extensions for a maximum of seven years for more complex projects with detailed justifications to Congress and any non-federal project sponsor. It directs Interior to develop a coordinated and expedited environmental review process, and to establish a completion schedule with financial penalties for Interior if timelines are not met. Similar to Corps feasibility studies, Interior is directed to develop and submit an annual report to the relevant Congressional committees of proposed water development projects, with cost estimates and proposed modifications. Interior would publish an annual Federal Register request for proposals from non-federal interests for project studies and modifications to authorized projects, which Interior would include in its annual report. H.R. 4419 lists four projects that meet the criteria of the bill that would be carried out: (1) Phase III of the Yakima River Basin Water Enhancement Project in Washington; (2) the Equus Beds Division of the Wichita Project in Kansas; (3) the Musselshell-Judith Rural Water System in Montana; and (4) the Shasta Lake Water Resources Investigation in California. The bill directs Interior to identify \$369M in Reclamation projects that are no longer feasible due to lack of local support, lack of federal resources, or irrelevance, and develop a deauthorization list to offset federal costs for water development projects. See also, H.R. 23 (which incorporates H.R. 875)		
H.R. 3859	Issue: Drinking Water SRFs Title: Drinking Water Infrastructure for Job Creation Act. The bill provides \$7.5B in supplemental FY17 appropriations to EPA for Drinking Water SRFs	9/27/17: H.R. 3859 introduced in the House, referred to Appropriations	Rep. Maxine Waters (D-CA) introduced H.R. 3859 with 61 Democratic co-sponsors
S. 1770, H.R. 4723	Issue: Indian Water Rights Title: Hualapai Tribe Water Rights Settlement Act. The bill would approve the settlement of water rights claims of the Hualapai Tribe and certain allottees in the State of Arizona, to authorize construction of a water project relating to those water rights claims. The settlement includes claims to water in the Verde River, the Bill Williams River, and the Colorado River. It would also authorize the Hualapai Water Project to divert, treat, and convey water from the Colorado River to the Reservation. The bill establishes a Hualapai Water Project Account and OM&R Trust Account. The tribe would be allowed to enter into contracts to lease the tribe's Central Arizona Project water within the lower basin in Arizona, with approval from Interior. The CAP water may not be permanently alienated, leased or transferred outside of Arizona, but may be stored as groundwater for the tribe's later use. All of the tribe's CAP water diverted directly from the Colorado River will be accounted for as deliveries of Arizona's CAP water for purposes of Colorado River accounting.	9/7/17: S. 1770 introduced in the Senate, referred to Indian Affairs 12/6/17: Senate Indian Affairs hearing 12/21/17: H.R. 4723 introduced in the House, referred to Natural Resources	Senator Jeff Flake (R-AZ) introduced S. 1770 with co-sponsor Senator John McCain (R-AZ) Rep. Paul Gosar (R-AZ) introduced H.R. 4723 with four bipartisan Arizona Representatives
H.R. 3846	Issue: Reclamation Fund Title: Providing Opportunity With Energy Revenues (POWER) in Counties Act. The bill would redirect half the federal mineral leasing receipts from the Reclamation Fund to the counties of origin for roads and schools. Under the Mineral Leasing Act of 1920, States receive 50% of the revenues resulting from the leasing and production of onshore mineral resources on federal land within their borders with 40% paid into the Reclamation Fund. Alaska, which is not a Reclamation state, gets 90%. The remaining 10% goes to the federal treasury. H.R. 3846 would	9/27/17: H.R. 3846 introduced in the House, referred to Natural Resources 4/18/18: Subcommittee on Energy and Mineral Resources held a hearing.	Rep. Bill Johnson (R-OH) introduced H.R. 3846

	reduce the percentage of onshore mineral revenues paid into the Reclamation Fund from 40% to 20%. WSWC Executive Director Tony Willardson testified at the Subcommittee hearing, noting that WSWC "...strongly supports the appropriation and use of receipts that accrue to the Reclamation Fund for their intended purpose of financing authorized western water projects and programs. Moreover, the WSWC has recommended the Administration and the Congress investigate the advantages of restoring the Reclamation Fund as a true revolving trust fund with annual receipts appropriated for authorized purposes in the year following their deposit...." It should also be noted that "...federal land ownership generally is concentrated in the West. Specifically, 61.3% of Alaska is federally owned, as is 46.4% of the eleven coterminous western states. By contrast, the federal government owns 4.2% of lands in the other states. In the West, water and energy are inextricably connected. Western energy resources are vast and diverse, while western water resources are often scarce.... Any diversion of Reclamation Fund receipts for other purposes would delay or supplant expenditures for essential water and power development, environmental restoration and water conservation projects and programs." Appended to the testimony were the WSWC's recently adopted position on water infrastructure funding and readopted position on integrating energy and water planning and policy. His testimony highlighted, "The FY2019 budget request includes \$1.0 billion for Reclamation's water resource programs. Reclamation's 5-year estimate of major rehabilitation and replacement needs total \$2.1 billion for extraordinary maintenance, \$337 million in deferred maintenance, and \$358 million for dam safety. Other estimated construction needs include \$1.2 billion for authorized Title XVI water reclamation and reuse projects, \$1.3 billion for authorized rural water projects (\$13.8 million is requested in the President's FY2019 budget), \$1.5 billion for projects related to Indian water rights settlements (\$100.7 million requested for FY2019), and \$1.6 billion for new water and power projects, related to the Central Valley Project in California, the Yakima Integrated Plan in Washington, and the Platte River. Reclamation is also working with water contractors on potential new water storage, such as raising Shasta Dam and Upper San Joaquin River storage in California."		
H.R. 3646	Issue: Precision Conservation through Technology Title: Water Quality Conservation Act. The bill would take existing federal funds to create a precision conservation pilot program for up to ten states that would assist farmers to identify which soil and water conservation measures work best at the watershed level. It would provide cost-sharing grants to states with matching funds to participate in creating innovative programs in collaboration with tribes, local governments, academic institutions, soil and water conservation districts, producers, agricultural associations, and relevant nonprofit entities. The bill is intended to increase nutrient retention in soil, reduce soil erosion, improve soil health and improve overall water quality. Rep. Young said, "As new technology - such as satellite imaging - has allowed farmers to precisely target where to use yield enhancing applications, the same federal government one-size-fits-all conservation programs are in place. But they may not necessarily always work.... My legislation promotes conservation by harnessing new technology to pinpoint which water quality conservation practices will be the most effective in different places across the country." The legislation is intended to bring together stakeholders at the community level to engage in a process that will "precisely implement the right practices in the right place, at the right time and at the right scale."	9/1/17: H.R. 3646 introduced, referred to the House Committee on Agriculture	Rep. David Young (R-IA) introduced H.R. 3646

S. 1696	Issue: Energy-Water Nexus Title: Smart Energy and Water Efficiency Act. The bill would require DOE to establish and carry out a smart energy and water efficiency management pilot program to award grants to utilities, municipalities, tribes, water districts and other water authorities for demonstrating advanced and innovative technology-based solutions. DOE must annually evaluate each project for best practices. The projects are intended to increase the energy efficiency of water, wastewater, and water reuse systems; conserve water and save energy; implement automated systems with real-time data on energy and water; and improve energy and water conservation, water quality, and predictive maintenance through Internet-connected technologies. <i>See also, H.R. 3275, WEST Act</i>	8/1/17: S. 1696 introduced in the Senate, referred to Energy and Natural Resources	Senator Tom Udall (D-NM) introduced S. 1696
H.R. 3387	Issue: SDWA Amendments and SRFs Title: Drinking Water System Improvement Act. The bill is intended to improve public water systems and enhance compliance with the Safe Drinking Water Act. Section 2 would expand the requirements of consumer confidence reports to include exceedances with corrective action and violations during the monitoring period. Section 4 would require EPA in coordination with States, public water systems, and other interested stakeholders to develop a strategic plan for improving the accuracy and availability of monitoring data collected to demonstrate compliance with national primary drinking water regulations. Section 6 would authorize an increase in appropriations from \$100M to \$150M for FY2018-2022 for grants to States to carry out public water system supervision programs. Section 7 would expand the use of SDWA SRFs to include replacing or rehabilitating aging treatment, storage, or distribution facilities of public water systems. It would also expand the timing on the requirements to use American iron and steel products (42 U.S.C. 300j–12(a)(4)(A)) from FY2017 to continue through FY2018-2022. It makes amendments requiring cost-effective evaluations of projects, the payment of prevailing wages for SRF-funded construction projects, limiting loan subsidies to 35% of a State’s capitalization grant, allowing extended terms for loans to disadvantaged communities up to 40 years after project completion (depending on the expected design life of the project), and adding a requirement to EPA’s 4-year survey of water system capital improvement needs (42 U.S.C. 300j–12(h)) to include an assessment of costs to replace all lead service lines of eligible public water systems. It would also authorize incremental increases of \$200M in SDWA SRF appropriations, starting with \$1.2B in FY2018 and ending with \$2.0B in FY2022. It adds “best practices” for EPA oversight of State administration of SRFs. Section 11 would address source water used for drinking water in community systems, and notifications during emergencies.	7/25/17: H.R. 3387 introduced in the House, referred to Energy & Commerce. 7/27/17: Energy & Commerce held a mark-up session and ordered H.R. 3387 reported, H. Rept. 115-380 11/1/17: H.R. 3387 placed on the House calendar	Rep. Gregg Harper (R-MS) introduced H.R. 3387
S. 1576, H.R. 4164	Issue: Use of Water Rights to Grow Hemp Title: Industrial Hemp Water Rights Act. The bill would allow farmers to use their water rights to cultivate industrial hemp in states where it is legal to do so, even if the water passes through federal facilities, and notwithstanding the Controlled Substances Act.	7/18/17: S. 1576 introduced in the Senate, referred to Judiciary 10/27/17: H.R. 4164 introduced in the House, referred to Oversight and Government Reform	Senator Michael Bennett (D-CO) introduced S. 1576, with bipartisan co-sponsors from CO, MT, and OR Rep. Jared Polis (D-CO) introduced H.R. 4164 with 9 co-sponsors

H.R. 3281/S. 2560	Issue: Reclamation Title Transfer Title: Reclamation Title Transfer Act. The bill would facilitate the transfer title of eligible Reclamation facilities—including dams and appurtenant works, water rights, infrastructure distribution and drainage works and associated lands—to qualified non-federal entities, such as State or local government, Indian tribe, municipal corporation, public agency or water district that held or holds a federal water service or repayment contract, water rights settlement contract or exchange contract for water from the eligible facility to be transferred. The Secretary of the Interior must determine that the entity has the capacity to manage the conveyed property for the same purposes under Reclamation Law. The bill would direct the Secretary of the Interior, without further authorization from Congress, to convey all right, title and interest by a written agreement. Not less than 30 days before any conveyance, the Secretary is to transmit to the House Natural Resources Committee and the Senate Energy and Natural Resources Committee notice including written consent from the qualifying entity and reasons for supporting the conveyance. The Secretary is to establish criteria for determining eligible facilities, including requirements that the transfer: (1) “will not have an unmitigated significant effect on the environment;” (2) it is “consistent with the Secretary’s responsibility to protect land and water resources held in trust for federally recognized Indian Tribes;” (3) ensures “compliance with international treaties and interstate compacts;” and (4) the qualifying entity provides “consideration for the assets to be conveyed, compensation to the United States worth the equivalent of the present value of any repayment obligation...or other income stream...from the assets to be transferred....” No conveyance may adversely impact power rates or repayment obligations. Proposals are to be considered a categorical exclusion process under the National Environmental Policy Act. The Secretary is to report annually as part of Interior’s budget submission on actions under the Act, including a list of conveyances. Following conveyance, the property “shall not be considered to be a part of a Federal reclamation project.” The entity receiving the property “shall comply with all applicable Federal, State, and local laws and regulations in its operation of the conveyed property.” The U.S. “shall not be liable for damages of any kind arising out of any act, omission, or occurrence based on its prior ownership or operation of the conveyed property, except for damages caused by acts of negligence...” Senator Rische noted that S. 2560 “allows water users to obtain full rights to the assets they already manage and have paid for to make better use of these resources for farmers and other users.” Tim Petty, Assistant Secretary for Water and Science, U.S. Department of the Interior, expressed support for S. 2560, noting that DOI has “long endorsed a legislative remedy to allow local water managers to make their own decisions to improve water management at the local level while allowing Reclamation to focus management efforts on projects with a greater Federal nexus.” The bill would streamline the time-consuming and costly process for simple transfers, while protecting project purposes, contractors, stakeholder beneficiaries, public and tribal entities, environmental resources, and the federal financial investment.	7/18/17: H.R. 3281 introduced in the House, referred to the Committee on Natural Resources 7/26/17: Committee marked up the bill, ordered to be reported by a vote of 17-12, H. Rept. 115-334 3/15/18: S. 2560 introduced in the House, referred to Committee on Energy and Natural Resources 3/22/18: ENR hearing on S. 2560 7/12/18: H.R. 3281 passed the House by a vote of 233-184	Rep. Doug Lamborn (R-CO) proposed the draft legislation before the House Natural Resources Committee; introduced H.R. 3281 Senator James Rische (R-ID) introduced S. 2560
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H.R. 3275	Issue: WaterSMART, Energy-Water Nexus, Circuit Riders, Agriculture Efficiency, Water Data, SRFs, Groundwater Management Title: Water and Energy Sustainability through Technology (WEST) Act. The bill is intended to provide drought relief through innovation, increased water supply, and regional adaptation and self-sufficiency. Title I supports advanced, integrated data, modeling, and analysis; investments in targeted technology research; and the DOE's Energy-Water Nexus Crosscut Team and mission, a collaboration of agencies, national laboratories, State and local governments, utilities, industry stakeholders, and the science and environmental community. It directs DOE to establish and maintain an energy-water nexus database, integrating data and information into an interoperable, national, geospatially-referenced data framework, using existing shared databases and tools and identifying new needs. It directs Reclamation to determine its annual energy consumption, broken down by pumping station. Section 1119 would amend the Reclamation Rural Water Supply Act (43 U.S.C. 2402(a)) to include a program similar to the circuit rider program established under the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(a)(22)), in consultation with EPA, DOE, and the National Centers for Innovation in Small Drinking Water Systems. The focus of the program would be to provide technical and managerial assistance and improve energy efficiency for drinking water and wastewater utilities in rural and tribal areas. <i>See also S. 2969, Rural Water Infrastructure Improvement Act.</i> Section 1221 directs Interior, in collaboration with States that have or are developing groundwater management programs, to study the impact of Reclamation projects on groundwater resources. It also directs USGS to implement a groundwater information system for the purpose of advancing the availability, timely distribution, and widespread use of groundwater data for groundwater management, education, research, assessment, and monitoring purposes. Section 1223 directs the USGS to include estimates of the consumptive use of surface water, groundwater, and recycled water in its published survey on water uses, enter into cooperative agreements with the States to collect this data, and make the data available to the DOE's Energy-Water Nexus Data System. Section 1225 directs the USDA and DOI to coordinate efforts to improve agricultural efficiency in a way that protects wildlife. Such efforts would include coordinated grant programs, best known methods for water management, drought resilience guidelines, education, technical assistance, irrigation technology development, water application system maintenance, research into practices that improve soil health and safe and appropriate uses for recycled water on crops, evaluations of water delivery systems, and recommendations for improvements. Section 1226 would provide grants for agriculture technology centers, and section 1227 would provide grants for programs that offer technical assistance for efficient irrigation. Section 1228 would establish a water cooperation working group between the U.S. and Israel to improve the use of water resources through water-saving technologies and practices.	7/17/17: H.R. 3275 introduced in the House, referred to 7 committees	Rep. Jerry McNerney (D-CA) introduced H.R. 3275, with 15 Democratic co-sponsors from CA, HI, NV, NY, OR
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	Title II would reauthorize the WaterSMART program. It would expand the competitive grant program for water recycling and reuse projects to reimburse previous costs incurred. It directs EPA to assist states that are in the process of developing direct potable reuse regulations. Section 2004 directs EPA to consider the benefits of stormwater capture and reuse programs and their capacity to reduce pollutants when issuing NPDES permits for municipal and industrial stormwater discharges. It also directs EPA to provide technical assistance to communities to develop integrated plans for municipal wastewater and stormwater management for CWA compliance. Section 2005 directs USGS to provide technical assistance to develop and implement new and existing groundwater management plans, with priority given to drought-stricken areas as declared by States. Section 2006 would amend the Food Security Act (16 U.S.C. 3839bb et seq.) to add a new section on a groundwater recharge program. The USDA would provide grants to producers for groundwater recharge improvements to eligible land, including the installation of measurement devices on wells and pumps. Priority would be given to improvements that are implemented in conjunction with State groundwater recharge programs, and that provide habitat benefits and maintain groundwater quality without adversely impacting surface waters. Section 2007 expands the CWA pilot program for alternative water source projects to include consideration of rural community participation, particularly where projects are located in agricultural areas or provide benefits on a regional level. It also adds stormwater and conjunctively managed groundwater under the definition of alternative water sources. Section 2008 would provide grants to owners or operators of water systems to assist in efforts to improve resilience of systems to climate change, including mitigation measures to rapidly address impacts on the susceptible Colorado River Basin and coastal regions at risk from rising sea levels. The maximum federal cost-share is 50%. Section 2009 codifies EPA's WaterSense program. Section 2010 directs DOE to work with entities to establish residential financial incentive programs to purchase water-efficient products and services. Section 2011 directs the Treasury to clarify the Federal tax treatment of charitable donations of water rights acquired by appropriation. Section 2012 establishes a pilot program to study the feasibility of long-term cooperative agreements for the use of non-federal storage and conveyance facilities to supply water for National Wildlife Refuges, State wildlife areas, and private wetland areas as part of the Central Valley Project Improvement Act. Title III addresses infrastructure improvements. Section 3001 amends the Safe Drinking Water Act on the safety of public water systems by adding a section on water leak control technology. It directs EPA to study available and new technologies to improve location and mapping practices used by States and industry to monitor and regulate pressure and reduce water loss and leaks on transmission pipelines, water distribution systems, and aqueducts operated by public water		
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	systems. Section 3002 directs EPA to establish and maintain a publicly accessible data clearinghouse on reported water main breaks and associated repair activities for public water systems. It also directs EPA to promulgate a rule requiring public water systems serving 10,000+ to submit annual reports on the details of water main breaks. Section 3003 directs EPA to establish a program that makes grants to public water systems to undergo voluntary audits for water loss, and provide technical assistance to address any findings from the audit, including helping the system to establish a sustainable water loss control program. Section 3004 provides a tax exemption for water infrastructure bonds in areas with recent or current drought designations of D2 intensity or greater. Section 3005 would require CWA SRFs to ensure that at least 20% of funds are used to provide assistance for projects that address green infrastructure, water or energy efficiency improvements, or other environmentally-innovative activities, including sustainability, water efficiency or conservation, stormwater harvesting, reclaimed and recycled water, and pipes used for transporting recycled water. SDWA SRFs are permitted to prioritize projects that maximize the potential for efficient water use, reuse, recapture, and water-energy conservation. It would also fund CWA SRFs at \$2B for FY2018 and \$2.4B for FY2019. The SDWA SRFs would be funded at \$1.2B for FY2018, and \$1.3B for FY2019. Section 3006 would direct EPA to collect information from the States on the SRF programs (efforts to streamline the process, application assistance programs, incentives for small public water systems, and techniques to ensure obligated balances are liquidated in a timely fashion) and develop best practices for the administration of the programs. Title IV repeals tax preferences for oil and gas drilling, leaving them in place for geothermal energy. <i>See also, S. 1696, Smart Energy and Water Efficiency Act</i>		
H.R. 3248	Issue: EPA WaterSense Title: Water Advanced Technologies for Efficient Resource Use Act. The bill would codify the EPA WaterSense program, which labels and promotes water-efficient products, buildings, landscapes, and services. It would provide financial incentives for consumers and amend the Internal Revenue Code to exclude incentive programs from the gross income of individual taxpayers. It would also require federal agencies to purchase WaterSense products or services, or Federal Energy Management Program designated products, in order to meet procurement requirements, as long as they are cost-effective and reasonably available. See also S. 1700, Water Efficiency Improvement Act, introduced on 8/2/17 by Senator Tom Udall (D-NM). It would codify WaterSense with different requirements.	7/14/17: H.R. 3248 introduced in the House, referred to Energy & Commerce, Oversight & Gov't Reform, Armed Services, Ways & Means	Rep. Matt Cartwright introduced H.R. 3248 with 31 Democratic co-sponsors
S. 1556	Issue: Rural Water Projects and Reclamation Fund Title: Authorized Rural Water Projects Completion Act. The bill would establish a Reclamation Rural Water Construction and Settlement Implementation Fund, and directs the Treasury to deposit specified revenues from the Reclamation Fund into two accounts, the Rural Water Project Account and the Reclamation Infrastructure and Settlement Implementation Account, between FY2018-FY2038.	7/13/17: S. 1556 introduced in the Senate, referred to Energy and Natural Resources 2/28/18: Subcommittee on Water and Power held a hearing	Senator Jon Tester (D-MT) introduced S. 1556, with co-sponsor Senators Steve Daines (R-MT), Tom Udall (D-NM), Heidi Heitkamp (D-ND), Martin Heinrich (D-NM), Al Franken (D-MN), and Amy Klobuchar (D-MN)

	Interior is permitted to use the Rural Water Project Account to complete construction of rural water projects that are already authorized, or for Rural Water Supply Act of 2006 projects that have already completed a feasibility study if Congress authorizes the project. Interior must develop (1) programmatic goals that would enable the completion of construction of the authorized rural water projects as expeditiously as practicable and that reflect the priorities identified in the laws authorizing the projects; and (2) funding prioritization criteria to serve as a methodology for distributing funds that take into account specified factors, including the need for potable water supplies in the affected rural and tribal communities. Interior is directed to use the Reclamation Infrastructure and Settlement Implementation Account to (1) provide authorized compensation to resolve all monetary claims of an Indian tribe against the United States relating to use of tribal land by the United States for the generation of hydropower; or (2) complete projects and implement provisions authorized by Congress that resolve litigation involving the United States and the water rights of Indian tribes or that implement approved agreements limiting such rights. <i>See WSWC Position #381 and Position #390 supporting timely construction of rural water infrastructure projects and the use of the Reclamation Fund revenues for their intended purpose. Position #376 supports the use of the Reclamation Fund toward project construction related to Indian water rights settlements.</i>		
H.R. 3156	Issue: USGS Water Science Data Centers No Title: “There are hereby established, within the United States Geological Survey, local Water Science Centers that shall collect and disseminate reliable, impartial, and timely information about the Nation’s water resources.” <i>Note: See locations of USGS Water Science Centers: https://www.usgs.gov/science/mission-areas/water/centers</i>	6/29/17: H.R. 3156 introduced in the House, referred to Natural Resources	Rep. Darren Soto (D-FL) introduced H.R. 3156
S. 1288/S.1289	Issue: CWA §404 Dredge and Fill Permits and Compensatory Mitigation for Tribes No title S. 1288 would amend the CWA §404 to allow preservation leasing as a form of compensatory mitigation for discharges of dredged or fill material affecting wetlands on Indian land. A preservation lease is an agreement allowing a permittee to lease wetlands or other aquatic sites on Indian land for the sole purpose of preserving the wetlands in an undisturbed state to mitigate for the duration of a permitted activity. The bill directs the U.S. Army Corps of Engineers to allow the permittee to satisfy the compensatory mitigation requirements of the permitted activity by entering into a preservation lease with an Indian tribe as long as the preserved wetlands are in the same watershed as the permitted activity. A permittee that abandons the permitted activity is required to obtain a permit modification from the Corps, which may require a plan for conducting restoration and rehabilitation of the area. The Corps is required to consult with the tribe before making a determination on whether and to what degree restoration and rehabilitation are required. S. 1289 would amend the CWA §404 to exempt Indian tribes from compensatory mitigation requirements as a condition of a permit for the tribe to discharge dredged or fill material. In evaluating a tribe’s permit application, the Corps may not consider the exemption and	5/25/17: S. 1288 and S. 1289 were introduced in the Senate, referred to Environment and Public Works	Senator Dan Sullivan (R-AK) introduced S. 1288 and S. 1289, with co-sponsor Sen. Lisa Murkowski (R-AK)

	nonavailability of compensatory mitigation as a factor in its decision. If the tribe ceases the permitted activity, the tribe must obtain a permit modification from the Corps, which may require restoration and rehabilitation of the area.		
H.R. 3144	Issue: Colombia River Power No Title: The bill mandates a certain operation plan to maintain the status quo on the Federal Columbia River Power System (FCRPS) through 2022, or until a final biological opinion is issued, whichever comes first. It would effectively overturn the 9th Circuit's April 2, 2018, decision to release additional water. In the meantime, it would require the Bureau of Reclamation, the BPA, and the Corps to operate the FCRPS consistent with the 2014 biological opinion. The intent is to provide some certainty for water and power users under a collaborative agreement to manage the river system to protect fish as well as support clean, renewable energy. <i>Note: On April 3, the U.S. Army Corps of Engineers (Corps) began implementing its Spring Fish Operations Plan at the lower Snake River dams. For 2018, the Corps will release additional water through the spillways up to total dissolved gas limits established by Oregon and Washington state water quality agencies. Julie Ammann, Chief of the Reservoir Control Center for the Corps' Northwestern Division, said: "The Corps has been tasked with increasing spill up to the limits of state water quality standards. We will use our expertise and best professional judgment to implement this operation and maximize spill up to the state limits. There are many factors that influence total dissolved gas, so managing spill at all our lower Snake and lower Columbia River dams will be challenging."</i> <i>The additional water release is the result of a 2017 injunction from the District Court of Oregon in National Wildlife Federation v. National Marine Fisheries Service (Case No. 3:01-cv-0640). The agencies challenged the injunction on appeal due to recent stabilization of the fish species and competing interests for the water, arguing that requiring the additional spill intrudes into the traditional administrative functions of federal agencies. On April 2, the 9th Circuit (No. 17-35462) disagreed, affirming the injunction and noting that the agencies had a year to develop the operation plan and "conduct short-term tests to consider the effects of increased spill, to evaluate what problems might arise, and to make adjustments to the spill operation plan without having to worry about violating a court order."</i>	6/29/17: H.R. 3144 introduced 4/18/18: Natural Resources reported out of Committee, H.Rept. 115-643 4/25/18: House voted 225-189 to pass H.R. 3144 4/26/18: H.R. 3144 received in the Senate, referred to Environment and Public Works	Rep. Cathy McMorris Rodgers (R-WA) introduced H.R. 3144
H.R. 3106/S.519	Issue: EPA SDWA National MCLs and Perfluorinated Compounds No Title. Directs EPA to publish a maximum contaminant level goal and promulgate a national primary drinking water regulation for perfluorinated compounds (including perfluorooctanesulfonic acid and perfluorooctanoic acid)	3/2/17: S. 519 introduced in the Senate, referred to Environment and Public Works 6/29/17: H.R. 3106 introduced in the House, referred to Energy & Commerce	Senator Kirsten Gillibrand (D-NY) with 3 Democratic co-sponsors from MA, NY and NH Rep. Brendan Boyle (D-PA) introduced H.R. 3106 with 3 Democratic and 2 Republican co-sponsors from MI, NJ, NY, and PA
H.R. 3043	Issue: Clean Water Act §401 and Hydropower Title: Hydropower Policy Modernization Act. The bill designates the Federal Energy Regulatory Commission (FERC) as the lead agency for coordinating all federal authorizations and reviews related to hydropower license applications. It directs FERC to establish a timely	6/23/17: H.R. 3043 introduced in the House, referred to Energy and Commerce	Rep. Cathy McMorris Rodgers (R-WA) introduced H.R. 3043

	application process, and requires FERC to consult with federal and state agencies and the public to compile best practices for performing studies and environmental reviews. The bill is intended to reduce the duration, complexity, and uncertainty of the licensing process. Rep. Fred Upton (R-MI) noted that this bill is similar to bills that passed both the House and Senate with bipartisan support during the last session of Congress, but ultimately did not get conferenced or signed into law. This bill has some significant changes based on feedback from stakeholders, he said. “The biggest change, frankly...was taking the hammer away from FERC to compel agencies to stick to a deadline. Consequently, no permits are going to be granted by default because of a missed deadline. But we also inserted new State and Tribal consultation requirements with a very strong savings clause that clarifies that nothing shall affect the Clean Water Act and other environmental laws.” Section 3 of H.R. 3043 would amend the Federal Power Act (16 U.S.C. 792 et seq.), including a new §34 on hydropower licensing and process improvements. Subsection (l) indicates that this section will not be construed to affect any requirements of the CWA, the Fish and Wildlife Coordination Act, the Endangered Species Act, the Rivers and Harbors Appropriations Act, or the National Historic Preservation Act. Several letters raising concerns about the impact on state authorities were included in the House record, including the Western Governors’ Association letter from May 1. The California Water Resources Control Board noted that state and federal agencies serve an essential role in FERC’s hydropower licensing process. Making FERC the sole lead agency in control of the timeline could limit the other agencies’ time to complete their respective actions. Section 401 of the CWA “authorizes states to set conditions to protect the waters of their states, and provides that review of conditions of certification is in state court, not by federal agencies. In so doing, section 401 preserves both state authority and the integrity of state procedures and state institutions in overseeing how state agencies exercise that authority.” The Washington Department of Ecology also expressed concern that changes to FERC’s authority proposed by H.R. 3043 “would impede or invalidate states’ independent authority” under CWA §401. “We believe this bill provides enough ambiguity for individuals to attempt to preempt state CWA §401 authority. The bill as written could result in legal challenges and protracted litigation on how the extension of FERC’s authority conflicts with states’ rights to protect water quality and quantity.”	10/31/17: Committees discharged and reported, H. Rept. 115-377 11/8/17: Passed the House by vote of 257-166 11/9/17: H.R. 3043 received in the Senate, referred to Committee on Energy and Natural Resources	
H.R. 3009	Issue: Water Infrastructure/Tax Incentive Title: Sustainable Water Infrastructure Investment Act. The bill is intended to provide alternative financing for long-term infrastructure capital investment programs to restore safe drinking water and wastewater infrastructure capability. It would amend the Internal Revenue code to exempt tax-exempt facility bonds for sewage and water supply facilities from the state volume caps on private activity bonds. Section 2 on Congressional findings says: “The historical approach of funding infrastructure is insufficient to meet the investment needs of the future. The Federal partnership with State and local communities has played a pivotal role in improving the Nation’s water quality and drinking water supplies. Federal assistance under this partnership has been the linchpin of these improvements. In light of constrained Federal budgets, the availability of exempt-facility financing represents an important financing tool to help close the gap between funds currently being invested and water infrastructure needs, preserving the Federal partnership. Providing alternative financing solutions, such as tax-exempt securities, encourages investment in water and wastewater infrastructure that in turn creates local jobs and protects the health of our citizens. Federally mandated State volume cap restrictions in conjunction with other priorities have	6/22/17: H.R. 3009 introduced in the House, referred to Ways and Means	Rep. John Duncan (R-TN) introduced H.R. 3009, with 5 Republican and 3 Democratic co-sponsors from CA, IL, NJ, NY, OR, PA

	limited the use of tax-exempt securities on water and wastewater infrastructure investment. Removal of State volume caps for water and wastewater infrastructure will accelerate and increase overall investment in the Nation's critical water infrastructure; facilitate increased use of innovative infrastructure delivery methods supporting sustainable water systems through public-private partnerships that optimize design, financing, construction, and long-term management, maintenance and viability; and provide for more effective risk management of complex water infrastructure projects by municipal utility and private sector partners."		
H.R. 2799	Issue: Water Reuse and California Drought Title: Western Water Recycling and Drought Relief Act. The bill would amend the Reclamation Wastewater and Groundwater Study and Facilities Act to authorize the Department of the Interior to participate in the design, planning, and construction of recycled water system facilities in California in cooperation with various California cities, water districts, and sanitation districts. The bill also authorizes Interior to participate in the design, planning, and construction of recycled water system facilities in Hawaii in cooperation with the local water utility. The federal cost share for each project is limited to 25%, and Interior's agreements with the participating agencies and cities must include a provision for the reimbursement of design, planning, and construction costs. The bill also increases authorization for appropriations for certain California recycled water system facilities.	6/7/17: H.R. 2799 introduced in the House and referred to Natural Resources	Rep. Jerry McNerney (D-CA) introduced H.R. 2799 with 6 California Democratic co-sponsors
H.R. 2693	Issue: CWA Citizen Suits, Attorneys Fees, Affirmative Defenses No Title: The bill would amend the CWA to limit the amount that may be awarded for the costs of litigation in citizen suits. An award of litigation costs may not exceed: (1) an amount that is proportional to the number of successful claims included in the complaint, or (2) the amount of monetary penalties. The bill would also prohibit citizen suits if EPA or a state has commenced and is diligently prosecuting a civil or criminal action through the issuance of a compliance order. Section 3 provides affirmative defenses to liability for pollutant discharges where the immediate cause is an act of God, war, or certain unrelated third parties where there was due care and precautions against foreseeable acts or omissions of third parties.	5/25/17: H.R. 2693 introduced in the House, referred to T&I	Rep. Duncan Hunter (R-CA) introduced H.R. 2693, with California Republicans Tom McClintock and Ken Calvert
H.R. 2609	Issue: Authorized Purposes of Missouri River Mainstem Reservoir System No Title: Directs the Corps to revise the Missouri River Mainstem Reservoir System Master Water Control Manual, and any related regulations, to delete fish and wildlife as an authorized purpose of the Corps. <i>See WSWC Position #394, which opposes the removal of fish and wildlife as an authorized purpose for Corps reservoir system management, and urges Congress and the Administration to complete a comprehensive study of the System's authorized purposes and related benefits before addressing an appropriate balance and mix of uses.</i>	5/23/17: H.R. 2609 introduced in the House, referred to T&I	Rep. Sam Graves (R-MO) introduced H.R. 2609
H.R. 2939/ S.1230	Issue: Water Rights and Federal Agency Conditional Lease Approvals Title: Water Rights Protection Act. The bill prohibits the Departments of the Interior and Agriculture from conditioning permits for land use on the transfer of water rights to the U.S., or requiring any water user (including tribes) to acquire state water rights in the name of the U.S. as a condition of the permit. It requires the agencies to recognize states' water use authority when developing rules or other federal action relating to permits, and to coordinate with states to ensure	5/25/17: S. 1230 introduced in the Senate, referred to Energy and Natural Resources 6/20/17: H.R. 2939 introduced in the House,	Senator John Barrasso (R-WY) introduced S. 1230 with 8 Republican co-sponsors Rep. Scott Tipton (R-CO) introduced H.R. 2939 with 12 Republican co-sponsors from

	that federal action is consistent with applicable state water law and don't interfere with state authority or adjudications.	referred to Natural Resources and Agriculture 7/25/17: Natural Resources reported H.R. 2939 (H.Rept. 115-257) and placed on House calendar	AZ, AR, CA, CO, ID, NV, NM, UT
H.R. 2936	Issue: Forest management, wildfires, and health impacts on watersheds Title: Resilient Federal Forests Act. Title I creates several statutory categorical exclusions (CEs) – actions requiring no environmental assessment or environmental impact statement under NEPA – to expedite forest management activities for areas up to 10,000 acres. Section 111 authorizes CEs for critical response actions, including to protect municipal watersheds and to increase water yield, among other purposes. If a project under §111 is developed through a collaborative process, the CE acreage can be increased to 30,000. Other CEs include §112, salvage operations; §113, meeting forest plan goals for early successional forests; §114, road side projects; and §115, improvements to reduce the risk of wildfire. This title also expedites consultation requirements under the Endangered Species Act and the National Historic Preservation Act. When analyzing a forest management project proposed by a collaborative group, the Forest Service is limited to a choice of approval or no action. The no-action alternative must consider future impacts, including wildfire and its impacts on municipal watersheds. Title II expedites salvage and reforestation projects, in compliance with forest plans, following catastrophic wildfires. Title III prohibits attorneys' fees for plaintiffs challenging relevant forest management activities, and requires courts to weigh the potential long-term harm of inaction, such as wildfires, before granting injunctive relief. It establishes a pilot project to resolve lawsuits on forest management activities through arbitration. Title VI establishes a State-Supported Forest Management Fund, which allows state and other entities to contribute funds for forest management activities. Expenditures from the Fund are authorized to plan, carry out, or monitor forest management activities developed through collaborative processes. Title VIII makes clear that the development, maintenance, and revision of forest plans are not considered major federal actions and are not subject to NEPA. Title X would prohibit the transfer of funds between the wildfire suppression operations accounts and other non-wildfire accounts.	6/2/17: H.R. 2936 introduced in the House, referred to Agriculture, Natural Resources, Education and Workforce, Transportation and Infrastructure Committees 10/25/17: Committees discharged and ordered reported, H. Rept. 115-370, parts 1 and 2 11/1/17: House passed H.R. 2936 by a vote of 232-188 11/2/17: Senate received H.R. 2936, referred to Committee on Agriculture, Nutrition, and Forestry	Rep. Bruce Westerman (R-AR) introduced H.R. 2936 with co-sponsors from CA, CO, ID, MT, OR, TX, UT, WA, and WY
H.R. 2872	Issue: Exemptions from Dam Re-licensing Requirements Title: Promoting Hydropower Development at Existing Non-powered Dams Act. The bill would allow the Federal Energy Regulatory Commission to exempt qualifying facilities, in whole or in part, from any license requirements in consultation with relevant state and federal agencies (including the U.S. Fish and Wildlife and National Marine Fisheries Services, state fish and wildlife agencies, federal public land agencies), and any affected Indian tribe. The Commission may impose conditions “necessary to protect public safety,” and to prevent or mitigate direct adverse effects on fish and wildlife resources caused by construction and operation. However, the Commission may not require any “material change to the storage, control, withdrawal, diversion, release or flow operations of the qualifying Non-powered dam.” The bill requires only an environmental assessment under the National Environmental Protection Act (NEPA), unless the Commission determines a categorical exclusion is appropriate. For any facility at a non-federal	6/12/17: H.R. 2872 introduced in the House, referred to Energy and Commerce, Natural Resource, Transportation and Infrastructure Committees 12/12/17: Committees discharged, ordered reported, H. Rept. 115-461, passed the House by voice vote	Rep. Larry Bucshon (R-IN) introduced H.R. 2872

	dam, exemptees shall pay to the U.S. reasonable annual charges fixed by the Commission for the “purpose of funding environmental enhancement projects in watersheds in which facilities...are located...equivalent to annual charges for use of a Government dam under section 10(e) [of the Federal Power Act], unless the Commission determines...a lower charge is appropriate to protect exemptees’ investment in the project or avoid increasing the price to consumers of power due to such charges.” These miscellaneous receipts would be available through annual appropriations acts to state and federal fish and wildlife agencies. The Commission’s jurisdiction is limited to any “qualifying facility exempted and any associated primary transmission line, and shall not extend to any conduit, dam, impoundment, shoreline or other land, or any other project work associated with the qualifying facility....” Qualifying non-powered dams may include any dam completed before enactment, and operated for “agricultural, municipal, navigational, industrial, commercial, environmental, recreational, aesthetic, or flood control purposes.” Non-federal dams must be independently certified to comply with dam safety requirements.	12/13/17: Received in the Senate, referred to Committee on Energy and Natural Resources	
H.R. 2510	Issue: SRFs and Rural Technical Assistance Title: Water Quality Protection and Job Creation Act. Title I would authorize grants to nonprofit organizations in consultation with the states/tribes to provide technical assistance and training for rural, small, and tribal municipalities in the planning, developing, and acquisition of eligible POTW and wastewater treatment system projects, to achieve and maintain compliance with the CWA. It also authorizes funding for the technical assistance, for state management assistance, for watershed pilot projects, and nonpoint source management programs. Section 121 would amend the CWA to require that at least 15% of the CWA capitalization grants to provide assistance to municipalities of fewer than 10,000, to the extent that there are sufficient applications for such assistance. Section 122 would expand the types of assistance allowed under CWA SRFs (33 USC §1383(d)), “to provide grants to owners and operators of treatment works that serve a population of 10,000 or fewer for obtaining technical and planning assistance and assistance in financial management, user fee analysis, budgeting, capital improvement planning, facility operation and maintenance, equipment replacement, and other activities to improve wastewater treatment plant management and operations,” up to 1% of a state’s preceding fiscal year assistance, or 2% of a state’s preceding fiscal year received capitalization grants, whichever is greater. It would also expand §1383(d) to include “grants to owners and operators of treatment works for conducting an assessment of the energy and water consumption of the treatment works, and evaluating potential opportunities for energy and water conservation through facility operation and maintenance, equipment replacement, and projects or activities that promote the efficient use of energy and water by the treatment works,” under the same 1%/2% conditions. Section 124 would require states to establish or update a list of SRF projects and activities beginning FY2019 and prepared annually thereafter, with funding priorities set for projects and activities that achieve the greatest water quality improvement that would not be achieved without SRF assistance. Title II would amend the pilot program for alternative water source projects (33 USC §1300(d) and (e)) to remove consideration of projects located within the geographic scope of the reclamation and reuse program conducted under the Reclamation Projects Authorization and Adjustment Act of 1992. It would also remove the requirement for House T&I Committee approval of projects over \$3M. It would expand the definition of “alternative water source project” to include stormwater, in addition to wastewater. Section 202 would expand the Sewer Overflow Control Grants (33 USC §1301) to include stormwater reuse. It directs states to use not less than 20% of	5/18/17: H.R. 2510 introduced in the House, referred to T&I	Rep. Peter DeFazio (D-OR) introduced H.R. 2510, with 27 Democratic and 1 Republican co-sponsor.

	EPA grants “to carry out projects to intercept, transport, control, treat, or reuse municipal combined sewer overflows, sanitary sewer overflows, or stormwater through the use of green infrastructure, water and energy efficiency improvements, and other environmentally innovative activities.”		
S. 1137	Issue: SRFs and Wastewater Infrastructure Title: Clean Safe Reliable Water Infrastructure Act. The bill expresses a sense of Congress that SRFs should receive robust funding for capitalization grants to states. The bill amends the Safe Drinking Water Act to: (1) make the implementation of source water protection plans an eligible use of assistance from a drinking water state revolving fund; and (2) apply requirements about the qualifications-based selection of architects and engineers to contracts funded by state revolving funds, if the assistance is for a community with a population of more than 10,000 individuals. It codifies EPA’s WaterSense program. And it amends the CWA sewer grant program (33 U.S.C. §1301) to address combined sewer overflows, sanitary sewer overflows, and stormwater discharges, authorizing the program through FY2021.	5/16/17: S. 1137 introduced in the Senate, referred to Environment and Public Works	Senator Ben Cardin (D-MD) introduced S. 1137 with 3 bipartisan co-sponsors from AR, OK, and IL.
H.R. 2328/S. 3015	Issue: EPA Sewer and Water Infrastructure Compliance Grants Title: Low-Income Sewer and Water Assistance Program Act. The bill would amend the CWA to establish a pilot program that awards grants to at least 10 eligible entities for assisting low-income households maintain access to sanitation (water and sewer) services. In order to be eligible for grants, entities must be municipalities, or public entities that own or operate public water systems, that are affected by consent decrees related to compliance with standards under that Act.	5/3/17: H.R. 2328 introduced in the House, referred to Transportation & Infrastructure 6/6/18: S. 3015 introduced in the Senate, referred to environment and Public Works	Rep. Marcia Fudge (D-OH) introduced H.R. 2328 with 21 Democratic co-sponsors Senator Kamala Harris (D-CA) introduced S. 3015
H.R. 2371/S.930	Issue: Hydropower Title: Western Area Power Administration Transparency Act. The bill would require a pilot project to provide increased transparency on the WAPA’s costs, rates, and other financial operational dealings for utility ratepayers and taxpayers.	4/25/17: S. 930 introduced in the Senate, referred to Energy and Natural Resources 5/4/17: H.R. 2371 introduced in the House and referred to Committee on Natural Resources 5/18/17: House Subcommittee on Water, Power, and Oceans held hearings 6/14/17: Senate Subcommittee on Water and Power held hearings 7/26/17: Natural Resources ordered reported by unanimous consent; H. Rept. 115-282 2/7/18: H.R. 2371 passed the House by voice vote.	Senator Jeff Flake (R-AZ) introduced S. 930, with co-sponsor Senators John McCain (R-AZ) and Angus King (I-ME) Representative Paul Gosar (R-AZ) introduced H.R. 2371 with 10 bipartisan co-sponsors from AZ, CA, and SD

		2/8/18: H.R. 2371 received in the Senate, referred to Energy and Natural Resources Committee	
S. 1012	Issue: Drought Title: New Mexico Drought Preparedness Act. The bill would provide for drought preparedness. Section 3 authorizes \$30M for the Secretary of Interior to carry out a water acquisition program in basins in New Mexico through lease, purchase or contract from willing lessors or sellers, consistent with state law, to enhance: (1) streamflow for fish and wildlife (including endangered species), water quality, and river ecosystem restoration; and (2) to “enhance stewardship and conservation of working land, water, and watersheds in the Basins....” The Secretary may provide funds to a federally established nonprofit entity with particular expertise in western water transactions. Section 4 authorizes \$18M so the Secretary of the Interior may, in cooperation with water districts and Pueblos, provide funding and technical assistance for the installation of metering and measurement devices and the construction of check structures on irrigation diversions, canals, laterals, ditches and drains intended to ensure efficient use, reduce actual consumptive use, or not increase the use of water, and improve the measurement and allocation of acquired water. Further, the Secretary “shall” provide for the development of a comprehensive plan for the San Acacia and Isleta reaches to balance river maintenance, water availability, use and deliver, as well as ecosystem benefits. Section 5 addresses Middle Rio Grande peak flow restoration and directs the Secretary of the Army to continue existing temporary deviations in operations of Cochoiti Lake and Jemez Canyon Dam, and evaluate the benefits with a report to Congress, while a permanent reauthorization of the reservoirs is pursued. The goal is to restore natural river processes, including a Spring peak flow, as a means of increasing the spawning and recruitment of the endangered Rio Grande silvery minnow and overbanking flows necessary to maintain a healthy bosque and Southwestern willow flycatcher habitat, as well as channel capacity, and to increase irrigation and municipal water projects operational flexibility. The Secretary is to first obtain approval for any deviation from the Cochitit and Santa Ana Pueblos and the Rio Grande Compact Commission. Section 6 directs the Secretary of the Army to enter into an arrangement with the National Academy of Sciences to carry out a study on water and reservoir management and operation issues for Rio Grande reservoirs, including: (1) an evaluation of reservoir authorizations and legal requirements; (2) physical-hydrologic understanding; (3) potential constraints in light of climate change projections; (4) opportunities to optimize storage; (5) identified water use, supply and accounting impacts; (6) operational considerations; and (7) recommendations for future management. The report merits “due deference.” Section 7 would authorize emergency financial assistance under the Reclamation States Emergency Drought Relief Act of 1991, Title XII of the Food Security Act of 1985, and other federal laws to assist New Mexico and other western states with eligible water projects to assist in addressing “drought-related impacts to water supplies or any other immediate water-related crisis	5/2/17: S. 1012 introduced in the Senate, referred to Committee on Energy and Natural Resources 6/14/17: Senate Subcommittee on Water and Power held hearings on S. 1012	Senator Tom Udall (D-NM) introduced S. 1012, with co-sponsor Martin Heinrich (D-NM)

	or conflict.” Financial assistance would also be available to organizations and entities, including tribal governments, engaged in collaborative processes for environmental restoration. Eligible water projects include: (1) installing pumps, temporary barriers or gates for water diversion and fish protection; (2) drought-relief ground-water wells for Indian tribes and wildlife refuges; (3) acquisition of water from willing sellers; (4) agricultural and urban conservation projects with multiple benefits; (5) emergency temporary water exchanges; (6) planting cover crops; (7) emergency pumping projects; (8) reducing demand consistent with a comprehensive program for environmental restoration and settlement of water rights claims; (9) innovative on-farm water conservation; (10) protect, restore or enhance fish and wildlife habitat or other environmental improvements; (11) promoting groundwater recharge and reducing groundwater depletion; (12) technical assistance for irrigation improvement practices; (13) brackish water development and aquifer storage and recovery; (14) lining ditches and canals; (15) municipal water supply planning assistance, including hydrological forecasting, identification of alternative water supplies, and guidance on potential water transfer partners; and (16) any other “assistance the Secretary determines to be necessary to increase available water supplies, maintain the health of river ecosystems, or mitigate drought impacts.” Section 8 reauthorizes the Secure Water Act (Section 9504 of the Omnibus Public Land Management Act of 2009) and provides that the Commissioner of the Bureau of Reclamation “may” waive cost-sharing requirement to address emergency drought situations and prioritize projects that “expeditiously yield multiple water supply benefits..., prevent any other immediate water-related crisis or conflict,” and demonstrate “innovative conservation tools or methods that balance instream and out-of-stream water supply needs, including water conservation and water marketing.” It also raised the authorized ceiling by \$100M. Section 9 authorizes another \$100M under the Reclamation States Emergency Drought Relief Act. Section 10 extends the Rio Grande Pueblo Irrigation Infrastructure Reauthorization through 2014, and authorizes another \$6M. The Secretary of Agriculture, under Section 11, may allocate financial assistance consistent with the Food Security Act of 1985 to establish “special conservation initiatives at the local, state or regional level to assist producers in implementing eligible activities on agricultural land in the western States” for: (1) mitigating the effects of drought on agriculture and the environment; (2) improving water quality and quantity, including reducing groundwater depletion; (3) restoring, enhancing, and preserving fish and wildlife habitat; and (4) promoting innovative and collaborative conservation tools and approaches. Section 12 expands authority under the Conservation Reserve Program to cover “water quantity, or habitat impacts related to agricultural production activities...,” as well as the Special Conservation Reserve Enhancement Program “including improving water conservation and drought mitigation.” Of particular note, Section 13 declares: “An action taken by any of the Secretaries or other entity under this Act or an amendment made by this Act shall comply with applicable State laws....” It further declares: “Nothing in this Act or an amendment made by this Act affects, is intended to affect, or interferes with a law of the State relating to the control, appropriation, use, or distribution of water, or any vested right acquired under the law.”		
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H.R. 2116	Issue: Water Quality Financial Assistance Title: Perchlorate Reclamation and Water Replenishment Act. This bill amends the Reclamation Wastewater and Groundwater Study and Facilities Act to authorize the Bureau of Reclamation to provide financial assistance (up to 25% cost share) to eligible local water authorities for perchlorate remediation projects in areas identified by the Bureau, the Army Corps of Engineers, or a state designating agency as having experienced an impact from perchlorate contamination to: (1) design and construct water replenishment and reclamation projects that are owned and operated by the local water authority, or (2) operate and maintain such projects. It directs Reclamation to give priority to projects that serve an area: (1) that has received federal authorization for projects associated with perchlorate contamination remediation programs under the Bureau or the Corps of Engineers, (2) for which a feasibility study for perchlorate remediation efforts that is acceptable to the Bureau or the Corps of Engineers has been completed, or (3) where the regional water agency that imports out-of-basin water supplies has a wholesale area that includes a population of not more than 350,000.	4/25/17: H.R. 2116 introduced in the House, referred to Natural Resources	Rep. Stephen Knight (R-CA) introduced H.R. 2116
S. 914	Issue: SDWA Compliance Assistance Title: Safe Drinking Water Assistance Act. The bill is intended to improve and coordinate interagency Federal actions and provide assistance to States for responding to public health challenges posed by emerging contaminants. Although the EOA is required to identify and publish a description of unregulated contaminants that may require contamination, the bill's findings state that EPA has made limited progress in prioritizing drinking water contaminants due to lack of data regarding public exposure to contaminants, which may take decades without effective collaboration to complete. The bill establishes an interagency working group on emerging contaminants, including representatives from EPA, USGS, Health and Human Services, to work in collaboration with States, public water systems, and other interested stakeholders. It also establishes a federal research initiative with non-government participation, and requires a study on federal assistance and support for States in need of drinking water testing facilities.	4/24/17: S. 914 introduced in the Senate, referred to Environment and Public Works	Senator Jeanne Shaheen (D-NH) introduced S. 914 with 2 bipartisan co-sponsors from NH and OH
S. 880	Issue: SRFs Title: Made in America Water Infrastructure Act. The bill would ensure the use of American iron and steel in public water systems under SDWA SRFs. Iron and steel products would include lined or unlined pipe and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, and construction materials. Any waivers would require EPA approval and public notice with written justification, with a minimum 15-day comment period.	4/6/17: S. 880 introduced in the Senate, referred to Environment and Public Works	Senator Tammy Baldwin (D-WI) introduced S. 880 with 7 Democratic and 1 Independent co-sponsor
S. 865/H.R. 2012	Issue: Hydraulic Fracturing Title: Fracturing Responsibility and Awareness of Chemicals (FRAC) Act. The bill would amend the Safe Drinking Water Act to repeal exemptions for hydraulic fracturing from the definition of underground injection (42 U.S.C. 300h(d)(1)), and define it instead as a federally-regulated activity. It would allow States to seek primary enforcement responsibility for hydraulic fracturing operations for oil and natural gas without seeking to assume primary enforcement responsibility for other types of underground injection control wells, including underground injection control wells that inject brine or other fluids that are brought to the surface in connection with oil and natural gas production or any underground injection for the secondary or tertiary	4/6/17: S. 865 introduced in the Senate, referred to Environment and Public Works; H.R. 2012 introduced in the House, referred to Energy and Commerce	Senator Robert Casey (D-PA) introduced S. 865 with 10 Democratic co-sponsors, including from CA and OR Rep. Diana DeGette (D-CO) introduced H.R. 2012, with 60 Democratic cosponsors, including from AZ, CA, CO, OR, TX, and WA

	recovery of oil or natural gas. It would require disclosures before and after hydraulic fracturing operations of the chemicals and proppants intended for use in any underground injection during the operations (including identification of the chemical constituents of mixtures, Chemical Abstracts Service numbers for each chemical and constituent, material safety data sheets if available, and the anticipated amount of each chemical to be used). It would not require public disclosure of any proprietary chemical formula.		
H.R. 5426	Issue: Conservation, Source Water Protection Title: Water and Targeted Environmental Research (WATER) Act. The bill would amend the Food Security Act to provide competitive grants for innovated conservation approaches, with biennial report and a public database of effective conservation practices for soil health, nutrient management, source water protection in varying soil compositions, cropping systems, slopes, and landscapes.	4/5/18: H.R. 5426 introduced in the House, referred to Agriculture	Rep. David Young (R-IA) introduced H.R. 5426
H.R. 1893	Issue: Harmful Algal Blooms Title: Great Lakes and Fresh Water Algal Bloom Information Act. The bill would direct NOAA to create an electronic database of research and information on the causes of, and corrective actions being taken with regard to, algal blooms in the Great Lakes, their tributaries, and other surface fresh waters. The database would include relevant chemical, physical, and biological data that have been collected and voluntarily submitted by an accredited university, association or organization, research group, Federal agency, State, or local government in the United States or Canada. The database would be electronically available to the public, with appropriate confidentiality of information.	4/4/17: H.R. 1893 introduced in the House, referred to Natural Resources and to Science, Space & Technology	Rep. Robert Latta (R-OH) introduced H.R. 1893, with co-sponsors Matt Cartwright (D-PA) and Bob Gibbs (R-OH)
H.R. 1807/S.789	Issue: Water Transfers Title: Public Water Supply Invasive Species Compliance Act. This bill amends the Lacey Act to exempt certain water transfers between public water supplies located on, along, or across the boundaries of Texas, Arkansas, and Louisiana from prohibitions on illegal trade of plants and wildlife. Specifically, the prohibitions do not apply to covered water transfers containing a prohibited species if: (1) the species are present in both public water supplies before the transfer and the water is transferred directly between them; or (2) the water is transferred in a closed conveyance system (a closed system that collects, contains, and transports the flow of water, such as pipe systems) and sent directly to treatment facilities where the species will be destroyed.	3/30/17: H.R. 1807 introduced in the House, Referred to Natural Resources and Judiciary 3/30/17: S. 789 introduced in the Senate, referred to Environment and Public Works. 4/27/17: Natural Resources held a mark-up session on H.R. 1807, ordered reported by a vote of 19-17, H.Rept. 115-278 8/25/17: Judiciary Committee discharged H.R. 1807, and the bill was placed on the House calendar	Rep. Louie Gohmert (R-TX) introduced H.R. 1807, with 8 Republican co-sponsors from AR, LA, and TX Senator Ted Cruz (R-TX) introduced S. 789, with 3 Republican co-sponsors from AR and TX
H.R. 1769	Issue: Water Resources Title: San Luis Unit Drainage Resolution Act. The bill relates to the San Luis Unit of the Central Valley Project, and would direct the Department of the Interior to implement the Westlands Agreement between the U.S. and the Westlands Water District. It amends the San Luis Act of 1960	3/28/17: H.R. 1769 introduced in the House, referred to Natural Resources Committee	Rep. David Valadao (R-CA) introduced H.R. 1769

	and makes adjustments to repayments and allocation of water resources, including a contract for CVP water delivered to the Lemoore Naval Air Station. It would transfer title of certain facilities to Westlands upon execution of repayment contracts.	4/27/17: Committee mark-up and ordered reported by a vote of 23-16 10/16/17: H. Rept. 115-349, placed on House calendar	
S. 728/H.R. 1731/S. 738	Issue: Abandoned Mines Title: Revitalizing the Economy of Coal Communities by Leveraging Local Activities and Investing More (RECLAIM) Act. The bill would amend the Surface Mining Control and Reclamation Act of 1977 to provide funds to States and Indian tribes for the purpose of promoting economic revitalization, diversification, and development in economically distressed communities through the reclamation and restoration of land and water resources adversely affected by coal mining carried out before August 3, 1977. The bill would authorize the appropriation of \$200M each year from FY2018-FY2022, for projects reasonably likely to promote economic and community development in the area. S. 728 and H.R. 1731 are identical bills, and the Democrat version, S.738, differs in several policy details, but is identical to a bill introduced by Rep. Harold Rogers (R-KY) in the 114th Congress (H.R. 4456). “All funding under the Democrats' proposal would be based on how much coal a state mined in 1977, as states with more coal mining then are likely to have more eligible sites. Under the GOP bill, 80 percent of funding would be based on that calculation, with 20 percent distributed based on how much a state or tribe paid in reclamation fees between 2012 and 2016. Priority 1 and 2 sites — those posing a threat to public health, safety and property — would be eligible. While preferred, only Priority 3 sites — environmental restoration — would have to prove their economic impact. Eligible communities would qualify based on local employment data, per-capita income and other economic indicators as well as demonstrated reliance historically on coal. The Republican bill also adds a planning requirement that public meetings should be held on project proposals. Republicans also tacked on a provision that would move the headquarters of the Appalachian Regional Commission out of Washington, D.C.” E&E News, Dylan Brown, 4/3/17	3/27/17: S. 728 and S. 738 introduced in the Senate, referred to the Energy and Natural Resources Committee. H.R. 1731 introduced in the House, referred to Committees on Natural Resource and Transportation and Infrastructure. 4/5/17: House Natural Resources Subcommittee on Energy and Mineral Resources held hearings on H.R. 1731 6/27/17: House Natural Resources held mark-up session and ordered H.R. 1731 reported, H. Rept. 115-351. 10/19/17: H.R. 1731 placed on the House calendar	Senator Mitch McConnell (R-KY) introduced S. 728 with co-sponsor Senator Shelley Moore (R-WV) Senator Joe Manchin (D-WV) introduced S. 738, with 4 Democrat co-sponsors from OH, PA, and VA Rep. Harold Rogers (R-KY) introduced H.R. 1731 with 23 Republican and 17 Democrat co-sponsors, including from CA, CO, and NM.
S.714	Issue: Water Resource Management Yakima River Basin Water Enhancement Project Phase III Act. A bill to amend Public Law 103-434 to authorize Phase III of the Yakima River Basin Water Basin Water Enhancement Project for the purposes of improving water management in the Yakima River basin Senator Cantwell’s press release states that the reintroduced bill “addresses water security needs in the Yakima River Basin, which is one of the Columbia River Basin’s most significant tributaries, through an unprecedented, collaborative approach that has become a national model for water management. The bill authorizes key elements of a plan to meet the long-term water needs of both humans and nature through a combination of conservation, restoration, fish recovery and drought relief measures.”	3/23/17: S. 714 introduced in the Senate, referred to Committee on Energy and Natural Resources 3/30/17: ENR reported S. 714 favorably without amendment; S. Rept. 115-107 6/13/17: S. 714 placed on Senate Legislative Calendar	Senator Maria Cantwell (D-WA) introduced S. 714 with co-sponsor Senator Patty Murray (D-WA)

	<i>This bill is similar to a bill Senator Cantwell introduced June 2015 (S. 1694) and passed as part of the bipartisan energy bill, the North American Energy Security and Infrastructure Act (S. 2012), but differences between the House and Senate were never resolved in 2016.</i>		
S. 692/H.R. 1971/H.R. 2355	Issue: CWA Technical Assistance Title: Water Infrastructure Flexibility Act The bill would provide technical assistance, outreach and training for compliance the CWA and Safe Drinking Water Act, including information about financial assistance and regulatory flexibility, opportunities to develop integrated plans, and promotion of green infrastructure on a local and regional level. It also requires the revision of the financial capability guidance, “Combined Sewer Overflows—Guidance for Financial Capability Assessment and Schedule Development” (February 1997) and “Financial Capability Assessment Framework” (November 2014). The bills S. 692 and H.R. 1971 are identical. H.R. 2355 is almost identical, but drops the provision that priority should be given to municipalities that demonstrate affordability concerns, and adds a provision about the guidance, to consider the degree to which customer assistance programs address the rates of low-income users. <i>See also below, H.R. 465, Water Quality Improvement Act, and above, S. 2800</i>	3/21/17: S. 692 introduced in the Senate, referred to the Committee on Environment and Public Works 3/28/17: Subcommittee on Fisheries, Water, and Wildlife held hearings on S. 692 (S. Hrg 115-12) 4/5/17: EPW ordered S. 692 reported with an amendment (report No. 115-87, with errata sheet) 4/6/17: H.R. 1971 introduced in the House, referred to Transportation and Infrastructure and Energy and Commerce 5/4/17: H.R. 2355 introduced in the House, referred to T&I and E&C 5/18/17: House T&I held a hearing on integrated infrastructure, including testimony on these bills. 5/25/17: S. 692 placed on legislative calendar 10/5/17: S. 692 passed Senate with an amendment 10/10/17: S. 692 received in the House, referred to Transportation and Infrastructure, and Energy and Commerce Committees	Senator Deb Fischer (R-NE) introduced S. 692, with 8 bipartisan co-sponsors from AR, MD, MI, MO, NJ, OH, and OK Rep. Lloyd Smucker (R-PA) introduces H.R. 1971, with co-sponsor Rep. Robert Latta (R-OH) Rep. Robert Latta (R-OH) introduced H.R. 2355 with 5 bipartisan co-sponsors from CA, IL, OH, and PA
S. 685	Issue: Rural Infrastructure Title: Clean Water for Rural Communities Act. The bill’s purpose is to ensure a safe and adequate municipal, rural, and industrial water supply for various counties in Montana and North Dakota that are part of the Dry-Redwater Regional Water Authority System and the Musselshell-Judith Rural Water System, authorizing a cooperative agreement to provide federal cost-share	3/21/17: S. 685 introduced in the Senate, referred to the Committee on Energy and Natural Resources 6/14/17: Subcommittee on Water and Power held hearings on S. 685	Senator Steve Daines (R-MT) introduced S. 685, with co-sponsor Jon Tester (D-MT)

	assistance for the planning, design, and construction of the water systems, according to Reclamation feasibility studies and reports.		
S. 677/H.R. 1654	Issue: Surface Water Storage Projects Title: Water Supply Permitting Coordination Act. The bill would authorize the Secretary of the Interior to coordinate Federal and State permitting processes related to the construction of new surface water storage projects on lands under the jurisdiction of the Secretary of the Interior and the Secretary of Agriculture and to designate the Bureau of Reclamation as the lead agency for permit processing. In general, Reclamation would serve as a point of contact for project applicants, State agencies, Indian tribes and others. It would coordinate preparation of unified environmental documentation and coordinate federal agency reviews, beginning with a preapplication meeting to explain applicable processes, data requirements, and submission necessary to complete required federal agency reviews. Reclamation would establish a schedule and timeframe for agency action, and consult with the cooperating agencies to set deadlines and a project schedule. Reclamation would also prepare a unified environmental review document, maintain a consolidated administrative record, ensure that all project data is submitted and maintained in generally accessible electronic format (to the extent practicable) and make such data available to cooperating agencies, the project applicant and the public, as well as appoint a project manager. Cooperating agency responsibilities are also detailed. <i>H.R. 1654 was incorporated into H.R. 23 and passed again on 7/12/17.</i>	3/21/17: S. 677 introduced in the Senate and referred to the Committee on Energy and Natural Resources; H.R. 1654 introduced in the House and referred to the Committee on Natural Resources 4/27/17: House NR amended H.R. 1654, ordered reported by a vote of 24-16; H. Rept. 115-166 6/14/17: Senate Subcommittee on Water and Power held hearings on S. 677 6/22/17: House passed H.R. 1654 by a vote of 233-180 6/26/17: H.R. 1654 received in the Senate, referred to Energy and Natural Resources	Senator John Barrasso (R-WY) introduced S. 677, with 5 Republican co-sponsors from AZ, ID, NV, and WY Rep. Tom McClintock (R-CA) introduced H.R. 1654 with 8 Republican co-sponsors from AZ, CA, CO, ND, and WY
S. 664	Issue: Indian Water Rights Title: Navajo Utah Water Rights Settlement Act. The bill includes a water settlement fund to be used for the construction of drinking water infrastructure, domestic and municipal water supply, and the financing of distribution infrastructure on the Navajo Nation in exchange for limiting the legal exposure and litigation expenses of the federal government and the State of Utah. The agreement quantifies the Navajo Nation's right to use 81,500 acre-feet of water annually, from water sources on or adjacent to the Navajo Reservation within Utah's boundaries. The federal contribution would be authorized up to \$198.3M, which includes \$11.1M to a trust account to assist the Navajo Nation with the expenses of operating, maintaining, and replacing the water development projects, and \$1M for programmatic costs, including the preparation of a hydrographic survey of historic and existing water uses on the Reservation. The bill includes a provision that the total federal obligation would increase or decrease based on construction costs from the June 2014 cost indices. Utah would contribute an additional \$8M for planning, design and construction of water development projects, with payments spread over three years.	3/15/17: S. 664 introduced in the Senate and referred to Committee on Indian Affairs 12/6/17: Indian Affairs hearing	Senator Orrin Hatch (R-UT) introduced S. 664
S. 518	Issue: CWA Technical Assistance	3/2/17: S. 518 introduced in the Senate, referred to	Senator Roger Wicker (R-MS) introduced S. 518, with 8

	Title: Small and Rural Community Clean Water Technical Assistance Act. The bill would amend the CWA (33 USC 1281, 1383, 1301(d)) to provide technical assistance for qualified nonprofit small treatment works serving less than 10,000 people. The bill would authorize \$15M to be appropriated each year FY2018-FY2022. The EPA Administrator would be authorized to use the funds to provide grants or cooperative agreements to qualified nonprofit small treatment works technical assistance providers to provide to owners and operators of small treatment works onsite technical assistance, circuit rider technical assistance programs, multi-State, regional technical assistance programs, and onsite and regional training, to assist the small treatment works in achieving compliance with this Act or obtaining financing under this Act for eligible projects. The bill was amended to add medium treatment works serving between 10,001 and 75,000, with authorization to appropriate \$10M each year for FY2018-FY2022.	the Environment and Public Works Committee 3/28/17: Subcommittee on Fisheries, Water, and Wildlife held hearings (S. Hrg. 115-12) 4/5/17: EPW ordered S. 518 reported with an amendment, S. Rept. 115-71 5/17/17: S. 518 placed on legislative calendar	Democrat and 6 Republican co-sponsors from AR, HI, ID, MN, MT, ND, WV, and WY
H.R. 1673/ H.R. 5609	Issue: State Revolving Funds Title: Water Affordability, Transparency, Equity, and Reliability (WATER) Act. The bill would amend the Internal Revenue Code relating to the establishment of trust funds to create a Water Affordability, Transparency, Equity, and Reliability Trust Fund in the Treasury. Funds would be limited to \$34.9M in any fiscal year, and would be allocated between the Clean Water and Safe Drinking Water programs, as well as household well water systems under the USDA Consolidated Farm and Rural Development Act. Rep. Conyers said the bill “funds a massive investment in our public water utilities and creates thousands of jobs in every community...More than 11,200 community water systems have lead service lines, some of which provide water to schools. The EPA estimates roughly \$697B is needed to upgrade our drinking water and wastewater systems over the next 20 years. Without adequate federal support, communities often have to compensate for the funding gap by raising service rates, which some households cannot afford, leading some...to be cut off from water and sewer service... The WATER Act would allow states to issue grants to replace lead service lines and would establish a School Drinking Water Improvement Grant program to provide funding to public primary and secondary schools that wish to test, repair, replace or install the infrastructure necessary for drinking water foundations or bottle filling stations. Additionally, the WATER Act creates a new grant program to help households install, repair, replace and upgrade septic tanks and drainage fields. The legislation also amends the existing Tribal grant program to increase the amount of assistance from 1.5 percent of Drinking Water SRF funds to 3 percent.”	3/22/17: H.R. 1673 introduced in the House, referred to several committees 4/25/18: H.R. 5609 introduced in the House, referred to several committees	Rep. John Conyers (D-MI) introduced H.R. 1673, with 40 Democrat co-sponsors, including from AZ, CA, NM, OR, TX, and WA Rep. Keith Ellison (D-MN) introduced H.R. 5609 with 40 Democratic co-sponsors
H.R. 1653	Issue: State Revolving Funds Title: Drinking Water Affordability Act. The bill would amend the Safe Drinking Water Act (42 USC 300g and 300j) to authorize activities FY2018-FY2024, to modify loan terms, and to exempt public water systems from redundant federal cross-cutting requirements if States impose an equally stringent requirement. The bill also requires reports from EPA on best practices for streamlining application processes and efficient administration of SRFs, and a GAO report on a study of cost-effective and economically feasible rehabilitation or replacement of drinking water infrastructure, with an assessment of barriers that preclude communities from using such materials and technologies.	3/21/17: H.R. 1653 introduced in the House, referred to Committee on Energy and Commerce	Rep. Robert Latta (R-OH) introduced H.R. 1653 with co-sponsor Rep. David McKinley (R-WV)
H.R. 1647	Issue: State Revolving Funds	3/21/17: H.R. 1647 introduced in the House,	Rep. Earl Blumenauer (D-OR) introduced H.R. 1647 with co-

	Title: Water Infrastructure Trust Fund Act. The bill would amend the Internal Revenue Code relating to the establishment of trust funds to create a Water Infrastructure Trust Fund in the Treasury, with funds available without further appropriation for EPA capitalization grants under the CWA (33 USC 1377) and the Safe Drinking Water Act (42 USC 300j-12)	referred to several committees	sponsors Rep. John Duncan (R-TN) and Daniel Lipinski (D-IL)
H.R. 1579	Issue: Water Infrastructure Resiliency Title: Secure and Resilient Water Systems Act. The bill would require community drinking water systems to identify their source water and distribution system vulnerabilities to climate change, drought, extreme weather; source water degradation due to threats from industrial activity, pipelines and storage tanks, contaminated sites, agricultural activity, and oil and gas exploration; and threats from intentional acts, including intentional contamination, sabotage, and theft of chemicals. These assessments would be due to the EPA Administrator every five years. Each community water system would also be required to submit a protection plan that identifies strategies and resources to mitigate threats, including emergency response plans. The bill would authorize cost-share grants to provide technical assistance for those water systems at greatest and most immediate risk, with an appropriation authorized of \$50M for each FY2018-FY2022. <i>See also H.R. 1068.</i>	3/16/17: H.R. 1579 introduced in the House, referred to the Committee on Energy and Commerce	Rep. Scott Peters (D-CA) introduced H.R. 1579 with co-sponsors Frank Pallone (D-NJ) and Paul Tonko (D-NY)
H.R. 1269	Issue: Water Infrastructure Title: Sacramento Valley Water Storage and Restoration Act. Directs the Secretary of the Interior to take actions to support non-Federal investments in water infrastructure improvements in the Sacramento Valley. The Sites Project is an off-stream surface water storage project that includes the Sites Reservoir and associated water conveyance and hydropower facilities in Glenn and Colusa Counties, CA. The bill directs the completion of the feasibility study as a non-federal project with Reclamation partnership for designing and constructing the project, and future coordinated operations between the Central Valley Project and the Sites Project.	3/1/17: H.R. 1269 introduced in the House, referred to Natural Resources Committee	Rep. Doug LaMalfa (R-CA) introduced H.R. 1269 with 4 bipartisan California co-sponsors
H.R. 1261	Issue: WOTUS/Navigable Waters Title: Federal Regulatory Certainty for Water Act. The bill amends the CWA (33 USC 1362) to define “navigable waters” as navigable-in-fact, or permanently or continuously flowing bodies of water (streams, rivers, lakes, oceans) connected to navigable-in-fact waters. It explicitly excludes intermittent or ephemeral flows, wetlands, playa lakes, prairie potholes, wet meadows, wet prairies, and vernal pools unless they are adjacent to navigable waters with a continuous surface water connection.	2/28/17: H.R. 1261 introduced in the House, referred to the Committee on Transportation and Infrastructure	Rep. Mac Thornberry (R-TX) introduced H.R. 1261 with 12 Republican co-sponsors, including ND, NM, and TX
S. 451/H.R. 1663	Issue: Water Infrastructure Funding and Research Title: Water Resources Research Amendments Act. This bill amends the Water Resources Research Act (42 USC 10301) to: (1) declare that additional research is required into increasing the effectiveness and efficiency of new and existing treatment works through alternative approaches, including non-structural alternatives, decentralized approaches, energy use efficiency, water use efficiency, and actions to extract energy from wastewater; (2) require each water resources research and technology institute to arrange for research that fosters the exploration of new ideas that expand understanding of water resources (currently, of water-related phenomena); (3) direct the Department of the Interior to report to specified congressional committees annually on each institute's compliance with matching fund requirements and provisions permitting the use	2/27/17: S. 451 introduced in the Senate, referred to Committee on Environment and Public Works 3/21/17: H.R. 1663 introduced in the House, referred to the Natural Resources Committee	Senator Benjamin Cardin (D-MD) introduced S. 451 with co-sponsor John Boozman (R-AR) Rep. Robert Whitman (R-VA) introduced H.R. 1663, with 11 bipartisan co-sponsors from CA, KY, MA, ME, NC, VA, WI

	of funds only to reimburse direct cost expenditures incurred for the conduct of the water resources research program; and (4) authorize appropriations for such institutes through FY2022		
H.J. Res. 77	Issue: Corps Water Control Manuals No Title. Provides congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Army Corps of Engineers in December 2016 relating to the Apalachicola-Chattahoochee-Flint River Basin Water Control Master Manual, impacting water resources in Alabama, Florida, and Georgia	2/16/17: H.J. Res. 77 introduced in the House, referred to the Transportation and Infrastructure Committee	Rep. Neal Dunn (R-FL) introduced H.J. Res. 77 with 12 Florida co-sponsors.
H.R. 1179	Issue: EPA Veto Authority, Environmental Lawsuits Title: Discouraging Frivolous Lawsuits Act. The bill would amend the CWA to streamline the permitting process for infrastructure projects, and hold special interest groups accountable for filing frivolous lawsuits that unnecessarily delay infrastructure projects at increased tax-payer expense. The bill would remove the EPA's veto authority over Corps-issued permits on wetlands, reducing the uncertainty applicants experience when filing permits.	2/16/17: H.R. 1179 introduced in the House, referred to the Committee on Transportation and Infrastructure	Rep. Tom Rice (R-SC) introduced H.R. 1179 with 65 Republican co-sponsors, including from AK, AZ, CA, MT, ND, NM, NV, OK, UT, and TX
H.R. 1105	Issue: Clean Water Act – WOTUS Rule Title: Stop WOTUS Act. The bill would repeal the Waters of the United States (WOTUS) Rule, issued by the EPA and Corps under the CWA, which defines the scope of waters protected and regulated. Rep. Rick Allen provided the following background: “The rule would significantly broaden the definition to extend the federal government’s regulatory authority over nearly all bodies of water, including creeks, streams, and groundwater as well as drainage ditches, irrigation pipes and farmland ponds. The Administration failed to properly consult state and local governments in developing its rule, which undermines the federal-state partnership Congress intended to establish under the CWA.”	2/16/17: H.R. 1105 introduced in the House, referred to the Committee on Transportation and Infrastructure	Rep. Rick Allen (R-GA) introduced H.R. 1105, with co-sponsor Blake Farenthold (R-TX)
H.R. 1071	Issue: Safe Drinking Water Act Title: Assistance, Quality, and Affordability (AQUA) Act. To amend the Safe Drinking Water Act, to increase assistance for States, water systems, and disadvantaged communities; to encourage good financial and environmental management of water systems; to strengthen the EPA’s ability to enforce the requirements of the Act. The bill would increase federal investments in U.S. water systems to remove old lead pipes, and improve long-term resiliency and sustainability. It would authorize significantly higher funding levels for the Drinking Water State Revolving Fund for states to meet their most pressing local water system needs. <i>See also H.R. 1068.</i>	2/15/17: H.R. 1071 introduced in the House, referred to the Committee on Energy and Commerce	Rep. Paul Tonko (D-NY) introduced H.R. 1071, with 19 Democratic co-sponsors, including from CA, CO, OR, and TX
H.R. 1068	Issue: Safe Drinking Water Act Title: Safe Drinking Water Act Amendments. To enable needed drinking water standards, reduce lead in drinking water, plan for and address threats from climate change, terrorism, and source water contamination, invest in drinking water infrastructure, increase compliance with drinking water standards, foster greater community right to know about drinking water quality, and promote technological solutions for drinking water challenges.	2/15/17: H.R. 1068 introduced in the House and referred to the Committee on Energy and Commerce	Rep. Frank Pallone (D-NJ) introduced H.R. 1068 with 10 Democratic co-sponsors, including from CA, CO, and OR.
S. 398	Issue: Federal Allocation of Interstate Water Resources	2/15/17: S. 398 introduced in the Senate, referred to the Committee on	Senator Bill Nelson (D-FL) introduced S. 398

	No Title. Directs the Secretary of the Army to modify the operation of certain water development projects in the Apalachicola, Chattahoochee, Flint (ACF) Rivers. The intent is to provide freshwater flows sufficient for the physical, chemical, biological and overall ecological integrity of the “components, functions, and natural processes” required for a thriving river system, floodplain and Apalachicola Bay – and thereby protect commercial and recreational fishing and shellfish. The bill is in response to a U.S. Army Corps of Engineers’ (Corps) environmental impact statement (EIS) and updated ACF water control manual that would provide for nearly all of Atlanta’s water needs through 2050, as well as an anticipated Supreme Court special master’s report that is expected to also favor Georgia. The bill would support and re-establish “thriving and diverse fish, wildlife and plant populations with species composition, diversity, adaptability, and functional organization similar to those found in the... ecosystems prior to the construction of the [ACF] projects.” It is intended to restore and recover endangered, threatened and/or at risk species and prevent significantly harmful adverse impacts to the ecosystems. The bill directs the Corps to enter into an arrangement with the National Oceanic and Atmospheric Administration (NOAA) to study and evaluate existing studies, assessments and data related to freshwater flows, and recommend how to maintain such flows. It would prohibit the Corps from issuing a final water control manual based on its 2016 EIS, and calls for development of a revised manual with operational modifications to carry out the purposes of the bill, including “to the maximum extent practicable, while providing system-wide balance in conservation storage through the maintenance of water levels in the same action zone for each of the [ACF] project reservoirs.” Further, the bill calls for an independent National Academy of Sciences peer review of each revised water control manual. Before a manual is issued, the Corps is to obtain written approval from NOAA, EPA, the FWS, and the U.S. Geological Survey.	Environment and Public Works	
H.R. 953	Issue: FIFRA Title: Reducing Regulatory Burdens Act. To amend the Federal Insecticide, Fungicide, and Rodenticide Act and the Federal Water Pollution Control Act to clarify Congressional intent regarding the regulation of the use of pesticides in or near navigable waters, exempting certain pesticides from NPDES permitting. The bill would overturn <i>National Cotton Council v. EPA</i> (6th Cir. 2009) <i>Related to Position #359, allowed to sunset at the St. George, Utah meeting September 2016. See also S. 340.</i>	2/7/17: H.R. 953 introduced in the House, referred to Committees on Transportation and Infrastructure, and Agriculture 2/16/17: House Agriculture Committee held a mark-up session and ordered H.R. 953 reported. (H. Rept. 115-131) 5/24/17: H.R. 953 passed the House 256-165 5/25/17: H.R. 953 received in the Senate, referred to the Committee on Environment and Public Works	Rep. Bob Gibbs (R-OH) introduced H.R. 953, with 43 Republican and 4 Democrat co-sponsors

H.R. 939/H.R. 904	Issue: EPA State Revolving Funds Title: Buy America for Drinking Water Extension Act (H.R. 939). To amend the Safe Drinking Water Act to extend and expand the provision requiring the use of iron and steel products that are produced in the United States in projects funded through a State drinking water treatment revolving loan fund. Title: Buy American Improvement Act (H.R. 904). Would amend 41 USC 83 to increase the requirement for American-made content and strengthen the waiver provisions. Section 208 includes drinking water state revolving funds, Section 209 includes rural utilities, and Section 211 includes the Rural Water Supply Program	2/7/17: H.R. 939 introduced in the House, referred to Committee on Energy and Commerce 2/7/17: H.R. 904 introduced in the House, referred to various committees	Rep. Cheri Bustos (D-IL) introduced H.R. 939, with 19 Democrat and 2 Republican co-sponsor Rep. Daniel Lipinski (D-IL) introduced H.R. 904, with 18 Democrat and 3 Republican co-sponsors
S. 340	Issue: Water Quality Title: Sensible Environmental Protection Act. A bill to clarify Congressional intent regarding the regulation of the use of pesticides in or near navigable waters. The bill would amend FIFRA 7 USC 136a(f) and the CWA 33 USC 1342 to clarify which pesticides are exempt from NPDES discharge permits. It would require EPA and USDA to report to Congress on coordination between the agencies and the effectiveness of regulations regarding water quality and human health. <i>Related to Position #359, allowed to sunset at the St. George, Utah meeting September 2016. See also H.R. 953.</i>	2/7/17: S. 340 introduced in the Senate, referred to the Committee on Environment and Public Works	Senator Mike Crapo (R-ID) introduced S. 340, with 15 Republican and 3 Democrat co-sponsors, including from AZ, ID, KS, NE, ND, OK, SD, and WY
H.R. 689/S.285	Issue: Access to irrigation headgate on federal land for maintenance Title: Bolts Ditch Access and Use Act. Seeks to resolve maintenance issues for a ditch headgate located on wilderness land in Colorado's White River National Forest. The parties have a stipulated settlement agreement on the point of diversion for the Bolts Ditch, removing it from the wilderness area absent other Congressional or Presidential authorization. S. 2524 would direct the USDA to issue a special use permit authorizing non-motorized access for routine maintenance on the Bolts Ditch headgate, but does not authorize new construction or reconstruction. <i>Note: This bill is similar to S. 2524 and H.R. 4510 introduced in the 114th Congress, passed by the House.</i>	1/24/17: H.R. 689 introduced in the House, referred to the Committee on Natural Resources 2/2/17: S. 285 introduced in the Senate, referred to the Committee on Energy and Natural Resources 2/6/17: H.R. 689 passed by a vote of 409-1 2/7/17: H.R. 689 received by the Senate, referred to Committee on Energy and Natural Resources 3/30/17: ENR Committee ordered H.R. 689 and S. 285 to be reported favorably without amendment (reports 115-53 and 115-58) 5/9/17: Bills placed on Senate calendar	Rep. Jared Polis (D-CO) introduced H.R. 689, with co-sponsors Rep. Scott Tipton (R-CO) and Doug Lamborn (R-CO) Senator Cory Gardner (R-CO) introduced S. 285 with co-sponsor Senator Michael Bennet (D-CO)
S. 199/H.R. 648	Issue – Reclamation/Infrastructure	1/24/17: S. 199 introduced in the Senate, referred to the Committee on Energy	Senator John Barasso (R-WY) introduced the bill with co-sponsor Michael Enzi (R-WY)

	Title –None: Authorizes the Department of the Interior, in cooperation with the state of Wyoming, to amend the Definite Plan Report for the Seedskaadee Project to provide for the study, design, planning, and construction activities that will enable the use of all active storage capacity of Fontenelle Dam and Reservoir, including the placement of sufficient riprap on the upstream face of the Dam to allow such storage capacity to be used for authorized Project purposes. <i>Note: This bill is similar to S. 1305 and H.R. 2273 introduced in the 114th Congress and passed by the House.</i>	and Natural Resources. H.R. 648 introduced in the House, referred to the Committee on Natural Resources 3/15/17: House passed H.R. 648 by a vote of 408-0 3/21/17: Senate received H.R. 648, referred to ENR Committee 3/30/17: Senate ENR Committee reported S. 199 favorably without amendment (115-96) 6/8/17: S. 199 placed on the Senate calendar 4/25/18: H.R. 648 placed on Senate calendar	Rep. Liz Cheney (R-WY) introduced H.R. 648
H.R. 660/S.216	Issue: Reclamation Aging Infrastructure Title: Bureau of Reclamation Transparency Act. To require the Secretary of the Interior to submit to Congress a report on the efforts of the Bureau of Reclamation to manage its aging infrastructure assets, which provide important benefits to the 17 Reclamation states including irrigated agriculture, municipal and industrial water, hydropower, flood control, fish and wildlife, and recreation. The replacement value of these assets was \$94.5B as of 2013, and many of the infrastructure facilities are over 60 years old. The bill requires DOI to submit an Asset Management Report to Congress for reserved and transferred works, describing maintenance and major repair and rehabilitation needs and the cost estimate of appropriations needed to complete each item, and a rating system. DOI may consult with the Corps and with water and power contractors as appropriate to facilitate the preparation of the report. The bill also reduces the federal cost share of the Central Valley Water Recycling Project by \$2M	1/24/17: H.R. 660 introduced in the House, referred to the Committee on Natural Resources; S. 216 was introduced in the Senate and referred to the Committee on Energy and Natural Resources 3/30/17: Senate ENR reported S. 216 without amendment (115-97) 4/27/17: House NR ordered H.R. 660 reported (H. Rept. 115-156) 6/2/17: H.R. 660 placed on House calendar 6/8/17: S. 216 placed on Senate calendar	Senator John Barasso (R-WY) introduced S. 216 with co-sponsor Sen. Brian Schatz (D-HI) Rep. Paul Gosar (R-AZ) introduced H.R. 660, with 15 Republican and 5 Democrat co-sponsors from AZ, CA, CO, GA, NV, NM, PA, TN, TX, and WA
H.R. 637	Issue - EPA Climate Change Regulations Title - Stopping EPA Overreach Act: The bill would prevent the EPA from exceeding its statutory authority by prohibiting the regulation of climate change or global warming through the Clean Air Act, the Federal Water Pollution Control Act, the National Environmental Policy Act, the Endangered Species Act, or the Solid Waste Disposal Act, noting that the Acts neither authorize nor require such regulation. <i>Note: This bill is similar to H.R. 3880 introduced in the 114th Congress</i>	1/24/17: H.R. 637 introduced in the House, referred to multiple committees	Rep. Gary Palmer (R-AL) introduced H.R. 637, with 121 Republican co-sponsors

S. 181	Issue: Water Infrastructure No Title. To ensure that certain Federal public works and infrastructure projects use materials produced in the United States, including iron, steel, manufactured goods, pipes, concrete, glass, lumber, drywall, and insulation. Projects receiving federal assistance failing to comply with various domestic content preference statutes would be considered deficient, and federal funds would not be available for infrastructure projects going forward unless all of the iron, steel, manufactured goods, and commodity construction materials used in the project are produced in the United States. With written justification, exceptions would be made where the relevant materials are not produced in sufficient and reasonably available quantities, or purchasing the materials in the U.S. would increase the costs of the overall project by more than 25%. <i>See WSWC Position #404.</i>	1/20/17: S. 181 introduced in the Senate, referred to the Committee on Homeland Security and Governmental Affairs.	Senator Sherrod Brown (D-OH) introduced S. 181 with co-sponsor Sen. Rob Portman (R-OH)
H.R. 448/S.1464	Issue: Water Conservation Title: Water Conservation Rebate Tax Parity Act. To amend the Internal Revenue Code to expand the tax exclusion for certain conservation subsidies to include subsidies for water conservation or efficiency measures and storm water management measures. Senator Feinstein said: “Section 136 of the Internal Revenue Code already exempts energy conservation rebates from inclusion in gross income. However, there is no Federal exemption for water conservation or storm water management measures, which may undermine incentives for participation in these programs. These programs are just as valuable as energy conservation programs and should be treated equally in the tax code. This bill would simply exempt water conservation and storm water management rebates from being included in gross income and would be retroactive to 2015. This would maintain the important incentives for resident participation in critical water conservation measures. This bill is supported by a coalition of organizations and public utilities, including the Western Urban Water Coalition, Alliance for Water Efficiency, American Water Works Association, National Association of Water Companies, U.S. Water Alliance, Association of Water Agencies, WaterNow Alliance, Western Coalition of Arid States, and National Water Resources Association. This bill is crucial to ensuring residents continue participating in water conservation and storm water management programs.”	1/11/17: H.R. 448 introduced in the House, referred to the Committee on Ways and Means 6/28/17: S. 1464 introduced in the Senate, referred to Committee on Finance	Rep. Jared Huffman (D-CA) introduced H.R. 448, with 36 Democrat and 5 Republican co-sponsors, including from AZ, CA, CO, IL, NH, NV, MD, TX and WI Senator Dianne Feinstein (D-CA) introduced S. 1464 with co-sponsor Senators Kamala Harris (D-CA), Michael Bennet (D-CO), Cory Gardner (D-CO), and Dean Heller (R-NV)
H.R. 438	Issue: Salton Sea/Water Quality Title: California New River Restoration Act. The bill directs EPA to establish a restoration program to build on, and help coordinate funding for, restoration and protection efforts relating to the New River, which was born out of the Colorado River’s occasional flows into the Salton Sink and the erosion of the New River channel and has significant water pollution problems from agricultural runoff, raw sewage, pesticides, and waste discharges from sources in Mexico and the Imperial Valley. The EPA program would implement projects, plans, and initiatives for the New River supported by the California-Mexico Border Relations Council, and work in consultation with applicable federal, state, regional, and international management entities. EPA would also provide grants and technical assistance to the state and various other entities to carry out the purposes of the program, with the federal cost share not to exceed 55%, and non-federal costs that	1/11/17: H.R. 438 introduced in the House, referred to the Committees on Natural Resources and Transportation & Infrastructure	Rep. Juan Vargas (D-CA) introduced H.R. 438 with co-sponsor Rep. Duncan Hunter (R-CA)

	may be provided by in-kind contributions of services or materials. EPA would provide annual reports to Congress on implementation and funding of the program.		
S. 90/H.R. 428	Issue: BLM Property/Red River Banks Title: Red River Gradient Boundary Survey Act. Directs BLM to survey the gradient boundary along the Red River in the States of Oklahoma and Texas, subject to approval of those states' respective land offices. <i>Note: This is similar to H.R. 2130 and S. 1153 introduced in the 114th Congress, passed by the House 12/9/15.</i>	1/10/17: S. 90 introduced in the Senate, referred to the Committee on the Judiciary; H.R. 428 introduced in the House, referred to the House Committee on Natural Resources 2/14/17: House passed H.R. 428 by a vote of 250-171 2/15/17: Senate received H.R. 428, referred to the Committee on Energy and Natural Resources 7/26/17: Senate Subcommittee on Public Lands, Forests, and Mining held hearings on S. 90	Senator John Cornyn (R-TX) introduced S. 90 with co-sponsor Senator Ted Cruz (R-TX) Rep. Mac Thornberry (R-TX) introduced H.R. 428 with 13 Republican co-sponsors from Texas and Oklahoma
S. Res. 12/H. Res. 152	Issue: Clean Water Act/WOTUS Rule A resolution expressing the sense of the Senate/House of Representatives that clean water is a national priority, and that the June 29, 2015, Waters of the United States Rule should be withdrawn or vacated.	1/12/17: S. Res. 12 introduced in the Senate, referred to the Committee on Environment and Public Works 2/27/17: H. Res. 152 introduced in the House, referred to Transportation & Infrastructure	Senator Deb Fischer (R-NE) introduced S. Res. 12, with co-sponsor Joni Ernst (R-IA) Rep. Bob Gibbs (R-OH) introduced H. Res. 152, with 45 Republican and 1 Democratic co-sponsor
H.R. 519/S.1090	Issue: Water Infrastructure/Tax Incentive Title: Water and Agriculture Tax Reform Act. Amends the Internal Revenue Code to permit tax-exempt mutual ditch or irrigation companies to earn income from dispositions of certain real property and stock interests without affecting their tax-exempt status, but requires that such income be used to pay the costs of operations, maintenance, and capital improvements of such a company. Also establishes a rule regarding the organizational governance of mutual ditch or irrigation companies. Where state law provides that such a company may be organized in a manner that permits voting on a basis that is pro rata to share ownership on corporate governance matters, the tax-exempt status of the mutual ditch or irrigation company must be determined without taking into account whether its member shareholders have one vote on corporate governance matters per share held in the corporation. <i>Note: This is similar to H.R. 4220 and S. 384 introduced in the 114th Congress</i>	1/13/17: H.R. 519 introduced in the House, referred to the Committee on Ways and Means 5/10/17: S. 1090 introduced in the House, referred to Finance	Representative Ken Buck (R-CO) introduced H.R. 519, with 13 bipartisan co-sponsors from AZ, CA, CO, UT, WA, and WY Senator Mike Crapo (R-ID) introduced S. 1090, with 4 co-sponsor Senators from CO, ID, and WY

H.R. 465	Issue: Clean Water Act Title: Water Quality Improvement Act. To provide an integrated planning and permitting process for municipalities facing financial challenges in CWA compliance. It was referred to the House Committee on Transportation and Infrastructure. The bill would allow municipalities to obtain permits for wastewater and stormwater management with the most cost-effective, technically-feasible, and protective approaches to CWA compliance. In coordination with the State—or the EPA, where the State does not have delegated authority—the municipality can develop a plan that prioritizes the maximum health benefits for the resources expended. In determining whether a plan is economically affordable, the state can take into consideration existing and potential future costs for implementation, including the economic and social impact on the service area; low-income households and cumulative costs that exceed 2% of annual household income; impact of increased costs on local industry; unemployment rates; bond ratings; the legal ability to pass increased costs through to ratepayers; and whether compliance with the CWA would require a municipality to divert resources away from essential capital improvements that would provide core public services to the community. When evaluating the technical feasibility of a plan, the state would consider naturally-occurring pollutants; natural, ephemeral, intermittent, or low-flow conditions or water levels; human-caused pollution that cannot be remedied; dams, diversions, or other types of hydrologic modifications that make CWA compliance impracticable; or other physical conditions related to the natural features of a water body unrelated to water quality that preclude compliance with the CWA. The bill directs EPA to coordinate with states to select 15 eligible municipalities to develop and implement integrated plans and permits as pilot projects, with annual reports to Congress. The bill also directs EPA to update its 1997 financial capability assessment guidance, titled “Combined Sewer Overflows—Guidance for Financial Capability Assessment and Schedule Development” (EPA-832-B-97-004). The update would occur in consultation with representative municipal and State officials, including their representative regional or national organizations. Consultations would focus on how to assess the financial capability of municipalities to implement effluent limitations and other CWA control measures. The updated guidance would also take into consideration relevant studies and reports, and would provide a consistent reference point to aid parties in negotiating reasonable and effective schedules for implementation. <i>Note: The bill is similar to H.R. 6182, introduced in the 114th Congress. About that bill, Rep. Gibbs said: “Too many cities and towns in America are facing expensive EPA mandates with no real way to achieve them. One-size-fits-all policies out of Washington do not work when American mayors and administrators need flexibility. The Water Quality Improvement Act will write into law the EPA’s Integrated Planning Process, providing that flexibility. Our communities need to be given flexibility in complying with mandates that may not even be technically achievable or economically affordable. I am proud to support our nation’s cities, mayors, and their residents by introducing this bill.”</i>	1/12/17: H.R. 465 introduced in the House, referred to the Committee on Transportation & Infrastructure	Rep. Bob Gibbs (R-OH) introduced H.R. 465, with co-sponsors Rep. Steve Chabot (R-OH), James Renacci (R-OH), Jackie Walorski (R-IN), Glenn Grothman (R-WI), Keith Rothfus (R-PA), Fred Upton (R-MI), and Warren Davidson (R-OH)
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S. 140/S. 2850	Issue: Indian Water Rights Settlements No Title. This bill amends the White Mountain Apache Tribe Water Rights Quantification Act of 2010 to specify that settlement funds may be used for the planning, design, and construction of the tribe's rural water system. <i>Note: This Act is identical to S. 2959 passed by unanimous consent in the 114th Senate 9/29/16, and related to H.R. 5433 (introduced but no movement in committee)</i> <i>Note 2: The House tacked on language regarding the expansion of the Pueblo of Santa Clara land eligible for 99-year lease, and excluding Indian tribes from the definition of employer under the National Labor Relations Act (similar to states and their political subdivisions, which are also excluded from the definition of employer.) See 29 USC §152(2). On May 16, 2018, Senator Flake reintroduced the same language from the original S. 140, sans all the amendment language, as S. 2850.</i>	1/12/17: S. 140 introduced in the House, referred to Committee on Indian Affairs 2/8/17: S. 140 passed out of committee, order to be reported favorably (115-7) 5/8/17: Passed Senate unanimously without amendment 5/11/17: House received S. 140 and referred to Committee on Natural Resources 12/6/17: S. 140 reported by House Natural Resources, H. Rept. 115-441, placed on Union Calendar 1/10/18: House passed S.140 with amendments by a vote of 239-173 4/16/18: Senate considered House amendments (resolving differences)	Senator Jeff Flake (R-AZ) introduced S. 140 (and S. 2850) with co-sponsor John McCain (R-AZ)
H.R. 434	Issue: Infrastructure Financing Title: New Water Available To Every Reclamation State (New WATER) Act. The bill authorizes the Department of the Interior to provide financial assistance, including secured loans and loan guarantees, to non-federal entities that contract with the Bureau of Reclamation to carry out eligible water projects within the 17 Reclamation states, Alaska, or Hawaii. Eligible projects would cost at least \$20M, with maximum federal assistance up to 80% of the total cost, and include (1) infrastructure projects for domestic, agricultural, environmental, municipal or industrial water supply; (2) enhanced energy efficiency in the operation of a water system; (3) accelerated repair and replacement of aging water distribution facilities; (4) desalination; and (5) acquisition of real property for water storage, reclaimed or recycled water, or wastewater integral to such a project. Loan repayment would begin within 5 years of project completion and last no more than 35 years. Federal financial assistance under this Act would not qualify as a federal action that triggers a NEPA review, but does not supersede compliance with relevant state, tribal, and local laws and permitting requirements. The bill would appropriate annual funds in graduated amounts: \$20M for FY 2018; \$25M for FY2019; \$35M for FY2020; \$45M for FY2021; and \$50M for FY2022. <i>Note: This bill is similar to H.R. 6022 introduced in the 114th Congress.</i>	1/11/17: H.R. 434 introduced in the House, referred to Committee on Natural Resources	Rep Jeff Denham (R-CA) introduced H.R. 434 with bipartisan co-sponsors Rep. Doug LaMalfa (R-CA), Ken Calvert (R-CA), Jim Costa (D-CA), John Garamendi (D-CA), David Valadao (R-CA), Stephen Knight (R-CA), Kevin Cramer (R-ND), Tom Cole (R-OK), and Dan Newhouse (R-WA)

H.R. 417	Issue: Safe Drinking Water Act No Title. Amends Section 1414(c)(4) of the Safe Drinking Water Act (42 U.S.C. 300g–3(c)(4)) to require EPA, to revise regulations about consumer confidence reports in order to increase their effectiveness and understandability. Currently, each community water system must mail their customers an annual consumer confidence report that provides information about local drinking water quality.	1/10/17: H.R. 417 introduced in the House, referred to Committee on Energy and Commerce	Rep. Brenda Lawrence (D-MI) introduced H.R. 417, with co-sponsor Rep. Eleanor Norton (D-DC)
H.R. 360	Issue: Reserved Water Rights Title: Greater Grand Canyon Heritage National Monument Act. The purpose of the Monument is “to preserve and, if necessary, restore the native, cultural, sacred lands, and key tribal resources, nationally significant biological, ecological, including wildlife connectivity, cultural, historical, recreational, geological, hydrological, education, scenic and scientific values found in the Greater Grand Canyon ecosystem and watershed, including aboveground tributaries, springs and interconnected groundwater that contribute significantly to the Colorado River; and to secure now and for future generations the opportunity to experience and enjoy the diverse tribal resources, landscape, wildlife, water flows, and recreational use of the lands included in the national monument.” Notably, section 9 says that nothing in the Act authorizes or imposes any new reserved Federal water right, nor does it relinquish or reduce and water rights reserved or appropriated by the U.S. in Arizona before the date of enactment.	1/6/17: H.R. 360 introduced in the House, referred to Natural Resources	Rep. Raul Grijalva (D-AZ) introduced H.R. 360, with 13 Democratic co-sponsors.
H.R. 196/H.R. 250/S. 276/S. 295/H.R. 1598	Issue: Restructuring Circuit Court of Appeals Title: Ninth Circuit Court of Appeals Judgeship and Reorganization Act (H.R. 196). Divides the U.S. Court of Appeals for the Ninth Circuit into: (1) the Ninth Circuit, composed of California, Guam, Hawaii, and Northern Mariana Islands; and (2) the Twelfth Circuit, composed of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington. The President must appoint two additional judges for the former Ninth Circuit, three judges for the new Ninth Circuit, and two additional temporary judges for the former Ninth Circuit. The bill: (1) specifies the locations where new circuits are to hold regular sessions, (2) distributes active circuit judges of the former Ninth Circuit to the new circuits, (3) allows senior circuit judges of the former Ninth Circuit to elect assignment, and (4) authorizes administrative coordination between any two contiguous circuits. Title: Judicial Administration and Improvement Act (H.R. 250). Divides the U.S. Court of Appeals for the Ninth Circuit into: (1) a new Ninth Circuit, to be composed of California, Hawaii, Oregon, Washington, Guam, and the Northern Mariana Islands; and (2) a newly established Twelfth Circuit, to be composed of Alaska, Arizona, Idaho, Montana, and Nevada. Title: Judicial Administration and Improvement Act (S. 276). Divides the U.S. Court of Appeals for the Ninth Circuit into: (1) a new Ninth Circuit, to be composed of California, Hawaii, Oregon, Guam, and the Northern Mariana Islands; and (2) a newly established Twelfth Circuit, to be composed of Alaska, Arizona, Idaho, Montana, Nevada, and Washington. Title: Circuit Court of Appeals Restructuring and Modernization Act (S. 295). Divides the U.S. Court of Appeals for the Ninth Circuit into: (1) a new Ninth Circuit, to be composed of	1/3/17: H.R. 196 introduced in the House, referred to the Committee on the Judiciary 1/13/17: H.R. 250 introduced in the House, referred to the Committee on the Judiciary 2/2/17: S. 276 introduced in the Senate 2/2/17: S. 295 introduced in the Senate 3/17/17: H.R. 1598 introduced in the House	Rep. Michael Simpson (R-ID) introduced H.R. 196. Rep. Andy Biggs (R-AZ) introduced H.R. 250, with 9 Republican co-sponsors from AK, AZ, SC, TX, and VA Senator Jeff Flake (R-AZ) introduced S. 276 with co-sponsors John McCain (R-AZ) and Dean Heller (R-NV) Senator Steve Daines (R-MT) introduced S. 295, with co-sponsors Dan Sullivan (R-AK) and Lisa Murkowski (R-AK) Rep. Louie Gohmert (R-TX) introduced H.R. 1598, with co-sponsor Jeff Duncan (R-SC)

	California, Guam, Hawaii, and Northern Mariana Islands; and (2) a newly established Twelfth Circuit, to be composed of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington. Title: Ninth Circuit Court Modernization and Twelfth Circuit Court Creation Act (H.R. 1598). This bill divides the U.S. Court of Appeals for the Ninth Circuit into: (1) a new Ninth Circuit that consists of only California; and (2) a newly established Twelfth Circuit to be composed of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Hawaii.		
H.R. 26 S. 21	Issue: Regulatory Reform Title: Regulations from the Executive in Need of Scrutiny (REINS) Act. The bill would require agencies to report to Congress whether a rule is classified as major or non-major, as well as provide a cost-benefit analysis that includes any jobs added or lost as a result of the proposed rule. A major rule would result in: (1) an annual effect on the economy of \$100M or more; (2) a major increase in costs or prices for consumers, industries, agencies or regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.	1/3/17: H.R. 26 introduced in the House. 1/4/17: S. 21 introduced in the Senate, referred to the Committee on Homeland Security and Gov't Affairs (HSGA) 1/5/17: House passed H.R. 26 by a vote of 237-187. 1/6/17: H.R. 26 received in the Senate, referred to the Committee on Homeland Security and Governmental Affairs 3/29/17: Senate Committee on Small Business and Entrepreneurship held hearings on H.R. 26, S.Hrg. 115-21 5/17/17: HSGA ordered S. 21 to be reported without amendment, S. Rept. 115-169 10/16/17: S.21 placed on Senate calendar	Representative Doug Collins (R-GA) introduced H.R. 26, with 160 Republican co-sponsors Senator Paul Rand (R-KY) introduced S. 21, with 38 Republican co-sponsors
H.R. 23	Issue: California Drought Title: Gaining Responsibility on Water (GROW) Act. The bill is intended to make more water available to communities in California and bordering Western states, providing relief to California families, farmers, and communities by restoring water deliveries that have been drastically reduced over the last two decades as a result of various environmental lawsuits and state and federal regulations. The legislation requires regulators to comply with the bipartisan Bay-Delta Accord, consistent with the requirements of the Endangered Species Act. The bill is intended to cut red tape holding back major water storage projects that have been authorized for over a decade, to aid the entire Western United States during dry years. The bill also contains provisions recognizing state authority to manage and allocate water, and provisions to facilitate water transfers, management decisions, and conservation.	1/3/17: H.R. 23 introduced in the House, referred to the Committees on Natural Resources and Agriculture 7/12/17: House amended and passed H.R. 23 by a vote of 230-190, largely along party lines 7/18/17: H.R. 23 received in the Senate, referred to Energy and Natural Resources	Rep. David Valadao (R-CA) introduced the bill, co-sponsored by 13 Republican and 1 Democrat California co-sponsors

	H.R. 23 was amended to incorporate provisions from several other water-related bills before it was passed by the House. The seven titles of H.R. 23 are intended to provide both short and long-term solutions to expand water storage, improve infrastructure, restore reliability, protect privately-held water rights, and create more abundant and reliable water resources to benefit both communities and the environment. It is also intended to build on the water storage and delivery provisions of the Water Infrastructure Improvements for the Nation (WIIN) Act passed last December and give federal agencies the necessary tools to help safeguard communities from the effects of droughts. Title I addresses water reliability, predictability, and availability in California for the Central Valley Project (CVP) and the State Water Project (SWP). It amends the purposes and definitions of the Central Valley Project Improvement Act to facilitate water transfers, to authorize contracts for additional storage and water delivery, to ensure that water dedicated to fish and wildlife purposes is replaced and provided to water contractors at the lowest cost reasonably achievable, and clarifies the meanings of “anadromous fish” and “reasonable flows.” Under Section 108, if the CVP and SWP are operated consistent with the Bay-Delta Accord, they may operate without additional regard to Endangered Species Act compliance. The bill limits the mitigation measures and adjustments to operating criteria that may be imposed on diversions during water supply shortages. Section 113 amends the San Joaquin River Restoration Settlement Act, noting that the settlement cannot be implemented as originally authorized due to catastrophic species declines, cost estimates that have more than doubled, and scientific assessments that no amount of additional flow in the San Joaquin River will sustain Spring-run Chinook salmon. It provides an alternative settlement option that includes the development and implementation of a warm water fishery program, requiring California and the Secretary of the Interior to determine whether the changes are consistent with the settlement agreement. Title II sets deadlines for the completion of five feasibility studies relating to the coordinated CALFED surface storage projects in California. It prohibits Wild and Scenic River Act designations from hindering the completion of the proposed Temperance Flat Reservoir Project. It authorizes the Secretary of the Interior to enter agreements with local entities to advance water storage projects, to coordinate with state and local water agencies to conduct geophysical surveys of aquifers to consider the areas of greatest recharge potential, and to partner with state and local water agencies and academics to study ways of enhancing mountain runoff to reservoirs through headwater restoration. Title III protects the joint operation of the CVP and SWP, and includes protections for California senior water rights holders. Title IV requires an accounting of CVP water supply used for fishery beneficial purposes to fulfill any post-1992 agreements. It limits the volume of water that may be released from Lewiston Dam based on the type of water year (dry versus wet). It requires Interior, in coordination with other federal and state agencies, to publish an annual report on instream flow releases from CVP and SWP, including details about the measured environmental benefit of the releases. Section 405 requires the federal agencies to “recognize Congressional opposition to the violation of private property rights by the California State Water Resources Control Board in their proposal to require a minimum percentage of unimpaired flows in the main tributaries of the San Joaquin River; and recognize the need to provide reliable water supplies to municipal, industrial, and agricultural users across the State.” It also prohibits the use of the \$18M, authorized in section		
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	4010(b) of WIIN Act to carry out activities to benefit endangered species, to acquire land or water already designated for other instream uses or environmental purposes. Title V incorporates the provisions of the Water Supply Permitting Coordination Act (H.R. 1654), was passed by the House on June 22, by a vote of 233-180. The bill would authorize the Secretary of the Interior to coordinate federal and state permitting processes related to the construction of new surface water storage projects on lands under the jurisdiction of the Secretary of the Interior and the Secretary of Agriculture and to designate the Bureau of Reclamation as the lead agency. In general, Reclamation would serve as a point of contact for project applicants, State agencies, Indian tribes and others. It would coordinate preparation of unified environmental documentation and coordinate federal agency reviews, beginning with a preapplication meeting to explain applicable processes, data requirements, and submissions necessary to complete required federal agency reviews. Reclamation would establish a schedule and timeframe for agency action, and consult with the cooperating agencies to set deadlines and a project schedule. Reclamation would also prepare a unified environmental review document, maintain a consolidated administrative record, ensure that all project data is submitted and maintained in generally accessible electronic format (to the extent practicable) and make such data available to cooperating agencies, the project applicant and the public, as well as appoint a project manager. Cooperating agency responsibilities are also detailed. Title VI, Bureau of Reclamation Project Streamlining Act (H.R. 875), was introduced in the House in February. It is intended to facilitate and streamline the Bureau of Reclamation process for creating or expanding water storage, rural water supply, and water recycling projects under Reclamation law. The bill sets forth provisions governing feasibility studies for surface water storage projects initiated by the Department of the Interior under the Reclamation Act of 1902 (project studies). It requires a project study initiated after enactment of this Act to: (1) result in the completion of a final feasibility report within three years; (2) have a maximum federal cost of \$3 million; and (3) ensure that personnel from the local project area, region, and headquarters levels of the Bureau of Reclamation concurrently conduct the required review, while eliminating repetitive discussions of the same environmental issues. It delineates factors for extending timelines for complex projects, and sets requirements for Interior to complete reviews for project studies, set meetings, provide information and expedite project study completion, as well as other responsibilities. It also sets requirements for National Environmental Policy Act (NEPA) compliance, sets forth responsibilities of the lead agency, and provides for a reduction of funds for an agency that fails to render such a decision by a specified deadline. Title VI directs Interior to: (1) survey the use by the Bureau of categorical exclusions in projects since 2005 and propose a new categorical exclusion for activities if merited, and (2) establish a program to measure and report on progress made toward improving and expediting the planning and environmental review process. It requires Interior to develop and submit an annual Report to Congress on Future Water Project Development that: (1) identifies the project reports, proposed project studies, and proposed modifications to authorized projects and project studies that are related to the missions and authorities of the Bureau of Reclamation, that require specific congressional authorization, that have not been congressionally authorized, that have not been included in any previous annual report, and that, if authorized, could be carried out by the Bureau of Reclamation; (2) provides a description of the benefits to the protection of human life and		
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	property, improvements to domestic irrigated water and power supplies, the national economy, the environment, or the national security interests; and (3) for proposed project studies, whether the non-federal interest submitting the proposal has local support and the financial ability to cost-share. Title VII, the Water Rights Protection Act (H.R. 2939), was reintroduced as part of H.R. 23 on June 21. The bill would prohibit the Departments of the Interior and Agriculture from conditioning any permit, lease, or other use agreement on the transfer of any water right to the U.S. WGA provided testimony on H.R. 2939, stating that, “Nowhere is the need for substantive consultation between states and the federal government more critical than in the water arena.” Consultation requires each federal agency to have a clear and accountable process to provide each state with early, meaningful, and substantive input in the development of regulatory policies with federalism implications. “That process involves communicating with the governor and any state and local representatives the governor designates.” <i>During the 114th Congress, H.R. 2989, the Western Water and American Food Security Act as well as H.R. 2749, the Dams Accountability Maintenance and Safety Act, were both aimed at improving water supply to the Central Valley.</i>		
H.R. 21 S. 34	Issue: Regulatory Reform Title: Midnight Rules Relief Act. To amend the Congressional Review Act (5 U.S.C. §§801-808) to allow consideration of joint resolutions of disapproval of multiple rules at once rather than the current procedure of considering only one regulation at a time, for rules submitted during the final year of a President’s term.	1/3/17: H.R. 21 introduced in the House 1/4/17: H.R. 21 passed the House by a vote of 238-184. 1/5/17: H.R. 21 received and S. 34 introduced in the Senate; both referred to the Committee on Homeland Security and Governmental Affairs 5/17/17: HSGA ordered S. 34 reported without amendment, S. Rept. 115-164 10/5/17: S. 34 placed on Senate calendar	Representative Darrell Issa (R-CA) introduced H.R. 21, with 13 Republican and 1 Democratic co-sponsors, including TX Senator Ron Johnson (R-WI), Chairman of the Senate Homeland Security and Governmental Affairs Committee, introduced S. 34, with 6 Republican co-sponsors, including MT and WY

NOTABLE LITIGATION

Case Name	Issue – Treaty Rights and State Water Resources
<i>Washington v. United States</i> (#17-269) United States v. Washington, (#13-35474) 853 F.3d 946 (2017)	On June 27, 2016, the 9th Circuit ruled that Washington’s barrier culverts are a violation of its obligations relating to off-reservation fishing under Tribal treaties, affirming the decision of the U.S. District Court in Washington. The 21 Tribes filed a Request for Determination in 2001 alleging that the barrier culverts prevented salmon from moving freely between the sea and upstream spawning grounds at various life stages, reducing the size of salmon runs. In 2007, the District Court entered an injunction directing the State of Washington to correct the culverts, which allow streams to flow underneath roads, within the next seventeen years; sooner for the approximately 1,000 culverts within a specific area of watersheds on former tribal lands that are still significant for fish. The 9th Circuit rejected Washington’s argument that the treaty rights impose no obligations that prevent the state from making land use decisions that could incidentally impact fish, holding that an implicit promise of the treaty rights was that the number of harvestable fish would be sufficient to provide a moderate living to the Tribes, not merely provide tribal access to usual and accustomed fishing places. The Court noted several alternatives to barrier culverts, including bridges that entirely span streams, culverts that allow unobstructed fish passage, or building roads away from streams. The Court also rejected Washington’s request for an injunction requiring the U.S. to fix its culverts first, noting that Washington didn’t have standing to bring the Tribe’s claims and that the U.S. didn’t waive sovereign immunity. The 9th Circuit also held that because treaty rights belong to the Tribes rather than the U.S., it is not the prerogative of the U.S. to waive those rights.
Court	
U.S. District Court in Washington 9th Circuit U.S. Supreme Court	
Relevant Dates	On August 17, 2017, the State of Washington appealed the 9th Circuit’s decision. The petition for certiorari presents three questions: (1) whether the 9th Circuit’s interpretation of the treaties, guaranteeing sufficient fish to provide a “moderate living,” conflicts with the U.S. Supreme Court decision in <i>Washington v. Fishing Vessel</i>, 443 U.S. 658 (1979) that the tribes are guaranteed at most a 50% share of available fish; (2) whether the federal role in designing and permitting the culverts in question should require the court to consider a more equitable solution; and (3) whether the injunction to remove the culverts at great cost violates principles of federalism and comity, when there is no clear evidence of a connection to the tribal fisheries, or that culvert replacement will have an impact. Beginning in the 1990s, Washington took the initiative in its own economic self-interest to identify and replace fish-barrier culverts, becoming a national leader in developing new culvert designs that allow fish to pass. However, state-owned culverts are a small fraction (less than 25%) of the ubiquitous barrier culverts that are also owned by federal, tribal, municipal, and private landowners. Consequently, the state focused its voluntary replacement efforts on streams without non-state culverts, providing the most cost-effective replacement and meaningful access to habitat. Since 1991, Washington has spent over \$135M to replace culverts, and several hundred million dollars on other salmon recovery efforts. The 9th Circuit ordered the state to replace all 817 culverts by 2030, at a cost of several billion dollars, without regard to the fact that 90% of them are co-located on streams with non-state culvert barriers and would not increase available salmon habitat. The state argues that the cost will come at the expense of other salmon restoration efforts to the detriment of fish, the tribes and the state. The state also argues that the new interpretation of the treaty, requiring the state to ensure enough fish to enable a “moderate living” for the tribes, “is not only irreconcilable with precedent, it is also unworkable.” It ignores natural fluctuations in salmon runs, salmon prices, non-salmon tribal incomes, and tribal population. Further, the court’s broad decision could be used to attack a variety of development, construction, or farming practices perceived to diminish salmon harvest numbers, or to demand the removal of dams or the elimination of century-old water rights, significantly affecting the state’s natural resource management. Additionally, “the future reach of this decision extends far beyond the State of Washington, as the same fishing rights are reserved to tribes in Idaho, Montana, and Oregon.” On September 20, 2017, the States of Idaho, Kansas, Louisiana, Maine, Montana, Nebraska, and Wyoming filed an amicus brief in support of the petition for certiorari. The States argue that the 9th Circuit’s decision creates an environmental servitude that goes far beyond the removal of culverts, writing “a script for subjecting a broad swath of regulation by States...to like servitudes.” By way of example, the States point to recent EPA reliance on the 9th Circuit’s decision to impose federal water quality standards in Maine and Washington. “It is a short step from [transforming the treaty right] to creating a claim for injunctive relief against States...[for] any diminishment of fish runs subject to harvest and human consumption.” This has implications for dams, water diversions, increasing stream temperatures, timber harvests, grazing practices, and sediment-producing construction, among other things. The States also note the failure of the 9th Circuit to
2007: Dist. Ct. injunction 6/27/16: 9th Cir. decision 8/17/17: Washington petition for cert to U.S. S. Ct. 1/12/18: Petition granted 4/18/18: Oral arguments 6/11/18: S. Ct. 4-4 decision	

	apply a more appropriate culvert-specific assessment of benefits and costs, or to take into consideration the fact that Washington is already two decades into the process of improving culvert fish passage. Also on September 20, a group of business, real estate, farming, and municipal organizations filed a separate amicus brief. They argue, “If tribes have a right to ensure that States maintain a particular number of fish for tribal interests, then few activities in the West will escape judicial superintendence at the behest of tribes.” The organizations’ brief explains that the 9th Circuit decision offers tribes a treaty-based guarantee of sufficient water to support salmon populations, undermining established water rights. “The Ninth Circuit has previously ruled that a tribally held reserved water right for aboriginal fishing uses would have a priority date of time immemorial. Such a priority date has the potential to displace every other water right lawfully created and recognized under Washington law. If tribes have an implied reserved water right for enough streamflow to support a quantity of fish that would provide for a ‘moderate living’ for each tribe in each of the tribes’ usual and accustomed places, there may be no surface water left in Washington to allocate to future users. Similarly, if there is not enough water to support the tribes’ implied reserved water rights, then junior users whose rights infringe the tribes’ water rights could see their perfected state-law water rights disappear.” This could create “ongoing uncertainty about the legal regime governing development throughout the West” and “holders of water rights will face doubt about whether their state-law property rights will be impaired to satisfy the court’s understanding of the treaty’s obligations.” The U.S. Supreme Court granted the petition on January 12, 2018, and oral arguments were held April 18, 2018. On June 11, 2018, the U.S. Supreme Court issued a 4-4 per curium decision, that the decision of the 9th Circuit on the removal of state culverts “is affirmed by an equally divided court.” Justice Anthony Kennedy recused himself from the decision due to his involvement in an earlier, related case while serving on the 9th Circuit. See https://www.supremecourt.gov/docket/docketfiles/html/public/17-269.html; http://www.scotusblog.com/case-files/cases/washington-v-united-states/.
Case Name	Issue – Corps Water Storage and Allocation of Flow
<i>Cobb County-Marietta Water Authority v. U.S. Army Corps of Engineers</i> (1:17-cv-400)	Plaintiff Cobb-Marietta Water Authority (CMWA) was granted water rights by the State of Georgia at Allatoona Lake, a reservoir operated by the Corps. A 1963 contract with the Corps granted the CMWA the right to utilize a portion of the Lake to store 13,140 acre-feet of water for its customers. After investing hundreds of millions of dollars to generate man-made inflows into the Lake with “return flows” of recycled water, as well as water released from a CMWA-owned water supply reservoir upstream, which flows when released through the natural river channel to be withdrawn through CMWA’s existing intake structure in the Lake. The Corps has rejected the State’s allocation of inflows to CMWA, adopting instead its own federal water allocation rule implemented through a “Storage Accounting System,” which would allow the Corps to allocate to itself almost 95% of the CMWA inflows. The Corps asserts that these inflows become the property of the federal government, subject to allocation by the Corps, simply because they entered the federal facility.
Court	
U.S. District Court, Northern District of Georgia	
Relevant Dates	
2/1/17: Case filed 4/28/17: Corps filed Answer	CMWA asks the Court (1) to review the Corps’ adoption of the Storage Accounting System as a final agency action under the Administrative Procedures Act and find it arbitrary, capricious, and an abuse of discretion; (2) to find that the Corps’ decision to override the State of Georgia’s water allocation authority is a violation of the structural federalism provisions of the 10th Amendment; (3) to find that the Corps violated NEPA by failing to prepare an Environmental Impact Statement, or Environmental Assessment and finding of no significant impact, related to its decision to adopt and implement its Storage Accounting System. On April 28, the Corps filed its Answer in response, largely denying CMWA’s characterization of the Storage Accounting System and other documents that speak for themselves. The Corps also raised the defenses that the court may lack subject matter jurisdiction, and that the court may not be able to grant the relief requested by CMWA, even if the court finds that the Corps has violated federal statutory provisions. The case was on hold for several months pending the administrative record from the Corps. In February 2018, the case was stayed for 90 days for settlement discussions. That stay has been extended for continued discussions. <i>Special thanks to Lewis Jones and John Fortuna from King & Spaulding for assisting with updates on the Cobb-Marietta case.</i>

Case Names	Issue – Interstate Equitable Apportionment
Florida v. Georgia, #220142	On October 31, 2016 U.S. Supreme Court-appointed Special Master Ralph Lancaster heard opening remarks in <i>Florida v. Georgia</i>, regarding whether Florida is entitled to an equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin (ACF Basin), and for any injunctive relief against Georgia to sustain an adequate flow of fresh water into the Apalachicola Region.
Courts	
U.S. Supreme Court	The ACF Basin covers nearly 20,000 square miles, and the U.S. Army Corps of Engineers (Corps) operates a system of five federal dams along the three rivers. About 11% of the tri-state ACF Basin lies in Florida, 74% in Georgia, and 15% in Alabama. Florida argued that the ecosystem and economy of its Apalachicola Region are suffering due to Georgia’s unchecked upstream water consumption for its municipal, industrial, recreational, and agricultural uses, forcing Florida to shoulder the burden of Georgia’s growth. Florida also accused Georgia of bad faith negotiations, causing the 1997 ACF Basin Compact to disintegrate and leaving Florida no alternative but to redress its harms before the Supreme Court. Florida is seeking a cap on Georgia’s water withdrawals. Alabama, while not a party to the case, supports Florida’s position. Georgia has countered that: (1) the Corps controls the reservoirs that release water to Florida, and is an indispensable party to the case; (2) that the ecological harms Florida alleges are not the result of Georgia’s water withdrawals; and (3) that any economic benefits Florida might experience with the requested cap are outweighed by the economic harms Georgia would face.
Relevant Dates	
11/3/14: Complaint filed	Equitable apportionment cases are predominantly between Western states, where the doctrine of prior appropriation often governs. The State of Colorado filed an amicus brief on October 21, where it: (1) noted the differences between prior appropriation and riparian laws and that “equitable apportionment must be guided by the affected States’ laws governing the rights to use the waters;” (2) distinguished the facts and holding of Colorado v. New Mexico from the circumstances of Florida v. Georgia; and (3) emphasized that Florida, as the complaining state, has the burden to “prove by clear and convincing evidence that it has suffered injury as a result of Georgia’s use of water within its own borders. Absent such proof, there is no basis for the Court to prevent Georgia from exercising sovereign control over the natural resources within the State.” Colorado stated that a decision on the question of Florida’s burden of proof “could potentially inform the limits and extent of Colorado’s rights and obligations under its existing equitable apportionment decrees or interstate compacts, as well as options for apportioning water in the future.”
10/21/16: Colorado’s Amicus Brief filed	
10/31/16: Trial before the Special Master begins	The Special Master recommended that the Supreme Court deny Florida’s request for relief, finding that Florida had not met its burden. “Florida has failed to show that a consumption cap will afford adequate relief. The testimony and evidence submitted at trial demonstrates that the Corps can likely offset increased streamflow in the Flint River by storing additional water in its reservoirs along the Chattahoochee River during dry periods. The evidence also shows that the Corps retains extensive discretion in the operation of those federal reservoirs. As a result, the Corps can release (or not release) water largely as it sees fit, subject to certain minimum requirements under the RIOP [Revised Interim Operations Plan, 2012]. There is no guarantee that the Corps will exercise its discretion to release or hold back water at any particular time. Further, Florida has not shown that it would benefit from increased pass-through operations under normal conditions. Finally, without the Corps as a party, the Court cannot order the Corps to take any particular action. Accordingly, Florida has not proven by clear and convincing evidence that any additional streamflow in the Flint River resulting from a decree imposing a consumptive cap on Georgia’s water use would be released from Jim Woodruff Dam into the River at a time that would provide a material benefit to Florida.”
2/21/17: S. Ct. receive the Special Master’s Report	
3/30/17: Corps updated and implemented the Master Water Control Manual, governing the projects in the ACF Basin	Florida filed exceptions to the report, emphasizing the ecological damage that occurs in Florida as flows decline, particularly along the Apalachicola River and Bay, and the Special Master’s findings of substantial injury. The brief pointed out the weakness of Georgia’s laws requiring irrigation permits that lack limits on amounts of consumptive use or any incentive to invest in efficiency, and the impact that widespread irrigation has had on the groundwater and surface water resources, particularly during times of drought. Florida downplayed the role of the Corps in the ACF system: “Unlike the situation in many western States, the United States does not own the water in the ACF Basin and the Corps has no authority to apportion water among States or determine water rights.” The Corps has exercised its discretion in the past to release more water than the required minimum, when it is available. Florida argues that the Special Master was wrong to focus on the uncertainty of whether the Corps would exercise that discretion in Florida’s favor in the future, and to require a guarantee of redressability. Even if the Corps does not, with a finite storage capacity behind the dams, additional water foregone by Georgia would eventually make its way to Florida, benefit the system as a whole, and provide at least partial relief for Florida. Citing <i>Idaho ex rel. Evans</i>
5/31/17: Florida filed Exceptions to the Special Master’s Report	
8/7/17: Colorado and Corps amicus briefs	
1/8/18: Oral argument before the Supreme Court on the exceptions to the Special Master’s Report	
6/27/18: S. Ct. Remand to Special Master	

	<i>v. Oregon</i>, 444 U.S. 380 (1980) and <i>Washington v. Oregon</i>, 297 U.S. 517 (1936), Florida argued that the equitable standard to remedy a finding of injury is to grant the relief unless the proposed remedy is certain to fail. Citing <i>Colorado v. New Mexico</i>, 459 U.S. 176 (1982), Florida argued that as the downstream state that has established injury, the burden should shift from Florida to Georgia to prove that its conduct should be allowed to continue under an equitable balancing, even under a riparian water rights system. The Corps filed an amicus brief to ensure that the Court understands the operational protocols for its system of five dams in the ACF Basin, noting that it has an interest in protecting its ability to operate the dams for congressionally authorized purposes and in compliance with other federal statutes, including the Endangered Species Act, Fish & Wildlife Coordination Act, Water Supply Act, and Flood Control Act. The newly revised Master Manual changed drought operations to more proactively retain water in the system to minimally satisfy project purposes if drought conditions persist. Despite Florida’s assumptions about how the Corps would exercise its authority, given additional flows produced by a cap on Georgia’s consumption, the Corps argued that (1) releases above the 5000 cfs minimum flow requirement has not historically occurred based on the basin inflow, but on other project considerations; (2) since the Corps would not be bound by an equitable apportionment decree to which it is not a party, the decision to alter operational protocols to provide Florida with additional flows would require public administrative processes and environmental reviews to amend operating procedures. Without taking a position on whether Florida’s requested relief should be granted, the Corps noted that it cannot prejudge the outcome of those processes and determine whether Florida would benefit in a timely way from a consumption cap in Georgia, particularly during a time of drought. The Supreme Court heard oral arguments on the Special Master’s Report and related briefings on January 8, 2018. On June 27, the Supreme Court issued a 5-4 decision to remand the case to the Special Master for further evidence. Justice Breyer authored the opinion, joined by Chief Justice Roberts, and Justices Kennedy, Ginsburg, and Sotomayor. Justice Thomas filed the dissenting opinion, with Justices Alito, Kagan, and Gorsuch. Rather than deny Florida’s request for relief due to the absence of the Corps as a necessary party, the Court noted that the Corps has agreed to cooperate in implementing any determinations and obligations this Court decrees. While the Corps must meet statutory obligations when it operates dams and impounds water, and any cooperation would be at the Corps’ discretion, the Court determined that it is premature to assume that a remedy to the interstate conflict would be in vain without an order binding the Corps. The Court held that Florida made a legally sufficient showing at this stage of the case that equitably apportioning the water from the interstate Apalachicola -Chattahoochee-Flint River Basin might be an effective remedy. The Special Master’s assumptions about Florida’s significant ecological and economic harms entitle Florida to the opportunity to show that the benefits of equitable apportionment outweigh the harms of placing a cap on Georgia’s use of Flint River waters. While the Court reserved judgment on the correct findings of fact and the ultimate disposition of the case, it held that the Special Master’s standard of proof for a workable remedy was too strict. Florida was required to show the general availability of judicial relief by clear and convincing evidence, but the details and effectiveness of a decree is a separate consideration. The Court remanded the case to conduct an equitable-balancing inquiry. To determine whether Florida’s harms may be redressed by a court decree, the Special Master must make findings of fact regarding the scope of Florida’s harm caused by the absence of water, and the approximate amount of water that must flow into the Apalachicola River to ameliorate the harm. <i>For more information, see the Special Master’s website, http://www.pierceatwood.com/florida-v-georgia-no-142-original, or http://www.scotusblog.com/case-files/cases/florida-v-georgia-2/</i>
Case Names	Issue – State Authority over Interstate Groundwater, Equitable Apportionment
<i>Mississippi v. Tennessee</i> , No. 220143	On June 6, 2014, the State of Mississippi filed an original jurisdiction complaint against the State of Tennessee, the City of Memphis, and Memphis Light, Gas & Water Division (MLGW) for wrongful conversion of groundwater from the Sparta-Memphis Aquifer (Aquifer). Mississippi alleges that groundwater pumping by MLGW in Tennessee has depleted water that is subject to Mississippi’s ownership and

Earlier complaints dismissed: <i>Hood ex rel. Mississippi v. City of Memphis, Tenn.</i>, 533 F. Supp. 2d 646 (N.D. Miss. 2008) (aff'd 570 F.3d 625 (5th Cir. 2009)) <i>Mississippi v. City of Memphis</i>, 559 U.S. 901	control because, absent the effects of the pumping, the water would remain in the Aquifer beneath Mississippi's territory. Mississippi seeks declaratory and injunctive relief, as well as over \$600 million in damages. Mississippi presented three questions: (1) Whether the Court will grant Mississippi leave to file an original action to seek relief from respondents' use of a pumping operation to take approximately 252 billion gallons of high-quality groundwater; (2) whether Mississippi has sole sovereign authority over and control of groundwater naturally stored within its borders, including in sandstone within Mississippi's borders; and (3) whether Mississippi is entitled to damages, injunctive, and other equitable relief for the Mississippi intrastate groundwater intentionally and forcibly taken by respondents.
Courts U.S. Supreme Court	
Relevant Dates	
6/6/2014: Motion for leave to file complaint	
6/29/2015: Motion granted	
9/11/2015: Answer of Memphis Defendants filed	
9/14/16: Answer of State of Tennessee filed.	
11/10/2015: Special Master appointed	
8/12/2016: Special Master's Memorandum of Decision on various motions	On August 12, 2016, the Special Master issued a Memorandum of Decision on various motions to dismiss and to exclude information from the record. The Special Master reviewed details of a previous complaint against the Memphis Defendants, <i>Hood ex rel. Mississippi v. City of Memphis, Tenn.</i> The U.S. District Court for the Northern District of Mississippi ruled that the doctrine of equitable apportionment has historically been the means by which disputes over interstate waters are resolved, that the aquifer in question had never been apportioned, and that, without an apportionment determining which portion of the aquifer's water is the property of which state, the Court could not grant relief on Mississippi's claims. The 5th Circuit affirmed, noting that the groundwater is an interstate source, and the amount of water to which each state is entitled must be allocated before one state may sue an entity for invading its share. The 5th Circuit also rejected Mississippi's argument that it owns a fixed portion of the aquifer because it controls the resources within its state boundaries, reasoning that the Supreme Court has consistently rejected the argument advanced by different states that state boundaries determine the amount of water to which each state is entitled from an interstate water source (citing <i>Hinderlider v. La Plata River & Cherry Creek Ditch Co.</i>, 304 U.S. 92, 102 (1938)). That case was dismissed for failure to join Tennessee as a required party.
2/28/18: Joint Statement of Stipulated and Contested Facts	
6/1/18: Tennessee MSJ	The Special Master noted that Mississippi's complaint explicitly disclaims a request for equitable apportionment and appears to implausibly allege that water in the aquifer lacks an interstate character. On its face, the complaint should probably be dismissed under FRCP 12(b). However, the Federal Rules of Civil Procedure are guidelines rather than strict mandates in original jurisdiction cases, and in the absence of an interstate compact, the Supreme Court has authorized only one avenue, equitable apportionment, for states to pursue a claim that another state has depleted the availability of interstate waters within its borders. The Special Master, tasked with erring on the side of over-inclusiveness to assist the Supreme Court in making its ultimate determination, recommended that an evidentiary hearing be held on the limited issue of whether the aquifer and the water constitutes an interstate resource. "Evidence that would likely be relevant to this determination includes the nature and extent of hydrological and geological connections between the groundwater in Memphis and that in Mississippi, the extent of historical flows in the aquifer between Mississippi and Tennessee, and similar considerations."
7/6/18: Mississippi response to MSJ	On October 26, 2016, the Special Master entered a Case Management Order in preparation for the evidentiary hearing, with discovery scheduled to be completed by July 30, 2017. On May 25, 2017, the Special Master extended the discovery deadline to August 31. On July 19, 2017, that deadline was further extended to September 30.
	On February 28, 2018, the parties submitted a 108-page Joint Statement of Stipulated and Contested Facts. The parties were able to stipulate to several details, locations, and definitions about the aquifer and associated well fields, but most of the facts are contested. The joint proposed plan for the evidentiary hearing and any pre- or post-hearing briefing is due March 20. On June 1, 2018, Tennessee filed a motion for summary judgment. Tennessee's motion reviewed the evidence from both states and the U.S. Geological Survey, indicating that the aquifer in question is an interstate resource, flowing beneath Mississippi, Tennessee, and six other states, as well as discharging to interstate surface waters, including the Mississippi River. The states do not have a compact governing the use of the groundwater. "Because equitable apportionment is the exclusive remedy for disputes between States over rights to a shared interstate resource, and because Mississippi has expressly disavowed the remedy of equitable apportionment, Defendants are entitled to judgment as a matter of law."

	On July 6, the State of Mississippi filed its response, requesting that the motion be denied. “This is a matter of first impression for which a full record of scientific literature and expert testimony should be developed for the Supreme Court.” Mississippi disagreed with Tennessee’s characterization of the aquifer as a continuously flowing interstate resource that naturally crosses state boundaries. Mississippi noted that the subsurface geology is complex and diverse, with discontinuous deposits creating heterogenous and anisotropic formations. Rather than a single multi-state aquifer, the variations in natural flow velocity, flow direction, groundwater residence times, water quality, specific yield, and aquifer thickness and permeability, make the interrelated aquifers distinct and separable, the response argues. Under natural conditions, Mississippi’s groundwater flow is measured in inches or feet per day, remaining in storage at constant volumes and pressures for thousands of years. The groundwater at issue would remain within Mississippi’s confined aquifer “...but for the introduction of [Tennessee’s] massive groundwater pumping operations near the Mississippi border.” Tennessee’s pumping from the confined aquifer has drawn “much younger groundwater in shallower aquifer formations downward into the older, higher quality water...”; has caused a significant loss in Mississippi’s natural groundwater storage (an estimated 412 billion gallons since 1965); and “...has increased the costs of producing Mississippi groundwater within the cone of depression.” Mississippi argues that these losses were avoidable, that the Memphis Light, Gas, and Water Division (MLGW) could have (1) placed their wellfields in the same formation further north and east; (2) increased the spacing between the commercial wells; and (3) limited “the duration of pumping from individual wells on a rotating cycle in accordance with good groundwater development practices...” Rejecting Tennessee’s arguments that equitable apportionment is the exclusive remedy, Mississippi distinguished their groundwater from past cases addressing surface water: “The Court’s water cases do not limit its authority to fashion remedies appropriate for the facts in each case. This case is not about water rapidly flowing through and temporarily residing in multiple States on a journey to the sea. It is about Mississippi’s sovereign authority under the Constitution to manage, preserve, protect, and control the taking of high quality groundwater naturally occurring and residing in Mississippi for hundreds and thousands of years. [Tennessee’s] argument that groundwater pumping by MLGW is an ‘agency of natural laws’ is convoluted and absurd. Such groundwater pumping is an ‘unnatural’ force disrupting the natural forces under which the Mississippi groundwater was naturally stored and resided. The fact that the natural geology that kept the naturally occurring groundwater within Mississippi could be utilized as a conduit for [MLGW’s] pumping because there is not a ‘barrier’ beneath the ground to counteract [Tennessee and MLGW’s] technological manipulation of the natural conditions does not change Mississippi’s rights in and sovereignty over the naturally occurring groundwater residing only within its territory under natural conditions.” For more information, see http://www.ca6.uscourts.gov/special-master
Case Name	Issue – Reserved Water Rights include Groundwater as a Potential Source
<i>Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, et al.</i>	The Agua Caliente Band of Cahuilla Indians filed a lawsuit in May 2013, asking the Court to declare and quantify the existence of the tribe’s water rights as the senior rights in the Coachella Valley under federal law. In March 2015, the Court ruled on summary judgment that the Agua Caliente Band of Cahuilla Indians has a reserved right to water, and groundwater is a water source available to fulfill that right. The Court denied the Tribe’s claim for aboriginal title to groundwater.
Courts	
U.S. District Court, Central District of California, EDCV 13-883	
9 th Circuit (for interlocutory review) 5:13-cv-883	The water districts filed a petition with the 9th Circuit for interlocutory review of the portion of the District Court’s order addressing the inclusion of groundwater in the Tribe’s reserved right to water. The parties briefed the issue with written arguments by May 2016, and oral arguments are scheduled for October 18, 2016.
Relevant Dates	The parties agreed to trifurcate the case, and proceeded forward with Phase 2 in a limited way. On February 23, the District Court ruled on the Motion for Partial Summary Judgment against the water district’s equitable defenses and arguments. The remainder of Phase 2 issues, which were stayed by the court pending the Ninth Circuit’s resolution of the water district’s appeal, will address whether the tribe owns pore space beneath the reservation, whether there is a right to water of a certain quality and how to quantify the tribe’s reserve water right. If necessary, Phase III will quantify the tribe’s rights to underground water and pore space and order injunctive relief.
5/2013: Agua Caliente filed suit	

3/27/2015: Summary judgment re: groundwater available as part of reserved water right	On March 7, 2017, the 9th Circuit upheld the California District Court’s summary judgment from Phase I of the trifurcated case. The 9th Circuit decision holds that the United States implicitly reserved a right to water when it created the Agua Caliente Reservation, and that the Tribe’s reserved water right extends to the groundwater underlying the Reservation. The court summarized hydrological considerations in the arid valley, noting that “even in a peak year the river system provides very little water for irrigation or human consumption.” Given the lack of perennial streams in the area and the importance of water for survival, “a reservation without an adequate source of surface water must be able to access groundwater.” The court expressed “no opinion on how much water falls within the scope of the Tribe’s federal groundwater right,” since that will be determined at a later phase of the case. However, even with water under state-law entitlements, “there can be no question that water [from the aquifer] in some amount was necessarily reserved to support the reservation created.”
10/18/16: Oral arguments on interlocutory appeal, 9th Cir.	The court acknowledged that it was unable to find any controlling federal appellate authority explicitly holding that the federal reserved water rights doctrine in <i>Winters v. United States</i>, 207 U.S. 564 (1908), extends to groundwater. Instead, it pointed to <i>United States v. Cappaert</i>, 426 U.S. 128 (1976) and <i>In re General Adjudication of All Rights to Use Water in Gila River System and Source</i>, 989 P.2d 739 (Ariz. 1999) as persuasive and implied authority for its decision, emphasizing that <i>Winters</i> does not distinguish between surface and groundwater or prohibit the inclusion of groundwater among the reserved rights. “Apart from the requirement that the primary purpose of the reservation must intend water use, the other main limitation of the reserved rights doctrine is that the unappropriated water must be ‘appurtenant’ to the reservation.” The court determined that as long as the waters are attached to the reservation, it does not matter whether that water is above or below the ground.
3/7/17: 9th Circuit panel decision on Phase I reserved groundwater appeal from CA court	The court noted that it previously held in its review of <i>Cappaert</i> “...that the <i>Winters</i> doctrine applies ‘not only to surface water, but also to underground water.... But on appeal, the Supreme Court did not reach this question.” Rather, the 9th Circuit panel said, Supreme Court hinted that reserved waters may include appurtenant groundwater when <i>Cappaert</i> held that “the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.” The 9th Circuit determined that “If the United States can protect against groundwater diversions, it follows that the government can protect the groundwater itself.”
6/5/17: Tribe’s Motion to Lift Stay granted; CA Dist. Ct. proceeding with Phase II	The court also held that federal reserved water rights preempt conflicting state law. The water district argued that the Tribe does not need a federal reserved right to prevent the purpose of the reservation from being defeated, because (1) the Tribe has a correlative right to groundwater under California law; (2) the Tribe has not historically used groundwater; and (3) the Tribe is entitled to surface water under the Whitewater River Decree. The court rejected these arguments, noting that state water entitlements do not affect the analysis of the Tribe’s federally reserved water right, and that states do not have power to dispose of reserved rights.
7/5/17: Petition for Certiorari from DWA and CVWD	The water district is appealing the 9th Circuit decision to the U.S. Supreme Court (petition for cert. due by July 5.) In the meantime, the California District Court has granted the Tribe’s motion to lift the stay and proceed with Phase II of the case, which deals with whether the Tribe beneficially owns the “pore space” of the groundwater basin underlying the Reservation, and whether a tribal right to groundwater includes the right to receive water of a certain quality. Phase III will focus on the quantification of the Tribe’s right.
8/7/17: Amicus brief in support of Petition for Cert, filed by NV, AZ, AR, ID, NE, ND, SD, TX, WI, WY	On July 5, the Desert Water Agency (DWA) petitioned the U.S. Supreme Court for a Writ of Certiorari related to the Ninth Circuit Court’s decision in Agua Caliente, with the band of Cahuilla Indians and the United States as respondents. Roderick E. Walston, DWA Counsel of Record is a former WSWC member. The Coachella Valley Water District (CVWD) separately petitioned. Petitioners’ contend that the Court has never decided whether the reserved rights doctrine applies to groundwater, and the questions presented include whether or not the federal government, in reserving lands, impliedly reserves ground water to accomplish the reservation purposes. In <i>U.S. v. New Mexico</i>, 438 U.S. 696 (1978), the Court limited the reserved rights doctrine, according to the DWA brief, “...because it conflicts with Congress’ deference to state water law,” and held that federal water rights are impliedly reserved only as “necessary” to accomplish the primary purposes of the reservation and prevent them from being “entirely defeated.” <i>New Mexico</i>, 438 U.S. at 700,702. The Ninth Circuit held that New Mexico’s limitations apply in quantifying an existing federal reserved right, but not in determining whether a right exists – and whether the right exists depends on whether the reservation purpose “envisions” use of water. The Ninth Circuit held that in this case the reservation of land “envisions” use of water, and thus the tribe has a reserved right in groundwater. The petitioners contend a federal reserved right exists only
11/27/17: S. Ct. denied Cert	

if the reservation of water is “necessary,” so as not to be “entirely defeated.” Then, the question remains, whether the reserved rights doctrine applies to groundwater. Finally, does the Tribe have a reserved right in groundwater, in light of the fact that the Tribe has the right to use groundwater under California law. The DWA states that the most significant issue is whether the existence of a water right under state law is relevant in determining whether a federal reserved water right exists under federal law. DWA argues that since the Tribe has the same right to use groundwater under California law, as other overlying landowners, the Tribe’s claimed reserved right is not “necessary,” and does not meet the Supreme Court’s standard in *New Mexico* for an implied reserved right. The Tribe also has a 1938 decreed right to the use of surface water from the Whitewater River that includes the precise amount of water that the United States had “suggested” during the adjudication proceeding was necessary to meet the Tribe’s reservation needs. Historical documents surrounding the creation of the reservation by Executive Orders signed by Presidents Grant and Hayes in the 1870s, indicate that the Tribe was not using groundwater, which DWA contends defeats any implication that they intended to create a reserved right in groundwater. Even today, the Tribe does not use groundwater, but instead purchases DWA and CVWD water. Therefore, DWA argues, the Tribe’s failure to use or attempt to use groundwater demonstrates that their prosperity and success is not dependent on whether or not the Tribe has a reserved right in groundwater. “Notably, the Tribe’s complaint does not allege otherwise. Instead, the complaint alleges that DWA and CVWD are required to compensate the Tribe for importing and storing water [from the Colorado River] into the groundwater basin that the Tribe allegedly ‘owns’.”

On August 7, the States of Nevada, Arizona, Arkansas, Idaho, Nebraska, North Dakota, South Dakota, Texas, Wisconsin, and Wyoming filed an amicus curiae brief with the U.S. Supreme Court in support of the petition for writ of certiorari, appealing the 9th Circuit’s decision. The brief argues that the 9th Circuit’s expansion of the federal reserved water rights doctrine unsettles the scope of the states’ authority over groundwater resources, and that the decision is inconsistent with caution courts must exercise when altering the federal-state balance by interfering with state sovereign power, particularly when applying implied Congressional intent. It calls the decision an “indiscriminate application of the *Winters* doctrine to groundwater” that ignores the nuances of past court decisions and expressed Congressional intent. The brief describes three factors that the 9th Circuit ignored: (1) the long historical differential treatment of surface water and groundwater by most states, in part due to the fact that “never before has any court recognized an unqualified reserved right in the groundwater disconnected from any consideration of the protections already offered by the state;” (2) the primary purposes of the reservation should inform whether a reserved groundwater right exists at all, not just the quantity of the right; and (3) a primary purpose need for surface water is distinguishable from whether that purpose included a need for groundwater. Water that is valuable for secondary use purposes on federal reservations may still be acquired in the same manner as any other public or private appropriator. Western states have vast quantities of federal land withdrawn from the public domain, and states have allocated and adjudicated groundwater rights with a “legitimate expectation that they had primary control over their groundwater” based on past court decisions. “If a federal reservation can assert absolute preemption over state groundwater allocation laws and regulations, a state’s effort to effectively manage those limited water resources will be thrown out of balance.” While the states have adopted various approaches to managing and allocating water rights, many of their existing water rights holders have relied on the availability of water and invested heavily in putting their water rights to beneficial use. A newly-created, previously unknown federal senior water right, which cannot be lost through non-use unlike other water rights in the system, has the ability to curtail or dispossess those established rights under the 9th Circuit’s decision. Especially troubling to the amicus states is the 9th Circuit’s holding that the implied reservation of water may be flexible and change over time, expanding beyond the original purpose and expected beneficial use at the time the reservation was created. “It leaves States facing a possible tide of federal reserved water rights claims in excess of those rights already allocated, and budgeted, in the States’ respective water allocation system.” Agua Caliente also has the potential to create uncertainty for states that do not rely on a temporal priority system of rights. Using Minnesota’s administrative process of addressing riparian water-use conflicts as an example, the brief illustrates federalism and domestic water supply concerns that would arise if an implied federal reserved water right unnecessarily preempted applicable state law.

The Supreme Court extended the petition response deadline to September 6, and then again to October 6.

The Supreme Court denied the petition for cert on November 27, 2017.

The parties are working on the Phase II legal issues. The parties have begun mediation meetings with Senior Judge Leavy from the Court of Appeals to explore settlement opportunities.

	http://www.scotusblog.com/case-files/cases/coachella-valley-water-district-v-agua-caliente-band-cahuilla-indians/ https://www.narf.org/cases/agua-caliente-v-coachella/
Case Names	Issues – Groundwater as a CWA Point Source/Conduit
<i>Sierra Club v. Virginia Electric and Power Company, CA (2017)</i> <i>Hawaii Wildlife Fund v. County of Maui (2018)</i>	<i>Sierra Club v. Virginia Electric and Power Company</i> On November 6, 2015 the U.S. District Court for the Eastern District of Virginia denied a motion to dismiss, finding that the Sierra Club had standing to bring a lawsuit alleging that the energy company was discharging coal ash, contaminating groundwater with arsenic that eventually leads to a navigable body of water. Rather than try to argue that the groundwater is part of the “waters of the U.S.” under the CWA, the Sierra Club asserted that the groundwater acted as a “conduit” for the pollution, reaching the navigable water and creating a point source, requiring an NPDES permit. Notably, the First, Fifth and Seventh Circuits have each held that the CWA does not cover discharges that enter surface waters through groundwater. Other courts have held that hydrologically-connected groundwater is covered under the CWA.
Courts	
U.S. District Court for the Eastern District of Virginia (2:15cv112)	
Fourth Circuit Court of Appeals (0:17-cv-1539)	On March 23, 2017, the District Court issued its ruling that the Coal Ash Piles constitute a point source that “channel and convey arsenic into groundwater that eventually discharges into the surrounding surface waters.” The defendant obtained discharge permits from the Virginia Department of Environmental Quality (VDEQ), for wastewater that enters the river through outfall pipes. The Sierra Club alleged violations of the CWA due to the unpermitted discharges into the groundwater. The Court agreed, holding that the arsenic discharge through hydrologically-connected groundwater is a violation of the CWA. Acknowledging that courts have disagreed on whether the CWA encompasses groundwater, the Court concluded, “Congress intended the CWA to protect the water quality of the nation’s surface water. Where the facts show a direct hydrological connection between ground water and surface water, that goal would be defeated if the CWA’s jurisdiction did not extend to discharges to that groundwater.”
Ninth Circuit, #15-17447	
Relevant Dates	
<i>Sierra Club</i> 11/6/15: Motion to Dismiss denied 5/20/16: Sierra Club filed a Motion for Partial Summary Judgment 6/2/16: Virginia Electric and Power Company (dba Dominion Virginia Power) filed a Motion for Summary Judgement 6/24/16: Four-day trial 3/23/17: District Court ruling 4/25/17: Virginia Electric and Sierra Club appeal to 4 th Circuit (#17-1539 and # 17-1537) 5/22/17: Virginia Electric and Sierra Club filed motions to dismiss the appeals. 7/13/17: 4 th Circuit granted the motions to dismiss both appeals for lack of jurisdiction.	The Court determined that Congress intended the definition of “point source” in 33 U.S.C. §1362 to be interpreted broadly, and that the 3 million tons of Coal Ash Piles are discrete conveyances that channel the pollutants away from the power plant and directly into the groundwater. The Court relied in part on an EPA pronouncement in the preamble to a 1991 final rule, Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 FR 64876, which says that “the affected groundwaters are not considered waters of the United States but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.” Given that the defendant cooperated with the VDEQ and has been a good corporate citizen, the Court held that the defendant should not suffer civil penalties “for doing things that it, and [Virginia] thought complied with state and federal law.” Instead, the Court requested the parties to submit a remedial plan, including site monitoring and an application for a revised solid waste permit. Virginia Electric and the Sierra Club appealed the to the 4th Circuit. The Court dismissed both appeals, noting that the District Court ordered the parties to submit a plan, and did not yet enter an appealable judgement or issue an injunction. Virginia Electric filed supplemental authorities to the 4th Circuit relating to (1) EPA’s published request for comment on “Clean Water Act Coverage of ‘Discharges of Pollutants’ via a Direct Hydrologic Connection to Surface Water,” 83 FR 7126; and (2) the Supreme Court’s decision regarding waters of the U.S. in <i>National Association of Manufacturers v. Department of Defense</i>. Sierra Club argues that <i>NAM v. DOD</i> has no bearing on the case. <i>See prior summary of the Dominion Virginia Power case through the end of February 2016 in the Washington, D.C. briefing binder, Tab N, March 2016</i>

<i>Hawaii Wildlife Fund</i> 2/1/18: 9th Cir. ruled on CWA violations for groundwater discharge	<i>Hawaii Wildlife Fund v. County of Maui</i> On February 1, 2018, the 9th Circuit ruled that the County of Maui violated the CWA when it indirectly discharged treated wastewater from its injection wells through a groundwater conduit into the Pacific Ocean, a “navigable water.” Dye tracer tests showed the connection between the four wells at the Lahaina Wastewater Reclamation Facility and the ocean, and the court held that the wells were point sources, the effluent was a pollutant, and the county was subject to the National Pollutant Discharge Elimination System (NPDES) permitting requirements under the CWA. Although the U.S. District Court of Hawaii held that the groundwater is both a point source and navigable water under the CWA, the 9th Circuit declined to decide whether groundwater is a navigable water under the statute, and referred to the wells themselves as the point source. The county argued in its opening brief on appeal that the “conduit theory” ignores the text of the CWA and express congressional intent, and obliterates the distinction between “point source” and “nonpoint source” pollution, a distinction made no less than 11 times in the CWA. “How pollutants travel from the original point source to navigable water matters. They must travel to navigable water through a ‘discernible, confined and discrete conveyance,’ i.e., a point source.” The county also argued that such nonpoint sources of pollutants are regulated by the states. Protection of navigable water is only one of the purposes of the CWA. “A co-equal goal is the preservation of the states’ authority over the regulation of groundwater.... Courts cannot override this congressional decision to further the goal they think deserves priority.” The county cited decisions from the 1st, 5th, and 7th Circuits that “conclude that discharges into groundwater do not require an NPDES permit regardless of any hydrologic connection between groundwater and navigable water.” The 9th Circuit disagreed and noted that the county released the discharge through the wells, resulting in a pollutant that was confined, contained, and discharged from a discernable source. The court distinguished this from nonpoint source pollution that is widely dispersed and exempt from NPDES permits under the CWA. “That the groundwater plays a role in delivering the pollutants from the wells to the navigable water does not preclude liability under the statute.” The court held that the plain language of the statute does not require a direct connection between the point source and the navigable water, and cited several cases from the 9th, 2nd, 5th Circuits supporting the interpretation that indirect conveyance of pollutants through air or groundwater is subject to permitting. “The County could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit. It cannot do so indirectly either to avoid CWA liability. To hold otherwise would make a mockery of the CWA’s prohibitions.” <i>Other Cases (Indirect Discharge through Groundwater to Navigable Waters)</i> * <i>Upstate Forever v. Kinder Morgan Energy Partners, L.P.</i>, Case No. 17-1640 (April 12, 2018) * <i>26 Crown Street Assocs. v. Greater New Haven Water Pollution Control Authority</i>, 2017 U.S. Dist. Lexis 106989 (D. Conn. 2017) (No. 17-2426, 2d Cir.) * <i>Kentucky Waterways Alliance v. Kentucky Utilities Co.</i>, No. 5:17-292-DCR, 2017 WL 6628917 (E.D. Ky. Dec. 28, 2017) (No. 18-5115, 6th Cir.) * <i>Tennessee Clean Waters Network v. TVA</i>, 273 F. Supp. 3d 775 (M.D. Tenn. 2017) (No. 17-6155, 6th Cir.) <i>Special thanks to Kathy Robb at Sive, Paget & Riesel for the additional list of related cases.</i>
Case Names <i>North Dakota, et al. v. EPA et al.</i>, (D. N. Dak.), Case 3:15-cv-59 <i>Texas, et al. v. EPA et al.</i>, (S. D. Tex.), Case 3:15-cv-162 <i>Georgia et al. v. EPA</i> (11th Cir) Case 2:15-cv-79	Issue - EPA’s/USACE’s Waters of the United States Rule On June 29, 2015, the EPA and the U.S. Army Corps of Engineers (USACE) published their Final Rule on the Waters of the United States (WOTUS) in the Federal Register (80 Fed. Reg. 37054). From June 29 to July 31, 69 plaintiffs filed 11 lawsuits, including 15 WSWC member states: Alaska, Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico (agencies), North Dakota, Oklahoma, South Dakota, Texas, Utah, Wyoming. Other plaintiffs include 15 additional states, 14 industrial groups, as well as environmental groups. Simultaneous petitions were filed in 2nd, 5th, 6th, 8th, 9th, 10th 11th and D.C. Circuit Courts from most of the same plaintiffs out of an “abundance of caution,” since certain EPA actions are generally exclusively reviewable by the Circuit Courts of Appeals under 33 USC §1369(b)(1). These petitions were consolidated before the 6th Circuit by order of the Multi-District Litigation (MDL) Panel. On February 22, a divided 6th Circuit panel ruled 2-1 that it has jurisdiction over the consolidated appellate court cases challenging the EPA and Corps’

Consolidated 33 USC §1369 Petitions in 6th Circuit (Ohio) (from 2nd, 5th, 6th, 8th, 9th, 10th 11th and D.C. Circuit Courts): <i>Murray Energy Corp. v. EPA</i> <i>National Association of Manufacturers v. Department of Defense, et al.</i> (#16-299)	WOTUS rule, rather than the District Courts, and denied the petitioners’ motions to dismiss. The 6th Circuit’s nationwide stay on the WOTUS rule implementation remains in effect. On July 1, 2016 Oklahoma’s Attorney General appealed the U.S. District Court for Northern Oklahoma decision that it lacked jurisdiction to hear the case following the 6th Circuit’s “splintered” decision ruling that it had jurisdiction to hear the WOTUS rule challenges. Oklahoma argued that the 6th Circuit’s decision does not control the outcome of the case, noting that “...courts are obligated to independently assess jurisdiction in each case that comes before them.” It also added that oral arguments regarding jurisdiction in the 10th Circuit would help the court make the determination whether the state’s challenge to the WOTUS rule falls within the narrow category of EPA Administrator actions subject to direct appellate court review.
Courts	
6th Circuit, 11th Circuit, District North Dakota, Southern District of Texas U.S. Supreme Court	
Relevant Dates	
6/29/15: EPA & Corps published WOTUS rule (80 Fed. Reg. 37054); various lawsuits filed, including 15 WSWC member states: Alaska, Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico (agencies), North Dakota, Oklahoma, South Dakota, Texas, Utah, Wyoming, and 15 other states. 2/22/16: A divided 6th Circuit panel ruled 2-1 that it has jurisdiction over the MDL consolidated appellate court cases, under 33 USC §1369(b)(1); nationwide stay of WOTUS rule remains in effect 4/21/16: 6th Cir. denied 6 petitions for en banc hearing. 5/5/16: Corps & EPA moved to dismiss <i>State of Texas v. EPA</i> from U.S. Dist. Ct.	On August 16, the 11th Circuit stayed the WOTUS rule appeal proceedings in <i>Georgia et al. v. McCarthy</i>, ruling that, “It would be a colossal waste of judicial resources for both this Court and the Sixth Circuit to undertake to decide the same issues about the same rule presented by the same parties.” In the months since the 6th Circuit issued its order holding that it has original jurisdiction under CWA §1369(b)(1), the parties “have devoted considerable time and effort to the task of paring down the contents of the administrative record (which is more than a million pages long) and to developing a workable briefing schedule for briefing the merits of the challenges to the rule.” The 11th Circuit exercised its discretion to hold the appeal in abeyance, considering that a decision by the 6th Circuit would likely “narrow and refine, if not render moot, at least some of the issues we asked the parties to brief.” On August 19, EPA and U.S. Army Corps of Engineers (Corps) filed their response brief to dismiss Oklahoma v. EPA, (10th Circuit), arguing that the 6th Circuit has exclusive jurisdiction over the challenges to the Clean Water Rule. “Plaintiffs are entitled to their day in court, and they shall have it—in the Sixth Circuit. They are not entitled to two separate days, in two separate courts, on the same claims.” They assert that even if the 6th Circuit’s decision were not controlling, under 33 U.S.C. §1369(b)(1), “...the Clean Water Act precludes district-court review of the limitations established by the Clean Water Rule.” Citing the recent decision in <i>Georgia et al. v. EPA</i>, they added, “Parallel court-of-appeals and district-court proceedings would also create protracted and duplicative litigation over preliminary matters in cases, such as this one, that are based on a large and complex administrative record.” On September 2, 2016, the National Association of Manufacturers (NAM) petitioned the U.S. Supreme Court for a writ of certiorari, appealing the 6th Circuit’s decision that the challenge to the Waters of the United States (WOTUS) rule, filed by states, municipalities, environmental groups, and industries, falls under the CWA’s judicial review provision, 33 U.S.C. § 1369(b)(1). NAM noted, “Although two [of the three 6th Circuit] panel members concluded that §1369(b)(1) [should preclude 6th Circuit jurisdiction], one of them reasoned that he was bound by ‘incorrect’ circuit precedent to take jurisdiction under §1369(b)(1)(F), which requires that agency actions ‘in issuing or denying any permit under’ §1342 be reviewed by the court of appeals.” Arguing against this interpretation of the statute, NAM said: “What should be a straightforward gatekeeping provision has in this and other cases generated widespread judicial disagreement, caused needless delay, and wasted valuable resources for no substantive purpose.” NAM also argued that allowing the 6th Circuit’s decision to stand denies the parties and the courts of the benefits of multilateral review of agency rulemaking. On October 4, the 6th Circuit excluded most of the agency materials that state and industry petitioners argued should be included in the administrative record for judicial review, including Corps memoranda that show internal disagreement with the EPA. The court deferred to EPA’s interpretation of its Administrative Records Guidance, and held that the materials are deliberative and exempt from inclusion in the record to protect the quality of agency decisions by ensuring open and candid communications. The court allowed portions of an April 24, 2015 Corps memo with a factual and technical analysis of the WOTUS rule. The document says that as much as 10% of wetlands previously covered by the CWA would be out of reach under the WOTUS rule, a contrast to EPA’s estimates of a 4.65% increase in federal jurisdiction. On October 7, 31 states filed a brief with the Supreme Court in support of the National Association of Manufacturers’ petition for writ of certiorari. The states note that EPA and the Corps have attempted to both expand their power under the WOTUS rule as well as narrowly restrict judicial review of the rule for those who would challenge it, limiting the broad definitional rule to a narrow class of specific EPA

5/9/16: 6th Cir. designated <i>Murray Energy Corporation v. EPA</i> (No. 15-3751) as the lead case for the 22 consolidated petitions for review	actions listed in 33 USC §1369(b)(1), reviewable only by Circuit courts. The states argue for: (1) a plain text reading of the statute that avoids rendering words or phrases superfluous; and (2) keeping the interpretation of the jurisdictional statute simple and straightforward to avoid the hazards of having to sue in multiple courts to protect their rights.
5/24/16: U.S. District North Dakota denies motion to dismiss, but issues a stay pending further 6th Cir. or S. Ct. decision	On November 8, 2016, members of Congress, including 21 Senators and 67 Representatives, filed an amicus brief in support of state, business, and municipal petitioners in the 6th Circuit. The brief provides insights regarding congressional statutory intent and legislative history of the CWA, noting that the members “have strong institutional interests in preserving Congress’s role in making law for the nation.” The brief emphasizes that Congress expanded jurisdiction beyond traditionally navigable interstate waters to include tributaries for water quality purposes, but considered and declined to regulate land with ephemeral flows, non-point source precipitation runoff, wetlands, or groundwater, leaving these waters to state rather than federal control. The brief argues that the WOTUS rule “unlawfully expands federal jurisdiction to regulate land and water that is traditionally within the sole purview of the states, including wholly intrastate non-navigable ponds and wetlands as well as land over which water flows when it rains.” Congress intended to regulate water pollution with the CWA, not the quantity of flow nor wildlife habitat. EPA’s studies supporting the WOTUS rule, the brief continues, have no relevance to water quality in navigable waters, but to habitat studies and the role of ephemeral flows in recharging groundwater. Although “from a scientific standpoint, all water is connected...Congress did not grant the Agencies with limitless authority to regulate all water.”
8/19/16: Additional briefing filed with 11th Cir. in <i>State of Georgia v. McCarthy</i> re: 6th Cir. §1396(b)(1) jurisdiction	On December 7, 2016, the Administration filed a brief in opposition to the Supreme Court petition for certiorari in <i>National Association of Manufacturers v. Department of Defense, et al.</i> The Administration argued that jurisdiction over the challenges to the EPA and Corps’ WOTUS Rule belong in the 6th Circuit, noting that five U.S. District Courts have concluded that they lack jurisdiction to review the rule. Additionally, the Administration argued that the 6th Circuit is “significantly far along the decisional path in resolving the challenges to the Clean Water Rule on the merits” and that any challenges to the 6th Circuit’s decision, including over jurisdiction, may be brought to the Supreme Court at the same time. On December 20, the National Association of Manufacturers (NAM) filed its reply, emphasizing that the CWA §1369 jurisdiction question “is a swamp that routinely mires challenges to CWA rules in inefficient, multi-court litigation over where the challenge belongs,” and is therefore an important question for Supreme Court review. NAM also pointed out the potential waste of taxpayer resources in continuing the 6th Circuit case, when President-Elect Donald Trump has promised to eliminate the WOTUS rule under his Administration.
9/2/16: NAM petition for cert	On January 13, 2017 the U.S. Supreme Court granted certiorari in <i>National Association of Manufacturers (NAM) v. Department of Defense</i>. On March 6, 2017, the federal respondents filed a motion to hold the briefing schedule in abeyance due to the new Administration’s review of the WOTUS Rule. The motion was opposed by several other parties, and on April 3, 2017, the Supreme Court denied the motion.
11/8/16: Minnesota District Court dismissed WOTUS case without prejudice due to 6th Cir. Jurisdiction (<i>Washington Cattlemen’s Association et al. v. EPA</i>, 0:15-cv-03058)	On January 25, 2017, the 6th Circuit held the WOTUS cases in abeyance pending the Supreme Court ruling in <i>NAM v. Department of Defense</i>.
1/13/17: S. Ct. grants cert for NAM	On April 3, 2017, the Supreme Court denied the Trump Administration’s request to stay proceedings on whether the 6th Circuit has jurisdiction to hear challenges of the WOTUS Rule. A hearing before the Court is expected to take place in October.
1/25/17: 6th Circuit stay pending S. Ct. decision on jurisdiction	On April 27, 2017, several briefs were submitted to the Supreme Court in <i>NAM v. Department of Defense</i>, including NAM’s opening brief and a supporting amicus brief from 30 states. The parties request a reversal of the 6th Circuit’s decision that it has subject matter jurisdiction over the consolidated petitions. The briefs argue that the federal rule redefining the Waters of the United States (WOTUS) does not fall within the exclusive, original jurisdiction of the circuit courts of appeals under 33 U.S.C. §1369(b)(1), because the rule does not fit within one of the seven actions listed for judicial review. They oppose the federal argument that policy concerns for judicial efficiency should grant immediate appellate jurisdiction, noting the wisdom in allowing difficult issues to mature through full consideration by different courts. NAM pointed out that, “Stretching the text of §1369(b) past its breaking point to increase efficiency undermines the very purpose of the [law].”
4/27/17: Opening round of briefs in NAM appeal.	
5/4/17: EPA Administrator Pruitt recuses himself from the WOTUS cases in which Oklahoma is involved.	
1/22/18: S. Ct. reversed 6th Circuit ruling, jurisdiction over WOTUS Rule challenges belongs in Dist. Ct.	

The U.S. Supreme Court granted cert to review the 6th U.S. Circuit Court of Appeals determination that it has jurisdiction to hear challenges to the WOTUS rule, and whether federal or district courts are the right venue for such legal challenges. Oral arguments are set for October 11.

On January 22, 2018, the U.S. Supreme Court reversed the 6th Circuit’s ruling that challenges to EPA’s 2015 WOTUS Rule belong in the appellate court. The Court held that the rule falls outside the scope of CWA §1369(b)(1), so challenges to the rule must be filed in the federal district courts. The Supreme Court noted that the WOTUS Rule announces a regulatory definition for a statutory term; it is not an effluent limitation or other restriction of pollutant discharge under subparagraph (E), nor is it an action that issues or denies a permit under subparagraph (F), the two subparagraphs that the 6th Circuit relied on for jurisdiction and exclusive judicial review of the rule. The Court also rejected the federal government’s arguments that appellate court jurisdiction would be efficient and provide a consistent and orderly judicial review. The Court said, “Congress could have funneled all challenges to national rules to the courts of appeal, but it chose a different tack here: It carefully enumerated the seven categories of EPA action for which it wanted immediate circuit court review and relegated the rest to the jurisdiction of the federal district courts. Ultimately, the Government’s policy arguments do not obscure what the statutory language makes clear: Subparagraphs (E) and (F) do not grant courts of appeals exclusive jurisdiction to review the WOTUS rule.”

The Supreme Court is expected to issue a certified judgment returning the petitions to the 6th Circuit in late February, and the 6th Circuit is expected to dismiss the petitions and dissolve its nationwide stay of the WOTUS Rule.

On February 6, 2018, the states of Texas, Louisiana, and Mississippi filed a motion with the U.S. District Court for the Southern District of Texas for a nationwide preliminary injunction of the WOTUS Rule. *Texas et al. v. EPA et al.*, 3:15-cv-162

The same day, the states of Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, South Carolina, Kentucky, Wisconsin, and Utah filed a motion with the 11th Circuit to issue a mandate to allow the states to request the U.S. District Court for the Southern District of Georgia to rule on their previously briefed motion for a preliminary injunction of the WOTUS Rule. *Georgia et al. v. Pruitt et al.*, #15-14035 (Dist. Ct. Case No. 2:15-cv-79)

On May 1, 2018 the U.S. District Court for North Dakota entered an order affirming that North Dakota et al. v. EPA will proceed rather than wait for the outcome of the federal agency’s new rulemaking efforts to define “waters of the U.S.” The case was turned over to a magistrate judge following the Supreme Court’s reversal of the Sixth Circuit, holding that challenges to the WOTUS Rule belong in the federal district courts. EPA objected to the magistrate judge’s decision in March to proceed with the case, and the District Court Judge denied the motion. “While additional rulemaking may make this case moot, such a possibility does not insulate the Defendants from challenges to the original rule while the original rule remains in place. The 2015 WOTUS Rule remains in effect. Additional delay is unwarranted.”

On June 8, 2018, the U.S. District Court for the Southern District of Georgia granted a preliminary injunction in *Georgia et al. v. Pruitt, et al.* (2:15-cv-79). The injunction prohibits implementation of the EPA and Corps’ 2015 Clean Water Rule defining waters of the United States (WOTUS) in the following states: Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin. Although the Trump Administration has delayed implementation of the 2015 Rule and is currently in a rulemaking process to replace the Rule, the Court found the threat to state sovereignty sufficiently imminent to issue the injunction and maintain the status quo.

The U.S. District Court for Georgia also found that the states were likely to prevail on the merits. “The WOTUS Rule allows the Agencies to regulate waters that do not bear any effect on the ‘chemical, physical, and biological integrity’ of any navigable-in-fact water. The definition of ‘tributary’ covers a trace amount of water so long as ‘the physical indicators of a bed and banks and ordinary high watermark’ can be found by ‘mapping information’ or ‘remote sensing tools’ where actual physical indicators are ‘absent in the field.’ This definition

	is similar to the one invalidated in <i>Rapanos</i>, and it carries with it the same concern that Justice Kennedy had there – it seems ‘to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water.’” See summary of the WOTUS cases through 2016 in the Washington, D.C. briefing binder, Tab N, March 2016 and in the North Dakota briefing binder, Tab V, July 2016. For more information, see http://www.scotusblog.com/case-files/cases/national-association-of-manufacturers-v-department-of-defense/ and https://www.americanbar.org/groups/environment_energy_resources/resources/wotus/wotus-rule.html#status
Case Names	Issue - Abandoned Hard Rock Mines
<i>New Mexico v. EPA et al.</i>, 1:16-cv-465 <i>New Mexico v. Colorado</i> (#220417) <i>Navajo Nation v. EPA</i>, 1:16-cv-931 (now consolidated with 1:16-cv-465) <i>Utah v. Environmental Restoration LLC et al.</i>, 2:17-cv-866	<i>New Mexico and Navajo Nation v. EPA et al.</i> In May and August 2016, New Mexico and the Navajo Nation filed lawsuits in the U.S. District Court in New Mexico against the EPA and mining companies for injuries relating to releases of heavy metals and waste from the Gold King Mine and Sunnyside Mine, requesting relief under CERCLA, RCRA, CWA, and various tort claims. The two cases were consolidated in November 2016. EPA filed a Motion to Dismiss in February 2017, arguing (1) that CERCLA does not waive EPA’s sovereign immunity to suit when its sole connection to the site at issue arises from exercising its authority under CERCLA to respond to other entities’ legacy contamination; (2) that EPA does not fit the definitions of a liable party under CERCLA; and (3) that EPA is already engaged in remediation efforts, and that judicial review of those efforts is premature or prohibited, and that the parties have other means of participating in and commenting on the agency remediation process.
Courts	
U.S. Supreme Court U.S. District Court, Districts of New Mexico and Utah Multidistrict Litigation Panel	Both New Mexico and the Navajo Nation filed responses to EPA’s Motion to Dismiss, countering EPA’s arguments. They also requested leave of the court to file amended complaints to add tort claims and certain factual allegations. As of May 24, 2017, the briefing is complete on EPA’s Motion to Dismiss and New Mexico and the Navajo Nation’s motions for leave to file an amended complaints. On July 28, 2017, the Court noted that EPA argues that its removal action precludes the plaintiffs’ claims, and that discovery limited to the jurisdictional issue may be required. The parties conferred, and on August 22, the Court granted EPA until October 2, 2017 to produce documents relevant to the jurisdictional issue and the scope of EPA’s response action. The parties are directed to submit a status report by October 19th, advising the Court whether further discovery is requested on the jurisdictional issue.
Relevant Dates	
5/23/16: New Mexico v. EPA filed 6/20/16: New Mexico v. Colorado filed (S.Ct.) 8/16/16: Navajo Nation v. EPA filed 10/21/16: Colorado brief opposing New Mexico’s request for leave to file a complaint with the Supreme Court 11/28/16: New Mexico v. EPA and Navajo Nation v. EPA cases consolidated, with 1:16-cv-465 as the lead case 11/28/16: S.Ct. requested briefing from DOJ in the NM v. CO case 2/13/17: EPA Motion to Dismiss consolidated NM and NN cases in District Court 3/13/17: NM and NN file opposition to EPA’s MTD in Dist. Ct.	On December 11, 2017, defendant Environmental Restoration filed a motion with the U.S. Judicial Panel on Multi-District Litigation, requesting a transfer of the cases for coordinated or consolidated pre-trial proceedings. EPA filed a motion on January 17, 2018, to stay the cases in New Mexico pending a decision on the transfer. On December 22, 2017, New Mexico filed a motion to conduct jurisdictional discovery. On February 12, 2018, the New Mexico District Court entered an order on several of Environmental Restoration’s motions to dismiss and motions to strike, denying most of the requests, holding in abeyance the decision on whether the plaintiffs are barred from requesting injunctive relief, and striking the plaintiff’s joint and several liability claims under state tort law. The New Mexico District Court case has been stayed pending a determination on whether the four cases will be coordinated and consolidated before the Judicial Panel on Multidistrict Litigation (MDL-2824) As of July 16, 2018, this docket was still pending. <i>Utah v. Environmental Restoration, et al.</i> On July 31, 2017, Utah filed a complaint for damages against EPA and various companies related to the 2015 Gold King Mine spill. The lawsuit alleges negligence and other claims to recover costs related to the cleanup and compel the mine owners and EPA contractors to investigate and pay for cleanup, and collect civil penalties for violations of the Utah Water Quality Act and the Utah Solid and Hazardous Waste Act. Utah filed an amended complaint on January 4, 2018 to add an EPA contractor as a defendant. Utah is negotiating with EPA over damages.

4/6/17: EPA reply on MTD in Dist. Ct. 5/23/17: US amicus brief, NM v. CO 6/26/17: S. Ct. dismissed NM v. CO 7/28/17: Court reviewed the various MTDs and advised the parties to confer on whether discovery was needed on the limited issue of jurisdiction over the claims. 7/31/17: Utah v. Environmental Restoration LLC, et al. filed	For more information, see http://www.scotusblog.com/case-files/cases/new-mexico-v-colorado/ See previous summaries of cases, including claims from each complaint, through September 2016 in the St. George, Utah briefing binder, Tab M, September 2016 and through June 2017 in the Rohnert Park, California briefing binder, Tab U, June 2017.
Case Name	Issue – Rio Grande Compact
<i>Texas v. New Mexico and Colorado</i> (#220141)	The state of Texas filed a lawsuit in the United States Supreme Court against the states of New Mexico and Colorado alleging that New Mexico is violating the 1939 Rio Grande Compact, which governs the distribution of Rio Grande water among the three states. New Mexico denies this allegation. The United States filed a motion to intervene on the grounds that the case affects the Department of Interior’s management of the Reclamation’s Rio Grande Project, its calculation of diversion allocations, and its responsibility to deliver water to intended Project beneficiaries and to Mexico pursuant to Treaty. New Mexico filed a motion to dismiss on the grounds that the language of the compact could not provide the relief requested by Texas, and that the United States is not a party to the Compact. The case was referred to Special Master in November 2014. Two political subdivisions (water districts supplied by and the sole direct beneficiaries of the Rio Grande Project) of New Mexico and Texas also sought to intervene on the grounds that they have compelling interest in the case not properly represented by their respective states. On June 28, 2016, Special Master Gregory Grimsal issued the public draft of his first special report in <i>Texas v. New Mexico</i> (#220141). The draft report provides extensive historical context for the local, interstate, and international uses of and disputes over the Rio Grande, as well as attempts to resolve problems through treaty, compact and legislative efforts. The report makes recommendations to the U.S. Supreme Court on several preliminary motions, including: (1) denying New Mexico’s Motion to Dismiss Texas’ complaint, which alleges a claim under the text and structure of the compact; (2) rejecting the United States’ federal Reclamation claims as outside the interstate compact, but recommending that the Supreme Court exercise its discretion to hear the claims together since they impact the same project; and (3) denying the motions to intervene from the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1, as both districts failed to satisfy the burden to establish compelling interests separate from the interests of New Mexico or Texas. On February 9, 2017, the Special Master submitted the First Interim Report with the same conclusions to the Supreme Court, officially received on March 20, 2017. Exceptions to the Report were file in June, and Kansas filed an amicus brief in August. The Supreme Court heard oral arguments on the Special Master’s Report and related briefings on January 8, 2018. On March 5, the Supreme Court ruled that the United States may pursue its complaint as an intervenor, asserting its claim that New Mexico has violated the Rio Grande Compact, and remanded the case back to the Special Master. All other exceptions to the Special Master’s Report were overruled. On May 23, New Mexico filed answers to the Complaints from Texas and the United States, and filed its own counterclaims. See prior summary of the Rio Grande Compact case through the end of February 2016 in the Washington, D.C. briefing binder, Tab N, March 2016, including the positions of Texas and New Mexico.
Courts	
U.S. Supreme Court	
Relevant Dates	
1/8/13: Texas filed its complaint (motion for leave to file granted 1/27/14) 2/27/14: United States Motion to Intervene 12/3/14: Elephant Butte Irrigation District Motion to Intervene 4/22/15: El Paso County Water Improvement District No. 1 Motion to Intervene 6/30/16: Status conference with the Special Master 3/20/17: Special Master Report received by the Supreme Court 5/22/17: U.S. filed an Exception to the Report 6/9/17: New Mexico and Colorado filed Exceptions to the Report, and several amicus briefs were filed by New Mexico entities 7/28/17: Replies to Exceptions filed by U.S., New Mexico, Colorado, and Texas; amicus briefs of TX and NM entities	

8/4/17: Kansas amicus brief in support of Texas re: interstate compacts and impact of upstream groundwater diversions 9/1/17: Sur Replies filed. 1/8/18: S. Ct. oral arguments 3/5/18: S. Ct. decision to allow US to intervene 5/23/18: NM filed Answers and Counterclaims	For more information, see the Special Master's website at http://www.gamb.law/?p=7235 and Supreme Court documents at http://www.scotusblog.com/case-files/cases/texas-v-new-mexico-and-colorado/
Case Names	Issue – ANILCA §103(c), NPS Authority to Regulate State Navigable Water as an Inholding within Park Boundaries
<i>Sturgeon v. Masica, Sturgeon v. Frost</i>	The 1980 Alaska National Interest Lands Conservation Act (ANILCA), 16 USC §1301 et seq., created/expanded the 150 million acres of National Park Service (NPS) land in Alaska, with boundaries of “conservation system units” (CSUs) enclosing State, Tribal, and privately-owned land. The non-federal enclaves were made exempt from federal regulations otherwise applicable to federal land within the CSU pursuant to ANILCA §103(c). In 2007, while John Sturgeon was stopped on a gravel to make repairs to his hovercraft, NPS law enforcement employees told Sturgeon it was a federal crime to operate the hovercraft within the boundaries of the Yukon-Charley, an ANILCA CSU. Sturgeon subsequently filed suit, arguing that the Nation River is a State-owned navigable river, exempt from NPS regulations against hovercraft under ANILCA §103(c).
Courts	The 9 th Circuit held that ANILCA §103(c) only exempted the State, Tribal and privately-owned land from regulations “solely” applicable to CSUs in Alaska. Since the NPS hovercraft ban (36 CFR 1.2(a), 2.17(e)) is applicable nationwide and not just in Alaska, the 9 th Circuit held that the hovercraft ban applied to Alaskan land owned by the State, Native Corporations and individuals within the CSU boundaries.
U.S. District Court of Alaska, 3:11-cv-0183 9 th Cir., #13-36165, 768 F.3d 1066 U.S. Supreme Court, #14-1209, 136 S. Ct. 1061 (2016) #17-949	On March 22, 2016 the U.S. Supreme Court issued a unanimous 8-0 opinion by Chief Justice John Roberts rejecting the 9 th Circuit's interpretation of Section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA) in <i>Sturgeon v. Frost</i> . The Supreme Court held that the 9 th Circuit's interpretation of the statute is implausible and inconsistent with both the text and context of ANILCA, violating a fundamental canon of statutory construction.
Relevant Dates	The Supreme Court noted that ANILCA repeatedly recognizes that Alaska is different and carves out numerous Alaska-specific exceptions to the National Park Service's (NPS) general authority over federally managed preservation areas. Section 103(c) clearly draws a distinction between public and non-public lands. The 9 th Circuit's reading would prevent the NPS from recognizing Alaska's unique conditions and would allow NPS to regulate non-public lands only through rules applicable outside Alaska, while public lands could be regulated through Alaska-specific provisions.
10/30/13: District Court decision	Notably, the Supreme Court declined to decide: (1) whether the waters of the Nation River qualify as “public land” or belong to the State of Alaska for purposes of ANILCA; (2) whether the NPS has authority under Section 100751(b) to regulate Sturgeon's hovercraft activities on the Nation River regardless of whether it is “public land;” or (3) whether the NPS has authority under ANILCA over both public and non-public lands within the boundaries of conservation system units in Alaska. The Court left those issues to be resolved on remand.
10/6/14: 9 th Cir. Decision	The 9 th Circuit held oral arguments October 25, 2016 to address the issues that remain, but no further briefing was filed.
10/1/15: Petition for writ of certiorari granted	On January 2, 2018, John Sturgeon filed a new petition for certiorari with the U.S. Supreme Court, seeking to overturn the 9 th Circuit's October ruling that the National Park Service properly exercised its authority to regulate hovercraft use on the Nation River within the Yukon-Charley in Alaska. The 9 th Circuit relied on an implied reservation of water rights, noting that one of the reservation's primary purposes is to protect fish, and any diminution of water would impact that purpose. Sturgeon argued that this is an indefensible expansion of the reserved water rights doctrine, and a subversion of Alaska's absolute sovereign right to its navigable waters and the soils under them.
1/20/16: Oral arguments by Sturgeon, Alaska, NPS	
3/22/16: S. Ct. decision, remand to 9 th Cir.	
10/25/16: Oral arguments scheduled before 9 th Cir.	
10/_/17: 9 th Cir. Decision	
1/2/18: New petition for writ of certiorari (#17-949)	

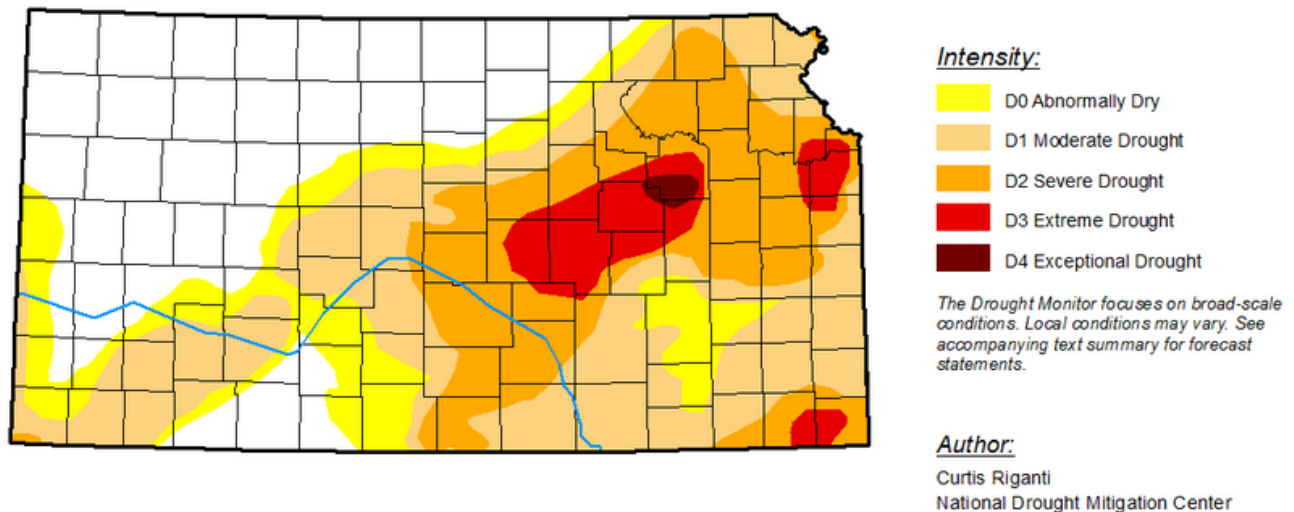
6/18/18: Petition for Cert granted	On January 5, 2018, Alaska filed its amicus brief in support of the petition. The state argued that the right to regulate and manage state-owned resources is an essential component of Alaska’s sovereignty. The 9th Circuit’s holding that the Nation River qualifies as public lands because Congress implicitly reserved an undefined and unquantified level of instream flow when it created the Yukon-Charley preserve “stretches the federal reserved water rights doctrine beyond all recognition.” Alaska argued that a federal reserved water right is a limited, non-ownership right to use or preserve a specific volume of water necessary to fulfill the purpose of the reservation. The 9th Circuit’s holding that the NPS reserved water right prevents any water use that would merely impact the purposes of the reservation defeats Alaska’s rights in its waters “just because there may be some federal interest in some use of the water.” The 9th Circuit did not limit the right to the use of a particular amount of water, but “invoked the doctrine to justify a wholesale grant of federal management authority over Alaska’s navigable waters.” The 9th Circuit went a step beyond the use of water, ruling that with its vested interest, the U.S. has “title” to the water, transforming state waters into federal lands subject to ANILCA’s definitions, without explaining how a federal reserved water right eclipses the state’s sovereign interests in managing its waters. “The Ninth Circuit’s ruling subverts not only ANILCA, but also the constitutional equal footing doctrine, the Submerged Lands Act, and the Alaska Statehood Act.” On June 18, 2018, the Petition for Cert was granted. See the Supreme Court docket at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-949.html See summary of the ANILCA case through the end of February 2016 in the Washington, D.C. briefing binder, Tab N, March 2016
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Tab U – State Reports

**Kansas State Report
Western States Water Council
Summer 2018 meeting**

Climate Conditions – Water supply conditions during the 2018 growing session started off very dry over large parts of the state but have since improved over much of western Kansas. Significant portions of central and northeastern Kansas remain very dry.

U.S Drought Monitor for Kansas, July 17, 2018



Minimum Desirable Streamflows: MDS were established to protect ecological, water quality, and domestic needs. Under MDS, when prescribed gages fall below statutorily defined values, all surface water and connected groundwater rights junior to MDS (1984) are to be regulated. Statewide 2018 has been an active year for administration of MDS.

Legislation: Once again, this year's legislature session was dominated by issues related to taxation and budget, esp. enhanced funding for public schools. The Legislature did agree to a \$3.25 million enhancement to the State Water Plan Fund to implement additional portions of the Kansas Water Vision.

Other water legislation included:

- **House Bill 2312** clarified procedures related to certain administrative hearings conducted by the chief engineer.
- **House Bill 2691** moves the deadline to apply for a Multi-Year Flex Account (MYFA) from October 1 to December 31 to take current year water usage into account.
- **Senate Bill 194** permits groundwater management district (GMD) boards to increase the maximum water withdrawal charge from \$1.00 for each acre-foot to \$2.00 for each acre-foot. The charge would continue to be used to finance the operations of the GMD. In addition, the bill eliminates a provision of current law that permits the boards of GMD to assess a greater annual water withdrawal charge if more than 50 percent of the authorized place of use of the water is outside the district.

Water management activities - (for information visit <http://www.agriculture.ks.gov/dwr>)

- **Local Enhanced Management Areas (LEMAs).** In 2012, the Kansas Groundwater Management Districts was amended to allow GMDs to initiate the creation of these special management area in over-appropriated areas, providing a two-hearing process for their consideration.
 - At the request of the Northwest Kansas GMD No. 4, after the required public hearings, the Sheridan 6 LEMA was extended for another 5 years, for the period 2018-22, under the same terms as the 2013-2017 LEMA, except for allowing carryover of a portion of any unused allocations from the first 5 years.
 - During June 2017, GMD No. 4 requested a new District-wide LEMA, which provided for allocations based on the rate of decline in the aquifer by township. For township of low decline, no restrictions were proposed. For rates of decline in saturated thickness of 0.5% - 1 %/year, a 5-year allocation of 90 inches/acre is provided. For rates of decline of 1 % - 2 %/year, a 5-year allocation of 5 times the 80% net irrigation requirement for corn is provided. For rates of decline of greater than 2 %/year, a 5-year allocation of 5 times the 50% net irrigation requirement for corn is provided. The LEMA was opposed by a group of intervenors who sought to delay of the second hearing and requested additional due process. While the hearing was not delayed, additional process was added, resulting in an improved record for decision. On February 23, 2018, I issued an order of decision, returning the LEMA plan to the GMD with proposed modifications based on the hearing record. The GMD accepted the proposed modifications and the order of designation for the modified plan was issued on April 13, 2018. On June 13, 2018, a petition for judicial review and a notice disputing the validity of the LEMA were filed in Gove County District Court to challenge the LEMA orders and the validity of K.S.A. 82a-1041 (the LEMA statutory provisions). On June 26, 2018, a petition for judicial review was filed in Thomas County District Court seeking review of the LEMA order related to setting allocations for particular plaintiffs within the LEMA area.
 - Western Kansas GMD No. 1 is actively exploring the use of the LEMA tool in the District, starting with a plan for the highly depleted Wichita County.
- **Water Conservation Areas (WCAs)** – In 2015, the Legislature amended our Water Appropriation Act to allow for the development of WCAs, which allows a water right owner or group of owners the opportunity to develop a management plan to reduce withdrawals to extend the usable life of the Ogallala-High Plains Aquifer, typically with increased flexibility to manage the reduced use. We now have 15 approved WCAs with more actively being considered. The most significant is the Wichita County WCA, a plan that covers the entire county which is highly depleted, with over 15% of the eligible acres of the area enrolled in the WCA.
- **Quivira National Wildlife Refuge Impairment Complaint** - The U.S. Fish and Wildlife Service (Service) owns and operates the Quivira National Wildlife Refuge (Quivira), a wetland of international significance and part of the central U.S. flyway. Water is a critical component its operations with a water right priority date in 1957. After decades of voluntary efforts to resolve its concerns were unsatisfactory, the Service filed an impairment complaint with KDA-DWR in April of 2013. KDA-DWR published its final impairment investigation report during April 2016 finding that upstream junior groundwater pumping is regularly impairing the Service's senior water right. GMD No. 5 is developing a plan for an augmentation project as the cornerstone of the remedy of the impairment. They are also developing a LEMA proposal to reduce groundwater pumping to decrease the rate of increase in depletions.

- **Cities of Hays and Russell / R9 Ranch Water Right Changes and Water Transfer** - The Cities of Hays and Russell purchased the approximately 7,000-acre R9 Ranch and its thirty water rights in southwestern Edwards County in 1995 with the intention of someday using the water as part of the city's water supply. During June 2015, the Cities submitted applications to KDA-DWR to change the use made of water from irrigation to municipal use for the R9 Ranch water rights. As these proposed changes envision moving greater than 2,000 acre-feet more than 35 miles, during January 2016, the Cities submitted an application to transfer water from Edwards County to the Cities pursuant to the Water Transfer Act (K.S.A. 82a-1501, et seq.). The change applications and detailed proposed orders to approve the change applications have been sent to GMD No. 5 and the public for review. If the change applications are contingently approved this fall, the water transfer process would then begin.
- **Aquifer Storage and Recovery Project, City of Wichita** – The City of Wichita has requested changes to the permit conditions of its ASR project to meet the City's current objectives for the project (as a source of water for long-term drought). The changes include reducing the bottom of the "basin storage area" and allowing for a new means to accumulate credits when the aquifer is full, called aquifer maintenance credits (AMCs). The public hearing has been set for October 22-23, 2018 to consider the City's proposals.

From: **Woodmansey, Kent** <Kent.Woodmansey@state.sd.us>
Date: Tue, Jul 17, 2018 at 7:28 AM
Subject: **WSWC South Dakota State Report**
To: "Tony Willardson <twillardson@wswc.utah.gov> (twillardson@wswc.utah.gov)"
<twillardson@wswc.utah.gov>, "mbushman@wswc.utah.gov" <mbushman@wswc.utah.gov>

South Dakota has four items for its state report:

1. Missouri River Reservoirs are getting full. The first graph in the first attachment shows the Missouri River reservoir system storage is now in the Exclusive Flood Control Zone, while the remaining three graphs show water levels in the big three reservoirs - Oahe in South Dakota, Ft. Peck in Montana, and Garrison in North Dakota - and compares those levels to both maximum elevations and elevations during 2011, which is when the three month Missouri River flood event occurred.
2. South Dakota remains concerned about the Corps finalizing the propose Water Supply Rule, which we strongly oppose. The second attachment is a copy of a letter to President Trump signed by Governor Dugaard and all three of South Dakota's Congressional delegation (i.e. Senator Thune, Senator Rounds, and Representative Noem) asking for the proposed rule to be stopped before it is finalized.
3. At the invitation of Senator Rounds, South Dakota DENR testified to the US Senate Subcommittee on Superfund, Waste Management and Regulatory Oversight (which he chairs) at a hearing entitled, "*Oversight of the Army Corps' Regulation of Surplus Water and the Role of States' Rights*" on June 13, 2018. A copy of our testimony is the third attachment. Ward Scott from WGA testified as well.
4. Recently DENR staff assisted local officials in Union County with preparation and response to the Big Sioux River flood that impacted the lower Big Sioux River basin. The models that are being built for the Big Sioux Flood Information System were employed to predict river elevations and inundation areas in the Jefferson, North Sioux City, and Dakota Dunes areas. Local officials were provided the predictions 48 hours in advance of the flood pulse, which gave them time to take appropriate action. The Flood Information System did well predicting impacts from the flood and a combination of USGS and DENR stream gages on the river were used to monitor the timing and magnitude of the flood pulse as it moved into populated areas.



System Storage Comparison



*In January 2011, the Base of Flood Control was 56.0 MMF, and the Top of Exclusive Flood Control was 71.1 MMF.

Oahe Elevation Comparison



Fort Peck Elevation Comparison



*In 2011, the elevation in Fort Peck exceeded the Top of the Exclusive Flood Control zone by 2.8 feet.

Garrison Elevation Comparison



*In 2011, the elevation in Garrison exceeded the Top of the Exclusive Flood Control zone by 0.5 feet.



STATE OF SOUTH DAKOTA

DENNIS DAUGAARD, GOVERNOR

May 23, 2018

President Donald J. Trump
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Trump,

We want to congratulate you and your team on re-establishing cooperative federalism as the way to conduct business with the states. This has been a breath of fresh air. However, we are writing to alert you the US Army Corps of Engineers (Corps) is instead still focused on trampling state's rights under a President Obama directive. The instruments they are using to federalize our Missouri River water are called the proposed Water Supply Rule, Surplus Water Reports, and Reallocation Studies.

To put our opposition to the proposed Water Supply Rule into context, remember our people and Native American Tribes paid a heavy price for the four dams on the Missouri River in South Dakota. These large reservoirs permanently flooded more than 500,000 acres of our most fertile river bottomlands. Many citizens and tribal members were forced from their lands, their homes, and their communities. The promise of federal irrigation projects to help offset those losses never materialized.

Unfortunately, another payment was extracted from us in 2008 when the Corps issued Real Estate Guidance Policy Letter No. 2. This policy requires municipal and industrial water users to acquire a water storage contract prior to the Corps issuing an access easement to a Missouri River reservoir for a pump site, but the Corps had no process for issuing the contracts. Therefore, the effect of the policy was to place a moratorium on easements to the Missouri River reservoirs.

This moratorium hit South Dakota hard, because out of a thousand miles of Missouri River shoreline, only about one hundred miles are on the two short free-flowing stretches in the state. Therefore, ninety percent of our shoreline became off limits to potential users of Missouri River water, and this moratorium is still being implemented

by the Corps. Just two months ago, the South Dakota Department of Environment and Natural Resources (DENR) issued a temporary permit to Morris Inc. on March 19 to use 90,000 gallons of Missouri River water for construction purposes as they redo the Department of Game, Fish, and Parks parking lot just above Oahe Dam. When notified of the action, the Corps responded as follows: *"All requests for using water from the South Dakota reservoirs are on hold until finalized guidance is received from Headquarters. An alternate source of water should be utilized for this project."*

To develop a process for Policy Letter No. 2, the Corps began Surplus Water and Reallocation Studies under the authority of Section 6 of the 1944 Flood Control Act and the surplus water provisions in the 1958 Water Supply Act. We do not dispute the Corps has authorities under those Acts, but we strongly dispute the Corps' resulting definition of stored water as being all the water held in the reservoirs. This new definition, should it go unchallenged, creates a monumental change to the law and would defeat states' rights to natural flows that, by tradition and law, are under the jurisdiction of the states.

To better understand natural flows, visualize the reservoirs of stored water sitting on top of a river with natural flow passing underneath; this natural flow represents water under the jurisdiction of the state. States' rights to natural flows of navigable waters within their borders are constitutionally founded, and protected, in the Equal Footing Doctrine. Congress acknowledged this states' right in the first sentence of Section 1 of the 1944 Flood Control Act by stating *"...it is declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control,..."* As a consequence of the doctrine and the enacted law, the Corps must acknowledge the state's right to natural flows. Its definition of stored water, as proposed in the rulemaking, will do exactly the opposite.

Another concern with the Corps studies is one of equity. The Corps has documented the tremendous benefits the reservoirs supply to people throughout the basin – controlled water supplies, hydropower, and flood control. Now to require just the upstream states to pay the cost through stored water fees with people in the downstream states enjoying these benefits at no cost is not fair or equitable. To impose all reservoir operation and maintenance costs on upstream states alone adds insult to injury.

A more detailed objection to the proposed rulemaking was submitted to the Corps on March 15, 2017, and is enclosed for your use. However, the bottom line is the Corps is attempting an Obama-directed federal takeover of nearly all the Missouri River water in

President Trump
Page 3
May 23, 2018

South Dakota with this proposed rulemaking. It needs to be stopped now before the Corps finalizes the rule in September. In the name of cooperative federalism and protecting state's rights, we ask for your help. Thank you.

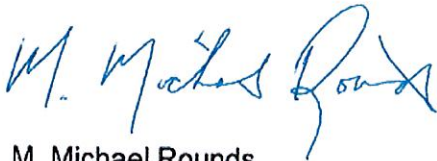
Sincerely,



Dennis Daugaard
Governor



John Thune
United States Senator



M. Michael Rounds
United States Senator



Kristi Noem
United States Representative

DD:rg

Enclosure

Cc w/enclosure:

Marty Jackley, South Dakota Attorney General
Tony Willardson, Executive Director, Western States Water Council

Testimony of Steven Pirner, PE
Secretary, South Dakota Department of Environment and Natural Resources
to the
US Senate Subcommittee on Superfund, Waste Management and Regulatory Oversight

**“Oversight of the Army Corps’ Regulation of Surplus Water and
the Role of States’ Rights”**

June 13, 2018
Washington, D.C.

Chairman Rounds, Ranking Member Booker, and Members of the Committee, my name is Steve Pirner, Secretary of the South Dakota Department of Environment and Natural Resources (DENR). You all have heard about the Waters of the U.S. rule proposed by the U.S. Environmental Protection Agency (EPA). Many labeled that rule as the largest federal takeover of our nation’s water resources ever attempted. However, the Water Supply Rule proposed by the U.S. Army Corps of Engineers (Corps) for the Missouri River reservoirs exceeds that federal takeover action, at least in South Dakota.

The Missouri River is the largest, most reliable surface water supply in South Dakota. As such, it is extremely important to the state. In the 1950s and 60s, the federal government built four massive dams in South Dakota on the Missouri River, but we paid a heavy price. Environmentally, these reservoirs flooded more than 500,000 acres of our most fertile river bottomlands, never to be seen again. Socially, the dams disrupted people, forcing citizens and tribal members from their lands, homes, and communities. The promise of federal irrigation projects to help offset those losses never materialized.

The proposed Water Supply Rule began in 2008 when the Assistant Secretary of the Army issued Real Estate Guidance Policy Letter No. 26. This policy requires municipal and industrial water users to acquire a water storage contract prior to the Corps issuing an access easement to a Missouri River reservoir for a pump site, but the Corps had no process for issuing the contracts. Therefore, the effect of the policy was to place a moratorium on easements to the reservoirs.

To advance the process, the Corps developed the proposed Water Supply Rule. Under the rule, the Corps' defines stored water as being all the water in the reservoirs. This new definition creates a monumental change to the law and steals South Dakota's rights to natural flows that by tradition and law are under the jurisdiction of the states. To better understand natural flows, visualize the reservoirs of stored water sitting on top of a river with natural flow passing underneath; this natural flow represents water under the jurisdiction of the state.

States' rights to natural flows of navigable waters within their borders are constitutionally founded, and protected, in the Equal Footing Doctrine. Congress acknowledged this states' right in the first sentence of Section 1 of the 1944 Flood Control Act by stating *"...it is declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control,..."* No other federal law usurps this policy. As a consequence of the doctrine and the enacted law, the Corps must acknowledge the state's right to natural flows. Its definition of stored water does the opposite.

Another concern with the Corps' rule is one of equity. The Corps has documented the tremendous benefits the reservoirs supply to people throughout the basin, yet in the rule the Corps applies fees to just the upstream states. To require the upstream states to pay the cost through stored water fees with people in the downstream states enjoying these benefits at no cost is not fair or equitable. As Governor Daugaard wrote to the Corps in 2012, *"To impose all reservoir operation and maintenance costs on upstream states alone adds insult to (that) injury."*

Taken together, the moratorium on easement access and proposed Water Supply Rule has deprived South Dakota of its Missouri River water because out of a thousand miles of Missouri River shoreline, only about one hundred miles are on the two short free-flowing stretches in the state. Therefore, ninety percent of our shoreline is off-limits to potential users of Missouri River water.

Midland Contracting was one of the first to find this out when the Corps told them they could no longer pump water used for dust control out of the lake behind Big Bend Dam. The amount of water to be used from this reservoir that is 80 miles long and covers 63,000 acres was miniscule at best. The Corps has held fast to this moratorium, refusing to let a contractor pump water in 2011 even while flood waters were devastating Pierre, Ft. Pierre, and downstream communities. The city of Pierre has been denied access for several years to the river to install a small pumping station that would allow the city to irrigate green space with river water, saving time and money. This moratorium remains in place today, as evidenced by the Corps response to our issuance of a temporary water right permit to a contractor on March 19, 2018, to use 90,000 gallons of Missouri River water out of the Oahe Reservoir to redo a state parking lot just above Oahe Dam. Oahe holds 6.4 trillion gallons. The Corps response to this [use of 0.000001 percent of Oahe water](#) was, *“All requests for using water from the South Dakota reservoirs are on hold until finalized guidance is received from Headquarters. An alternate source of water should be utilized.”* All of these actions by the Corps denying use of water already approved by the state are nonsensical at best.

More detailed objections to the proposed rulemaking have been submitted by Governor Dugaard, and I have enclosed copies of his letters for your information. However, the bottom line is the Corps is attempting a federal takeover of the Missouri River water in South Dakota. This 2008 rulemaking effort tramples state's right and needs to be stopped now before the Corps finalizes the rule in September. The future of South Dakota is linked directly to having a Missouri River water supply we can manage. Please do not let the Corps take that away from us. We ask for your help in stopping the rulemaking in the name of the Constitutional Equal Footing Doctrine, cooperative federalism, and protecting state's rights under the 1944 Flood Control Act.

Thank you again for the invitation.

Enclosed: Letters from Governor Dennis Dugaard

Texas Update

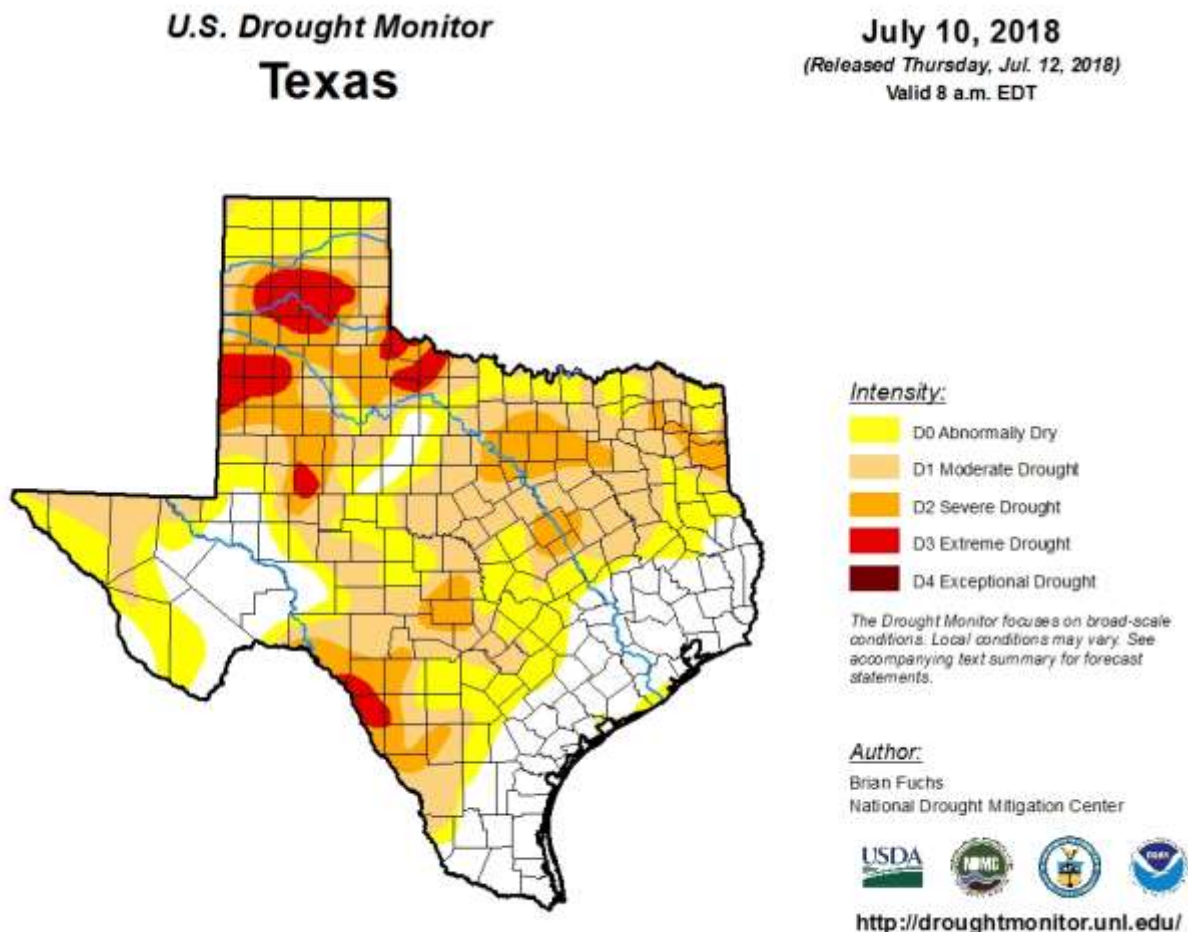
Western States Water Council - August 2018

Preparation for Next State Legislative Session

TCEQ is preparing for the upcoming biennial legislative session. Bills may be prefiled beginning November 12, 2018, with regular session running from January 8, 2019 to May 27, 2019. TCEQ is currently developing its proposed budget and special legislative appropriations requests for the upcoming legislative session. As part of this process, TCEQ is trying to better align water fees with associated agency efforts, based on findings from a water fee study conducted by the agency. In addition, TCEQ is developing proposed legislative recommendations, which may include changes to streamline water rights permitting processes.

Drought Development

Drought conditions are continuing to develop across much of the state. Currently, approximately half of the state is in moderate or more severe drought conditions. By comparison, at the beginning of the year, less than one third of the state was in such condition. Approximately 19 percent of the state is in at least severe drought conditions as compared to 3 percent at the beginning of the year. These drought conditions have resulted in TCEQ issuing its first senior water right call in the San Saba river basin earlier this month.



**Wyoming State Report
WSWC – Newport, Oregon
August 2018**

1. **Water Banking Legislation** – In June, Wyoming’s Joint Agriculture, State and Public Lands & Water Resources legislative committee held a full day meeting on topics and issues surrounding the Colorado River. At the conclusion, the committee directed the Legislative Services Office to draft a bill on “water banking”. This is a topic we have discussed internally and with the committee over the past couple of years in our ongoing dialogue on drought planning in the Colorado River basin. Whether the bill will be narrow or broad in scope, or apply to our part of the Colorado River Basin only or to the entire state, is yet to be seen. Whatever emerges should be designed to put Wyoming on a path to decide for ourselves how we want to handle potential water use shortages should the Colorado River drought continue all while protecting our water rights and our apportionment under the compacts.
2. **WRDA Package:** We’ve been continually reviewing portions of the WRDA package for Senator Barrasso’s (WY) office. Items of particular interest for Wyoming include:
 - Authorization of the Fontenelle Dam project to expand the active capacity to the permitted capacity
 - Reauthorization of base funding for the Upper Colorado and San Juan Rivers Endangered Fish Recovery Programs (although there is a ongoing funding issue here)
 - Allows Glendo Reservoir to be considered for modification of flood control operation via a FIRO analysis
 - Extends the authorization for the Colorado River basin’s System Conservation Pilot Program thru 2022, although can only operate in the Upper Basin with the participation of the Upper Colorado River Commission
 - Support of the water transfer rule
3. **Colorado River Drought Contingency Planning (DCP):** Efforts are ongoing between the 7 Colorado River basin states, water users and the Department of Interior to complete the Upper and Lower Basin’s Drought Contingency Plans by the end of the 2018. The current goal is to have all documents finalized by the end of August to allow time for all the necessary state and local approvals to occur. The hope is to have all DCP documents executed by the end of 2018. Legislative action in Arizona in early 2019 will still be necessary for final implementation.

Tab V – Newsletter Index

WESTERN STATES WATER NEWSLETTER INDEX

January 5, 2018 - July 13, 2018

Issues No. 2277 - 2304

<u>HEADING</u>	<u>SUBHEADING maintenance</u>	<u>DATE</u>	<u>ISSUE</u>
ADMINISTRATION UPDATE	Army Corps of Engineers	01-26	2280
		02-02	2281
		02-23	2284
		05-04	2294
		06-22	2301
	Bureau of Reclamation	05-18	2296
		06-29	2302
	Clean Water Act	02-02	2281
		02-23	2284
		04-06	2290
		05-25	2297
	Department of the Interior-Reorganization	02-23	2284
		03-02	2285
	Drought	06-29	2302
	Environmental Protection Agency (EPA)	02-02	2281
		02-23	2284
		04-06	2290
		04-20	2292
		05-04	2294
		06-01	2298
		06-22	2301
		06-29	2302
		07-06	2303
		07-13	2304
	FY2019 Budget	03-02	2285
		04-13	2291
	FY2019 Interior Budget (special report)	05-11	2295
	Groundwater	02-23	2284
		05-25	2297
	Hurricane Harvey	05-04	2294
	Infrastructure (special report)	02-02	2281
		02-16	2283
		04-06	2290
		06-01	2298
	Jurisdictional Determinations	04-06	2290
	National Aeronautics and Space Administration (NASA)	07-13	2304
	Nebraska	07-06	2303
	Produced Water	05-04	2294

	Public Lands Infrastructure Fund (special report)	05-11	2295
	Regulatory Science	05-04	2294
	Section 408 Projects	02-02	2281
	Senate Judicial Nomination	02-16	2283
	State-Federal Relations (special report)	03-02	2285
	State of the Union	02-02	2281
	Streamgages	04-13	2291
	Supreme Court	07-13	2304
	Texas	05-04	2294
	U.S. Geological Survey	02-16	2283
		04-13	2291
		07-13	2304
	Water Data	07-13	2304
	Water Infrastructure Finance and Innovation Act (WIFIA)	04-06	2290
		04-20	2292
		06-01	2298
		07-06	2303
	Waters of the United States (WOTUS)	02-02	2281
		02-23	2284
		04-06	2290
		06-22	2301
		06-29	2302
		07-13	2304
	Water Reuse	05-04	2294
		05-18	2296
	WaterSmart	06-29	2302
CONGRESSIONAL UPDATE	Arizona	01-05	2277
	Army Corps of Engineers	03-09	2286
	Bureau of Reclamation - Title Transfer	02-02	2281
		04-20	2292
		05-11	2295
	-Reclamation Fund	06-29	2302
	Clean Water Act	06-22	2301
	Columbia River	04-27	2293
	Commerce, Justice and Science Appropriations	05-18	2296
	Committee Leadership	01-05	2277
	Compliance Assistance	06-22	2301

Department of the Interior	07-06	2303
Endangered Species Act (ESA)	07-06	2303
Farm Bill	04-27	2293
	06-22	2301
FY2019 Appropriations - Agriculture	05-18	2296
-Energy and Water	06-29	2302
FY2019 Budget	03-09	2286
	04-13	2291
FY2019 Energy and Water Appropriations	05-11	2295
	05-18	2296
Gold King Mine	01-05	2277
Grazing	07-13	2304
House Judiciary	04-13	2291
House Natural Resources	04-20	2292
Hydropower	04-27	2293
Indian Affairs	07-06	2303
Indian Water Rights Settlements	01-05	2277
	06-29	2302
Infrastructure (special report)	01-12	2278
(special report)	02-02	2281
	03-02	2285
	05-11	2295
	05-18	2296
	05-25	2297
	06-22	2301
(special report)	07-13	2304
National Park Restoration Act	04-11	2295
National Aeronautics and Space Administration (NASA)	03-09	2286
Reclamation Fund	05-11	2295
Regulatory Streamlining	04-13	2291
Senate Committee on Natural Resources	03-23	2288
Senate Confirmation	07-06	2303
Senate Judicial Nomination	02-16	2283
State Revolving Funds	06-22	2301
	07-13	2304
Texas	04-13	2291
U.S. Geological Survey	02-16	2283

	Water Infrastructure Finance and Innovation Act (WIFIA) (special report)	07-13	2304
	Water Resources Development Act (WRDA) (special report)	01-12	2278
		02-02	2281
		05-11	2295
		05-18	2296
		05-25	2297
		07-13	2304
	Western Water Supply	03-23	2288
ENVIRONMENT	Endangered Species Act (ESA)	07-06	2303
	Invasive Species	03-23	2288
	National Park Restoration Act	05-11	2295
	Reclamation Fund	05-11	2295
LITIGATION	Alaska	01-12	2278
	California	03-09	2286
	Clean Water Act	01-26	2280
	-2015 WOTUS Rule	05-04	2294
		06-15	2300
	Environmental Protection Agency (EPA)	05-04	2294
	Equitable Apportionment	06-29	2302
	<i>Florida v. Georgia</i>	06-29	2302
	Interstate Groundwater	06-22	2301
	<i>Mississippi v. Tennessee</i>	06-22	2301
	<i>Nam v. DOD</i>	01-26	2280
	Navajo Water Rights	05-04	2294
	New Mexico	05-04	2294
	<i>New York et al. v. EPA</i>	01-26	2280
		03-09	2286
	North Dakota	06-29	2302
	Northwest Area Water Supply (NAWS)	06-29	2302
	Reserved Water Rights	01-12	2278
	<i>Sturgeon v. Frost</i>	01-12	2278
	Tribal Treaty Fishing Rights	06-15	2300
	Washington	06-15	2300

	Water Curtailment	03-09	2286
	Water Transfer Rule	01-26	2280
		03-09	2286
	Waters of the United States (WOTUS)	01-26	2280
		06-15	2300
WATER QUALITY	Arizona	02-16	2283
	Army Corps of Engineers	02-23	2284
	Bureau of Reclamation	05-18	2296
	California	02-16	2283
		06-22	2301
	Clean Water Act (CWA)	01-26	2280
		02-02	2281
		02-23	2284
		04-06	2290
		05-04	2294
		05-25	2297
		06-15	2300
		06-22	2301
	Compliance Assistance	06-22	2301
	Drought	01-26	2280
	Environmental Protection Agency (EPA)	02-23	2284
		04-06	2290
		05-04	2294
		06-01	2298
		07-06	2303
	Groundwater	02-23	2284
		05-25	2297
	Infrastructure	01-26	2280
		04-06	2290
		06-01	2298
	Jurisdictional Determinations	04-06	2290
	Nebraska	07-06	2303
	Produced Water	05-04	2294
	Regulatory Science	05-04	2294
	State 401 Certifications	06-15	2300
	State Revolving Funds (SRF)	01-26	2280
	Tribal Treaty Fishing Rights	06-15	2300
	Washington	05-04	2294
		06-15	2300

WATER RESOURCES	Water Infrastructure Finance and Innovation Act (WIFIA)	04-06 06-01 07-06	2290 2298 2303
	Water Reuse	02-16 05-04 05-18	2283 2294 2296
	Water Transfer Rule	01-26	2280
	WaterFix	02-16	2283
	Waters of the United States (WOTUS) (also see Clean Water Act)	01-26 02-23 04-06 06-15	2280 2284 2290 2300
	AgriMet	01-05	2277
	Arizona	02-16	2283
	Army Corps of Engineers (special report)	06-15	2300
	Bureau of Reclamation	01-12	2278
	California	01-12 02-16 06-22	2278 2283 2301
	Colorado River	04-27 05-18	2293 2296
	Columbia River Treaty	06-01	2298
	Drought	01-05 01-26 05-18 06-15	2277 2280 2296 2300
	Farm Bill	06-22	2301
	Grazing Water Rights	04-20	2292
	House FY2019 Energy and Water Appropriations	05-11	2295
	Hydropower	04-27	2293
	Idaho	04-20	2292
	Infrastructure (special report)	01-12 01-26 05-11 05-25 06-15 06-22	2278 2280 2295 2297 2300 2301
	National Aeronautics and Space Administration (NASA)	07-13	2304
	Oroville Dam	01-12	2278

	S2S Precipitation Forecasting	06-01	2298
	Senate Committee on Energy and Natural Resources	03-23	2288
	Senate Hearing (special report)	06-15	2300
	State Revolving Funds (SRF)	01-26	2280
		06-22	2301
	Surplus Water Rule	06-15	2300
	USGS - Water Use Data	03-22	2288
		07-13	2304
	Water Data	01-05	2277
	Water Projects	01-12	2278
	Water Resources Development Act (WRDA) (special report)	01-12	2278
		05-11	2295
		05-25	2297
	Water Supply Outlook	01-05	2277
		05-25	2297
	Water Transfers	06-15	2300
	WaterFix	02-16	2283
	Western Water Supply	03-23	2288
WATER RIGHTS	Equitable Apportionment	06-29	2302
	Indian Water Rights Settlements	06-29	2302
	Reserved Water Rights	01-12	2278
	Tribal Water Rights	01-05	2277
WESTERN GOVERNORS	Annual Meeting - Rapid City, SD (special report)	06-29	2302
	Department of the Interior-Reorganization	02-23	2284
	Invasive Species	03-23	2288
	Montana	05-04	2294
	State-Federal Relations (special report)	03-02	2285
		04-27	2293
	State of State Addresses	01-19	2279
		02-02	2281
		02-16	2283
	Surplus Water Rule	06-15	2300

WESTERN STATES WATER COUNCIL	Washington DC Spring Meetings and Roundtable	03-19	2287
	S2S Precipitation Forecasting Workshop	06-01	2298
PEOPLE	Jack A. Barnett	04-20	2292
	Floyd Bishop	06-01	2298
	Michael Black	01-12	2278
	Thomas E. Cahill	02-02	2281
	Grant Davis	01-12	2278
	Amy Haas	07-06	2303
	Rickey Dale "R.D." James	01-26	2280
	Peter Lake	05-18	2296
	Jan Langel	05-18	2296
	Tom Livers	05-18	2296
	Sue Lowry	02-23	2284
	Karla Nemeth	01-12	2278
	Don Ostler	07-06	2303
	Michael Ryan	01-12	2278
	Eileen Sobeck	01-05 01-12	2277 2278

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Tab XYZ – Sunsetting Positions for Fall 2018
Meetings (#384 - #388)



Western States Water Council

A VISION ON WATER

Position #384 adopted on October 9, 2015

Our Mission

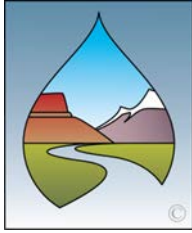
To ensure that the West has an adequate, secure and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.

Our Present Condition

Water in the West is an increasingly scarce and precious resource. Population growth, competing economic and ecological demands, and changing social values have left surface and ground water supplies stressed in many areas. This has increased the number and complexity of conflicts among users and uses. A secure water future is becoming more costly and increasingly uncertain given our unpredictable climate, aging and often inadequate infrastructure, data limitations regarding water supplies and demands, competing or poorly defined water rights, and a constantly evolving regulatory landscape. Effectively addressing these challenges will require stronger collaboration and cooperation that transcends political and geographic boundaries between states, federal agencies, tribes, and local communities.

Our Principles

- Water must be elevated to a higher public policy priority given the importance of the resource to our public health, economy, food security, environment, and western way of life. We must cultivate a western water conservation ethic through greater understanding of, and appreciation for, water's value.
- State primacy is fundamental to a sustainable water future. Federal water planning, policy development, regulation, protection, and management must recognize, defer to, and support state water laws, plans, policies, programs, water rights administration, adjudication and regulation, compacts and settlements. Rather than attempt to dictate water policy, the federal government should engage states early in meaningful consultation and contribute its fair share of funding to support implementation of state water planning and management, thus avoiding, or at least minimizing, the need for federal regulatory mandates.
- An integrated, collaborative, and grassroots approach to water resources management is critical to the environmentally sound and efficient use of our water resources. States, federal agencies, tribes, and local communities should work together to identify water problems and develop optimal solutions at the lowest appropriate level. Striving for cooperation rather than litigation, we must recognize and respect national, state, regional, local and tribal differences in values related to water resources.
- Sustainable water resource management and development should yield long term economic growth, enhanced protection and restoration of significant aquatic ecosystems, and improved economic and environmental security and quality of life.
- A secure and sustainable water future will be determined by our ability to maintain, replace, expand and make the most efficient use of critical water infrastructure. We must preserve and improve existing infrastructure, as well as encourage and support innovative water supply strategies and new storage options to better balance supplies with demands.
- All levels of government must prioritize the collection, analysis and open sharing of reliable data regarding water availability, quality, and usage given its importance to research for sound science and data driven decision making.



**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
FEDERAL WATER AND CLIMATE DATA COLLECTION AND ANALYSIS PROGRAMS
Manhattan, Kansas
October 9, 2015**

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

WHEREAS, in the West, water is a critical, vital resource and sound decision-making demands accurate and timely data on precipitation, temperature, evapotranspiration, soil moisture, snow depth, snow water content, streamflow, groundwater, water quality and similar information; and

WHEREAS, the demands for water and related climate data continue to increase, and this information is used by federal, state, tribal, and local government agencies, as well as private entities and individuals to: (1) forecast flooding, drought and other climate-related events; (2) project future water supplies for agricultural, municipal, and industrial uses; (3) estimate streamflows for hydropower production, recreation, and environmental purposes, such as for fish and wildlife management, including endangered species needs; and (4) facilitate water management and administration of water rights, decrees, and interstate compacts; and

WHEREAS, without timely and accurate information, human life, health, welfare, property, and environmental and natural resources are at considerably greater risk of loss; and

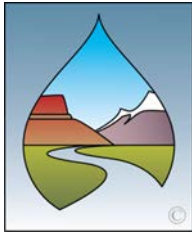
WHEREAS, critical and vital information is gathered and disseminated through a number of important federal programs including, but not limited to: (1) the Snow Survey and Water Supply Forecasting Program, administered by the National Water and Climate Center (NWCC) in Portland, Oregon, and funded through USDA's Natural Resources Conservation Service (NRCS); (2) NWCC's Soil and Climate Analysis Network (SCAN); (3) the U.S. Geological Survey's (USGS) Cooperative Streamgaging Program and National Streamflow Information Program (NSIP), which are funded through the Department of Interior; (4) Landsat thermal data, archived and distributed by the USGS, and other remotely-sensed data acquired through the National Atmospheric and Space Administration (NASA) and its water-related missions; (5) USGS ground water measurement and monitoring; (6) the National Oceanic and Atmospheric Administration's (NOAA) National Weather Service and Climate Programs Office; and (7) the Environmental Protection Agency's National Environmental Information Exchange Network (NEIEN); and

WHEREAS, state-of-the-art technology has been developed to provide real or near real-time data in formats that can be shared and used by different computer programs with the potential to vastly improve the water-related information available to decisionmakers in natural resources and emergency management, and thus better protect the public safety, welfare and the environment; and

WHEREAS, over a number of years, the lack of capital investments in water data programs has led to the discontinuance, disrepair, or obsolescence of vital equipment needed to maintain existing water resources related data gathering activities; and

WHEREAS, there is a serious need for adequate and consistent federal funding to maintain, restore, modernize, and upgrade federal water, weather and climate observation programs, not only to avoid the loss or further erosion of critical information and data, but also to address new emerging needs, with a primary focus on coordinated data collection and dissemination.

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council urge the Administration and the Congress to give a high priority to the allocation and appropriation of sufficient funds for these critical, vital programs, which benefit so many, yet have been or are being allowed to erode to the point that it threatens the quantity and quality of basic data provided to a myriad, growing and diffuse number of decisionmakers and stakeholders, with significantly adverse consequences.



**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
DROUGHT PREPAREDNESS, PREDICTION AND EARLY WARNING PROGRAMS
Manhattan, Kansas
October 9, 2015**

WHEREAS, the Western States Water Council is a policy advisory body representing eighteen states, and has long been involved in western water conservation, development, protection, and management issues, and western states have a long history of promoting drought preparedness, planning and response programs, in cooperation with federal agencies; and

WHEREAS, in the West, water is often scarce even in “wet” years and drought is a recurring threat to our environment, economy and way of life – affecting not only the West, but also the Nation; and

WHEREAS, three of the top five national natural disasters, in terms of economic losses, have been droughts, and the current exceptional drought in California and extreme to severe conditions along the West Coast and elsewhere highlight the need for greater attention to developing more comprehensive and coordinated drought prediction, preparedness, planning and response programs at all levels; and

WHEREAS, the Western Governors’ Association has taken a lead role in identifying needs and best management practices through an ongoing series of forums, webinars and reports; and

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

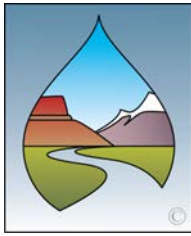
WHEREAS, there is a continuing need for developing new monitoring technologies, such as remote sensing, that provide more timely data on water availability and better spatial coverage for assessing drought impacts; and

WHEREAS, early drought warning systems facilitate early drought assessment and mitigation efforts to minimize drought impacts; and

WHEREAS, there is a need for continuing federal research to develop new predictive capability for precipitation at intraseasonal to interannual time scales – such as research on the influence of other ocean-atmosphere interactions on the El Niño-Southern Oscillation (ENSO), the only factor now providing some limited understanding of precipitation and temperature prediction; and

WHEREAS, there is a continuing need for a permanent federal role in coordination of research programs related to drought early warning and prediction;

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council urge the Administration and the Congress to support federal programs including but not limited to the National Integrated Drought Information System (NIDIS), under the National Oceanic and Atmospheric Administration (NOAA), and other programs designed to improve our forecasting and response capabilities.



**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
BUREAU OF RECLAMATION DROUGHT RESPONSE PROGRAM
Manhattan, Kansas
October 9, 2015**

WHEREAS, the Western States Water Council is a policy advisory body representing eighteen states and since its inception, the Council has been actively involved in national drought preparedness, planning and response, as well as related policy and program development and implementation; and

WHEREAS, in the West, water is often scarce even in “wet” years and drought is a recurring threat to our environment, economy and way of life – affecting not only the West, but also the Nation; and

WHEREAS, three of the top five national natural disasters, in terms of economic losses, have been droughts, and the current exceptional drought in California and extreme to severe conditions along the West Coast and elsewhere highlight the need for greater attention to developing more comprehensive and coordinated drought prediction, preparedness, planning and response programs at all levels; and

WHEREAS, the Western Governors’ Association has taken a lead role in identifying needs and best management practices through an ongoing series of forums, webinars and reports; and

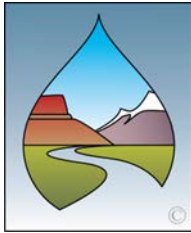
WHEREAS, the Reclamation States Emergency Drought Relief Act of 1991 (43 U.S.C. 2214(c)) and subsequent reauthorizations, under Title I, provide only temporary authority for some critical Reclamation actions; and

WHEREAS, Reclamation’s current Drought Response Program supports a proactive approach to drought and provides financial assistance to water managers and users to: (1) develop drought contingency plans; (2) implement drought resiliency projects to build the capacity of communities to mitigate and respond to drought – increasing the reliability of water supplies, improving water management and operational flexibility, facilitate voluntary sales, transfers or exchanges of water, and provide benefits for fish and wildlife and the environment; and (3) undertake emergency actions to minimize losses due to drought through temporary construction activities and other activities, including water purchases and the use of Reclamation facilities to convey and store water; and

WHEREAS, there is a continuing need for making permanent the temporary authority allowing Reclamation the flexibility to continue delivering water to meet authorized project purposes, meet environmental requirements, respect state water rights, work with all stakeholders, and provide leadership, innovation, and assistance; and

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council strongly supports legislation to permanently authorize Title I activities under the Reclamation States Emergency Drought Relief Act, and provide for adequate appropriations to meet priority needs and continue the Reclamation Drought Response Program.

BE IT FURTHER RESOLVED that the Council urge and encourage the Administration and the Congress to assess and consider the need for a comprehensive national drought preparedness and response program on par with federal efforts to address other natural disasters such as hurricanes, tornadoes and similar extreme events.



**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
STATES' WATER RIGHTS AND NATURAL FLOWS
Manhattan, Kansas
October 9, 2015**

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 in October 2012.*