



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER RESOURCES

Bureau of Reclamation/Milk River/Montana

On August 20, the U.S. Bureau of Reclamation (USBR), the Blackfeet Tribe and the Milk River Joint Board of Control broke ground on the St. Mary Diversion Dam Rehabilitation Project. The dam plays a critical role in supplying water to approximately 110,000 acres of irrigated land and several communities in northcentral Montana. The project will address structural deficiencies, improve water delivery efficiency, and enhance fish passage for the threatened bull trout. The dam is expected to be completed by 2027, at a cost of over \$88.3M. USBR's Deputy Commissioner Roque Sanchez said: "Today's groundbreaking is a testament to the power of collaboration. By working together with the Blackfeet Tribe and the Milk River Joint Board of Control, we are not only rehabilitating a critical piece of infrastructure but also reinforcing our commitment to the communities that rely on these water resources." <https://www.usbr.gov/newsroom/news-release/4936> Reclamation has also secured initial funding to begin site remediation activities on the St. Mary Canal Siphon that suffered a catastrophic failure on June 17 (WSW #2616).

EPA/California/Drinking Water

On August 21, the Environmental Protection Agency (EPA) awarded over \$7.3M in grants in California to support four drinking water systems in underserved, small, and disadvantaged communities facing drought, wildfires and climate change. These are the first awards under EPA's Drinking Water System Infrastructure Resilience and Sustainability Program. The four recipients are in: (1) Antelope Valley-East Kern (\$559,760) to install fuel trailers and a generator to power the drinking water system during disasters; (2) Fresno (\$3,700,214) to replace failing water pipes; (3) Indian Wells Valley (\$2,790,000) towards water supply enhancement; and (4) Dry Creek Rancheria Band of Pomo Indians (\$331,769) to support infrastructure and computerized control improvements. EPA Pacific Southwest Regional Administrator Martha Guzman said: "Across California, the impact of climate change is often felt as water-related stress, with serious burdens placed

on communities' drinking water infrastructure. This new grant program, along with historic investments from the Biden-Harris Administration's Bipartisan Infrastructure Law, will strengthen our state's water infrastructure and advance the goal of safe, available drinking water for all." <https://www.epa.gov/newsreleases/>

CONGRESS/ADMINISTRATION

Colorado/USDA/Drought

On August 7, Senators Michael Bennet (D-CO) and Roger Marshall (R-KS) wrote asking Secretary of Agriculture Tom Vilsack to adapt the USDA's drought mitigation programs to provide sufficient resources to western farmers and ranchers. The letter included testimony and recommendations from producers, water managers, and state officials gathered at a field hearing held in Burlington, Colorado in June. The letter outlines recommendations for the Conservation Reserve Program (CRP), the Environmental Quality Incentives Program (EQIP), the Watershed and Flood Prevention Program (PL-566), research and data, and scaling voluntary water conservation programs.

The Senators said that CRP rental rates should be based on erodibility indexes, rather than soil productivity. Producers want the overall annual payment cap increased to at least \$125,000 per individual or entity. Regarding EQIP, the letter reads: "The USDA must implement the EQIP water management entity provision that allowed the Natural Resources Conservation Service (NRCS) to enter contracts with entities such as irrigation districts, ditch companies, and groundwater management districts to implement voluntary regional-scale water conservation and efficiency improvements. Despite this authorization, NRCS has not widely utilized this new authority within western states, partly due to limited NRCS guidance on how best to implement these provisions in line with the statute and limited financial and technical resources." They also recommend modernizing PL-566 to meet increasing demands and unique western water challenges.

The letter urged investment in cutting-edge research to develop agricultural breakthroughs, including practices to conserve water, through localized research,

development and application of drought-resistant technologies. They also called for investment in data. “Quality climate data has become increasingly sparse and is essential in helping producers, water managers, and others in the High Plains region make decisions. Support and investment in state weather and environmental networks like the Kansas Mesonet (Mesonet, 2024) or Colorado’s COLORADO AGRICULTURAL Meteorological NETWORK (CoAgMET, 2024), which is important to not only sustain historical standardized data collection but also build an enhanced spatial and temporal database. These provide significant additional meteorological and climatological phenomena beyond historical temperature and precipitation data to decision makers to assist with irrigation planning, understanding crop stress, soil moisture availability, fire weather risk, and ground truthing insurance payouts for resulting losses of both crops and livestock.” Further, they recommended USDA implement a voluntary groundwater conservation program and pressed for more investment in the Conservation Innovation Grants Program.

Bennet said: “Colorado and Kansas producers told us they cannot survive the current levels of drought unless we make serious changes to how we address it. Their field hearing testimonies were invaluable, and now we need the assistance from our USDA programs and upcoming Farm Bill to reflect the unique challenges they are facing.” Marshall said: “We heard the problems and complications loud and clear - it’s now time to focus on solutions. We hope the USDA will take the next steps and make improvements and investments to help our Kansas and Colorado producers. We recognize that these won’t solve all our water issues in the West, but it’s a good start.” <https://www.bennet.senate.gov/public/>

LITIGATION/WATER QUALITY

West Virginia et al. v. EPA/Clean Water Act

On August 16, West Virginia and 23 other States requested leave from the U.S. District Court for the District of North Dakota to file a sur-reply in *West Virginia et al. v. EPA* (#3:23-cv-32). A sur-reply may only respond to arguments raised in the corresponding reply and may not be accompanied by new evidence. The sur-reply seeks an opportunity to address the Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) and the Eastern District of North Carolina’s decision in *White v. EPA*, 2024 WL 3049581 (E.D.N.C. June 18, 2024). See WSW #2580, #2615 and Special Reports #2546, #2552.

In the sur-reply, the States noted that the defendant agencies, EPA and the U.S. Army Corps of Engineers (Corps), were able to address *Loper Bright* and *White* because of the timing of their reply to a motion for summary judgment. The agencies had relied on Chevron deference in their motion for summary judgment, but

were able to withdraw that request in their final reply, and argue that their motion should prevail regardless. The States’ opposed this assertion, arguing that EPA and the Corps’ definition of “waters of the United States” (WOTUS), deserves neither deference nor respect following *Loper Bright*. Instead, the court “should adopt its own best interpretation of WOTUS” guided by the CWA and *Sackett v. EPA*, 143 S. Ct. 1322. They wrote: “Here, the Agencies have misread *Sackett* and their justifications for the Rule fall far short. With the latest rule, the Agencies again seek to ‘minimize [the] impact’ of Supreme Court reversals (*Sackett*, 598 U.S. at 666) and stretch their authority past the CWA’s boundaries.” The States also asserted that the *White* decision, holding that the rule’s text is consistent with *Sackett*, actually misunderstood the decision. Finally, the States asserted an agency memorandum “...flatly confesses that the Agencies will not abide by the *Sackett* indistinguishability or continuous surface water requirements.”

In November, the States submitted an amended complaint to address the new Conforming Revised Definition of Waters of the United States (88 FR 61964), issued by EPA in response to *Sackett*. Although similar to the original complaint, the States added a number of new assertions. They argued that the amended rule fails to define or analyze the “relatively permanent standard” or the “continuous surface standard,” and the Amended Final Rule still exercises inappropriately expansive jurisdiction over wetlands. “If the Amended Final Rule means to leave in place the understanding from the Final Rule, then that understanding is fatally flawed, relying as it does on connections through non-jurisdictional features, connections that lack water, and connections that are not ‘continuous’ based on any ordinary understanding of that word. The CWA’s text, as interpreted by the Supreme Court in *Sackett* and the *Rapanos* plurality opinion, demands more.... As *Sackett* made crystal clear, wetlands may only be deemed jurisdictional if they are as a practical matter indistinguishable from waters of the United States.” The States argued that the agencies were inconsistent in applying Supreme Court case law. “Thus, the Agencies appear to have read the relevant Supreme Court precedents, yet employed only those they found helpful - and even those they only employed in an undefined way.... Moreover, the Agencies cited their own generalized experience in applying prior iterations of the statute without explaining how that experience helps decide the question of what the statute intended when it greenlit regulating ‘navigable’ ‘waters of the United States.’” In their previous complaint, the States had listed terms used in the rule which they argued were “irretrievably vague.”

The States updated the list to remove “material influence,” “significantly affect,” “significant nexus,” and “similarly situated.”