

2018

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

53rd Annual Report

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	iv
MEMBERS ADDRESSES AND PHONE NUMBERS	1
COMMITTEE AND SUBCOMMITTEE ASSIGNMENTS	9
WESTFAST MEMBERS	13
COUNCIL MEMBERS	15
COUNCIL STAFF	16
COUNCIL MEMBERSHIP/STAFF CHANGES/NEWS	17
COUNCIL MEETINGS	
Spring - Arlington, Virginia	19
Summer - Newport, Oregon	22
Fall - Coeur d’Alene, Idaho	24
OTHER MEETINGS	
Western Governors’ Association	28
State and Local Government Associations Summit	28
Annual Meeting	31
Winter Meeting	33
Western States Water Council	
Water Information Management Systems Workshop	36
Improving Sub-Seasonal to Seasonal (S2S) Forecasting Workshop	37
Water Quality-Water Quantity Nexus Workshop	37
Stock Water Rights for Grazing Livestock on Federal Lands Workshop	38
CONGRESSIONAL TESTIMONY	
House Natural Resources Committee	39
Senate Environment and Public Works Committee	44
WATER DATA EXCHANGE	50
WESTERN STATES FEDERAL AGENCY SUPPORT TEAM	56
OTHER IMPORTANT ACTIVITIES AND EVENTS	
Western States Water	59
Western Governors’ State of the State Addresses	59
Agriculture	63
Farm Bill	63
House-Senate Conference Committee	65
Bureau of Reclamation	69
Reclamation Title Transfers	69

Title Transfer and Non-Federal Infrastructure Incentivization Act	70
National Environmental Policy Act	71
FY2019 Budget	71
WaterSMART	72
Northwest Area Water Supply Project.	74
Sedimentation	75
Clean Water Act/Environmental Protection Agency.	75
State Revolving Funds	75
Water Transfer Rule.	76
Waters of the United States	78
Litigation	78
Suspension Rule	80
Federal Outreach.	82
New Proposed WOTUS Rule	84
Groundwater/NPDES.	85
Litigation	85
EPA Rulemaking	87
Section 404/Jurisdictional Determinations.	90
Water Infrastructure Finance and Innovation Act	90
Oil and Gas Produced Water Reuse.	92
CWA Compliance Assistance	94
Corps of Engineers	94
Water Resources Development Act	94
Senate	94
House	99
America’s Water Infrastructure Act	104
Corps’ Communication and Project Delivery	104
CWA §404/State Authority	105
Proposed Surplus Water Rule	106
Corps Water Infrastructure Initiatives	107
Indian Water Rights	108
New Mexico/Navajo Water Rights	108
Reclamation Water Settlement Fund	109
DOI-Inspector General/Montana/Crow Indian Tribe.	110
Navajo Utah Water Rights Settlement.	110
Infrastructure.	112
Legislative Goals to Rebuild America’s Infrastructure	112
Congressional Action.	116
The State of the Nation’s Water and Power Infrastructure.	116
The Long-Term Value to U.S. Taxpayers of Low-Cost Federal Infrastructure Loans	117
River Basins	119
Columbia River Basin	119
Federal Columbia River Power System/Hydropower Operations.	119
Columbia River Treaty	121
Colorado River Basin.	123
Drought Contingency Plan	123
Republican River Compact	126
States.	127
Arizona	127
Direct Potable Reuse	127
Reserved Water Rights.	128
California.	129
Oroville Dam/Independent Forensic Team Report.	129

Oroville Dam Repairs	130
WaterFix	131
Water Curtailment	131
Hetch Hetchy Dam	132
State Water Project/Central Valley Water Project	133
Colorado	134
Yampa River Curtailment	134
Idaho	135
Snake River/Aquifer Recharge	135
Stockwater/Grazing Water Rights	136
Nevada	137
Groundwater/Water Basin Transfers	137
South Dakota	138
Flood Information System	138
Texas	138
Water Project/Streamlining	138
Hurricane Harvey	140
Utah	140
Instream Flows/Water Banking and Leasing	140
Washington	143
Tribal Treaty Fishing Rights	143
Water Supply Outlook	143
Senate Committee on Energy and Natural Resource Hearing	145
RESOLUTIONS AND POLICY POSITIONS	148
WSWC Vision on Water	150
Forecast Informed Reservoir Operations and Innovations	151
Weather Station Networks	152
Water Infrastructure Funding	154
Integrating Water and Energy Planning and Policy	157
Federal Research on Climate Adaptation	159
State Primacy Over Groundwater	161
Rural Water Supply Project/Infrastructure Needs	163
National Pollutant Discharge Elimination System	166
Endangered Species and State Water Rights	168
State CWA Section 401 Certification Authority	169
Clean Water Act Jurisdiction	171
Federal Water and Climate Data Collection and Analysis Programs	174
Drought Preparedness, Prediction and Early Warning Programs	176
Bureau of Reclamation Drought Response Program	178
States' Water Rights and Natural Flows	179
RULES OF ORGANIZATION	181
GLOSSARY OF ACRONYMS	186

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OF THE

WESTERN STATES WATER COUNCIL

INTRODUCTION

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

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

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

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

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

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

Meetings of the Council are held on a regular basis, rotating among the member states, with state representatives hosting Council members and guests. In 2018, meetings were held in: Washington, D.C. on March 14-15; Newport, Oregon on August 1-3; and Coeur d'Alene, Idaho on October 24-26. Guest speakers are scheduled according to the relevant subjects to be considered at each meeting. The Council meetings are open to the public. Information regarding future meeting locations and agenda items can be obtained by contacting the Council's office, or visiting our website. Included herein are reports on each of the Council meetings, positions and resolutions adopted by the Council, and a discussion of other important activities and events related to western water resources. Other information about the Council and Council members is also included.

The Council relies almost exclusively on state dues for funding the organization. Dues are set by the Executive Committee and each state pays the same amount. The Executive Committee provides general oversight and authorizes regular reviews and audits of Council finances. A review was approved for 2018.

During 2018, the WSWC staff was comprised of: Anthony (Tony) G. Willardson, Executive Director; Michelle Bushman, Legal Counsel; Sara Larsen, Senior Program Manager; Roger Pierce, WestFAST Liaison (a National Weather Service detailee); and a secretarial staff consisting of Cheryl Redding, Office Manager; and Julie Groat, Administrative Assistant. John D'Antonio, U.S. Army Corps of Engineers (and former New Mexico State Engineer) was selected to serve as the next WestFAST Federal Liaison replacing Roger Pierce (NOAA), who retired the end of the year.

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WESTERN STATES WATER COUNCIL

Committee Assignments

EXECUTIVE COMMITTEE

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

Management Subcommittee

Jeanine Jones
(Chair)
Tim Davis
(Vice-Chair)
Tracy Streeter
(Secretary/Treasurer)
Tony Willardson
(Executive Director)
Jerry Rigby
(Former Chair)

Nominating Subcommittee

Roland Westergard **(Chair)** - Nevada
Hal Simpson - Colorado
Jeff Fassett - Nebraska
Garland Erbele - North Dakota
Pat Tyrrell - Wyoming

Ex-Officio Representatives

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

LEGAL COMMITTEE

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

Clean Water Act Jurisdiction

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

Non-Tribal Federal Water Needs Subcommittee

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

Ex-Officio Representatives

BLM - Paul Curtis
BOR - Deborah Lawler
Owen Walker
DOD - Marc Kodack
Lauren Dempsey
USFS - Michael Eberle, Chris Carlson
NPS - Jeff Hughes, Peter Fahmy

Tribal Reserved Water Rights Subcommittee

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

WRDA/Corps Policies

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

WATER QUALITY COMMITTEE

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

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

Water Quality/Quantity Nexus Workgroup

David Schade - Alaska
Tom Stiles - Kansas
Kent Woodmansey - South Dakota

WATER RESOURCES COMMITTEE

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John Simpson - Idaho
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David Barfield - Kansas
John Tubbs - Montana
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(Chair)
Kent Woodmansey - South Dakota
Peter Lake - Texas
Eric Millis - Utah
(Vice-Chair)
Maia Bellon - Washington
Patrick Tyrrell - Wyoming
Steve Wolff - Wyoming
(Alternate)*

Climate Adaptation and Drought Subcommittee

Jeanine Jones - California (Chair)

Ex-Officio Representatives

Corps - Rolf Olsen
NRCS - Mike Strobel

Water Information and Data Subcommittee (WIDS)

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

Ex-Officio Representatives

USACE - Steve Ashby
USBOR - Allison Danner
USEPA - Dwane Young
USGS - Nancy Barber
NASA - Brad Doorn
NOAA - DeWayne Cecil
NRCS - Mike Strobel

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Council Members
Newport, Oregon
August 3, 2018



Front Row: (L to R)

Brenda Bateman (OR), David Schade (AK), Jeanine Jones (CA), Jerry Rigby (ID), Jennifer Verleger (ND), Einav Henenson (AZ), Patrick Tyrrell (WY), Becky Mitchell (CO), Jan Langel (MT), Greg Ridgley (NM), Mary Verner (WA), and Kathleen Ligon (TX)

Second Row: (L to R)

Garland Erbele (ND), Norm Johnson (UT), Eric Millis (UT), Dave Barfield (KS), Patrick Pfaltzgraff (CO), Kevin Frederick (WY), Steve Wolff (WY), Tracy Streeter (KS), Tom Blaine (NM), Mat Weaver (ID), Buck Smith (WA), and Mike Gallagher (WA)

COUNCIL STAFF



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

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

John D’Antonio, USACE
WestFAST Liaison
2018 - Current



Roger Pierce, NOAA
WestFAST Liaison
2016 - 2018



COUNCIL MEMBERSHIP/STAFF CHANGES/NEWS

IN MEMORIAM

Jack A. Barnett, 82, a former WSWC Executive Director from 1974 -1980, passed away on April 13. Jack worked for both the State of Idaho and Utah in water resources. Jack served as the Executive Director of the Idaho Water Users' Association and was the first Executive Director of the Colorado River Basin Salinity Control Forum. He was the Engineer Manager of the Bear River Commission, a member of the Utah State Parks Board, and was the owner of a water resource consulting business.

Floyd Bishop, a former Wyoming State Engineer and WSWC member, passed away on May 28, at the age of 97. In 1995, former Wyoming Governor Clifford Hansen wrote that in 1963 he had "persuaded Floyd to abandon a private engineering practice, which was more financially rewarding, in order to serve his state." He was so successful as State Engineer and so well respected by governors and engineers of the other western states, that Governor Stan Hathaway reappointed Bishop to another six-year term. Bishop also served on the WSWC for ten years (1965-1975) serving as the WSWC Secretary-Treasurer (1970-1973).

Thomas E. Cahill, 85, a former WSWC member from Wyoming, passed away on January 24. Tom started his career as a Special Assistant Attorney General representing the Wyoming State Engineer. When the Council was organized in June 1965, he was appointed as an alternate WSWC member. In 1969, he was hired as the Council's Assistant Director and led the Council as Executive Secretary and Executive Director from 1970 to 1973. He left to accept a position as General Counsel with the National Commission on Water Quality. He later served as Director and Chief Executive Officer of the Colorado River Commission of Nevada, eventually returning to Cheyenne and private law practice.

Thomas S. Maddock, 90, a former WSWC member from California, passed away on February 3. Thomas began his work career in 1957 with Boyle Engineering in Bakersfield, California where he took on major state and worldwide water projects and became President and CEO in Orange County in 1975. He became Chairman in 1993, retired in 2001, and continued to work as a consulting engineer. Thomas was elected to the National Academy of Engineering in 1993 and later as an Honorary Member of the American Society of Civil Engineers (ASCE). He was a Distinguished Alumni of Virginia Tech, School of Civil and Environmental Engineering, and served on numerous boards and societies. He was a licensed professional engineer in 18 states. In 1994, the Governor appointed him to represent California on the WSWC, where he served for fifteen years as a member of the Council, on the Water Resources and Legal Committees.

Kansas

In December, **Tracy Streeter**, WSWC Member, and a Kansas government leader who was instrumental in developing a long-term vision for protecting and sustaining the state's water resources, joined Burns & McDonnell. Tracy served 33 years in positions related to Kansas water

resource management, including 14 years as Director of the Kansas Water Office. Tracy was appointed as an alternate member to the Council in May 2009.

Montana

Governor Steve Bullock named **Jan Langel**, Acting Administrator, Water Resources Division, Montana Department of Natural Resources and Conservation, and **Tom Livers**, Director, Montana Department of Environmental Quality to the WSWC.

New Mexico

In December, New Mexico State Engineer and WSWC member **Tom Blaine** announced his retirement. He was appointed in December 2014 by Governor Susana Martinez and served on the WSWC Executive and Water Resources Committees.

Texas

Governor Greg Abbott appointed **Peter Lake**, Chairman, Texas Water Development Board to replace Bech Bruun on the WSWC.

Washington

Washington Governor Jay Inslee appointed **Mary Verner**, Water Resources Program Manager, Department of Ecology (DOE) to the WSWC. Governor Inslee also appointed **Mike Gallagher**, Water Resources Section Manager, DOE to serve as an alternate member. **Maia Bellon**, DOE Executive Director and **Alan Reichman**, Assistant Attorney General will continue to serve as members.

Wyoming

Wyoming State Engineer, **Pat Tyrrell** notified Governor Matt Mead in November of his plans to retire following the state general legislative session. Pat was appointed to the WSWC in 2001, and served as WSWC Chair from 2014-2016.

WSWC/WestFAST

WestFAST selected John D'Antonio, U.S. Army Corps of Engineers (USACE), to serve a two-year detail as the next Federal Liaison to the WSWC. He will be stationed in the WSWC's offices and will work to coordinate WSWC and WestFAST activities and to further federal-state collaboration. John succeeded Roger Pierce, who was with the National Oceanic and Atmospheric Administration (NOAA), National Weather Service.

COUNCIL MEETINGS

186th Council Meetings Arlington, Virginia March 14-15, 2018

The Western States Water Council (WSWC) held its Spring 2018 meetings in Arlington, Virginia on March 14, in conjunction with the meetings of the Interstate Council on Water Policy (ICWP). Abbreviated WSWC Committee meetings were held consecutively, addressing newly proposed and sunset policy positions, followed the same day by the Full Council meeting. The Council readopted a position presenting numerous considerations for integrating western water and energy planning and policy. Another position, revised and readopted, supports state and federal applied research and hydroclimate data collection programs, to assist water agencies and all levels of government to make sound scientific decisions and adapt to climate variability. Similarly, a position statement emphasizing state primacy over groundwater was readopted with few changes that declared states have exclusive authority over the allocation and administration of rights to the use of groundwater, and states are primarily responsible for protecting and managing groundwater.

Three new positions were approved. The first supports the development and use of forecast informed reservoir operations (FIRO) using innovative technologies to maximize the effective and efficient use of existing and future water resources infrastructure to meet myriad and growing economic needs for water, as well as balance and protect public health, safety, and the environment. The second addressed the urgent need to invest in water-related infrastructure at the federal state and local level, to meet both water supply and water quality challenges, while also seeking assistance from the private sector. It noted the need for leadership at all levels to establish water infrastructure investments as a public policy priority, as well as streamline permitting processes, coordinate environmental and other regulatory reviews, and eliminate duplicative requirements to reduce costs and promote timely project completion, maintenance and relicensing. The third new position recognized the importance of weather station networks, many under-funded and in eminent danger of failure. The U.S. Bureau of Reclamation's (USBR) Agrimet network is one example. These network observations of temperature, precipitation, wind, and other parameters are critical in estimating crop water needs and evapotranspiration, which in turn are the foundation for better management and conservation of water resources, as well as warning of extreme events and protecting public health and safety.

Other topics discussed in the Committee meetings included improving state-federal relations, with updates on the Western Governors' Association's (WGA) State-Federal Relationship Summit and the Environmental Protection Agency's (EPA) State outreach efforts. The federal agencies were reminded to treat states as government partners rather than stakeholders. Federal agencies should make a concerted effort to consult with states in substantive ways. States can provide meaningful information and use their respective authorities and regulations. Both sides must learn how they can work together to achieve common goals with limited government resources.

The WSWC staff and members provided brief summaries of recent workshops on water information management, earth system prediction capabilities, and seasonal to sub-seasonal (S2S) precipitation forecasting. Workshops were planned for the Summer and Fall Council meetings on the water quality-quantity nexus, grazing and water rights, respectively. Plans for an Infrastructure Symposium were also discussed.

WSWC and ICWP met jointly on March 14-15, for a Water Planners' Conference and Roundtable with multiple federal agency representatives, and also hosted a reception for Congressional staff.

The Department of the Interior (DOI) roundtable discussion included: Tim Petty, Assistant Secretary for Water and Science; Brenda Burman, USBR Commissioner; and William Werkheiser, Acting Director for the U.S. Geological Survey (USGS). They emphasized efforts to streamline the permitting process, the significant interest in new surface water storage projects, and concerns about drought and limited budgets. Discussions included: (1) the impact of renewable energy policies on hydropower costs and contracts; (2) the critical importance of the upcoming Landsat 9 launch; (3) streamgauge monitoring; and (4) identifying ways to work with states on projects to store water underground. DOI also addressed the importance of Indian water rights settlements and renegotiation of the Columbia River Treaty.

During the U.S. Army Corps of Engineers' (Corps) roundtable discussion, Ryan Fisher, Principal Deputy Assistant Secretary of the Army (Civil Works) talked about working with EPA to develop new Waters of the United States (WOTUS) rule, meeting with states and tribes and focusing on not only protecting water, but also recognizing state primacy. Edward Belk, Chief of Civil Works Programs Integration, described the backlog of authorized infrastructure, the mission of the Corps, and the struggle to keep water at the forefront of the Administration's Infrastructure Initiative. They addressed concerns about inconsistencies between Corps districts, noting the challenges of becoming more agile in decisionmaking, and delegating authorities, while ensuring internal accountability and clarity regarding Corps policies and rules.

Craig McClean, Assistant Administrator for Oceanic and Atmospheric Research provided a historical update on the National Oceanic and Atmospheric Administration (NOAA) and improvements to forecast models. He pointed out that it is a time of great promise with the confluence of technologies and nations working together.

David Ross, Assistant Administrator for Water, EPA, spoke about the engagement with the states as they work to define a new WOTUS rule. Mr. Ross also addressed a variety of topics ranging from infrastructure needs related to water quality, EPA's water transfers rule, nutrients and non-point source pollution (perhaps the greatest remaining threat), and EPA's lead and copper rule.

The U.S. Department of Agriculture (USDA) roundtable discussion included: Mark Brusberg, Chief Meteorologist, Office of the Chief Economist/World Agricultural Outlook Board; Chris Carlson, Assistant Director, Water and Aquatic Resources, U.S. Forest Service (USFS); and

Astor Boozer, Regional Conservationist, Western Region, Natural Resources Conservation Service (NRCS). They addressed interagency partnerships such as the National Drought Resilience Partnership and National Integrated Drought Information System (NIDIS), as well as joint efforts with NOAA to develop soil moisture data. They discussed intra-agency efforts to work together to address wildfire, data and information sharing, and water conservation.

Bradley Doorn, Water Resources Program Manager at the Earth Science Division led the National Aeronautics and Space Administration (NASA) roundtable discussion. He talked about their mission to integrate data and make it better not only for states, but also the other federal agencies, to improve decisionmaking. He addressed international efforts to improve satellite data, and recent success with airborne snow observation programs.

During the Water Planners' Conference, a data and information management panel addressed: USGS visualization tools and data organization; the National Groundwater Monitoring Network; USDA's NRCS SNOTEL sites; maintenance and staff challenges in managing databases; and NASA's efforts to ensure that data from its robust system of earth observation satellites is routinely available to meet the needs of western water managers.

A panel on groundwater management noted that models have improved in their capability and utility. Groundwater models are now able to provide answers in real time, and are used to determine whether new wells can be developed in an aquifer. Properly formatting data from satellites and other quality sources of water information has been key to obtaining meaningful output.

A water supply panel discussed efforts to improve the accuracy and timescale of drought forecasting in an integrated way that cuts across agencies, as well as identifying authorities to manage water operations in response to those forecasts. A landscape conservation panel addressed the importance of healthy watersheds, headwaters areas and restoration efforts, invasive species, and the need to better manage hazardous fuels ahead of wildfires.

On infrastructure, the Corps, USBR and EPA addressed funding challenges to maintain aging infrastructure, as well as build vital new projects. They discussed efforts to change policies on federally-owned infrastructure, and creative financing and cost-sharing to improve project delivery and operations.

A panel on farm policy talked about the role of water and conservation in food security, and crop insurance programs, noting that most crop losses are weather-based.

A Congressional staff panel provided updates on legislative efforts on infrastructure, water supply, drought resilience, Indian water rights settlements, streamlining the regulatory process, and budget priorities addressing western water needs. Surface water storage projects and desalination are solutions on the table, but the challenge is funding. Streamgaging is one of those quiet issues that needs to be regularly brought to the forefront.

On March 16, the WSWC met with the Western States Federal Agency Support Team (WestFAST) Principals. This year marks the 10th anniversary since WestFAST was created.

**187th Council Meetings
Newport, Oregon
August 1-3, 2018**

The 187th meetings of the Council were held in Newport, Oregon on August 1-3. The Council renewed two sunseting positions with minor revisions. The first recognizes the need and supports action to “expedite construction of authorized rural water supply projects...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.” The resolution notes a number of congressionally authorized and active rural water projects that are under construction in Montana, New Mexico, North Dakota and South Dakota, with a federal price tag of some \$1.2 billion. At the current rate of funding, completion of these projects will take decades, and the Council recommends increased spending from receipts accruing to the Reclamation Fund.

The second resolution reiterates the Council’s long declared position that transfers of water from one location to another through various conveyances without any intervening use or addition of any pollutant should not trigger federal permit requirements under the Clean Water Act (CWA) and its National Pollutant Discharge Elimination System (NPDES). The courts have deferred to the EPA’s current rule expressly excluding water transfers from regulation, but the Council also supports the codification of the rule¹ into statute by the Congress. The Council also recognizes and supports the use of available state authorities to “protect the water quality of the receiving water body in a water transfer.”

Lastly, the Council adopted a new resolution calling 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 the conservation of endangered species.” The resolution specifically notes such a policy direction is included in Section 2(c)(2) of the Endangered Species Act (ESA).² The resolution notes that western states are “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;” while also recognizing that “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.”

The resolution continues, “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

¹40 CFR 122.3(j)

²16 U.S.C. 1531

terrestrial environments upon which they depend.... Opportunities exist for greater cooperation to conserve threatened and endangered species....”

New Council officers were also elected at this meeting, with Jeanine Jones, California Department of Water Resources, elected as Chair; Tim Davis, Montana Water Quality Division as Vice-Chair; and Tracy Streeter, Kansas Water Office as Secretary-Treasurer. Also of note, the Council announced the selection of John D’Antonio, Corps and a former New Mexico State Engineer, as our new liaison with WestFAST. John will be working with Roger Pierce, National Weather Service, our current liaison, through a transition period until the beginning of the new federal fiscal year.

A number of other federal agency representatives attended and participated in the Council meetings, including: Kevin Werner, WestFAST Chair, NOAA; Pat Lambert, WestFAST Vice-Chair, USGS; Mindi Dalton, USGS Water Availability and Use Science Program; Doug Curtis, Bureau of Land Management (BLM); Deborah Lawler, USBR; and by phone, Roger Gorke, EPA.

Water Resources Committee Chair Tom Byler (Oregon) conducted its meeting and outlined WSWC efforts towards hosting a Water Infrastructure Symposium early next year. Mike Gallagher, Washington Department of Ecology, explained the state’s new Stream Restoration Act and related work. Dave Tuthill, Recharge Development Corporation (and a former Idaho member), presented a concept for private development and trading of recharged groundwater. Christopher Estes reported on the 2018 Instream Flow Council’s meeting and recommendations, as an At-Large Director. Jeanine Jones reported on the WSWC’s May 2018 Seasonal-to-Subseasonal (S2S) Precipitation Forecasting Workshop, and an outline of NOAA’s plan to implement the 2017 Weather Research and Forecasting Innovation Act, along with Kevin Werner and Roger Pierce. Sara Larsen, WSWC, updated members on progress with our Water Data Exchange (WaDE).

The Water Quality Committee, Chaired by Kevin Frederick (Vice-Chair, Wyoming), received an update on two Water Infrastructure Finance and Innovation Act (WIFIA) loans that EPA issued recently. Dan Kaplan described the King County (Washington State) wet weather treatment project and the loan application process. Jim Macy (Nebraska) talked about Omaha’s project addressing combined sewer overflow challenges. Both large projects were not only shovel-ready, but in progress, and had funding from various sources. The WIFIA loans significantly reduced the interest payments the respective projects would owe over time, saving taxpayers and ratepayers millions of dollars. The Committee also received an update from EPA on efforts to reach out to states and other stakeholders to address various water quality concerns through joint efforts, demonstrated by the recent Memorandum of Understanding signed by EPA and New Mexico to study respective legal frameworks for identifying alternative uses for produced water. Other topics of discussion included harmful algal blooms, groundwater as a conduit for pollutants (and NPDES permitting), and treatment of tribes as states for CWA purposes.

Ward Scott, Policy Advisor, WGA addressed both committees, noting efforts to keep federalism issues in the forefront for this Administration, and working toward better consultation and

collaboration between federal agencies and states. He also summarized WGA's recently renewed resolutions on water resources and water quality, as well as other water-related WGA letters and actions.¹

Of note, a half-day workshop on water quantity and quality issues was held prior to the usual meetings, as was a two-hour workgroup discussion (continuing a series of calls) focused on principles for any new EPA rule defining WOTUS.

During the Legal Committee, Jen Verleger (North Dakota) updated members on issues related to the Corps' surplus water rule and elutriate testing and state sovereignty over streambeds. Mike Ellingburg from Corker Horton & Bell presented Mississippi's perspective of the hydrologic, legal, and state sovereignty issues in the interstate groundwater pumping case, *Mississippi v. Tennessee*. Tom Byler described the recent increase in the use of Petitions for Judicial Review under Oregon law to delay final orders from watermasters regulating junior water rights users. The Committee discussed recent developments in Indian water rights settlements, how states address calls and curtailments, and other legislation and litigation.

Two special guests from the American Water Resources Association (AWRA) addressed the full Council on AWRA activities. Brenda Bateman (Oregon Water Resources Department), AWRA President, described efforts related to state water planning, as well as various upcoming AWRA meetings and her attendance at the 2018 World Water Forum in Brasilia. Michael Campana, AWRA Technical Director (Oregon State University), noted a number of AWRA webinars on various topics and opportunities to participate.

188th Council Meetings Coeur D'Alene, Idaho October 24-26, 2018

The 188th meetings of the Council were hosted by the State of Idaho in Coeur d'Alene on October 24-26. The Council revised and adopted its Vision on Water as a permanent mission statement. The Council also renewed four sunseting positions. The first recognizes the critical importance of federal water and climate data collection and analysis programs to the Western states. Language was added to clarify that these "federal programs provide useful products to assist in visualizing and interpreting data on water and snow, making water supply and availability information more accessible and easy to interpret."

The second resolution addresses drought preparedness and monitoring networks. It emphasizes the important role of federal programs designed to improve forecasting and response capabilities, such as the NIDIS and NOAA programs. The third resolution supports the USBR's Drought Response Program. The fourth resolution opposes federal policies that interfere with state

¹www.westgov.org

authority over the allocation of surface water, including natural flows that would exist in the absence of reservoirs built by the Corps.

The Council adopted a new position supporting state-delegated authority under CWA Section 401 to review federally permitted or licensed projects for impacts on water quality. Lastly, the Council adopted a new resolution on CWA jurisdiction, acknowledging that EPA has “actively sought meaningful state consultation, engagement and participation in its review and development of a new proposed rule to define Waters of the United States” and encouraging continued consultation in authentic partnership with the states. EPA was expected to publish a new rule in the coming weeks.

Tim Petty, Assistant Secretary for Water and Science, DOI, spoke to the Council. He noted the importance of developing positive relationships at all levels. He said that when he was appointed to his position, he called David Ross at EPA, and they agreed to get together on a monthly basis. They reached out to Admiral Gallaudet at NOAA, R.D. James at the Corps, Cathy Tripodi at the Department of Energy, and Bill Northey at the USDA. They started calling themselves the Water Subcabinet, getting together on a regular basis to discuss and support their respective key roles on water. Rather than reinvent the wheel, they hope to use programs and groups already engaged on water issues, and work more effectively together to address critical needs, including: infrastructure; storage; water reuse; aquifer recharge; produced water; drought contingency plans; open water data; streamgages; and Landsat technology.

A number of other federal agency representatives attended and participated in the Council meetings, including: Kevin Werner, WestFAST Chair (NOAA); Tom Hamill, NOAA Earth Systems Research Laboratory; Pat Lambert, WestFAST Vice-Chair, USGS; Chris Carlson, USFS; Mindi Dalton, USGS Water Availability and Use Science Program Acting Coordinator; Doug Curtis, BLM; Deborah Lawler, USBR; Jama Hamel, USBR Agrimet Program Coordinator; Stephen Bartell, U.S. Department of Justice (DOJ); Forrest Melton, NASA Western Water Applications Office; and by phone, Roger Gorke, EPA.

In the Water Resources Committee, WSWC Chair Jeanine Jones (California) provided an update on recent programmatic efforts on seasonal to subseasonal forecasting. Sara Larsen, WSWC, updated members on progress with our WaDE.

Tracy Streeter (Kansas) provided an overview of some key provisions in the conservation title of the Farm Bill, including the Environmental Quality Incentives Program (EQIP) and the Conservation Reserve Program (CRP). He noted there is some tension between the eastern and western states about what the programs should include.

Amy Kremen, Ogallala Water Coordinated Agriculture Project Manager, described a recent summit with 210 participants from the eight states that share the aquifer, held to build relationships and identify collaborative opportunities among producers, water management districts, elected officials, researchers, and non-profits. They looked at a combination of technology, conservation,

soil health, water use, crop management, and other interconnected factors to improve water management and water quality.

The Water Quality Committee, Chaired by Kent Woodmansey (South Dakota), held a robust discussion on appropriate limits on federal jurisdiction under the CWA. Ward Scott, Policy Advisor, WGA, discussed recent legislative and administrative efforts to limit states' CWA Section 401 authority. Mary Anne Nelson, Idaho Department of Water Quality, presented on Idaho's recent efforts toward assumption of the NPDES program.

Roger Gorke, EPA, spoke briefly about a Department of Energy (DOE) workshop on water scarcity and technology, and a symposium on produced waters in New Mexico. He noted that EPA is preparing webinar presentations on the WIFIA program and State Revolving Funds (SRFs) to show how the programs are working together.

During the Legal Committee, Jen Verleger (North Dakota) updated members on the timing of the Corps' final surplus water rule, and John D'Antonio, WestFAST Liaison, reported on his recent efforts to get the Corps to engage with the states in a more meaningful way to address concerns about natural flows.

Laura Watson, Washington Assistant Attorney General, presented the implications of *Washington v. United States*. The Supreme Court allowed the 9th Circuit's decision to stand, requiring Washington to replace over 800 culverts by 2030 in the middle of a construction boom. She also noted concerns about the court's expansive interpretation of tribal treaty rights.

Judge Eric Wildman, Idaho District Court, and Steve Snyder and Alf Brandt from the Dividing the Waters program, provided an overview of their Groundwater Bench Book, which is intended to assist judges that are new to water cases involving the science, law, and hydrologic modeling of groundwater.

Darrell Early, Natural Resources Division Chief from the Idaho Attorney General's Office, gave a presentation on several legal issues Idaho is facing, including stockwater rights, conjunctive management of groundwater and surface water, refill rights at on stream reservoirs, adjudication of water rights in the Coeur d'Alene-Spokane River Basin, and dealing with issues of non-point source contamination impacting water quality at Coeur d'Alene Lake.

During the Full Council meeting Jama Hamel, USBR, provided an update on the growing AgriMet network, with almost 300 stations, collecting local weather and evapotranspiration data. Although the network was originally established to identify the consumptive water use of crops to assist irrigators, the data have also been used for ground-truthing remote sensing and satellite data, input for weather forecast models, drought monitoring, long-term climate models, wastewater reuse and groundwater quality, and water rights litigation.

Forrest Melton, NASA, described the ECOSTRESS thermal radiometer experiment, measuring evaporative stress data from the space station, which is included in the National Drought Monitor. It may provide a cost-effective complement to Landsat data. He also provided an update on other NASA missions, including the Gravity Recovery and Climate Experiment Follow-On (GRACE-FO), launched in May, and the Ice, Cloud, and Land Elevation Satellite-2 (ICESat-2), launched in September.²

²PowerPoint presentations given at the meetings are posted on the WSWC's website. See: <http://www.westernstateswater.org/upcoming-meetings/past-meetings/>.

OTHER MEETINGS

Western Governors' Association

State and Local Government Associations Summit

On February 27, the WGA, Council of State Governments-West (CSG-West), and other members of the Western Policy Network held a State and Local Government Associations Summit in Washington, D.C. with a wide range of Administration officials. Jim Ogsbury, WGA Executive Director, opened the meeting and addressed its objectives. In 2017, WGA adopted a resolution that provided a “road map” for achieving a more functional state-federal relationship. CSG-West, the National Association of Counties and other organizations have adopted similar statements. A collaborative effort led to the development of shared federalism principles, and a Summit of Federalism in February 2017. The participating organizations carried these principles to the Administration and the Congress.

The speakers identified specific opportunities for actions to foster a sense of partnership that would lead to improved and durable state-federal relationships. A slide “STATES NOT STAKEHOLDERS” captured the theme of the meeting. Ogsbury noted the Constitutional division of state and federal powers, between two sovereign levels of government, adding that states are not merely stakeholders. Federal powers are limited and defined, while the 10th Amendment reserved broad powers for the States. The state-federal relationship is very complex. He specifically mentioned delegated authorities under the CWA and Clean Air Act. He also raised issues related to groundwater management and federal and tribal reserved water rights. There are both legitimate and illegitimate impediments to building better, stronger and more collaborative state-federal relationships, and the meeting was intended to find common ground.

Special guest speakers included Utah Governor Gary Herbert and Rep. Rob Bishop (R-UT), Chairman of the House Natural Resources Committee. The Governor noted his 14-years of experience as a county commissioner, before also serving as Lieutenant Governor. He highlighted Constitutional history, referring to James Madison and the Federalist Papers #45 as designed to limit the power and authority of the federal government and reassure states reluctant to cede too much power to the central government. He opined on how things have changed nothing that James Madison must be “spinning in his grave.” Today, the federal budget is some \$4 trillion dollars, annually, compared to \$1.7 trillion for all 50 States combined. It’s our money and the federal budget should reflect our priorities. Federal agency “mission creep” is in part due to our turning to the federal government to solve all our problems. One size doesn’t fit all. He added states are the laboratories of democracy, and the most effective and cost effective level of government to meet most public needs. He asked, “Who cares about the education of our children more, the federal government or the people of the State of Utah?”

Congressman Bishop exclaimed, “We are trying to work together as States and the Federal Government.” But if one is out of line, “How do we reign in their power?” Bishop chairs the Task

Force on Intergovernmental Affairs created last year by House Speaker Paul Ryan. He called for specific ideas on how to protect state primacy and proposals for statutory changes to empower states, recognize their special standing, and require meaningful consultation. He asked, “how do we define consultation?” He suggested that federal money is the tool used to get states to “do what we want you to do.” We provide grants with little flexibility. How do we get away from that? If states leave the money on the table, they lose it. More and more we are looking at federal legislation in terms of Constitutional authority and the impacts on states. He also noted efforts to establish national goals and support state programs to achieve those goals

State representation at the summit included the National Governors’ Association, Coalition of Northeast Governors, the Alaska, Guam and Nevada Governors’ Offices, California Natural Resources Agency, the State of Colorado Office of the Attorney General, National Association of Counties, Council of Western State Foresters, Environmental Council of the States, the National Association of State Departments of Agriculture, Western States Air Resources Council, Western State Land Commissioners Association, and WSWC.

Federal agency speakers represented the White House, Office of Management and Budget (OMB), Council on Environmental Quality (CEQ), U.S. Departments of Agriculture (USDA), Education, Interior (DOI), and Homeland Security, as well as the EPA.

Doug Heolscher, Special Assistant to the President and Deputy Director of Intergovernmental Affairs, declared, “States created the federal government and not the other way around.” While recognizing there is more to do to repair state-federal relationships, he observed that in the first year of this Administration the President personally has interacted with state governors on 169 occasions, Vice President Pence (a former governor) 172 times, and cabinet members 840 times. Forty governors attended a White House campus meeting. He acknowledged, “We have to do this right. Governors want less talking to and more talking with.” He suggested the need for a robust plan, as even those that come from states to the federal government forget. State associations need to be at the table.

Jessica Anderson, OMB Associate Director, Intergovernmental Affairs and Strategic Initiatives noted the need for innovative policy ideas and a firm structured relationship with states. “We want to talk early and often.” She referred to federal government reorganization efforts, and legislative and policy work. She asked States for help in getting the President's infrastructure package “over the line” in this Congress.

Jeffrey Harris, OMB Assistant Administrator, Office of Information and Regulatory Affairs (OIRA), discussed efforts to review regulations with significant economic and policy or legal consequences and ensure uniformity. OMB would like to complete its internal review of proposed rules within 90 days. Director Mick Mulvaney has emphasized the importance of operating within federal authority. “It is not our job to push the envelope.” OMB will also respect state roles and ask, “Are States already doing the job?” He offered to help states understand where the decision points are within the White House and how to elevate policy questions. OMB is moving towards greater

flexibility and improved federalism. He specifically noted “big ticket” items, including the Clean Power Plan and WOTUS. We want to stop bad rules, and push good rules.

Alex Herrgott, CEQ Associate Director for Infrastructure, also discussed the need for regulatory streamlining. “We need to get out of your way.” He lamented the legacy “paper-based” networks, with no clearinghouse for permits for infrastructure projects to proceed expeditiously. One decision has to go through multiple agencies and offices. CEQ’s goal is to reduce the time and costs related to permits, requiring one agency to take the lead on one project with no more than 21 months for review under the National Environmental Policy Act (NEPA) and another three months to issue the relevant permits. This will require institutional and behavioral changes, as well as changes in agency business plans. The White House is looking at things from the view of private investors with capital at risk. We should remove as many hurdles as possible. He mentioned the President’s \$1.5 trillion Infrastructure Initiative, on top of existing federal spending, and opportunities to leverage private investment.

Blake Rollins, USDA, Director of the Office of External & Intergovernmental Affairs, noted that Secretary Sonny Purdue is leading efforts to address rural prosperity, including integrating federal agency responses to cross-cutting issues. The White House is emphasizing the “One Government, One Answer” theme. He noted 85% of impoverished U.S. counties are in rural America. Doug Crandall, USDA Acting Deputy Assistant Secretary, Office of Congressional Affairs, admitted, “Our forests are a mess.” Some 80 million acres are at high risk, with over 50% of the USFS budget spent on firefighting, and that cost is growing. “We share [problems with] fires, land, water, drought, invasives, beetles and disease. We can’t solve these problems without help. We need discussions early and often with states.” USDA is working to standardize environmental analysis and decisionmaking processes, including grazing permitting. He asked, “Where is it easy to work with us, and where is it hard?”

Todd Wynn, DOI, Director of the Office of Intergovernmental and External Affairs, offered to serve as a liaison with senior officials. “I am actually reaching out, and not to just check a box.” We want to work with you and other state partners, he said. “The White House demands it!” We want to hear what is important to you and help solve problems and get you answers. He asked the states to reach out, and don’t assume we know your concerns. He noted that his staff of five serves nine bureaus across five time zones. Casey Hammond, newly confirmed Deputy Assistant Secretary, Land and Minerals Management, worked on the Hill for Chairman Bishop. He said, “It is funny to be sitting on this side of the table banging on the same issues.... We know what States are. States are not stakeholders.” However, he advised, “If you are going to be heard, you are going to have to raise your voice.” He noted Secretary Ryan Zinke has put in place a state-centric team, and now is the time to move with urgency to make changes. The proposed reorganization of the Interior Department is of particular concern to governors which have called for withdrawal of the current plan pending greater dialogue with the States.

Henry Darwin, EPA, Chief Operating Officer, served in the same position for Arizona Governor Doug Ducey. He said his most “disturbing” realization upon arriving at EPA was there

is no comprehensive system to engage with the States. Most everything is done on a region-by-region and state-by-state basis with some openly treating State A differently than State B based on politics. “It was eye opening.” EPA is now going to each region and asking about their relationships with the States. The two issues he hears about most are first, that states don’t know how to elevate issues for a decision within EPA, and second that it takes too long to get a decision. He is working to set up management systems for accountability and review measurements on a monthly basis. This includes addressing overdue state requests, and legal or other deadlines. He concluded that EPA partnerships with the States are very important.

Annual Meeting

The WGA annual meeting was held in Rapid City, South Dakota on June 25-27. Seven governors attended, including John Hickenlooper (CO), Butch Otter (ID), Steve Bullock (MT), Doug Burgum (ND), Dennis Daugaard (SD), Gary Herbert (UT) and Matt Mead (WY). Among the special guests were Saskatchewan Premier Scott Moe, DOI Secretary Ryan Zinke and Labor Secretary Alexander Acosta, as well as Secretary of the Air Force Heather Wilson.

WGA Executive Director Jim Ogsbury praised the Governors for their commitment to “bipartisan solutions to the challenges facing our Nation.” Chairman Governor Daugaard’s Initiative for the past year was workforce development, and WGA released a first-year report highlighting work to bridge the skills gap between workers and employers, including enhanced opportunities for students, graduates and displaced workers to help build a more vibrant regional economy.

Secretary Acosta’s comments preceded a panel discussion on the initiative. He noted most jobs are created by small businesses. He also referred to the fact that the Nation is almost at full employment, and there is a need to bring people that may have dropped out back into the workforce. He addressed this Administration’s efforts to treat States very differently and provide them with greater flexibility.

Other panels addressed: (1) technology and hardware and software tools, as well as more data, to provide greater opportunities for States to better serve citizens and manage government operations; (2) the impacts that wildfire has on water supplies and regional air quality, as well as steps to mitigate the effects; and (3) battling the opioid epidemic. With respect to wildfires, Governor Bullock noted the impacts on water quality can be evident for decades.

Secretary Zinke spoke from the amphitheater at Mt. Rushmore. Governor Otter introduced Zinke and praised him for returning to the States greater control over lands previous designated as monuments, including Utah’s Bear’s Ears. Zinke suggested, “If you don’t know the difference between the Potomac and the Yellowstone River, then you shouldn’t be making so many rules that affect the Yellowstone.... I don’t think that one size fits all. My job is to ensure that one size doesn’t fit all.”

He declared, “Infrastructure will become a key issue for Interior moving forward. America needs to invest in our parks...” in partnership with the States. He also addressed Interior reorganization and attempts to ensure the bureaus work together within watershed boundaries. The governors expressed appreciation for his willingness to listen to their concerns and modify reorganization efforts.

Zinke observed that the United States is producing some 10.7 million barrels of oil per day and will be the number one producer of oil and gas in the world. With respect to energy, Interior believes in an “all of the above” approach, and he noted that it is better to meet our needs through domestic production under reasonable environmental regulation. He added our regulatory framework needs to promote innovation and take advantage of cutting edge technology and partnerships, promoting safety and environmental stewardship. As a Navy seal, he saw in the Middle East the way that things shouldn’t be done. He drew applause when he declared, “There are a lot of reasons to go to war, but energy, when we have it here, is not one of them.” He added, “Jobs matter. American’s need to make a living...and attain the American dream.” Energy and technology, low cost energy, provide us a competitive edge over other countries.

The Governors adopted policy resolutions related to infrastructure, international trade, workforce development, abandoned mines, radioactive waste, a National Minerals Policy, enhanced oil recovery, transportation, air quality and methane emissions, as well as renewing policies related to both water resources and water quality.³

Water Resource Management in the West (Resolution 2018-08) reasserts that states have primary authority over water management and allocation, and that federal investment is critical to water infrastructure needs. It also highlights Governors’ encouragement of effective partnerships between state, federal, tribal, and local governments; reliable and up-to-date water resource information; and drought preparedness and response. “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.”

The Governors further state: “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.... The federal government has long recognized the right to use water as determined under the laws of the various states. 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

³www.westgov.org/resolutions

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.”

Cleaning Up Abandoned Mines in the West (2018-11) is an updated call for Congress to protect “Good Samaritans” that voluntarily clean up abandoned mines from potential liability under the CWA, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and Resources Conservation and Recovery Act (RCRA). It elucidates the Governors’ support for pilot projects if comprehensive legislation is not possible and provides recommendations for Good Samaritan remediation plans, permitting, reviews, and approvals that will facilitate the voluntary cleanup of abandoned mines.

Water Quality in the West (2018-12) declares Western Governors call on the federal government to provide adequate funding and tools to assist states in complying with federal water quality and drinking water requirements and for federal deference to states’ primary authority over water management and allocation within their borders.

Modernizing Western Infrastructure (2018-15) notes that Western Governors support more efficient infrastructure permitting and environmental review processes without shortening timelines for state input and consultation – or compromising natural resource, environmental, or cultural values. Early, meaningful and ongoing state consultation on infrastructure will help prevent delays, reduce duplication, and streamline the process. The Governors also recommend that the federal government encourage joint NEPA reviews with states improve the cooperating agency approval process and work directly with states to use up-to-date state data and analyses in the NEPA process.

The resolution states: “Investments to modernize our states’ 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.... 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 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.... Federal agencies should be required to engage with states and state agencies in early, meaningful, substantive and ongoing consultation.”

Winter Meeting

The WGA’s Winter Meetings were held December 11-13, in Kona, Hawaii with Governor David Ige hosting ten governors, including Governors “Butch” Otter (ID); Steve Bullock (MT); Brian Sandoval (NV); Doug Burgum (ND); Ralph Torres (Northern Mariana Islands); Mary Fallin

(OK); Kate Brown (OR); Dennis Daugaard (SD); Gary Herbert (UT); and Matt Mead (WY). WGA Executive Director Jim Ogsbury recognized each of the governors for their knowledge (hohonu), understanding (ike), learning/teaching (kuauha), strength (ikaika), wisdom (na'auao), endurance (ahonui), and authority/leadership (mana). In Hawaiian tradition, the opening ceremony included song and dance.

A special guest speaker was Nainoa Thompson of the Polynesian Voyaging Society, dedicated to teaching traditional “wayfinding” navigation. He described the history of Hawaiian and Polynesian migration and navigation and the importance of living sustainably to maintain the health of the oceans and the Earth. He also noted that in the Islands wealth was defined by access to fresh water! Thompson led an expedition to sail around the world, using as much of the traditional navigation tools as possible, and emphasizing minimizing our carbon footprint. He declared, “The world needs navigators. We need to teach young people to love to explore.” We need to be courageous, find strength in diversity, and not forget where we came from.

Governor Ige moderated a discussion on Biodiversity and Invasive Species and the impact on our environment and economy. Phyllis Shimabukuro-Geiser, Hawaii Department of Agriculture, described the scope of the problem. “We import 80-90% of our food, the number of visitors to Hawaii is higher than ever before, and the purchase and shipping of online goods only complicates matters further.” Ulalia Woodside, Nature Conservancy, noted: “About 90% of the flowering plants in Hawaii are found nowhere else in the world; 80% of birds are found nowhere else. And there are over 5,000 species of insects in Hawaii.” Osama El-Lissy, USDA’s Animal and Plant Health Inspection Service (APHIS): “One of the things that makes it challenging to increase food production is invasive species.” Losses due to invasive species are estimated at \$220 billion every year in direct costs. When you include indirect costs, it goes up to \$1.9 trillion. That’s 5% of the global GDP.”

A roundtable on Harnessing the Power of Outdoor Recreation focused on economic growth across the region. Tom Adams, Utah Office of Outdoor Recreation, said: “We’re one of the fastest growing states in the nation, and outdoor recreation is one of, if not the number one recruiting factor. Companies come to, stay, and grow in Utah because of the access to the outdoors.” Luis Benitez, Colorado Outdoor Recreation Industry Office, added that outdoor recreation involves “stewardship, education and workforce training, economic development, and public health and wellness.” Domenic Bravo, Wyoming Outdoor Recreation Office and State Parks, remarked: “We’re working on collaboratives across the State. We’re helping communities look at and define their assets. What can we do to help you be successful in the outdoor recreation space?” Rachel VandeVoort, Montana Governor’s Office of Outdoor Recreation, declared: “This is an incredibly important part of our economy. Outdoor recreation touches 67 of the 71 core sectors of our economy.”

Sonny Perdue, Secretary of the USDA kicked off the second day with a keynote address that stressed the importance of state and federal collaboration. He stressed a “shared stewardship” theme. He applauded the work of the western governors, particularly for their push to resolve the federal appropriations fire borrowing issue and improve forest and rangeland management. He noted a visit to Paradise, California and the devastation of that community, while noting the demarcation between

areas where forest thinning and clearing had been done to remove hazardous fuels. As the former Governor of Georgia, he shared his commitment to genuine USDA outreach and USDA's Good Neighbor Initiative. He noted there are now 136 agreements on 56 forests in 36 states making it easier to remove unproductive biomass by streamlining environmental analysis, increasing efficiency, and reducing costs. He touched briefly on the 2018 Farm Bill describing it as evolutionary and building on the 2014 legislation. It is an improvement, but did not address all the department wanted to move people towards greater independence.

Following the Secretary's remarks, there was a signing of a Memorandum of Understanding (MOU) to "establish a framework to allow the Forest Service and WGA to work collaboratively to accomplish mutual goals, further common interests, and effectively respond to the increasing suite of challenges facing western landscapes." The MOU furthers two ongoing activities, Secretary Perdue's Shared Stewardship Initiative and the WGA's National Forest and Rangeland Management Initiative. The agreement was signed by Secretary Perdue, Governor Ige as WGA Chair, and Governor Doug Burgum as WGA Vice Chair.

"This is an important step in cooperatively addressing land management challenges," said Governor Ige. "We recognize that no one agency or level of government has the capacity to deal with all of these risks alone. This MOU puts us on a path to working closely on these serious matters."

"Governors possess primary decision-making authority for management of state resources, including many resources on federal lands. Being a 'good neighbor' is an essential component in USDA's work, which is why this MOU is so important," said Secretary Perdue. "USDA's Forest Service will work shoulder-to-shoulder with WGA to co-manage risks and identify land management priorities. As authentic collaborators, the states and federal government will improve service to the public by creating more efficient, effective, and long-lasting policy."

Federal, state and private managers of forests and rangelands face a multitude of urgent challenges, including catastrophic wildfires, invasive species, degraded watersheds, and epidemics of insects and disease. The conditions fueling these circumstances are not improving, as demonstrated by the devastating wildfires of 2018. The USFS announced a new strategy earlier this year to work more closely with states to identify landscape-scale priorities for targeted treatments. Over the past two years, Western Governors have been examining a wide variety of land management challenges, including those involving large landscapes with multiple ownerships.

Robert Wilkie, the Secretary of Veteran Affairs, described the changing demographics challenging the VA and efforts to modernize agency record keeping and facilitate service delivery. Entrepreneur Henk Rogers addressed the renewable energy efforts of his Blue Planet Foundation and Hawaii's commitment to generate 100% of its electricity from renewable sources.

The final day concluded with and a keynote by Administrator Linda McMahon, Small Business Administration, the reflections of outgoing governors, and the announcement of four policy resolutions on foreign visitors, cyber security, compensatory mitigation and health care.

Water Information Management Systems Workshop

The WSWC and the NASA Western Water Applications Office (WWAO) hosted a Water Information Management Systems (WIMS) workshop at the Jet Propulsion Laboratory/Caltech (JPL) in Pasadena, California on January 16-18. Stephanie Granger and other WWAO representatives welcomed the over 70 public, private and academic representatives in attendance. Over 27 state water agency staff participated from Arizona, California, Idaho, Kansas, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, and Wyoming. There were over 37 presentations on a series of panels addressing: (1) water rights and water rights adjudications and data management strategies; (2) water use, permitting and reporting systems; (3) States' use of the "cloud;" (4) advances in remote sensing for water resources management; (5) federal data sources and applications; and (6) data access, visualization, and archiving.

The goal of the workshop was to discover the needs of WSWC members regarding water data acquisition, quality control, and publication, and to generate a dialogue between states and the other attendees. Including an associated tour, the WIMS workshop provided a forum for the attendees to make many new connections with other states and agencies, hear about the diversity of new resources and tools available to water resource managers, and associate with others with similar interests in water data.

Representatives from western states presented on data management strategies that their offices were employing to improve adjudication processes, survey data collection in the field, and online platforms for both permitting and reporting from users. Methods used for water use projections and implementation of new water regulatory frameworks were also discussed. A significant portion of the meeting was set aside for advances in remote sensing, snowpack estimation, groundwater monitoring, and irrigation management, as well as support for greater use of remote-sensing tools by strategic use of cloud platforms. Discussion of the merits and challenges of cloud platforms for state agencies was a highlighted topic.

WWAO office representatives also had the opportunity to present on their ongoing collaboration and partnerships with state water resource management agencies and put forward new science and tools that could be useful for decision support. Breakout sessions enabled small group interactions with NASA-WWAO staff, and several presentations provided federal data program updates.

WSWC Vice Chair Jeanine Jones spoke over lunch on the merits of improved sub-seasonal to seasonal precipitation forecasting and the impacts that better modeling could have not only for California, but throughout the West.

The last day's focus was on "open water data" concepts and discovering the value of shared data. New technologies and strategies available for data acquisition, publication, and storage were also presented by state agency staff, ranging from use of unmanned aerial vehicles (UAVs), to new statutory requirements for data, to migrating to strictly "open source" tools and software. The meeting successfully provided a forum for many insightful presentations, questions, discussions, and interactions between the state water resources attendees and others.

Improving Sub-Seasonal to Seasonal Forecasting Workshop

On May 14-16, the California Department of Water Resources (CDWR) and WSWC co-hosted a workshop on Improving Sub-Seasonal to Seasonal (S2S) Forecasting in San Diego, California. Participants included 40 federal, state and local officials, and academic interests, from Arizona, California, Colorado, Nevada, Oregon and Texas. WSWC Vice Chair Jeanine Jones welcomed those in attendance.

NOAA's Office of Atmospheric Research, the Climate Prediction Center, the National Weather Service, the Colorado Basin River Forecast Center, the Earth System Research Laboratory and Geophysical Fluid Dynamics Lab were represented, along with the NIDIS and NOAA Fisheries. The NASA Jet Propulsion Laboratory, Earth Science and Technology Directorate participated, as did NASA's Applied Science Engineering Group. The USBR and USGS also participated.

State and local representatives came from the Arizona, California and Oregon Departments of Water Resources, the Salt River Project (Arizona), the Colorado River Board of California, the Orange County Water District, Sonoma County Water Agency and Metropolitan Water District of Southern California and Scripps Institute of Oceanography (at UC San Diego), Colorado State University, Southern Nevada Water Authority and Desert Research Institute (Nevada), Texas Water Development Board and Lower Colorado River Authority (Texas).

Among the many and varied topics presented and discussed were the Weather Research Act of 2017, California's investments in observations and research, incorporating satellite data in weather and climate models, Reclamation's forecast rodeo, atmospheric rivers and blocking events, cut off low pressure systems, improving forecasting out to week 4, seasonal snowpack prediction, cool-season precipitation mechanisms, river basin forecasting challenges, and FIRO.

On May 17, the Orange County Water District sponsored a field trip that highlighted its groundwater recharge and water reuse facilities.

Water Quality-Water Quantity Nexus Workshop

On August 1, the WSWC held a Water Quality-Water Quantity Nexus Workshop in Newport, Oregon. Dave Schade (Alaska) began the meeting noting continuing discussions of how to ensure sufficient quantities of water of suitable quality are available to meet our economic and environmental needs. Andrew Thuman from HDR, Inc., provided an overview of causes and controls of harmful algal blooms, modeling and monitoring case studies, and demonstrated improvements in predictive capabilities and linking technologies for better data collection. Tom

Byler (Oregon) talked about collaboration between states, tribes, and local communities, and efforts toward transparent watershed-scale planning. Oregon is trying to integrate quantity, quality, and ecosystem needs in a more holistic and forward-thinking manner, rather than focus only on solutions to an immediate crisis that may have unintended consequences.

The workshop included extensive presentations from Sara Larsen (WSWC), Pat Lambert (USGS) and Al Rea (USGS) on state and federal mapping resources, including their potential and limitations for regulatory purposes. Melinda Witgenstein and Joe Brock from the Corps explained tools and processes they use to make CWA jurisdictional determinations and issue nationwide permits. Roger Gorke discussed EPA's programs and resources to work with states to address water quality-quantity nexus issues, and suggested that WSWC and WestFAST work together to identify more projects where federal funding and programs can be used to help states and local communities achieve their goals.

Stock Water Rights for Grazing Livestock on Federal Lands Workshop

The WSWC-WestFAST Non-Tribal Federal Water Rights Workgroup held a Stock Water Rights for Grazing Livestock on Federal Lands Workshop on October 24, in Coeur d'Alene, Idaho.

Pat O'Toole, Ladder Ranch (Wyoming) started the workshop with a rancher's perspective. He noted that relationships are almost more important than the law, because the law is interpreted in different ways. Pat grazes cattle and sheep on BLM and USFS allotments, as well as private lands.

The workshop included presentations from Gary Spackman, Director of the Idaho Department of Water Resources; Norman Johnson, Division Director, Utah Attorney General's Office; Christopher Brown, Senior Assistant Attorney General for Wyoming; and Greg Ridgley, General Counsel for the New Mexico Office of State Engineer. Chris Carlson, USFS, and Doug Curtis, BLM, also participated.

States deal with stock water rights in a variety of ways, and grapple with issues of beneficial use, a complex history and culture, state and federal laws, and how to best approach relationships and disputes concerning water rights for stock grazing on federal lands.

CONGRESSIONAL TESTIMONY

House Natural Resources Committee

On April 18, 2018, the WSWC was invited to testify before the House Committee on Natural Resources Subcommittee on Energy and Mineral Resources on H.R. 3846 - POWER Counties Act. Tony Willardson, Executive Director for the WSWC provided the following testimony.

The WSWC strongly supports the appropriation and use of receipts that accrue to the Reclamation Fund for their intended purpose of financing the construction of authorized western water projects and programs. Moreover, the Council 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.

The Council is currently comprised of 18 States, including the 17 Reclamation States and Alaska, covering an expansive and diverse geographic, topographic, climatologic, meteorological, hydrologic and political spectrum. 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. Water is indeed our "life blood." It is a vital resource the availability of which has and continues to circumscribe growth, development, economic opportunity and our social and environmental quality of life. The wise conservation and management of our water resources is critical, particularly with respect to energy development and production.

The Reclamation Fund

Recognizing the importance of water to the development of the arid West, the Congress passed the Reclamation Act on June 17, 1902. It provided that monies be "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 the seventeen western states, to be continually invested and reinvested.

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...."

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. 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 discretionary federal expenditures pursuant to annual appropriation acts. This includes construction and operational expenditures of the USBR and the Western Area Power Marketing Administration.

The Reclamation Fund was established originally as a revolving fund for development of irrigation projects on the arid and semiarid lands of the 17 western states. However, receipts were not sufficient to fund early Reclamation projects.

The Mineral Leasing Act of 1920 provided for the deposit of receipts from natural resource royalties into the Reclamation Fund. Originally over 50% of receipts, in 1976 that amount was reduced to 40% of federal royalty payments from the production of oil, gas, coal, potassium, and other minerals on federal lands. Such payments currently account for more than half the Fund's receipts. In recent years, these receipts have also increased significantly.

According to the Administration's FY19 budget request, actual receipts accruing to the Reclamation Fund from various sources were \$1.942 billion for FY17, with estimated receipts of \$1.702 billion for FY18, and \$1.8 billion for FY19. By way of comparison, actual appropriations were \$1.054 billion for FY17, and estimated appropriations are \$1.057 billion for FY2018, with the President's initial budget request of \$827 million for FY19. The unobligated balance in the Reclamation Fund at the end of FY17 was \$13.824 billion. It is estimated to be \$14.469 billion at the end of FY18, and \$15.442 billion by the end of FY19.

This unobligated balance continues to grow as appropriated funds are substantially less than receipts. The unobligated figure gets larger and larger, but the money in the Reclamation Fund is in fact spent elsewhere for other federal purposes contrary to the Congress' original intent. Any unobligated balance essentially reduces federal borrowing to finance other federal expenditures.

The Council urges the Congress to investigate the advantages of converting the Reclamation Fund from a special Treasury account to a true revolving trust fund with annual receipts appropriated for authorized purposes in the year following their deposit (similar to some other federal authorities and trust accounts).

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.

Bureau of Reclamation Budget

USBR facilities include 337 reservoirs with the capacity to store 245 million acre-feet of water and irrigating approximately 10 million acres of farmland that produce 60 percent of the nation's vegetables and 25 percent of its fruits and nuts. Reclamation projects also provide 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 serving some 3.5 million households. Reclamation and its partners manage 289 recreation areas, with over 90 million visits annually. Reclamation projects further provide flood control, and fish and wildlife benefits.

Reclamation's dams and reservoirs, water conveyance systems, and power generating facilities are integral components of the Nation's infrastructure. Effectively managing the benefits provided by these structures are among the many significant challenges that Reclamation faces over the next five years and beyond in its ability to achieve progress on its mission objectives. Changing demographics and competing demands are increasingly stressing already strained systems. Reclamation's water and power projects and activities throughout the western United States are not only essential for sustainable and safe water supplies for both agricultural, municipal and industrial purposes, but also provide energy in the form of hydropower, and maintain ecosystems that support fish and wildlife, hunting and recreation, as well as rural economies.

As the largest supplier and manager of raw water in the nation and the second largest producer of hydroelectric power, Reclamation's projects and programs are vital for maintaining the quality of life in hundreds of watersheds throughout western states, provide an economic contribution of \$48.1 billion, and support approximately 388,000 jobs.

The Reclamation Act succeeded as a catalyst for the settlement of the arid West, which is now among the most urbanized regions in the Nation. The water and power resources developed and provided by the USBR (as well as the flood control benefits) over more than a century supported the growth and continue to be critical to the maintenance of the water supply for 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 diverse rural communities across the West.

The FY19 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 FY19 budget), \$1.5 billion for projects related to Indian water rights settlements (\$100.7 million requested for FY19), 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.

Similarly, the President’s FY19 budget request for Reclamation’s WaterSMART grants and programs, including basin studies, water conservation and field services, drought response and plans, resilient infrastructure and cooperative watershed management totals \$19.9 million compared to FY17 enacted levels of \$83.5 million.

Requested and appropriated funds have not been sufficient to complete many authorized projects in a timely manner or address many identified program needs. Increasing appropriations from the Reclamation Fund proportionate to receipts would expedite work to meet pressing water resources infrastructure and conservation and management program priorities. Reducing the percentage of Reclamation Fund receipts from mineral leasing royalties by half could seriously impede opportunities to address the backlog of authorized projects and fully fund Reclamation’s programs. Mineral leasing receipts for 2017 totaled \$1.136 billion, which reduced by half would be \$568 million. Estimated reductions for 2018 and 2019 would be \$676.5 million and \$699 million respectively.

State Mineral Leasing Revenues

As explained by the Tax Foundation, “The existing federal mineral royalty system is a result of the way in which lands in the U.S. were historically developed. Royalties collected by the federal government from mineral production on public lands is disbursed to a variety of areas, one of which serves as compensation to states for the costs accrued from production.... Rather than divest land from federal to state ownership, the government has opted to compensate states that contain federal lands on which production occurs via the disbursement of a portion of royalty revenues to affected states.... Mineral royalties collected by the federal government are disbursed to a variety of funds. Fifty percent of onshore lease revenue goes to the state in which the lease is located (except in the case of Alaska, where 90 percent of the royalties go back to the state), 40 percent is disbursed to the national Reclamation Fund (except in the case of Alaska, where no Reclamation Fund disbursement takes place), and the remaining 10 percent goes to the U.S. Treasury.”

The State share of federal mineral leasing royalties can be a significant portion of states’ budgeted income. It is intended to recognize the external costs of development borne by States in the form of increased needs for services and capital investments. The state share covers impacts related to growth and development, such as the need to build new or expand existing public infrastructure, including roads and schools. The equally vital need to construct, repair and rebuild water-related infrastructure should not be discounted.

Water Infrastructure Funding

The WSWC 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. 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. 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. 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. 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.

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. Inconsistent, inadequate, and untimely funding increases project construction and financing costs, as well as risk, including the failure of critical infrastructure. 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.

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. 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. Federal financial resources are limited and many authorized federal water infrastructure projects have not been started or remain incomplete for decades.

The Water/Energy Nexus in the West

The West enjoys diverse and abundant energy resources, including renewable and non-renewable resources, but water is scarce in much of the region and may or may not be sufficient for all proposed uses. Current law regarding receipts and expenditures from the Reclamation Fund recognize the importance of providing financial assistance to ensure adequate water is available in the West to meet its current and future needs, including water for energy needs.

Maintaining adequate and sustainable supplies of clean water and energy present interrelated challenges given a growing population, increasing water and energy demands, and an uncertain climate subject to multi-year drought and other extremes. An integrated approach to water and energy resource planning, development, diversification, management and protection is necessary to achieve a thriving and sustainable future for the West.

The WSWC supports collaboration and leadership at all government levels - federal, state, tribal, and local - as well as the private sector - to address the Nation's infrastructure needs and establish water infrastructure improvements as a public policy priority. The Council supports

appropriate federal investments in water-related infrastructure projects and programs that provide jobs and economic security, while protecting the environment.

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.

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.

The Council also 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.

Conclusion

In conclusion, the WSWC would suggest the Congress carefully consider present and future needs for investment in water resources infrastructure, given existing financial resources, including appropriate infrastructure asset management and capital budgeting. It is vital that the West maintain sustainable, reliable and robust infrastructure systems necessary to deliver adequate supplies of clean water and energy to meet present and future needs. Further, the Congress should investigate the advantages of converting the Reclamation Fund from a special account into a true revolving trust fund with receipts promptly and fully appropriated for their intended purpose in the continuing conservation, development and wise use of western water resources and work with the states to meet their future water, energy and infrastructure needs.

Senate Environment and Public Works Committee

On August 16, 2018, the WSWC was invited to testify before the Senate Committee on Environment and Public Works regarding State Authorities and S. 3303 - Water Quality Certification Improvement Act. Tony Willardson, Executive Director for the WSWC provided the following testimony.

Chairman [John] Barrasso, Senator [Thomas] Carper and members of the Committee, we appreciate your leadership on issues related to water, public works, the environment and the economy, and particularly your efforts to achieve a balance between federal policies and programs and the role of the states in our federalist system. The Council represents a diverse set of States but find common ground in declaring that western states have primary authority and responsibility for the appropriation, allocation, development, conservation and protection of water resources, both

groundwater and surface water, including protection of water quality, instream flows and aquatic species.

The Congress has historically deferred to state water law as embodied in Section 8 of the Reclamation Act, Section 10 of the Federal Power Act, Section 101(g) and 101(b) of the CWA, and myriad other statutes. Any weakening of the deference to state water laws is inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states. The Council has addressed many issues under the jurisdiction of this Committee.

The Council has called for leadership at all levels of government, in partnership with the public sector, to address the Nation's infrastructure and water needs as a public policy priority – and to work together with each other 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.

This month, meeting in Newport, Oregon, the Council adopted two resolutions. One recognizing Congress' stated policy in the ESA Section 2(c)(2) that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species," and calling upon "federal agencies to engage in a substantive discussion of past, present and future efforts to work in concert with State agencies to implement Congress' intent...."

The second reiterates our position that the transport of water through constructed conveyances to supply beneficial uses – without subjecting the water to intervening industrial, municipal, or commercial use – should not trigger federal NPDES permit requirements, simply because the transported water contains different chemical concentrations and physical constituents, and calls for the use of available State authorities to protect the water quality of the receiving water body in a water transfer. The Council supports the EPA's current rule expressly excluding water transfers from regulation under the NPDES permitting program and supports the codification of 40 CFR 122.3(i) into statute.

Lastly, the Council has been working with its member states to revise and refine recommendations for redefining WOTUS under the CWA and clarifying federal and state jurisdiction, recognizing that all waters are protected by the States, regardless of the extent of federal jurisdiction or limits thereof.

The Water/Energy Nexus in the West

The Council has called for integrating water and energy resources planning and policy. The West enjoys diverse and abundant energy resources, including renewable and non-renewable resources, but water is scarce in much of the region and may or may not be sufficient for all proposed uses. Maintaining adequate and sustainable supplies of clean water and energy present interrelated

challenges given a growing population, increasing water and energy demands, and an uncertain climate subject to multi-year drought and other extremes. An integrated approach to water and energy resource planning, development, diversification, management and protection is necessary to achieve a thriving and sustainable future for the West.

The Council has specifically supported federal legislative and administrative actions to authorize and implement reasonable hydropower projects and programs that enhance our electric generation capacity and promote economic development, through streamlined permitting processes, while appropriately protecting environmental resources - also declaring that past, present and future hydropower development and operational changes should recognize and ensure consistency with state law and regulatory authority, including delegated authority under federal law.

The Federal Power Act

Of note, Section 10 of the Federal Power Act (FPA) of 1920 directed the Federal Energy Regulatory Commission (FERC) to coordinate the development of hydroelectric projects as part of a comprehensive plan for improving our waterways. Section 10(a)(1) required that any plan "...shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes...and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

Section 10(a)(2) requires that the Commission shall consider the "...extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared..." pursuant to federal law or the state in which the project is located. Moreover, FERC is to consider..."the recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project."

Further, Section 27 states: "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." Balancing federal and state authority related to hydropower development has been a difficult and sometime contentious undertaking.

In 1983, FERC issued a license authorizing the operation of a hydroelectric project along Rock Creek in California, setting an interim minimum flow rate of water that must remain in the

bypassed section of the stream rather than drive the generators. The State Water Resources Control Board (SWRCB) issued a state permit conforming to those federal requirements but reserving the right to set different permanent requirements. When SWRCB considered a draft with considerably stricter requirements, the licensee petitioned FERC for a declaration that FERC possessed exclusive jurisdiction to determine the project's minimum flow rates. FERC agreed, concluding that setting flow rates was "integral to its planning and licensing process" under the Federal Power Act, and that "giving effect to competing state requirements would interfere with its balancing of competing considerations in licensing and would vest in States a veto power over federal projects inconsistent with the FPA," as interpreted by the Supreme Court in *First Iowa*. California sued.

California v. FERC reached the 9th Circuit Court of Appeals which found that "...one reading would construe the [Section 27] to limit state authority to the area of property rights involving water for irrigation, municipal use, and related activities. Under this reading, any aspect of operating a hydropower project not implicating these rights would fall under exclusive federal regulation. A second reading would construe the section much more broadly as an anti-preemption clause that gives the states final authority over all issues connected to the control and use of water...." California argued for the latter interpretation, but the 9th Circuit disagreed, and held that "...Congress intended to vest regulatory authority in FERC over most aspects of hydropower projects. Only control over certain limited proprietary rights remains in state hands."

California appealed the decision to the Supreme Court, which granted certiorari. The issue on appeal was: "Whether the Federal Power Act preempts state regulatory water right laws otherwise applicable to hydropower projects licensed by FERC, or instead, whether Section 27 of the Act – which subjects such projects to state laws relating to control, appropriation, use, or distribution of water – precludes such preemption?" Forty-nine states supported California in an amicus brief. The Supreme Court unanimously affirmed the 9th Circuit's decision.

The Supreme Court determined that the narrow reading of Section 27 of the Federal Power Act in *First Iowa* was not dicta but was necessary to the Court's holding and interpretation of the law. The Court declined to revisit *First Iowa* and disturb 44 years of precedent governing state and regulatory authority over hydroelectric projects, particularly where there had been no intervening change of law. "The California requirements for minimum streamflows cannot be given effect and allowed to supplement the federal flow requirements." The Court did, however, note that "...Congress remains free to alter what we have done."

The States unanimously viewed this ruling as an erosion of state authority over water resources. Shortly after the decision, the Idaho congressional delegation introduced legislation (S. 2805 and H.R. 5194) in the 101st Congress to restore states' primary authority for regulating water use related to hydropower projects. The WSWC subsequently supported federal legislation to "...assure that applicants for hydropower licenses comply with state substantive and procedural water law, thus restoring to the Act Congress' intent that state law govern water use associated with a hydropower project."

The Clean Water Act

Within the year, the states were looking at amendments to the CWA to strengthen states' abilities to mandate minimum streamflows and protect designated uses through Section 401 certification. Opposing interests sought to further limit state authority while streamlining the federal hydropower licensing process, proposing a bill, to prohibit states from including any conditions for Section 401 certifications not directly related to water quality. The WSWC adopted a position supporting a balanced national energy policy that recognizes legitimate state water management and planning authority to balance competing water uses.

Ironically, as the Congress considered legislation, the Supreme Court in another case upheld States' authority delegated under Section 401 of the CWA to impose bypass flows to protect water quality and fish and wildlife - the same requirements States had argued they had power to impose under state law in *California v. FERC*.

In 1994, the U.S. Supreme Court issued a 7-2 decision declaring that minimum streamflow requirements are a permissible condition of CWA Section 401 certifications. A Washington city and local utility district sought a license to build a hydroelectric project on the Dosewallips River. The proposed project would reduce the water flow below the State's minimum stream flow requirement to protect fish habitat, a state-designated use of the water under Section 303 of the CWA. The Washington Department of Ecology issued a Section 401 certification imposing a minimum stream flow requirement as a condition of the hydropower license, and the applicants objected to the State's authority to impose water flow requirements. In *P.U.D. No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Court upheld a state's authority to impose conditions under the Section 401 certification process where necessary to protect a designated use for fish habitat.

The Court rejected the argument that water quality requirements were limited to discharges under the CWA, noting that Washington's instream flow requirement was necessary to enforce the designated use of the river. The Court said that the CWA preserves each state's authority to allocate water quantity between users and does not limit Section 401 to water quality concerns when protecting designated uses. Importantly, the Court also rejected an effort to read "implied limitations" into Section 401 based on a perceived conflict between Section 401 state certifications and FERC authority under the Federal Power Act and the First Iowa interpretation.

Again in 2006, the Supreme Court recognized that state 401 certification authority is "...essential in the scheme to preserve state authority to address the broad range of pollution."

CWA Section 101(b) recognizes the states' critical role in protecting water quality and declares: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution..." Similarly, Section 101(g) 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..." The latter,

known as the Wallop amendment, was sponsored by Senator Malcolm Wallop of Wyoming, a respected rancher, conservative, and critic of regulatory red-tape.

Senator Barrasso we look forward to continuing to work with you and other Committee members to balance environmental protection and economic development needs, as well as the respective roles of state and federal agencies in the development, conservation and protection of our water resources - including protection of water quality, instream flows, aquatic species, and States' rights to allocate water and water rights.

Attached to my testimony is a letter summarizing a 2014 survey that addresses questions related to state administration of 401 certification authority that are sometimes raised by critics of the process. Section 401 State certification alone is not usually an obstacle in itself to timely federal licensing and permitting, provided that applications are complete and ancillary federal activities are complete or nearly complete. The majority of requests are processed within 40-90 days, some within a couple of weeks. The vast majority of states have no backlog of certification actions, but a few do. Delays are typically due to submission of an incomplete application, completion of necessary study requirements, and constraints on state resources, including staff limitations and turnover. Certifications may also be held up by the applicant not responding to States' requests for additional information or failing to comment on proposed project conditions. Often substantive details of the proposed action change requiring further review.

Conclusion

In conclusion, the WSWC reiterates its position that States have primary jurisdiction over water quantity and quality issues and should retain primary jurisdiction under the CWA for the integration of water quantity and water quality considerations through the water quality certification process set forth under Section 401. The Council recently signed a joint letter together with western governors, legislators, attorneys general and various interstate associations of state water and wetland agencies recognizing the "importance of partnerships between states and the federal government," and that a "balanced system of cooperative federalism has enabled states to implement the CWA effectively and with flexibility.... 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." Again, as States, we look forward to working with the Committee to balance the sometimes competing interests surrounding our water and energy policy goals.

WATER DATA EXCHANGE

The Water Data Exchange (WaDE) program continued to expand during 2018. At the onset of 2018 the WaDE Central Portal supported seventeen state water agencies, spanning fifteen states. By the end of the year this was increased to sixteen, some states with multiple agencies, others with multiple datatypes (i.e., more than one primary datatype such as water rights). See Figure 1 for the WaDE Central Portal status at the end of the 2018 calendar year.

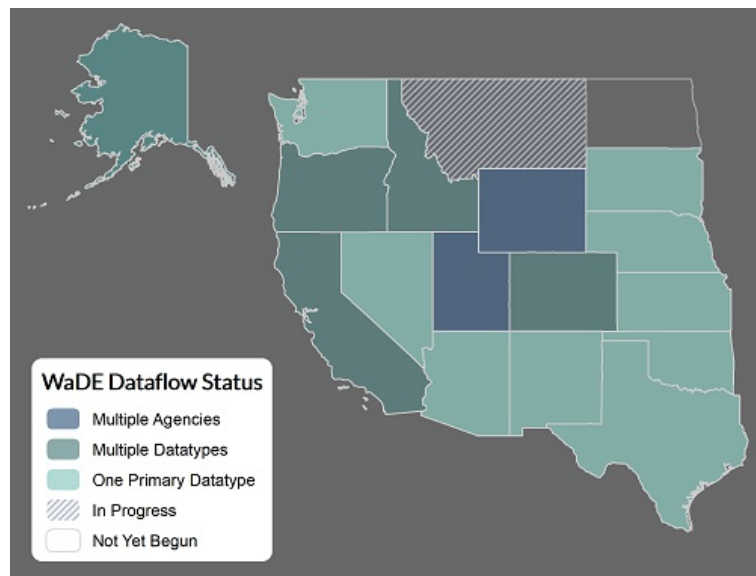


Figure 1. Status of WaDE Program Providers in 2018

During 2018, the WaDE portal incorporated new dataflows and datatypes from additional state agencies. These were made available through the new WaDE website.⁴ Documentation for the Application Programming Interface (API) and demonstration applications for accessing WaDE endpoints continued to be added to the website. While more states were participating in WaDE, the data shared remained fairly heterogeneous, with water rights being the most common datatype, and aggregated water use (or summary water use) information a distant second category.

Efforts were underway to add Montana and North Dakota, the final remaining WSWC members who are not sharing data in the WaDE platform. In addition to information about WaDE, the website contains additional information about the Water Information and Data Subcommittee (WIDS - see more below), which is the primary governing body for the WaDE Program. The WIDS is comprised of both state and federal agency members.

Goals for the WaDE program in 2019 include more comprehensive and standardized data, including complete water rights data across all participating states, and aggregated water use at both county and HUC-8 scales for any states that generate them. Standardization of data vocabulary will

⁴<http://wade.westernstateswater.org>

be a primary focus of the program, as well as updating the WaDE schema to facilitate access by the USGS and to integration into an updated, cloud-based platform (i.e., WaDE 2.0).

For the WaDE system to gain enterprise-level reliability and utility, a new architecture approach is needed. WSWC has investigated possibilities for hosting a federation of “nodes” on a cloud or at the UC-Davis Supercomputer Center where each data provider would maintain control over their database and web services that are shared in WaDE, but the series of nodes can also be monitored, maintained, and updated either by cloud vendor support staff or WSWC staff members. WSWC staff are investigating the resources that would be needed to support such a transition.

WaDE 2.0 - Architecture and Schema Refinements

Over the course of the year, interactions between the WaDE Program Manager and other users/agencies and stakeholders led to requests for adjustments and additions to the data that could be supported by the platform. Examples include more information about municipal and industrial water use, agricultural field boundaries and crop types, interbasin transfers, etc. Coincidentally, as the last few WSWC member states came online and shared data in the WaDE portal, the difficulty of updating each states’ WaDE database and software code increased. Each state would need to be assisted to update their application, then either turn on or switch to the new system while simultaneously adjusting to the WaDE Central Portal. Other issues that became apparent with the distributed node architecture was a lack of information about performance (i.e., ensuring that all nodes were functional at all times) and about usage (i.e. access data to nodes not hosted by WSWC was not available).

During 2017, the NASA’s WWAO and WSWC staff began a joint effort to understand what alternative architectural approaches might better suit a network of states hoping to either support NASA research tools or a more sophisticated and updated WaDE platform. To this end, a survey of states was begun in late 2017 and completed at the beginning of 2018. The survey revealed that a few member states were successfully utilizing cloud-based hosting to support their agency applications, but the majority of participating states had not utilized the cloud or had experienced setbacks or high costs related to its use. However, all survey respondents thought that their cloud-usage would grow in the future and had no strong objections to WaDE using a cloud vendor to support a more performant and reliable platform. Results of the survey were compiled in a report and associated webpage⁵ and published in October. The survey and resulting summary report included case studies and recommendations for states interested in using the cloud. It also covered several important recommendations for state agencies beginning or in existing partnerships with the NASA Applied Sciences Program (ASP). Lastly, adjunct to the publication, a dashboard was compiled where interested parties can review all westerns states’ policies regarding use of the cloud in one location.

⁵<http://www.westernstateswater.org/western-state-water-resource-agency-use-of-cloud-computing-technology-platforms/>

2018 Water Information Management System (WIMS) Workshop

In January, the WSWC and NASA's WWAO research team co-hosted the first WIMS workshop to be held since 2011. WSWC staff plan to continue WIMS workshops to increase dialogue between not only member state appointees, but their IT and data program staff as well. The intent is to discover the data and science-related needs of WSWC member states and their highest priorities regarding water data acquisition, quality control, and publication.

The WIMS workshop was held at NASA's JPL in Pasadena, CA and focused on water use reporting systems, IT-related adjudications topics, use of cloud computing and big data (and the results of the cloud-survey discussed above), advances and recent projects related to remote-sensing techniques with participation from NASA's WWAO research team, and "open" water data platforms and trends. Planning for future workshops was also discussed.⁶

WSWC Water Information & Data Subcommittee (WIDS)

The WIDS group convened once during 2018, with much of WIDS-related work being associated with the drafting of the Cloud-Computing Survey Report. However, during their meeting, the WIDS discussed the successes and challenges of the WIMS meeting. Those attending preferred limiting the frequency of WIMS meetings to one to two years apart. This was due to constrained travel budgets for agency staff members. A review of the comment forms suggested that most attendees were primarily interested in facets of water use estimation, including use of remote sensing, cloud storage, interoperability of water use data (using WaDE), and innovations in snowpack and streamflow forecasting. The next WIMS, planned for mid-2019 will focus on these topics and give more time to the attendees for questions, group discussion, and networking.

Exchange Network (EN) Grant Partnership

WSWC's FY15 Exchange Network (EN) Grant Partnership is led by California, with South Dakota and Nevada as other state partners and funding recipients. The CDWR completed their initial operating capability in WaDE and is developing similar sets of data for the 2011-2018 time period. CDWR has continued their implementation of the Open and Transparent Data law (AB1755) enacted in 2016. CDWR requested assistance from WSWC on a review of their technical documentation for data standards and interoperability protocols via their Open Water Information Architecture (OWIA) workgroup. WSWC staff members have supported these efforts by participating during meetings, on-site and remotely, and by reviewing technical and policy reports. WSWC continues to benefit from these interactions by learning from experts in the data-provision field, which led to substantial revisions to both the WaDE data architecture (WaDE 2.0), and data elements template.

⁶<https://www.westernstateswater.org/upcoming-meetings/2018-water-information-management-systems-wims-workshop/>

CDWR asked that WSWC develop and host a repository that contains the information developed during a stakeholder workshop in 2017, and assembled these as "use cases" to help define the OWIA approach and implementation. This was established in the fall of 2018. The Western Water Use Case Repository serves as a searchable dashboard for CA, TX, and WaDE-related suggested use cases (all still under development) that allow users to discover the status of data sources that support selected use cases. The repository also allows a user to search for data sources to discover their support use cases.⁷

Among other milestones, the South Dakota Bureau of Information Technology (SDBIT) and Nevada Division of Water Resources successfully mapped their native water rights data into the WaDE platform and completed their requirements for the grant. As part of their grant obligations and to utilize all available funds, CDWR, WSWC, South Dakota, and Nevada successfully extended their grant deadline from September 2018 to September 2019.

The partners continue to have quarterly calls to update partners and evaluate progress on the grant deliverable.⁸

Outreach and Collaboration

WSWC staff continue to participate in a number of forums and conferences to increase awareness of general "open water data" concepts and in support of the WaDE program. These include the USGS-hosted Open Water Data Initiative (OWDI) monthly calls, in support of publication of federal water-related datasets. The WaDE Program Manager continues to work with the USGS Water Availability and Use Science Program (WAUSP) and Water-Use Data and Research (WUDR) staff on ensuring that WaDE water use data will support both the U.S. Water Census and the agency's 5-year water use compilations. To this end, WSWC staff provided feedback to USGS at two meetings - the first in Austin, Texas and the second at Albuquerque, New Mexico. These meetings allowed USGS water use staff members the chance to review the water use-related data to be provided in WaDE 2.0 to ensure it would be compliant with their needs and requirements for continued data compilation.

The USGS also hosts calls for the participants on their Streamflow Collaborative Workgroup, a forum for stakeholders of USGS streamgaging to provide feedback on data collection and their new National Streamflow Information Program (NSIP) platform. WSWC staff participate on these calls and engage with national leaders on how national streamgaging and groundwater data portals are evolving.

Aside from closeout work related to the cloud survey (described above), WSWC staff continue to engage with partners at NASA's WWAQ, coordinating on future activities. These

⁷<http://wade.westernstateswater.org/use-case-repository/>

⁸<http://wade.westernstateswater.org/fy2015-wade-en-grant-partners/>

include providing feedback on a related research project, called OpenET, aimed at evaluating and disseminating techniques for remote-sensed water use estimation (evapotranspiration).⁹

Other outreach efforts include continued participation in the Aspen Institute’s Dialogue Series on Integrating Water Data for Sustainability. WSWC staff participated in a related Texas Water Data Workshop in Austin, and have been assisting Aspen Institute staff with planning for a Colorado River Basin Data Roundtable, to be held in Salt Lake City, Utah in early 2019. The Dialogue Series led to the formation of a new organization that is solely focused on assisting states and other agencies with water data interoperability and dissemination tasks called the Internet of Water (IOW). The program managers for this fledgling program asked WSWC staff to participate on the IOW Advisory Board. WSWC looks forward to participating on this body along with a highly-collaborative set of colleagues around the nation dedicated to data-sharing and “open” data concepts.¹⁰

The Aspen Institute Dialogue Series led to many discussions with philanthropic organizations about how to best further data-sharing for sustainability goals. Those discussions led to general support of the WaDE Program, but in 2018, the Water Foundation and the Mitchell Foundation offered to assist with funding that could accelerate WaDE program activities. The Water Foundation and later Mitchell Foundation provided substantial grants that allowed WSWC to hire another full-time employee to assist with the WaDE 2.0 implementation work, and allowed for additional contracting assistance with setting WaDE up as a cloud-based platform with a centralized cache for increased resiliency, performance, and usage monitoring. These funds were received in mid-2018 and the search for both contractors and addition staff began in earnest in the fall. WSWC advertised for a data-science/technical position at local universities and nationally to support the more technical aspects of the WaDE program.

WSWC staff continued to report on WaDE program progress at the WSWC meetings, held in Washington, DC in the spring, as well as Newport, Oregon in the summer, and Coeur d’Alene, Idaho in the fall. These meetings allow staff members to present highlights on the program to WSWC members, as well as its direction and funding status. The WSWC Program Manager also participated in the annual meeting of the ICWP in Oklahoma City, in October to present on the status of the program and meet potential partners from eastern states.

The WaDE Program Manager and Executive Director attended the AWRA National Annual Conference in Baltimore, Maryland in November. Both presented at the conference, primarily on the WaDE program and on western states water policy and law, respectively. At this meeting, WSWC was able to greater engage with the Consortium of Universities for the Advancement of Hydrologic Science, Inc. (CUAHSI) staff and agreed to assist with the planning of CUAHSI’s Hydroinformatics Conference, to be held in Provo, Utah in the summer of 2019. They also agreed

⁹<https://etdata.org/>

¹⁰<https://internetofwater.org/>

to set up training sessions with state water agency staff members on best management practices for sensor-based data that could be incorporated into CUAHSI's Hydroclient application toward the end of 2019 or beginning of 2020.

Summer Internships

Carly Hansen, a University of Utah Civil Engineering PhD candidate, and WSWC intern graduated in the spring of 2018. She was offered a position at the University of Utah and left the WaDE program in the fall. Adel Abdallah, hired during the summer of 2017, continued his tenure as a part-time intern with the WSWC, working on the development of the WaDE 2.0 data schema and database creation. During the summer of 2018 WSWC advertised for a full-time hydroinformatics specialist. Adel was offered the position, which he accepted. He will become a full-time employee with WSWC with the title of Senior Hydroinformatics Specialist in January of 2019.

WESTERN STATES FEDERAL AGENCY SUPPORT TEAM

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

WestFAST federal agencies include: U.S. Department of Agriculture's Forest Service (USFS) and Natural Resources Conservation Service (NRCS); U.S. Army Corps of Engineers (Corps); U.S. Department of Defense (DOD); U.S. Environmental Protection Agency (EPA); the U.S. Department of the Interior's - Bureau of Land Management (BLM), Bureau of Reclamation (USBR), National Parks Service (NPS), U.S. Fish and Wildlife Service (USFWS), and U.S. Geological Survey (USGS); National Aeronautics and Space Administration (NASA); and National Oceanic and Atmospheric Administration (NOAA). The WestFAST/WSWC Liaison is Roger Pierce, NOAA.

In 2018, WestFAST focused on many federal initiatives and promoted communication between federal agencies relevant to priority issues identified in the above-referenced WGA and WSWC reports and resolutions. WestFAST representatives reviewed WSWC committees' work plans and the WestFAST Work Plan to ensure consistent activities could be promoted for 2018. The Federal Liaison held conference calls with WSWC leadership and WestFAST leadership to correlate WestFAST actions and WSWC priority objectives.

- WestFAST members held monthly conference calls to discuss ongoing programs and coordinate interagency and federal-state collaboration and outreach opportunities.
- WestFAST published a monthly newsletter distributed to more than 163 federal agency staff, and state and local partners.
- WestFAST continued to maintain a WestFAST website containing information about WestFAST's origins, goals and objectives, and documentation of activities, reports, newsletters, and webinars.
- WestFAST continued its series of "Special Topics" information meetings, held mainly via webinar, on issues of interest to WestFAST member agencies and WSWC water-resource managers, scientists, and stakeholders. In July 2018, a USDA, Economic Research Service: Preliminary Work on Irrigation Survey for Water and Irrigation Districts webinar was held.

- WestFAST sponsored and/or participated in three WSWC meetings and two jointly-sponsored WSWC seminars and workshops. WestFAST agencies gave a combined 56 presentations during these events. These efforts were very beneficial to both the WSWC and the federal agencies, in that they provided a forum for discussion of a number of priority issues.
- WestFAST has continued its work to foster federal-state communication on general water issues in the West. One of the larger emerging issues in the West is the WOTUS Rulemaking. At the beginning of the Trump Administration, EPA discussed rescinding the 2015 WOTUS Rule and developing a replacement rule. WSWC and WestFAST facilitated state-federal engagement.
- The WestFAST Federal Liaison continued working with the Western Regional Partnership (WRP) on the water-resource components of their programs. The WRP is a Department of Defense-led collaboration between federal, state, local and tribal interests in six western states: Arizona; California; Colorado; Nevada; New Mexico; and Utah.
- WestFAST continued to work on regional issues, such as the Southwest Oklahoma Action Plan. The WestFAST facilitated monthly conference calls with the officials in Oklahoma, regional customers, and water suppliers. WestFAST took lessons learned from this state-federal engagement and considered whether replication of this format for dealing with water supply issues could be used elsewhere in the West. Based on meetings facilitated by the State of Oklahoma and WestFAST in August 2017, the update to the original 2014 Action Plan was completed in April 2018.¹¹
- S2S Weather Forecasting was a major effort as several Federal employees, especially in NOAA, were involved in multiple meetings. The main meeting for WestFAST, is the May meeting in San Diego, sponsored by the State of California and WSWC was three days of seminars, roundtables, discussion and presentations by experts, some connected with WestFAST on the latest research on the topic.
- A series of meetings came from ideas discussed at the May S2S meeting and supported by WestFAST and facilitated by the WestFAST Federal Liaison, brought the Director of NOAA's Climate Prediction Center (CPC) out to meet with other Federal officials at the three NOAA National Weather Service River Forecast Centers(RFC's) in August. The idea was to facilitate a better understanding of products, services, and needs between the RFC's, CPC, Western Water Customers, and multiple Federal Agencies working on water issues in the West.

¹¹https://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/SWAP%202018%20Update.pdf

- WestFAST and WSWC sponsored meetings and roundtables in Arlington, VA in the Commerce Department Building in March. The focus of this meeting was to introduce many Council members to the WestFAST Principals (appointed Federal members). This was the first meeting of the Principals under the Trump Administration. This was a great opportunity to discuss Federal Agency priorities and to get WSWC members priorities to the Federal Agencies.
- The WestFAST and WSWC continued their work on Non-Tribal Federal Water Rights, focusing on the state-federal relationships through the implementation phase of decreed and adjudicated water rights. WestFAST worked with WSWC on workshops in Coeur d'Alene, ID and on follow up actions to the 2017 meeting in Albuquerque.

OTHER IMPORTANT ACTIVITIES AND EVENTS

Western States Water

Since the first issue in 1974, the WSWC's weekly newsletter, *Western States Water*, has been one of its most visible and well received products. Its primary purpose is to provide governors, members, and others with accurate and timely information with respect to important events and trends. It is intended as an aid to help achieve better federal, state, and local decisionmaking and problem solving, improve intergovernmental relations, promote western states' rights and interests, and highlight issues. Further, it covers WSWC meetings, changes in WSWC membership, and other WSWC business.

The newsletter is provided as a free service to members, governors and their staff, member state water resource agencies, state water users associations, selected multi-state organizations, key congressional staffs, and top federal water officials. Other public and private agencies or individuals may subscribe for a fee.

The following is a summary of significant activities and events in 2018 primarily taken from the newsletter. However, this does not represent an exclusive listing of all WSWC activities, or other important events. Rather, it seeks to highlight specific topics.

Western Governors' State of the State Addresses

On January 8, Arizona Governor Doug Ducey called for continued bipartisanship and a spirit of service to find solutions and move the state forward. He said part of Arizona's recipe for success is reducing burdensome and unnecessary state regulations, and "responsible water policies that will protect us from sharing in California's water crisis. Earning Arizona's reputation as a national leader in water management was no easy feat, and it didn't happen by accident. It was the proactive nature of our predecessors, and our state's willingness to take on complex issues. This session, we must follow their lead and put forward responsible policies that will ensure Arizona speaks with one voice to secure the state's future for generations to come."

On January 8, Idaho Governor Butch Otter offered his 12th and final "State of the State and Budget Address." He noted that the state government "is leaner, more fiscally responsible, more transparent, more responsive, and better prepared than ever to help Idahoans achieve their own best potential." He said in the past year "we saw a renaissance of responsiveness and regulatory relief from our national government. It has been especially refreshing to see the Trump administration's willingness to seek our input – to really listen and embrace the value of state perspectives on issues that affect us most directly. As we all know, the whole concept of federalism spent years on the shelf. But now, what we here in Idaho say and how we collaborate and develop our own solutions matters again, maybe more than ever." There are still federalism challenges, but efforts with federal partners such as the BLM, USFS, and the USFWS are resulting in more active management of

resources, protection of rangeland from wildfires, and timber harvests to improve the health of forests and watersheds.

Governor Otter recalled that it was a great water year that also disrupted lives and caused damage to property and infrastructure. “Runoff from last year’s snowpack on top of saturated soils required careful, coordinated management of dams and reservoirs. The effort successfully reduced flooding and ensured that dam structures were secure. Meanwhile it provided a full allocation of water in the Boise River and Snake River reservoirs and plenty of carryover for use in 2018. Just as importantly, for the first time since the 1950s we put more water back into the Eastern Snake Plain Aquifer than we pumped out in 2017. Water levels in the Lake Erie-sized aquifer had been dropping at an average rate of 215,000 acre-feet per year for 60 years. But last year the Idaho Water Resource Board worked with private canal companies to recharge 317,000 acre-feet of water. A landmark settlement agreement between surface water users and ground water users resulted in a net gain of another 200,000 acre-feet. Along with the wet weather, the result was a 660,000-acre-feet increase in water storage in the aquifer. Without our work together on these issues it would have been impossible to realize these historic advances in managing and protecting our most precious and fragile natural resource.”

On January 9, Kansas Governor Sam Brownback talked about the state as a dreamer’s paradise, and how collaboration, encouragement, and creative efforts solve problems and bring an imagined future into reality. He expressed his dream for a future Kansas with “an Ogallala Aquifer that never runs dry because the use is sustainable. Of our reservoirs dredged, renewed and supplying the water we need in times of severe drought. Of us having a legal, binding allotment of water from the Missouri River and of an Arkansas River with water in its whole course. These are possible. We can do it.”

On January 9, South Dakota Governor Dennis Daugaard said, “This is my twenty-second legislative session, and my final State of the State address as governor.” He spoke of the work the State has done to preserve and improve its outdoors and natural resources, from efforts to fight the mountain pine beetle to creating and improving parks. “Our new buffer strip program has just begun to increase natural grasses, to improve water quality and create more wildlife habitat.” He talked about the drought that developed last spring and persisted through the summer, prompting a statewide emergency declaration in June and the activation of the State Drought Task Force to assist farmers and ranchers.

Governor Daugaard talked about the special legislative session that addressed “nonmeandered” waters, a contentious issue since the 1990s. “Past legislative solutions had been elusive. The situation came to a head last March, when the [state] Supreme Court said it was ‘up to the legislature to decide how these waters are to be beneficially used in the public interest.’ You heard that message, went to work, and the Open Waters Compromise you passed is already working. Today, more than 99% of all nonmeandered bodies of water with managed fisheries are open for recreation.... The owners of the ground under these waters have demonstrated their support for the

compromise by keeping nearly all of these waters open. And this process has created a new dialogue among sportsmen and landowners, which has been positive for all.”

Governor Daugaard expressed his appreciation for the intergovernmental relationships the State has with the Native Americans who call South Dakota home, and expressed hope for continued progress. Among several other state-tribal cooperative efforts, he noted that the Department of Environment and Natural Resources dedicated millions of dollars for the operation and maintenance of tribal drinking water systems.

On January 9, Washington Governor Jay Inslee expressed his pride in the people of the State for standing together for civility, for their can-do spirit of confidence and innovation, and for protecting the right to clean air and water. He emphasized the need to act now to curb carbon emissions. Among the state’s capital budget needs, he noted that the community of Ephrata is waiting for the replacement of an aging water line. He said that by joining across political interests, they can “reduce the wildfire risk in rural communities and on tribal lands” and “make much-needed upgrades to our irrigation and water management systems.... And by doing these things, we can save our forests. We can help rural economies. We can protect our waterways.”

On January 10, Nebraska Governor Pete Ricketts said he was happy to report that the State of the State is strong and growing, including having the most economic development projects per capita of any state in the country last year. He spoke of the legislative efforts to streamline government and merge state agencies, to enable the Nebraska Department of Transportation to assume responsibility for environmental reviews. “Our Center of Operational Excellence is working with state agencies to eliminate waste and speed up service. With this philosophy, we are turning around environmental permits in a single day....”

Governor Ricketts noted that the state agencies are also working to eliminate red tape. “In July, we launched a review aimed at cutting unnecessary regulation to streamline state government.” The agencies presented their recommendations in November. Revenue forecasts are still short, and he proposed across-the-board reductions of 2% this fiscal year and 4% next fiscal year in an effort to balance the budget without raising taxes.

On January 11, Colorado Governor John Hickenlooper pointed out the state’s efforts to cut or modify almost half of their rules and regulations. He noted that the state has created a water plan that secures food production and protects water for agriculture. He asked for the support of the General Assembly to enact an Infrastructure Funding Plan that would make the framework of the Colorado Water Plan a reality over the next 30 years. “If we don’t implement our water plan, rural agricultural communities will be hit first and hardest. We live in a state of open markets. They can never afford to match what front range homeowners pay for domestic water. Having a sustainable source of food – no matter what happens around the world – is an essential foundation for the future of our state. We’re one of the great food exporting states and that’s a resource we should continue to invest in, rather than put at risk.” He said that the responsibility to be good stewards rests not only on the rural parts of the state, but “with all of us.” Colorado’s clean air, water, and natural landscape

are among the most essential pieces of infrastructure, “things everyone thinks about when they hear the word ‘Colorado.’ It’s one reason companies of all sorts have been drawn to this place we love.”

On January 16, New Mexico Governor Susana Martinez discussed the state’s competitive, pro-growth plan with several key areas. One of those areas is changing the way infrastructure dollars are spent by investing in more large-scale projects that create jobs and lay a long-term foundation for economic growth, and ensuring that projects are delivered on time and on budget. “We’ve had success with this – the Paseo del Norte extension, big water projects throughout the state.” She also noted the benefits New Mexico has seen as it has diversified its economic growth and become more business-friendly to the private sector, so the State is no longer dependent on oil and gas.

On January 18, Alaska Governor Bill Walker talked about taking aggressive measures to access and develop resources responsibly, improving the health of the economy while coping with the realities of climate change. He expressed confidence in Alaskans, saying the State’s role is to provide the necessary infrastructure for access to energy, mineral and timber development, including efforts to lift federal restrictions. He rejected the dysfunction of partisanship and the difficulty in passing an effective budget. He described recent measures to make government more efficient: “While maintaining most public services, state spending, including capital spending, is down by over 40 percent and the number of state employees has dropped by nearly 3,000. We have closed over 40 state facilities and significantly reduced or eliminated state funding in more than 100 programs and services.”

On January 23, North Dakota Governor Doug Burgum emphasized the “whole-of-government” and listening approaches taken to address multiple crises in 2017, including the multi-agency efforts to bring the Dakota Access Pipeline to a peaceful resolution and help livestock producers and residents through a historic drought and wildfire season. He noted that more than half the State remains in moderate drought. The creation of the Fargo-Moorhead Area Flood Diversion Task Force and collaboration with Minnesota has breathed new life into the water project stalled by litigation. Visits to all four tribal nations in the State have advanced and strengthened state-tribal partnerships, enabling the development of action plans to address transportation, law enforcement, economic development and addiction.

On January 24, Utah Governor Gary Herbert said: “Nothing is more fundamental to our quality of life in Utah than the water we drink and the air we breathe. Without them, there is no life and there is no economy. Stakeholders across our state are working diligently to ensure that we will have enough water to support our growing population. Doing so will require us to conserve more water, to invest more in our water infrastructure and to develop future water sources in fiscally and environmentally responsible ways.”

On January 25, California Governor Edmund G. Brown, Jr. delivered his 16th – and final – State of the State address, asserting that the “bolder path is still our way forward” on climate change, infrastructure investment, health care, education and criminal justice. “The recent fires and mudslides show us how much we are affected by natural disasters and how we can rise to the

occasion – at the local level, at the state level and with major help from the federal government.” He pointed out, “We should never forget our dependency on the natural environment and the fundamental challenges it presents to the way we live.” He called clean water a “fundamental good that must be protected and made available on a sustainable basis.” He noted the importance of conservation measures during drought, the historic legislation to manage the state’s groundwater, the need for WaterFix to modernize a broken water system and restore habitat, and a recent water bond that invests in safe drinking water, conservation and storage. “As the climate changes and more water arrives as rain instead of snow, it is crucial that we are able to capture the overflow in a timely and responsible way. That, together with recycling and rainwater recapture will put us in the best position to use water wisely and in the most efficient way possible.”

On February 5, Oklahoma Governor Mary Fallin talked about the budget stabilization challenges and the “Step Up Oklahoma” plan. In addition to revenue considerations, she addressed government reforms. “My budget includes money for agency performance and accountability efforts, which will ensure public resources are being spent appropriately and help address public confidence in state governance.”

Also on February 5, Oregon Governor Kate Brown focused her remarks on jobs and education needs. She noted the efforts of legislators advocating for recovery efforts following the devastating wildfires last summer. She spoke of the diversity of the legislature and how this is an asset, ensuring that more voices and experiences and communities are represented at the decision-making table. She emphasized the need to preserve the beauty and bounty of Oregon by fighting to keep public lands in public hands. She also said that the state government must be operated as efficiently as possible, being careful with every single taxpayer dollar.

Agriculture

Farm Bill

Throughout 2018, the House and Senate worked on different versions of the Farm Bill, which is renewed about once every five years. The two chambers met in a conference committee in September, and in December Congress was able to pass a version of the bill that the President signed into law. The WSWC has a longstanding interest in the Conservation provisions of the bills, as they tend to provide funding for programs affecting wetlands, nutrients and erosion in nonpoint source water, flood protection, technical assistance for small water and wastewater systems, and water infrastructure.

On April 12, Rep. Michael Conaway (R-TX) introduced the Agriculture and Nutrition Act of 2018 (H.R. 2). On April 18, the House Agriculture Committee considered and approved the bill by a vote of 26-20.

Title II contained provisions for conservation programs. Section 2302 would maintain authorization for the EQIP and increase funding to \$3 billion per year through FY23. The bill would

eliminate 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 FY16, the CSP had over 70 million enrolled acres, with over a million acres each in Kansas, Montana, Nebraska, New Mexico, Oklahoma, and South Dakota. The existing contracts would continue, but would not be renewed, if the bill passes.¹²

Authorization would be extended through FY23 for the Grassroots Source Water Protection Program, with an additional \$5 million in funding (§2402). Section 2404 would reauthorize Watershed Protection and Flood Prevention, including the Small Watershed Rehabilitation programs to address aging dams, erosion, floodwaters, and watershed protection and restoration with \$100 million per year in addition to funds through the Commodity Credit Corporation (CCC) (§2404). Section 2102 provided \$10 million of the CCC funds to carry out the Wetland Mitigation Banking Program (16 USC §3822(k)(1)(B)). The CCC would be authorized at \$500 million per year through FY23 (§2501).

The bill would authorize \$250 million per year for the Regional Conservation Partnership Program (RCPP) (§2704), but removed 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 would reauthorize 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.

Section 2201 would gradually increase acreage eligible for the CRP from 25 million acres in FY19 to 29 million acres in FY23, while capping rental rates and focusing the CRP toward fragile lands. Section 2202 would reauthorize the farmable wetlands program through FY23, but reduces the total number of eligible wetland acres that may enroll in the CRP from 750,000 down to 500,000.

The Agriculture 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 would reauthorize the Conservation Loan and Loan Guarantee Program to help farmers and ranchers implement conservation measures on their lands, but reduces funding from \$150 million to \$75 million per year (§5102).

¹²www.nrcs.usda.gov/Internet/NRCS_RCA/maps/cp_cstp_maps.html

Title VI covered rural development. It would give rural communities increased access to credit to finance critical infrastructure, including public water systems. Grants for water, waste disposal, and wastewater facilities would be reauthorized, and maximum financing levels increased from \$100,000 to \$200,000. However, overall funding for the program would be reduced from \$30 million a year down to \$15 million a year (§6204). The Technical Assistance and Training Program was amended to include options for long-term sustainability of systems (§6205). The Circuit Rider Program would be reauthorized, with an increase from \$20 million to \$25 million (§6202). Grants for NOAA weather radio transmitters (7 USC §2008p(d)) and the National Agricultural Weather Information System would be reauthorized through FY23 (§6220, §7206).

Title VIII included forest management activities. It would reauthorize the Landscape Scale Restoration Program for the USFS and state agencies to tackle forest health, wildfires, and drinking water protection (§8104). Sections 8311 to 8321 establish categorical exclusions from NEPA requirements for various forest management activities, including wildfire prevention and mitigation.

Title X covered crop insurance provisions to manage risk from drought and other natural disasters.

On June 11, Senator Pat Roberts (R-KS) introduced the Agriculture Improvement Act (S. 3042). On June 18, the Senate Committee on Agriculture, Nutrition and Forestry reported the bill with an amendment and placed it on the Senate calendar. This bill did not progress any further.

On June 21, the House passed H.R. 2 by a vote of 213-211. On June 28, the Senate passed an amended version of H.R. 2, by a vote of 86-11. On July 27, the Congressional Research Service published a side-by-side comparison of the House and Senate versions of H.R. 2 with the previously enacted version of the Farm Bill.¹³

House-Senate Conference Committee

On August 1, the Senate appointed conferees to the House-Senate Conference Committee on the different versions of the H.R. 2. Members from the House were appointed to the committee in July.

The WSWC supported the role of conservation title programs in the Farm Bill in providing solutions to resolve water supply reliability, water quality impairments, groundwater recharge, and other water resource concerns facing agricultural producers and water users. The WSWC also supported rural development title programs to provide financial assistance for drinking water, wastewater facilities, and other services to rural communities.

¹³<https://fas.org/sgp/crs/misc/R45275.pdf>

Within the conservation title of the Farm Bill, both the House and Senate versions of H.R. 2 would reauthorize nearly all of the agricultural conservation programs, with the exception of the CSP, which the House version would repeal. CSP provides financial and technical assistance to producers to maintain and improve existing conservation systems and adopt comprehensive conservation activities. In the absence of funding and reauthorization, the current contracts for the enrolled 70 million acres would expire in FY23. The Senate version would reduce annual enrollment from 10 million acres down to 8.8 million acres a year, and provide other program amendments aimed at environmental improvements.

Both versions would increase funding for conservation in the short term. The House would increase funding by \$656 million for the first five years, but over the long term would shift funding out of the conservation title, reducing funding by \$800 million over ten years. The Senate version would increase funding by \$185 million over five years, but would reallocate funding within the conservation title among the larger programs, and would be budget neutral over ten years.

Both versions of H.R. 2 would reauthorize the CRP. The program provides annual rental payments for retiring environmentally sensitive land and replacing crops with long-term resource-conserving plants. Both bills would raise the acreage for enrollment from the current limit of 24 million acres. The House version offered incremental annual increases up to 29 million acres in FY23, while the Senate version would increase up to 25 million acres through FY23. Both bills would reduce payments to participants to offset the increased enrollment levels.

The EQIP would receive annual incremental increases in funding under the House version, from the current level of \$1.7 billion in FY18 to \$3 billion in FY23. The Senate bill reduced EQIP funding to \$1.5 billion, with annual incremental increases up to \$1.6 billion in FY23. The House bill added a stewardship contract and expanded options for irrigation and drainage entities. The Senate version contained several amendments that focus on water quality and quantity-related practices. The EQIP Conservation Innovation Grants program would receive reduced funding under the House version, while the Senate bill would add eligible projects to the program.

The RCPP would receive increased funding from the current level of \$100 million; the Senate would provide \$200 million annually, and the House would provide \$250 million annually. The covered conservation programs would expand under both bills, with the ability to renew partnership agreements. The Senate version provides additional funding and flexibilities for partners.

The rural development title would make several provisions for water projects and technical assistance. The House version would raise the maximum loan amount for water and wastewater projects. It would also increase funding for water and wastewater technical assistance. It would change the rural population eligibility criteria, including how military personnel and incarcerated individuals are counted toward the population for a community to qualify below the defined rural threshold of 10,000 people.

Both versions would authorize funding for the Rural Water and Wastewater Circuit Rider Program at \$25 million a year through FY23. Both versions would raise the maximum amount of project financing for water, waste disposal, and wastewater facility grants from \$100,000 to \$200,000; however, the Senate would authorize \$30 million for the program, while the House version only authorized \$15 million.

Senate Agriculture Committee Chairman Pat Roberts (R-KS) said, “We hoped to have made progress, but we have yet to meet in person with what we call the fab four,” referring to himself, Ranking Member Debbie Stabenow (D-MI), House Agriculture Committee Chairman Rep. Mike Conaway (R-TX), and Ranking Democrat Rep. Collin Peterson (MN). Staff have been working on H.R. 2 for weeks. The first full conference committee meeting is scheduled for September 5. “I’ve been urging, along with the others, the staff to find these landing zones where we can compromise and still have a good bill. That’s in progress right now,” said Roberts. “I think we’re going to have to meet personally to get that done.” Time would be short, if House leadership decided to adjourn earlier in September than planned. Roberts listed crop insurance subsidies, continuation of the CSP, EQIP spending authority, CRP acreage expansion, and CRP payments to farmers as issues.

On August 30, the WSWC sent a letter to the Farm Bill conference committee supporting important water-related provisions of the House and Senate versions of the 2018 Farm Bill. “The WSWC supports investment in voluntary, incentive-based conservation programs that are implemented in coordination with state and local governmental partners, while providing the maximum flexibility possible and opportunity for innovation to create efficiencies, coordinate funding and achieve real water savings. Agriculture sustains many rural economies and communities in the West. Water scarcity and periodic drought impact all water users across the West, but particularly threaten the agricultural sector, which accounts for the predominant share of consumptive water use westwide.”

The letter supported conservation and rural development programs, including financial and technical assistance to producers, rural communities, water users, and water quality managers. Programs of particular interest include: the CRP and Conservation Reserve Enhancement Program (CREP); CSP; Emergency Watershed Protection Program (EWPP); EQIP and its Conservation Innovation Grants (CIG) and Colorado River Basin Salinity Control Program (CRBSCP), and RCPP; watershed protection and planning programs; the National Water and Climate Center’s water supply forecasting, snow surveys, and soil climate analyses; the Rural Water and Wastewater Circuit Rider Program; rural water and wastewater technical assistance; and raising the maximum amount of project financing available for water, waste disposal, and wastewater facility grants.

The WSWC further noted, “A sustainable agricultural economy requires promoting efficient water use and achieving net water savings, given overdrafted groundwater aquifers and increasingly stressed surface streamflows. In some cases, assisting in the transition from irrigated to dryland farming may be necessary, while striving to maximize production. It is also important to address other concerns including non-point source pollution, fish and wildlife habitat, endangered and

invasive species, drought and wildfire resilience. Locally-identified concerns should be addressed on a voluntary basis, across public and private lands, in targeted and collaborative ways.”¹⁴

On September 5, the Senate and House met in conference. On December 12, they filed the conference report, H. Rept. 115-1072. On December 11, the Senate passed the re-named Agriculture Improvement Act (H.R. 2) by a vote of 87-13. On December 12, the House passed the bill by a vote of 369-47. The President signed it into law on December 20 (Public Law No. 115-334).

The Senate’s summary noted that the final Farm Bill grows overall funding for conservation by leveraging private dollars; triples funding for regional conservation partnerships; streamlines requirements for farmers and local partners leading conservation projects; and targets investments in rural drinking water infrastructure.

Title II contains the conservation provisions, including the CRP, EQIP, CSP, ACEP, and RCPP. The CRP was reauthorized through FY23 (§2201), and the current acreage enrollment limit was increased from 24 million in FY19 up to 27 million in FY23. Funding for CRP provisions was increased from \$43 million in FY18 to \$62 million per year from FY19 to FY23. EQIP was reauthorized through FY23 (§2304), with annual incremental funding increased from \$1.75 billion in FY19 to \$2.02 billion in FY23. Funding for ACEP was increased from \$250 million in FY18 up to \$450 million per year from FY19 through FY23. Funding for RCPP was increased from \$100 million in FY18 up to \$300 million per year from FY19 through FY23.

Section 2301 terminated the existing CSP, though current contracts will continue until they expire, and certain one-year extensions are permitted. Section 2308 establishes a new CSP, authorized through FY23, placing greater emphasis on environmental benefits of conservation efforts. Funding for the new CSP was authorized to start at \$700 million in FY19 and incrementally increase to \$1 billion in FY23.

Title VI contained provisions on rural development, including grants, technical assistance, and training programs for rural water and wastewater systems. Section 6403 increased the maximum grant for eligible water, waste disposal, and wastewater facilities from \$100,000 to \$200,000, although authorization for annual appropriations was reduced from \$30 million per year (FY08-FY18) down to \$15 million per year (FY19-FY23). The rural water and wastewater circuit rider program funding was increased from \$20 million in FY18 up to \$25 million per year from FY19 through FY23 (§6404). Section 6421 reauthorized grants for NOAA weather radio transmitters through FY23.¹⁵

¹⁴<http://www.westernstateswater.org/letters/>

¹⁵www.agriculture.senate.gov

Bureau of Reclamation

Reclamation Title Transfers

On January 17, the Senate Energy and Natural Resources Subcommittee on Water and Power held a hearing to examine changes to further facilitate the USBR's title transfer process and the potential benefits to federal and non-federal stakeholders. Witnesses included: Austin Ewell, Deputy Assistant Secretary for Water and Science, DOI; Paul Arrington, Executive Director, Idaho Water Users Association; Jerry Brown, General Manager, Contra Costa Water District; Mike DeVries, Director of the Provo River Water Users Association; and Jason Phillips, Chief Executive Officer, Friant Water Authority.

Ewell noted that the USBR has transferred title to thirty projects since 1996, and strongly supported title transfer legislation. In an effort to work with stakeholders interested in pursuing title transfers, Reclamation developed a consistent and comprehensive process known as the Framework for the Transfer of Title. "Our support for this concept is grounded in our aim to enable 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 enactment of title transfer legislation would be the culmination of Reclamation's longstanding experience with interested stakeholders."

Ewell welcomed the opportunity to work with Congress to draft legislation, and offered key considerations: (1) Reclamation should be authorized to administratively transfer title based on eligibility criteria that are focused on protecting authorized project purposes, benefits to stakeholders, and environmental resources; (2) agreements in a title transfer program should be open, public, and transparent; (3) a categorical exclusion for title transfers under the NEPA would be a logical and helpful tool; (4) legislation should address the complexities of transferring hydropower projects, including issues related to FERC licensing and the role of Power Marketing Administrations; and (5) statutory language should ensure Reclamation law continues to control project water regardless of the title transfer to prevent adverse impacts on other project beneficiaries.

Arrington's testimony included examples of successful title transfers of Reclamation projects in Idaho and other western states, partly due to "the demonstrated ability by the entities to operate, maintain and manage their facilities in a highly professional and competent manner." Title transfers can be costly, complex, and time consuming. "The process can take nearly a decade and ultimately requires an act of Congress to complete." Successful transfers divest the federal government of maintenance costs, liability, and regulatory responsibility, while providing non-federal entities greater flexibility and autonomy to manage the facilities in a way that meets their current water resource needs. He recommended the following improvements: (1) simple title transfers for projects that will continue to operate in the historical manner should not be subject to rigorous NEPA analysis required for more complex transfers; (2) Reclamation should have the authority to complete simple transfers without an act of Congress; and (3) access to project power should not be eliminated, increasing the cost of delivering water.

Brown described the duplicative administration, costly coordination, and lack of flexibility that the Contra Costa Water District struggles with as it manages the operation and maintenance of a Reclamation system. To streamline the title transfer process, he recommended such changes as quit claiming federal property interests where title documentation is incomplete, and using the library of existing environmental reviews to limit any further analysis to new environmental impacts specific to the title transfer.

DeVries described the complexities, costs, and benefits of transferring title of the Salt Lake and Provo River aqueducts to the local water entities. “I urge you to consider a streamlined process, particularly for projects that were authorized under the 1902 Reclamation Act and thus have only water supply and power development as authorized purposes.”

Title Transfer and Non-Federal Infrastructure Incentivization Act

On July 12, the House passed the Reclamation Title Transfer and Non-Federal Infrastructure Incentivization Act (H.R. 3281) by a vote of 233-184, largely along party lines. The bill authorized transfers of Reclamation projects to eligible entities with the capacity to continue to manage the property for the same purposes it has been managed by the DOI. The bill laid out the conveyance procedure, criteria for eligibility, a right of first refusal for an entity currently operating and maintaining an eligible facility, and protects power rates and repayment obligations. It would allow the Administration to develop title transfer agreements with utilities and authorize the transfer administratively, while still retaining Congressional oversight over each transfer.¹⁶

Rep. Doug Lamborn (R-CO), who introduced the bill, said: “This Act will streamline the administrative process and remove cumbersome, bureaucratic hurdles for the Interior Department. Federal water projects have been a critical asset to many Colorado farmers for generations. The Bureau of Reclamation has played an essential role in constructing many of these facilities. However, over the years, populations in the West have continued to grow while the infrastructure aged. Many facilities are in disrepair and require new investment. Uncertain federal funding and burdensome regulation cripple development of critical water resources. This Act maintains congressional oversight while granting local water districts the flexibility to fulfill the needs of their communities. H.R. 3281 allows districts to leverage local investment and encourages local control.”

House Natural Resources Committee Chair Rob Bishop (R-UT) said: “Our communities can’t flourish without access to water. That’s why this bill provides needed reforms that give localities more control over their own water resources. We need to bring our nation’s water infrastructure into the 21st century. This bill does that while saving money for taxpayers and providing the flexibility needed for water users in our western states.”

On July 16, the bill was received by the Senate and referred to the Energy and Natural Resources Committee. No further action has been taken.

¹⁶*Western States Water*, #2247, June 9, 2017

National Environmental Policy Act

On October 16, the DOI published a *Federal Register* notice seeking public comment on a proposed categorical exclusion under the NEPA for certain transfers of title of projects and facilities from the USBR to qualifying non-federal entities. Reclamation proposed establishing a new categorical exclusion to facilitate the transfer of title for a limited set of simple, noncontroversial or uncomplicated projects and/or project facilities.¹⁷

Title transfer is a voluntary conveyance of ownership for water projects including dams, canals, laterals and other water-related infrastructure to the beneficiaries of those facilities. It divests Reclamation of responsibility for the operation, maintenance, management, regulation of, and liability for the project, lands and facilities to be transferred.

The benefitting non-federal entity is also provided with greater autonomy and flexibility to manage the facilities to meet their needs in compliance with federal, state, and local laws and in conformance with contractual obligations. Public comments were due November 16, 2018.

A transfer of title is a federal action under the NEPA. NEPA requires that when a major federal action may have significant impacts on the quality of the human environment, a statement be prepared to describe the impacts and effects on the human environment associated with the federal action. If it is determined that a certain category of actions will not normally have a significant effect on the human environment, those actions may be excluded from further NEPA review.

FY2019 Budget

On April 12, the House Natural Resources Committee's Subcommittee on Water, Power, and Oceans, held an oversight hearing on the President's FY19 Budget requests for the USBR, the USFWS, the NOAA, and the four Power Marketing Administrations.

Witnesses on the federal panel included Timothy Gallaudet, Acting Under Secretary for Oceans and Atmosphere, U.S. Department of Commerce; Timothy R. Petty, Assistant Secretary for Water and Science, DOI; Mark Gabriel, Administrator, Western Area Power Administration; Kenneth Legg, Administrator, Southeastern Power Administration; Elliot Mainzer, Administrator, Bonneville Power Administration; and Mike Welch, Acting Administrator, Southwestern Power Administration.

Reclamation's FY19 budget request for water and related resources is proposed at \$891 million (a decrease from \$1.148 billion for FY18). This includes \$19.9 million for WaterSMART (down from \$83 million), with \$3 million for water recycling and reuse research grants. Petty said the budget supports collaboration with the USGS and non-federal partners to address emerging water

¹⁷<https://www.federalregister.gov/d/2018-22630>

demands, conservation and improved water management, and water shortages. Petty said \$127 million of the budget request implements Indian water rights settlements and furthers the construction of water delivery systems that support Tribes and rural communities. The budget includes \$34 million for rural water projects, with \$20 million for operation and maintenance and \$14 million for construction. Dam safety continues to be one of Reclamation's biggest challenges and highest priorities, and the budget requests \$88 million. Another \$45 million is for extraordinary maintenance, repairs, and replacements. The budget includes \$19.3 million for recovery of endangered species, including \$12.4 million for the Platte River Endangered Species Recovery Implementation Program and \$4.3 million for the Upper Colorado and San Juan River Endangered Fish Recovery programs. The budget also requests \$17.5 million to facilitate plans to reorganize the DOI's regional boundaries and operating structure, and \$61 million for policy and administration.

WaterSMART

On June 26, the USBR announced the award of \$8.3 million under the WaterSMART initiative to 15 drought resilience projects in California, New Mexico, and Utah. Commissioner Brenda Burman said: "Helping western states prepare and build resiliency for future drought is an essential part of Reclamation's 116-year history. By proactively planning for drought, communities are able to reduce its impact and improve their ability to recover once the rain and snow start to fall."

One California project will receive \$300,000 from Reclamation and contribute \$322,185 in non-federal funds to construct two interties as mitigation actions. The San Juan Water District intertie will enable it to receive water from the Placer County Water Authority, and the Sacramento County Water Authority will complete an intertie to deliver groundwater to the City of Sacramento.

In New Mexico, the Elephant Butte Irrigation District will receive \$180,670 from Reclamation and contribute \$181,784 for infrastructure improvements to better capture stormwater and recharge the aquifer, facilitating watershed scale flow management.

In Utah, Ephraim City will receive \$645,255 from Reclamation and contribute \$788,645 to construct a new well to increase the City's potable water supply by 328 acre-feet per year.¹⁸

On October 2, USBR Commissioner Brenda Burman announced that 54 projects in 12 States would receive \$26.5 million in WaterSMART water and energy efficiency grants, which with non-federal funds will provide some \$167 million for canal lining and piping, automated gates and control systems, and installation of advanced metering. Better water management will also result in greater drought resiliency.

"President Trump is dedicated to better water infrastructure for communities and farmers, and adequate and safe water supplies are fundamental to the health, economy, and security of the country," said U.S. Secretary of the Interior Ryan Zinke. "WaterSMART grants enable Interior,

¹⁸<https://www.usbr.gov/drought>

states, tribes, and local entities to work together to take action to increase available water supply through infrastructure investments.”

“Improving water efficiency is an important part of ensuring communities have a reliable water supply in the future,” said Burman. “The projects we’ve selected today will help communities throughout the Western United States by providing them with tools they can use to better manage their water needs.”

Water and energy efficiency grants help conserve and use water more efficiently, and may also lessen the risk of future water conflicts, or provide other benefits. Other projects complement on-farm improvements that can be carried out with the assistance of the USDA’s NRCS to achieve coordinated water conservation improvements. Funding is provided in two groups. Group I projects receive up to \$300,000 and can be completed within two years. Group II projects may receive up to \$1 million for a phased project up to three years.

The City of Bakersfield, California, will receive \$743,300 to install monitoring devices with telemetry at 20 locations along the Kern River and a Supervisory Control and Data Acquisition system to accurately and remotely measure Kern River diversions. The \$1.6 million project will result in annual water savings of 4,592 acre-feet that will be used to replenish local groundwater and make more water available to users, reducing the potential for water-related conflicts.

The Shoshone-Bannock Tribes near Pocatello, Idaho, will receive \$888,818 to replace a 1,500-horsepower pump on the Portneuf River and install a new variable frequency drive pump. It will also line one mile of earthen canal to reduce water losses due to seepage. The project is expected to result in water savings of 5,628 acre-feet per year which will increase tribal water supply and improve drought resiliency.

The Southwest Kansas Groundwater Management District No. 3, located in western Kansas, will get \$300,000 for a \$1.6 million project to install a new head gate with a Supervisory Control and Data Acquisition system and line three miles of earthen canal with impervious clay, saving 498 acre-feet of water per year, currently lost to seepage and over deliveries. As a result, this project will offset the need to pump water from the Ogallala Aquifer.

The Malta Irrigation District, located on the Milk River in northern Montana, will receive \$300,000 to replace the Exeter Siphon with a new, geosynthetic lined canal embankment, as well as a series of culverts to pass creek flows and storm runoff, which will also help to restore the creek bed for wildlife habitat and recreation. A large debris collection system will also reduce spills by preventing plugging of culverts. The project cost is \$845,020 and annual water savings is 2,500 acre-feet, currently lost due to leakage and spills, improving water quantity and quality.

The Mapleton Irrigation District and Company near Provo, Utah, will replace three miles of existing open canals and a box culvert in Hobbie Creek Canyon with a pressurized pipeline that will

eliminate water losses due to seepage, evaporation and ditch failure. They will receive \$300,000 towards the \$1.2 million project, with savings of 1,685 acre-feet of water each year.

Projects were selected through a competitive process and must provide a minimum 50-percent cost-share.¹⁹

On October 10, the USBR opened a WaterSMART funding opportunity through the Cooperative Watershed Management Program, to help local communities develop solutions to improve water reliability, stretch limited water supplies, address complex issues, and reduce conflict. A 50% cost-share project may receive up to \$300,000 in federal funds, and Reclamation anticipates awarding up to ten projects.

Eligible watershed groups must make decisions on a consensus basis and be composed of diverse stakeholder interests, such as irrigated agriculture, the environment, municipal water suppliers, hydroelectric producers, livestock grazing, timber production, land development, recreation or tourism, private property owners, and state, tribal, local, and federal governments.²⁰

Northwest Area Water Supply Project

On June 27, the USBR announced a settlement agreement and MOU reached on the Northwest Area Water Supply (NAWS) Project. Canada's Manitoba Province appealed the 2017 summary judgment decision of the U.S. District Court for the District of Columbia, and the settlement enabled Reclamation, Manitoba, and the State of North Dakota to file a Joint Motion for Voluntary Dismissal of the appeal on June 22.

Reclamation committed to establishing a team to assist in the development of an adaptive management plan for the NAWS project, and the MOU pertains to Manitoba's participation on that team. The plan will address the operation, maintenance, and replacement of the NAWS Biota water treatment plant, used to reduce the risk of transferring invasive species from the Missouri River basin to the Hudson Bay basin.

The press release said: "Other federal, state and local entities with relevant expertise will also be invited to participate on the adaptive management team. No schedule for the adaptive management team/adaptive management plan development is available at this time. Design and construction of NAWS Project features is proceeding. Currently, construction of upgrades at the Minot water treatment plant are underway and design work is proceeding for the Biota water treatment plant."²¹

¹⁹<https://www.usbr.gov/watersmart/weeg/>

²⁰<https://www.usbr.gov/watersmart/cwmp/>

²¹<https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=62591>; *Western States Water*, #2258, August 25, 2017

Sedimentation

On October 10, the USBR announced a competition seeking cost effective techniques to remove sediment from reservoirs. Sedimentation in reservoirs can limit the active life of reservoirs and reduce available water storage capacity or flood control benefits. Sedimentation also impacts dam outlets, reservoir water intakes, water quality, recreation, upstream flood stage, and downstream habitat.

This is a theoretical challenge requiring a white paper, where solvers can provide ideas on sediment collection, transport, or delivery to the downstream river. Solvers are asked to submit their idea with detailed descriptions, drawings, illustrations, specifications, supporting data or literature, and anything else needed to bring the idea to practice.

In this first stage, a total prize pool of \$75,000 is available. The minimum full amount award is \$15,000. Depending on the proposal, Reclamation may award more than that up to the total prize purse. If this first stage produces winning concepts and Reclamation determines a second stage is beneficial, it will launch a subsequent challenge where participants will be asked to present their proposal and provide a working prototype. In addition to an anticipated higher monetary award, Reclamation will invite industry, non-profit organizations, and venture capital representatives to the Stage 2 presentations and testing.

Reclamation is partnering with the Corps, Federal Energy Regulatory Commission, NRCS and American Rivers on various aspects of this prize competition.²²

Clean Water Act/Environmental Protection Agency

State Revolving Funds

In January, the EPA's Water Infrastructure and Resiliency Finance Center, in collaboration with states and other federal agencies, published a paper titled "*State Revolving Funds: Financing Drought Resilient Water Infrastructure Projects.*" The report reviewed 13 western states in four EPA regions to identify successful uses of the Clean Water and Drinking Water SRFs to fund drought resilient projects. The States are considered "drought prone," and include Arizona, California, Colorado, Idaho, Nevada, New Mexico, Montana, Oklahoma, Oregon, Texas, Utah, Washington, and Wyoming.

Although the scoring processes for potential SRF projects were designed to emphasize public health and water quality improvements, the states combined "traditional projects with nontraditional approaches" to create cost effective solutions for managing water resources in the West. "Most of these projects were not specifically designed to mitigate drought, but nonetheless better position utilities and their customers to conserve and use water resources more efficiently." The report

²²<https://www.usbr.gov/research/challenges/index.html>

reviewed SRF Intended Use Plans and Annual Reports to identify innovative mechanisms states are using to encourage drought resilience. The Finance Center took a more detailed look at specific projects in California, Oklahoma, and Texas, with information provided by their respective EPA Region and state SRF staff.

EPA's report described SRF incentives that the states provide to encourage drought remediation in project proposals, from awarding additional application priority points to setting lower interest rates or providing subsidization through principal forgiveness. Although the report noted that priority points are not comparable between states, it provided several pages of detail about each western state's priority classes, categories, or sections. "Generally, projects that address immediate health needs, compliance, or impaired water bodies are eligible for the largest share of priority points," but the added value of smaller points for sustainability "can be useful in giving drought resilient projects an edge in the ranking process over similar projects." Some SRF programs also implement state-level requirements that focus on water conservation and efficiency.

The report included western state drought resilience and SRF programmatic goals, as well as complementary state programs and other networks that fund infrastructure and drought resilient projects. The states also provide technical assistance to water and wastewater systems for drought planning and water loss auditing.²³

Water Transfer Rule

On January 19, the federal government filed its brief in opposition to the U.S. Supreme Court petitions for certiorari (#17-418 and #17-446), submitted by New York and others. The petitioners sought to appeal the decision in *New York State et al. v. EPA*, 846 F.3d 492 (2nd Cir., 2017), which upheld and deferred to EPA's Water Transfer Rule (40 CFR 122.3(i)). The rule excludes certain water transfers – from a water of the U.S. to another water of the U.S. – from the requirements of the NPDES permits under the CWA.

The federal government's brief argued that: (1) the 2nd Circuit's decision does not conflict with relevant decisions of other appellate courts; (2) EPA's interpretation of Congressional intent is reasonable; and (3) further review of the rule is unwarranted. "In the absence of express statutory direction, EPA has long maintained" that water transfers do not entail the addition of pollutants to the WOTUS "because any pollutants were already present in those waters. EPA's position reflects at least a permissible construction of the term 'discharge of any pollutant' and its statutory definition."

The government's brief also noted that "Congress appreciated the significance of water transfers, which serve multiple important purposes, and state and local governments' roles in administering and regulating them. For example, Congress was aware that water transfers physically implement state regimes for allocating water rights, many of which existed long before the CWA's

²³https://www.epa.gov/sites/production/files/2018-01/documents/srf_drought_paper_-_final_2_8-31-17.pdf

enactment. Far from displacing state and local governments' authority in this area, Congress expressly confirmed it" (internal quotes and citations omitted). In its own analysis leading to the rule, EPA identified Congressional concerns that the statute not unnecessarily burden water quantity management activities or interfere with water resource allocation.

Western states and western water providers also submitted a joint brief in opposition to the petition for certiorari. "Throughout the western United States, water transfers are integral to the delivery of essential water supplies for municipal, industrial, and agricultural use. These projects have always fallen under state regulatory authority – indeed, for nearly the entire 45-year history of the Clean Water Act, the Environmental Protection Agency has consistently interpreted the Act to defer to state administration of water transfers." The brief argued that the 2nd Circuit's decision is reasonable given the severe and cost prohibitive consequences of overturning EPA's Rule. "Subjecting the thousands of western water transfers to the massive costs of a mandatory NPDES system, and requiring them to remove naturally occurring constituents from the transferred water, would yield far fewer benefits than one might assume."

Compliance costs for individual water providers could reach into hundreds of millions of dollars, which are not only infeasible, but would often treat water for natural erosive processes from mountain runoff rather than point source pollution. Additionally, most transferring waters are of equal or better quality than the receiving waters, and impairment of water bodies due to water transfers are rare.

The western brief also argues there are other state and federal mechanisms available to protect water quality. "The Rule does not establish a regulation-free zone. To the contrary, the Rule was enacted in part because state and federal regulatory mechanisms are available to mitigate the potential environmental effects of water transfers." States have water quality management plans, regulations for total daily maximum loads, and a variety of unique laws that are often substantially broader than regulation under the CWA.

The federal government also has alternative tools such as the Safe Drinking Water Act, the Federal Energy Regulatory Commission's regulation of non-federal hydropower dams, the National Environmental Policy Act, and the ESA. Contrary to New York's arguments that these tools are insufficient to resolve interstate disputes over water pollution, "more than a dozen interstate compacts involving more than twenty-five States facilitate interstate pollution control." The brief describes the interstate cooperative efforts to address water quality concerns in the Colorado River Basin, as well as EPA's basin-wide salinity control plan, and Congressional legislation on the issue. "As a result of these efforts, salinity levels in the basin have declined significantly.... In short, the States and the federal government have tools available to address water quality concerns in the context of water transfers, and they in fact employ those tools."

On February 26, the U.S. Supreme Court denied the petitions for certiorari. The WSWC supports EPA's Water Transfers Rule, which will stand under the 2nd Circuit's decision.

Litigation

On January 22, the U.S. Supreme Court reversed the 6th Circuit's ruling that challenges to the EPA's 2015 WOTUS Rule belong in the appellate court. The Supreme 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 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 Supreme 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." *National Association of Manufacturers v. Department of Defense, et al.*, No. 16-299.²⁴

On May 1, the U.S. District Court for North Dakota entered an order affirming that *North Dakota et al. v. EPA* would 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 6th Circuit. EPA objected to the magistrate judge's decision in March to proceed with the case, and the District Court Judge denied EPA's 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, 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 prohibited implementation of the EPA and Corps' 2015 WOTUS Rule in the following states: Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin. Although the Trump Administration had delayed implementation of the 2015 Rule and was still 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.

²⁴*Western States Water*, #2242, May 5, 2017; #2227, January 20, 2017; #2224, December 30, 2016; #2214, October 21, 2016; and #2208, September 9, 2016

The Court 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 water mark’ 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 *Rapanos*, 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.’”

On August 16, the U.S. District Court for South Carolina issued an injunction (*South Carolina Coastal Conservation League et. al. v. EPA*, 2:18-cv-330) that vacated the EPA and Corps’ February 6, 2018 Suspension Rule,²⁵ which suspends the effective date of the 2015 WOTUS Rule until 2020. The Court determined that the agencies violated the Administrative Procedures Act (APA) by: (1) taking action with inadequate public notice and meaningful opportunity to comment on the substance of either the 2015 WOTUS Rule or the 1980s regulation; (2) failing to consider and articulate the substantive implications of suspending the 2015 WOTUS Rule; and (3) failure to restore the legal effect of the language of the 1980s regulation by publication in the *Federal Register*.

The Court rejected the agencies’ argument that the Suspension Rule is not a repeal or rescission, and that it maintains the status quo. “As administrations change, so do regulatory priorities. But the requirements of the APA remain the same.”

The Court declined to geographically limit the scope of the injunction, making it applicable nationwide. However, only 26 states were affected by the ruling, as the remaining states were under court-ordered stays of the WOTUS Rule.

On September 12, the U.S. District Court for the Southern District of Texas issued an injunction on implementation of the 2015 WOTUS Rule for the States of Texas, Louisiana, and Mississippi (*Texas, et al. v. EPA*, 3:15-cv-162). The Court noted that it did not want to overstate the strength of the States’ case, but the public interest in governmental, administrative, and economic stability overwhelmingly tipped the balance of factors in favor of an injunction. “Determining which governmental bodies have jurisdiction over our nation’s waters is an important task, and one that this Court is unwilling to do without full discovery and briefing on the matter.”

The Court also said that “...clarification of what is, and what is not, a navigable water under the Clean Water Act is long overdue.” Post-*Rapanos* cases have inconsistently used Justice Kennedy’s concurrence or Justice Scalia’s plurality opinion as the controlling test for determining what is navigable water, the Court said, or even applied “pre-*Rapanos* Circuit precedent because it could not discern clear direction from *Rapanos*.”

²⁵83 Fed. Reg. 5200

On September 18, the U.S. District Court for the District of North Dakota issued a clarifying order that its previous injunction on August 27, 2015, also applied to the State of Iowa as a subsequent intervenor-plaintiff (*North Dakota, et al. v. EPA*, 3:15-cv-59). Iowa filed a motion to intervene in the *North Dakota* case in November 2015, which was granted the following month. At the time, the 6th Circuit had issued a nationwide stay, making the applicability of the *North Dakota* injunction for Iowa moot. The EPA's subsequent publication of the Suspension Rule delaying the effective date of the 2015 WOTUS Rule on February 6, 2018, continued to render the *North Dakota* injunction moot, until the Suspension Rule was invalidated by the South Carolina federal district court on August 16, 2018. At that point, the 2015 WOTUS Rule became effective in the State of Iowa. Governor Kimberly Reynolds (R-IA) filed a motion seeking clarification that the *North Dakota* injunction applied to Iowa. The federal agencies and intervenor-defendant Sierra Club did not oppose expanding the scope of the injunction to include Iowa, and the Court granted the request.

With Texas, Louisiana, Mississippi, and Iowa under court injunctions, the 2015 WOTUS Rule was effective in only 22 of the 50 states.

On September 26, a motion was filed in *Georgia et al. v. Wheeler*, 2:215-cv-79, seeking to expand the injunction from the U.S. District Court for the Southern District of Georgia to the remaining 22 states. "This is a deeply troubling state of affairs," the business intervenor-plaintiffs argued. "A rule this fundamental to the CWA's regulatory scheme should not apply in a patchwork manner. Nor, indeed, should it apply *at all*: As this Court and three other federal courts have now concluded, the WOTUS Rule is almost certainly unlawful." The motion lays out the changed circumstances since the narrow 11-state *Georgia* injunction was issued, including the subsequent addition to the *Georgia* case of the business intervenor-plaintiffs with members in those 22 states.

Suspension Rule

On January 31, the EPA and U.S. Department of the Army finalized a rule to delay the applicable date of the 2015 WOTUS Rule until 2020. EPA Administrator Scott Pruitt said: "The 2015 WOTUS rule developed by the Obama administration will not be applicable for the next two years, while we work through the process of providing long-term regulatory certainty across all 50 states about what waters are subject to federal regulation." EPA's press release explained: "The 2015 Rule, which redefined the scope of where the Clean Water Act applies, had an effective date of August 28, 2015. The U.S. Court of Appeals for the Sixth Circuit's nationwide stay halted implementation of the 2015 Rule. But last week the Supreme Court determined that the U.S. Courts of Appeals do not have original jurisdiction to review these challenges and, therefore, the Sixth Circuit lacked authority to issue a stay. Given uncertainty about litigation in multiple district courts over the 2015 Rule, this action provides much needed certainty and clarity to the regulated community during the ongoing regulatory process."²⁶ The rule was published on February 6.

²⁶<https://www.epa.gov/wotus-rule>

On June 29, the EPA announced a supplemental notice of proposed rulemaking (SNPR) to request comment on the legal basis of the 2015 WOTUS Rule. This notice will supplement the July 27, 2017, proposed rulemaking,²⁷ continuing step one of the two-step process to review and revise the definition of WOTUS. EPA noted that commenters to the July 2017 proposal do not need to resubmit their comments. However, the supplemental notice does include additional considerations for the repeal of the 2015 WOTUS Rule that were not previously discussed in detail.

The SNPR indicated that the interpretation of the CWA adopted by the 2015 WOTUS Rule “expanded the meaning for tributaries and adjacent wetlands to include waters well beyond those regulated by the agencies under the preexisting regulations,” as applied by the agencies following the U.S. Supreme Court decisions in *Rapanos* and *SWANCC*. This interpretation is not compelled, appears to exceed the agencies’ authority under the CWA, and “may have altered the balance of authorities between the federal and State governments, contrary to the agencies’ statements in promulgating the 2015 Rule and in contravention of CWA section 101(b)....”

EPA Administrator Scott Pruitt said, “By issuing today’s supplemental proposal, we are responding to public feedback, expanding opportunities for comment, and providing clarity and transparency in the rulemaking process. We are making it clear that we are proposing to permanently and completely repeal the 2015 WOTUS rule and keep the pre-2015 regulatory framework in place as we work on a new, improved WOTUS definition.”²⁸

On July 12, the EPA and Corps published a supplemental notice in the *Federal Register*, clarifying the agencies’ intent to repeal the 2015 Clean Water Rule and recodify the regulatory definitions of “waters of the United States” that existed prior to the 2015 rule. Comments were due by August 13.²⁹

On August 29, the EPA provided an update on litigation and the status of the 2015 WOTUS Rule, following the decision of the U.S. District Court for South Carolina to vacate the Suspension Rule. The 2015 WOTUS Rule is now in effect in 26 states, including California, Oklahoma, Oregon, Texas, and Washington. Although EPA and the Corps have filed motions appealing the order and seeking a stay of the district court’s decision, the agencies are complying with the order. Implementation issues are being handled on a case-by-case basis. “The agencies recognize the uncertainty this decision has created and are committed to working closely with states and stakeholders to provide updated information on an ongoing basis regarding which rules are in place in which states.”³⁰

²⁷82 Fed. Reg. 34899

²⁸<https://www.epa.gov/newsreleases/epa-and-army-seek-additional-public-comment-waters-us-repeal>

²⁹83 Fed. Reg. 32227

³⁰<https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update>

Federal Outreach

On February 20, the EPA and the Department of the Army held a “WOTUS Outreach Webinar for State Partners” to discuss their direction and progress toward revising the jurisdictional definition of “waters of the United States.” The agencies noted that they view the webinar and opportunity for questions as an important part of their enhanced pre-proposal engagement with their state partners. The presentations included an overview of the rulemaking process, including federalism consultations, feedback from states, and a preliminary assessment of state authorities and programs that the agencies have prepared and plan to transmit to the states next week. The agencies discussed considerations for a proposed rule, including clarifications and definitions for tributaries, wetlands, and exclusions.³¹

The agencies said that all states have a legal definition for state waters, as well as approved water quality standards under the CWA. States’ permitting authority and programs vary. Some states limit permitting requirements so as not to be more stringent than federal requirements. They are interested in hearing back from the states as to whether the assessments of their programs are accurate, how state limitations apply in the context of changes to jurisdictional definitions, how the states have dealt with past jurisdictional uncertainty, what plans the states have to respond to updated clarifications, and whether there are other questions the agencies should be asking.

State feedback regarding the appropriate scope of federal jurisdictional waters varied, including: (1) traditional navigable waters only; (2) permanent lakes, and perennial streams that contain water at all times except extreme drought; (3) perennial, intermittent, and ephemeral streams; (4) only wetlands that directly touch waters of the U.S.; and (5) wetlands within a set distance, that have a direct hydrologic connection, or tributaries that have a minimum level of flow. State feedback on exclusions also varied, with comments on groundwater, shallow subsurface flow, farm ponds, artificial drains, stock ponds, dip ponds for fire suppression, municipal storm sewer system features, irrigation ditches, roadside ditches, man-made ditches without perennial flow, ephemeral streams, wet meadows, sheet flow, drain tiles, dry arroyos, prairie potholes, and playa lakes.

Although there is no current national data set or map that the agencies were aware of, the federal agencies were working on analytical tools to help clarify the scope of CWA jurisdiction. They were seeking to estimate stream mileage and differentiate between perennial, intermittent and ephemeral streams, using input from the National Hydrography Dataset, as well as the National Wetlands Inventory, as refined by data from the Corps. Given the limitations of the data sets, the agencies also sought input from the states on the utility of the exercise and whether the states were aware of other state-specific mapping resources or other approaches.

On March 8-9, the EPA and Environmental Coalition of States (ECOS), hosted a unique co-regulators workshop with several selected States to discuss WOTUS Step 2 efforts to replace the

³¹<http://www.westernstateswater.org/letters/>

2015 rule. David Ross, EPA Assistant Administrator for Water with Cindy Barger, Deputy General Counsel, Office of the Assistant Secretary of the Army (Civil Works), conducted the meeting. Ryan Fisher, Principal Deputy Assistant Secretary of the Army (Civil Works), joined for part of the discussion, and EPA Administrator Scott Pruitt dropped by and expressed his appreciation for the States' participation.

Representative States were identified by ECOS and other interstate organizations, including the Association of Clean Water Agencies (ACWA), Association of State Wetland Managers, and the WSWC. Arkansas, Arizona, Florida, Iowa, Maryland, Minnesota, Oregon, Pennsylvania and Wyoming participated, with representatives from state environmental, water quality, agriculture, land, and water resource agencies. WSWC members participating were: Jennifer Wigal, Water Quality Program Manager, Oregon Department of Environmental Quality (DEQ) (and ACWA Chair); Trevor Baggione, Water Quality Division Director, Arizona DEQ; and Pat Tyrrell, Wyoming State Engineer.

In an unusually open and frank discussion of possible paths forward in writing a new rule, EPA and the States addressed a wide range of issues. Constitutional federal and state roles and responsibilities were addressed, recognizing the Congress and the Supreme Court have not provided clear guidance and definitions as to what constitutes "waters of the United States," tributaries, wetlands and exclusions. Prior outreach and public comment efforts provided a variety of concepts for discussion.

There was an extensive discussion of bringing greater certainty to the CWA permitting process by more clearly defining jurisdictional waters, or WOTUS, and waters that are clearly excluded. However, there was general agreement that some gray area will remain and no bright line definition is likely. ACWA and WSWC provided summaries of State authorities available to protect waters and water quality that may fall outside any future WOTUS definition. Waters of the State is a much broader, often all-inclusive, category.

For those waters that may in the future not be defined as jurisdictional, the discussion covered the potential implications and the development or expansion of state programs to address needs or gaps related to: CWA Section 303 – Listing Impaired Waters and Total Maximum Daily Loads; Section 311 – Oil and Hazardous Substances; 401 – State Water Quality Certification; 402 – NPDES; and 404 – Dredge or Fill Permits. With respect to Section 404, there was also an extended discussion of the potential for delegation of CWA authority to states and obstacles to that, including the costs of program implementation, which waters might be delegated and some that may not, and continuing oversight by the Corps and EPA.

Mr. Ross' priorities included true engagement with States. The meeting concluded with an open discussion, and recommendations for future state outreach. Pat Tyrrell observed, "This feels like consultation."

New Proposed WOTUS Rule

On June 15, the EPA and the Department of the Army submitted to the Office of Management and Budget (OMB) a new proposed rule defining the WOTUS for interagency review. Following the review process, the proposed rule will be issued for public comment. This proposed rule follows “Step 2” of the process to consider revisions to the 2015 Clean Water Rule, consistent with the President’s Executive Order 13778.

EPA Administrator Scott Pruitt said: “Farmers, ranchers, landowners, and other stakeholders are counting on EPA to listen to their input when it comes to defining ‘waters of the United States.’ Today, we are taking an important step toward issuing a new WOTUS definition and answering President Trump’s call to ensure that our waters are kept free from pollution, while promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the federal government and the states under the statutory framework of the Clean Water Act.”

Assistant Secretary of the Army (Civil Works) R.D. James said: “From day one we have been focused on bringing common sense and fairness back to the rulemaking process. Today’s action highlights our commitment to listening to public input, providing clear and transparent rules, and ensuring that our waters remain clean and our economy can continue to thrive.”

The Administration has expressed ongoing interest in consultation meetings while the new Proposed Rule defining “waters of the U.S.” is under review at the OMB. Although there are no updates on the timing of the Proposed Rule, the review process can take up to 90 days with the possibility of extensions. The final rule is not expected until 2019.

On October 2, EPA Acting Administrator Andrew Wheeler said that EPA would announce a new WOTUS Rule in approximately 30 days. During his opening remarks at the EPA’s Third Smart Sectors Roundtable Summit, Wheeler said: “The previous Administration’s Waters of the U.S. definition would have dramatically expanded federal power over the private sector. Our proposal will restore the rule of law and end years of uncertainty over where federal jurisdiction begins and ends. Our definition will be clear and straightforward and easy for landowners to understand.... As we are moving forward on Waters of the U.S., we hope to have something out over the next 30 days or so for a proposal. Our guiding principle there is to follow the Clean Water Act and the Supreme Court cases so we develop a rule that will stand the course of time and provide regulatory certainty for American businesses, for environmental organizations, and more importantly, the American people, so that everybody knows exactly what is a water of the U.S. and what is not.”³²

On December 11, the EPA and the Corps announced a proposed rule to define the “waters of the United States” and clarify federal authority under the CWA. The proposed definition would include traditional navigable waters, perennial and intermittent tributaries to navigable waters, wetlands adjacent to navigable waters and tributaries, and certain ditches, lakes, ponds, and

³²www.youtube.com/watch?v=esNpcMnpyuA

impoundments. Excluded from federal regulation would be groundwater, ephemeral features that only contain water in response to rainfall, most roadside and farm ditches, prior converted cropland, stormwater control features, and wastewater treatment systems.

The proposed definition is intended to clearly identify waters subject to regulation under the CWA while respecting the role of states and tribes in managing their own land and water resources. The agencies recognize that states and many tribes have existing regulations to protect and manage waters within their borders, and the proposed rule offers greater flexibility for states and tribes to manage their land and water resources while still protecting the nation's navigable waters, as intended by Congress. Additionally, in response to requests from some states, EPA and the Corps are exploring ways the agencies can work with federal, state, and tribal partners to develop a data or mapping system that could provide a clearer understanding of the presence or absence of federal jurisdiction over waters.

EPA Acting Administrator Andrew Wheeler said: "For the first time, we are clearly defining the difference between federally protected waterways and state protected waterways. Our simpler and clearer definition would help landowners understand whether a project on their property will require a federal permit or not, without spending thousands of dollars on engineering and legal professionals." R.D. James, Assistant Secretary of the Army for Civil Works, said: "EPA and the Army together propose this new definition that provides a clear and predictable approach to regulating 'waters of the United States.' We focused on developing an implementable definition that balances local and national interests under the Clean Water Act."

Once published in the *Federal Register*, the agencies anticipate a 60-day comment period, with additional outreach to states and stakeholders.³³

On December 28, the EPA and Corps published notice in the *Federal Register* of a public hearing on a revised rule to redefine WOTUS. The proposed rule has yet to be published in the *Federal Register*. The public hearing will be held in Kansas City, Kansas at the Reardon Convention Center on January 23. On January 22, the agencies will post a general agenda for the hearing that will list pre-registered speakers in approximate order. The agencies may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

Groundwater/NPDES

Litigation

On February 1, 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

³³<https://www.epa.gov/wotus-rule/revised-definition-waters-united-states-proposed-rule>

the Pacific Ocean, a “navigable water.” *Hawaii Wildlife Fund v. County of Maui*, No. 15-17447 (9th Cir. 2018). 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 NPDES permitting requirements under the CWA. Although the U.S. District Court of Hawaii held that the groundwater is both a point source and a 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.”

On August 27, the County of Maui filed a petition for certiorari to the U.S. Supreme Court in *County of Maui v. Hawaii Wildlife Fund* (#18-260). The first question presented is whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

In its petition, Maui argued that the 9th Circuit “has swept into the NPDES permitting program millions of sources long regulated as nonpoint sources of pollution” by treating pollutants that reach navigable water by nonpoint sources, like groundwater, as point sources. The CWA distinguishes between groundwater and navigable waters, and between point sources and nonpoint

sources, and “...Congress specifically debated [and rejected] several proposals to extend NPDES permitting to groundwater that may connect to navigable waters.”

The underground injection (UIC) wells in Maui County are part of a wastewater treatment facility operated for forty years under the EPA and Hawaii Department of Health’s (HDOH) safe drinking water program, as permitted Class V wells. Effluent from local homes and businesses is treated to meet Hawaii’s highest standards for recycled water, and the permit imposes limits on nitrogen and other constituents to address ocean water quality. “Though these agencies have known since the facility’s design in the early 1970s that the effluent would enter groundwater, which in turn would carry it to the ocean, neither required an NPDES permit until this litigation.” None of Hawaii’s 6,600 other Class V UIC wells have NPDES permits, either.

Additionally, Hawaii’s nonpoint source pollution management program is designed to control the migration of effluents from the County’s wells to coastal waters, providing a coordinated federal, state, and local approach to effectively target pollutants and their sources, as envisioned by the CWA.

Maui noted that certiorari is warranted because the 9th Circuit’s decision creates a conflict with the bright-line decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) and several appeals court decisions consistent with *Miccosukee*. The response to the petition for certiorari is due October 1.

The 4th and 6th Circuit courts issued decisions relating to the role of groundwater in moving pollutants into navigable waters, and whether the CWA permitting requirements apply. The diverse decisions created a nuanced Circuit split, including the 9th Circuit ruling in *Hawaii Wildlife Fund v. County of Maui*.

EPA Rulemaking

On February 20, the EPA published a notice³⁴ requesting comments on the applicability of the CWA to pollutant discharges from point sources that reach jurisdictional surface waters through groundwater or other subsurface flow. The notice provides background on the NPDES program. It addresses various collateral statements EPA has made since 1990 about the applicability of the CWA to pollutant discharges to hydrologically-connected groundwater. It notes that case law results are mixed. Some federal courts have interpreted the CWA to exclude any federal authority over groundwater, clearly leaving the regulation of groundwater to the states, while others “have taken the view that Congress intended to regulate the release of pollutants that reach waters of the United States, whether the pollutants reach the surface water directly, or through groundwater with a direct hydrologic connection.” EPA has characterized a direct hydrologic connection on a case-by-case basis, considering factors such as geology, flow, slope, distance, and traceability.

³⁴83 FR 7126

EPA requested comments on these questions: (1) Whether subjecting such releases to NPDES permitting is consistent with the text, structure, and purpose of the CWA? (2) If federal authority does exist, whether those releases would be better addressed through other federal programs, such as underground injection control regulations under the Safe Drinking Water Act, or through state statutory or regulatory programs? (3) Whether EPA should clarify its previous statements to provide certainty, such as defining what activities would be regulated, or which connections are considered “direct?” (4) What issues and consequences should be considered for asserting CWA jurisdiction over certain releases to groundwater, or determining that no such jurisdiction exists? and (5) What format or process EPA should use to revise or clarify its previous statements, whether memoranda, guidance, or rulemaking?

On May 21, the WSWC submitted comments to EPA regarding the applicability of the CWA to pollutant discharges to hydrologically-connected groundwater. WSWC emphasized the unique position of groundwater as a resource in the West, and longstanding deference to state management of groundwater resources by Congress and the U.S. Supreme Court. “The EPA should work cooperatively with the governors and appropriate state agencies to address state and federal needs. Protecting and managing groundwater and surface water requires cooperation among all levels of government. States have demonstrated the ability and authority to address federal needs regarding groundwater within existing legal frameworks.... The EPA is encouraged to meet with individual states and work together to identify solutions to water quality needs.”

The WGA submitted a comment that focused on the need to recognize the limits of the CWA, state authority over groundwater, and the importance of consulting with states and utilizing their local science and expertise. WGA also requested, if EPA is going to continue to analyze discharges of pollutants to groundwater on a case-by-case basis, that EPA establish clear criteria, processes, and parameters.

Eileen Sobeck, on behalf of the California State Water Resources Control Board, took no position on CWA jurisdiction itself, but requested that any clarifications or revisions of EPA’s previous statements be adopted through a formal rulemaking procedure.

Patrick Pfaltzgraff submitted comments on behalf of the Colorado Department of Public Health and Environment (CDPHE), Water Quality Division. “It has been the governing case law in Colorado for at least 25 years that the discharge of a pollutant into ‘navigable waters’ can include a discharge which reaches those waters through groundwater.... CDPHE has used this flexible authority, when appropriate based on site-specific conditions, to permit such discharges as discharges to surface water in order to protect federal and state surface waters from exceeding water quality standards, particularly aquatic life standards. CDPHE requests that [EPA] allow states to retain their current flexibilities to regulate these discharges using our discretion to determine which laws and regulatory schemes apply under the CWA and other state and federal laws. If federal law does not allow protection of surface water from a discharge to groundwater, this could compromise CDPHE’s ability to protect federal and state surface waters in accordance with CDPHE’s responsibilities under the federal CWA and the Colorado Water Quality Control Act.”

Jennifer Carr, Nevada Division of Environmental Protection (NDEP), emphasized the importance of involving the states as co-regulators and thanked EPA for “continuing to increase State involvement in federal rulemaking workgroups and other outreach activities that seek input and communicate federal direction and policy.” She provided language from the Nevada Water Pollution Control Law, which addresses the types of discharges contemplated while being protective of all waters of the state. She noted Nevada’s participation in the Brief of Amici Curiae filed in *Hawaii Wildlife Fund v. County of Maui*, which explains that the 9th Circuit panel decision threatens the sovereign states’ traditional primary authority to regulate and manage intrastate land and water uses, including groundwater.

Butch Tongate, New Mexico Environment Department (NMED), opposed efforts to clarify or revise EPA’s previous statements at this time. “The current EPA guidance on this question has allowed states, such as New Mexico, to approach questions regarding these types of discharges with proficiency and flexibility. New Mexico does not have primacy over the National Pollutant Discharge Elimination System program. Accordingly, the NMED coordinates its efforts to protect surface and groundwater resources utilizing both state and federal law. The ability to utilize both these mechanisms provides the NMED with the flexibility to determine how best to address such discharges, using the CWA or state permitting program, or both. Creating a bright-line rule on this question at this point would interfere with a state’s ability to determine for itself how to manage such discharges, which can be very technically complex and require the use of multiple regulatory tools to adequately resolve.”

Scott Thompson, Oklahoma Department of Environmental Quality, noted that the primary authority to protect and manage groundwater should remain with the states, and that the CWA was not intended and is not well-suited to regulate groundwater releases of pollutants to groundwater. He provided examples of Oklahoma and other states’ statutes that address the release of pollutants into groundwater. He also detailed the protections offered under the RCRA, CERCLA, and the Safe Drinking Water Act.

Stephanie Perdue, Texas Commission on Environmental Quality (TCEQ), requested that EPA revise its previous statements to clarify that the CWA does not regulate groundwater, and only extends to discharges to WOTUS. “EPA should refrain from making future statements that do not take into consideration the States’ jurisdictional authority.” Texas statutes safeguard groundwater supplies from pollution and degradation. Perdue described TCEQ programs to address groundwater quality, and noted that discharges of waste or pollutants directly to groundwater are not authorized. She added that unintentional releases such as spills and leaks are most appropriately addressed by emergency response, clean up, remediation, or enforcement mechanisms. Permitting releases of contaminants to groundwater under the CWA could interfere with other state and federal regulatory programs, and complicate remediation programs, undermining cleanup standards by quantifying allowed releases.

Members of the Senate Environment and Public Works Committee requested that EPA clarify that discharges through groundwater are not subject to regulation as point sources under the

CWA. The letter references recent language accompanying the Consolidated Appropriations Act of 2018 that explains how recent court decisions are inconsistent with Congress’s intended reach of the NPDES program. It also reviews legislative history surrounding passage of the CWA, making clear that Congress explicitly rejected amendments that would have extended CWA point source regulation to groundwater. Included with the letter are materials from the Committee’s hearing in April on The Appropriate Role of States and the Federal Government in Protecting Groundwater. The letter was signed by Senators John Barrasso, Chairman (R-WY), James Inhofe (R-OK), Deb Fischer (R-NE), Jerry Moran (R-KS), Dan Sullivan (R-AK); as well as Senators John Boozman (R-AR), Joni Ernst (R-IA), Shelley Moore Capito (R-WV), and Roger Wicker (R-MS).³⁵

Section 404/Jurisdictional Determinations

On March 30, EPA Administrator Scott Pruitt sent a memo to the Assistant Administrator, Office of Water, and Regional Administrators revising authority delegated under the Section 404 dredge and fill permit program. “To restore regulatory certainty and promote the rule of law, the U.S. Environmental Protection Agency began a two-step process last year to review and define ‘waters of the United States’ under the Clean Water Act. In light of this ongoing effort and to ensure consistency and certainty in how the EPA makes certain jurisdictional determinations under the Clean Water Act, I have issued the accompanying revised delegation of authority for Section 404 dredged and fill material permitting. With this revised delegation, authority previously delegated to regional administrators to make final determinations of geographic jurisdiction shall be retained by the Administrator. Please take all necessary steps to adjust associated consultations, reviews and other practices in a manner consistent with the revised delegation. As part of effectuating this revision, I ask that you involve the Administrator’s Office early on in the process of developing geographic determinations.... The revised delegation is effective immediately.”

Water Infrastructure Finance and Innovation Act

On April 4, the EPA announced the next round of credit assistance under the WIFIA program. Congress provided \$63 million through the Consolidated Appropriations Act of 2018 (P.L. 115-141), which more than doubled the funding available in 2017. The Notice of Funding Availability solicits letters of interest, due by July 6, to demonstrate project eligibility, financial creditworthiness, engineering feasibility, and alignment with EPA’s policy priorities: (1) to provide for clean and safe drinking water, including reducing exposure to lead in the nation’s drinking water systems; and (2) to repair, rehabilitate, and replace aging infrastructure and conveyance systems.

EPA Administrator Scott Pruitt said: “Thanks to the President’s leadership, this WIFIA funding will spark new investments to repair our nation’s crumbling water infrastructure. EPA will play a key role in the President’s infrastructure efforts by incentivizing states, municipalities, and

³⁵www.westernstateswater.org/letters/

public-private partnerships to protect public health, fix local infrastructure problems, create jobs, and provide clean water to communities.”³⁶

On April 20, the EPA announced the issuance of its first loan under the WIFIA program to King County, Washington. The low interest rate loan will help finance nearly half of the Georgetown Wet Weather Treatment Station, a project estimated to cost \$275 million. The station will collect and treat up to 70 million gallons of wastewater and stormwater per day, including polluted runoff and sewage during bad weather. During heavy winter rains, the combined sewer pipes currently overflow into the Duwamish River, which drains into Puget Sound.

EPA Administrator Scott Pruitt said: “EPA’s WIFIA program is proof positive that we can achieve environmental protections and economic growth at the same time.”

On June 20, the EPA issued its second loan through the WIFIA program to the City of Omaha, Nebraska. The \$69.7 million loan will help the city finance and construct the Saddle Creek Retention Treatment Basin, to collect and treat up to 320 million gallons of wastewater and stormwater. The polluted runoff overflows the existing sewer system during storm events and spills into the Little Papillion Creek, then the Missouri River. The loan will finance 49% of the eligible project costs, including study, design, construction administration, inspection, material testing, land acquisition, and construction costs. The low, fixed interest rates through the WIFIA program are expected to save the city’s ratepayers up to \$20 million in interest, while providing jobs and improving local water quality.

Governor Pete Ricketts (R-NE) said: “Thank you to the Environmental Protection Agency and Administrator Pruitt for supporting our efforts in Nebraska to build high-quality water infrastructure. Modernizing and upgrading our infrastructure is key to delivering a great quality of life and helping grow the greater Omaha area and communities across our state.” EPA Region 7 Administrator, Jim Gulliford said: “The Saddle Creek project is one of 60 the city has undertaken to protect waterways from combined sewer overflows. The WIFIA loan should provide the City of Omaha immediate capital to modernize their water infrastructure at the Saddle Creek Basin.”³⁷

On July 30, the EPA issued a \$699 million loan under the WIFIA to the San Francisco Public Utilities Commission (SFPUC). The loan will help finance a project to replace their outdated biosolids digester facilities with more modern, efficient technology. SFPUC General Manager Harlan Kelly said: “Rebuilding our biosolids digester facilities is crucial to realizing our vision to transform San Francisco’s largest wastewater treatment plant into a modern resource recovery facility. With the federal government’s low-cost loan program, we can realize significant savings for our ratepayers and create high quality employment and contracting opportunities in parts of the City that need it most.” The total project is estimated to cost \$1.43 billion, and the WIFIA loan is expected to save the SFPUC up to \$398 million in interest.

³⁶www.epa.gov/wifia

³⁷<https://www.epa.gov/newsreleases/epa-provides-nearly-70-million-loan-omaha-water-infrastructure-upgrade>

On August 1, EPA announced a \$135 million WIFIA loan to the Orange County Water District (OCWD) to help finance the final expansion of its groundwater replenishment system. The project will enable OCWD to purify treated wastewater to produce an additional 30 million gallons per day of drinking water, which will be stored in the county's groundwater basin to improve the county's resilience to future droughts. OCWD Board President Denis Bilodeau said: "WIFIA borrowing enhances the Groundwater Replenishment System's viability. The WIFIA loan program creates another tool in the proverbial toolbox to finance critical water infrastructure projects like ours. The cost of borrowing is less than the private market would have been, which helps make the cost of the final expansion feasible to ratepayers. OCWD is trying to reduce reliance on imported water from the Colorado River and become self-sufficient...." OCWD estimates the total project will cost \$282 million, and the WIFIA loan will provide up to \$16 million in interest savings compared to municipal bonds.

On November 1, the EPA announced the selection of 39 projects eligible to apply for WIFIA loans. EPA received 62 letters of interest from public and private entities during the second round of WIFIA funding. Eight of the prospective borrowers previously sent letters of interest during the first round in 2017, and were eligible to apply for a loan. Of the projects selected, twelve will reduce lead or other drinking water contaminants, and 37 will address aging infrastructure. In Arizona, the City of Phoenix is seeking a WIFIA loan for its Water Main Replacement Program (\$49 million).

Twelve projects by various entities in the State of California were selected: San Mateo Wastewater Treatment Plant Upgrade and Expansion Project (\$277 million); Coachella Valley Stormwater Channel Improvement Project (\$22 million); Carlsbad Intake Project (\$32 million) and North Indio Regional Flood Control Project (\$29 million); Stockton Regional Wastewater Control Facility Modifications Project (\$53 million); Silicon Valley Clean Water RESCU (\$181 million); Sunnyvale Cleanwater Program Phase 2 (\$166 million); Hinkle and Kokila Reservoir Rehabilitation and Replacement (\$12 million); City of Los Angeles Donald C. Tillman Advanced Water Purification Facility (\$185 million); Los Angeles County Joint Water Pollution Control Plant Effluent Outfall Tunnel (\$426 million); Inland Empire Utilities Agency RP-5 Expansion Project (\$138 million); and Antioch Brackish Water Desalination Project (\$32 million).

In Kansas, two projects were eligible: Wichita Northwest Water Treatment Facility (\$270 million); and Frontenac Water Supply, Treatment, Distribution and Storage Improvements and Additions (\$5 million). Oklahoma has the Enid KLWS Pipeline (\$53 million). Oregon has the Willamette Water Supply Program (\$617 million). Washington has the Seattle Ship Canal Water Quality Project (\$197 million).³⁸

Oil and Gas Produced Water Reuse

On May 2, EPA announced plans for a study of how EPA, states, and stakeholders regulate and manage wastewater from the oil and gas industry. Large volumes of produced water are

³⁸ <https://www.epa.gov/wifia/wifia-selected-projects>

currently managed by disposing of it through underground injection, a process that has limitations in some areas. Some states and stakeholders are asking whether it makes sense to treat and reuse the water for other purposes, including discharge of treated produced water to surface water. EPA's study would address how existing CWA approaches to produced water can interact more effectively with state regulations, requirements, or policy needs. EPA plans to reach out to states in the coming months to identify whether future agency actions are appropriate to further address oil and gas extraction wastewater.

Ken McQueen, New Mexico Energy, Minerals and Natural Resources Department Cabinet Secretary said: "In New Mexico's arid environment, conserving our resources by recycling produced water for more beneficial uses presents a significant economic development and water supply opportunity. For years New Mexico has advocated recycling of produced water in oil and gas completion activities. Continued collaboration with EPA on this issue will no doubt encourage even greater recycling and additional reuse opportunities."

EPA Administrator Scott Pruitt said: "I am pleased that this study will take into consideration the expertise of states and stakeholders in developing effective options and alternatives to better manage wastewater from the oil and gas sector. It's important the Agency works cooperatively with local officials and energy providers to protect the environment and provide affordable, reliable energy to the American people."

On July 19, the EPA announced that it had entered into a MOU with the State of New Mexico to clarify the existing regulatory and permitting frameworks for using the large volumes of wastewater produced from oil and natural gas extraction activities.

New Mexico is the third largest oil producer in the United States, and in 2017 produced nearly 900 million barrels of wastewater, most of which was disposed of in underground injection wells, removing it from the hydrologic cycle and other uses. The MOU includes a workgroup that will be convened to develop a white paper that synthesizes the framework of state and federal law and identifies alternatives and opportunities for beneficial use of treated produced water.

The MOU and workgroup build on EPA's oil and gas wastewater study announced in May, to take a holistic look at how EPA, states, tribes, and stakeholders regulate and manage the large volumes of wastewater. The agency wants to know how existing federal approaches to produced water under the CWA can interact more effectively with state and tribal regulations. EPA is taking a look at regulatory requirements and policy needs to determine whether it is possible to enable broader discharge of treated wastewater to surface waters. The states are at the forefront of the changing oil and gas industry, EPA said, and often manage complex water allocation programs under state law.

New Mexico State Engineer Tom Blaine said: "Reuse of this water in appropriate applications has the potential to relieve the growing demand on our ground and surface water sources. For that reason alone, this effort makes absolute sense." New Mexico Environment

Department Cabinet Secretary Butch Tongate added: “If there are better, viable uses of this water, it is important to ensure the framework is adequate to both facilitate reuse and protect public health and the environment.”

EPA Office of Water Assistant Administrator David Ross said: “While underground injection certainly has its utility and place, alternatives are available that treat wastewater from oil and natural gas extraction for re-introduction into the hydrologic cycle which is especially important in arid areas suffering from drought like New Mexico. This MOU with New Mexico is cooperative federalism in action – working directly with states and local officials to create new opportunities to provide safe water to water-scarce communities across the country.”

CWA Compliance Assistance

On June 6, Senator Kamala Harris (D-CA) introduced the Water Affordability Act (S. 3015). The bill would establish an EPA pilot program to award grants for public water utility companies to assist low-income households with the increased regulatory costs of compliance with the CWA. Eligibility would consider inequitable environmental burdens. Senator Harris said: “No family should have to choose between paying for safe, clean drinking water and putting food on the table. Access to affordable clean water is a fundamental right. In California alone, rates for water have risen by as much as 71% in Los Angeles and as much as 127% in San Francisco within the past decade. That places a huge burden on families just trying to make ends meet, and it’s our responsibility to act.” The bill is similar to the House version, the Low-Income Sewer and Water Assistance Program (H.R. 2328) introduced by Rep. Marcia Fudge (D-OH) on May 3, 2017.³⁹ The bill was referred to the Committee on Environment and Public Works, but no further action was taken.

Corps of Engineers

Water Resources Development Act

Senate

On January 10, the Senate Environment and Public Works (EPW) Committee held a hearing titled America’s Water Infrastructure Needs and Challenges. The hearing featured testimony from Julie Ufner, Associate Legislative Director at the National Association of Counties; Scott Robinson, Port Director at the Muskogee City-County Port Authority in Oklahoma; Steve Cochran, Associate Vice President for coastal protection at the Restore the Mississippi Delta Coalition; William Friedman, Chairman-Elect at the American Association of Port Authorities; and Nicole Carter, Natural Resources Policy Specialist at the Congressional Research Service.

³⁹<https://www.harris.senate.gov/news/press-releases>

Chairman John Barasso (R-WY), delivered the opening remarks: “Today, we are holding a hearing to highlight the importance of passing a new Water Resources Development Act, or WRDA, during the 115th Congress.... [R]egardless of party affiliation, we understand that these kinds of investments are far too important to our economy and security to fall victim to partisan politics.... When it comes to rural areas in particular, many communities depend on Corps projects for their existence. Congress must act to make it easier for the Corps to prevent flooding and to modernize levees. We must find better solutions to minimize ice jams such as those that caused the Big Horn River to flood small rural towns such as Worland and Greybull, Wyoming. Ice jams are a major public safety concern for towns which can’t afford the out-of-control costs that come with severe flooding. In Wyoming and other western states, rural communities still face challenges associated with providing long-term water supply and storage. Federal water-storage facilities out West continue to lose existing space as a result of sediment buildup. This is a major problem for western state economies, which have rapidly growing populations, significant ranching and farming communities, and enlarging energy industries. I believe the Corps and the Bureau of Reclamation need to work together to address this challenge.”

Robinson described several of the challenges Oklahoma and Arkansas have faced in maintaining and updating the McClellan-Kerr Arkansas River Navigation System (MKARNS), a 445-mile multi-purpose waterway authorized in 1946 and completed in 1970. Despite authorizing legislation and appropriated funding, the time and cost of feasibility studies and mitigation for environmental impacts has hindered new start, shovel-ready modifications for over a decade. A growing backlog of deferred maintenance and cost-share hurdles are contributing to the deterioration of the infrastructure. “If there is going to be an infrastructure reinvestment plan of the magnitude talked about, then my plea, on behalf of MKARNS stakeholders, is that it not just be for roads and bridges but waterways too.... To the extent waterway projects are favorably considered in such an infrastructure plan, and require private investment as leverage, then the Water Infrastructure Finance and Innovation Act program, created in WRDA 2014 may be just the tool necessary to attract such investment in projects for which the Inland Waterway Trust Fund revenues are not sufficient to cost-share.”

Ufner explained the role that counties play in water issues and the challenges of meeting water infrastructure needs. She focused her remarks on the western counties, where significant federal public land limits the abilities of counties to raise revenue to meet critical services from fire management to clean and reliable public water resources. “Our western counties own a wide variety of infrastructure that is directly impacted by WRDA and Corps policies.” She noted that counties are both co-regulators and regulated entities in protecting the environment and providing water services, controlling water pollution, protecting water recharge areas, participating in water conservation programs, and preparing for and responding to flooding and other water hazards.

Ufner noted that increased state and federal mandates, the growing cost of services, and aging infrastructure impact the ability of counties to face unique water challenges. The requirements of the ESA, while important to safeguard our nation’s wildlife, fish, and plants, often result in socioeconomic impacts shouldered squarely by local governments. Permitting delays for

infrastructure projects magnify simple maintenance into complex and costly projects, with mitigation costs that far exceed the maintenance costs. The Corps' CWA §404 program "has been fraught with difficulties ranging from complex permit requirements; lengthy and costly permit reviews; inconsistent application of Corps rules across Corps districts; and general confusion by both the Corps and regulated entities over what types of waters and activities must obtain a Section 404 permit." If federal jurisdiction is claimed under CWA §404, the project is subject to further delays for reviews under ESA and the NEPA. Routine ditch maintenance is supposed to be exempt under existing regulations, Ufner said, but many Corps offices narrowly interpret the exemption, creating a significant permit backlog for sediment, debris, and vegetation removal in flood protection areas. "Permit approvals can take up to three years and Section 404 general permits are limited to five year terms and as a result, counties are in a constant costly cycle of permitting. Meanwhile, vegetation continues to grow and becomes habitat, triggering additional permits, mitigation and further delays."

Each version of WRDA changes the rules for project implementation, which increases the length of Corps studies and time to undertake the project, and creates additional funding obligations for local governments. Although recent WRDA bills have addressed specific concerns, the Corps has not yet released corresponding agency guidance, slowing efforts to move forward with critical infrastructure projects. Additionally, many of the challenges could be resolved if there was a better process for the Corps to engage and consult with state and local partners to more effectively implement federal policies. "To our knowledge, the Corps has no internal policy governing its interactions with its intergovernmental partners – state and local governments – nor do they have an Office of Intergovernmental and External Affairs where counties, states, and other local governments and stakeholders can easily interface with the Corps."

WRDA projects help counties strengthen local resiliency, Ufner said. The legislation can be instrumental in upgrading systems and facilities built more than a century ago. The National Association of Counties surveyed its members regarding WRDA-authorized projects and Corps technical assistance. "Overwhelmingly, both rural and urban counties indicated that they would not be able to move forward with projects without their partnership with the Corps.... Without WRDA, our counties could not have accomplished the multitude of projects we have been able to carry out over the past several decades. Simply put, WRDA is a partnership that works."

However, she identified several key factors that would improve WRDA's value for western counties, including: (1) increase funding for the Corps, including for water studies and projects; (2) enhance federal-state-local financial partnerships for water resource projects, without shifting the federal share to states and counties; (3) streamline the Section 404 permitting process to address delays and inconsistencies, extend permit terms from five to ten years for routine maintenance, and provide a clear national exemption for ditch maintenance and flood protection activities; (4) maintain focus on drinking water and wastewater needs, including both the SRF programs as well as federal grant and technical assistance programs; (5) address ongoing threats from high hazard dams with increased federal funding for grants, loans, and cost-share programs for repair and rehabilitation of non-federal dams to meet national safety standards; and (6) improve levee safety and management

by directing the Corps to release its long overdue reports and guidance on its vegetation management policy and National Levee Safety Program for public review and comment.

On January 17, the Senate EPW Committee held a hearing titled America's Water Infrastructure Needs and Challenges: Federal Panel. The hearing featured testimony from Ryan Fisher, Principal Deputy Assistant Secretary of the Army (Civil Works) and Acting Assistant Secretary of the Army (Civil Works); and Lieutenant General Todd T. Semonite, Chief of Engineers and Commanding General, Corps.

Chairman John Barrasso (R-WY) opened the hearing with remarks about previous testimony and the importance of WRDA. He spoke of sediment buildup decreasing the storage capacity of western reservoirs, and the importance of adequate and reliable water supplies for western and rural communities. "The Corps and the Bureau of Reclamation should continue sharing related information, and work together, in the hopes of solving these water supply problems."

Ranking Member Tom Carper (D-DE) said: "Corps' activities have shifted to operations, maintenance and the rehabilitation of existing infrastructure, while a backlog of deferred maintenance has continued to grow.... As a result, much of the Corps' infrastructure is now exceeding its useful life span. Our waterways are the backbone of our economy, and the Corps is an often invisible agency keeping much of it together with limited resources. New estimates...after last week's hearing reveal that the Corps' overall construction backlog is in the neighborhood of \$96 billion worth of projects. If provided, this money would only address current needs. It doesn't include any of the funds needed for future investment.... As I said last week, with an annual budget that hovers around \$4.6 billion, the Corps has a seemingly impossible math problem to overcome."

On May 9, the Senate Committee on Environment and Public Works (EPW) held a hearing on the bipartisan America's Water Infrastructure Act of 2018 (S. 2800). Witnesses included: Pat Riley, Family Farm Alliance; Dennis Sternberg, Arkansas Rural Water Association; Kristina Swallow, American Society of Civil Engineers; Jeffrey Bullock, Delaware Secretary of State; and Tony Pratt, American Shore and Beach Preservation Association.

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 FY20-21 for a total of \$158 million (§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 WIFIA through 2021 (§5002), with an additional \$100 million 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 assistance for small and medium publicly owned treatment works (§5004).

Riley testified in support of cost-effective flood control rule curve adjustments, optimizing operations at Corps and Reclamation dams and reservoirs, noting the provisions for a pilot program in Senator Flake's Water Supply Infrastructure and Drought Resilience Act (S.2563). He expressed concern that the National Committee on Levee Safety's (NCLS) planning and actions could apply Corps standards to levees, canals, and embankments in the West without first coordinating with Reclamation or Western water managers, who are not part of the NCLS. Riley supported §3121, noting that debris removal challenges have impacted the flood control capacity of channels and have interfered with water diversion intakes.

Sternberg testified in support of §5004 and the technical support circuit riders provide to small and rural communities, which comprise nearly 80% of the country's 14,500 wastewater utilities. He noted that they can visit over 20 communities in a month and are able to make recommendations to solve compliance problems, saving communities with limited resources from costly fines. With regard to water infrastructure, he said that SRFs are essential for small and rural communities that have greater difficulty affording water service due to small population densities. The WIFIA program currently lacks any economic needs-based targeting, and Sternberg added support for Senators Boozman and Booker's Securing Required Funding for Water Infrastructure Now (SRF WIN) Act (S. 2364) which would authorize states to direct some portion of WIFIA funding toward their SRF programs.

Swallow also encouraged the Committee to include the SRF WIN Act in the WRDA 2018 bill, calling it "an innovative new financing mechanism that blends the most successful parts of the State Revolving Funds and WIFIA to create a program that gives State Infrastructure Financing Authorities access to WIFIA loans for drinking water and wastewater infrastructure. This program would offer a new and efficient tool to leverage limited federal resources and stimulate additional investment in our nation's infrastructure while safeguarding against any cuts to the existing State Revolving Funds and WIFIA program." She also emphasized the need for critical funding to maintain and improve levees (\$80 million over the next 10 years) and rehabilitate federal and

non-federal dams (\$64 billion). At the rate of current investment, she said, repairs at Corps-owned dams will take over 50 years to complete.

On May 22, the Senate EPW Committee reported America's Water Infrastructure Act (AWIA) (S. 2800) by a unanimous vote of 21-0. The bill reauthorizes the WIFIA, and authorizes the SRF WIN Act (S. 2364).

EPW Chair John Barrasso (R-WY) said: "This legislation will cut Washington red tape, create jobs, and grow our economy. America's Water Infrastructure Act will increase water storage in the West, protect communities from dangerous floods, and upgrade old drinking water systems." Ranking member Tom Carper (D-DE) noted that the bipartisan bill authorizes Army Corps of Engineers' projects and programs and makes "long-overdue investments in the water systems that touch nearly every American community."

Transportation and Infrastructure Subcommittee Chair Jim Inhofe (R-OK) said the bill is about modernization, updating aging infrastructure, and giving state and local stakeholders expanded authority to fund projects that matter to them. Subcommittee ranking member Ben Cardin (D-MD) added: "From the goods that come in through our ports to the water that comes out of our taps, every person in this country benefits from improving and maintaining our water infrastructure."

The Senate Natural Resources Committee has proposed a bipartisan amendment to the AWIA and to WRDA.

The amendment would provide additional authority for the following DOI projects and programs: (1) water supply infrastructure and asset management; (2) forecast informed reservoir operations; (3) water conservation and drought resilience; (4) completion of authorized rural water projects; (5) facilitating Reclamation project title transfers to eligible entities; (6) clean and renewable hydropower development; (7) SECURE Water Act implementation, including WaterSMART programs; (8) conjunctive use of surface and groundwater through aquifer recharge, storage, and recovery; (9) resolving water resources needs in concert with the conservation of endangered species; and (10) extension of the Reclamation Water Settlements Fund. Numerous Council positions support sound public policy on these issues, though they do not address every detail of the proposed amendment.

House

On January 18, the House Committee on Transportation and Infrastructure's Subcommittee on Water Resources and Environment met for a hearing on "America's Water Resources Infrastructure: Approaches to Enhanced Project Delivery." The Subcommittee's summary memo noted that few water resource projects have been completed in recent years due to lack of sufficient funding and institutional process impediments. It said that modernizing our water infrastructure "requires examination of current policy and practice, as well as consideration of new, innovative, and alternative approaches to drive efficient, effective project delivery." The memo discussed the

backlog of Corps projects, valued at \$75 billion for project construction plus \$21 billion for dam safety, operations, and maintenance, compared to average annual appropriations of around \$5 billion.

Witnesses at the hearing included: Mike Inamine, Executive Director, Sutter Butte Flood Control Agency (SBFCA), Yuba City, California; Leah Pilconis, Senior Counsel on Environmental Law and Policy, Associated General Contractors of America (AGC); Jill Jamieson, Managing Director, Jones Lang LaSalle; Nichole Carter, Specialist in Natural Resources Policy, Congressional Research Service; and on behalf of the Corps, Major General Donald Jackson, the Deputy Commanding General for Civil and Emergency Operations, and James Dalton, Director of Civil Works.

Inamine discussed the benefits of recent changes the Corps has implemented, expediting 33 USC §408 permission for non-federal repairs of aging Corps levees on the Feather River below the Oroville Dam in California, and a new financing approach to enable project completion with non-federal dollars ahead of the federal schedule. He noted that the CWA §404 contains emergency procedures that are lacking in §408, and making necessary emergency repairs requires “gaming the system.” The levee repairs would normally have been delayed by three years to obtain §408 permission. “To their great credit, the Corps granted permission in about five weeks, facilitating the completion of a \$28 million levee repair just in time for the current flood season. Again, 100% of this cost was at non-federal expense. This expedited 408 approval was made possible by regulatory reform underway under the leadership of Corps Civil Works Director James Dalton,” who delegated §408 authorities to Division and District offices. “We applaud his appreciation for real-world difficulties faced by local agencies and hope to see these changes expanded and formally codified.”

Inamine said that while large projects are still best left to the Corps to deliver, local agencies can often execute §408 projects faster and at a lower cost, and should be accommodated and prioritized by the federal government beyond the study phase. “As the non-federal sponsor, SBFCA has spent \$130 million to improve 36 miles of levee out of the total 41 miles of federal project authorized in 2014. What remains out of the \$689 million...project is just five miles of work at a total estimated cost of \$77 million. The federal cost share of the remaining project is \$49 million, which essentially leverages \$640 million of federal construction by non-federal sponsors – a fantastic deal by any measure.” That calculation doesn’t account for the added benefits of project delivery a decade ahead of federal implementation, increasing the cost-benefit ratio. However, he added that SBFCA has exhausted their resources and cannot complete the final section of the project without the federal appropriations.

Inamine added some thoughts on infrastructure following the lessons of the Oroville Dam incident. “The Oroville spillway incident was a wake-up call for civil engineers around the world. Once again, we are reminded that infrastructure falls apart without ongoing, thoughtful investment. Just because a structure performed well for 50 years (or for levees, 150 years) is no assurance it will perform well tomorrow.” He pointed out that the dams and downstream levees are an integrated system, but they are built to different standards, and this needs to be addressed for public safety before spending limited federal dollars. “Regardless of our preparations and planning, unexpected

events will always occur,” highlighting the need to build resilience into all our major public safety structures and aging water infrastructure systems.

Pilconis provided a flowchart AGC created to diagram the dozens of federal environmental approvals needed before a construction contractor can break ground on infrastructure projects. “There is a backlog of more than 1,000 authorized water resources construction projects that will cost more than \$90B to complete.” These projects require sequential and duplicative environmental reviews, presenting massive schedule, budget, and legal hurdles with repeated analyses, studies, mitigation, and planning as projects make their way through lengthy permits and litigation, for even minor project modifications. “WRDA-authorized water resource projects are caught on a NEPA treadmill.”

Pilconis made several detailed suggestions on ways to improve the process: (1) require all relevant federal agencies to do a joint NEPA review for a given project, with firm deadlines and a single Record of Decision issued by the lead agency, and if the Corps is not the lead agency it should be a mandatory cooperating agency; (2) merge the NEPA review with the CWA §404 and RHA §408 permitting processes, revise their respective analyses of project alternatives to allow more flexibility in project decisionmaking, and rely on state and local environmental plans to identify the purpose, need, and alternatives for the project; (3) direct agencies to clearly delineate what constitutes a material change in a project meriting a re-evaluation of previously-approved environmental documentation; (4) ensure that permit requirements are achievable, practical, and consistent, protecting the environment with flexibility for real-world implementation during construction activities; (5) provide reliable standards and consistent requirements for compensatory mitigation opportunities, with coordinated planning between the Corps, USFWS, and non-federal partners; (6) eliminate EPA’s final authority over Corps determinations under CWA §404; and (7) reform citizen suit provisions to prevent misuse of environmental laws, requiring early involvement for standing to sue, shorter statutes of limitation, bonds to reduce delay tactics that harm taxpayers and private parties, and additional clarifications of federal environmental rules and enforcement.

Jamieson described many of the policy, legislative, and fiscal challenges to using performance-based contracting, such as public private partnerships (P3s), to efficiently deliver water infrastructure projects. She noted that our nation’s infrastructure problems require long-term solutions from authorization and financing new projects to operation and maintenance of assets through their life-cycle. She talked about deferred maintenance, a “fix-as-fails” approach, with a federal budget that has been essentially flat for the past 50 years, protracted appropriations, and uncertainty about the timing and amount of appropriations that lead to escalating costs and delayed public benefits. She said we need to look beyond funding and address the problem in a holistic manner. P3s are not a panacea or suitable for every project, she said, but they “have demonstrated their benefit by accelerating project delivery and generating better value-for-money for taxpayers through innovation, life-cycle asset maintenance, enhanced efficiency, reduced costs, and optimized risk allocation. In most instances, despite the private sector’s higher cost of capital, P3s have been able to deliver infrastructure to taxpayers at savings ranging anywhere from 15 to 25 percent when compared to traditional public delivery.”

Jamieson emphasized that P3s and performance-based contracts are delivery tools, not a funding strategy. “They can help deliver infrastructure in a timelier and more cost-effective manner, with enhanced transparency into how taxpayer dollars are spent, but they are not a means of funding projects.” She proposed several solutions to overcome the current systemic constraints that severely restrict or prohibit federal agencies from leveraging P3s and similar arrangements for water resource projects. The agencies don’t have the ability or legislative authority to dedicate a funding stream to compensate the costs and risks through usage payments. Existing trust funds, including the Reclamation Fund, Inland Water Trust Fund, and Harbor Maintenance Trust Fund, could be legislatively reformed to dedicate some portion of their revenue to create a repayment stream for project-specific purposes and enhanced delivery and life-cycle management of federal water resources. Current budget scoring guidelines would consider P3 projects as capital leases that have to be scored up-front, rendering the projects financially infeasible for Congress to pass. The underlying accounting rules that formed our current budgetary scorekeeping rules have changed in the past 25 years, and “there is a strong argument to be made for OMB to establish [separate] budget scoring guidelines for water resource infrastructure” that distinguish leasing and capital purchases from service concession arrangements and P3s.

Jamieson also talked about cost-share programs, and the need for technical assistance and viability gap funding to balance the playing field for rural and poorer communities. “This should include expansion of the WIFIA program, as well as the authorization of expanded grant and revenue guarantee programs for water resource infrastructure. The program could be administered within relevant federal agencies, such as USACE or USBR, or delegated to the EPA Water Infrastructure and Resiliency Finance Center.”

Carter addressed several of the challenges the Corps’ WIFIA program is experiencing compared to EPA’s WIFIA program. Although authorized, Congress has not yet appropriated funds for the Corps’ WIFIA program. The Corps completed a feasibility analysis in 2015 to evaluate the types of Corps water resource projects and non-federal project sponsors that may be viable candidates for WIFIA loans. The Corps is uncertain that relevant water resource projects would have sufficient revenue streams to be creditworthy and able to repay WIFIA loans. Many projects would be for work on structures that are federally-owned, making it difficult for non-federal entities to commit existing revenues or to create new revenue streams that could be committed to repayment, particularly if the fees or charges require congressional authorization.

Jackson noted that the Corps dedicates a significant amount of its resources to maintain key features of infrastructure built around 50 to 100 years ago. He said the Corps has implemented changes to improve its Section 408 processes, and is also working toward electronic applications and jurisdictional determination requests. Because the needs of the Nation have changed over time, the Corps is operating and maintaining some water resource infrastructure that may no longer be needed, and they are conducting studies to determine the viability of deauthorization. The Corps has provided implementation guidance on most of the provisions included in WRRDA 2014 and WRDA 2016. “You have both my commitment and that of Mr. Dalton, to complete implementation guidance for the remaining provisions as soon as possible.”

On May 18, the House Transportation and Infrastructure Committee leadership introduced a bipartisan WRDA (H.R. 8). Notably, the House bill does not include reauthorization for the WIFIA.

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 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 Department of Defense to a new or existing federal agency (§118).

Title II authorizes studies for future water resources improvements included in the Army Corps of Engineer'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) 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 resources improvement 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.

On June 7, the House of Representatives approved H.R. 8 by a vote of 408-2. The legislation provides for improvements to the Nation's ports, inland waterways, locks, dams, flood protection, ecosystem restoration, and other water resources infrastructure.

"Today's passage of the Water Resources Development Act of 2018 is a win for our Nation's coastal communities and those located on inland waterways," said Ranking Member DeFazio. "With that said, I am extremely disappointed that the bill does not include a bipartisan provision that would have ensured that funds collected in the Harbor Maintenance Trust Fund (HMTF) are used only for harbor maintenance – not for unrelated government spending. Unlocking the HMTF is key to ensuring we're not just adding to the \$100 billion dollar backlog of projects at the Corps of Engineers, but are actually using existing funds to make real investments in our Nation's ports, harbors and waterways. Despite the removal of my HMTF provision, I support this legislation because of the many other provisions which will improve safety, sustain jobs, and provide improvements to projects undertaken by the Army Corps."

America's Water Infrastructure Act

On October 10, the Senate passed the America's Water Infrastructure Act (S. 3021) by a vote of 99-1. The House unanimously passed the bill on September 13, and the Senate made no changes.⁴⁰

Senate EPW Chairman John Barrasso (R-WY) said: "America's Water Infrastructure Act will cut Washington red tape, grow the nation's economy, and help keep communities safe. It will create jobs, reduce the deficit, and give local stakeholders more control of projects. This bipartisan legislation will help communities in Wyoming by increasing water storage, fixing irrigation systems, addressing the maintenance needs of older dams, and by finding a permanent solution for flooding caused by ice jams."

Ranking Member Tom Carper (D-DE) said: "This legislation invests in the critical water infrastructure we don't see every day, but that American families in every state rely on, such as drinking water systems, dams, reservoirs, levees, and ports. It...incentivizes businesses to buy and use American products, and authorizes and expands programs for clean drinking water for the first time in more than two decades. And when it comes to local infrastructure projects, it ensures the voices of our country's local governments are being heard by the federal government to ensure needs are being met and taxpayer dollars are being used efficiently."

Senator Mike Lee (R-UT) voted against the bill, saying that it is a continuation of a failing status quo rather than providing the reform that national water infrastructure needs. He also noted that the bill spends federal dollars on local projects that should be funded and maintained by state and local governments.⁴¹

Corps' Communication and Project Delivery

On March 6, the House Committee on Oversight and Government Reform's Subcommittee on the Interior, Energy, and Environment held a hearing to examine the Corps. The Subcommittee discussed ways to improve the Corps' communication and interaction with the localities where it conducts its work, and how project delivery can be streamlined.

Kirsten Mickelsen, Executive Director of the Upper Mississippi River Basin Association, noted that the Corps' challenges seem to stem from budget and policy constraints. The Corps' District staff are committed to working with state and local partners to find the best solutions within those constraints, but the states are concerned about the Corps' continued ability to maintain a safe and reliable navigation system, manage flood risk, and ensure a healthy ecosystem.

Mickelson noted concerns with the Corps' cost-share Project Partnership Agreements (PPAs), which require non-federal partners to assume complete liability and indemnification for

⁴⁰*Western States Water*, #2314, September 21, 2018

⁴¹*Salt Lake Tribune*, 10/10/18

constructed projects, conflicting with many states' constitutions and tort laws. Moreover, the assumption of risk by states is required before the Corps takes control over the project design and implementation. Despite changes enacted by Congress in the 2014 Water Resources and Reform Development Act, no progress has been made on reviewing the PPA process, and many important water resource projects have been stalled or withdrawn as a result.

Sean Strawbridge, Chief Executive Officer of the Port of Corpus Christi Authority, described the delays of the Corpus Christi Ship Channel Improvement Project, to facilitate the movement of goods and trade, including the export of American oil and gas overseas. Congress suggested the feasibility study in 1990, which took 13 years to complete. The project was approved by the Office of Management and Budget in 2007, and the estimated cost of construction was \$188M. It took ten more years to complete the PPA with the Corps, by which time the cost estimate was \$327M. "Last month, we were for the first time included in the President's Corps Civil Works Budget for FY19. That's the good news. The bad news is the budget recommendation falls significantly short of the need. If our Nation expects to remain competitive in the global marketplace, we must expedite the project delivery process or risk lengthy development schedules and significant cost impacts to our national waterways infrastructure projects." Without financial constraints, the project would take approximately four years to complete, but with the proposed funding stream it could take over a decade, with costs continuing to inflate and delaying the national benefits of exporting American energy.

Strawbridge described the swift movement of their PPA negotiation once all parties were in the same room, with the opportunity to share in ideas and information. He said that "interactions with the Corps of Engineers work best when there is an agreement on project importance, greater transparency in sharing of information and collaborative efforts in reaching an accord." He also recommended authorizing the Corps to delegate management of certain projects to states and port authorities, similar to the authority granted to states to build surface transportation projects, to conserve Corps resources and allow the Corps to serve as a regulator with federal oversight.

CWA §404/State Authority

On August 7, the Corps announced the release of a guidance memorandum taking initial steps to empower states and tribes in assuming CWA §404 permitting authority. The memorandum approves the recommendations of the Assumable Waters Subcommittee of the National Advisory Council for Environmental Policy and Technology. The Subcommittee was formed by EPA in 2015 to provide advice and develop recommendations on the meaning and scope of CWA §404(g), as uncertainty in this area has stifled the interest of several states that otherwise would pursue §404 authority.

The memorandum identifies the scope of waters that must be retained by the Corps under CWA §404(g) and cannot be delegated to state authority. These non-assumable waters include waters that are jurisdictional under Section 10 of the Rivers and Harbors Act (RHA), including waters used for commerce and adjacent wetlands. The retained waters do not include waters that

qualify as “navigable” solely because they were used in the past to transport interstate or foreign commerce. “For ease of implementation and to provide transparency to states, tribes, and the public, the Corps will use existing RHA Section 10 lists of waters as a starting point, which could be amended by the Corps as appropriate consistent with applicable regulations and case law.” The memorandum clarifies that it does not affect the scope of “waters of the United States” under the CWA, but only addresses the division of responsibility between the Corps and a state or tribe that assumes the §404(g) program.

Letters were also sent to governors and tribal leaders encouraging them to assume this authority for dredge and fill activities.

Assistant Secretary of the Army (Civil Works) R.D. James said, “This action supports this Administration’s dedication to infrastructure by providing states and tribes the clarity they need to better balance their environmental protection mission with their economic development goals. In my view, implementing Section 404 in this clear and decisive manner not only adheres to the language of the statute and the intent of Congress when enacting Section 404(g), but it is also in the overall best interest of the Army and the regulated public.”⁴²

Proposed Surplus Water Rule

On September 6, Senators Michael Rounds (R-SD), John Thune (R-SD), John Hoeven (R-ND), John Barrasso (R-WY), and Representatives Kristi Noem (R-SD), Steve King (R-IA), and Kevin Cramer (R-ND) submitted a letter to the joint conference committee on the consolidated appropriations bill, H.R. 5895, which combines Energy and Water, with the Legislative Branch and Military Construction-Veterans Affairs funding.

The letter requested that the conference committee retain language from H. Rept. 115-697, which addresses concerns with the Corps’ proposed Surplus Water Rule: “The Committee urges the Corps to consider adoption of the alternative definition of ‘surplus water’ excluding ‘natural flows’ from stored water in the Missouri River mainstem reservoirs in its proposed rule entitled ‘Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply’ (82 F.R. 9555).”

The letter notes that Section 6 of the Flood Control Act (FCA) authorizes the Corps to make surplus water available to states, municipalities, and other entities, but since the term “surplus water” is not defined in the FCA, “...it is the role of Congress to insist that the USACE operate in a manner that recognizes the rights of the states to the natural flows of the river system.” The letter acknowledges the Corps’ right to regulate for authorized purposes, such as hydropower and flood control, and does not seek to divert water away from those purposes. “However, we are concerned

⁴²<https://www.army.mil/e2/c/downloads/525981.pdf>

with the notion that the people do not have a right to access the water passing through their states outside the well-defined purposes authorized by Congress.”

The WSWC has consistently supported deference to the states’ rights to allocate their water resources, and has taken the position that natural flows are separate from captured floodwaters stored within Corps reservoirs, and are subject to state authority and control. The WSWC opposes any Corps policy that would require storage contracts to access natural flows within a reservoir boundary, which would be a violation of a state’s legal right to develop, use, control, distribute, and allocate the state’s surface waters.

Corps Water Infrastructure Initiatives

On November 27 and 29, the Corps held two national-level stakeholder webinars, in conjunction with internal meetings with its Division and District offices, to discuss several 2018 Corps initiatives to accelerate and improve water infrastructure projects. The President’s Infrastructure Initiative (February 12) sought to secure long-term reforms on how infrastructure projects are regulated, funded, delivered, and maintained. The Administration asked the agencies to pursue changes that do not require legislation. Since then, the Corps has worked on ways to (1) start and finish projects more quickly, (2) deliver projects more efficiently using alternative financing tools and new budgeting processes, and (3) streamline permit processes to eliminate duplicate reviews while still meeting statutory requirements and protecting the environment.

To that end, the Corps held several face-to-face sessions and webinars over the summer, reaching out to various stakeholders for feedback. The resounding response was that projects take too long, cost too much, and that states, local entities, and other project sponsors want to be more involved. There is a \$100 billion backlog of Corps projects, and federal project financing is insufficient and unpredictable.

The Corps Infrastructure Team developed a work plan and has undertaken specific steps to address concerns within their control: (1) enabling bundling and consolidation of unique procurement contracts; (2) changing what has to be sent to headquarters for review; and (3) delegating decision-making authority to the division level for Section 408 permissions, independent external peer reviews (IEPRs), and design and construction deficiencies under \$500,000. They are developing guidance on credit, reimbursement, and waivers of permit requirements for federally-authorized projects with non-federal sponsors. They reviewed 53 regulations for possible modification, repeal, or replacement. They are aligning Corps programs to provide a single point of contact and coordinated decisions. They completed guidance for state assumption of Section 404 authority and which waters are assumable. They are developing a public tracking system for the status of applications.

Although Congress has not yet appropriated funds for the Corps WIFIA loan program, the Corps signed a MOU with EPA to share information and resources where possible. They have

developed a credit subsidy model which tells them how far the Corps program can be leveraged, and what project criteria to target for the first round of WIFIA loans once the funds become available.

In September, the Corps issued a public-private partnership (P3) policy, and in December the Corps published a call for proposals for P3 pilot projects in the *Federal Register*. They are working on how to screen projects suitable for P3s, and how to deal with issues of revenue, risk transfer, and equity.

The Corps is also working to finalize a multi-year civil works budget approach. Rather than annually justify every project, they are looking at a five-year capital budget for Corps projects, and a “One Federal Investment Decision,” where a decision to start a project is also considered a decision to finish the project.⁴³

Indian Water Rights

New Mexico/Navajo Water Rights

The New Mexico Court of Appeals rejected the San Juan Acequias’ challenges to the Navajo Nation water rights settlement in *State of New Mexico ex rel. State Engineer v. United States of America and Navajo Nation*. The state, tribal, and federal governments reached the settlement in 2005, with Congressional approval in 2009 as part of the Omnibus Public Land Management Act (P.L. 111-11). The District Court subsequently heard evidence on various water rights previously allocated in the San Juan River Basin, and ultimately rejected the objections to the Settlement Agreement and entered the decree of water rights. The San Juan Acequias appealed, challenging more than fifty aspects of the District Court’s conclusions.

The Court of Appeals rejected the notion that the Governor lacked the power to sign the settlement without prior legislative approval. The New Mexico Legislature has given the Attorney General the authority to prosecute and settle civil litigation to which the State is a party. The State Engineer also has delegated legislative authority to supervise the apportionment of water in court adjudications, with express authority to specifically engage in this litigation. Additionally, the Legislature appropriated over \$50 million for the State’s share of the cost of the Settlement.

The Court rejected any requirement for the Nation to show immediate beneficial use, distinguishing reserved water rights under the *Winters* doctrine from requirements under the New Mexico Constitution, the Reclamation Act, the Pueblo Water Rights doctrine, and the Colorado River Compact.

Regarding the calculation of “practicable irrigable acreage” (PIA), reservations in less agricultural settings have “required judicial resourcefulness” to calculate quantities of water sufficient to make the reservations livable, to promote survival and success of the reservations, to

⁴³<https://www.usace.army.mil/Missions/Civil-Works/infrastructure/>

create a sustainable homeland, to allow the Indians to change to new ways of life, and secure a moderate living.

Finally, the Court noted the Acequias' misunderstanding of the *interse* water rights proceeding, which differs from typical civil claims. The pattern of adjudicating senior water rights before junior rights is efficient and not a due process violation of property rights. The equitable arguments regarding global warming, shrinking Navajo population, endangered species, exclusion of other reserved federal water uses, and exclusion of the Acequias from the settlement negotiations "all miscomprehend the scope and legal effect of the congressional approvals in this case."

Reclamation Water Settlement Fund

On June 28, Senator Tom Udall (D-NM) introduced the Indian Water Rights Settlement Extension Act (S. 3168) to amend the Omnibus Public Land Management Act (2009) (P.L. 111-11). The amendment would extend authority for transfers of money from the Reclamation Fund to the Water Settlement Fund. The bill was referred to the Senate Committee on Indian Affairs.

The WSWC has long supported permanent funding for negotiated settlements of disputed Indian water rights claims. These settlements enable a resolution of claims that is least disruptive to existing water rights.

On July 18, the Senate Indian Affairs Committee, Chaired by Senator John Hoeven (R-ND), held a hearing on S. 3168, to make the Reclamation Water Settlements Fund permanent, as well as S. 2154, to codify a water rights settlement agreement between the State of Kansas and the Kickapoo Tribe. John Tubbs, Director, Montana Department of Natural Resources and Conservation, testified on behalf of the State and the WSWC. Other witnesses included Lester Randall, Kickapoo Chairman, and Alan Mikkelsen, Senior Advisor to the Secretary of the Interior Ryan Zinke.

Mikkelsen expressed the Department's continuing support as, "...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." However, he explained Interior can't support the bill as the settlement agreement only resolves the Tribe's water rights, while leaving unresolved a waiver of claims against the United States, anticipated federal funding, and State and local cost sharing.

Regarding S. 3168, Mikkelsen testified, "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.... Indian water rights settlements can however be costly, and costs have increased over the years." He did not express

support or opposition to S. 3168. In response to questions he noted the \$1.2 billion to be made available under the current Settlement Fund authority had already been committed, and estimated another \$5 billion in settlements were “in the pipeline,” emphasizing the need for funding. The President’s FY19 Budget request included \$173 million for Indian water rights settlements.

Tubbs declared, “The State of Montana and Western States support 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.” John expressed pride in the eighteen compacts settling reserved water rights claims negotiated through Montana’s Reserved Water Rights Compact Commission adding, “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.” WSWC positions on Indian water rights settlements and use of Reclamation Fund receipts were appended.⁴⁴

DOI-Inspector General/Montana/Crow Indian Tribe

The DOI’s Inspector General (IG) released an audit on October 2, finding that the Crow Tribe in Montana has misused \$4.8 million for “business expenses unrelated to the contracts” that was intended for water system improvements as part of a \$460 million settlement of historic tribal water rights, and can’t account for another \$7.7 million. In all, the IG report raises questions regarding \$29 million. The funding was intended to rebuild the aging drinking water system serving the more than 7,000 Crow members living on the reservation, as well as improve on reservation irrigation systems serving Crow farmers and ranchers. Investigators examined \$13.8 million in contracts between October 2014 and March 2017, and Crow officials could not provide adequate documentation for over half that amount. Former Tribal Chairman Darrin Old Coyote has stated when he left office in December 2016, his administration left behind spending documentation. He added that the USBR oversaw tribal project spending. “They approve the projects. Step by step, they were right with us.”⁴⁵

Navajo Utah Water Rights Settlement

On October 3, the Indian Affairs Committee, Chaired by Senator John Hoeven (R-ND), reported S. 664 – the Navajo Utah Water Rights Settlement Act – which ratifies and modifies the Navajo Utah Water Rights Settlement Agreement negotiated between the Navajo Nation, the United States, and Utah. The bill quantifies the Navajo Nation’s right to use 81,500 acre-feet of water

⁴⁴www.indian.senate.gov

⁴⁵October 3, 2018; EEnews.net.

(depletions) from sources located within Utah and adjacent to or encompassed within the boundaries of the Navajo Nation pursuant to “all legal theories.” It recognizes and protects the reserved water rights and “all those possessing water rights derived by or through the Navajo Nation.” It also protects “State appropriative water rights,” and provides “Navajo and non-Indian citizens in the Upper Colorado River Basin in Utah with certainty regarding water rights, water management, and administration that will allow them to plan for their futures.” It also will provide sufficient water supplies and facilities for delivery of those supplies needed to “develop and maintain the Navajo Reservation in Utah as a permanent homeland...to promote the economic development and economic self-sufficiency of the Navajo Nation in Utah.”

The bill explicitly states: “It is the policy of the United States, in keeping with the trust responsibility of the United States to Indian tribes, to settle Indian water rights claims whenever possible without lengthy and costly litigation.... Consistent with the policy of the United States, this Act settles the water rights claims of the Navajo Nation and the United States within the State of Utah, acting as trustee for the Navajo Nation and allottees of the Navajo Nation, without litigation..., by providing a permanent source of water..., a water settlement fund to be used for the construction of drinking water infrastructure, and the financing of other modes of water delivery...in exchange for limiting the legal exposure and litigation expenses of the United States and the State of Utah.”

The Secretary of the Interior, acting through the Commissioner of Reclamation, “shall plan, design, and construct the water diversion, delivery, and conservation features of the Navajo water development projects...,” through an intergovernmental agreement, providing a “comprehensive approach to addressing identified Reservation water needs” and “providing funds for domestic and municipal water supply and distribution infrastructure and agricultural water conservation. To allow the Navajo Nation flexibility in meeting the needs of its people over time as both circumstances and technologies evolve, the costs to meet Reservation water needs determined in the studies identified in the agreement were used to establish the dollar amount [\$198.3M] of the Navajo Water Development Fund...,” as well as provide for a Navajo Operations, Maintenance, and Repair Trust Account within that same amount. Utah will pay \$8 million to the Secretary of the Interior.

Once project construction is complete, the Secretary “shall convey title” to the Navajo Nation, together with liability for “any act, omission, or occurrence relating to the facilities conveyed,” and the United States “shall have no obligation to pay for the operation, maintenance, or replacement costs of any Navajo water development project...” The Secretary “shall provide technical assistance..., including operation and management training.” A joint federal-state-tribal “Project Management Committee” is created, and \$1 million is authorized to be appropriated to “assist the nation with programmatic costs associated with the settlement, including the preparation of hydrographic survey of historic and existing water uses on the Reservation.” The Navajo’s related water rights “shall not be subject to loss by non-use, forfeiture, abandonment, or other operation of law.”

The Act concludes: “Nothing in the agreement or this Act shall be construed in any way to quantify or otherwise adversely affect the water rights, claims, or entitlements to water of any Indian tribe, band, or community, other than the Navajo Nation.”

Of note, the legislation was amended to address funding concerns raised by Interior, which along with the Justice Department, then cleared the measure. In the House, a companion bill (H.R. 6979) has been introduced by Rep. Rob Bishop, Chair, Natural Resources Committee.

Infrastructure

Legislative Goals to Rebuild America’s Infrastructure

On February 12, the President released an outline of legislative goals to rebuild America’s infrastructure. The proposal includes \$200 billion in federal funds to leverage \$1.5 trillion 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, \$50 billion 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 \$18 billion, 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 WIFIA program to include remediation of water quality contamination by non-labile 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 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 EPA’s 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 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 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 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 USBR 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.⁴⁶

Congressional Action

The State of the Nation’s Water and Power Infrastructure

On February 14, the House Natural Resources’ Subcommittee on Water, Power and Oceans held an oversight hearing on The State of the Nation’s Water and Power Infrastructure. The Subcommittee’s hearing memorandum states that “....it is indisputable that surface storage continues to serve a key role in making the West what it is today....” It addressed impediments to properly maintaining aging infrastructure and constructing new multi-purpose surface water storage dams and reservoirs, such as cumbersome permitting processes, uncertain federal appropriations, and the difficulties of title transfers. Witnesses included Daren Bakst, Research Fellow, The Heritage Foundation’s Institute for Economic Freedom; Charles Freeman, District Manager, Kennewick Irrigation District in Washington; Jonathan Nelson, Policy Director, Community Water Center in Visalia, California; and Jim Watson, General Manager, Sites Project Authority in Willows, California.

Bakst discussed the impacts of regulatory barriers on western states, particularly the burdens of the NEPA, with examples drawn from projects in North Dakota, Colorado, Idaho and Nevada. He also pointed to the failures of the ESA, illustrating the impacts to water deliveries in California and Montana. He noted the important difference between protecting species and protecting a flawed statute. He also talked about the impacts of the EPA’s retroactive vetoes under CWA §404 and the expansion and inconsistent application of authority under vague definitions of navigable waters, making it costly and difficult to complete energy and water projects.

Freeman described the challenges water managers face in their efforts to supply water, including aging infrastructure, changing precipitation patterns, and growing demand. He noted the comprehensive water infrastructure system that allows most Americans access to safe, reliable, and affordable supplies of water. He pointed out the significant return on investments in infrastructure

⁴⁶*Western States Water*, #2281 and Special Report, February 2, 2018; Special Report #2278, January 12, 2018.

managed by the USBR and the Corps. He recommended changes to federal title transfers and project operations that would enable greater flexibility, efficiency, and responsiveness for water suppliers.

Nelson shared his perspective on safe and reliable drinking water for vulnerable communities. He talked about the USDA's Rural Development Water Program and Emergency Community Water Assistance Grants, the Safe Drinking Water Act's SRFs, and Reclamation's role in water delivery. He spoke of challenges due to funding shortages, arbitrary definitions of "rural" and "public water system," and lack of funds for operation and maintenance of drinking water treatment systems.

Watson said: "California needs long-term, smart surface water storage solutions that will help capture and store excess runoff and provide multiple benefits under just about any hydrologic or environmental conditions." The water is needed to build more resilient and sustainable urban and rural economies, and to ensure the health and sustainability of the environment. He described the non-federal Sites Project, developed as a partnership between the USBR, the State of California, and diverse stakeholders, to be cooperatively integrated into the operations of the Central Valley Project and the California State Water Project. "To help address the long-term water supply needs of our region, the State of California and the West, we need Congress to consider these new, taxpayer friendly federal assistance tools to help local agencies like ours to better manage and develop new, more drought resilient water supplies."

The Long-Term Value to U.S. Taxpayers of Low-Cost Federal Infrastructure Loans

On July 11, the Senate Committee on Environment and Public Works held a hearing entitled, The Long-Term Value to U.S. Taxpayers of Low-Cost Federal Infrastructure Loans. Witnesses included Doug Holtz-Eakin, American Action Forum and former CBO Director; Brian Motyl, Delaware Department of Transportation (DelDOT); and Vincente Sarmiento, Orange County Water District (OCWD).

Chair John Barrasso (R-WY) noted that this was the Committee's seventh hearing on improving the highways, bridges, and water projects so critical to the nation's prosperity. "As America's population and economy have grown, our infrastructure has not kept pace. Maintenance shortfalls and project backlogs have left many key elements of our transportation and water infrastructure in need of major repair or replacement.... Loan and loan-guarantee programs often allow expensive projects to be delivered in a timely fashion and at a reduced cost.... These programs enable state and local project sponsors to borrow money at lower long-term costs, and to complete construction years sooner than if funding was secured through other means. As we have heard in past hearings, leveraging federal funds to maximize investment is a tool the Trump administration strongly supports."

Barrasso also explained the funding constraints under Congressional rules, which require that bills be scored by the Congressional Budget Office (CBO) to assess the amount of taxpayer dollars that will be spent, as well as the Joint Committee on Taxation (JCT) to determine whether any

federal revenue will be lost. “States use tax-free bonds for infrastructure projects. JCT assumes that the federal treasury will lose tax revenue when the states borrow. Under this theory, the \$12 billion in increased state infrastructure spending is presumed to cost the federal treasury \$2.6 billion.” The Committee cut back the size of programs to address the scoring issue, but noted, “If states aren’t able to finance their infrastructure needs, federal taxpayers will inevitably be on the hook to directly fund more projects in the future.”

Eakin summarized the WIFIA and the Securing Required Funding for Water Infrastructure Now Act (SRF-WIN) programs, and addressed their economic and budgetary impacts. He noted that the programs allow relatively few federal dollars to support a very large base of water infrastructure investments. The Office of Management and Budget estimates a subsidy rate of 1.55% for WIFIA projects suggests that “every \$1 of WIFIA contract authority, on average, will enable the EPA to issue \$102 in WIFIA loans (1:102 direct loan leverage ratio). Since WIFIA can cover up to 49% of project total costs, WIFIA appropriations could yield a total water infrastructure investment ratio of 1:208, on average.... EPA estimated that its budget authority (\$55 million) would provide approximately \$5.5 billion in credit assistance, which could support an estimated \$11 billion in water infrastructure.”

Eakin pointed out the differences between the core economic questions of infrastructure investment, which considers costs and benefits, sources of revenue, and rates of return, versus the federal budgetary treatment of these investments: (1) the federal budget focuses on the costs of programmatic activities, with no attempt to quantify benefits or to systemically investigate the benefit-cost question; (2) the federal budget does not attempt to measure the social costs, or the costs borne by state and local governments or private investors; and (3) the focus on financing the investment looks at the subsidy cost that covers the probability of less than full recovery of the investment, as well as the revenue forgone from taxing the return on private sector investment.

Motyl described the process DelDOT went through to obtain a Transportation Infrastructure Finance and Innovation Act (TIFIA) loan for \$211 million, to improve a bottleneck along a regional highway network. “The time from the submission of the Letter of Intent to apply to the loan closing was almost three years...and substantial documentation had to be provided.” He described the terms of the loan negotiated by both parties, and the process of disbursing the loan and oversight of the project. While providing the compliance documentation has been a positive experience, the length of time between project expenditures and reimbursement has the potential to be burdensome, between 30 and 60 days. “There may be opportunity to streamline the pre-closing phases of the program which could be beneficial to future borrowers.... The loan process was at times cumbersome and loan term negotiations were time consuming. However, the benefits of the TIFIA Loan far outweighed the...lengthy process required with this program.”

Sarmiento described OCWD’s Groundwater Replenishment System (GWRS) project, developed in collaboration with the USBR under the Title XVI program (\$20 million grant) and the EPA’s SRF program (\$135 million loan). The Orange County Sanitation District contributed \$194 million, and California water bonds added another \$37 million. The project had to provide a

sustainable, drought-proof water supply, and the water costs had to be aligned with existing potable sources for ratepayers to support the value of the project.

The final phase of the GWRS project will be financed in part through a \$135 million WIFIA loan, Sarmiento said, enabling them to borrow for almost a full percentage point lower than issuing tax-exempt bonds, representing a savings of \$18 million. “If WIFIA had not been available, it is unclear how we would have proceeded with the project’s financing given the over subscription of California’s SRF. It is highly likely we would have proceeded, but the costs of the project would have grown, putting pressures on the ratepayers. In short, WIFIA is creating a savings for the ratepayers and the federal government is receiving a return on its investment through loan repayment and the dividends created in the development of a sustainable water supply that will support robust economic growth and improved public health.”

Sarmiento also discussed the need for Congress to increase SRF funding, recognizing how difficult that is under current budgetary constraints. Current infrastructure needs surpass the incremental funding increases. “In addition, the allocation formula that determines how much SRF assistance is allocated to each state has not been updated since the 1980s.” He acknowledged that updating the formula for a more equitable apportionment of resources is a zero-sum game and unlikely to be addressed.

In light of these difficulties, “How can Congress continue to ensure a meaningful federal partnership to improve our vital water infrastructure and avoid delays in constructing such projects?” Sarmiento testified in support of the approach taken in America’s Water Infrastructure Act (S. 2800), which he said would establish a new financial assistance program at WIFIA-like rates to support the individual states’ SRF programs. With this leveraged assistance, the states could address their backlog of priority projects on their Intended Use Plan or Priority List. The bill mandates that the traditional SRF programs be funded at FY18 levels prior to funding the new SRF-WIN program. “As we noted, every tool in the toolbox needs to be available to support public agencies’ needs, but the primacy of the SRF must be preserved in any given year.... And we would urge the committee that as the bill proceeds through Congress that this commitment be re-enforced to ensure that no ‘wiggle’ room exists that might, in later years, undermine the SRF.”

River Basins

Columbia River Basin

Federal Columbia River Power System/Hydropower Operations

On April 25, the House passed H.R. 3144, to provide for operations of the Federal Columbia River Power System, by a 225-189 margin. The bipartisan bill mandates a certain operation plan to provide some certainty for water and power users, by codifying a 2014 Biological Opinion issued under the ESA, and implemented a collaborative agreement to manage the river system to protect fish and support clean, renewable energy. “Dams and fish can coexist, and after more than two

decades in the courtroom, let's let scientists, not judges, manage our river system and get to work to further improve fish recovery efforts," said Rep. Cathy McMorris Rodgers (R-WA). She introduced the bill last June. "The need for this legislation became clear when an unelected judge rejected...collaborative work, claiming he knows better how to manage the Columbia River than all of the scientists, tribes, elected officials and others who are using the river."

In March 2017, U.S. District Court for the District of Oregon (*National Wildlife Federation v. National Marine Fisheries Services*, 3:01-cv-0060 40) issued an order requiring federal agencies to increase spill over the Columbia and Snake River dams, an order expected to cost taxpayers roughly \$40 million. Many scientists contend that spill leads to increased dissolved nitrogen and other gases in the water, actually killing fish.⁴⁷

McMorris Rodgers added: "When the sun doesn't shine and the wind doesn't blow, our dams provide critical baseload energy to power homes and businesses all across Eastern Washington and the Pacific Northwest. Not only that, they provide transportation and irrigation benefits for our farmers, flood control for our communities, and recreational opportunities that fuel our economy. This isn't about the merits of protecting salmon, we all agree on that. This is about providing certainty and letting experts and scientists in the region, who know the river best, work collaboratively to meet that goal."

"Our bill finally codifies that science, not politics or the courts, should dictate the best way to balance fish recovery and the power needs in the Pacific Northwest," said Rep. Schrader (D-OR), a cosponsor. "Scientific experts steeped in fish recovery and clean renewable energy will be able to do their job based on good science rather than an ideological crusade to eliminate dams on the river system resulting in the loss of our region's best carbon free energy asset. Simply put, the Columbia River Power System will be managed according to the 2014 Obama Administration approved biological opinion until a new BiOp can be completed by 2022, saving ratepayers millions of dollars. I am pleased to have worked with Rep. McMorris Rodgers, and our Pacific Northwest colleagues, on this bill to bring science back into the equation for our Oregon and Pacific Northwest Salmon recovery efforts."

"House passage of H.R. 3144 is a momentous accomplishment," stated Terry Flores, Executive Director of Northwest River Partners. "It's good news for salmon, which will continue to benefit from protections that are already working; for the environment, because the federal dams generate nearly 90% of the Northwest's carbon-free, renewable energy; and for families and businesses who need relief from rising power rates resulting from two decades of anti-dam lawsuits." The bill was referred to the Senate Committee on Environment and Public Works, but no further action was taken.

On September 10, the House Natural Resources Committee held an oversight hearing titled, The Federal Columbia River Power System (FCRPS): The Economic Lifeblood and Way of Life for

⁴⁷*Western States Water*, #2290, April 6, 2018

the Pacific Northwest. The FCRPS comprises 31 federal hydropower dams owned by the Corps and the USBR providing water for navigation and irrigation, while operating with in the constraints of various biological opinions under the ESA. Related litigation threatens both economic and environmental successes. Witnesses included: Terry Flores, Northwest RiverPartners; Marci Green, Washington Association of Wheat Growers; Dan James, Bonneville Power Administration; Kris Johnson, Association of Washington Business; McCoy Oatman, Vice-Chairman of the Nez Perce Tribe; Rob Rich, Shaver Transportation; and Glen Spain, Pacific Coast Federation of Fishermen's Associations.

Flores refuted assertions that Northwest hydropower is insignificant and could be replaced by intermittent wind or solar. Dam removal would lead to the power being replaced by natural gas. "The federal hydrosystem does much more than just provide clean energy. The system of federal dams protect rural communities and big cities alike from devastating floods, creates a river highway that links the Northwest to the rest of the nation producing over \$20 billion in economic opportunity and wealth; provides recreational opportunities and irrigation for over 7 million acres of farmland producing \$8 billion in agricultural income. There is no question that the federal hydrosystem is the backbone of the region's carbon free energy supply and the lifeblood of its economy."

Flores noted that the hydrosystem does come at a cost to the indigenous people and to fish and wildlife resources. "As a result, the Northwest is home to the largest fish and wildlife restoration program anywhere in the nation, and likely the world. Over \$16 billion has been spent to mitigate for the impacts of the dams on fish and wildlife since the late 1970's. It is important to point out that the Northwest is unique in this respect too: almost all these costs are borne by Northwest families and businesses through their electric bills - not U.S. taxpayers. Without these costs, BPA's wholesale power rate would be about a third lower." The federal dams have undergone a \$2 billion overhaul to make them more fish friendly, with NOAA and other scientific studies showing that fish survival levels are similar to undammed rivers. Another \$1 billion has been spent by the Northwest states and tribes over the past decade to remove culverts, increase water flows, and restore wildlife habitat.

Flores also pointed out that the ongoing litigation to increase spills or remove dams offer minimal environmental benefits at best, while increasing costs to ratepayers. She concluded, "...as stewards of this great asset, it is imperative to identify practical and bipartisan solutions to these tough challenges. As stated, there is no silver bullet when it comes to restoring our iconic salmon, orcas or other species and the answer certainly won't be found in a court room. It requires following sound science, fostering collaboration, and providing strong leadership..."⁴⁸

Columbia River Treaty

On May 29-30, the United States and Canada began formal negotiations in Washington, D.C., to modernize the 1964 Columbia River Treaty. The Columbia River Basin encompasses parts of

⁴⁸<https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=405550>

British Columbia, Idaho, Montana, Oregon, Utah, Washington, and Wyoming. The Treaty negotiations covers transboundary cooperation on hydropower, flood risk management, irrigation, municipal and industrial water use, navigation, recreation, and river ecosystem support. Certain flood control provisions of the Treaty are set to expire in 2024.

The U.S. Entity that implements the Treaty, which consists of the Administrator of the Bonneville Power Administration and the Corps' Northwest Division Engineer, submitted Regional Recommendations to the U.S. Department of State in 2013.⁴⁹ The Regional Recommendation was developed in collaboration with states, tribes, and stakeholders. The State Department has indicated that its objectives are guided by this consensus document, and include “continued, careful management of flood risk; ensuring a reliable and economical power supply; and better addressing ecosystem concerns.” In addition to the State Department and the U.S. Entity, the negotiating team will include the DOI and the NOAA.⁵⁰

Senator Patty Murray (D-WA) expressed appreciation for the extensive preparation and time invested in preparing for these negotiations. “The Columbia River Treaty is integral to so much of the Pacific Northwest way of life – from our economy, to our environment, to our culture and heritage – so it’s hard to overstate the importance of updating this Treaty to meet modern-day issues and getting this right.”

The House Northwest Energy Caucus co-chairs Rep. Cathy McMorris Rogers (R-WA) and Peter DeFazio (D-OR) have urged re-negotiation of the Treaty for several years. McMorris Rogers noted that the Treaty “plays a critical role in the lives and livelihoods of people here in Eastern Washington and the entire Pacific Northwest.” She hoped that the negotiations would “update and rebalance the terms of this agreement so it can remain mutually-beneficial into the 21st Century.” DeFazio emphasized the need for a mutually beneficial agreement, rather than the current arrangement that requires energy consumers in the Pacific Northwest to pay Canada for a premium for hydropower benefits.

House Natural Resources Committee Chair Rob Bishop (R-UT), and Water, Power, and Oceans Subcommittee Chair Doug Lamborn (R-CO), also issued a statement: “The Columbia River Treaty is critical to ensuring a reliable supply of clean, renewable hydropower in the Pacific Northwest.... We applaud the Trump administration and State Department for prioritizing this important negotiation process and for listening to the millions of water and power users who depend on the Columbia River.” Their press release notes that “...it is critical to reassess the value that Canadian flood protection provides, and ensure that the amount paid to Canada in hydropower benefits reflects this realistic valuation.”

⁴⁹*Western States Water*, #2066, December 30, 2013

⁵⁰www.state.gov/p/wha/ci/ca/topics/c78892.htm

Katrine Conroy, British Columbia's Minister Responsible for the Columbia River Treaty, said: "The Columbia River Treaty is a model for Canada-U.S. co-operation in the Pacific Northwest.... The fundamental principle...must continue to be maximizing benefits for Canada and the U.S., and sharing them equitably." Following its own technical studies and extensive consultation with First Nations and local communities, British Columbia is determined to continue the Treaty and seek improvements within the existing framework, a decision supported by the Government of Canada.

The Idaho legislature passed a joint resolution (House Joint Memorial No. 11) in March, addressed to Congress, the Idaho Congressional delegation, and the U.S. Secretary of State, regarding negotiations with Canada over how post-2024 flood control operations will be interpreted. Flood control shifts from guaranteed space in Canadian reservoirs to space only when called upon in flood events that cannot be adequately met by U.S. facilities. The U.S. Entity has interpreted this to apply only to reservoirs in the Basin specifically authorized for system-wide flood control. The Canadian Entity's position is that all U.S. storage projects, including smaller projects on the Snake River and other tributaries, must be utilized before Canadian reservoirs are required to provide any flood control space.

The Idaho legislature, the Coalition for Idaho Water, (watermasters governing federal irrigation projects) the Committee of Nine, the Federal Instream Flow Coalition, and other water users/stakeholders have expressed grave concern over the potential impact to Idaho reservoirs, settlement agreements, water rights, and water management. The Idaho legislature noted "...altered flood control operations could have devastating impacts on reservoir storage and operation levels, irrigation, recreation, hydropower, local flood control and other authorized purposes in Idaho." The legislature and stakeholders emphasize that the renegotiated treaty should not place any additional flood control obligations on Idaho's private and federal storage projects, water facilities, or water users, nor should it alter or affect the 2004 Snake River Water Rights Agreement.

While Idaho agrees with other Basin states that the hydropower provisions should be more equitable, it cautions against any ecosystem provisions that could cause greater uncertainty in an already heavily regulated river system. Ecosystem restoration is intentionally vague, the legislature noted, and "could be used as a vehicle to override and infringe upon existing federal environmental laws and usurp state sovereignty over water...." State and federal laws (including the CWA and the ESA) already "impose conditions and limitations on the use and development of Idaho's water resources and are sufficient to protect the ecosystem functions of the Columbia River Basin."

Colorado River Basin

Drought Contingency Plan

On May 9, the USBR issued a press release regarding the increased need for state and federal action in light of ongoing drought conditions in the Colorado River Basin. Snowpack levels for the 2017-2018 season were at record lows in many parts of the Basin, continuing the decline of reservoir

water elevations. Although the infrastructure is working, and voluntary conservation efforts by the agency, states, water districts, and Mexico have delayed the onset of reductions to lower Basin states, the forecast models are still predicting shortage conditions at Lake Mead in the near future.

USBR Commissioner Brenda Burman said: “We need action and we need it now. We can’t afford to wait for a crisis before we implement drought contingency plans. We all – states, tribes, water districts, non-governmental organizations – have an obligation and responsibility to work together to meet the needs of over 40 million people who depend on reliable water and power from the Colorado River. I’m calling on the Colorado River basin states to put real – and effective – drought contingency plans in place before the end of this year.”

The press release includes statements from the Governors’ representatives of the Basin states. Pat Tyrrell, Wyoming’s State Engineer stated: “This is a critical juncture and we must complete drought contingency plans in both the Upper Basin and the Lower Basin prior to crisis. Further delay is not an option, and I have to believe we can get to ‘yes.’ Full implementation of Minute 323 with Mexico is only possible when the drought contingency plans are complete, and with Lower Basin shortages likely by 2020, we have no other palatable solution.”

James Eklund, Of Counsel with Squire Patton Boggs, Colorado’s appointed representative, said: “Colorado is heartened by Commissioner Burman’s call to action, stands at the ready to move drought contingency planning forward, and agrees that the situation is urgent. Paraphrasing Ben Franklin, the states must hang together or we’ll hang separately.”

Eric Millis, Director of the Utah Division of Water Resources said: “With the threat of this unprecedented drought continuing, the Colorado River Basin States and Mexico need to complete drought contingency planning efforts in the near future. We need the participation of all these parties in order to ensure this goal’s accomplishment. It has never been more important to work together.”

Tom Blaine, New Mexico State Engineer said: “New Mexico believes that drought contingency plans are a key step to surviving this exceptional drought. Now is the time for us to come together and establish a path for the future of the Colorado River Basin.”

John Entsminger, Southern Nevada Water Authority General Manager said: “This ongoing drought is a serious situation and Mother Nature does not care about our politics or our schedules. We have a duty to get back to the table and finish the Drought Contingency Plan to protect the people and the environment that rely upon the Colorado River.”

California’s Colorado River Commissioner, Bart Fisher, stated: “California’s Colorado River agencies recognize the continuing poor hydrologic conditions within both California and the Colorado River Basin, and remain fully committed to collaborate with our partner states in completing the Lower Basin Drought Contingency Plan and ensuring activation of the Mexican Binational Water Scarcity Contingency Plan contained within Minute No. 323.”

Thomas Buschatzke, Director of the Arizona Department of Water Resources (ADWR) said: “The completion of the lower basin states’ Drought Contingency Plan is vitally important to Arizonans. The plan reduces the likelihood of Lake Mead declining to critically low levels and incentivizes the use of tools to conserve water in the Lake so that reductions in delivery of Arizona’s Colorado River supplies are avoided or lessened.”

On November 9, the Colorado River Indian Tribes (CRIT), a tribal council that includes the Mohave, Chemehuevi, Hopi, and Navajo tribes, sent a letter to the ADWR and Central Arizona Project (CAP), offering to store 50,000 acre-feet of water a year in Lake Mead for three years beginning in January 2020. The proposal seeks \$250 per acre-foot of water. The CRIT reservations are located along the Colorado River in both Arizona and California, and have already been part of a Reclamation conservation pilot program since 2016. The CRIT proposal would build on the success of the pilot program using the same methods.

CRIT Chairman Dennis Patch said: “We have been working with the state for the past two years to help protect the River and to help the State of Arizona to deal with the drought and shortages. The proposal we delivered today puts real numbers to that offer that are significant to getting the necessary approvals for DCP.” Vice Chairman Keith Moses said: “We know our water is worth more than \$250 an acre-foot. We are making this proposal at this price for the benefit of the River and to move the process forward in Arizona for approval of the Drought Contingency Plan.”

Arizona’s 35-member Drought Contingency Plan (DCP) steering committee continued to work toward a plan for voluntary water cutbacks from municipalities, agriculture districts, developers, tribes, and other groups to enable the State of Arizona to sign the Lower Colorado River Basin DCP. The committee includes the ADWR, the CAP, Arizona legislators, and Governor Doug Ducey’s (R-AZ) staff.

Tom Buschatzke, ADWR Director, and Ted Cooke, CAP General Manager, noted that the public meetings have been standing-room only. “It’s clear a lot of people believe negotiating an effective Lower Basin Drought Contingency Plan is vital to our State. Each meeting tends to spawn additional meetings with people throughout Arizona working feverishly to get this done - not to keep us out of shortage, but to keep us and the Colorado River system from being in an even worse place.”

Steering committee delegates are refining proposals to discuss with stakeholder groups. The committee anticipates completing the intrastate implementation plan and framework by the end of November, prior to the Colorado River Water Users Association meeting. Their goal is to build broad-based agreement within Arizona to support an effective Lower Colorado River Basin DCP, which the Arizona Legislature will consider for authorization in early 2019.

Governor Ducey said: “Our state is growing. We’ve been a leader on water management for decades, and we’re in a position where we’ve brought constituencies together to talk about the plan going forward.” His chief of staff, Kirk Adams, noted: “Ultimately, this is not a decision that can

be forced upon the water community by the Governor's Office. This will require the water community to give and take with each other to make this happen. If we were to say the Governor's Office demands that you do X, it would fail."⁵¹

On November 15, the Colorado Water Conservation Board (CWCB) endorsed the Colorado River Drought Contingency Plan (DCP) and expressed its support for finalizing the DCP documents. CWCB staff spent most of 2018 conducting outreach presentations across the state regarding the DCP and soliciting feedback from water rights holders and other interested stakeholders regarding tools to address drought.

The CWCB also developed a policy statement on how Colorado will proceed on the development of any Upper Basin Demand Management Program. The Program is a non-mandatory opportunity for Colorado, New Mexico, Utah, and Wyoming to use available storage space at Glen Canyon Dam, Flaming Gorge, Aspinall Unit reservoirs, and Navajo Reservoir to store conserved water for compact purposes at no additional charge.

Also on November 15, the Southern Nevada Water Authority Board voted unanimously to authorize the General Manager, John Entsminger, to execute the DCP agreements.

The CAP Board voted on November 15 to approve a proposal for recommendation to the Arizona DCP Steering Committee, which is scheduled to meet again on November 29. The proposal includes the utilization and storage of CAP water resources that would maximize opportunities to maintain CAP water in Lake Mead, with a conservation and mitigation program for up to 250,000 acre-feet and a cost of up to \$60 million included in CAP fixed annual maintenance and repair rates. The CAP Board also supported the development of a separate groundwater infrastructure and system efficiency program in CAP Agricultural Districts, in cooperation with the state, tribes, federal government and others.

Governor Ducey said in a recent opinion piece: "Implementing DCP in Arizona will require compromise from every stakeholder. This means setting aside narrow special interests and working for the good of the entire state." He called recent proposals short-sighted, with demands for water and money to mitigate reductions growing to insurmountable proportions. Conservation, augmentation, and innovation must be prioritized, he said, keeping in mind that drought may be the new normal.⁵²

Republican River Compact

On August 1, Kansas and Colorado announced that they reached a settlement of claims regarding Colorado's past use of water under the Republican River Compact, which allocates the

⁵¹ *Arizona Capital Times*, 11/2/18; <https://new.azwater.gov/lbdcp>

⁵² *Arizona Capitol Times*, 11/13/18; www.cap-az.com/board/meetings/meeting/1729; <http://cwcb.state.co.us/Pages/CWCBHome.aspx>; and www.snwa.com/apps/snwa-agendas/index.cfm

waters of the river basin between Colorado, Kansas, and Nebraska. Colorado has agreed under the settlement to pay \$2 million to Kansas toward the benefit of the South Fork of the Republican River Basin, and invest an additional \$2 million in Colorado to reduce its use on the South Fork. The agreement allows the states to continue to work collaboratively through the compact with each other and Nebraska, without resorting to litigation.

On August 8, Governor Jeff Colyer (R-KS) sent a letter to Jeff Fassett, Director of the Nebraska Department of Natural Resources, objecting to an interbasin transfer application from the Central Nebraska Public Power and Irrigation District and others. The application proposes to transfer water from the Platte River to the Republican River Basin.

Governor Colyer noted that “...the transfer will provide a pathway for invasive species of fish,” the Asian carp, “to enter the Republican River Basin where currently, no evidence of these species exists.” He noted the safety hazards, environmental impacts, and threat to other fish populations, as well as the economic impact to Kansas and local communities. “The Kansas Republican River Compact Administration team has collaborated with the state of Nebraska to develop strategies providing greater water certainty for our water users and we support water supply strategies to insure compliance with the Compact. However, the invasive species implications to the Republican River resulting from the Platte River transfer proposal prohibit Kansas from supporting its permit approval.”

The Republican River Compact Administration has launched a collaborative website maintained by Colorado, Kansas, and Nebraska.⁵³

States

Arizona

Direct Potable Reuse

On February 7, two Arizona water stakeholder organizations released a Guidance Framework for Direct Potable Reuse in Arizona, a 114-page document intended to inform the State of Arizona as it develops regulations for direct potable reuse (DPR) of treated wastewater to augment public water supplies. The report covers issues relating to: (1) source control; (2) treatment performance; (3) pathogen control; (4) chemical control; (5) monitoring; and (6) water quality. The report makes regulatory recommendations, as well as recommendations that are considered best addressed through guidance or permitting to allow flexibility with experience.

Arizona Administrative Code currently prohibits DPR for human consumption. However, in 2017 the Arizona Department of Environmental Quality (ADEQ) commissioned technical work groups to address a series of questions related to water reuse in Arizona, including DPR, with the

⁵³<http://republicanriver.org/>

intent to remove the prohibition and allow DPR under regulatory oversight. Potable reuse is a key component of former Governor Jan Brewer’s (R-AZ) Final Report of the Blue Ribbon Panel on Water Sustainability (2010), leading to the formation of the Steering Committee for Arizona Potable Reuse (SCAPR) (2013), and the ADWR’s Strategic Vision for Water Sustainability (2014).

WaterReuse Arizona and the Arizona Water Association commissioned the National Water Research Institute (NWRI) to review existing potable reuse regulations, U.S. project experience, and current DPR research. NWRI held two workshops with SCAPR and the WaterReuse Arizona Board, and reviewed documents on reuse from various organizations, including California’s State Water Resources Control Board and the Texas Water Development Board.

Tim Thomure, Director of Tucson Water and Vice President of the Arizona Water Association, said: “This document is the capstone of a collective effort spanning a number of years. It provides a solid foundation for a robust potable reuse framework in Arizona to protect public health and meet water supply challenges face by many communities.”⁵⁴

Reserved Water Rights

On August 9, the Arizona Supreme Court held in *Silver v. Pueblo Del Sol Water Co.*, CV-16-0294, that the ADWR is not required to consider unquantified federal reserved water rights before issuing a decision on the availability of groundwater for pumping and development.

The water company asked ADWR for an “adequate water supply” determination to support a proposed community development that includes 7,000 commercial and residential units outside an active management area (AMA) that would require additional groundwater pumping. The BLM National Conservation Area is asserting both state-based and reserved water rights in the nearby San Pedro Riparian, with a 1988 priority date. BLM’s water rights claim is part of the ongoing Gila River General Stream Adjudication, but remains unquantified.

ADWR issued a draft decision that water was continuously, legally, and physically available. On appeal the trial court vacated ADWR’s ruling, holding that the agency was required to consider BLM’s unquantified reserved water rights. The appellate court reversed, holding that ADWR instead had a duty to provide an educated estimate of the amount of water BLM may eventually obtain through adjudication.

The Arizona Supreme Court disagreed. “ADWR is not required to consider unquantified federal reserved water rights under its physical availability or legal availability analysis.” Nor is the agency required to estimate unquantified rights, which is a fact-intensive determination to be made in the Adjudication process.

⁵⁴http://www.nwri-usa.org/pdfs/NWRI_Guidance-Framework-for-DPR-in-Arizona_2018.pdf

Arizona's water management regime bifurcates surface water, subject to prior appropriation, from groundwater. An overlying landowner outside an AMA has the legal right to capture as much groundwater as can reasonably be used on the overlying land. In Arizona, the reserved water rights doctrine applies to groundwater, but only where other waters are inadequate to accomplish the purpose of a reservation. Arizona does not apply "a zero-impact standard of protection for federal reserved rights." The federal government may separately seek a narrowly-tailored injunction for any surface water rights injured by groundwater pumping.

Additionally, the State regulation that counties may use to require an adequate water supply for development takes into consideration the impact of existing uses on groundwater supply available for an applicant, but not the impact of the applicant's proposed groundwater use on existing uses. It does not operate as a mechanism to protect existing uses from future legal disputes with other groundwater users.

California

Oroville Dam/Independent Forensic Team Report

Following the Oroville Dam spillway incident in February 2017, the Federal Energy Regulatory Commission (FERC) required the CDWR to engage an Independent Forensic Team (IFT) to develop findings and opinions. On January 5, the IFT released its 584-page review, building on its September 2017 interim memo that identified physical causes of the incident. "There was no single root cause of the Oroville Dam spillway incident, nor was there a simple chain of events that led to the failure of the service spillway chute slab, the subsequent overtopping of the emergency spillway crest structure, and the necessity of the evacuation order. Rather, the incident was caused by a complex interaction of relatively common physical, human, organizational, and industry factors, starting with the design of the project and continuing until the incident."

IFT notes inherent vulnerabilities in the spillway design, which was not modified appropriately to fit the local site conditions. The structure cracked shortly after construction, and underdrain flows were observed, but after the initial observation that this was unusual, the situation was later deemed normal and subject to ongoing repairs that were never effective and possibly detrimental.

The report provides a background of the Oroville project, the spillway's operational history, and the chronology of the incident. It describes the physics of what happened, the design and construction defects, the inspections and evaluations, repairs, geology, and incident management decisions. The report discusses concerns with overconfidence and complacency with regard to infrastructure integrity, and the detriments of taking a reactive approach to infrastructure management.

The report also highlights the disadvantages of relying on the regulatory process to ensure dam safety and notes several lessons still to be learned. "Although the practice of dam safety has

certainly improved since the 1970s, the fact that this incident happened to the owner of the tallest dam in the United States, under regulation of a federal agency, with repeated evaluation by reputable outside consultants, in a state with a leading dam safety regulatory program, is a wake-up call for everyone involved in dam safety. Challenging current assumptions on what constitutes ‘best practice’ in our industry is overdue.”

The final section provides industry-level lessons to be learned about physical inspections, comprehensive facility reviews, regulatory compliance, potential failure modes analyses, and dam safety programs and culture. “In dam safety practice, physical inspections are typically visual inspections from accessible locations and do not directly provide insight into latent conditions which cannot be detected by visual inspection.” While necessary, physical inspections alone are insufficient to identify risks, the IFT asserted. Comprehensive reviews are needed to understand the significance of conditions observed, “supplemented by subsurface and non-destructive testing, such as video, geophysical methods, and ground penetrating radar, to investigate and gather data on actual conditions within or beneath components such as chute slabs.” Although costly, such investigations can provide essential information and can be planned and budgeted in advance.

Of particular note, Colorado and New Mexico have begun incorporating file review and failure modes analyses into their regular activities. The IFT recommended that other state regulators and dam safety organizations invest the necessary resources to improve inspection and reviews and avoid continued occurrences like the Oroville Dam incident. The Colorado Division of Water Resources said: “It’s noteworthy that Colorado has been able to accomplish the objective without additional resources due to innovative use of technology, reallocation of assets in terms of geographic areas of responsibility, and distribution of design review responsibilities.”

Then CDWR Director Grant Davis said: “We strongly supported having an independent assessment of the spillway failure and take the findings very seriously.... As we have done in the past, we will carefully assess this report, share it with the entire dam safety community and incorporate lessons learned going forward to ensure California continues to lead the nation on dam safety.”⁵⁵

Oroville Dam Repairs

On October 31, the CDWR announced that it met the public safety milestone on the Oroville dam repairs. CDWR Director, Karla Nemeth, noted that the reconstruction of the main spillway was completed with help from state, federal, and local agency partners. “We thank the surrounding communities for their patience and DWR staff who have worked tirelessly on the Oroville spillways over the past two construction seasons. Today’s milestone is significant, but there is still more work to do before we call this project complete.” The erosion-resistant concrete will continue to cure in the month of November, and work will continue on dry finishing, joint sealing, completing sidewall backfill, and site clean-up.

⁵⁵<http://www.water.ca.gov/news/newsreleases/2018/010517ift.pdf>

In conjunction with the Corps, the Federal Regulatory Commission, and the Division of Safety of Dams, CDWR updated its reservoir operation plan for the 2018-19 flood season. The plan calls for maintaining “lower-than-average lake levels during the winter months to provide operational flexibility to ensure flood protection, meet water deliveries, meet environmental requirements, and prevent use of the emergency spillway this winter, as construction will continue on the emergency spillway into early 2019.”⁵⁶

WaterFix

On February 7, the CDWR announced a two-stage approach to build the WaterFix tunnels, initially focusing on the first tunnel and two intakes for a total flow of 6,000 cubic feet per second (cfs). CDWR noted that the State Water Project (SWP) is able to fund and use the full cfs of the Stage 1 conveyance capacity. The second stage will eventually complete the project by adding the second tunnel and a third intake for a maximum flow of 9,000 cfs and a yield of approximately 4.7 million acre-feet. SWP contractors and participating Central Valley Project (CVP) contractors will manage the design and construction of the WaterFix project, under CDWR’s oversight. Permits are expected to be completed by the end of 2018. The project is intended to provide a reliable supply of water during drought, modernize and upgrade aging infrastructure in the Sacramento-San Joaquin Delta, enable California to capture and store more water in groundwater basins and reservoirs during wet years, and protect and improve the Delta ecosystem.⁵⁷

Water Curtailment

On February 21, the Superior Court of California, County of Santa Clara, issued its decision in California Water Curtailment Cases, Judicial Council Coordinate Proceeding No. 4838 (#2015-1-cv-285182). Various irrigation districts and other water users challenged the State Water Resources Control Board’s (SWRCB) jurisdiction to issue curtailment notices without due process in the Sacramento-San Joaquin River and Delta watersheds during the drought in 2015.

Although the drought ended and the curtailments were lifted, drought is a persistent and recurring threat in California. Given the temporary and seasonal nature of drought emergencies, the Court determined that the water users and SWRCB would benefit from receiving guidance on the issues.

The Court held that SWRCB has power to protect the public interest and provide for the orderly and efficient administration of California’s water resources. It has authority to prevent unreasonable or wasteful use of water from all water rights users, and to determine the relative priorities of all water rights in a stream system for final court adjudication, among other

⁵⁶<https://water.ca.gov/News/News-Releases>

⁵⁷*Western States Water*, #2137, May 1, 2015; #2223, December 23, 2016; #2225 January 6, 2017; and #2257, August 18, 2017.

responsibilities. But it plays a limited role in resolving disputes and enforcing the rights of water holders, a task that is mainly left to the courts.

The Court reviewed SWRCB's reliance on California Water Code §1052 and determined that the statute does not authorize SWRCB to curtail or take enforcement action against pre-1914 water appropriators based on use of water in excess of what is available. The Court acknowledged that SWRCB may have statutory authority under other code sections, and that it may be preferable for the Board rather than the courts to order curtailments under a drought.

The Court also held that the curtailment notices were a violation of due process, depriving users of vested property rights without meeting appropriate notice and hearing requirements. Although SWRCB characterized the notices as informational, they unequivocally ordered petitioners to stop using water or risk large fines, and threatened to commence enforcement proceedings to recover penalties that were already accruing.

"The Court is mindful of the difficult challenges faced by SWRCB in fulfilling its mission during an unusually severe drought. Due process jurisprudence recognizes and accommodates these types of challenges. Nevertheless, due process requires certain minimal protections that were not provided here. In a future drought, the Board is called to fashion a curtailment process that gives users some meaningful opportunity to challenge the underlying findings *before* they are ordered to curtail their water use and *before* fines for noncompliance begin to accrue against them."

Hetch Hetchy Dam

On July 22, DOI Secretary Ryan Zinke met with Restore Hetch Hetchy, a group interested in razing the 430-foot O'Shaughnessy Dam on the Tuolumne River and dismantling power plants downstream.

Built in the early 1920s, the dam and Hetch Hetchy reservoir are a major source of high quality drinking water for the City of San Francisco. The construction of the dam was actively opposed by John Muir, cofounder of the Sierra Club, who worked to protect the Yosemite Valley.

In August 1987, then Secretary of the Interior Donald Hodel stunned environmentalists and San Francisco officials by suggesting that Hetch Hetchy reservoir in Yosemite National Park be drained and the valley restored to its natural state. Hodel said draining the reservoir would allow the federal government to "add a second Yosemite Valley," making the heavily used park accessible to more tourists. Then-San Francisco Mayor Dianne Feinstein declared, "I'll do all in my power to fight it." She called Hetch Hetchy water, noted for its high quality and smooth taste, a "birthright" of San Franciscans. Citing the herculean task of dismantling the project, Feinstein said, "All this is for an expanded campground? It's dumb, dumb, dumb."⁵⁸

⁵⁸LA Times 8/7/87

As one of California's longest serving Senators (since 1992), Feinstein is in a position as a senior member of the Appropriations Committee to weigh in on any proposal to drain Hetch Hetchy.

Interior spokeswoman Heather Swift indicated Zinke's meeting was a fact-finding meeting to explore options and opportunities to balance land conservation and public access for recreation with the water supply benefits the reservoir provides.

A 2006 study by the University of California, Davis, found that there are other storage options for Hetch Hetchy's waters. Other reservoirs could be used to manage water shortages in most years, but San Francisco has been strongly opposed to dam removal, overwhelmingly voting against a 2012 measure to study the impacts of draining the reservoir.

Restore Hetch Hetchy is also pursuing removal of the dam in the California courts, and has sought to have the dam declared an unlawful diversion under state law. A Tuolumne County judge ruled that the state laws regarding reasonable diversions were written after the dam was built. The organization is appealing the decision to the California Supreme Court.

Interior is taking a look at how removing the dam would impact the reliable operation of federal water projects supplying California farmers.⁵⁹

State Water Project/Central Valley Water Projects

On December 14, the CDWR and the USBR reached agreement on updating how the SWP and Central Valley Water Project (CVP) are operated to meet environmental regulations. "The state and federal projects are intertwined, and we have a joint interest and responsibility to ensure our water system meets California's needs especially as conditions change," said CDWR Director Karla Nemeth. The Coordinated Operation Agreement (COA) was originally signed in 1986 and defines how the state and federal water projects share water quality and environmental flow obligations imposed by regulatory agencies. The agreement calls for periodic review to determine whether updates are needed in light of changed conditions. After completing a joint review process, CDWR and Reclamation agreed to an addendum to the COA to reflect water quality regulations, biological opinions and hydrology updated since the agreement was signed. The CDWR and the USBR also signed an agreement to formalize the cost sharing formula for projects needed to meet joint responsibilities under the ESA. The new agreement calls for costs to be shared equitably between the state and federal projects for work to meet joint responsibilities under the ESA, including monitoring and habitat restoration.

CDWR Director Karla Nemeth said, "The operating agreement was supposed to be adjusted every five years. But in the 32 years since it was signed, no adjustments were made. In that same period, our water management challenges changed dramatically. During the record-breaking drought

⁵⁹WSJ, 7/23/18; Mercury News, 5/29/18; Restore Hetch Hetchy Press Release, 7/23/18

in 2014-2015, for example, it was evident that federal reservoirs simply did not have enough water to provide cold water for salmon in rivers upstream and freshwater flows for the Delta. The state needed to step in, and it did, releasing more water from state reservoirs to meet shared environmental responsibilities and taking other measures. The updated agreement recognizes changed conditions since 1986, including hydrology and environmental regulations. The update also calls for more periodic reviews to reflect current conditions.”

Finally, the state and federal government agreed on how to move forward with the Delta conveyance project known as California WaterFix, an upgrade to the existing infrastructure that delivers water through the Delta that will improve environmental conditions and ensure reliable water supplies. According to Nemeth, “This agreement provides the opportunity for continued federal participation, but also describes how the project would operate if the federal government or Central Valley Project water contractors choose not to participate. California’s water management systems in the Sacramento-San Joaquin Delta watershed are complex. Agreements about how to manage them for water users and the environment take years to resolve and must be able to weather changes in state and federal administrations. That makes it essential to sustain coalitions to support this work so vital to California’s environment and economy.”⁶⁰

Colorado

Yampa River Curtailment

On September 6, the Colorado Division of Water Resources placed a “call” on the mainstem of the Yampa River, a tributary to the Colorado River. Water users with a priority date before 1950 are being curtailed, as well as any water users without measuring devices on their diversions.

Much of southern and western Colorado has experienced severe, extreme, or exceptional drought this summer, as classified by the U.S. Drought Monitor. Governor John Hickenlooper (D-CO) activated the State’s Drought Mitigation and Response Plan in May to more effectively address problems as they arise. In August, Colorado DWR’s Drought Update noted that the SNOTEL water year-to-date precipitation for the Yampa-White is at 75% average. Water users across the state have been working collaboratively to maintain streamflows, with voluntary and mandatory restrictions.

Stagecoach Reservoir, owned and operated by the Upper Yampa Water Conservancy District, was designed in 1983 to provide a reliable source of water to the Yampa River for agricultural, municipal, industrial, environmental, and hydropower needs in northwest Colorado. Other project partners include the Colorado Water Conservation Board (CWCB), the City of Steamboat Springs, the Colorado Water Trust, and the Tri-State Generation and Transmission Association. which have worked collaboratively in the past to release water for CWCB’s instream flow program, municipal use for Steamboat Springs, for fishery health, power, recreation, and drought response.

⁶⁰<https://water.ca.gov/News/Blog/2018/Dec-18/What-new-water-deals-mean-op-ed>

The call was initially placed on the river on August 22, but implementation was delayed as storms brought precipitation and water commissioners worked to assign the natural streamflow according to seniority. The call protects water releases from the reservoir, for their intended purpose. The Colorado River Trust and Tri-State Generation had been releasing Stagecoach Reservoir water under their contracted amounts to increase flows for aquatic habitat, recreation, and power uses. However, due to intervening diversions, the releases were not reaching their intended destinations, including a measuring gauge in Dinosaur National Monument and a coal-fired power plant, for cooling operations. Colorado DWR Division 6 Engineer, Erin Light, contacted water users on September 5, to inform them of the curtailment: “We are now faced again with the Yampa River being extremely low at its lower end, and we are unable to both protect the Endangered Fishes Recovery Program reservoir water and allow all water users to continue to divert water.” Water commissioners are visiting headgates and shutting down diversions with a tag and notice, and Steamboat Springs is switching to its reservoir-augmented water supply. The call could be lifted depending on rainfall and cooler temperatures.⁶¹

Idaho

Snake River/Aquifer Recharge

On March 27, the Idaho Water Resources Board (IWRB) announced that surplus water in the Upper Snake reservoir system will provide an estimated 440,000 acre-feet of water to recharge the Eastern Snake Plain Aquifer (ESPA) by the end of the current water year, 76% more than the State’s annual goal to recharge 250,000 acre-feet. The IWRB has already recharged more than 350,000 acre-feet, with another month to go in the recharge season.⁶²

Snowpack and precipitation levels were above average for the Upper Snake River this year, and many reservoirs are starting to match or exceed inflows with flood control releases to make room for the upcoming spring melt.⁶³

The USGS is working with the IDWR and the USBR to measure groundwater levels in more than 1,300 public and private wells throughout the ESPA. The aquifer water levels were measured in 2002, 2008, and 2013, and the agencies plan to continue every five years. IDWR Hydrology Section Manager Sean Vincent said: “The mass measurement is like taking a snapshot of the current state of the aquifer....Privately-owned wells are a valuable source of information.” The data collected will improve the computer model, and will help water managers understand the aquifer status as it enters the irrigation season.⁶⁴

⁶¹*Steamboat Pilot & Today*, 8/22/18, 9/5/18; <http://water.state.co.us/>

⁶²www.idwr.idaho.gov

⁶³www.wcc.nrcs.usda.gov

⁶⁴www.usgs.gov/news

On April 3, the 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."⁶⁵

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."

The Bonneville Power Administration (BPA) said that the 9th Circuit's decision "creates a new multi-million dollar obligation for the region's ratepayers...achieving the full scope of BPA's mission requires a careful balance between sometimes competing objectives."⁶⁶

H.R. 3144 has been introduced 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 Court's decision. In the meantime, it would require the USBR, the BPA, and the Corps to operate the FCRPS consistent with the 2014 biological opinion. Rep. Dan Newhouse (R-WA) said that the bill is expected to advance through the Committees on Natural Resources and Transportation and Infrastructure this month, and possibly to a vote of the full House.⁶⁷

Stockwater/Grazing Water Rights

On March 27, Governor Butch Otter (R-ID) signed House Bill 718, amending stockwater rights legislation. In 2017, the Idaho legislature passed Idaho Code §42-501, codifying the Idaho Supreme Court decision in *Joyce Livestock Company v. United States of America*, 144 Idaho 1 (2007), prohibiting federal agencies from obtaining stockwater rights unless they actually own livestock and put the water to beneficial use. Federal ownership or management of the land alone does not qualify the agencies to be the appropriator of the right. The amendments provide a

⁶⁵www.nwd.usace.army.mil/Media/News-Releases

⁶⁶www.bpa.gov/news

⁶⁷www.tri-cityherald.com/news

procedure for the forfeiture of those rights, beginning with the Department of Water Resources compiling a list of all stockwater rights held by any federal agency by October. The forfeiture procedures only apply to stockwater rights decreed on the basis of beneficial use, not on the basis of federal law, or acquired by appropriation under §42-201, et seq. With Governor Otter's approval, the list will then be submitted to the agencies with an order to show cause why the rights should not be forfeited. The procedure offers a right to an administrative hearing if requested, to determine whether the stockwater right holder is putting the water to beneficial use. Forfeiture does not prevent the holder of a federal grazing permit or lease from filing a water rights claim to water their livestock.

Governor Otter also signed Senate Bill 1305, clarifying that grazing water rights are appurtenant to the grazing land. It provides that when a federal grazing permit is transferred to a new livestock owner, the associated stockwater rights may be conveyed, subject to approval of an application to transfer those rights.

Nevada

Groundwater/Water Basin Transfers

On August 17, Nevada State Engineer Jason King issued a ruling denying groundwater rights to the Southern Nevada Water Authority (SNWA). However, he noted that although he was fully complying with a 2013 remand order in *White Pine County et al. v. Jason King, P.E., Nevada State Engineer, et al.* (CV1204049 7th Judicial District Court of Nevada) he had misgivings about the legality of it.

In 1989, SNWA's predecessor filed 146 water right applications for interbasin transfers of groundwater to the Las Vegas Valley. Several of the applications were approved while others were denied by the State Engineer in 2007 and 2008, and the rulings were appealed. The Nevada Supreme Court required the State Engineer to re-open the protest periods in 2010. Following an additional hearing before the State Engineer, the applications that were granted were subject to certain conditions, including compliance with monitoring, management, and mitigation plans. The subsequent appeal to the state district court resulted in a remand order in 2013.

The court's remand order required: (1) the addition of Utah counties in the mitigation plan for one of the groundwater basins; (2) a recalculation of water available for appropriation "assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time," taking into account water lost to evapotranspiration; (3) defining reasonable standards for mitigation of groundwater pumping; and (4) recalculation of appropriations to avoid over-appropriation or conflicts with down-gradient, existing water rights. Several of the applications which had previously been approved were denied on remand under issues 2 and 4.

In the summary of his decision, the State Engineer noted: "All water right applications subject to this Ruling are denied as a result of the analysis mandated by the District Court.... The

State Engineer respects the District Court’s remand order and has ruled accordingly. However, it is the State Engineer’s statutory authority to conserve, protect and enhance the water resources of the State in accordance with Chapters 532, 533, and 534 of the Nevada Revised Statutes, and it is his belief that these two remand instructions run counter to those duties and represent poor water policy for all Nevadans. Although the State Engineer believes there is water to appropriate in the four subject groundwater basins...he is precluded from doing so as a result of the scope of those remand issues, which imposes new water policy into the science of water appropriations in Nevada.”

South Dakota

Flood Information System

On November 2, Governor Dennis Daugaard (R-SD) announced the completion of the Big Sioux Flood Information System. He noted that 40% of South Dakota’s population lives in the Big Sioux River basin. Following flood events in 2014, Governor Daugaard recognized the limitations of existing flood prediction models, and he created a task force to evaluate improved models and river gages to better predict inundated areas during high flow events. The task force recommendations were included in the Department of Environment and Natural Resources (DENR) 2016 Water Plan, and the 2016 Legislature passed a bill appropriating the necessary funds.

Governor Daugaard said: “I’m pleased to announce DENR and its contractor have completed the modeling effort on-time and on-budget. Best of all, it works! While maintenance of the system will be on-going, it has been verified and calibrated several times this spring and summer during high-flow events in the Big Sioux River.” DENR produced two online systems, one for public education, and one for real-time use by local, state, and federal officials “...to assess immediate flood conditions and determine appropriate response actions to protect communities and critical infrastructure such as drinking water and wastewater systems.”⁶⁸

Texas

Water Project/Streamlining

On April 12, the U.S. House Judiciary Committee’s Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing on permit streamlining, looking at the North Texas Water Supply Security Act (H.R. 4423), and the Permitting Litigation Efficiency Act (H.R. 5468). Witnesses included: Mike Rickman, North Texas Municipal Water District; Donald Elliot, Yale Law School; Emily Hammond, George Washington University Law School; and William Kovacs, U.S. Chamber of Commerce.

Rickman testified of the critical importance of the Lower Bois d’Arc Creek Reservoir (LBCR) Project for the north Texas region’s long-term water supply plan. The Corps has already determined as part of its CWA §404 review that no other viable water supply can address the Water

⁶⁸www.news.sd.gov/

District's needs. H.R. 4423 would limit NEPA lawsuits for environmental review of the LBCR, requiring claims to be brought within 60 days of *Federal Register* publication of the record of decision. It also requires that the plaintiff submits comments during the NEPA public comment period, and that all actions be brought in the U.S. District Court for the Eastern District of Texas. It also imposes restrictions and considerations before a court may grant injunctive relief against federal or state agencies or the Water District.

Rickman noted that the bill does not completely circumvent the judicial process, but it would prevent unnecessary delays, ensure that any legal challenge is legitimate, and require the court to meaningfully balance the need for a critical infrastructure project with attempts to obstruct its construction and use.

Kovacs noted that permit streamlining has been a bipartisan effort since 2009, when Senators Tom Barrasso (R-WY) and Barbara Boxer (D-CA) "recognized that there were flaws in the permitting process that made it difficult to move infrastructure projects forward in a reasonable time frame, i.e. several years versus a decade, due to delays in the environmental review process." The Chamber of Commerce prepared a report identifying 351 energy projects that were stalled due to the environmental review process.

Kovacs reviewed legislation since 2009, including the Fixing America's Surface Transportation (FAST) Act, and the positive effects of the streamlining provisions on covered projects. He noted that under the FAST Act, a structure was established for the management, coordination, timing, and transparency of the environmental review process, and the deadline for lawsuits was reduced from six to two years. However, the streamlining provisions are scheduled to sunset in 2022, and smaller projects are not covered. The Permitting Litigation Efficiency Act would address some of the shortcomings of the FAST Act.

Hammond called both bills "thinly veiled attempts to tamper with well-established procedural systems on behalf of anti-environmental interests.... The effect of these bills would be to undermine the integrity and predictability of both the administrative state and the judicial system, to the detriment of all interests."

But Elliott said: "I believe this legislation is necessary to cure some of the abuses and misuses of environmental review and permitting litigation that have grown up over time in order to save environmental review so that it can perform its important mission." He said that judicial interpretations have unnecessarily lengthened the process, and the more arduous environmental review becomes, the more temptation there will be to exempt important projects from NEPA entirely in order to get them done in a timely fashion. NEPA serves a useful purpose, but judicial review contributes relatively little to actually improving environmental reviews, while imposing significant economic harm.

Hurricane Harvey

On April 30, the Corps announced an initial allocation of \$360 million to address short-term repair work for a list of 32 projects damaged by recent natural disasters, including the damage caused by Hurricane Harvey to Corps projects in Texas. The funding comes as part of the Bipartisan Budget Act (P.L. 115-123) signed into law in February. Assistant Secretary of the Army for Civil Works, R.D. James, said: “The short-term repair work will alleviate the impacts of the project damages and shoaling on human safety, flood-prone property, commercial navigation costs, ecosystem values, and other project outputs such as recreation, hydropower and water supply.”

The Texas projects include: Buffalo Bayou and Tributaries; Corpus Christi Ship Channel; Galveston Harbor and Channel; Channel to Victoria; Gulf Intracoastal Waterway; Houston Ship Channel; Matagorda Ship Channel; Sabine Neches Waterway; and Wallisville Lake. Governor Greg Abbott said: “As Texas continues on the road to recovery, our shipping channels and bayous are among the highest priorities for investment and repair. These projects and improvements will address concerns in a number of local communities affected by Harvey and help combat future flood events. I thank the Army Corps of Engineers for their commitment to these initial projects...as Texas continues to recover and rebuild.”

On July 9, the USGS released a flood report on information collected in cooperation with the Federal Emergency Management Agency (FEMA) following Hurricane Harvey in August 2017. The rainfall event lasted eight days and exceeded 60 inches in some locations, making it the most significant in scope and peak rainfall amounts since records began in 1880. USGS and FEMA initiated the study to evaluate the magnitude of flooding, map its extent, and determine the probability of future occurrences. USGS field crews collected 2,123 high-water marks in southeast Texas and southwest Louisiana, and together with flood flow information from USGS streamgages, USGS created nineteen inundation maps for six river basins to document the areal extent and depth of flooding.

The maps and information will assist officials in updating building codes, planning evacuation routes, creating floodplain management ordinances, providing environmental assessments, and planning other community efforts to become more flood resistant.⁶⁹

Utah

Instream Flows/Water Banking and Leasing

On November 14, the Utah Legislature’s Natural Resources, Agriculture, and Environment Interim Committee discussed and approved a draft joint resolution, introduced by state Senator Jani Iwamoto, supporting the further study of water banking and instream flows in Utah.

⁶⁹<https://www.usgs.gov/news/post-harvey-report-provides-inundation-maps-and-flood-details-largest-rainfall-event-recorded>

In 2017, the legislature considered S.B. 214, “Public Water Supplier Amendments,” to expand the instream flow provisions under Utah Code Ann. §73-3-30, to allow municipal suppliers to hold water rights for instream flow purposes. This stirred up considerable controversy in the water community. The current version of the statute limits instream flow rights to the Utah Division of Wildlife Resources and the Utah Division of Parks and Recreation, and (since 2008) a non-profit organization that specifically promotes fishing. Only a handful of instream flow rights have been perfected. Public water suppliers often hold water rights for long periods of time before they are needed and diverted from the stream, and the proposed bill would have allowed them to put their water rights to public use by providing for instream flow. However, the junior priority water users downstream, including agricultural irrigators, have benefitted from the unused municipal water as it continues to be available for diversions. Additional concerns were raised by the agricultural community about perpetual and mandatory protection of species habitat causing temporary transfers to become permanent, complications created by private instream flow rights and changing definitions of beneficial use, and policies to use increased instream flow to meet water quality demands.

The legislature determined that the instream flow issue was complex and needed input from stakeholders before any changes could be made to the statute to expand the list of who can file for instream flow rights. The legislature instead passed a substitute bill, requesting the Executive Water Task Force and Water Development Commission to study the application process for instream flows, and present their findings to the legislature.

Senator Iwamoto reported the findings of the Executive Water Task Force over the past eighteen months. She said they initially studied what other states like Colorado and Idaho have done with instream flow programs to identify what approach would be most appropriate for Utah. Early discussions tackled issues such as how to address agricultural concerns and how to keep transaction costs low, and considered water banking as an ideal tool to facilitate greater use of instream flows. After considering the issue, the Task Force formed a Water Banking Study Committee. The study committee includes fifty diverse stakeholders volunteering their time, comprised of legislators, the State Engineer’s Office, the Utah Department of Agriculture, local municipal water suppliers, water attorneys, the Central Utah Water Conservancy District, the Utah Farm Bureau, Trout Unlimited, the Audubon Society, and The Nature Conservancy.

These legislative efforts coincided with recommendations from Governor Gary Herbert’s (R-UT) State Water Strategy Advisory Team to develop tools like water banking and water leasing to protect instream flows and facilitate temporary water transfers. The 2017 Recommended State Water Strategy states: “A water bank is an institution that exists to facilitate the temporary transfer of water. If a bank were in place, rights to the water could be banked for another water user in the region to buy or lease. A benefit of a water bank includes more transparency in terms of both transactions and costs. Banked water could be available for agricultural, environmental, M&I [municipal and industrial], or other purposes. These banks allow water users to put unused water into the bank in years when they do not need it (without it counting against them for purposes of forfeiture ‘use it or lose it’) and, conversely, to go to the bank to lease additional water when they need it for any lawful purpose.”

Senator Iwamoto said that the Water Banking Study Committee recently considered existing Utah laws and identified pilot programs at the watershed level that can be done in Cache County and on the Provo River. They are looking at the feasibility of the pilot programs, using state legislative appropriations and federal grants to fund the necessary manpower to implement the programs.

Steve Clyde, a water attorney at Clyde Snow and member of the Water Banking Study Committee, testified on the need for legislative support to move the water banking study and the State Water Strategy forward. Surface or groundwater storage will be necessary to hold banked water so that it remains available within the watersheds to withdraw as needed from the water bank. In response to questions from the interim legislative committee, Clyde acknowledged that banking water usually involves evaporative losses from surface storage that would need to be taken into account. He said the political and environmental reality is that Utah probably will not build a lot of new surface storage; however, existing reservoirs have excess storage capacity at times that could hold banked water and they are looking to better use the available storage. “And we can store in the ground. We know from groundwater recharge and recovery projects that have been done that groundwater can be injected through wells. It’s a very efficient means of storing water without having to build very expensive surface storage that is more environmentally damaging.”

Utah’s State Water Strategy emphasizes the need to maintain agriculture. Clyde said: “Eighty percent of our existing water rights are held in the agricultural community. Unlike other western states, we don’t want to see the buy and dry approach prevail...,” where farms are left fallow and water is taken into urban centers. Water banking allows us to look at our limited shared resources and competing demands, he said, including environmental flows that did not have a seat at the table when all the water was appropriated, and more flexibly accommodate those needs. Water banking, together with other mechanisms, allows for voluntary market-based transactions. The water priorities and property rights are still recognized and protected from forfeiture, but water conservation, crop rotation, lined ditches, and other agricultural efficiencies can free up water for alternative temporary uses. At the same time, split-season or long-term water leases can provide a revenue stream that pays for things like drip irrigation, and banking allows farmers to temporarily forego use and lease their water without losing their water rights or adversely impacting their operations.

Clyde noted that it will be important to keep an eye on those agricultural efficiencies and water transfers. “One man’s waste is another man’s water right.” We have to protect return flows and downstream interests as well. “You can force efficiency upstream, but it has a ripple effect all the way down the system.” The State will need to address this as a longer-term policy issue, including how to compensate those who may be impacted by upstream conservation efforts, perhaps providing incentives for those downstream to implement conservation strategies to deal with reduced water quantities.

Even with aquifer storage and recovery, the effects of the changed timing or location of water use needs to be taken into account. The study committee is looking at an abbreviated process for change applications at the State Engineer’s Office. If it takes two years to approve an application

to store or lease water, the seasonal benefits of water banking would be lost. At the same time, the water rights of others still need to be protected. The State Engineer has the administrative expertise to evaluate those applications and protect all water rights that could be impacted by water banking and leasing.

Clyde reported that the study committee is in the process of drafting proposed legislation, but it probably will not be ready until the 2020 general session.

Rep. Susan Duckworth added that the Water Development Commission had an opportunity to review the proposed resolution. She noted that this process has had a lot of public input and vetting among stakeholders. “It’s a step in the right direction for water users.”

Washington

Tribal Treaty Fishing Rights

On June 11, 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.”⁷⁰

Water Supply Outlook

The National Drought Summary for January 2, reported, in the West: “Drought intensified in the Four Corners, while heavy snow brought relief to northeastern portions of the region. Across Montana, Abnormal Dryness to Severe Drought were trimmed along the Canadian border to account for the favorable start to the Water Year and subsequent easing of long-term moisture deficits;

⁷⁰*Western States Water*, #2265, October 13, 2017, and #2258, August 25, 2017

12-month precipitation climbed to near-normal levels in western Montana, but was still less than 50 percent of normal in the lingering Extreme Drought (D3) areas.”

“While no changes were made to the Pacific Coast States, the poor start to the current Water Year was raising concerns over drought resumption from the Cascades southward into central and southern California. In particular, 90-day precipitation has averaged less than 40 percent of normal from central Oregon southward into central California, and less than 10 percent from the southern San Joaquin Valley into southern portions of Nevada and Arizona. Severe Drought (D2) was expanded over large portions of the Four Corners region, coincident with much-below-normal precipitation totals over the past 6 months (30-65 percent of normal). Farther east, Moderate Drought (D1) expanded across northern portions of New Mexico and environs, where short-term dryness (10-40 percent of normal over the past 90 days) was most pronounced.”

For the High Plains: “Extreme cold gripped the region, accompanied by much-needed moderate to heavy snowfall. Temperatures for the period averaged 25 to 35°F below normal from eastern Montana into the Dakotas and northern Nebraska. There were no changes made to the drought depiction in central and eastern portions of the region, while reductions in Abnormal Dryness, Moderate Drought, and Severe Drought (D0-D2) were made in northwestern Montana.⁷¹

On January 4, the NRCS’s National Water and Climate Center data for 830 stations recorded little or no snow across most of the Upper Rio Grande in Southwest Colorado and New Mexico, as well as across Arizona, Nevada and Southern Utah. Numbers are similarly dire for the Eastern Sierra Mountains surrounding Lake Tahoe. Colorado’s West Slope is below average with a majority of stations reporting 50-75% of average, and similar numbers reported for Utah’s Uinta and Wasatch Mountains. This pattern persists across the Lower Snake Plain in Idaho and Oregon’s Blue Mountains. The dearth of snow stretches through Oregon’s Cascades, improving to mostly near average northward in Washington. The Idaho Panhandle is near to above average. Western Montana and Northwest Wyoming stations range from 100%-200% of average.⁷²

Stations registering the lowest snow depth on record include the eastern edge of the Great Basin in Utah, a few interspersed through Southeastern Utah and Southwestern Colorado, the Cascades from California into Washington, the Snake River Basin and the Northern Rockies.

On May 24, the USDA’s NRCS reported intensified drought conditions through the Southern Plains and Southwest regions. Parts of Arizona, Colorado, New Mexico, Oklahoma, Texas and Utah had been designated as in exceptional drought. The mountains in those regions received very little snow or precipitation over the winter, and started the spring with very low streamflow. Parts of eastern Oregon, southern California, and western North and South Dakota were experiencing moderate to severe drought. Although most reservoirs were at or above their average storage

⁷¹<http://droughtmonitor.unl.edu/DroughtSummary.aspx>

⁷²www.wcc.nrcs.usda.gov/cgibin/water/drought/wdr.pl

capacity, Arizona, New Mexico, and Washington reservoirs were below average. Wildfire potential was above normal for much of Arizona, Colorado, New Mexico, Utah, and parts of California, Nevada, and Idaho.

Senate Committee on Energy and Natural Resources Hearing

On March 22, the Senate Committee on Energy and Natural Resources held a hearing on the Western Water Supply Outlook for 2018. The committee also reviewed three new bills related to water infrastructure and drought resilience. Committee Chair Lisa Murkowski (R-AK) started the hearing by acknowledging the vital importance of water to the western states, and drought conditions impacting the Colorado River Basin again after last year's brief respite. "Every Committee has been talking about infrastructure in this Congress.... For western water, drought resilience is simply not possible with insufficient and aging water systems that do not even function properly.... The failure to store as much water as possible in a wet year can have devastating, long-term impacts.... With infrastructure as a foundation, we can also look to flexible water management practices to build drought resilience. Tools like conjunctive management, data driven reservoir operations, conservation, and other innovative techniques can multiply the drought resilience benefits for our communities."

Witnesses included: Tim Petty, Assistant Secretary for Water and Science, DOI; Derek Sandison, Director, Washington State Department of Agriculture; Patrick O'Toole, Family Farm Alliance; Laura Ziemer, Trout Unlimited; Kathryn Sorensen, Director, City of Phoenix Water Services Department; and Cindy Ortega, MGM Resorts International.

Senator Dean Heller (R-NV) introduced a bill (S. 2539) on March 13, that would reauthorize water pilot projects in the Upper Colorado River Basin (43 USC §620) through 2022. Petty's testimony provided details 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 \$20 million 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."

One of Reclamation's tools, the reemployed annuitant program under the National Defense Authorization Act (NDAA), enables them to quickly hire experienced employees to meet the short-term needs of large-scale infrastructure projects and scale back to normal staff levels once projects are completed. The NDAA authority is limited, however, and Petty expressed the willingness of the Department to work with the Committee on language to extend Reclamation's authority.

Senator James Risch (R-ID) introduced the Reclamation Title Transfer Act (S. 2560) on March 15, a bill to authorize the administrative transfer ownership of certain Reclamation projects or facilities to qualified non-federal entities. Risch noted that the bill “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.” A related bill of the same name was introduced in the House, H.R. 3281.⁷³

Petty acknowledged that the Department supports S. 2560, noting that they “have 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.

Senator Jeff Flake (R-AZ) introduced the Water Supply Infrastructure and Drought Resilience Act (S.2563) on March 22, with co-sponsoring Senators John McCain (R-AZ), Cory Gardner (R-CO), James Risch (R-ID), and John Barrasso (R-WY). The bill would establish a pilot program to update flood-control curves at USBR facilities. It would increase 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.

Petty expressed appreciation to the Committee for refining the language of S.2563 to meet the mutual goals of Congress and the Administration, noting that it “strikes the appropriate balance between Reclamation’s ability to serve as a coordinating lead on new surface water storage projects and the limits of Reclamation’s authority to dictate the actions of other agencies and bureaus.” Reclamation does not oppose expansion of eligible applicants for WaterSMART programs, although Petty noted it does increase competition for the available funds.

⁷³*Western States Water*, #2247, June 9, 2017

Regarding flood control curves, Petty described the Reservoir Operations Pilot Initiative, which started five studies in FY15 to explore whether flexible criteria could improve water supply management, identifying trends in water availability, hydrology, sedimentation, and conjunctive groundwater management. The studies are expected to be complete in the Spring of 2018, and if this bill is passed, Petty said the initiative would be adapted to meet the requirements of the bill.

Petty expressed some concerns with the aquifer recharge language, pointing out that the requirements as worded may have unintended consequences for contractors. He said it may be useful to allow the Secretary of the Interior discretionary authority to modify operations where feasible, with notice to contractors.

On the issue of water rights protection, Petty expressed appreciation for the §304 savings clause, recognizing the importance of other applicable federal laws and contracts; state-acquired federal water rights; and the unique role of federally reserved Indian water rights “which will allow the Department to continue pursuing the settlement of Indian water rights disputes...and help create conditions that improve water resources management by providing certainty as to the rights of all water users who are parties to the dispute.”

On the 2018 water supply outlook, Petty provided hydrologic updates for each of Reclamation’s regions, including snowpack, extended precipitation forecasts, reservoir storage, and flood control operations.

RESOLUTIONS AND POLICY POSITIONS

From time to time, the WSWC adopts policy positions and resolutions, many of which address proposed federal laws, rules and regulations or other matters affecting the planning, conservation, development, management, and protection of western water resources. Policy positions sunset after three years, and are then reconsidered, reaffirmed, revised and readopted, or allowed to expire. All WSWC positions are also vetted through the WGA.

In 2018, the WSWC revised and adopted its Vision on Water as a permanent mission statement. The WSWC also adopted six new positions (No. 417, 418, 419, 425, 426, 427) and revised and re-adopted numerous sunseting positions:

Position No. 417 supports the development and use of FIRO using innovative technologies to maximize the effective and efficient use of existing and future water resources infrastructure to meet myriad and growing economic needs for water, as well as balance and protect public health, safety and the environment.

Position No. 418 recognizes the importance of weather station networks, many under-funded and in eminent danger of failure. The USBR's Agrimet network is one example.

Position No. 419 addresses the urgent need to invest in water-related infrastructure at the federal state and local level, to meet both water supply and water quality challenges, while also seeking assistance from the private sector.

Position No. 420 presents numerous considerations for integrating western water and energy planning and policy.

Position No. 421 supports state and federal applied research and hydroclimate data collection programs, to assist water agencies and all levels of government to make sound scientific decisions and adapt to climate variability.

Position No. 422 declares States have exclusive authority over the allocation and administration of rights to the use of groundwater, and States are primarily responsible for protecting and managing groundwater.

Position No. 423 recognizes the need and supports action to "expedite construction of authorized rural water supply projects...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."

Position No. 424 reiterates the WSWC's long declared position that transfers of water from one location to another through various conveyances without any intervening use or addition of any pollutant should not trigger federal permit requirements under the CWA and its NPDES.

Position No. 425 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 the conservation of endangered species.”

Position No. 426 supports state delegated authority under CWA Section 401, to review federally permitted or licensed projects for impacts on water quality.

Position No. 427 acknowledges that EPA has “actively sought meaningful state consultation, engagement and participation in its review and development of a new proposed rule to define Waters of the United States” and encourages continued consultation in authentic partnership with the states.

Position No. 428 recognizes the critical importance of federal water and climate data collection and analysis programs to the Western states.

Position No. 429 addresses drought preparedness and monitoring networks.

Position No. 430 supports the USBR’s Drought Response Program.

Position No. 431 opposes federal policies that interfere with state authority over the allocation of surface water, including natural flows that would exist in the absence of reservoirs built by the Corps.



Western States Water Council

A VISION ON WATER⁷⁴

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. Western States have and will continue to face unique hydrologic, legal and infrastructure challenges. 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 recognized as a critical 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.

⁷⁴Revised and Adopted on October 26, 2018



**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
to Support the Use of
FORECAST INFORMED RESERVOIR OPERATIONS and INNOVATIONS
Arlington, Virginia
March 14, 2018**

WHEREAS, Western States experience great variability in precipitation, with serious impacts and consequences for the operation of water projects, particularly aging water infrastructure, as well as water supply and emergency planning and management, drought and flood preparedness and response, and other public and private decisions; and

WHEREAS, decisions to operate water projects to protect life and property by reducing flood risks, while at the same time maximizing water supply storage, including carryover storage, impact billions of dollars of economic investments in the West to maintain and protect municipal and industrial centers, agriculture, hydropower generation, and fisheries; and

WHEREAS, these investments depend on our ability to observe, understand, model, predict, and adapt to precipitation variability on operational time scales ranging from hours to days, weeks and months, seasons and longer; and

WHEREAS, observations, modeling, high-performance computing capabilities, research, and demonstration projects are essential to significantly improving operational forecasting of precipitation to maximize the use of our existing water storage projects to reduce flood damages, mitigate economic and environmental damages, and maximize water storage and water use efficiently; and

WHEREAS, operating aging water infrastructure effectively in the face of growing and often competing water supply and water management and flood protection demands requires that state, federal, tribal, and local agencies optimize operations and seek innovative alternative strategies to support their decision-making; and

WHEREAS, project operations and alternatives may include, but are not limited to, using enhanced forecasting capabilities to better inform reservoir operators, operations, and actions - to dynamically determine reservoir levels to improve storage opportunities, and to alter static reservoir operating rule curves and requirements based on updated hydrologic information.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council supports the use of innovative and forecast informed reservoir operations by public and private entities at all levels to maximize the effective and efficient use of our existing and future infrastructure to benefit our myriad and growing economic uses of water, while at the same time balancing and protecting our need for public health and safety, as well as a resilient and healthy environment.



**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in Support of
WEATHER STATION NETWORKS
Arlington, Virginia
March 14, 2018**

WHEREAS, Western States experience great variability in precipitation, with serious impacts and consequences for water supply planning and management, drought and flood preparedness and response, water rights and water market administration, operation of water projects, and irrigation management; and

WHEREAS, sound decision-making to protect life and property and to inform decisions involving billions of dollars of economic activity involving urban centers, agricultural production, and fisheries depends on our ability to observe, understand, model, predict and adapt to precipitation variability; and

WHEREAS, data made available by weather station networks of all kinds operated by federal and state agencies, local interests, volunteer private observers, and universities that span the West is critical for sound decision-making; and

WHEREAS, at the local scale the National Weather Service's (NWS') Cooperative Observer Program - the nation's oldest and largest weather network - collects critical information on precipitation intensity that supports design of community flood control infrastructure and planning for flood hazard mitigation, especially in rural areas; and

WHEREAS, at the global scale NWS geostationary and polar-orbiting weather satellites capture the data needed to make hourly to two-week forecasts, and issue public safety warning and watches; and

WHEREAS, the U.S. Bureau of Reclamation's Agrimet network is an example of an agroclimate network of weather stations whose data can be used for improving water planning and water use efficiency in the agricultural sector, conserving water, improving crop yields, reducing pesticide and fertilizer application, and reducing energy costs for growers; and

WHEREAS, weather station network data serve as an important and efficient ground-truthing, calibration, and model validation tool for analysis of information products derived from satellite and remote-sensing platforms such as Landsat and others; and

WHEREAS, network observations can provide near real-time information for estimation of vegetation evapotranspiration (ET) and in-the-field crop water use, that can be used to optimize production and increase the efficiency of irrigation, and are used extensively by irrigation districts, farmers, resource conservation agencies, municipal and state entities, and agricultural consultants; and

WHEREAS, agricultural water use is the largest consumptive use of water in the West, and weather stations and other observing systems that aid in water conservation and more efficient use of water will be a critical tool for meeting future water supply and water quality challenges posed by growing needs for food and fiber; and

WHEREAS, many of the nation's weather observing networks suffer from the challenges of aging instrumentation infrastructure, deferred maintenance, need for technology upgrades, and budgets that fail to keep up with observing system needs, making it difficult to maintain data continuity for users; and

WHEREAS, weather station networks operate very efficiently and yield public safety and water supply benefits that are much greater than the cost of their operation providing significant value to their users.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council expresses its continuing support for critical weather station network observations and programs and urges the Administration, Congress, and supporting partners at all levels, to give a high priority to the allocation and appropriation of funds for their continued operation and expansion.



**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 channels, 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.



**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
INTEGRATING WATER AND ENERGY PLANNING AND POLICY
Arlington, Virginia
March 14, 2018**

WHEREAS, the West enjoys diverse and abundant energy resources, including renewable and non-renewable resources, but water is scarce in much of the region and may or may not be sufficient for all proposed uses; and

WHEREAS, power plant cooling and other energy resource development and related water requirements can be significant on state, local and westwide scales; and

WHEREAS, the West is a leader in the planning, development, diversification, management and protection of the Nation's water and energy resources; and

WHEREAS, in the West, maintaining adequate and sustainable supplies of clean water and energy present interrelated challenges given a growing population, increasing water and energy demands, and an uncertain climate subject to multi-year drought and other extremes; and

WHEREAS, an integrated approach to water and energy resource planning, development, diversification, management and protection is necessary to achieve a thriving and sustainable future for the West; and

WHEREAS, effectively planning for the future requires gathering and integrating data and information on past, present and future water and energy supplies and demands, including embedded demands by different sectors/uses and users; and

WHEREAS, in general, current water use data (especially consumptive water use data) are not sufficient for detailed and comprehensive analyses to support many water/energy decisions and policymakers' needs; and

WHEREAS, the Western Governors' Association (WGA), Western States Water Council (WSWC), Department of Energy (DOE), Sandia National Laboratories (and other DOE laboratories), Western Interstate Energy Board (WIEB), Western Electric Coordinating Council (WECC), Electric Reliability Council of Texas (ERCOT) and others have worked collaboratively to develop a better understanding of water and energy supplies and demands; and

WHEREAS, public-private partnerships are increasingly important in addressing our future water and energy challenges; and

WHEREAS, there is a continuing need for federal and state water and energy resource agencies, public utility commissions, and other planners, regulators and policymakers to better define and consider the nexus between water and energy resources in their respective areas of jurisdiction; and

WHEREAS, continuing water and energy nexus research and development is needed to further our understanding and evaluate the effectiveness of different policies and programs given various future scenarios;

NOW THEREFORE BE IT RESOLVED, that western water and energy planners, policymakers, managers and regulators should consider the following:

- (1) integrating water and energy policies and engaging water and energy planners to maximize program and project effectiveness and efficiencies;
- (2) supporting new and continuing data gathering, analyses and research related to better understanding water and energy supplies and demands, and related science;
- (3) promoting integrated water and energy conservation and use efficiency;
- (4) seeking to minimize economic, environmental and other costs of providing adequate, reliable and sustainable supplies of water and energy;
- (5) expanding public education, engagement and outreach to highlight the importance, vulnerability and interrelated nature of our water and energy resources;
- (6) ensuring decisions related to the siting, construction and operation of water and energy development projects include an evaluation and appropriate consideration of the interrelated impacts of such development;
- (7) tailoring the use of alternative cooling technologies and other energy-related options to the availability of water, and the related opportunity costs related to other water uses;
- (8) seeking to develop a diversified portfolio of water and energy resources and assets to maximize reliability and flexibility;
- (9) taking advantage of synergies and economies of scale related to integrating water and energy conservation, development and protection programs and projects;
- (10) evaluating and integrating life-cycle costs related to water and energy supply development, conveyance and transmission;
- (11) integrating short and long-range water and energy supply planning;
- (12) promoting the development and use of “smart” technologies for management of water and energy demands and production; and
- (13) ensuring that the West maintains sustainable, reliable and robust infrastructure systems necessary to deliver adequate supplies of clean water and energy to meet present and future needs.



**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
supporting
FEDERAL RESEARCH ON CLIMATE ADAPTATION
Arlington, Virginia
March 14, 2018**

WHEREAS, climate variability has serious potential consequences for water supply availability, water resources planning and management, water rights administration, flood management, and water quality management; and

WHEREAS, much of the West's water infrastructure was designed and constructed prior to our current understanding of climate variability, often from short hydrologic records from the first half of the 20th century; and

WHEREAS, the impacts of climate variability can include increased frequency and intensity of severe weather (droughts and floods), reduction of mountain snowpacks, changes in timing and amount of snowmelt runoff, and changes in plant and crop evapotranspiration resulting in changed water demand patterns; and

WHEREAS, climate variability is an additional stressor on western water resources, which are already challenged by population growth, competition for scarce resources, increasingly stringent environmental regulations, and other factors; and

WHEREAS, water resources planning and management at all levels of government and sound future decision-making depend on our ability to understand, monitor, predict, and adapt to climate variability; and

WHEREAS, the Council has over the years co-sponsored several workshops to gather input on climate adaptation and research needs, including research on extreme events; and

WHEREAS, these workshops and various federal reports have helped in identifying knowledge gaps, research needs, opportunities to improve planning capabilities, and other activities that would assist in climate adaptation, including those that could impact water quality and thus, available water supply; and

WHEREAS, applied research needs and improvements to water resources planning capabilities include subjects such as evaluation of modifications to reservoir flood control rule curves, evaluation of the adequacy of existing federal hydroclimate monitoring networks, improvements to extreme precipitation observing networks and forecasting capabilities, development and improvement of applications for remote sensing data (satellite imagery), preparation of reconstructed paleoclimate datasets for drought analyses, and development of new guidelines for estimation of flood flow frequencies;

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council supports state and federal applied research and hydroclimate data collection programs that would assist water agencies at all levels of government in adapting to climate variability and making sound scientific decisions.



**POSITION
of the
WESTERN STATES WATER COUNCIL
on
STATE PRIMACY OVER GROUNDWATER
Arlington, Virginia
March 14, 2018**

WHEREAS, groundwater is a critically important natural resource that is vital to the economy and environment of the arid West;

WHEREAS, the Desert Land Act of 1877 and the United States Supreme Court in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935) recognize States have exclusive authority over the allocation and administration of rights to the use of the groundwater within their borders and States and their political subdivisions are primarily responsible for the protection, control and management of the resource;

WHEREAS, the Congress has created and the U.S. Supreme Court has recognized federal reserved rights to surface water, but no federal statute has addressed any federal property or other rights related to groundwater; and

WHEREAS, the regulatory reach of federal statutes and regulations, including but not limited to the Clean Water Act, Endangered Species Act, Multiple-Use Sustained-Yield Act, National Environmental Policy Act, Organic Administration Act (USFS), Reclamation Act of 1902, Safe Drinking Water Act, Wild and Scenic Rivers Act, Wilderness Act and the Comprehensive Environmental Response, Compensation, and Liability Act, were never intended to infringe upon state ownership or control over groundwater; and

WHEREAS, States recognize the importance of effective groundwater management and are in the best position to protect groundwater quality and allow for the orderly and rational allocation and administration of the resource through state laws and regulations that are specific to their individual circumstances; and

WHEREAS, working cooperatively with their federal partners, states have shown that they have the ability and authority to address federal needs regarding groundwater within existing legal frameworks, including but not limited to memoranda of understanding, water rights compacts, stipulations, and other methods; and

WHEREAS, the conditions affecting groundwater supplies, demands, and impairments vary considerably across the West and within individual states; and

WHEREAS, federal efforts to exert control over or ownership interests related to groundwater or otherwise infringe upon or supersede state rights to the use of groundwater or state groundwater management laws and authorities are contrary to federal law and threaten effective groundwater management and protection; and

WHEREAS, nothing stated in this position is intended to apply to the interpretation or application of any interstate compact, court decrees, international treaty or tribal settlement agreement.

WHEREAS, states have exclusive authority over the allocation and administration of rights to the use of the groundwater located within their borders and are primarily responsible for allocating, protecting, managing and otherwise controlling the resource; and

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council opposes any and all efforts that would establish a federal ownership interest in groundwater not otherwise recognized or allowed under state law, or diminish the primary and exclusive authority of States over groundwater; and

BE IT FURTHER RESOLVED, that federal agencies should work cooperatively with appropriate state agencies and officials to address federal needs involving groundwater through state laws and authorities.



Position No. 423
Revised and Readopted
(formerly Position No. 343, June 8, 2012
and Position No. 381, July 10, 2015

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding the
RURAL WATER SUPPLY PROJECT/INFRASTRUCTURE NEEDS
Newport, Oregon
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 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 billion - while costs continue to increase due to delays, inflation and the rising costs of materials and labor - and at current levels of funding completion of some project could be delayed by decades; 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.

Position No. 423
Revised and Readopted
(formerly Position No. 343, June 8, 2012
and Position No. 381, July 10, 2015

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).



Position No. 424

(See also No. 382, revised and reaffirmed July 10, 2015)

(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
Newport, Oregon
August 3, 2018
(revised and reaffirmed)

WHEREAS, 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, the Western States Water Council supports the ability of each Western State to use available authorities to place appropriate conditions on water transfers to protect water quality; and

WHEREAS, the EPA published 40 CFR Part 122.3(i), 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 Petitions for Writ of Certiorari;

(See also No. 382, revised and reaffirmed July 10, 2015)

(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.



**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.

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 in concert with State agencies to implement Congress' intent to resolve water and species protection issues.



**RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
STATE CWA SECTION 401 CERTIFICATION AUTHORITY
Coeur d'Alene, Idaho
October 26, 2018**

WHEREAS, States have responsibly exercised their delegated authority under the Clean Water Act (CWA) Section 401 and under state water quality statutes to protect water quality, and must consider proposed activities and discharges in light of the states' designated water uses and related water quality standards; and

WHEREAS, the Council supports a balanced and integrated approach to achieve water and energy policy goals that plans for the future in sustainable ways, and recognizes legitimate state water and water quality management, protection and planning authorities to balance competing water uses; and

WHEREAS, the western states strongly support the planning and development of critical infrastructure and streamlined permitting processes, but such efforts should not come at the expense of states' authority to allocate, manage, and protect their water resources; and

WHEREAS, the development of hydropower and other federally permitted and licensed projects involving activities that may impact states' water quality standards should be appropriately undertaken in compliance with substantive and procedural state water law and delegated authority under CWA Section 401; and

WHEREAS, CWA 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, CWA Section 101(g) of the CWA further provides that it is 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, Section 27 of the Federal Power Act declares: "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."; and

WHEREAS, the Supreme Court has narrowly interpreted the Federal Power Act (16 U.S.C. 791a et seq.) reading Section 27 (16 U.S.C. 821) to limit state authority to set streamflow requirements on federally permitted and licensed projects, holding in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946) and in *California v. FERC*, 495 U.S. 490 (1990) that

federal requirements preempted any state requirements, including efforts to establish minimum stream flows, noting that "...Congress remains free to alter what we have done"; and

WHEREAS, these rulings eroded state authority over state resources, and the Council has supported federal legislation to restore states' primary authority for regulating streamflows and water use and clarifying Congressional intent under the Federal Power Act; and

WHEREAS, in P.U.D. No. 1 of *Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Supreme Court upheld a state's delegated authority to impose minimum stream flow conditions under the CWA Section 401 certification process where necessary to protect a designated use for fish habitat, expressly rejecting any implied limitations on Section 401 certifications based on the First Iowa interpretation of the Federal Power Act; and

WHEREAS, an overly narrow reading of Section 401 would deprive the states of the ability to maintain the very beneficial uses that the Clean Water Act was designed to protect, and threaten the existing partnership between states and federal agencies based on cooperative federalism; and

WHEREAS, the vast majority of Section 401 certification requests are processed within 90 days, well within the one year allowed by current law, with relatively little if any backlog of certification actions; and

WHEREAS, most delays are typically due to submission of an incomplete application, applicants' non-responsiveness to requests for additional information, the completion of necessary study requirements, the size and complexity of some projects (and related impacts), substantive changes to the proposed project requiring further review, or constraints on state resources; and

WHEREAS, CWA Section 401 certification denials by states are rare and carefully considered, and are not examples of the failure of the system, as the current process is well-understood, reliable and supported by case law that provides certainty for both the states, federal agencies, and the regulated community; and

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council opposes any changes that may weaken the deference to state water laws and diminish the primary state authority and responsibility for the appropriation, allocation, development, conservation, and protection of their water resources, including minimum streamflows, and the protection of water quality and designated uses.

BE IT FURTHER RESOLVED that the Western States Water Council strongly supports early state engagement in federal permitting and licensing actions and the coordination of state and federal environmental requirements and review processes for critical infrastructure without diminishing state authority.



Position No. 427
Revised and Readopted
(see former Positions No. 410 - June 29, 2017 and
No. 369 - July 18, 2014)

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
CLEAN WATER ACT JURISDICTION
Coeur d'Alene, Idaho
October 26, 2018

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, EPA has actively sought meaningful state consultation, engagement and participation in its review and development of a new proposed rule to define Waters of the United States; 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 both state statutory and constitutional 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, CWA 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, CWA Section 101(g) 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, a one-size-fits-all national approach to federal regulations, guidance, and programs pertaining to the CWA does not recognize 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 and arroyos, snow dependent intermittent streams, effluent dependent and dominated streams, prairie potholes, playa lakes, and terminal lakes, as well as numerous man-made reservoirs, impoundments, and water and stormwater conveyance structures; and

WHEREAS, physical, biological, and chemical differences between waters, and hydrologic differences, both spatially and temporally, as well as considerable differences in legal doctrines that govern water in western states, mean that any federal effort to clarify CWA jurisdiction will inevitably impact each State differently, thus underscoring the need to thoroughly involve states in developing and implementing any rule so as to clearly respect and avoid conflict with state authority over the regulation of water quality and the allocation of waters and water rights 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

WHEREAS, as co-regulators, States are separate and apart from the general public, and have a unique role with the federal government in the development and implementation of any rule 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; and

WHEREAS, uncertainty and differences of opinion have and continue to exist regarding CWA jurisdiction among States, and challenge EPA and the Corps to develop and implement any new rule in cooperation with the States, based on principles of cooperative federalism, and together to provide greater certainty and a clearer definition of the limits of federal jurisdiction; and

WHEREAS, perennial streams with a relatively permanent surface water connection to navigable waters are now presumptively considered to be under federal CWA jurisdiction.

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

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 the development and implementation of any rule, acknowledging the inherent federalism implications.
3. Gives full force and effect to Congress' intent and the purposes 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, applied to individual waters on a case-by-case and not watershed basis.

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 outside the scope of CWA jurisdiction, including:
 - (a) Groundwater;
 - (b) Man-made conveyances and related control features for water supply, stormwater and flood water management, including but not limited to: (i) agricultural irrigation canals, laterals and ditches and drains; (ii) municipal and industrial water supply pipelines, conduits, and aqueducts; (iii) storm sewers, drains, and flood flow bypass features; (iv) roadside barrow pits, ditches, and culverts.
 - (c) Man-made impoundments on ephemeral or intermittent streams (or off stream impoundments), such as farm and stock ponds, dugouts and similar features; and
 - (d) Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement; and
 - (e) Isolated, non-navigable, intrastate waters and wetlands, including prairie potholes and playa lakes, as well as intrastate terminal lakes, individually or in combination with similarly situated waters; and
 - (f) Arroyos, coulees, washes and similar features.
7. Acknowledges that states have authority to protect all "waters of the state," and that excluding waters from federal jurisdiction does not mean that they will be exempt from state regulation and protection.
8. Continues to provide access to appropriate technical and financial assistance to the States to protect and improve water quality under existing EPA programs without regard to jurisdictional determinations.
9. Provides a clearly delineated process for resolving differences of opinion over federal and non-federal jurisdiction, and jurisdiction between different States and Tribes (treated as States).
10. Provides for mapping of jurisdictional waters as a joint federal/state/tribal effort employing the best available data and tools, with appropriate provisions and processes for map maintenance.
11. Includes an appropriate delay in the effective date of any new rule or otherwise allows for a transition enabling States to take such actions as may be necessary to address any gaps in state law, regulation and protection.

The State of Washington voiced concerns and abstained from the vote.



Position No. 428
(See also No. 385, 345, 320, 284, 256, and 235)
Adopted as revised October 26, 2018

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
FEDERAL WATER AND CLIMATE DATA COLLECTION AND ANALYSIS PROGRAMS
Coeur d'Alene, Idaho
October 26, 2018**

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) Groundwater and Streamflow Information Program (GWSIP) and National Streamflow Network, 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) the National Oceanic and Atmospheric Administration's (NOAA) National Weather Service and Climate Programs Office; and (6) 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, these federal programs provide useful products to assist in visualizing and interpreting data on water and snow, making water supply and availability information more accessible and easy to interpret; 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 No. 429

Readopted

(formerly Position No. 386, October 9, 2015 and 346, October 12, 2012)

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
DROUGHT PREPAREDNESS, PREDICTION AND EARLY WARNING PROGRAMS
Coeur d'Alene, Idaho
October 26, 2018**

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, according to the National Centers for Environmental Information, from 2015-2017, economic losses due to drought have been estimated at \$11.1B while also contributing to \$34.1B in wildfire losses; and

WHEREAS, continuing exceptional, extreme and severe conditions afflict the West and elsewhere, highlighting the need for greater attention to developing more comprehensive and coordinated drought prediction, preparedness, planning and response programs at all levels; 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 subseasonal to seasonal time scales as described in the report to Congress prepared by NOAA pursuant to Title II of PL 115-25; and

WHEREAS, there is a continuing need for a permanent federal role in coordination of research programs related to drought early warning and prediction;

WHEREAS, collection of basic monitoring data on streamflow, snow pack, groundwater levels, and weather and climate data are essential to understanding water availability and interpreting the early signs of drought.

Position No. 429

Readopted

(formerly Position No. 386, October 9, 2015 and 346, October 12, 2012)

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 No. 430

Readopted

(formerly Position No. 387, October 9, 2015 and #347, October 12, 2012)

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
BUREAU OF RECLAMATION DROUGHT RESPONSE PROGRAM
Coeur d'Alene, Idaho
October 26, 2018**

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 and drought is a recurring threat; and

WHEREAS, according to the National Centers for Environmental Information, from 2015-2017, economic losses due to drought have been estimated at \$11.1B; 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 via its WaterSMART program 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, facilitating voluntary sales, transfers or exchanges of water, and providing 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.

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 No. 431
*(formerly Position No. 388, October 9, 2015;
348, October 12, 2012)*

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
STATES' WATER RIGHTS AND NATURAL FLOWS
Coeur d'Alene, Idaho
October 26, 2018**

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; and

WHEREAS, in its Proposed Rule on Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply (81 FR 91556) the Corps asserts that its contracting authority over surplus waters was intended by Congress to include "withdrawals that could potentially

have been accommodated from the natural flow of the river had the reservoir never been constructed" (at 91565).

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, including natural flows.

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.

RULES OF ORGANIZATION

RULES OF ORGANIZATION

Preamble

The Western States Water Council is a government entity, an instrumentality of each and every participating state, established to fulfill a number of governmental purposes on behalf of those states, including advising the governors on planning, conservation, development, management and protection of their water resources. As outlined herein, Council membership is comprised of States with member representatives appointed by the Governors of each participating State. The activities of the Council are subject to the control and supervision of the Governors of member States through their appointed representatives. The Council is funded by dues from member States, set by an Executive Committee, which also controls expenditures.

Article I - Name

The name of this organization shall be “THE WESTERN STATES WATER COUNCIL.”

Article II - Purpose

The purpose of the Western States Water Council shall be to accomplish effective cooperation among western states in matters relating to the planning, conservation, development, management, and protection of their water resources, in order to ensure that the West has an adequate, sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.

Article III - Interstate Water Transfer Principles

Except as otherwise provided by existing compacts, the planning of western water resources development on a regional basis will be predicated upon the following principles for protection of states of origin:

- (1) All water-related needs of the states of origin, including but not limited to irrigation, municipal and industrial water, flood control, power, navigation, recreation, water quality control, and fish and wildlife preservation and enhancement shall be considered in formulating the plan.
- (2) The rights of states to water derived from the interbasin transfers shall be subordinate to needs within the states of origin.
- (3) The cost of water development to the states of origin shall not be greater, but may be less, than would have been the case had there never been an export from those states under any such plan.

Article IV - Functions

The functions of the Western States Water Council shall be to:

- (1) Undertake continuing review of all large-scale interstate and interbasin plans and projects for development, control or utilization of water resources in the Western States, and submit recommendations to the Governors regarding the compatibility of such projects and plans with an orderly and optimum development of water resources in the Western States.
- (2) Investigate and review water related matters of interest to the Western States, and advise Council member states and governors as appropriate.
- (3) Express policy positions regarding proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management, and protection of water resources in Western States.
- (4) Sponsor and encourage activities to enhance exchange of ideas and information and to promote dialogue regarding optimum management of western water resources.
- (5) Authorize preparation of amicus briefs to assist western states in presenting positions on issues of common interest in cases before federal and state courts.
- (6) Encourage collaboration among federal, state, tribal and local governments, public and private water resources associations and water-related non-governmental organizations.

Article V - State Membership and Member State Representatives

- (1) The Council shall consist of the states of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. Member states of the WGA, which are not members of the Council, shall be added to membership if their respective Governors so request. The Executive Committee may, upon unanimous vote, confer membership upon other western states, which are not members of the WGA, if their respective Governor so requests. The Executive Committee may also confer Associate Member status on states as described in section (4) below. Any state may withdraw from membership upon written notice by its Governor.
- (2) Member state Governors may appoint not more than three member state representatives to the Council, but may name any number of standing alternate representatives.
- (3) Member state representatives (members) and alternate representatives (alternates) so appointed may designate other individuals to represent them and participate in Council meetings and other activities provided that such designations are made in writing prior to the event by letter or email.
- (4) Associate Membership may be granted for a period of up to three years, during which time a state's appointed representatives may participate as observers in Council activities and receive all information disbursed by the Council. However, Associate Member states shall have no vote in Council matters.

(5) If any state fails to pay the appropriate level of dues established by the Executive Committee of the Council, the privileges afforded by virtue of its membership to participate in Council activities and to receive all information dispersed by the Council may be withheld pending the payment of dues, beginning at the start of the fiscal year following the delinquency.

Article VI - Ex-Officio Members

The Governors of the member states shall be ex-officio members and shall be in addition to the regularly appointed members from each state.

Article VII - Officers

The officers of the Council shall be the Chair, Vice-Chair and Secretary-Treasurer. They shall be selected in the manner provided in Article VIII.

Article VIII - Selection of Officers

The Chair, Vice-Chair and Secretary-Treasurer, who shall be from different states, shall be elected from the Council by a majority vote at the annual regular summer meeting to be held each year. These officers shall serve one-year terms. However, the Chair and Vice-Chair may not be elected to serve more than two terms consecutively in any one office. In the event that a vacancy occurs in any of these offices, it shall be filled by an election to be held at the next scheduled regular Council meeting.

Article IX - Executive Committee

(1) Each Governor may designate one representative to serve on an Executive Committee which shall have such authority as may be conferred on it by these Rules of Organization, or by action of the Council. In the absence of such a designation by the Governor, representatives of each state shall designate one of their members to serve on the Executive Committee. Any Executive Committee member may designate in writing by letter or email an alternate to temporarily act on his/her behalf in his/her absence.

(2) The Executive Committee shall determine whether or not States are eligible for participation as members or associate members of the Council.

(3) The Executive Committee of the Council shall set annual dues for Council participation and may, by unanimous vote, confer the status of Associate Member of the Council upon states it deems eligible. The Executive Committee shall, through regular Council voting procedures, establish the appropriate level of dues for Associate Member states. In addition to determinations concerning Associate Member states, the Executive Committee may, when appropriate, authorize and establish fees for participation in Council activities by non-member states and non-member state representatives (non-members).

(4) The Executive Committee shall annually adopt a budget and oversee all Council expenditures and activities.

(5) The Executive Committee may establish other committees, subcommittees and work groups which shall have such authority as may be conferred upon them by action of the Council.

Article X - Voting and Policy Development

(1) Each state shall have one vote. Since state delegations consist of more than one person, but each state has only one vote, the Executive Committee member for each state shall be responsible as an internal state matter for coordinating and communicating the official position of the state relative to voting on proposed policy positions. An email message is sufficient to meet this requirement. Whenever a person who is not a Council representative is attending on behalf of a Council representative at a regular or special meeting, either in person or via conference call, a written notification to this effect must be provided to the Council offices to assure that the person is serving in the appropriate capacity.

(2) A quorum shall consist of a majority of the member states (excluding associate member states).

(3) No recommendation may be issued or position taken by the Council except by an affirmative vote of at least two-thirds of all member states, with the exception of the following:

(a) Recommendations and external policy positions concerning out-of-basin interstate transfers require a unanimous vote of all member states; and

(b) Action may be taken by a majority vote of all member states on all internal administrative matters.

(4) In any matter put before the Council for a vote, other than election of officers, any member state may upon request obtain one automatic delay in the voting until the next regular meeting of the Council. Further delays in voting on such matters may be obtained only by majority vote.

(5) The Council shall consider external policy positions for adoption at its three regular meetings held each year. No external policy matter may be brought before the Council for a vote unless advance notice of such matter has been mailed or emailed to each member of the Council at least 30 days prior to one of the Council's regular meetings.

(6) At the discretion of the Chair, in those instances where circumstances warrant consideration of an external policy position outside of the regular meetings, the Executive Committee may adopt positions at special meetings (including by conference call) provided that proposed positions are mailed or emailed to each member of the Executive Committee at least 10 days prior to the special meeting or conference call.

(7) Any proposed external policy positions can be added to the agenda of a regular or special meeting by unanimous consent of those states represented at the meeting provided that a quorum exists.

Article XI - Policy Coordination and Deactivation

With regard to external positions adopted at special meetings or added to the agenda of a meeting by unanimous consent, such external policy positions shall be communicated to the member governors of the WGA and the WGA Executive Director for review. If after 10 days no objection is raised by the governors, then the policy position may be distributed to appropriate parties. In extraordinary cases, these procedures may be suspended by the WGA Executive Director, who will consult with the appropriate WGA lead governors before doing so.

Policy positions will be deactivated three years after their adoption. The Executive Committee will review prior to each regular meeting those policy statements or positions due for sunseting. If a majority of the Executive Committee members recommend that the position be readopted by the Council, then such position shall be subject to the same rules and procedures with regard to new positions that are proposed for Council adoption.

Article XII - Conduct of Meetings

Except as otherwise provided herein, meetings shall be conducted under Robert's Rules of Order, Revised. A ruling by the Chair to the effect that the matter under consideration does not concern an out-of-basin transfer is an appealable ruling, and in the event an appeal is made, such ruling to be effective must be sustained by an affirmative vote of at least 2/3 of the member states.

Article XIII - Meetings

The Council shall hold regular meetings three times each year at times and places to be decided by the Chair, upon 30 days written notice. Special meetings may be called by the Chair, upon 10 days written notice.

Article XIV - Limitations

The work of the Council shall in no way defer or delay authorization or construction of any projects now before Congress for either authorization or appropriation.

Article XV - Dissolution

In the event of the dissolution of the Council, to the extent practical the assets of the Council shall be liquidated in a timely manner and evenly divided among those member states in good standing, at the time of the dissolution.

Article XVI - Amendment

These articles may be amended at any meeting of the Council by unanimous vote of the member states represented at the meeting. The substance of the proposed amendment shall be included in the call of such meetings.

Glossary of Acronyms

ACWA	Association of Clean Water Administrators
AMA	Active Management Area
APHIS	Animal and Plant Health Inspection Service, USDA
ASDWA	Association of State Drinking Water Administrators
AWIA	America’s Water Infrastructure Act
AWRA	American Water Resources Association
ADWR	Arizona Department of Water Resources
BLM	Bureau of Land Management
CDWR	California Department of Water Resources
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
Corps	U.S. Army Corps of Engineers
CPC	Climate Prediction Center
CRP	Conservation Reserve Program
CSP	Conservation Stewardship Program
CWA	Clean Water Act
DOE	Department of Energy
DOI	Department of the Interior (also known as “Interior”)
EPA	Environmental Protection Agency
EQIP	Environmental Quality Incentives Program
ESA	Endangered Species Act
EWPP	Emergency Watershed Protection Program
FIRO	Forecast Informed Reservoir Operations

MOU	Memorandum of Understanding
NASA	National Aeronautics and Space Administration
NEPA	National Environmental Policy Act
NIDIS	National Integrated Drought Information System
NOAA	National Oceanic and Atmospheric Administration
NPDES	National Pollutant Discharge Elimination System
NRCS	Natural Resources Conservation Service
NWS	National Weather Service
OMB	Office of Management and Budget
RCPP	Regional Conservation Partnership Program
RCRA	Resource Conservation and Recovery Act
S2S	Seasonal to Sub-Seasonal
SDWA	Safe Drinking Water Act
SRFs	State Revolving Funds
USBR	Bureau of Reclamation (also known as “Reclamation”)
USDA	U.S. Department of Agriculture
USFS	U.S. Forest Service
USFWS	U.S. Fish and Wildlife Service
USGS	U.S. Geological Survey
WaDE	Water Data Exchange
WestFAST	Western States Federal Agency Support Team
WGA	Western Governors’ Association
WIFIA	Water Infrastructure Finance and Innovation Act

WOTUS	Waters of the United States
WSWC	Western States Water Council
WWAO	Western Water Applications Office