



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **WESTERN GOVERNORS**

#### **BLM/State-Federal Relationship**

On February 10, the Western Governors' Association (WGA) sent a letter to the majority and minority leaders in the Senate and House, regarding WGA's concerns about the Bureau of Land Management's (BLM) Resource Management Planning 2.0 rule, finalized December 12, 2016 (81 FR 89580). Among other concerns with transparency, national interference with state and local management planning, and BLM's plans to revise the agency's Land Use Planning Handbook, WGA also emphasized the importance of meaningful consultation. "Prior to issuance of the Planning 2.0 proposed rule and during the subsequent comment period, Western Governors – individually and through WGA – sought substantive engagement to raise and address concerns over several matters." A primary concern was the failure of BLM to engage in substantive and ongoing state-federal consultation. See <http://westgov.org/letters-testimony>.

The Governors defined meaningful consultation in WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship. As federal agencies develop regulatory policies with federalism implications, particularly where states have delegated authority, they should be required to have a clear and accountable process to involve states, through their Governors and their designated representatives. Consultation includes: (1) federal agencies taking into account state data and expertise in the development and analysis of underlying science serving as the legal basis for federal regulatory actions and processes; (2) pre-rulemaking, substantive communications with states before a formal rulemaking proposal is sent to the White House Office of Management and Budget; and (3) ongoing engagement between federal agencies and designated state officials to refine the proposed federal regulatory actions prior to finalization. See <http://www.westgov.org/policies>.

### **ADMINISTRATION/CONGRESSIONAL UPDATE**

#### **EPA Administrator**

On February 17, the Senate voted 52-46, largely along party lines, to confirm the President's nominee, Oklahoma Attorney General Scott Pruitt, to be the next

Administrator of the Environmental Protection Agency (EPA). Democrats delayed the vote, debating the nomination and Pruitt's qualifications through the night, with particular concern for Pruitt's communications with oil, gas, and coal companies and potential conflicts of interest. On February 16, an Oklahoma district court ordered the Attorney General's Office to release emails, pursuant to a January 2015 records request, following an expedited hearing in *Center for Media and Democracy v. Scott Pruitt*, CV-2017-223, but the February 21 deadline to provide over 7,500 pages of emails occurred after the Senate vote.

Senator John Barrasso (R-WY) addressed the Senate prior to the vote: "Scott Pruitt is the right person to run the Agency, and we need to confirm him. Over the past 8 years, the political leaders of the EPA have taken actions that have undermined the American people's faith in the Agency. They have pushed broad and sweeping regulations that have hurt our economy and have failed to protect our environment....These...include regulations defining the term 'waters of the United States.' This was a classic example of Washington overreach. The Agency brought irrigation ditches, plowed farm fields, and even parking lot puddles under Federal control. With these rules, dozens of State governments have had to take Washington to court...to try to stop the crippling effects of these Washington-based regulations."

On February 21, Pruitt addressed EPA DC headquarters employees, focusing on the importance of working together to solve problems. "[A]s we do our work here, we deal with very important monumental issues with respect to our future environment and our natural resources." He noted that civility "is in short supply in this country today," and that "we ought to be able to get together and wrestle through some very difficult issues and do so in a civil manner." He said he would seek to be a good listener and to learn how to be a resource to them.

Pruitt also emphasized the need for working together with the regulated community. "Regulations ought to make things regular. Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them, so that they can plan and allocate resources to comply; that's really the job of a regulator." He stressed avoiding the abuses of regulation

through litigation that bypass the Administrative Procedures Act, and the need “to be open and transparent and objective in how we do rule making and make sure that we follow the letter of the law as we do so.... The only authority that any agency has...is the authority given to it by Congress. Sometimes those authorities are broadly stated, giving much discretion to an agency to engage in the authority given to it, granted. But other times, ...Congress has been very prescriptive. It's been very specific on what we can and cannot do as an agency. We need to respect that...[so we can] avoid the uncertainty of litigation, and we reach better ends and outcomes at the end of the day.”

He also stated that federalism matters, and stressed the importance of each of the regional offices in partnering with the respective state departments of environmental quality. “I seek to ensure that we engender the trust of those at the state level. That those at the state level see us as partners in this very important mission we have as an agency and not adversaries.” He concluded, “I believe that we as an agency, and we as a nation, can be both pro-energy and jobs and pro-environment. But we don't have to choose between the two. I think our nation has done better than any nation in the world in making sure that we do the job of protecting our natural resources and protecting our environment, while also respecting the economic growth and jobs our nation seeks to have.” See transcript: <http://newsok.com/article/5538883>.

## **CONGRESSIONAL UPDATE/ENVIRONMENT** **Senate Environment and Public Works/ESA**

On February 15, WGA Executive Director Jim Ogsbury testified before the Senate Committee on Environment and Public Works regarding modernization of the Endangered Species Act (ESA). Western states, which contain the vast majority of ESA critical habitat designations, benefit from tourism and recreation supported by healthy species and ecosystems. At the same time, ESA compliance can hinder their ability to maintain and expand communities and infrastructure. “The ESA is premised on a strong state-federal partnership. Section 6(a) of the ESA states that, ‘in carrying out the program authorized by the Act, the Secretary shall cooperate to the maximum extent practicable with the States.’ Western Governors submit that such cooperation should involve full and authentic partnership between the states and [U.S. Fish and Wildlife (FWS) and National Marine Fisheries (NMFS)] Services with respect to species listing, critical habitat designations, establishment of recovery goals and delisting decisions.” While the ESA has become outdated and in need of common-sense reform, the states have “developed extensive science, expertise and knowledge of species within their borders. In many cases, state wildlife agencies often possess the best available science on species and retain primary

management authority over most fish and wildlife within their borders.” The FWS and NMFS recently engaged with WGA as part of the Species Conservation and ESA Initiative launched 2015, by Wyoming Governor Matt Mead. “Governors are hopeful that this positive engagement will help ensure that state considerations are reflected in federal agency rulemaking and policies. Governors also recognize the limitations of regulatory reform. Regulations are not statutes and do not provide the certainty and consistency that statutory changes would produce.” See <http://westgov.org/letters-testimony>.

## **WATER RESOURCES/WATER RIGHTS** **Interstate Water Allocation-Appportionment**

Senator Bill Nelson (D-FL) introduced a bill (S. 398) to direct the Secretary of the Army to modify the operation of certain water development projects in the Apalachicola, Chattahoochee, Flint (ACF) Rivers. The intent is to provide freshwater flows sufficient for the physical, chemical, biological and overall ecological integrity of the “components, functions, and natural processes” required for a thriving river system, floodplain and Apalachicola Bay – and thereby protect commercial and recreational fishing and shellfish. The bill is in response to a U.S. Army Corps of Engineers’ (Corps) environmental impact statement (EIS) and updated ACF water control manual that would provide for nearly all of Atlanta’s water needs through 2050, as well as an anticipated Supreme Court special master’s report that is expected to also favor Georgia.

The bill would support and re-establish “thriving and diverse fish, wildlife and plant populations with species composition, diversity, adaptability, and functional organization similar to those found in the... ecosystems prior to the construction of the [ACF] projects.” It is intended to restore and recover endangered, threatened and/or at risk species and prevent significantly harmful adverse impacts to the ecosystems. The bill directs the Corps to enter into an arrangement with the National Oceanic and Atmospheric Administration (NOAA) to study and evaluate existing studies, assessments and data related to freshwater flows, and recommend how to maintain such flows.

It would prohibit the Corps from issuing a final water control manual based on its 2016 EIS, and calls for development of a revised manual with operational modifications to carry out the purposes of the bill, including “to the maximum extent practicable, while providing system-wide balance in conservation storage through the maintenance of water levels in the same action zone for each of the [ACF] project reservoirs.”

Further, the bill calls for an independent National Academy of Sciences peer review of each revised water control manual. Before a manual is issued, the Corps is to obtain written approval from NOAA, EPA, the FWS, and the U.S. Geological Survey.

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**The WESTERN STATES WATER COUNCIL is an organization of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.**