



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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WESTERN GOVERNORS/WATER RESOURCES WGA Summer Meeting

The Western Governors' Association (WGA) held its 2017 Summer Meeting in Whitefish, Montana on June 26-28. Governor Steve Bullock welcomed the governors and attendees to Montana, and in his remarks urged them to "examine the opportunities and challenges we face as a country and...the tests we face to keep our lands healthy...." The governors adopted five new policy resolutions on: (1) funding, education, research, and conservation programs for Western agriculture and responsible management of federal lands in the West, with policy recommendations to consider for the 2018 Farm Bill; (2) national forest and rangeland management, supporting programs to reduce wildfire risks and improve forest health and resilience; (3) federal use of state wildlife science, data, analysis, and expertise as the principle sources in developing regulatory actions to manage species and habitat; (4) refinements to improve the operation of the Endangered Species Act, amending WGA Policy Resolution 2016-08; and (5) innovative approaches to meet workforce development needs in the West.

The resolution on Western Agriculture acknowledges the differences and greater variations in "soil, climate, terrain...and water availability" relative to other regions of the country. Western agricultural and forest lands are primary sources of water supplies and other important resources. Responsible management of these public lands "provide numerous conservation benefits, water supply, and recreational opportunities for Western communities and the nation." The resolution also notes that "Many agricultural producers in the West rely on irrigation water delivery systems that are shared among multiple producers and operated by an irrigation district, canal company, or mutual ditch company." The governors support funding for various U.S. Department of Agriculture programs, as well as "collaborative, targeted and voluntary conservation to address locally identified natural resource issues for farm, range, and forest resource concerns on private and public lands, such as soil health, air and water quality, drought and wildfire resilience, wildlife habitat conservation and invasive species...." They support an increased role for state and local governments in managing public lands for

multiple uses, including agriculture. They also support "the continued efforts of the Rural Utilities Service to provide financial assistance for drinking water, wastewater facilities and broadband connectivity in rural and remote areas, particularly in communities that have minimal or no such infrastructure."

The resolution on National Forest and Rangeland Management notes that the states have a particular interest in improving the active management of federal forest lands, as poorly managed forests can have "significant and broad impacts on the landscapes and communities in the West, including...degradation of rivers and streams and associated water quality" including drinking water. Many forests throughout the West have been damaged by disease and insect infestation, and the "significant decline in forest health has also created serious threats and challenges to watershed integrity, wildlife and fisheries habitats, recreational uses, businesses and tourism." The resolution emphasizes the importance of collaborative community planning and implementation of forest health projects, addressing landscape, watershed, and other needs, and calls for continued reform of management practices to protect water quality, address fire risk, protect key habitats and meet other important community needs.

WATER QUALITY Clean Water Act/WOTUS

On June 27, Environmental Protection Agency (EPA) Administrator, Scott Pruitt, and Douglas Lamont, senior official performing the duties of the Assistant Secretary of the Army for Civil Works (Corps), proposed rescinding the 2015 rule defining "waters of the United States," and recodification of pre-existing rules. The proposed rule has been submitted for publication in the Federal Register. A pre-publication version indicates that the proposed rule will rescind the previous Administration's definition and will initiate "the first step in a comprehensive, two-step process intended to review and revise the definition of "waters of the United States" consistent with President Trump's Executive Order, signed on February 28, 2017, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' (WOTUS) Rule." The two agencies will continue to apply the prior definition that has governed since the 6th Circuit

Court's stay of the 2015 WOTUS rule, "informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding practice."

The proposed rule would replace the 2015 WOTUS rule and re-codify the pre-2015 regulatory definitions in the Code of Federal Regulations (CFR): 33 CFR 328 and 40 CFR Parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401. In reciting the history of the Clean Water Act (CWA), the proposed rule notes that the policy of Congress in CWA §101(b) is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources...." The CWA requires EPA "...to pursue two policy goals simultaneously: (a) to restore and maintain the nation's waters; and (b) to preserve the States' primary responsibility...[to]...eliminate pollution."

Although the 2015 WOTUS rule acknowledged the language of CWA §101(b) and the important role of states and tribes, "...the agencies did not include a discussion in the 2015 rule preamble of the meaning and importance of section 101(b) in guiding the choices the agencies make in setting the outer bounds of jurisdiction of the Act...." Under this new two-step process, they will "more fully consider the policy in section 101(b) when exercising their discretion to delineate the scope of waters of the U.S., including the extent to which states or tribes have protected or may protect waters that are not subject to CWA jurisdiction." The Corps and EPA "have well-defined and longstanding relationships" with state, tribal and local governments "and these relationships are not altered by the proposed rule."

Once published in the *Federal Register* website at <http://www.regulations.gov> under docket number EPA-HQ-OW-2017-0203, comments on the rule may be made for 30 days. "The agencies solicit comment as to whether it is desirable and appropriate to re-codify in regulation the status quo as an interim first step pending a substantive rulemaking to reconsider the definition of 'waters of the United States' and the best way to accomplish it." The agencies are not seeking comments yet on the scope of a new definition.

WATER RIGHTS/LITIGATION

Federal Reserved Rights/Groundwater/Agua Caliente

On July 5, the Desert Water Agency (DWA) petitioned the U.S. Supreme Court for a Writ of Certiorari related to the Ninth Circuit Court's decision in *Agua Caliente*, with the band of Cahuilla Indians and the United States as respondents. Roderick E. Walston, DWA Counsel of Record is a former WSWC member. The Coachella Valley Water District (CVWD) separately petitioned. Petitioners' contend that the Court has never

decided whether the reserved rights doctrine applies to groundwater, and the questions presented include whether or not the federal government, in reserving lands, impliedly reserves ground water to accomplish the reservation purposes. In *U.S. v. New Mexico*, 438 U.S. 696 (1978), the Court limited the reserved rights doctrine, according to the DWA brief, "...because it conflicts with Congress' deference to state water law," and held that federal water rights are impliedly reserved only as "necessary" to accomplish the primary purposes of the reservation and prevent them from being "entirely defeated." *New Mexico*, 438 U.S. at 700,702.

The Ninth Circuit held that New Mexico's limitations apply in quantifying an existing federal reserved right, but not in determining whether a right exists – and whether the right exists depends on whether the reservation purpose "envisions" use of water. The Ninth Circuit held that in this case the reservation of land "envisions" use of water, and thus the tribe has a reserved right in groundwater. The petitioners contend a federal reserved right exists only if the reservation of water is "necessary," so as not to be "entirely defeated." Then, the question remains, whether the reserved rights doctrine applies to groundwater. Finally, does the Tribe have a reserved right in groundwater, in light of the fact that the Tribe has the right to use groundwater under California law. The DWA states that the most significant issue is whether the existence of a water right under state law is relevant in determining whether a federal reserved water right exists under federal law. DWA argues that since the Tribe has the same right to use groundwater under California law, as other overlying landowners, the Tribe's claimed reserved right is not "necessary," and does not meet the Supreme Court's standard in *New Mexico* for an implied reserved right. The Tribe also has a 1938 decreed right to the use of surface water from the Whitewater River that includes the precise amount of water that the United States had "suggested" during the adjudication proceeding was necessary to meet the Tribe's reservation needs.

Historical documents surrounding the creation of the reservation by Executive Orders signed by Presidents Grant and Hayes in the 1870s, indicate that the Tribe was not using groundwater, which DWA contends defeats any implication that they intended to create a reserved right in groundwater. Even today, the Tribe does not use groundwater, but instead purchases DWA and CVWD water. Therefore, DWA argues, the Tribe's failure to use or attempt to use groundwater demonstrates that their prosperity and success its not dependent on whether or not the Tribe has a reserved right in groundwater. "Notably, the Tribe's complaint does not allege otherwise. Instead, the complaint alleges that DWA and CVWD are required to compensate the Tribe for importing and storing water [from the Colorado River] into the groundwater basin that the Tribe allegedly 'owns'." The Tribe seeks money, not wet water.

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.