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Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION
Supreme Court

On July 9, President Trump announced the nomination of D.C. Circuit Judge Brett Kavanaugh to fill Justice Anthony Kennedy's vacancy on the U.S. Supreme Court.

The White House press release notes that "Judge Kavanaugh has served as a judge on the U.S. Court of Appeals for the District of Columbia Circuit since 2006, authoring more than 300 opinions, including 11 that have been affirmed by the Supreme Court. Before becoming a judge, he served in the George W. Bush administration, first as an Associate Counsel and then Senior Associate Counsel, and subsequently as Assistant to the President and Staff Secretary." He also clerked for Justice Kennedy. "Judge Kavanaugh has earned a reputation as a brilliant jurist with impeccable legal credentials, and he is universally respected for his intellect, as well as his ability to persuade and build consensus." See https://www.whitehouse.gov/.

Senate Judiciary Chair Chuck Grassley (R-IA) said: "Judge Kavanaugh is one of the most qualified Supreme Court nominees to come before the Senate. His credentials are well known, and he's served with distinction as a judge on the esteemed D.C. Circuit for more than a decade. He is a superb mainstream candidate worthy of the Senate's consideration. As we have always done when reviewing nominees for lifetime-appointed judgeships, the Senate Judiciary Committee will conduct a fair and comprehensive evaluation of the nominee's background and qualifications followed by hearings where we'll hear directly from the nominee as we fulfill our advice and consent responsibility." See https://www.grassley.senate.gov/.

Environmental analysts have noted that Judge Kavanaugh takes a stringent view of regulatory agency responsibilities, making sure they've done their homework and not cutting them any slack. In an August 2017 decision partially vacating the U.S. Environmental Protection Agency's (EPA) 2015 rule on the use of hydrofluorocarbons, he wrote, "The separation of powers and statutory interpretation issue that arises again and again in this Court is whether an executive or independent agency has statutory authority from Congress to issue a particular regulation.… Those bedrock separation of powers principles undergird our decision in this case. However much we might sympathize or agree with EPA's policy objectives, EPA may act only within the boundaries of its statutory authority. Here, EPA exceeded that authority." See *E&E News*, 7/10/18; *Mexichem Fluor*, *Inc. v. EPA*, #15-1328 (D.C. Cir. 2017).

EPA/WOTUS

On July 12, the Environmental Protection Agency (EPA) and Corps of Engineers (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 must be received by August 13. See 83 FR 32227; WSW #2301.

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 Office of Management and Budget (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.

ADMINISTRATION/WATER RESOURCES
USGS/NASA/Water Data

On June 28, the U.S. Geological Survey (USGS) and National Aeronautics and Space Administration (NASA) began testing new technologies to better understand how unmanned aerial systems (UAS), or drones, may be used to measure river water depth, levels, and velocity from the sky.

The measurements taken by instruments on the drones could provide critical water data from previously inaccessible locations, and help water mangers to protect life and property during floods. Instruments include Doppler velocity radars and cameras for measuring

velocity; low-altitude photogrammetry for mapping the floodplains and water surface; and MiDAR, a NASA-developed Multispectral Imaging, Detection and Active Reflectance for measuring river depth. The test flights will take place over the Arkansas River in Colorado. See https://www.usgs.gov/news/media-advisory-witness-groundbreaking-river-measurements-collected-sky.

CONGRESSIONAL UPDATE

Grazing

On July 12, the House Natural Resources Subcommittee on Federal Lands held an oversight hearing on "The Essential Role of Livestock Grazing on Federal Lands and its Importance to Rural America." Witnesses included Idaho Lieutenant Governor Brad Little, Arizona Farm Bureau President Stephanie Smallhouse, University of Montana Professor Dave Naugle, and Western Watersheds Project Executive Director Erik Molvar.

The hearing memo notes that ranching on public lands provides important economic, conservation, and ecosystem benefits, particularly in the western United States, where roughly half the land is federally owned. "Public lands ranchers have historically been good stewards of their grazing allotments, frequently paying out-of-pocket for water source management, wildfire fuels reduction, and species habitat restoration. This stewardship provides significant cost savings for federal land management agencies that are already struggling to keep up with substantial deferred maintenance backlogs."

Lt. Governor Little addressed the essential role of livestock grazing to successful and economical federal land management, including wildfire prevention, keeping lands open for recreation, and working together to conserve plant and animal species. Regulations and litigation are diminishing those benefits, pushing the ranchers to abandon their allotments.

Smallhouse explained the benefits cattle ranchers bring to government-owned lands: "This partnership maintains open space on private, state and federal lands through management of watersheds; encourages capital investments for the benefit of livestock and wildlife on working landscapes; supplies a large workforce to manage and care for the public trust without added expense to the taxpayer; creates economic activity and sustains a tax base for rural communities; and bolsters our food security through the efficient nutrient conversion of a vast natural resource otherwise unusable for human consumption."

Smallhouse also described the development and maintenance of water resources for livestock, including removal of invasive mesquite trees, which also benefits wildlife that would otherwise go without water for most of the year. Given the continuous regulatory agency backlog of projects, ranchers save taxpayers significant costs of carefully managing these public lands.

Naugle talked about the conservation efforts and successes through the U.S. Department of Agriculture's Natural Resources Conservation Service. The Working Lands for Wildlife (WLFW) program has provided a strategic, watershed-scale approach to shift from random acts of conservation kindness to efficiently focused resources to achieve desired conservation outcomes on western grazing lands. The University of Montana has partnered with WLFW to deliver a free online rangeland mapping tool to visualize the impacts of drought on perennial forage and identify areas in need of restoration following wildfire. The tool relies on cloud-based computing, machine learning, and remote sensing and field data.

Molvar provided a different perspective. He called the environmental impacts of domestic livestock grazing on federal lands "a slow and invisible cancer that is insidiously and inexorably killing native ecosystems over vast areas." He discussed the impacts to native fish, streambank erosion, suspended silt in steams, significant fecal coliform contamination along watercourses, soil compaction and loss of plant productivity, spread of invasive weeds, and declines in sage-grouse populations and other native wildlife species. He also presented numbers indicating that federally-subsidized livestock grazing is a negligible contributor to local western economies.

WRDA/Infrastructure

The Senate Natural Resources Committee has proposed a bipartisan amendment to the America's Water Infrastructure Act (AWIA) (S.2800) and the Water Resources Development Act (WRDA) (H.R. 8).

The amendment would provide additional authority for the following U.S. Department of the Interior 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.