



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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CONGRESS/WESTERN GOVERNORS Farm Bill

On August 31, the Western Governors' Association (WGA) sent a letter to House and Senate leadership, expressing support for provisions in the Agriculture Improvement Act (H.R. 2) addressing western states' unique concerns. The Farm Bill is currently in conference to resolve differences between the House and Senate versions of the bill.

In particular, the governors note the importance of the agriculture, conservation, and forestry programs. Effective management of national forests and rangelands and other forestry and conservation programs have a significant impact on: water supply, water quality, soil management, and watershed health; livestock grazing; wildlife, endangered, and invasive species; and drought and wildfire mitigation and resilience. The letter includes a ten-page side-by-side comparison of the relevant provisions in House and Senate versions of H.R. 2, with WGA policy and additional comments on the importance of each provision. See <http://westgov.org>.

ADMINISTRATION U.S. Forest Service/Wildfires

On August 16, the U.S. Forest Service (USFS) announced a new strategy for managing wildfires and improving forest conditions. *Toward Shared Stewardship Across Landscapes: An Outcome-Based Investment*, outlines plans for the USFS to work more closely with states to identify priorities, recognizing such urgent challenges as catastrophic wildfires, invasive species, degraded watersheds, and epidemics of forest insects and disease.

Despite past efforts and collaboration with states, tribes, and local communities, some of which are highlighted in the appendix of the report, they have not succeeded at a scale needed for lasting impacts across landscapes. Recent authorizations from Congress, a steady increase in collaboration capacity for cross-boundary work, and developments in science, mapping, and technology offer opportunities for better outcomes.

U.S. Secretary of Agriculture Sonny Perdue said: "On my trip to California this week, I saw the devastation that these unprecedented wildfires are having on our neighbors, friends and families. We commit to work more closely with the states to reduce the frequency and severity of wildfires. We commit to strengthening the stewardship of public and private lands. This report outlines our strategy and intent to help one another prevent wildfire from reaching this level." The report is available at <https://www.fs.fed.us/sites/default/files/toward-shared-stewardship.pdf>.

CONGRESS/WATER QUALITY CWA §401/FY2019 Appropriations

The House and Senate are resolving differences between different versions of a consolidated appropriations bill, H.R. 3354, which includes Interior and Environment; Financial Services and General Government; Agriculture; and Transportation, Housing, and Urban Development funding.

Language included in the related House Report 115-765 for Interior and Environment directs the Environmental Protection Agency (EPA) to finalize guidance on implementation of Clean Water Act Section 401. "Such guidance shall reinforce that the statutory time period for review does not exceed one year, that the scope of review is limited to Federal water quality standards, and that waiver of the certification obligations occurs when a State fails to act within one year from the date of application. The guidance shall also include a suggested schedule for a State making a Section 401 decision, which recognizes that the entirety of the State's review must occur within one year."

A separate report from the Energy and Water Appropriations Committee, H. Rpt. 115-679, expresses concern with the disparity in permitting timelines between Army Corps of Engineers' districts, and encourages the Corps to provide guidance on best practices and timely permitting. "Additionally, the Committee is concerned that infrastructure projects across the country are being impacted by unnecessary and unlimited delays in the section 401 water quality certification process. The Corps is encouraged to consider providing districts with additional guidance on this issue."

Although the western states strongly support the development of critical infrastructure and streamlined permitting processes, such efforts should not come at the expense of states' authority to manage, allocate, and protect their water resources. The Western Governors' Association, WSWC and a coalition recently sent a letter to Congressional leadership expressing concerns about language that diminishes state authority or alters the state certification process. See WSW #2308, 2309.

CONGRESS/WATER RESOURCES

Corps/Surplus Water Rule/FY2019 Appropriations

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 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.

WATER RESOURCES

Arizona/Reserved Water Rights

On August 9, the Arizona Supreme Court held in *Silver v. Pueblo Del Sol Water Co.*, CV-16-0294, that the Arizona Department of Water Resources (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 Bureau of Land Management (BLM) National Conservation Area is asserting both state-based and reserved water rights in the nearby the 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.

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.

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.