



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

682 East Vine Street / Suite 7 / Murray, UT 84107 / (801) 685-2555 / Fax 685-2559 / [www.westernstateswater.org](http://www.westernstateswater.org)

Chairwoman - Jeanine Jones; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

### **WESTERN GOVERNORS**

#### **Kansas**

Laura Kelly (D) was sworn in as the 48<sup>th</sup> governor of the State of Kansas on January 14. "I'm humbled and proud to stand here today. To lead this great State we love. To begin to turn the page and bring about a new chapter....And that's the new chapter we must write. And we'll write it together, starting today." Elected to the Kansas Senate in 2004, she served as minority whip and assistant minority leader. She was also Executive Director of the Kansas Recreation and Parks Association. <https://governor.kansas.gov/governor-laura-kellys-inaugural-speech/>.

#### **Oklahoma**

Kevin Stitt (R) was sworn in as the 28<sup>th</sup> governor of the State of Oklahoma on January 14. "You the people come first. I commit to you to be a good listener, a continuous learner, a committed communicator, and a bold leader for the decisions that make a difference for today's children and the next generation. I'm humbled by the trust you placed in me to serve as your governor. Please join us and let's get this done together, because Oklahoma's turnaround starts right here, right now." <https://www.ok.gov/governorstitt/>. A member of the Cherokee Nation, he is the first Native American Governor.

#### **WGA/State-Federal Relations**

On January 9, Hawaii Governor David Ige (D) and North Dakota Governor Doug Burgum (R), Chair and Vice Chair of the Western Governors' Association (WGA), wrote Nancy Pelosi (D), Speaker of the U.S. House of Representatives, and Minority Leader Kevin McCarthy. The letter reads: "As you begin the 116<sup>th</sup> Congress, Western Governors strongly encourage you to retain an emphasis on and seek improvements to the state-federal relationship. Over the past two years, Western Governors have engaged the Speaker's Task Force on Intergovernmental Affairs (Task Force) and Oversight and Government Reform Subcommittee on Intergovernmental Affairs (Subcommittee) in a meaningful dialogue about institutional improvements to the state-federal relationship. Governors appreciate the

opportunities these panels have provided for thoughtful consideration of issues surrounding the respective authorities of the federal government and the states – issues that are central to efficient and effective governance. We believe that continued bipartisan attention to these issues could lead to meaningful and beneficial adjustments to the state-federal paradigm, as well as to more productive working relationships between state and federal officials."

The letter continued, "The significance of the state-federal relationship in our system of government warrants continued and dedicated congressional attention. We are optimistic that you, in partnership with Governors and interested parties, will consider and develop enduring structural changes to improve operational aspects of that relationship over the course of the 116<sup>th</sup> Congress."

### **LITIGATION/WATER QUALITY**

#### ***Maui v. Hawaii Wildlife Fund/CWA/Groundwater***

On January 3, U.S. Solicitor General Noel Francisco responded to the Supreme Court's invitation to weigh in on whether the Court should grant certiorari in *County of Maui v. Hawaii Wildlife Fund* (18-260) and *Kinder Morgan v. Upstate Forever* (18-268), appealed from the 9<sup>th</sup> and 4<sup>th</sup> Circuits, respectively. The primary question at issue is whether a discharge of a pollutant occurs under the meaning and jurisdiction of the Clean Water Act (CWA) when a pollutant is released from a point source, travels through groundwater, and migrates to navigable waters.

Francisco started with a statement acknowledging Congress' intent in the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters while also recognizing, preserving, and protecting the primary responsibilities of States to prevent, reduce and eliminate pollution. (33 U.S.C. 1251(a) and (b)). He outlined the conflicting interpretations of "discharge of a pollutant" (33 U.S.C. 1362(12)(A)) between the 9<sup>th</sup>, 4<sup>th</sup>, and 6<sup>th</sup> Circuits, as well as various U.S. district courts, and supported granting certiorari to resolve the conflict. "Given the potential breadth of those provisions, and the ways in which groundwater may be connected to navigable waters, the question presented here has the potential to affect federal, state, and tribal regulatory

efforts in innumerable circumstances nationwide. The implications for regulated parties are also significant, including because CWA violators may face serious civil penalties and, in certain cases, criminal punishment.” He distinguished the significance of the primary question presented from the secondary issues of both petitions, and argued that the *Maui* petition “provides the better vehicle for resolving the circuit conflict.”

Francisco noted the U.S. Environmental Protection Agency’s (EPA) public request for comment (83 FR 7126) last February on “whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation.” While EPA’s request is intended to facilitate further action in the form of guidance or rulemaking to provide greater certainty in the face of various court interpretations, Francisco argued that the review process is “not an appropriate reason to deny certiorari here.” EPA expects to take action on its review in the “next several weeks,” he said, and EPA’s views should be available “before any brief on the merits is due,” enabling the Court to consider the agency’s views in deciding the issue.

On January 8, Respondents Hawaii Wildlife Fund et al., filed a supplemental response arguing that the issue is not fully ripe for the Supreme Court’s consideration. “The United States declines to support Petitioner County of Maui’s bald assertions that permitting in this context presents practical problems for the regulatory agencies or expands the scope of CWA regulation.” The Respondents characterize the U.S.’ brief as urging review “solely on the basis of an asserted conflict created by two decisions from the same divided panel of the Sixth Circuit.”

The Respondents assert that there is no circuit split. The 6<sup>th</sup> Circuit’s deliberation on the pending petition for *en banc* review of the panel’s ruling in *Tennessee Clean Water Network* has gone on for more than two months, indicating “the court has not yet come to rest on this issue. A grant of rehearing in [*Tennessee*] *Clean Water Network* and an *en banc* decision reversing the panel would abrogate the analysis in [*Kentucky*] *Waterways Alliance*] and eliminate the circuit conflict.” They further argued that the conflicting interpretations at the district court level “only confirms that it is unnecessary for this Court to intervene now. There will continue to be periodic opportunities for the Court to address this issue in the future, if warranted.”

EPA’s timeline of the “next several weeks” may be administratively delayed by the government shutdown and in any case, the Respondents argue, “the needs of the adversarial process would be ill-served by granting certiorari with the knowledge that the parties and potential amici will not know the regulatory landscape

until some undefined point in the briefing process.” The Respondents also argue that any new EPA action may “alter its longstanding interpretation” that permits are required for the pollutant discharges at issue in *Maui*, and be subject to administrative challenges for being procedurally defective, arbitrary and capricious, or an impermissible construction of the statute. The validity of EPA’s action “should be addressed in the lower courts before any request that this Court consider the agency’s views in deciding the CWA issue presented here on the merits.”

## PEOPLE

New Mexico State Engineer and WSWC member **Tom Blaine** retired effective December 28. He was appointed in December 2014 by Governor Susana Martinez and served on the WSWC Executive and Water Resources Committees.

After 28 years of service to Nevada, WSWC member **Jason King**, retired as State Engineer, Nevada Division of Water Resources, a position he has held for the last eight years, effective January 11. Jason was appointed to the WSWC in February 2012 and served on the Executive, Legal, and Water Resources Committees.

Wyoming State Engineer, **Pat Tyrrell** notified Governor Matt Mead last November of his plans to retire following the State general legislative session. “Pat Tyrrell has served in this role with distinction,” Governor Mead said. “He is recognized throughout the state, region and nation as an expert on all matters relating to water resources. Pat has a reputation for balance.” Appointed to the position in 2001, Pat is the longest serving of 16 state engineers since 1890. The position was established in the Wyoming State Constitution with a six-year term meant to overlap gubernatorial terms and minimize political changes. With newly elected Governor Mark Gordan, Pat will have served under four governors. “I’ve been honored to serve as Wyoming State Engineer. This is my home state, and I’m an outdoors guy. What better way to give back to a state you love than holding such a noble position focused on such an important natural resource? I’ve been lucky to serve as long as I have, and it’s been enormously rewarding. I’m very appreciative that every governor I served was supportive of our mission and helped with resources and decisions so we could perform at our best. And I have been blessed all these years to serve alongside wonderful, dedicated public servants in the State Engineer’s Office.” Pat was appointed to the Council in 2001, and served as WSWC Chair from 2014-2016.

We congratulate Tom, Jason, and Pat on their retirement, express deep appreciation for their service and friendship, and wish them the best in their future endeavors.