



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

Chair - Tim Davis; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

ADMINISTRATION/WATER RESOURCES

Bureau of Reclamation/Water Data

On September 23, the Bureau of Reclamation (USBR) announced the public release of the Reclamation Information Sharing Environment (RISE). The centralized data portal includes water, hydropower, biological, water quality, and infrastructure information, with geospatial, time series, and other data types. The data are searchable via map or catalog, and are available in a format that enables modeling and analysis. RISE helps Reclamation to fulfill its responsibilities under the OPEN Government Data Act (P.L. 115-435), which requires that public government data assets be published as machine-readable data. RISE replaced the Reclamation Water Information System (RWIS) beginning October 1. The improved portal will help fill gaps on water supply data, and complement the WaDE data on water use. See <https://data.usbr.gov/>.

Drought/New Mexico/Rio Grande

On September 28, the USBR announced an agreement with the New Mexico Interstate Stream Commission, the Middle Rio Grande Conservancy District, and the Albuquerque Bernalillo County Water Utility Authority to support flows in the Rio Grande. The partnership will lease 7,000 acre-feet of water from the Water Utility Authority, with Reclamation paying \$350,000, the Commission paying \$250,000, and the Conservancy District paying \$100,000. See <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=72703>.

Water Utility Authority Chairperson Klarissa Peña said: "Our utility has been working since late June to help keep San Juan-Chama water in the river (Rio Grande) by not diverting it. We're very happy to participate in this lease agreement, which will further supplement flows in the Rio Grande and is a great example of interagency partnership at the local, state and federal level."

Over 99% of New Mexico is in moderate to extreme drought, and fire restrictions have been in place on state, tribal, and federal lands all summer. New Mexico experienced lower than average spring runoff, and the monsoon season that brings nearly half of the state's annual rainfall has left much of the state with only 30-

70% of its average annual summer precipitation. (Governor Michelle Lujan Grisham Executive Order press release 6/16/20; NRCS Water and Climate Update 9/24/20).

Reclamation's press release noted that New Mexico separately requested and was granted a waiver by Colorado and Texas under the Rio Grande Compact to use stored water in upstream reservoirs, extending irrigation despite the lack of monsoon rains. New Mexico State Engineer John D'Antonio said: "The emergency debit water release agreed to by the New Mexico, Texas and Colorado Rio Grande Compact commissioners extended the water supply for 60 days from the middle of July, and this is another example of collaborative water management on the Rio Grande." Reclamation also pointed out that without stored reservoir water, much of the Rio Grande would have dried up in April. Some reaches of the river may still dry out in the fall, and some reservoirs have very little water left in storage at the end of the irrigation season.

John Fleck, Water Resources Program, University of New Mexico, noted the significance of the agreement with a city being in a position to provide surplus water for the environment and downstream farmers: "This is possible because Albuquerque's water conservation success has left it with more water rights than it currently needs, including water we import through the San Juan-Chama project, a transbasin diversion that brings Colorado River water through tunnels beneath the Continental Divide. Some of that, now sitting in storage in reservoirs up on the Chama, will be released in coming weeks to maintain flows in the river here in town." See <http://www.inkstain.net/fleck/2020/09/how-municipal-water-conservation-is-keeping-the-rio-grande-through-albuquerque-from-going-dry/>.

LITIGATION/WATER RIGHTS

Nevada/Public Trust Doctrine

On September 17, the Nevada Supreme Court responded to a certified question from the 9th Circuit concerning Nevada's public trust doctrine, in *Mineral County, et al. v. Lyon County, et al.* (#75917). The underlying 9th Circuit litigation deals with the Walker River Basin and efforts to protect and restore Walker Lake, which straddles the Nevada-California border. Water

rights in the basin were adjudicated under the Walker River Decree (1936). The U.S. District Court for the District of Nevada retains jurisdiction over the Decree, which has been the subject of ongoing litigation for several decades over tribal reserved water rights issues and environmental concerns.

The 9th Circuit certified two questions, rephrased by the Nevada Supreme Court: (1) Does the public trust doctrine permit reallocating rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent? (2) If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a “taking” under the Nevada Constitution requiring payment of just compensation?

The Nevada Supreme Court held: “We conclude that the public trust doctrine as implemented through our state’s comprehensive water statutes does not permit the reallocation of water rights already adjudicated and settled under the doctrine of prior appropriation. In doing so, we reaffirm that the public trust doctrine applies in Nevada and clarify that the doctrine applies to all waters within the state, including those previously allocated under prior appropriation. We further hold that the state’s statutory water scheme is consistent with the public trust doctrine by requiring the State Engineer to consider the public interest when allocating and administering water rights. But in recognizing the significance of finality in water rights, our Legislature has expressly prohibited reallocating adjudicated water rights that have not been otherwise abandoned or forfeited in accordance with the state’s water statutes. Accordingly, we answer the first question as reworded in the negative, and we need not consider the second.”

The court noted that it expressly adopted the public trust doctrine in *Lawrence v. Clark County*, 254 P.3d 606 (2011), deriving “not only from common law, but from Nevada’s Constitution, its statutes, and the inherent limitations on the states sovereignty.” Nevada holds the water within its borders – surface or groundwater, navigable or non-navigable – in trust for the public. “Nevada’s comprehensive water statutes are already consistent with the public trust doctrine because they (1) constrain water allocations based on the public interest and (2) satisfy all of the elements of the dispensation of public trust property” established in *Lawrence*. Nevada’s water laws in 1913 and 1939 brought all of the state’s waters under the jurisdiction of the State Engineer, who is charged with ensuring that water is used beneficially “...and must reject any permit applications detrimental to the public interest.” The State Engineer must also “limit water rights when water resources are short, abandoned, or being wasted.... Mechanisms are thus in place to ensure the preservation of water for the future.”

The court disagreed with the appellants, who argued that “the statutory scheme does not ensure that the state is fulfilling its continuous public trust duties.” The court noted several examples of beneficial use under Nevada law – which allows water to be allocated for irrigation, power, municipal supply, mining, storage, and recreation – and how the state and its residents benefit and prosper from these water uses, consistent with protecting the public interest in the waters of Nevada, now and for future generations.

ORGANIZATIONS/WATER RESOURCES

Interstate Council on Water Policy

The Interstate Council on Water Policy (ICWP) announced the release of an updated study that examines ways in which states have organized solutions to water resource management challenges across state boundaries. The report refreshes findings from a 2006 study, providing new examples of interstate water management initiatives, additional lessons learned, and observations of changes in the federal landscape. Entitled *Interstate Water Solutions: Lessons from the Past and Recommendations for the Future - A Look toward 2050*, the report and accompanying Executive Summary are available online at www.icwp.org.

MEETINGS

Western States Water Council/Fall Meetings

At the request of the Federal Water Subcabinet, we have added a special session to our meetings on Wednesday, October 14, from noon to 1:30 p.m. (Mountain) related to efforts to map Waters of the United States (WOTUS) under the new Navigable Waters Protection Rule (NWPR). We anticipate participation by: David P. Ross, Assistant Administrator for Water, Environmental Protection Agency (EPA); Tim Petty, Assistant Secretary of the Interior for Water and Science; and R.D. James, Assistant Secretary of the Army for Civil Works. Other Water Subcabinet members may also join. This will include a high-level policy discussion, technical explanation of work to date on WOTUS geospatial mapping, and dialogue with members about moving forward. EPA, Army Corps of Engineers, and Interior officials will describe the need for enhanced aquatic, stream and wetlands resource geospatial mapping and interagency efforts to date, with brief presentations from the U.S. Geological Survey (USGS), U.S. Fish and Wildlife Service (FWS), and EPA’s Office of Research and Development.

PEOPLE

Governor Pete Ricketts announced the appointment of **Tom Riley** as Director of the Nebraska Department of Natural Resources effective November 1. He replaces former WSWC member and Director, **Gordon “Jeff” Fassett**, who retired on February 28.

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.