



# 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)

Chairman - Pat Tyrrell; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

### **ADMINISTRATION/WATER QUALITY** **EPA/Forest Roads**

EPA has responded to the remand in *Environmental Defense Center, Inc. v. EPA* (2003) which required EPA to address whether Clean Water Act (CWA) §402(p)(6) requires regulation of stormwater discharges from forest roads. (WSW #2180) On June 27, EPA signed a Notice of Decision, determining that no additional regulations are needed to address stormwater discharges from forest roads under the CWA at this time. State, federal, regional, tribal government, and private sector programs already exist nationwide to address water quality problems caused by discharges from forest roads. Program implementation rates are generally high and are effective in protecting water quality when properly implemented. These programs employ a variety of approaches that are tailored to address regional and local differences. EPA concluded that efforts to help strengthen existing programs would be more effective in further addressing forest road discharges than superimposing an additional federal regulatory layer over them. The Notice of Decision is expected to be published in the *Federal Register* later in July.

### **Bureau of Reclamation/WaterSMART**

On June 27, the Bureau of Reclamation announced \$876,565 in funding through the WaterSMART Cooperative Watershed Management Program for eleven projects that will establish or further develop watershed management groups. The program promotes sustainable use of water resources and improves the condition of rivers and streams through water conservation, improved water quality and ecological resilience, and supports collaborative conservation efforts to reduce conflicts over water management. The financial assistance is intended to encourage diverse stakeholders to form local solutions to water management needs. The locally-led watershed groups are located in Arizona, California, Colorado, Montana, New Mexico, Oklahoma and Oregon.

Four entities will receive \$303,921 to establish a cooperative watershed management group: Colorado - \$100,000 for the Upper Colorado River Watershed

Group; New Mexico - \$50,000 for the Upper Rio Grande Watershed District; Oklahoma - \$53,921 for the Chickasaw Nation to establish the Lake of the Arbuckles Watershed Group; Oregon - \$100,000 for the Walla Walla Basin Watershed Management Group.

Another seven entities will receive \$572,644 to further develop existing cooperative watershed management groups: Arizona - \$80,700 for the Watershed Expansion & Management Project and \$100,000 to the Tse Si Ani Chapter; California - \$99,933 for the Bear River Watershed Group and \$100,000 for the Trinity River Watershed Council; Montana - \$100,000 for the Beaverhead Watershed Committee; \$61,011 for the Musselshell River Watershed Group; and \$31,000 for Sun River Watershed Group. See: <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=55331>.

### **CONGRESSIONAL UPDATE** **Tribal Water Rights**

On June 29, the Senate Indian Affairs Committee held hearings on three bills: the Salish and Kootenai Water Rights Settlement Act (S. 3013), a bill to amend the White Mountain Apache Tribe (WMAT) Water Rights Quantification Act (S. 2959), which was part of the 2010 Claims Resolution Act (P.L. 111-291), and the Repealing Existing Substandard Provisions Encouraging Conciliation with Tribes (RESPECT) Act (S.2796).

Letty Belin, Department of the Interior, testified that DOI has not completed its review of S. 3013, noting that they have significant concerns about the \$2.3B federal cost, and cannot support the legislation as introduced. She provided historical context for and expected benefits of the settlement, and added that the Confederated Salish and Kootenai Tribes (CSKT) have long been leaders in water and natural resources management. She emphasized the Administration's support for settling Indian water rights where possible. "Litigation does not solve these kinds of problems. Litigation goes on. In fact, having to do with CSKT and their water rights, I can't even count how many lawsuits there have been over the decades, and the problems are not solved."

Vernon Finley, CSKT Tribal Council Chairman, said numerous actions have infringed on the Tribes' treaty

rights over the past 100 years. The compact would settle those violations, waiving claims he said were worth more than 14 times the total cost of the proposed settlement according to engineers, hydrologists, scientists, and economists, and would allow the Tribes to remediate natural resources crippled by irrigation diversions off the reservation. (See WSW #2193)

Senators Jon Tester (D-MT) and Steve Daines (R-MT) acknowledged that S. 3013 has a long way to go before it can be enacted, but that introducing the bill starts to raise the issues and is the first step in getting the tribes and federal government to work toward an agreement that can be approved by Congress.

Ronnie Lupe, WMAT Chairman, testified in support of S. 2959, regarding the Tribe's current water sources, shortages and infrastructure concerns. The WMAT pulls its drinking water from a depleted well contaminated with uranium, and with no other groundwater sources, must turn to surface water. S. 2959 would ensure access to necessary funds from the WMAT Settlement Fund for a reservoir with water from the White River that would provide safe, reliable drinking water for the tribe. Construction of the rural water system and reservoir were already authorized by P.L. 111-291, a budget neutral Act that resolved many tribal water rights claims. However, DOI has indicated that it is not clear whether the Settlement Fund can be used for cost overruns, and the technical amendment would clarify the intended authority. Belin testified that Reclamation has not received the necessary design and cost estimate data from the Tribe to determine whether the designs are cost effective and meet Reclamation standards, so DOI can't evaluate yet whether S. 2959 is needed to complete the infrastructure.

Belin and David Flute, Sisseton-Wahpeton Oyate Chairman, testified in support of S. 2796, which would repeal obsolete laws concerning Indians, with their historical and antiquated language that presumes Indian-U.S. hostilities and favors removal of children to compulsory boarding schools.

#### **LITIGATION/WATER QUALITY**

##### **Colorado/New Mexico/Gold King Mine**

On June 20, New Mexico filed a lawsuit in the U.S. Supreme Court against Colorado over responsibility for downstream contamination of New Mexico watersheds from the 2015 Gold King Mine spill. Attorney General Hector Balderas said: "The Gold King Mine release is the result of two decades of disastrous environmental decision-making by Colorado, for which New Mexico and its citizens are now paying the price. New Mexicans rely on the Animas and San Juan Rivers for drinking water, ranching, farming, tourism and much more, so our communities must be compensated and protected from future health and safety risks."

New Mexico claims relief for (1) cost recovery under CERCLA, 42 USC §9607(a); (2) liability under CERCLA, 42 USC §9613(g)(2) for recovery of further costs; (3) a full investigation and remediation of downstream sites under RCRA, 42 USC §6972(a)(1)(B); and (4) tort claims of public nuisance, negligence and gross negligence. These claims mirror several of the claims filed against EPA and mining companies in the U.S. District Court of New Mexico. (See WSW #2193).

The CERCLA and RCRA statutes grant exclusive jurisdiction to U.S. District Courts, but the U.S. Supreme Court has exclusive jurisdiction over controversies between states under 28 USC §1251(a). New Mexico notes that this conflict of jurisdiction appears to be a matter of first impression for the Court. However, since its claims are intertwined with its EPA lawsuit, New Mexico suggested the Court consider referring the case to a Special Master for all discovery and pre-trial proceedings to conserve judicial resources and to ensure consistent pre-trial determinations in both lawsuits.

#### **Washington/Tribal Treaties Fishing Rights**

On June 27, the 9th Circuit ruled in *United States v. Washington* (13-35474), that Washington's barrier culverts are a violation of its obligations relating to off-reservation fishing under Tribal treaties, affirming the decision of the U.S. District Court in Washington. The 21 Tribes filed a Request for Determination in 2001 alleging that the barrier culverts prevented salmon from moving freely between the sea and upstream spawning grounds at various life stages, reducing the size of salmon runs. In 2007, the District Court entered an injunction directing the State of Washington to correct the culverts, which allow streams to flow underneath roads, within the next seventeen years; sooner for the approximately 1,000 culverts within a specific area of watersheds on former tribal lands that are still significant for fish.

The 9th Circuit rejected Washington's argument that the treaty rights impose no obligations that prevent the state from making land use decisions that could incidentally impact fish, holding that an implicit promise of the treaty rights was that the number of harvestable fish would be sufficient to provide a moderate living to the Tribes, not merely provide tribal access to usual and accustomed fishing places. The Court noted several alternatives to barrier culverts, including bridges that entirely span streams, culverts that allow unobstructed fish passage, or building roads away from streams.

The Court also rejected Washington's request for an injunction requiring the U.S. to fix its culverts first, noting that Washington didn't have standing to bring the Tribe's claims and that the U.S. didn't waive sovereign immunity. The 9th Circuit also held that because treaty rights belong to the Tribes rather than the U.S., it is not the prerogative of the U.S. to waive those rights.

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