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Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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CONGRESS/WATER RIGHTS
Indian Water Rights/Infrastructure

On June 24, the Senate Indian Affairs Committee held a hearing to consider several bills, including the Western Tribal Water Infrastructure Act (S. 3044) and the Montana Water Rights Protection Act (S. 3019). Witnesses included: Tim Petty, Assistant Secretary for Water and Science, Department of the Interior (DOI); and Darryl La Counte, Director, Bureau of Indian Affairs. S. 3044 authorizes EPA to fund up to ten water improvement projects per year for tribes in the Columbia River Basin and adjacent coastal river basins. It would make the Indian Reservation Drinking Water program permanent and increase funding from $20M to $30M per year. When Senator Ron Wyden (D-OR) introduced the bill last year, he said: "Access to clean and safe drinking water is a basic human right, and yet, federal resources to help tribal governments in Oregon to fix damaged water systems are woefully lacking. The federal government must step up and do more to support these communities working to make permanent fixes and ensure water security needed for their long-term health and quality of life."

Petty testified in support of S. 3019, with some technical amendments to the bill as introduced. The bill would authorize, ratify, and confirm the Confederated Salish and Kootenai-Montana Compact, which was approved by the Montana legislature in 2015. "The bill would provide $1.9 billion to be used for a number of purposes, including: rehabilitation and modernization of the [Flathead Indian Irrigation Project (FIIP)]; mitigation of damages to natural resources; administration and implementation of the Tribal water rights; construction of livestock fencing; installation of devices to prevent fish entrainment; construction and maintenance of community water distribution and wastewater facilities; and repair and replacement of certain culverts, bridges and roads. It would ratify the tribal water right and, in conformance with the Compact, would direct the Secretary to allocate to the Tribes 90,000 acre-feet per year of storage water from Hungry Horse Reservoir "for use by the Tribes for any beneficial purpose on or off the Reservation." The Compact also provides a unique and carefully crafted framework for the administration of water rights on the Reservation through the Unitary Administration and Management Ordinance (or Law of Administration), which proscribes the process to: (1) register existing uses of water; (2) change water rights; and 3) provide for new water development."

Petty provided some context for the bill, explaining details of the Hellgate Treaty (creating the Flathead Indian Reservation), the Flathead Allotment Act (leading to non-Indian ownership of Reservation lands), and the Flathead Indian Irrigation Project (FIIP), owned and operated by the Bureau of Indian Affairs (BIA). The Tribes and the State have complex water management issues regarding reserved instream flow rights (with a priority date of time immemorial) and irrigation water rights. "Currently, nearly 90 percent of the lands irrigated by FIIP are owned by non-Indians." Notably, without the settlement of the CSKT claims, "the amount of water available to FIIP irrigators may be reduced so substantially as to render FIIP nonviable." Aside from the negative economic impact to the region, the U.S. would likely have to decommission FIIP – 17 dams and storage reservoirs, 1,300 miles of canals and laterals, and about 10,000 structures – at a cost of about $1B, to protect lives and property.

Petty said: "The Department supports the level of funding provided in S. 3019, in large part because the Department recognizes that rehabilitating and modernizing FIIP in a way that preserves and increases instream flows while still maintaining the status quo for FIIP irrigators requires substantial costs. However, the Department is concerned that the introduced version of the bill lacks necessary assurances that settlement funds will be spent to sufficiently rehabilitate and modernize FIIP." Petty also pointed to the lack of prohibition on per capita distribution of funds to individual tribal members, "which would threaten the ability of the Tribes to carry out the essential purposes of the settlement…." CSKT and DOI were able to reach an agreement on changes to S. 3019 to ensure the settlement funds would be used for their intended purposes.

LITIGATION/ENERGY
***California v. BLM*/Hydraulic Fracturing**

On June 12, California appealed the *California v. BLM* decision of the U.S. District Court for the Northern District of California (#18-cv-521) to the 9th Circuit Court (#20-16157). On March 27, the district court granted

BLM's motion for summary judgement, rejecting California's argument that BLM failed to offer a reasoned explanation for reversing its position by rescinding the 2015 hydraulic fracturing rule. The court noted the increased state and tribal regulations as well as BLM guidance and site-specific water and environmental protections, and the overall rarity of adverse environmental impacts that could have been addressed by the 2015 rule. "The Court's task is not to decide whether the changes [BLM] seek[s] to make will result in better or worse environmental policy…[or] to decide whether it would find the rationales advanced by the agency compelling (or even persuasive) if it were reviewing the matter from scratch. Instead, the narrow [Administrative Procedures Act] question before the Court is whether the admitted policy change represented by the Repeal was so inadequately explained as to be arbitrary and capricious." The court added that it may not question BLM's choice to weigh socioeconomic concerns more heavily than the value of consistent federal regulations the 2015 rule may have provided. The court also rejected Wyoming's argument that BLM lacked authority to promulgate the rule. Aside from the fact that the 2015 rule wasn't before the court (only the repeal of the rule), the court said BLM never conceded that it lacked legal authority, only eliminated the need for further litigation over BLM's statutory authority by repealing the rule.

LITIGATION/WATER RIGHTS

Klamath River Basin/ESA/Indian Water Rights

On June 22, the U.S. Supreme Court denied the petition for certiorari in *Baley v. U.S.* (#19-1134). The case dealt with a 2001 decision by Reclamation to shut off irrigation water supplies to protect endangered fish. The Klamath River Basin farmers from Oregon and California argued that the Federal Circuit's decision upends several principles of western water rights administration, including procedures for curtailments and assertion of tribal reserved water rights (see WSW #2394 and #2264).

WATER RESOURCES/ADMINISTRATION

NASA/USGS/WestFAST

On June 24, WestFAST held a webinar titled, "NASA Water Applications Office and USGS National Land Imaging Program." Bradley Doorn, Water Resources and Agriculture Applied Science Program Manager, Earth Science Division, National Aeronautics and Space Administration (NASA) and Tim Newman, National Land Imaging Program Coordinator, U.S. Geological Survey (USGS) provided updates on how their respective programs are working to make Landsat and other data products more useful and available for water managers and decisionmakers.

Doorn specifically focused on the Western Water Application Office (WWAO) housed within the Jet Propulsion Laboratory at NASA, and their goals to create better data products and improve their relationship with water managers who can benefit from the data and research they produce. He recognized that NASA excels at research and data collection but is working to improve ways to make this information more accessible and user-friendly. WWAO is using needs assessments to understand what data, information and tools on-the-ground users need to better manage water resources and water quality. Two assessments within the Colorado River Basin and the Columbia River Basin have been completed, with others for the Rio Grande, Missouri, and Arkansas-Red Basin coming soon. WWAO is developing a "business case" for NASA applications in water management and building a stronger research-to-operations community to facilitate the dissemination of data.

Doorn detailed current WWAO efforts, beginning with the WWAO Dashboard, released in March 2020, to capture what the different federal agencies are doing regarding western water. Other projects include: (1) OpenET, an effort to better monitor and provide data sharing and services related to agricultural water needs and consumptive use; (2) satellite-based drought reporting for the Navajo Nation to help direct funding and resources; (3) a Cyanobacteria Assessment Network (CyAN) to monitor and report harmful algal blooms using Landsat; (4) improving groundwater models by integrating InSAR and airborne geophysical data streams; and (5) working in Alaska to integrate remotely-sensed streamflow data for resource management agency operations.

Newman highlighted the many applications of Landsat, and the value it brings to the U.S. economy. In 2017, Landsat imagery was estimated to be worth $3.45B in domestic and international benefits, with the U.S. accounting for $2B. Landsat 9 is scheduled to launch in 2021, ideally before Landsat 7 runs out of fuel and is decommissioned. Further, an "architecture study team" is working to develop the Landsat Next mission, to be launched in the late 2020s. Details on this mission will likely come out in February with the FY22 budget.

The National Land Imaging Program is working to meet more of the needs of scientific and operational users by: (1) improving operational capabilities; (2) enhancing research development and innovation; (3) expanding product and service usability; and (4) ensuring community engagement by focusing on "Level 2" and Level 3" data processing to enable easier access to the vast amounts of satellite imagery they collect. This includes developing various indices, fractional snow covered area, dynamic surface water extent, provisional evapotranspiration and other tools that help get information into the hands of decision-makers. See https://earthexplorer.usgs.gov