



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

Acting Chair - Jennifer Verleger; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

ADMINISTRATION/CONGRESS

EPA/Senate Confirmation

On March 10, the Senate confirmed Michael Regan as Administrator of the Environmental Protection Agency (EPA) by a vote of 66-34. Regan's confirmation hearings were conducted by the Senate Committee on Environment and Public Works (EPW) on February 3, advancing with a bipartisan vote of 14-6.

Senator Tom Carper (D-DE), Chair of the Senate EPW Committee, previously spoke in favor of President Biden's nomination of Regan. "...Biden has selected a forward-looking public servant to lead EPA and address the longstanding environmental problems affecting our communities...In the transition to a clean economy, EPA must ensure no worker, family or community is left behind. I look forward to hearing [Administrator] Regan's ideas to foster greater opportunity and prosperity in the economy-wide transition to net-zero emissions. I also look forward to hearing [Administrator] Regan's ideas to further the work of environmental justice and uplift communities of color, Indigenous communities and economically disadvantaged communities. To make real the promise of clean air, safe drinking water and a healthy community for everyone in this country, EPA must ensure environmental equity."

Senate EPW Committee Ranking Member Shelley Moore Capito (R-WV) opposed Regan's nomination on broader policy grounds. "While I have enjoyed getting to know Michael Regan...and appreciate his willingness to visit West Virginia, I am deeply concerned with his lack of commitment to a different policy agenda than that of the Obama administration. During his nomination hearing, Secretary Regan would not comment as to whether the so-called Clean Power Plan would be reinstated. He would not rule out a return to the 2015 WOTUS Rule. And, he would not say whether the EPA would again claim overreaching authority to force states to shift electricity generation sources. However, my greatest concern with [Administrator] Regan and EPA leadership in general is the probability that unaccountable climate czar Gina McCarthy and other Obama-era officials will be the ones calling the shots... Without commitments to different policies than what was pursued in the Obama EPA, I cannot support [Administrator] Regan today."

Interior/Senate Confirmation

On March 15, the Senate confirmed Representative Debra Haaland (D-NM) with a 51-40 vote to lead the Department of the Interior. Her confirmation is historic, as she is the first Native American to be confirmed as a cabinet secretary.

Senator Joe Manchin (D-WV), Chair of the Senate Energy and Natural Resources (ENR) Committee that vetted Haaland's confirmation, released the following statement: "Today, I voted to confirm Representative Debra Haaland as Secretary of the Interior. While I may not personally agree with some of her past statements and policy positions, as Secretary, she will be carrying out President Biden's agenda. At her hearing, she confirmed that she and the administration recognize that our country will remain dependent on fossil fuels for years to come, and a transition to a cleaner energy future must come through innovation, not elimination. She also affirmed her strong commitment to bipartisanship and the need to work across the aisle to find the bipartisan solutions needed to address the diverse needs of our country. President Biden has also expressed his commitment to assembling a Cabinet that reflects our diverse country. 230 years after George Washington assembled his first Cabinet, it is long past time to have a Native American woman at the table. I look forward to working with Rep. Haaland to protect our public lands and ensure the responsible use of all our natural resources in a bipartisan manner."

Senator John Barrasso (R-WY), Ranking Member of the Senate ENR Committee, was opposed to Haaland's confirmation, but was unable to cast his vote due to weather delays in his home state that prevented travel. He issued the following statement: "Representative Haaland's extreme policy views, lack of substantive answers during the confirmation process, and full support for President Biden's war on American energy disqualify her for the job of Interior Secretary. Her views on American energy fly in the face of the mission of the Department of the Interior - the agency she will now lead. I oppose her nomination and will continue to fight to protect America's energy workers and energy dominance."

LITIGATION

FWS v. Sierra Club/FOIA

On March 4, the U.S. Supreme Court held that pre-decisional, internal draft biological opinions and interagency memoranda are protected from disclosure under exemption 5 of the Freedom of Information Act (FOIA). In *United States Fish & Wildlife Service v. Sierra Club, Inc.* (No. 19-547), the Supreme Court reversed and remanded a 9th Circuit decision that previously held that the draft biological opinions were not privileged. The issue surrounds interagency communications following a 2011 EPA rule on industrial cooling water intake structures (76 FR 22174) that triggered Endangered Species Act (ESA) consultation requirements with the Fish and Wildlife Service (FWS).

The Sierra Club submitted FOIA requests for records related to those consultations, which spanned several years and resulted in a modified EPA rule, and a biological opinion that shifted from “jeopardy” to “no jeopardy” regarding the impact on endangered species. The FWS withheld the draft biological opinion on one of the previous versions of EPA’s proposed rule, labeling it as nonfinal and protected by the deliberative process exemption.

The Court said: “It is true that a draft document will typically be predecisional because, as we said earlier, calling something a draft communicates that it is not yet final. But determining whether an agency’s position is final for purposes of the deliberative process privilege is a functional rather than formal inquiry. If the evidence establishes that an agency has hidden a functionally final decision in draft form, the deliberative process privilege will not apply. The [FWS], however, did not engage in such a charade here.”

WATER RIGHTS/WATER RESOURCES **Adjudications/Nevada**

On March 3, the Nevada Supreme Court held a hearing to consider the creation of a Commission to Study the Adjudication of Water Law Cases in Nevada’s Courts (Commission). The proposed Commission would consider the creation of water courts in Nevada, with judges trained and assigned to work specifically on adjudicating water law cases.

The petition was filed by Nevada Chief Justice James Hardesty, who said: “Water law is a unique and complex area of the law and judicial review of water cases frequently involves, among other matters, an assessment of lengthy records, geologic and hydrologic concepts, conflicting expert testimony, and years of relevant Nevada history. And just as frequently, water cases take years to adjudicate, which adversely delays water law decisions in our state.”

The petition appendix includes a memorandum from Deputy Administrator Micheline Fairbank, Nevada, Division of Water Resources (DWR), Department of Conservation and Natural Resources, with a summary of different state approaches to adjudicating water law cases. Chief Justice Hardesty took particular interest in Colorado, Idaho, Montana, and New Mexico. “As the Summary shows, four of the sixteen western states surveyed have implemented some form of specialized water court, including three states by rules adopted by their supreme court. The fourth state, Colorado, provides for the appointment of water judges and staff by its supreme court, and all of the states that have implemented water courts have provided for specialized education and training for judges to serve on water cases.”

Chief Justice Hardesty recommended that the Commission include representatives from a broad group of entities with interests in water, including municipal and rural water interests; agriculture, mining, and environmental organizations; as well as DWR. At the hearing, Acting State Engineer Adam Sullivan added that the Commission should also include representation of the interests of Tribal Nations.

Sullivan said: “Decisions of the state engineer are often highly technical and specialized. Our division recognizes the need for the study to provide expedient judicial review of water cases, well into the future.” Contact WSWC for a copy of the petition; see also <https://www.nevadacurrent.com/blog/proposal-to-creat-e-state-water-court-gets-broad-support/>.

MEETINGS

Dividing the Waters/Klamath

On March 30, the National Judicial College’s Dividing the Waters program will host a webinar titled “The Klamath Water Wars – Twenty Years Later Part 1: Irreconcilable Promises: Indian Water Rights vs Reclamation Era Expectations.” The webinar will address some of the cultural fallout from the 2001 Bureau of Reclamation decision to cut of water deliveries to farmers on the Klamath Project in southeastern Oregon.

The irrigation deliveries were cut off during a sustained drought to protect endangered fish species that were culturally and economically important to the Klamath tribes. “Irrigators and their supporters responded to the Bureau’s action with protests and random acts of violence. Irrigation headgates were forcibly opened. Federal and tribal property was vandalized. The protests morphed into a cultural war among farmers, tribal members, fisherman and environmentalists. The cultural war is still ongoing but has ebbed and flowed over the years.” See <https://www.judges.org/courses/the-klamath-water-wars/>.