



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **ADMINISTRATION/ENVIRONMENT**

#### **Fish and Wildlife Service/Incidental Takings**

On October 4, the Fish and Wildlife Service (FWS) published an advanced notice of proposed rulemaking (ANPRM) (86 FR 54667) seeking comments on a regulatory codification of its interpretation of the Migratory Bird Treaty Act (MBTA), which prohibits an incidental take that results in the injury or death of protected migratory birds. FWS revoked the previous rule published by the Trump Administration (86 FR 1134), which offered an opposing interpretation that only prohibited direct taking actions.

The FWS is considering developing general permit authorization regulations for ten activities that have been identified as common sources of bird mortality, or have well-developed, activity-specific beneficial practices, such as various power generation activities and transportation infrastructure activities. The list also includes wastewater disposal pits and government agency activities. The FWS seeks input from states (among others) on the potential effects of regulating the incidental take of migratory birds, including impacts on: (1) floodplains, wetlands, wild and scenic rivers, and ecologically sensitive areas; (2) air, soil, and water; (3) prime agricultural lands; (4) other species; and (5) other federal, state, local, and tribal environmental laws or requirements. The FWS will host webinars for the public on November 4, 8, and 10. Comments are due December 3. See <https://www.fws.gov/regulations/mbta/>.

### **CONGRESS/WATER RIGHTS**

#### **Indian Water Rights Settlements**

On October 6, the Senate Indian Affairs Committee held a hearing on the Technical Correction to the Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement Act (S.648) and the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act (S. 1911). Witnesses were: Bryan Todd Newland, Assistant Secretary Indian Affairs, Department of the Interior; Chairman Brian Thomas of the Shoshone-Paiute of the

Duck Valley Reservation; and President Andrew Werk of the Fort Belknap Indian Community. Chairman Thomas said S. 648 appropriates money from settlement trust funds to enable the tribe to construct and rehabilitate critical water supply projects to make use of their water right and achieve the Duck Valley Reservation's economic potential.

President Werk observe: "The Fort Belknap Indian Community (FBIC) has been negotiating our water rights settlement with its trustee for the past 30 years. The pace...is excruciatingly slow. [T]here seems to have been this silent shift away from the commitments of the 20th Century to protect and preserve Indian water rights...and, in particular, its responsibilities to tribal water projects funded at a level that supports full Tribal water rights' development that will support economic opportunities on reservations such as ours. We played by the rules. But our effort to complete our water rights settlement with the federal government over the past two decades has been stymied by a series of past Administrations who have, without explanation, seemed to take political aim at the PIA [practical irrigable acreage]-based size and scope of our agreed upon Indian reserved water rights...and denying the scope of our damages claim that address the federal government's failure to build the water delivery infrastructure required to protect and preserve our water rights and put them to use - the purpose of which is to create our permanent homeland through the development of a stable agricultural economy. We fear that this recent policy trend seems to focus on an Indian water settlement funding policy that is based on the size of the reservation and tribal population, for which there is no legal basis, instead of a policy based on the PIA quantification standard.... The promise...when we ceded millions of acres of land, was a permanent, livable homeland and assistance in the development and use of our reserved water rights. The United States has a continuing trust obligation and programmatic responsibility to provide the Fort Belknap Indian Community a permanent and economically sustainable homeland."

Werk concluded: "Our Indian water settlement is structured to promote economic efficiency on our Reservation and our Tribal self-sufficiency. It is an agricultural infrastructure plan; includes the development of clean and safe drinking water; provides for the FBIC to administer, manage, and enforce its reserved water rights; with additional economic projects that will allow us to develop our Indian reserved water rights and improve the poor economic condition of our members on the Reservation. [W]e are the Winters Tribes with a recognized Indian reserved water right since 1908, and we are the last tribes in Montana to achieve our water settlement with the United States."

Newland said Interior supports S. 648, but has concerns with S. 1911. "This Administration strongly supports the resolution of Indian water rights claims through negotiated settlements. Indian water settlements help ensure that Tribal Nations have safe, reliable water supplies; improve environmental and health concerns...; enable economic growth; promote Tribal sovereignty and self-sufficiency; and help fulfill the United States' trust responsibility to Tribes. [W]ater rights settlements have the potential to end decades of controversy and contention among Tribal Nations and neighboring communities and promote cooperation in the management of water resources. Congress plays an important role...and we stand ready to work with this Committee and Members of Congress to advance Indian water rights settlements."

Regarding S. 648, he said: "The provision in the Duck Valley Settlement Act prohibiting investment until an enforceability date is reached is not common in Indian water rights settlements. It appears in the Duck Valley settlement and other settlements enacted in 2009-2010, including the Crow Tribe Water Rights Settlement Act...the Taos Pueblo Indian Water Rights Settlement Act...the Aamodt Litigation Settlement Act...and the Navajo-Gallup Water Supply Project and Navajo Nation Water Rights.... In each of these settlements, funds were inadvertently invested and were returned to Treasury. In total for the five settlements, over \$11 million was returned to the Federal Treasury. The Department supports S. 648 and, as a matter of equity, would support similar legislation to resolve this same issue in the four other Indian water rights settlements approved by Congress in 2009 and 2010."

Concerns over S. 1911 included: (1) the ability of the Tribes to unilaterally modify the authorized uses of the \$593.11M Trust Fund established by the bill; and (2) the open-ended funding authorized for the mitigation of impacts to junior non-Indian and Milk River Project water users, including the construction of a proposed dam and reservoir. "The Department believes that the uses of the

Trust Fund should be governed by statutory provisions, as has been the case in other Indian water rights settlements, and that funds should be targeted to developing water resources and expanding access to water on the Reservation." Open-ended funding unlocks the door to unknown federal obligations and costs.

### LITIGATION/WATER QUALITY **Sackett v. EPA/CWA/Wetlands**

On September 22, the plaintiffs in *Sackett v. Environmental Protection Agency* (EPA) filed a petition for a writ of certiorari with the U.S. Supreme Court (Case No. 21-454), appealing a 9th Circuit decision from August 16 (Case No. 19-35469). The question presented is whether *Rapanos v. United States* (2006) should be revisited to adopt the test for Clean Water Act (CWA) wetlands jurisdiction under the Justice Scalia plurality opinion. In 2007, the Sacketts began building a home in a residential subdivision in Idaho. Wetlands on the lot are thirty feet from an unnamed tributary to Kalispell Creek, separated by a road and connected only by subsurface flow. EPA sent an administrative compliance letter determining that the wetlands qualified as "navigable waters" under the Clean Water Act.

The petition summarized: "In *Rapanos v. United States* 547 U.S. 715 (2006), the Court held that the Clean Water Act does not regulate all wetlands, but no opinion explaining why that is so garnered a majority of the Court. A plurality opinion authored by Justice Scalia and joined by three other Justices argued that only those wetlands that have a continuous surface water connection to regulated waters may themselves be regulated. A concurring opinion by Justice Kennedy advanced a...much broader test, allowing for regulation of wetlands..., so long as the wetlands bear an (undefined) 'significant nexus' with traditional navigable waters. [T]he Ninth Circuit employed Justice Kennedy's 'significant nexus' test to uphold EPA's authority over the Sacketts' homesite."

The Sacketts cited continued confusion over the scope of CWA jurisdiction, including conflicts among the lower courts over what tests *Rapanos* established, as well as varying guidance and substantially different rulemaking efforts under different Administrations. "This Court can readily end the years of confusion and conflict...by adopting the *Rapanos* plurality rule of continuous surface water connection." The petition notes that this case "presents a sharply live controversy," the agencies are again working to repeal and replace the rule defining the scope of "waters of the United States," and Congress has failed to provide "a reasonably clear rule regarding the reach of the Clean Water Act" over the past 15 years.

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**The WESTERN STATES WATER COUNCIL is a government entity 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.**