



# 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)

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

### **ADMINISTRATION/ENVIRONMENT**

#### **U.S. Fish and Wildlife Service/Endangered Species**

On October 15, following a review of the best available science and requesting public comment, the U.S. Fish and Wildlife Service announced that it has reclassified the humpback chub from endangered to threatened status. In announcing the change, Matt Hogan, Acting Regional Director for the Service, declared: "Today's action is the result of the collaborative conservation that is needed to ensure the recovery of listed species. Reclassifying this distinctive fish from endangered to threatened is the result of many years of cooperative work by conservation partners in the Upper Colorado River Endangered Fish Recovery Program and the Glen Canyon Dam Adaptive Management Program. We thank everyone involved for their efforts as we look toward addressing the remaining challenges in the Colorado River Basin." The Upper Basin Recovery Program's conservation and management actions have resulted in improved habitat and river flow conditions for the humpback chub over the past 15 years. The House Natural Resources Committee's Subcommittee on Water, Oceans and Wildlife has scheduled a virtual hearing on H.R. 5001, the Upper Colorado and San Juan River Basins Recovery Act, introduced by Rep. Joe Neguse (D-CO), to reauthorize the program for November 4 ([naturalresources.house.gov/hearings](http://naturalresources.house.gov/hearings)).

### **ADMINISTRATION/WATER RESOURCES**

#### **NOAA/Drought**

On September 21, the National Oceanic and Atmospheric Administration (NOAA) Drought Task Force published a report on the exceptional drought for the states of Arizona, California, Colorado, Nevada, New Mexico, and Utah between January 2020 – August 2021. The low precipitation and high temperatures imposed an unprecedented and costly drought amid a two-decade period of persistently warm and dry conditions. The 20-page report looked at how bad the current drought is relative to the instrumental and paleoclimate records, the natural variations in precipitation and human-caused warming that contributed to the drought, and how long the drought is likely to continue despite the late season monsoon rains in 2021.

The NOAA Task Force is actively researching answers to additional questions through the Modeling Analysis Predictions and Projections (MAPP) program with support from the National Integrated Drought Information System (NIDIS), including: (1) What accounts for the forecast errors in seasonal precipitation and temperature in Summer 2020 and other seasons? (2) Has warming affected the dynamics or circulation that controls regional and seasonal precipitation, such as through land-atmosphere feedbacks? (3) What was more important in accounting for the severity of this drought, the exceptionally low precipitation or the exceptionally warm temperatures? (4) What impact will the forecast 2021–22 La Niña have on precipitation and temperature and, more generally, how are natural modes of seasonal to decadal climate variability impacting Southwest U.S. climate? (5) What effect will precipitation in Winter 2022 have on the water resources in 2022 over the Southwest? (6) How will drought monitoring and management change in the presence of Southwestern U.S. aridification? (7) How do warming effects on snowpack influence water availability in the Spring and Summer? (8) What are the major sources of uncertainty in regional and seasonal precipitation trends in the U.S. Southwest, and how can they be constrained for more certain projections?

The report notes that many governors took steps to prepare water districts and citizens for water limitations. Arizona reissued its drought state of emergency, which has been in place since 1999. California Governor Gavin Newsom declared three separate states of emergency for the Russian River basin, the Sacramento-San Joaquin river basin, and in the Central Valley the Klamath and Tulare Lake basins, and (3) another declaration in July, asking for voluntary water use reductions of 15%. In June, Colorado declared a state of emergency for 21 western counties due to the drought and the state was in its highest drought mitigation activation level (Phase 3). Nevada imposed use restrictions, while New Mexico and Utah both issued drought emergency declarations. On note, on October 19, Governor Newsom issued a proclamation extending the drought emergency statewide and further urging Californians to step up their water conservation efforts. See <https://www.drought.gov/documents/noaa-drought-task-force-report-2020-2021-southwestern-us-drought>.

Last month, NIDIS hosted a virtual Southwest Drought Forum and the recorded sessions are now available ([southwestdroughtforum.com](http://southwestdroughtforum.com)).

## **CONGRESS**

### **House Natural Resources**

On November 4, at 10:00 a.m. ET, the House Natural Resources Committee's Subcommittee on Water, Oceans, and Wildlife will hold a virtual, fully remote legislative hearing on the following bills: (1) H.Res. 320 recognizing the critical importance of access to reliable, clean drinking water for Native Americans and Alaska Natives and confirming the responsibility of the Federal Government to ensure such water access; (2) H.R. 4832 to establish the Open Access Evapotranspiration (OpenET) Data Program; (3) H.R. 5001 to authorize the Secretary of the Interior to continue to implement endangered fish recovery programs for the Upper Colorado and San Juan River Basin; and (4) H.R. 5345 to authorize the Director of the United States Geological Survey to establish a regional program to assess, monitor, and benefit the hydrology of saline lakes in the Great Basin and the migratory birds and other wildlife dependent on those habitats. The hearing will be via Cisco WebEx online video conferencing and will be streamed on YouTube. For hearing materials and schedules, please visit U.S. House of Representatives, Committee Repository at <http://docs.house.gov/>.

## **LITIGATION/WATER RIGHTS**

### **Kansas/Quivira National Wildlife Refuge**

On October 20, the U.S. District Court for Kansas granted the defendants' separate motions to dismiss *Audubon of Kansas v. Department of Interior et al.* (Case No. 2:21-cv-2025). The plaintiff challenged the Kansas Department of Agriculture, Division of Water Resources (KDA-DWR) and the U.S. Fish and Wildlife Service (FWS) for violations of federal statutes, regulations, and doctrines regarding the water rights of the Quivira National Wildlife Refuge (WSW #2439).

The Court found that the state defendants were entitled to immunity under the Eleventh Amendment, as the plaintiff had not demonstrated a violation of federal law. KDA-DWR was not a party to the 2020 memorandum of agreement (MOA) between the FWS and the local water district, and the allegations of KDA-DWR inaction were not supported by the complaint. "As State Defendants point out, the Chief Engineer of KDA-DWR is required to initiate an investigation upon a complaint that a water right is impaired. Audubon acknowledges that this occurred, and the Impairment Report was issued. But at that point, further action under state law is only required if there is a request to secure water. The [FWS] did make some requests initially. But the most recent one was withdrawn, and the [FWS] has opted not to make further requests to secure water

owing to the 2020 MOA. Without a request to secure water, State Defendants have nothing to act on. Thus, there is no current obligation of State Defendants to act under state law."

The claims against the federal defendants of both action and inaction under the Administrative Procedure Act (APA) were also dismissed. The Court held that the 2020 MOA was not a final agency action, nor was it a "major federal action," under the National Environmental Policy Act. "The Tenth Circuit has held that this type of 'general agreement for state and federal agencies to work together in the future on specific projects...is not final agency action.'" The Court added that under the plaintiff's logic, every day of an ongoing decision-making process would become a final agency action. "It's clear that Audubon passionately disagrees with the path chosen by the [FWS] in this case to address the Refuge Water Right. But the APA does not provide private parties with general oversight of federal agency decision-making." Audubon also claimed that the FWS violated the APA when it failed to protect and secure water rights for the refuge. The Court noted that none of the federal statutes cited include a specific mandate requiring the FWS to carry out specific actions to meet the refuge goals.

Audubon further alleged the improper disposal of property, a portion of the Quivira Refuge's water right, without the approval of Congress. "The Court notes that the complaint is silent as to what precise cause of action is asserted on this point, what legal basis Audubon has to sue the [FWS] (or anyone) for this action, or what standing Audubon has to challenge the alleged wrongful disposition of federal property." The federal defendants argued that they continue to hold the water right. Audubon argued that the FWS surrendered its priority to use the water under its water right. The Court construed this as an APA claim as well, and dismissed it for the same reason, that it was not a final agency action. The complaint was dismissed without prejudice.

## **MEETINGS**

### **Western Regional Partnership**

On October 26, the Western Regional Partnership (WRP) hosted a Western Water Security webinar on Groundwater-Surface Water Interface. Speakers from Arizona, California, Colorado, New Mexico, Nevada, and Utah offered different perspectives on the interconnectivity between surface water and groundwater, legal treatment of groundwater and surface water, surface water shortages and their impact on groundwater recharge, and best practices for aquifer storage and recovery and recharge. The webinar recording and materials are available at <https://westernstateswater.org/announcements/2021/wrp-webinar-groundwater-surface-water-interface/>.

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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.**