



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

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

ADMINISTRATION/WATER RESOURCES

Bureau of Reclamation/Title Transfer

On November 8, the Bureau of Reclamation (USBR) transferred title to part of the Middle Rio Grande Project to the Middle Rio Grande Conservancy District (MRGCD), following congressional review. Reclamation's news release indicated that phase one of the transfer includes "the vast majority of MRGCD Project Works - facilities and lands - located between the southern boundary of the Pueblo of Isleta to the northern boundary of the Bosque del Apache National Wildlife Refuge.... Reclamation will continue to have limited ownership within phase one of a few facilities and lands. Reclamation will also continue to fulfill its federal obligations throughout the project to conduct river channel maintenance to ensure efficient downstream water deliveries. MRGCD will continue to manage, use, and maintain the project for the same purposes as before title transfer, including habitat restoration sites within the Phase 1 area."

MRGCD Board Chair Karen Dunning said: "This is a major milestone for the district as receipt of full title will help provide cost-share as we begin rebuilding 42 miles of levees to achieve 100-year flood protection for constituents' properties from Mountain View to Jarales. Having title free of federal ownership provides for the district to leverage federal funding to continually invest in improving system efficiencies as we face future water supply shortages." <https://www.usbr.gov/newsroom/#!/news-release/4026>

LITIGATION/WATER RIGHTS

Mississippi v. Tennessee/Groundwater

On November 22, the U.S. Supreme Court dismissed a suit Mississippi brought under an original action against Tennessee for damages and other relief related to the pumping of groundwater by the City of Memphis from the Middle Claiborne Aquifer, a valuable water resource that lies beneath eight states. Mississippi argued that Tennessee's pumping - using wells Mississippi conceded are located entirely in Tennessee - siphons water away from Mississippi and amounts to a tortious taking of groundwater owned by Mississippi. In 2005, prior to the present litigation, the Attorney General of Mississippi sued the City of Memphis and its public

utility, the Memphis Light, Gas and Water Division (MLGW), in federal district court. MLGW pumps approximately 120 million gallons of groundwater daily, Mississippi alleged that Memphis had wrongfully appropriated groundwater belonging to Mississippi through its pumping activities, and sought hundreds of millions of dollars in damages. The district court dismissed the suit for failure to join Tennessee, which it determined was an indispensable party. The Fifth Circuit affirmed, and held that interstate aquifers are comparable to interstate rivers and are thus subject to equitable apportionment. Mississippi subsequently petitioned for a writ of certiorari, that the Court eventually granted, naming a special master. (See WSW Special Report #2473)

Chief Justice John Roberts delivered the opinion for a unanimous Court. "We conclude that the waters contained in the Middle Claiborne Aquifer are subject to equitable apportionment. We therefore overrule Mississippi's exceptions and adopt the Special Master's recommendation to dismiss the bill of complaint. After recommending that this Court dismiss Mississippi's suit, the Special Master went on to recommend that we grant the State leave to file an amended complaint seeking equitable apportionment. We decline to decide whether Mississippi should be granted such leave, because the State has never sought it.... Nor can we assume Mississippi will do so. Mississippi's initial pleadings in this case disavowed equitable apportionment entirely.... The State instead sought relief under principles of tort law. And the proceedings below reflected this posture, focusing on the physical properties of the aquifer and Tennessee's pumping. An equitable apportionment case would require us to consider a broader range of evidence. Such evidence often includes not only the physical properties and flow of a water resource, but also existing uses, the availability of alternatives, practical effects, and the costs and benefits to the States involved.... A just equitable apportionment might also require the joinder of additional parties, ...as Mississippi and Tennessee are not the only States that rely on the Middle Claiborne Aquifer for groundwater...."

C.J. Roberts continued, "Finally, if Mississippi were to seek leave to amend, its complaint would be subject to our longstanding rule that a 'State seeking equitable apportionment under our original jurisdiction must prove

by clear and convincing evidence some real and substantial injury or damage.’ As Mississippi has neither sought leave to amend nor tendered a proposed complaint seeking equitable apportionment, we have no occasion to determine how these and other pertinent principles might apply. Mississippi has failed to show that it is entitled to relief. We therefore overrule Mississippi’s exceptions to the Special Master’s report, sustain Tennessee’s, and dismiss the case. It is so ordered.”

In the body of the opinion, C.J. Roberts writes: “Equitable apportionment aims to produce a fair allocation of a shared water resource between two or more States. The doctrine’s ‘guiding principle’ is that States ‘have an equal right to make a reasonable use’ of a shared water resource.... Mississippi correctly observes that we have never considered whether equitable apportionment applies to interstate aquifers.... Mississippi contends that it has sovereign ownership of all groundwater beneath its surface, so equitable apportionment ought not apply. We see things differently. It is certainly true that ‘each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters.’ *Kansas v. Colorado*, 206 U. S., at 93. But such jurisdiction does not confer unfettered ‘ownership or control’ of flowing interstate waters themselves. *Wyoming v. Colorado*, 259 U. S., at 464. Thus, we have ‘consistently denied’ the proposition that a State may exercise exclusive ownership or control of interstate ‘waters flowing within her boundaries.’ *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 102 (1938). Although our past cases have generally concerned streams and rivers, we see no basis for a different result in the context of the Middle Claiborne Aquifer.” Call the Council’s office for a copy of the decision.

WATER RESOURCES **Nebraska/Republican River**

On November 15, the Nebraska Department of Natural Resources (NDNR) and four Natural Resource Districts (NRDs) held their Third Annual Meeting on the Republican River Basin-Wide Plan. The plan was developed in response to the requirements of the Nebraska legislature (Nev. Rev. Stat. §46-755), and the objective is to “sustain a balance between water uses and water supplies so that economic vitality, social and environmental health, safety, and welfare of the Republican River Basin can be achieved and maintained for both the near term and long term.”

The plan implementation website provides the following: “The Republican River Basin-Wide Plan lays out a 25-year implementation timeline, from 2019-2044. In addition, the plan states that the [NDNR] and the four participating [NRDs] will share data and information and work together to monitor and evaluate progress toward the goals and objectives of the plan. This includes

holding an annual meeting, exchanging annual reports, and publishing data on water supplies and uses in the basin.

The 66-page annual report with data for 2020 includes current water allocations, annual groundwater use for irrigation, conservation and irrigation buyout programs, groundwater levels and observation well locations, and curtailment of groundwater pumping and Republican River Compact compliance for each of the four NRDs. The report also tracks and evaluates progress on various action items and recurring activities.

PEOPLE

Environmental Protection Agency (EPA) Acting Region 6 Administrator **David Gray** announced his retirement at the end of this year, concluding 35 years of work with the agency. Region 6 includes New Mexico, Oklahoma, and Texas. Notably, most of EPA’s regions are still operating under the direction of acting administrators. Only Regions 3 and 5 have regional administrators named. Regional administrators are not subject to Senate confirmation. (E&E News 11/11/21)

Governor Spencer Cox has appointed **Candice Hasenyager**, Director, Division of Water Resources, Utah Department of Natural Resources (DNR), as a WSWC member replacing **Todd Adams**, who was previously appointed as Deputy Director of DNR. We congratulate Candice on her appointment and look forward to working with her.

MEETINGS **WGA 2021 Winter Meeting**

The Western Governors’ Association (WGA) 2021 Winter Meeting will be held on December 9-10, in Coronado, California. The meeting, hosted by Idaho Governor and WGA Chair Brad Little, will feature the Western Governors and their special guests in public conversations about the most significant issues facing the region during the two-day event. Guests include Deb Haaland, Secretary of the Department of the Interior; Richard Glick, Chairman of the Federal Energy Regulatory (FERC) Commission; and Deanne Criswell, the Federal Emergency Management Agency (FEMA) Administrator, among others. For further information see: <https://westgov.org>.

Spring Meetings/Roundtable - Washington, DC

The WSWC Spring (198th) Meetings and Washington Roundtable co-sponsored with the Interstate Council on Water Policy (ICWP), will be held in Crystal City, Virginia on April 5-7, 2022 at the Doubletree Hotel – Washington DC Crystal City. For further information, as it becomes available, please see <https://westernstateswater.org/events/2022-wswc-spring-198th-meetings-and-washington-roundtable/>.

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.