



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER RESOURCES

FWS/Migratory Birds/Incidental Take Permits

On November 30, the WSWC submitted comments on the Fish and Wildlife Service's (FWS) advanced notice of proposed rulemaking, regarding the potential effects of regulating incidental takings under the Migratory Bird Treaty Act. The letter said: "Opportunities exist for greater collaboration and cooperation to conserve migratory birds and threatened and endangered species, while recognizing state granted water rights and addressing western water issues. The WSWC requests that the FWS provide opportunities for states as sovereigns with wildlife and natural resource management responsibilities to actively engage in an integrated way with the rule development process, and to provide direct and effective feedback on the ability to implement any proposed rule that appropriately protects both water resources and migratory bird species."

EPA/Infrastructure

On December 2, the Environmental Protection Agency (EPA) sent letters to the governors with estimated 2022 state allotments of funds from the Investing in Infrastructure and Jobs Act. The letter said: "The majority of the water infrastructure dollars will flow through the State Revolving Funds (SRFs)... Assistant Administrator Radhika Fox will soon be issuing national program guidance from the EPA's Office of Water to state primacy agencies for the use of water infrastructure funding..." Western state allocations include Arizona (\$65M), Arizona (\$109M), California (\$609M), Colorado (\$121M), Idaho (\$63M), Kansas (\$79M), Montana (\$63M), Nebraska (\$63M), Nevada (\$71M), New Mexico (\$63M), North Dakota (\$63), Oklahoma (\$91M), Oregon (\$92M), South Dakota (\$63M), Texas (\$507M), Utah (\$63M), Washington (\$152M), and Wyoming (\$63M).

Under the Clean Water and Drinking Water SRFs and some community grants, a portion of the funds are dedicated to lead service line replacement and addressing emerging contaminants. There is no state matching requirement for those portions, and the state matching requirement for typical SRF projects is reduced to 10%. Further funds include programs for protecting regional waters, and underground injection control grants to support states' efforts to attain Class VI primacy.

CONGRESS

Re-election/Retirement

On December 1, Rep. Peter DeFazio (D-OR), House Transportation Committee Chair, announced his retirement at the end of this Congress, joining Rep. Eddie Bernice Johnson (D-TX), Chair of the House Science, Space, and Technology Committee. So far, nineteen Democrats and ten Republicans have said they will not run for re-election, with some seeking another office. In the West, retirements include Representatives Ann Kirkpatrick (D-AZ); Jackie Speier (D-CA); Filemon Vela (D-TX); and Kevin Brady (R-TX). (The Hill, 12-1)

CONGRESS/ADMINISTRATION

Infrastructure/Watersheds/Wildfire

On November 23, Montana Senator Jon Tester (D) wrote U.S. Forest Service Chief Randy Moore, "The Infrastructure Investment and Jobs Act recently signed into law offers some real opportunities.... I fought to secure \$500 million for hazardous fuels reduction projects in national forests, \$100 million for Forest Service to contract with crews to remove flammable vegetation to be used for biochar and innovative wood products, and \$180 million for the Joint Chiefs Landscape Restoration Program to reduce wildfire risk and protect water quality in municipal watersheds... The Infrastructure Investment and Jobs Act was designed from the ground up for opportunities like this one: protecting water quality, supporting the economy of rural communities, and mitigate the growing threat of severe wildfire driven by our changing climate."

Tester highlighted "...the dire need for a project in the Basin Creek Watershed in the Beaverhead-Deerlodge National Forest to protect the municipal watershed for Butte. Forest Service has been reviewing a potential project in the area for years, and with the threat of severe wildfire growing each year, we need to actually mitigate the risks to Butte as soon as possible."

Drought/Livestock/USDA

On December 1, 20 Senators sent a bi-partisan letter to U.S. Department of Agriculture Farm Services Agency Administrator Zach Ducheneaux calling on him to address a gap in federal assistance for "farmers and

ranchers affected by this year's widespread and devastating drought....” The Emergency Assistance for Livestock program “plays a critical role in assisting producers who face losses due to adverse weather events like the severe drought across the country this year. We appreciate USDA’s recent efforts to improve...coverage by reimbursing producers for a portion of their feed transportation costs and by lowering the threshold for assistance for water transportation costs.... [W]e continue to hear from producers who have...incurred costs related to transporting their livestock to feed sources instead of hauling feed to their livestock. Under current regulations, these producers are not eligible for...transportation assistance. We respectfully request that FSA exercise its authority...” to expand payments to cover a portion of such costs.

Senators signing the letter included: John Barrasso (R-WY); Kevin Cramer (R-ND); Mike Crapo (R-ID); Steve Daines (R-MT); Deb Fischer (R-NE); John Hickenlooper (D-CO); John Hoeven (R-ND); Mike Lee (R-UT); Cynthia Lummis (R-WY); Roger Marshall (R-KS); Jerry Moran (R-KS); Patty Murray (D-WA); Jim Risch (R-ID); Mitt Romney (R-UT); Mike Rounds (R-SD); Kyrsten Sinema (D-AZ); Jon Tester (D-MT); and John Thune (R-SD).

LITIGATION/WATER RIGHTS

Texas

The Texas Supreme Court received a petition to review whether the Texas Commission on Environmental Quality (TCEQ) has exclusive jurisdiction to determine disputes over private property ownership of surface water rights. (*Pape Partners, Ltd. et al. v. DRR Family Properties, LP, et al.*, No. 21-0049.) Several amicus briefs were filed, including by TCEQ, supporting the petition to overturn the ruling of the lower courts as disruptive to established law on water rights ownership.

In the underlying case, the petitioners filed suit for a determination of private property interests in water rights acquired with the purchase of a farm. The respondents moved to dismiss for lack of subject matter jurisdiction, arguing that TCEQ has exclusive jurisdiction to adjudicate the ownership of water rights among private parties. The trial court granted the motion, and the court of appeals affirmed, “....concluding that the pervasive scheme under the Texas Water Code for regulating and permitting water usage also evinced the legislature’s intent to grant [TCEQ] exclusive jurisdiction to adjudicate ownership of water rights conveyed between private parties.”

TCEQ argued in its brief that the district court had proper jurisdiction of the case, and that Texas statutes do not provide TCEQ with a mechanism to determine such disputes. TCEQ’s role is an administrative, record-keeping function, and water rights disputes are adjudicated in the courts as any other property dispute.

“Surface water in Texas is owned by the State and held in trust for Texas citizens. Through a system of water rights prioritization, the State grants the right to use water to individuals or entities such as ranchers, farmers, cities, or industries. [TCEQ] has an important role to play in issuing and recording those grants. However, [TCEQ’s] authority does not extend to adjudicating private disputes simply because they involve water rights. Once a water permit is issued and vested in the holder, it can be bought and sold like any other property. And, like any disagreement about the ownership of property, a dispute about who owns the water rights is properly adjudicated in court.”

TCEQ’s brief goes on to describe the history of the Irrigation Act of 1917, which was struck down as unconstitutional for violating the doctrine of separation of powers. The Irrigation Act authorized the Board of Water Engineers (TCEQ’s predecessor) to determine property rights, and the Texas Supreme Court held that this power could not be delegated outside of the courts.

The subsequent Water Rights Adjudication Act of 1967 provided a mechanism to quantify and categorize the rights of water users in Texas, which were “a bit of a jumble, with Texans holding rights derived from a variety of sources (some dating to Spanish land grants), taking different forms, and memorialized in different ways (sometimes recorded in the county deed records, sometimes not).” TCEQ accepted all required statements claiming water rights, made preliminary determinations based on the evidence, held hearings for contested determinations, then made final determinations to present to the court with all of the evidence. “At the completion of the judicial process, the court issued its final decrees, and the [TCEQ] recognized the terms of the final decree through an issuance of a certificate of adjudication.... Once perfected in the courts, those water rights became a vested property interest that can be conveyed and assigned through conveyance instruments such as deeds. When presented with deed(s) establishing a chain of title, [TCEQ] updates its records to note the change in ownership. The Texas Supreme Court has long recognized that the jurisdiction to determine disputes in private property rights is inherently a judicial function – one that under the doctrine of separation of powers [TCEQ] does not have jurisdiction to determine.”

The Texas Supreme Court later had occasion to review the constitutionality of the Water Rights Adjudication Act of 1967. TCEQ said: “The Court made specific note of section 11.320 of the Adjudication Act and explained that this judicial review provision is what separates the act from the constitutionality issues that plagued the earlier Irrigation Act.... Under the Adjudication Act, [TCEQ] does not make the final determination. There is a two-step procedure. [TCEQ] makes its determination, which is followed by a mandatory and automatic judicial review.”

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.