



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 **EPA/Oklahoma/Tribes**

On December 22, the Environmental Protection Agency (EPA) proposed to withdraw and reconsider the October 1, 2020 decision to extend Oklahoma's authority to administer environmental regulatory programs onto Indian reservations.

Prior to the U.S. Supreme Court decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), neither EPA nor the State had understood the Muscogee Creek Nation's original reservation boundaries to remain intact, and Oklahoma implemented environmental programs in that region. Following the Court's decision that Congress did not disestablish the reservation, Oklahoma sought approval from EPA to continue to administer the environmental programs under the provisions of §10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (P.L. 109-59).

The applicable Oklahoma-specific provision states that: "Notwithstanding any other provision of law, if the [EPA Administrator] determines that a regulatory program submitted by the State of Oklahoma for approval by the Administrator under a law administered by the Administrator meets applicable requirements of the law, and the Administrator approves the State to administer the State program under the law with respect to areas in the State that are not Indian country, on request of the State, the Administrator shall approve the State to administer the State program in the areas of the State that are in Indian country, without any further demonstration of authority by the State."

EPA held expedited tribal consultation meetings for three weeks with 38 tribes in Oklahoma in 2020. The tribes expressed concerns that this was an inadequate period of time for meaningful engagement regarding the impacts of Oklahoma's request on the tribes' sovereign interests. The tribes also expressed interest in opportunities for engagement with Oklahoma during program implementation to ensure appropriate coordination and consideration of tribal interests. EPA's proposal seeks input on specific implementation concerns, the scope of EPA's authority or obligation to review programmatic issues in its decisionmaking on

Oklahoma's request, as well as any conditions or procedures to address appropriate roles and responsibilities. EPA plans further consultation with the tribes and will leave Oklahoma's program authority in place pending the outcome of the rulemaking process. Comments are due January 31, 2022.

Interior/Orphaned Wells

On December 17, the Department of the Interior (DOI) released its initial guidance for states interested in federal grants to fund the closure and cleanup of orphaned oil and gas wells. Under §40601 of the Infrastructure Investment and Jobs Act ("Bipartisan Infrastructure Law" or BIL), DOI divided the state grant program into three types: (1) Formula Grants, requiring a state's Notice of Intent by December 30, 2021; (2) Initial Grants of up to \$25M, with applications due by May 15, 2022, and a one-year deadline to use the funds; and (3) Performance Grants. DOI is still developing detailed guidance for the Formula and Performance Grants. Eligible reclamation activities must be ranked based on public health and safety, potential environmental harm, and other land use priorities. www.doi.gov/pressreleases/interior-department-releases-implementation-guidance-states-infrastructure-law-efforts

LITIGATION

Oklahoma v. Interior

On December 22, the U.S. District Court for Western Oklahoma denied Oklahoma's motion for a preliminary injunction in *Oklahoma v. Interior* (#5:21-cv-00719). Following the *McGirt* decision, the Department of the Interior and its Office of Surface Mining and Enforcement informed Oklahoma that it could no longer regulate surface mining on the Muscogee Creek Nation's reservation in eastern Oklahoma. Oklahoma sued, arguing that *McGirt* was limited to federal criminal jurisdiction. The motion sought to enjoin enforcement of the decision to strip Oklahoma of its delegated regulatory authority under the Surface Mining Control and Reclamation Act (SMCRA), 30 USC §§1201 *et seq.* The Court concluded that Oklahoma was unlikely to succeed on its claims under the Administrative Procedures Act, equitable defenses based on a century of jurisdictional expectations, or the language of the SMCRA.

WATER RESOURCES

Atmospheric Rivers/Drought/Water Supply Outlook

On December 23, the U.S. Department of Agriculture's Natural Resources Conservation Service's (NRCS) Water and Climate Update reported significant December precipitation along the West Coast and inland to the Rocky Mountains, with the Sierra Nevada expected to receive up to 114" of snow. While most of the western states are in moderate to exceptional drought, conditions have improved slightly in some areas, particularly the Northwest. Many large reservoirs remain well-below 50% full.

On December 16, California reported that the atmospheric river that week increased the snowpack from 19% to 83% of average. Jeanine Jones, California Department of Water Resources (CDWR) said: "Much of Northern California is above or at average precipitation for December, but the question is what happens the rest of the wet season. It's certainly possible that we could revert to dry conditions next month, for example. In fact, some of the research models that NOAA [National Oceanic and Atmospheric Administration] produces suggest that fact. We won't know that until it happens. I would point out that with La Niña conditions present that suggests that Southern California will likely end up dry at the end of the season." SFGate 12/16/21.

On December 28, Colorado's SNOTEL report indicated that most of the western half of the state was more than 100% of average. In August, NOAA's Climate Program Office published a report indicating that atmospheric rivers contribute nearly 30% of the snow accumulation in the Colorado River Basin. See <https://cpo.noaa.gov/News/News-Article/ArtMID/6226/ArticleID/2362/How-much-snowpack-in-the-Colorado-River-Basin-comes-from-atmospheric-rivers>.

California/Drought/Groundwater Wells

On December 16, the California State Water Resources Control Board (SWRCB) and Department of Water Resources (DWR) issued its Groundwater Management Principles & Strategies to Monitor, Analyze & Minimize Impacts to Drinking Water Wells: A Framework for State Action to Support Drought Resilient Communities. The 17-page document was developed in response to Governor Gavin Newsom's (D-CA) Emergency Proclamation on April 21 as one of several actions to address the record drought conditions. The framework lists six major strategies, each with several sub-tasks using existing programs and resources listed in a table. The agencies note that additional executive action, legislation, funding, and guidance may be required to fully implement the strategies. Among the tasks are the need for: outreach, education, and training; addressing underlying challenges; improving data collection and accessibility; building trusted relationships

to improve coordination and decisionmaking; and recognizing that solutions can't be one-size-fits-all but must be specific and effective. See <https://water.ca.gov/Programs/Groundwater-Management/Drinking-Water-Principles>.

California/Water Data

On December 21, the SWRCB launched a new water rights project called Updating Water Rights Data for California (UPWARD California). The project will update the current water rights data system to simplify reporting, improve data management, and make information more accessible to the public. SWRCB's website said: "California's water rights data includes information on water use, demand, and when and how water is diverted from streams and rivers. This type of information is critical for data-driven water management decisions, particularly when hydrology affects supply, such as drought...UPWARD California will create a 21st century, modern platform that is crucial for California's long-term water resilience in the face of ongoing climate change." See waterboards.ca.gov/upward.

Kansas/Wildfires

On December 16, Governor Laura Kelly (D-KS) directed the Kansas Forest Service and National Guard to deploy aerial assets to fight wildfires in north-central Kansas. On December 24, the National Interagency Fire Center (NIFC) reported three large fires had burned over 121,000 acres near Paradise, Kansas. NRCS reported that a low pressure system, high winds, and pre-existing drought contributed to tornadoes and wildfires across Kansas, Nebraska, Oklahoma, and the Texas Panhandle.

The NIFC noted that 58,288 wildfires burned 7.8M acres in 2021, slightly above the 10-year average of 7.4M acres. The NIFC said: "Wildfire season has become longer based on conditions that allow fires to start and burn – winter snows are melting earlier, and rain is coming later in the fall. What was once a four-month fire season now lasts six to eight months. Fires in the winter months are also becoming part of the norm."

MEETINGS

On December 1-2, the Oklahoma Governor's Water Conference and Research Symposium was held virtually, with numerous presentations on water resource management, development, and protection. Topics included Oklahoma's 2025 Comprehensive Water Plan, water reuse projects, flood preparedness, the impact of climate extremes on water availability, agricultural water issues, water infrastructure, and various legislative and policy updates at the state and federal levels. Presentations and recorded videos are available at <https://www.owrb.ok.gov/GWC/presentations.php>.

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.