



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

WESTERN GOVERNORS/WATER RESOURCES

Utah/Great Salt Lake

One of Utah Governor Spencer Cox's (R) top budget priorities is saving the Great Salt Lake, given its decline due to extreme drought, climate change, and increasing water demands. "On my watch we are not allowing the lake to go dry. We will do whatever it takes to make sure that doesn't happen.... You're literally going to see releases from other reservoir systems into the lake. It's never happened before. You're going to see water rights going to the lake." (Fox 13 News, 12/21/22) The governor's FY23 budget includes \$500M for water infrastructure and conservation statewide, including: \$213M to expand "agriculture optimization;" \$100M to pay farmers not to grow crops; \$25M for a trust fund for the lake (on top of \$40M already appropriated); \$5M for turf buyback incentives; and \$2M for expanded cloud seeding.

Governor Cox issued a proclamation on November 3, 2022, on the recommendation of the State Engineer, suspending appropriations of waters that are tributary to the Great Salt Lake. The suspension applies to surplus and unappropriated water, both surface and underground, with the exception of non-consumptive uses, applications that include a mitigation plan to offset any depletion, and a "small amount of water" defined by statute to include water for one residence, ¼ acre of irrigable land, and limited livestock watering – consistent with basin policies. "Nothing in this proclamation impairs water rights or appropriations that existed prior to this proclamation."

ADMINISTRATION EPA/Corps/WOTUS

On January 18, the Revised Definition of "Waters of the United States" was published in the *Federal Register* (88 FR 3004). The final rule will be effective beginning March 20, 2023. (WSW #2537, Special Report #2539).

The same day, Texas filed a lawsuit challenging the scope of the definition as unconstitutional (*Texas v. EPA*, 3:23-cv-17, U.S. District Court for the Southern District of Texas.)

Governor Doug Burgum issued a statement calling on the Biden Administration to withdraw the rule, or delay it until after the Supreme Court issues a ruling in *Sackett v. EPA*. He said: "The EPA's reworked version of WOTUS has the same problems as its predecessor.... North Dakota has some of the cleanest water in the nation, and this proposed rule threatens our state's legitimate authority to protect our own waters from pollution.... We look forward to supporting North Dakota's attorney general in challenging this new rule."

ADMINISTRATION/CONGRESS NOAA/Climate Prediction Center

On January 15, the Washington Post published an article on the difficulties of making accurate subseasonal-to-seasonal (S2S) forecasts. The National Oceanic and Atmospheric Administration's (NOAA) Climate Prediction Center (CPC) issued seasonal advisories and forecasts in August through November anticipating continued La Niña warm and dry drought conditions across the West through the fall and winter. CPC Director David DeWitt said that the cyclical warming and cooling of El Niño and La Niña heavily influences prevailing seasonal conditions, but other factors impact drought, precipitation, and atmospheric rivers. "Precipitation forecasts beyond two weeks are inherently valuable to society. They have inherently low skill because of the state of the science." NOAA's research and operations programs seek to address gaps in atmospheric observations and provide more accurate forecasts, especially on the S2S time scale. (WSW #2518)

On December 21, 2022, House Science, Space, and Technology Committee Chair Frank Lucas (R-OK) noted one of his top priorities is to pass a NOAA Organic Act that would transition NOAA from the Department of Commerce into an independent agency. He has released a draft bill and asked for feedback from stakeholders, the Senate, and the Administration. "In addition to giving NOAA statutory authority, the NOAA Organic Act will promote scientific integrity and critical research within the agency by requiring NOAA's Science Advisory Board to develop a strategic plan for their research and development activities every five years."

Importantly, the NOAA Organic Act ensures the National Weather Service will continue to operate within NOAA as it provides essential weather forecasts, monitors severe weather, and communicates life-saving information to communities and government agencies. It also consolidates NOAA's work by refocusing it on its core mission areas.... Additionally, it directs a study on transferring NOAA's work on endangered species and marine mammal protection to the Department of the Interior, which has extensive expertise in this area." (<https://science.house.gov/press-releases>)

LITIGATION/WATER RESOURCES **Public Water/Streambeds**

On January 9, the Utah Supreme Court heard oral arguments in *Utah Stream Access Coalition v. VR Acquisitions LLC and State of Utah* (No. 20210748), a constitutional challenge to the Public Water Access Act (Utah Code Ann. §73-29-101 et seq.). The Act provides a limited right of recreational access on private property, establishing a public right to float on public waters, only with sufficient volume of flow for a chosen vessel to float without stopping on private property for more than incidental passage. This case involves a non-navigable stream, and the question is whether the recreating public has a right of access to streams after they flow onto private property, as long as the members of the public enter the stream from public property. This is the second time the Court has heard the case. The first time, the Court reversed a district court ruling for the plaintiff and remanded to determine whether Utah recognized a public easement to small, non-navigable streams that run over private land at the time the Utah Constitution was ratified. The State argued on remand that no such legal easement existed at statehood, and the district court agreed on summary judgment.

The New Mexico Supreme Court faced a similar case in 2022 in *Adobe Whitewater Club v. State Game Commission* (No. S-1-SC-38195). In 2018, the Commission established a regulatory process for landowners to obtain a designation of water flowing through their property as "non-navigable public water," potentially closing those waters to public access. The plaintiffs challenged the regulations as unconstitutional. The Court agreed with the plaintiffs, and held that the public has the right to recreate and fish in public waters, including the right to touch the privately owned beds below those waters. The court wrote: "Walking and wading on the privately owned beds beneath public water is reasonably necessary for the enjoyment of many forms of fishing and recreation. Having said that, we stress that the public may neither trespass on privately owned land to access public water, nor trespass on privately owned land from public water." The scope of the public's easement "includes only such use as is reasonably necessary to the utilization of the water itself

and any use of the beds and banks must be of minimal impact." New Mexico "is not alone in concluding title to the beds beneath water is immaterial in determining the scope of public use. Montana, Idaho, Iowa, Minnesota, North Dakota, Oregon, Utah, Wyoming, and South Dakota have all recognized public ownership and use of water is distinct from bed ownership."

WATER RESOURCES **Kansas/State Water Plan**

On January 5, the Kansas Water Authority (KWA) submitted its 2023 Annual Report to Governor Laura Kelly and the 2023 Legislature to advise them on water policy matters and share KWA's priorities for the expenditures from the State Water Plan Fund (SWPF). The Kansas Water Office completed the Kansas Water Plan in 2022, with KWA approval. The SWPF has insufficient revenue to meet all the program needs in plan, which KWA estimated to be \$69.3M/year. The report urged them to leverage additional federal, local, and private resources. Infrastructure Investment and Jobs Act (IIJA) funds could help finance drinking water projects in small communities experiencing high levels of uranium and nitrates. The Bureau of Reclamation could help with investments to increase water supply, water storage, water recycling and reuse, and drought contingency plans. The Inflation Reduction Act (IRA) funds U.S. Department of Agriculture conservation programs to support environmental quality, regional conservation, conservation stewardship, agricultural conservation easements, and technical assistance.

The report also said: "The policy of planned depletion of the Ogallala Aquifer is no longer in the best interest of the State of Kansas." KWA recommended a formal collaborative process to establish goals and actions to halt the decline of the aquifer with flexible management. It provided details on programs already in place, with ongoing funding needs and opportunities to expand into other areas of the state. The report provided updates on reservoir water supply, sediment management, a harmful algal bloom (HAB) pilot project, a produced water pilot project, various other water quality initiatives, water transfers, water rights, and interstate compacts. (<https://kwo.ks.gov/about-the-kwo/kansas-water-authority>)

MEETINGS **Western States Water Council**

The WSWC Spring (201st) Meetings will be held in Reno, Nevada on May 22-24, 2023 at the Peppermill Resort Spa Casino. A room block is being held until April 22, for single/double occupancy at the rate of \$114.00 per night, plus tax. Further information will be posted as it becomes available. See <https://westernstateswater.org/events/2023-spring-201st-meetings/>.

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.