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Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER RESOURCES
Corps/Western Water Cooperative Committee

On March 21, the WSWC and the Conference of Western Attorneys General (CWAG) submitted a joint comment letter on the Army Corps of Engineers (Corps) docket regarding implementation of the 2022 Water Resources Development Act (WRDA). WRDA §8158 authorized a new Western Water Cooperative Committee, intended to ensure that Corps "flood control projects in Western States are operated consistent with congressional directives by identifying opportunities to avoid or minimize conflicts between the operation of the [Corps] projects and water rights and water laws in such States." The Committee's membership includes two representatives from each Western State, one appointed by the Governor and the other by the Attorney General, as well as the Assistant Secretary of the Army (Civil Works), the Chief of Engineers, and an employee from each of the Bureau of Indian Affairs regional offices. The letter offered support in organizing the Committee and its first annual meeting.

The letter said: "As you know, the Corps owns and operates significant infrastructure in the West and has numerous federal priorities it considers. The Corps' interpretations and implementation of its priorities sometimes conflict with the States' water management laws and policies. We are hopeful the Committee will strengthen a spirit of cooperative federalism and practical problem-solving as water management continues to be critical to western states. Ideally, the Committee will provide an opportunity to: (1) facilitate ongoing state-federal communication; and (2) ensure that Corps policies and management of projects are consistent with Congressional intent to defer to Western States on matters of water allocation."

LITIGATION
***Texas v. EPA*/Clean Water Act/WOTUS**

On March 19, the U.S. District Court for the Southern District of Texas issued a preliminary injunction preventing the new Waters of the United States (WOTUS) rule from taking effect in the States of Texas and Idaho (*Texas, et al. v. EPA, et al.*, #3:3-cv-00017). The court declined to make the preliminary injunction applicable nationwide. The Environmental Protection Agency (EPA) and Corps challenged the standing of the states, arguing that the "federal regulation of water or land for purposes of pollution control is not a cognizable harm to 'state sovereignty,'" but the court disagreed, noting that "the States challenge the Rule as violating their quasi-sovereign interests in regulating land and water within their borders."

Regarding the injunction, the court wrote: "[T]wo aspects of the 2023 Rule make the plaintiffs particularly likely to succeed on the merits – first, the Rule's significant-nexus test, and second, the Rule's categorical extension of federal jurisdiction over all interstate waters, regardless of navigability." The court noted that the 2023 Rule's significant-nexus standard departs from Justice Kennedy's test articulated in *Rapanos* by including interstate waters regardless of navigability. "The Agencies' interpretation of the [Clean Water Act] to include all interstate waters irrespective of any limiting principle raises serious federalism questions; accordingly, the court will prefer any 'otherwise acceptable construction' not 'plainly contrary' to Congress's intent. Certainly, the court agrees with the defendants that federally regulating some interstate waters may be necessary to carry out Congress's intent to protect the nation's waters, but the court is not convinced that the Act's text supports unrestrained federal jurisdiction over all interstate waters." The court pointed to 33 U.S.C. § 1313(a)(1) and noted that "Congress anticipated that federal jurisdiction over at least some interstate waters would not be consistent with the Act and its 'purpose' to preserve the 'primary state responsibility for ordinary land-use decisions.'" The court continued: "This is not the first time the Agencies have read navigability out of the Act. Relying on *Rapanos*, a Georgia district court vacated and set aside the Agencies' previous attempt to extend their jurisdiction to 'all interstate waters... regardless of navigability' in a final rule. The Agencies' most recent attempt to read navigability out of the Act's plain text is unlikely to fare better."

The court found that the States' compliance costs and labor hours under the new rule would be

"nonrecoverable because the government-defendant enjoys sovereign immunity from monetary damages," thereby satisfying the preliminary injunction requirement of irreparable harm. The court did not reach whether there might be irreparable harm to the States' sovereignty from "the invasion of the federalism principles enshrined" in the Clean Water Act.

On balancing the equities and public interest, the Court noted that the agencies repeatedly emphasized that their new rule essentially codifies the regulatory status quo, while the intervenor-defendant Bayou City Waterkeeper asserted that there are intrastate waters that Texas and Idaho are not adequately protecting that will fall under the 2023 rule. "Taking as genuine the federal defendants' convictions that the Rule's differences from the status quo are 'slight,' it is difficult to see how an injunction will harm the Agencies as this court considers the merits. And if the intervenor-defendant is correct that the Rule will expand the waters that come under the Agencies' jurisdiction, then the equities would favor *granting* an injunction – rather than denying one – to preserve the status quo. The court is sympathetic to the intervenor-defendant's interest in and devotion to protecting Texas's wetlands, but even the most admirable aspirations 'do not permit agencies to act unlawfully.'"

The court also considered the "deference owed to the Agencies in exercising their delegated authority to implement the Act…. First, *Chevron* does not apply because the Act implicates criminal penalties…. Second, this court must interpret the Act 'as written to avoid the significant constitutional and federalism questions' that the Agencies' interpretation raises concerning the 'outer limits' of Congress's power. This interpretive approach is especially important 'where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.'" The court quoted Justice Scalia: "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority."

Tribal Water Rights/*Arizona v. Navajo Nation*

On March 20, the U.S. Supreme Court heard oral arguments in the consolidated cases of *Arizona v. Navajo Nation* and *Department of the Interior v. Navajo Nation* (#21-1484). At the heart of the case was whether the federal government, as a trustee, owes an enforceable, affirmative duty to assess the tribe's water needs and develop and carry out a plan to meet those needs. Many of the questions from the justices focused on whether the language of the 1868 treaty, or the implied *Winters* doctrine and the need for water to provide a permanent homeland, gave rise to an affirmative duty. Several questions explored whether the federal duty as a trustee included building infrastructure to provide access to water appurtenant to the reservation.

Arizona objected to the Navajo Nation's assertion, for the past 20 years in the underlying case, that they have an unquantified federal reserved water right to the Lower Colorado River. Arizona argued that if the assessment of water needs and sources goes beyond the groundwater under the reservation, it would require reopening the Lower Colorado River adjudication decree in *Arizona v. California*. "As long as any lower court has the potential to issue a ruling that directs the Secretary [of the Interior] to take an action that manages the [Colorado River] system differently than it currently is, under what we call the Law of the River, there is a risk that the vested water right holders with more than 60 years of rights are jeopardized."

Several justices asked questions about the extent of the Navajo Nation's needs and whether the appurtenant sources could meet those needs. While none of the parties had per capita water numbers at hand, the Navajo Nation said: "Today, the average person on the Navajo reservation uses just seven gallons of water per day. The national average is 80 to 100 gallons." They also noted that there are other appurtenant sources that could supply water to the reservation besides the mainstream of the Lower Colorado River, including the mainstream of the Upper Colorado River, the Zuni River, the San Juan River, and groundwater.

PEOPLE

David Wayne Schade, 63, passed away peacefully on March 2, after a short illness, surrounded by loving family at home. A WSWC member and advocate, he served as Director of the Division of Agriculture in the Alaska Department of Natural Resources (2019 - 2022), and as Chief of the Water Resources Section in the Division of Mining, Land and Water (2012 - 2018). He also served as President of the Alaska Chapter of the River Management Society, President of the Eagle River Valley Community Council, and was a member of the Alaska Farm Bureau and the Alaska Farmers Union. His parents and grandparents homesteaded land east of Homer in 1958, where he and his siblings worked in the family businesses that included farming, ranching, logging, boat transportation and fishing. He is survived by his wife Teresa Schade, daughter Christina Hunter (husband Jeffrey) and daughter Jacquelyn Schade. A celebration of life is planned for a later date. He will be greatly missed.