Issue #2568
August 4, 2023

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 QUALITY
EPA/Federal Baseline WQS

On August 3, the comment period closed for the proposed rulemaking on Federal Baseline Water Quality Standards (WQS) for Indian Reservations (88 FR 29496). The docket received over 3,000 comments still in process and being posted by the Environmental Protection Agency (EPA). Among the posted letters are comments from Alaska, Montana, Nebraska, and South Dakota.

The WSWC submitted a comment letter expressing concerns with the legal and administrative issues associated with promulgating nationwide tribal baseline WQS. The letter included the Council's Policy Position #490 as well as a copy of a 2017 letter submitted during the comment period for the advanced notice of proposed rulemaking. The letter notes that Executive Order 13132 directs great caution and meaningful consultation when establishing uniform national standards, particularly where proposed rules have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

The letter concluded with questions our Western states have raised that are still unresolved: (1) How will EPA implement this rule, and under what authorities, particularly with regard to non-jurisdictional waters and unquantified reserved water rights? (2) How will the baseline WQS impact existing state jurisdictions and water quality programs, particularly where the outer reservation boundaries do not reflect current regulatory jurisdictions or non-tribal lands within reservation boundaries? (3) How will EPA resolve any differences between state and tribal standards, as well as states' standards and EPA's baseline standards for tribes without TAS authority?

CONGRESS/WATER RESOURCES
FY24 Appropriations/Bureau of Indian Affairs

On July 27, the Senate Appropriations Committee reported its FY24 spending bill for the U.S. Department of the Interior and other agencies (S. 2605) by a bipartisan 28-0 vote. The bill includes funding for the Bureau of Indian Affairs (BIA) in support of federal trust responsibilities under treaties and agreements with Native Americans. The Bureau provides services directly or through contracts, grants, or compacts to nearly 2 million American Indians and Alaska Natives who are members of 574 federally recognized Indian Tribes in the lower 48 States and Alaska.

The Senate Report (118-83) notes that the legislation provides $976,000 for the Indian Land and Water Claim Settlements account, $151,000 more than the FY23 enacted level and equal to President Biden's budget request. Under the Operation of Indian Programs, the bill provides $18.4M for water resources, including $8.3M for Tribal Priority Allocation, and $10.1M for Water Management, Planning and Pre-Development. The report notes the Committee's continued "support for the [BIA's] partnership with local Tribes and the U.S. Geological Survey to help develop a water quality strategy for transboundary rivers."

For Construction programs, under Resources Management Construction, the Committee "recommends $75.2M, equal to the FY23 enacted level, which includes: $28.7M for irrigation projects, of which not less than $3.4M is for the Navajo Indian Irrigation Project and $10M is for projects authorized by the Water Infrastructure Improvements for the Nation [WIIN] Act (P.L. 114–322); $42M for dam projects; $1M for survey and design; $2.7M for engineering and supervision; and $671,000 for federal power compliance. The Committee expects the funds designated for WIIN Act activities will be deposited into the Indian Irrigation Fund to fund [authorized] projects.... The Committee continues the previous fiscal year funding increases for dam safety. However, the Committee is concerned that an unknown number of dams on reservations have not received a hazard classification, and the current review process is behind schedule, resulting in delays for comprehensive reviews. The Committee strongly encourages the Bureau to begin dam safety work expeditiously and report back to the Committee on the best way to effectively quantify the potential pool of dams on reservations in need of a review and/or classification."

LITIGATION

Congress/*Chevron* Deference

On July 24, 36 Republican Senators and members of the House of Representatives filed an amicus brief in *Loper Bright Enterprises v. Gina Raimondo* (U.S. Supreme Court, #22-451) advocating that the Court should abandon the *Chevron* deference doctrine. The underlying case involves a National Marine Fisheries Service regulation requiring vessel owners to pay the salaries of federal observers to ensure compliance with the Magnuson-Stevens Act. See WSW #2556.

Western Senators and Representatives joining the brief included Senators: Steve Daines (MT); Kevin Cramer (ND); John Cornyn (TX); Ted Cruz (TX); Mike Lee (UT); Cynthia Lummis (WY); and Representatives: Darrell Issa (CA); Cliff Bentz (OR); Randy Weber (TX); Lance Gooden (TX); Ronny Jackson (TX) and Harriet Hageman (WY).

The brief argues that (1) modern *Chevron* deference Is in severe tension with the Separation of Powers framework and principles in Articles I, II, and III of the Constitution; (2) the Administrative Procedures Act (APA) requires courts Independently to decide all relevant questions of law; and (3) that eliminating *Chevron* deference will enhance stability in the law.

The brief reads: "As members of Congress, *amici* have a strong interest in judicial interpretations that preserve the legislative powers that Article I of the Constitution vests exclusively in Congress. *Amici* also have an interest in ensuring that the judiciary serves as an appropriate check on the Article II executive in accordance with the vesting clause of Article III and also with the [APA's] review requirement that courts, not executive agencies, 'shall decide all relevant questions of law,' including 'interpret[ing] … statutory provisions' and determining whether agency action is 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.' 5 U.S.C. § 706(2)(C)."

"*Chevron* deference has no basis in law, history, or logic…. The Court should overrule *Chevron* deference and eliminate it from the courts' interpretive canon."

"Under the *Chevron* regime, 'individuals can never be sure of their legal rights and duties. Instead, they are left to guess what some executive official might reasonably decree the law to be today, tomorrow, next year, or after the next election.' ...And this uncertainty is only exacerbated by the 'wildly different' approaches that courts take to whether a statute is actually ambiguous – and thus whether it is subject to *Chevron* in the first instance."

"Further, when it comes to applying *Chevron*, there is a disconnect between this Court's theoretical retention of the doctrine and its application by the lower courts, suggesting that only a clear overruling will turn the tide. The Court has created an ever-growing list of exceptions to and substitutes for *Chevron*, most notably the major-questions doctrine…. On occasion, the Court has even appeared to invoke the exact opposite of *Chevron* deference. See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) ('[S]ometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion.')…. This Court's 'frequent disregard' of Chevron is a factor in favor of overruling it...."

"Finally, some may contend that Congress has acquiesced to *Chevron* and that it is too late in the day for this Court to abandon it now…. But of course, Congress has not approved of Chevron deference. In fact, Congress has addressed the matter of judicial deference by stating in the APA that courts shall decide all questions of law, including statutory interpretation…. In the similar context of whether to overrule his own opinion in *Auer v. Robbins*, Justice Scalia eventually exclaimed, 'Enough is enough.'"

PEOPLE

On August 7, Alan Salazar became the interim CEO/Manager of Denver Water replacing Jim Lockhead. Salazar has more than 30 years of experience in the public sector, working in both the legislative and executive branches of federal, state and local governments. Currently Chief of Staff for the City of Denver, he has also served Colorado as Chief Strategy Officer for former Governor John Hickenlooper, Chief of Staff for former U.S. Rep. Mark Udall and Deputy Chief of Staff for former Governor Roy Romer. Salazar will oversee a 10-year, $2.3B system investment plan and oversee the work to provide water to 1.5M people across the Denver metro area. He will represent Denver Water through many ongoing relationships with all levels of government, community organizations and stakeholders across the West, including the Colorado River Basin water crisis. https://www.denverwater.org/

Craig Jones, Board President, said: "Alan's expertise in natural resources, commitment to public service and empathetic leadership style make him the perfect candidate to lead Denver Water's critical community mission and the path set in Denver Water's renewed Strategic Plan." Salazar said: "I am deeply committed to the mission of excellence in public service that Denver Water is known for. And I am grateful for the opportunity to bring my experience in public life to contribute to this venerable institution, serve Denver Water's customers and be a thoughtful steward of resources so many Coloradans rely upon."