



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **CONGRESS/WATER RIGHTS**

#### **Montana/Indian Water Rights**

On June 20, the Senate passed the Fort Belknap Indian Community Water Rights Settlement Act of 2024 (S.1987). The bill would ratify the Fort Belknap Indian Community (FBIC) Water Rights Compact, the final Indian water rights settlement in Montana, after more than a decade of negotiation. The passage comes days after a major siphon burst on the Milk River Project near Babb, Montana, causing flooding with washout areas estimated to be 30-50 feet deep. (WSW Special Report #2570)

The settlement would provide \$1.3B to improve the Milk River Project and FBIC infrastructure and for economic development. The funding includes \$275M to rehabilitate St. Mary's Canal. It would also transfer FBIC land into a federal trust. Senator Jon Tester (D-MT) said during his remarks on the Senate floor: "The siphon failure caused thousands of gallons of water to flood the surrounding area, leading to extensive damage to local businesses in that area, and will damage irrigation opportunities for 120,000 acres.... It is a vital source of water for North Central Montana water users and too so many farmers that feed the world. The timing of this could not be worse, because there are literally hundreds of farmers and ranchers who are currently depending on the Milk River Project to irrigate their crops.... Farmers' operations that have been generational in this region's livelihood are on the line. Water for municipalities is on the line.... The siphon bursts that we saw earlier this week have left Montana families reeling. Congress can do its job.... So let's get this done so we can repair the Milk River Project and give water users in North Central Montana the certainty and predictability they need to survive."

Senator Steve Daines (R-MT) said: "This is a huge win for the Tribe, farmers and ranchers and the entire state of Montana. As the final Indian water rights settlement in Montana, this bill will help provide clean drinking water to Montanans on the Hi-Line, invest in critical ag irrigation and help prevent costly litigation by codifying existing water rights. Especially after the catastrophic siphon failure at St. Mary's this week, we must get this done. After years of hard work with the

Fort Belknap Indian Community and local leaders on the ground, I'm glad to see this come one step closer to becoming law."

### **LITIGATION/WATER QUALITY**

#### ***Idaho v. EPA/WQS/Tribal Treaty Rights***

On June 14, a coalition of States including Alaska, Idaho, Iowa, Louisiana, Montana, Nebraska, North Dakota, South Carolina, South Dakota, Texas, Utah, and Wyoming filed a joint amended complaint with the U.S. District Court of North Dakota against the Environmental Protection Agency (EPA) alleging that its final rule, Water Quality Standards (WQS) Regulatory Revisions to Protect Tribal Reserved Rights (89 FR 35717), violates various provisions of the Constitution - including the 5th and 10th amendments - and the statutory authority of the Clean Water Act (CWA), and the Administrative Procedure Act (APA) (*Idaho et al. v. EPA et al.*, #1:24-cv-00100). The rule, published May 2, addresses how the EPA and States must consider tribal reserved rights in their WQS when they are asserted by a tribe (WSW #2612). On the same day, the States filed a motion for a preliminary injunction to stay the rule.

The States alleged that the final rule usurps the role of the States under the CWA, expands requirements beyond the scope of the CWA, and forces States to protect tribal reserved rights (a concept which is not included in the CWA). They also allege that the final rule violates the authority of the States to allocate quantities of water within their jurisdiction, an authority explicitly retained under the CWA. They argue that the rule is impermissibly vague, creating uncertainty regarding the scope of their obligations and is an unwarranted expense on States and their agencies. They also argue that the final rule unconstitutionally disrupts state-tribal relationships by requiring States to evaluate and protect undefined rights reserved for the tribes by the federal government. Additionally, EPA failed to consult with the Fish and Wildlife Service or the National Marine Fisheries Service regarding the obvious impact of the rule on endangered species. Finally, the States allege that EPA's short notice period between publication and implementation and action exceeded its statutory authority and constitute violations of the APA.

In the motion the States argued: “Under the [CWA], the power to set water quality standards belongs first and foremost to the states. It is each state’s job to determine, lake by lake and river by river, which uses of its water will be protected and what level of health risk is acceptable for each use. Once states make these determinations, they submit them to EPA for review – and if their standards meet the [CWA] requirements, then EPA has no choice but to approve them.... Treaties with Native American tribes are not part of the [CWA].... But now EPA has [promulgated] a rule that requires state water regulators to consider and protect alleged tribal rights – whether or not those rights have been established in court, and whether or not the regulators have any expertise or authority for adjudicating claimed tribal rights. Complying with this requirement would require Plaintiff States to hire new staff for their water regulators; they would have to spend millions of dollars evaluating the legal strength of tribal claims and reassessing water quality standards. Because the Rule exceeds EPA’s authority, and because states will be irreparably harmed if they have to comply, the Court should stay the Rule’s effectiveness pending this litigation or enjoin EPA from enforcing it against the plaintiff States....”

The States concluded: “An injunction will not prohibit tribes from lobbying state regulators and the EPA for higher water quality standards. It will not prevent state regulators from considering tribal uses of the water when they set water quality standards or stop EPA from rejecting standards that fail to protect the states’ designated beneficial uses. An injunction will not even impair any tribal rights; in that sense, the Rule does not achieve a different result than what is already required by existing law, because, even without the rule in effect, any tribe that believes a WQS violates its treaty rights will be able to sue the state and the EPA and have its rights adjudicated in court. In short, EPA’s worst-case scenario is not very bad: it will be stuck with water quality standards it already approved, and with the same process for reviewing new standards that it has already followed for years.”

## **WATER RESOURCES**

### **Idaho/Curtailment**

On June 20, the Idaho Department of Water Resources (IDWR) announced that a comprehensive settlement had been reached between the Surface Water Coalition (SWC) and groundwater districts in the Eastern Snake Plain region for the 2024 irrigation season. In response to SWC’s conjunctive administration delivery call in April, IDWR announced a predicted a shortfall of 74,100 acre-feet of in-season deliveries to the Twin Falls Canal Company and called for junior users to attain strict compliance with an IDWR-approved

mitigation plan or face curtailment. On May 30, IDWR issued a final curtailment order requiring junior right holders not covered by a mitigation plan to refrain from diversion and use of groundwater.

Under the settlement, all Eastern Snake Plain groundwater districts have agreed to conform to a 2016 mitigation plan, which entails conservation of 240,000 acre-feet of groundwater and deliver 50,000 acre-feet of storage water to SWC. In return, all members of the groundwater districts will be protected from curtailment. The parties also committed to negotiating a new mitigation plan by the end of the year to protect junior water rights holders from curtailment in the future.

Governor Brad Little said: “Just like we’ve done over and over, Idahoans came together, resolved our differences, and found a path forward to protect farmers and our supply of water for the year. However, we recognize we still have a lot of hard work to do. We will be okay for this year, but we all agree we need a better plan in the out years to protect our farmers and ensure Idaho maintains our water sovereignty. We remain committed to working with all water users in Idaho to ensure we have a sustainable supply of water for this generation and future generations.”

IDWR Director Mathew Weaver said: “I am pleased that the parties to this delivery call were able to negotiate a settlement for 2024 that avoids large-scale curtailment of land irrigated from junior ground water wells. The parties did what I cannot do. They agreed to management solutions outside the strict legal confines of an approved mitigation plan and the priority administration of water rights.”

## **PEOPLE**

On June 30, New Mexico State Engineer **Mike Hamman** retired. During his brief time with Governor Michelle Lujan Grisham’s Administration, he focused on several high priority water issues such, emergency water user agreements following the Hermits Peak/Calf Canyon wildfires, and convening the Water Policy and Infrastructure Task Force. He worked with the legislature to pass the Water Security Planning Act, and helped finalize negotiation of the three-state consent decree in the *Texas v. New Mexico and Colorado* case. He worked with federal agencies and the congressional delegation to secure millions in federal funding for large water projects and water rights settlements. He also created a dedicated bureau to focus on negotiating and implementing Indian water rights settlements, and worked to build agency capacity to address water challenges and opportunities.