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Sound water policy starts with the states that manage water.

WESTERN STATES WATER

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WSWC NEWS & ACTIONS

Fall (211th) Meetings, Las Cruces, NM

On October 21-23, the State of New Mexico hosted the Western States Water Council's (WSWC) 211th Meetings in Las Cruces[1], New Mexico. The WSWC adopted two new consolidated positions: (1) Position #2026-04, Western Water, State Authority, and Cooperative Federalism; and (2) Position #2026-05, State Primacy and Cooperative Federalism for Western State Water Quality Programs. The Council also revised and renewed two sunsetting positions: (1) Position #2026-06, Supporting Indian Water Rights Settlements; and (2) Position #2026-07, Support for USDA Conservation and Rural Infrastructure Programs in the West.

On October 21, members toured Elephant Butte Reservoir and farms in Hatch and Mesilla, with discussion of this year's severe drought and recent flood damage.

At the October 22 Council Business Meeting, Executive Director J.D. Strong noted that leadership turnover in many states makes sharing institutional knowledge across states increasingly valuable. Members echoed that need, noting that legislators frequently ask how other states handle emerging issues, and that quick peer exchange during legislative sessions is among the most useful services the Council provides.

Roundtables on state agency capacity, permitting reform, and federal water data surfaced a shared concern: states are absorbing more work with fewer resources. States described reviewing their programs to find bottlenecks, using time-tracking data to justify staffing and fees, and modernizing public notice requirements. States noted that federal streamlining under the National Environmental Policy Act (NEPA) and Title 41 of the Fixing America's Surface Transportation Act (FAST-41) has sometimes shifted work and public concerns onto state permits. A Water Data Task Group survey identified U.S. Geological Survey (USGS) streamgaging and the Natural Resources Conservation Service (NRCS) Snow Survey and Snow Telemetry (SNOTEL) programs as members' top federal data priorities. Nearly all respondents noted the contribution of state and local resources alongside federal data collection, and members urged advocacy for federal investment improvements in Congress.

A roundtable on interstate compacts examined lessons from the Rio Grande settlement and the modern implementation challenges of other interstate water compacts now 50 to 100 years old. New Mexico and Texas reflected on the recent *Texas v. New Mexico & Colorado* settlement (WSW #2699). After 15 years of costly litigation, New Mexico is redirecting resources toward infrastructure and water supply projects benefiting both states. Texas said the case moved toward resolution once Texas and the United States turned their focus to defining the obligation at the state line, rather than determining how New Mexico would deliver.

New Mexico stressed that the settlement preserves its authority to manage its own water, with maximum flexibility in how it meets that obligation. "Texas and New Mexico are very good friends right now. We're working together to implement the settlement… and I think we're on a track to be good partners going forward."

During a roundtable on emerging issues, states raised topics ranging from state authority over federal water uses to water reuse for data

centers, new state permitting programs, and support for struggling rural water systems. New Mexico discussed *Anderson v. United States*, its challenge to federal wells drilled without state permits for border wall construction, along with a federal waiver purporting to set aside the state water code, administrative laws, and the McCarran Amendment. New Mexico noted that the wells pose a risk of groundwater contamination, and that the added pumping runs counter to its compact obligation to reduce Lower Rio Grande depletions. The dispute raises questions about state authority over groundwater that could affect other western states.

Idaho described a dispute over state administration of federal reserved water rights. A federal reserved groundwater right held by the U.S. Department of Energy for the Idaho National Laboratory (INL), decreed in the Snake River Basin Adjudication (SRBA), recently came within reach of curtailment under the Eastern Snake Plain Aquifer (ESPA) conjunctive management delivery call. The federal government maintains that states cannot administer any federal water right, and the question is now pending in both state and federal court. *United States v. Idaho*, No. 1:26-cv-00592-REP (D. Idaho filed Sept. 11, 2026). Idaho noted that many groundwater users already pay to mitigate or have been curtailed, and that the dispute calls into question the authority of states to administer water rights under the McCarran Amendment.

The discussion then turned to water quality. Nevada has proposed regulations to allow treated wastewater to cool indoor spaces such as data centers, with safeguards against Legionella, and noted that some local governments already want to require it without understanding the treatment involved. Wyoming reported that after the Environmental Protection Agency (EPA) treated Yellowstone National Park as land of exclusive federal jurisdiction in 2023 and assumed Clean Water Act authority there, the state and the Department of the Interior negotiated an agreement restoring concurrent state jurisdiction.

Western Federal Agency Support Team (WestFAST) Vice Chair Mike Eberle (U.S. Forest Service) thanked outgoing liaison Jason Olive (U.S. Fish and Wildlife Service) for his service and introduced Sean Fleming (National Aeronautics and Space Administration) as the incoming liaison beginning in January 2027.

In closing, WSWC Chair Earl Lewis (KS) reflected on the Council's progress toward more member-led meetings, saying that member engagement and discussion are "really what's the most valuable part," reflecting the Council's "superpowers of sharing information and coming up with advocacy positions."

ADMINISTRATION / WATER QUALITY

Interior/Wyoming Yellowstone Agreement

On October 16, Secretary of the Interior Doug Burgum and Wyoming Governor Mark Gordon (R-WY) finalized a draft Memorandum of Agreement (MOA) for concurrent water quality jurisdiction over Wyoming's portion of Yellowstone National Park. On October 19, the draft MOA was sent to Congress for review. Congress has 60 days to raise any concerns. Wyoming anticipates final approval in mid-December, after which the Department of the Interior (DOI) will relinquish federal environmental program authority, including Clean Water Act Section 401 authority to the Wyoming Department of Environmental Quality (DEQ). Jennifer Zygmunt, Water Quality Division Administrator, expressed appreciation to DOI and EPA for their collaboration and support to work toward this solution, acknowledging it as a good example of cooperative federalism.

Governor Gordon noted that Wyoming has managed Section 401 in the Park for years, and said formal recognition "will bring about an increase in certainty and responsiveness for our Yellowstone visitors."[2] Secretary Burgum said the people of Wyoming "know its land and water better than Washington ever could."

Wyoming DEQ issued Section 401 certifications in Yellowstone from 1973 until 2023, when EPA's Water Quality Certification Improvement Rule (88 FR 66558) declared the Park and 15 other national parks "lands of exclusive federal jurisdiction" and made EPA the certifying authority.

In December 2023, Wyoming, other affected states and three industry groups sued in the U.S. District Court for the Western District of Louisiana. After the court denied a preliminary injunction and put the case on hold in early 2025, EPA published a proposed rule Updating the Water Quality Certification Regulations (91 FR 2008), which continues to assert federal authority over lands of exclusive federal jurisdiction in limited circumstances. Governor Gordon said the agreement "restores the mutual responsibility that has worked so well."

CONGRESS / WATER QUALITY

ACWA/Senate Permitting Bill Analysis

On October 1, the Association of Clean Water Administrators (ACWA) released an analysis of the Clean Water Act (CWA) provisions in the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA) (S. 5653),[3] the Senate permitting package introduced September 30 (WSW #2708). ACWA's analysis covers the following: (1) narrower scope and higher evidentiary standards for Section 401 certification, which it calls the most extensive direct change to state authority; (2) standardized 401 applications and limits on state information requests; (3) direct appellate review of 304(a) criteria and Water of the United States (WOTUS) definitions; (4) limits on EPA's Section 404(c) authority; (5) a two-acre minimal-effects threshold and statutory nationwide permits; (6) new limits on Section 404 litigation; (7) the effect of ten-year National Pollutant Discharge Elimination System (NPDES) terms on permit updates; and (8) the treatment of state 401 certifications for transmission projects.

With respect to CWA Section 401, S. 5653 limits the scope of state authority and adds new procedures. The bill would confine state Section 401 review to "water quality requirements" (CWA Sections 301, 302, 303, 306 and 307 and implementing state laws), subjecting the "any other appropriate requirement of State law" language in Section 401(d) to those CWA Sections. States could deny certification only by showing, with clear and convincing evidence, that no reasonable condition could bring the project into compliance. For interstate pipelines and transmission lines, it would override the "any other appropriate requirement" language entirely.

The bill would also add new CWA 401 procedural steps for certifying states. A state would have 3 days to acknowledge an application and 90 days to declare it complete or identify missing materials, and applicants could petition a court if a state misses those steps. As under current law, certification would be waived if a state does not act within a review period of up to one year, but the period could be extended only at the applicant's request with the state's agreement. On request, a state would have to respond within 30 days and hold a pre-filing meeting within 60 days.
The bill would also authorize state-issued NPDES permits from a maximum of five years up to ten years.

LITIGATION / WATER RESOURCES

DHS/New Mexico Water Law Waiver

On October 2, the U.S. Department of Homeland Security published a notice in the Federal Register (91 FR 62739) determining that "it is necessary to waive certain laws, regulations, and other legal requirements in order to ensure the expeditious construction of barriers and roads in the vicinity of the international land border in the state of New Mexico."[4]

Among the laws waived in their entirety are the McCarran Amendment (43 USC 666), the New Mexico Water Code (NMSA 1978, 72-1-1 through 72-20-103) and New Mexico's groundwater regulations, including well siting, drilling, construction, repair, and plugging (NMAC 19.27.1.1 through 19.27.1.39 and 19.27.4.1 through 19.27.4.39).

Federal authority cited for the determination included Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the President's Executive Order on Securing Our Borders (EO 14165).

On the same day, the U.S. removed the State of New Mexico's lawsuit against the U.S. and its contractors from state to federal court (1:26-cv-03292). In its initial lawsuit, filed on August 27,

New Mexico alleged unauthorized groundwater well drilling, unpermitted water diversions, and meter tampering[5] in the Hachita, Mimbres, and Lower Rio Grande basins to support border wall construction (*Anderson v. US et al.*, Sixth Judicial District Court, D-619-cv-2026-00332.)

New Mexico's complaint stated: "For almost a hundred years, groundwater in New Mexico has been managed and overseen by the New Mexico Office of State Engineer (OSE) to ensure that New Mexicans have clearly delineated rights and predictable access to water for domestic use, irrigation, farming, manufacturing, and other uses…. It is illegal to drill a well and appropriate water without first applying for and being granted a permit from OSE, and permittees must abide by the Water Code, associated regulations, and the terms of their permit…. From the earliest days of the settlement of the American West, it has been a longstanding principle that the appropriation and use of water is controlled by the states, and the federal government must abide by state law in its diversion and use of this limited natural resource."

United States v. Idaho

On October 16, the State of Idaho filed an answer and counterclaims to the Department of Energy's (DOE) complaint in *United States v. Idaho* (U.S. District Court for the District of Idaho., 1:26-cv-00592).

The case originated in state court when Idaho sought a declaratory judgment that the DOE's groundwater right is subject to administration by the Idaho Department of Water Resources (IDWR), in accordance with Idaho law. IDWR required DOE to "either curtail its diversions or provide mitigation as necessary to remedy material injury to decreed senior-priority water rights."

In July 2025, Idaho issued an order curtailing all groundwater rights junior to 1900. DOE's water right authorizes the annual use of 35,000 acre-feet of groundwater, with a priority date of 1950. The elements of the water right were reached by a 1990 agreement between DOE and Idaho, and were then incorporated into the Snake River Basin Adjudication decree. The water right is used at the DOE's Idaho National Laboratory.

DOE subsequently removed the case to federal court, taking issue with the fact that the motion was filed in a subcase to the Snake River Basin Adjudication "which closed twenty-three years ago." The removal complaint argued that the court order IDWR sought "implicates issues of federal, rather than state, law, including federal sovereign immunity, the Supremacy Clause, and the Property Clause." The U.S. alleged that the water rights agreement included a clause regarding an open question of whether and to what extent the IDWR Director "has authority to administer federal water rights." Under the circumstances, the U.S. wished to defend itself in a federal forum.

Idaho asserted its authority to administer the United States' water rights under the McCarran Amendment, as well as other federal and state laws. "In Idaho, as in most Western States, water rights decreed in a general stream adjudication are not directly administered by the adjudication court, but rather by administrative or executive officers charged with distributing water according to the relative priorities of the decreed rights and applicable state law… Idaho law requires junior-priority water rights to be curtailed 'during times of water scarcity, in order to supply the prior rights of others.'" Idaho argued that these laws and principles apply equally to federal reserved water rights and state law-based water rights held by a federal agency.

Nevada v. Burgum/Arizona Intervention

Arizona and the Central Arizona Project (CAP) have filed motions to intervene in *Nevada v. Burgum* in the U.S. District Court for the District of Nevada (No. 2:26-cv-02665), Nevada's challenge to the DOI's post-2026 operating framework for Lake Powell and Lake Mead (WSW #2706).

Arizona argues the framework unlawfully fails to require Upper Basin deliveries to Lake Mead, exposing the Lower Basin to cuts of up to 3 million acre-feet per year. Arizona also seeks to finalize the Lower Basin Agreement, which DOI

did not adopt, under which Arizona, California and Nevada would conserve more than 3.2 million acre-feet in 2027 and 2028.[6]

CAP alleges that the federal decisions disregard the Colorado River Compact and other river law. General Manager Brenda Burman said CAP remains focused on finalizing that agreement.

Governor Joe Lombardo (R-NV) welcomed Arizona's motion, saying the federal plan unfairly burdens the Lower Basin without requiring meaningful Upper Basin reductions.[7]

WEBINARS AND MEETINGS

November 10—GAO Freshwater Study Webinar. The U.S. Government Accountability Office (GAO) has begun a study on freshwater availability and use, and this session gives state water managers an opportunity to share their perspectives with GAO directly. Preliminary topics include how state perspectives and actions have changed over the past decade, challenges Tribes face on tribal lands, what state water managers expect over the next 10 years, and federal actions since 2014 and how federal support for state and tribal water management can be enhanced. Register here.

November 17–18—2026 OpenET Applications Conference. Agencies, researchers, and water users will gather in Salt Lake City, Utah to share how satellite-based evapotranspiration data is applied to water rights administration, consumptive use accounting, groundwater management, and drought and conservation programs. More information.

December 1–3—Association of California Water Agencies 2026 Fall Conference. More information.

December 9–11—Colorado River Water Users Association 2026 Conference, Las Vegas, Nevada. More information.

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