



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER QUALITY

EPA/Perchlorates

On June 26, the Environmental Protection Agency (EPA) published its proposed rule on perchlorate levels in drinking water (84 FR 30524). The EPA is setting both the enforceable Maximum Contaminant Level (MCL) for the perchlorate regulation and the perchlorate MCL Goal at 0.056 mg/L (56 µg/L). The EPA is proposing requirements for water systems to conduct monitoring and reporting for perchlorate and to provide information about perchlorate to their consumers through public notification and consumer confidence reports. Comments may be submitted under Docket EPA-HQ-OW-2018-0780 at www.regulations.gov. The comment period closes August 26. (See WSW #2351).

EPA/Water Quality Standards

On June 14, EPA released a document titled Modernizing Public Hearings for Water Quality Standard (WQS) Decisions Consistent with 40 CFR 25.5. The regulation requires a public hearing when states and tribes review or adopt WQS. The document provides 12 non-mandatory, regulation-compliant suggestions to incorporate modern technologies into the public hearing process to maximize participation, simplify implementation, and reduce the costs of hearings. Suggestions include the use of web conferencing platforms and their useful features, online advertisement of meetings, recording meetings, and making meeting materials available online. See www.epa.gov/wqs-tech/options-modernizing-public-hearings-water-quality-standard-decisions-consistent-40-cfr-255

CONGRESS/WATER RESOURCES

House Hearing/Indian Water Rights

On June 26, the House Natural Resources Subcommittee on Water, Oceans, and Wildlife held a hearing on the Navajo Utah Water Rights Settlement Act (H.R. 644), the Hualapai Tribe Water Rights Settlement Act (H.R. 2459), and the Aamodt Litigation Settlement Act (H.R. 3292). Witnesses included: Alan Mikkelsen, Senior Advisor to the Secretary of the Interior (DOI) on Water and Western Resource Issues; Chairman Damon Clarke, Hualapai Tribe; Director Thomas Buschatzke,

Arizona Department of Water Resources; Norman Johnson, Natural Resources Division Chief, Utah Attorney General's Office; and President Jonathan Nez, Navajo Nation.

Clarke provided context for the current Hualapai settlement, including the Tribe's water shortages, water contamination, droughts affecting aquifer levels, and water supply for domestic, ranching, wildlife, and commercial uses. He reviewed the history of Phase 1 of the settlement, completed in 2014 under the Bill Williams River Water Rights Settlement Act (PL 113-223), and the Phase 2 agreement in 2016 that resolved all of the Tribe's remaining water rights claims. The Tribe, the State of Arizona, the Salt River Project, the Central Arizona Water Conservation District, and the Freeport Minerals Corporation are all signatories to the agreement. He summarized the elements of the settlement, including the federally reserved water rights claims, Central Arizona Project (CAP) water, groundwater, and \$134.5M in federal funds to construct infrastructure to divert 3,414 acre-feet a year from the Colorado River through a 70-mile pipeline to the reservation. "Passage of this legislation is absolutely essential if our Tribe is to attain a secure future on our Reservation, to accommodate future growth of our population and to realize the full economic potential of our Reservation. We have done everything possible to provide jobs and income to our people in order to lift them out of poverty – but the lack of a secure and replenishable water supply on our Reservation is our major obstacle that prevents us from achieving economic self-sufficiency, a goal that Federal Indian policy has long favored."

Mikkelsen recognized the substantial efforts of the parties to reach a settlement but called the provisions of the Hualapai settlement "untenable." He expressed concerns about the bill: "(1) the waiver of protections for the federal reserved groundwater rights; (2) the size and cost of the project; (3) the accuracy of the cost estimate. The Department also believes there is a less costly alternative to supply water that warrants further assessment." He said there are also concerns about the waiver of federal sovereign immunity. The settlement provisions that prohibit the Tribe from objecting to off-reservation groundwater use even if it interferes with

reserved groundwater rights "...would establish a deleterious precedent in Arizona and throughout Indian Country." The infrastructure plan includes intake, pumping and water plants "...that may not be used for 40-50 years, if ever, creating unnecessary operation, maintenance and repair costs and the need to replace facilities before they are even used." He also noted that the DOI's Criteria and Procedures require an analysis of whether the non-federal share of costs is proportionate to the benefits received, and that Arizona's contribution "...is not commensurate with the benefit to the State of Arizona for a final settlement of all Hualapai water claims."

Buschatzke addressed some of the concerns Mikkelsen raised, noting that the Tribe's consultant estimated the costs for constructing the water supply project "...using the same methods that are used by the Bureau of Reclamation to estimate costs." He said Arizona is opposed to a settlement that would require the Tribe to rely on groundwater, as that is contrary to the State's policy of preserving groundwater supplies for periods of drought, and the groundwater would not be a dependable supply for the Tribe over the long-term like CAP water. He also pointed out that the non-federal contributions – including the State, Freeport, and the Tribe – amounts to 30% of the financial contributions of the settlement. The State estimates the cost of firming the 557.5 acre-feet of CAP water to be \$3.25M.

Regarding the Navajo-Utah settlement, Nez said: "Without a negotiated settlement, conflict over these water rights could easily devolve into protracted, expensive, and divisive litigation. Choosing a more conciliatory and productive path, the State of Utah and the Navajo Nation devoted years to developing an agreement that would protect existing uses while at the same time guarantee the Navajo Nation a dedicated and perpetual supply of drinking water." The bill authorizes \$210M for a trust fund with two accounts, one for planning, design and construction of water development projects, and the other for operation and maintenance. The Navajo Nation Department of Water Resources produced a white paper proposing water development projects to address the needs of Navajo communities in Utah. "[T]he Trust Fund approach in this legislation is unique and reduces fiscal impacts on the U.S. Treasury by eliminating the possibility Reclamation would need to seek funding for cost over-runs on projects authorized under the Settlement Agreement. Rather, the Trust Fund is held by Interior until the Nation seeks withdrawals from the account.... The Nation would be responsible for identifying upcoming projects and providing Interior with its management and expenditure plans."

Johnson said: "I believe H.R. 644 is important to all Colorado River Basin states because the Navajo Nation's water claims in the Basin are large and not fully quantified. All basin states benefit from having the

Nation's claims quantified within the allocation of the state where portions of the Nation are located. New Mexico has achieved this type of quantification in the past and Utah will do so with passage of this legislation." He noted that the Nation's waiver of legal claims against the United States justified the expenditure of federal funds, and that the money provided under the settlement would be used to fund drinking water projects in an area where "many Navajos lack the basic necessity of safe, clean drinking water."

Mikkelsen said DOI supports the consensus language of S.1207 agreed to by Utah and the Nation, and H.R. 644 could be revised for consistency.

New Mexico/Aamodt/Indian Water Rights

On June 14, Rep. Ben Ray Lujan (D-NM) introduced the Aamodt Litigation Settlement Completion Act (H.R. 3292). On June 18, Senator Tom Udall (D-NM) introduced the companion bill (S. 1875). The Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque were joined by Santa Fe County, the City of Santa Fe and the State of New Mexico to reach an agreement to address the current costs and construction timeline associated with the Pojoaque Regional Water System. The proposed legislation would ensure the Bureau of Reclamation has sufficient funding and time to implement its obligations under the 2010 Aamodt Litigation Settlement Act and the related water rights case that began in 1966. The bill would amend the Aamodt Indian water rights settlement (PL 111-291), increasing the amount of funding available for construction costs of the Pueblo Water Facilities from \$106.4M to \$256.4M, and increasing funding for the regional water system from \$50M to \$200M.

During the settlement negotiations, the appraisal-level study of the project grossly underestimated costs, and the non-federal parties have agreed to contribute \$56M to help address the shortfall, Mikkelsen testified at the Subcommittee hearing. He expressed concerns about the language of H.R. 3292, including the need to have consistent deadlines between the various governing documents, as well as a clear definition of "substantial completion" of the project.

In a press release, Governor Michelle Lujan Grisham said: "The state, the federal government and local entities are all in this together, and only by continuing to work together will we ensure the best possible result for the residents of the Pojoaque Valley." State Engineer John D'Antonio said the legislation "...demonstrates the federal government's commitment to provide its appropriate share of the cost for construction of the Regional Water System, a rural infrastructure project that will provide a reliable supply of potable water to both Pueblo and non-Pueblo residents in the Pojoaque Valley."