



# 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](http://www.westernstateswater.org)

Chair - Tim Davis; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

### **WATER QUALITY/LITIGATION**

#### ***Wastewater Infrastructure/Arizona v. IBWC***

On June 30, the Arizona Department of Environmental Quality (ADEQ) and the United States Section of the International Boundary and Water Commission (USIBWC) signed a settlement agreement regarding payment for improvements on wastewater infrastructure for an international sewage pipe that flows from Mexico to Arizona.

ADEQ filed suit against USIBWC in 2012 over Clean Water Act (CWA) violations, *Arizona v. International Boundary and Water Commission et al.* (#2012-008715, Maricopa County Superior Court). ADEQ alleged that USIBWC failed "to implement a program to keep industrial waste from entering domestic sewage, which resulted in illegal levels of cadmium, cyanide, and ammonia nitrogen entering Arizona." (ADEQ Press Release, 5/25/2012).

The recent settlement addresses the CWA compliance issues and provides a comprehensive plan to mitigate future discharges of untreated wastewater into the Nogales Wash and Santa Cruz River. It includes upgrades to the aging wastewater conveyance pipeline, known as the International Outfall Interceptor (IOI), between the U.S.-Mexico border and the Nogales International Wastewater Treatment Plant (NIWTP). It also contains provisions for improving protections for the IOI from stormwater and debris damage. The settlement includes funding of \$38.8M from federal, state and local sources, including USIBWC, the State of Arizona and ADEQ, EPA, and the Freeport McMoRan Foundation.

The ADEQ press release notes: "Treated water from the [NIWTP] is an important contribution to the Santa Cruz River basin which supplies water for drinking, ranching, farming and other activities critical to the Arizona economy. The river also sustains habitat critical to migratory birds, bobcat, deer, javelina and many other species." The NIWTP facility discharges roughly 12 million gallons a day (13,442 acre-feet per year) into the Santa Cruz River, with most of that discharge originating in Mexico. The treated wastewater replenishes roughly 38% of safe groundwater yield in the Santa Cruz Active Management Area (AMA); maintains perennial surface

water flows in an 18-mile stretch of the Santa Cruz River; and constitutes a significant portion of the underflow from the Santa Cruz AMA to the Tucson AMA (over 15,000 acre-feet per year).

Governor Doug Ducey (R-AZ) said: "This agreement is a major win for Southern Arizona, helping resolve a decades-old issue that threatened the health and safety of residents and the environment in Nogales and Santa Cruz County. Working together, ADEQ and USIBWC have developed a plan that will upgrade this critical infrastructure, reduce hazards from storms and flooding and protect people and businesses in this border community." See <https://azdeq.gov/press-releases/>.

Senators Martha McSally (R-AZ) and Kyrsten Sinema (D-AZ), and Representatives Raul Grijalva (D-AZ) and Ann Kirkpatrick (D-AZ), in 2019 introduced the Nogales Wastewater Fairness Act (S. 1783, H.R. 3204), which addresses the equitable apportionment of costs for maintenance and operation of the Nogales sanitation project, owned by the City of Nogales and the USIBWC. Senator McCain introduced a similar bill during the 115th Congress. The City of Nogales has continually sought federal funds and responsibility for infrastructure improvements. McSally said: "This is good news for the people of Nogales, but this settlement makes it even more important that Congress acts to provide certainty for maintaining this international sewer line by passing [S. 1783]." Sinema said: "Today's agreement protects the health and safety of Nogales families by improving water quality and managing sewage flow." See <https://www.sinema.senate.gov>.

### **WATER RESOURCES**

#### ***CWAG/Corps Water Supply Rule***

The Conference of Western Attorneys General (CWAG) recently adopted a resolution relating to the Army Corps of Engineers (Corps) former Water Supply Rule. The resolution authorizes CWAG staff to work with other state associations to pursue legislation that would affirm state sovereignty over the distribution and allocation of water within Corps project reservoirs. The Corps withdrew their proposed Water Supply Rule in early 2020, which would have defined key terms under the 1944 Flood Control Act (FCA) and the 1958 Water

Supply Act (WSA) to clarify Corps' policies governing the use of project reservoirs for domestic, municipal and industrial water supply (see WSW #2384 & #2392).

The resolution emphasized deference to state water law in decades of Supreme Court decisions, congressional testimony, and congressional policy within the 1902 Reclamation Act, the FCA and the WSA. It further states that "the WSA did not authorize the [Corps] to sell water for municipal and industrial uses from its project reservoirs, but rather authorized the [Corps] to enter into contracts to make storage space available for municipal and industrial water supplies," and "contracting to provide municipal and industrial storage space in [Corps] reservoirs pursuant to §6 of the FCA and §301 of the WSA is distinct from the Corps' operations to regulate flows for congressionally authorized navigation and flood control purposes."

The resolution goes on to emphasize the importance of the Prior Appropriation Doctrine in managing, allocating and distributing water to, and that the efforts of the Corps under their Water Supply Rule would have upset the well-established state policies and laws that regulate western water management. "[T]he [Corps] has pursued water supply policies that seek to authorize water supply contracts at individual Corps project reservoirs for water it determines is not required during a specific time period to accomplish an authorized purpose or purposes of that reservoir without regard to the allocation, and distribution of water in western states under State law, primarily the prior appropriation doctrine; and...[the Corps] water supply policies are contrary to congressional intent, and are creating the very legal confusion Congress sought to avoid by expressly recognizing 'the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control....' (33 U.S.C. §701-1)."'

Within the resolution, CWAG adopted the following policy positions regarding "the allocation, distribution, permitting, use, management, and control of waters of river systems flowing through [Corps] project reservoirs:" (1) any Corps policy that seeks to authorize consumptive uses of water passing through project reservoirs without a State-recognized water right is in violation of the FCA, WSA and States' rights to manage their water resources; (2) the Corps must recognize States' rights to manage water resources within their State, including water that flows through or is stored in Corps reservoirs for consumptive uses; (3) the Corps must allow States access to water stored in any project reservoir west of the 98th meridian for purposes of appropriating water for beneficial uses; (4) the Corps can contract storage space within project reservoirs per the WSA, but cannot sell or permit stored water; (5) any water storage in Corps project reservoirs west of the 98<sup>th</sup> meridian for present or future beneficial uses must conform with

applicable state laws and water resources policies; and (6) authorizes CWAG to take action as necessary to ensure state sovereignty over water resources.

## **MEETINGS/ORGANIZATIONS**

### **National Judicial College Webinar**

On August 13 at 11am PST, the National Judicial College, in conjunction with Dividing the Waters, will be holding a webinar titled "The Emerging Megadrought: A Tale of Two River Basins." Panelists include Benjamin Cook, climate scientist at the NASA Goddard Institute for Space Studies in New York City; Connie Woodhouse, Regents' Professor in the University of Arizona's School of Geography, Development and Environment; Bradley Udall, senior water and climate research scientist at Colorado State University who has taught and published extensively on water issues in the Colorado River Basin; and moderator John Thorson, federal water master and Dividing the Waters co-convenor.

The description states: "State and federal judges increasingly preside over cases in which stakeholders assert competing demands for water – whether for consumptive uses, hydropower or the environment. While demand for water continues to increase, supplies are diminishing in many parts of the American West and Midwest. Drought is a pervasive reason for this decline, and it benefits judges to know more about this megatrend....Dividing the Waters is pleased to present a webinar exploring the scientific methods and findings behind these reports of "megadrought" in the Colorado and Missouri River Basins, and some of the policy and legal implications of these trends." Pre-registration is required at <https://www.judges.org/courses/dividing-the-waters-the-impact-of-the-emerging-north-american-megadrought-on-the-colorado-and-missouri-river-basins/>.

## **PEOPLE**

Arizona Governor Doug Ducey appointed **Ayesha Vohra**, Deputy Counsel, Arizona Department of Water Resources (ADWR) to the WSWC. Governor Ducey also appointed **Kelly Brown**, Deputy Counsel, and **Kyle Miller**, Planning and Data Manager, ADWR, to serve as alternate members. **Tom Buschatzke**, Director, ADWR and **Trevor Baggiore**, Director, Arizona Water Quality Division will continue to serve as members.

South Dakota Governor Kristi Noem appointed **Hunter Roberts**, Secretary, South Dakota Department of Environment and Natural Resources (SD DENR) to the WSWC. Governor Noem also appointed **Jeanne Goodman**, Director, Division of Environmental Services, SD DENR, and **Eric Gronlund**, Chief Engineer, Water Rights Program, SD DENR to serve as alternate members. **Kent Woodmansey** will continue to serve as a member.