



# Colorado River District

**75 Years**

**Protecting Western Colorado Water**



## MEMORANDUM

JANUARY 4, 2012

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**TO:** BOARD OF DIRECTORS

**FROM:** CHRIS TREESE

**SUBJECT:** FEDERAL AFFAIRS:  
1ST QUARTER 2012

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I will continue my tradition of a “progressive memo” on federal affairs for the Board’s quarterly meetings. Since federal issues remain active longer than state issues, creating separate quarterly memos for each federal issue would be redundant and inefficient. This progressive memo will follow the issues and developments of interest to the River District in the 112th Congress **with new materials and updates appearing in bold**. Since a session of Congress runs for two years, I will continue the same memo through 2012 to provide the Board with an easier, read-at-a-glance communication concerning federal affairs.

The length of this memo will grow considerably with each quarterly Board meeting. If Board members have questions between quarterly updates or desire additional information on federal legislative developments, do not hesitate to contact me.

### 4th Quarter (2011) Highlights:

- **In a vote divided by party lines, the House Judiciary Committee in November and then the full House in December approved a sweeping regulatory reform bill that would require agencies to conduct a cost-benefit analysis on proposed rules. The "Regulatory Accountability Act," H.R. 3010, would codify the cost-benefit analysis now required of all federal agencies through executive order. Agencies would be required to choose the option that has the least economic cost and be able to justify their reasoning in front of a judicial panel. Rules that have an annual cost to the economy of \$100 million or more, called "major rules," would need to be justified by reason of public health, safety or welfare.**
- **House Republicans introduced several bills that would tie new infrastructure funding to federal revenue generated from an expansion of domestic energy production generally or from the Keystone XL pipeline specifically. The new energy production plan would provide “a new devoted revenue stream” that could pay for infrastructure investments. Water-related infrastructure is included in most proposals.**

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- **Reps. Cathy McMorris Rodgers (R-WA) and Diana DeGette (D-CO) in mid-December introduced H.R. 3680, the "Hydropower Regulatory Efficiency Act of 2011." The bill would ease permitting requirements for small hydropower projects of less than 5 megawatts of power. The bill authorizes \$5 million to carry out the provisions; \$1 million of which goes to the Energy Department, the remainder to the Federal energy Regulatory Commission (FERC).**
- **After seemingly endless back and forth, Congress managed to pass a FY12 omnibus appropriations package to fund the federal government through the current fiscal year (ending 9/30/2012). Of significance were:**
  - **more than doubling of wastewater State Revolving Fund (SRF) funding over the President's budget;**
  - **a small increase in drinking water SRF moneys; and**
  - **\$90 million more for Reclamation than proposed in President's budget.**

### **112th Congress:**

#### **Hydro Incentives:**

Congressmen Adrian Smith (R-NE) and Jim Costa (D-CA) introduced legislation that will wholly exempt hydropower projects generating less than 1.5 megawatts from the Federal Energy Regulatory Commission (FERC) licensing process. To qualify, projects must be constructed on manmade conduits that are existing components of a water district's system. While FERC currently offers an exemption from its onerous permitting requirements for certain small projects, applicants must still undertake a costly, paperwork-driven process that can take months to complete. This bill would eliminate these requirements entirely.

H.R. 795, a bipartisan bill aimed at generating hydropower on federal and non-federal canals and pipelines by eliminating these outdated and inflexible federal regulations, had its first hearing in June before the Water & Power Subcommittee of House Resources. H.R. 795 passed House Resources Committee in July. The bill is also assigned to two other House committees.

#### **More Hydro Incentives:**

S. 629, introduced by Ranking Member Lisa Murkowski (R-AK), includes provisions to streamline the small hydropower regulatory process. At a hearing on the bill before the Water & Power subcommittee, Bureau of Reclamation Commissioner Michael Connor signaled his agency's support for small hydropower initiatives. Reclamation is in the midst of a one-year study of small hydropower opportunities at federally owned facilities as a follow-up to a final study released today on hydropower opportunities as a whole. The agency also intends to announce small hydropower pilot project grant opportunities in the coming weeks.

FERC Director Jeff Wright indicated his support for more efforts to streamline the process and voiced his optimism that a pilot project in which FERC partnered with the State of Colorado to fast-track projects could be replicated nationwide.

**S.629 passed Senate Energy and Natural Resources Committee.**

And Yet Another:

Congressman Tipton (R-CO) introduced H.R. 2842 to authorize small (less than 1.5 megawatts) hydro on all Reclamation canals and conduits. The bill controversially also exempts such installations from NEPA requirements. The River District testified before the House Water & Power Subcommittee in favor of the bill on behalf of the District and the Family Farm Alliance. HR 2842 was single-assigned to the House Resources Committee. The Subcommittee held Mark-up on the bill yesterday. Several changes requested by the River District and others were approved; however, marked-up versions with all changes is not available as of this writing.

And another:

**H.R. 3680, the "Hydropower Regulatory Efficiency Act of 2011," by Reps. McMorris Rodgers (R-WA) and DeGette (D-CO) would help facilitate and advance hydropower projects on non-federal infrastructure. The bill would ease permitting requirements for small hydropower projects that generate up to 5 megawatts of power. It would also allow FERC to extend the term of a preliminary permit once up to two additional years. The bill authorizes \$5 million to carry out the provisions; \$1 million of which goes to the Energy Department, the remainder to FERC.**

Pesticide Application, H.R. 872:

A bi-partisan bill, co-sponsored by lawmakers from the House Agriculture and Transportation and Infrastructure Committees, was introduced in early March 2011. H.R. 872 would address the Court of Appeal's ruling in the National Cotton Council case that requires pesticide users—including farmers, ranchers, forest managers, state agencies, city and county municipalities, mosquito control districts, and water districts, among others to obtain a permit under the Clean Water Act (CWA) for the use of pesticides, in addition to compliance with the Federal Insecticide, fungicide and Rodenticide Act. H.R. 872 must be enacted by October 31, at that time the court ruling will go into effect and pesticide applications not covered by a National Pollutant Discharge Elimination System permit are subject to a fine of up to \$37,500 per day per violation. In addition to the cost of compliance, pesticide users will be subject to an increased risk of litigation under the citizen suit provision of the CWA. Colorado water users have indicated this is an important issue for Colorado farmers.

The House passed the measure in March by a 292-130 vote. It earned the support of all the chamber's Republicans and 57 Democrats.

The Senate Agriculture, Nutrition and Forestry Committee on June 21 passed H.R. 872. The committee choose to address the House-passed bill rather than the introduced Senate companion bill, S.871, in order to expedite passage. The committee passed the legislation in a voice vote. After the committee vote, holds were placed on the bill by several Democratic Senators. It has not seen any floor action.

House Republicans tacked H.R. 872 on to an appropriations bill for U.S. EPA in an effort to get it through the Senate as the court-ordered Oct. 31 deadline for the new permits approaches, **without success.**

**EPA issued a general permit for applicators who do not apply materials over, near or directly to waterways. Colorado has adopted the EPA's general permit. Colorado's two US Senator's wrote to Senate leadership requesting they convene the principals in this legislation to review possible legislative compromises.**

H.R. 1042: The DELIST Act:

This Legislation was introduced in March by Congressman Joe Baca (D-CA) with 8 co-sponsors including three Democrats. "DELIST" provides that any species given ESA protection must be declared extinct after 15 years if it has not increased in population and if the listing poses an economic hardship on the communities located in the range of the species. Mr. Baca is particularly focused on the Deli Sands Flower-loving Fly whose ESA status has hamstrung economic development projects in his district in Southern California and adjacent areas.

Black Canyon & Dominguez Wilderness; McInnis Canyons Wild & Scenic evaluations:

Congressman Tipton has agreed to sponsor legislation addressing the consensus recommendations arising from the Grand Junction BLM's Wild & Scenic stakeholder process. I have circulated draft language to Mesa and Delta counties, area water users and environmental community partners (the Wilderness Society and Colorado Environmental Coalition). Mr. Tipton indicated in September that his current priority regarding public lands legislation is resolution of Chimney Rock and San Juan Wilderness proposals (both predominantly outside River District boundaries).

EPA Guidance proposal:

Most of 2011 EPA's proposed "Guidance Document" has been the focus of considerable debate in the water community and in Congressional hearings. This document is intended to provide administrative clarity to the reach and scope of the Clean Water Act post-Rapanos and SWANCC decisions from the US Supreme Court as well as the failure of past Chairman Oberstar's repeated, proposed "Clean Water Restoration Act" legislation. Concerns with EPA's document include:

1. Guidance extends the definition of "waters of the US" to ditches and other water conveyance structures.
2. Dry arroyos and ephemeral streams would be "waters of the US."
3. Constructed wetlands that are component parts of water reuse projects may be regulated.
4. Uncertainty resulting from when agencies move water supplies through their systems which could create a nexus with navigable waters.
5. Although billed as "guidance" this has the impact of a rule and therefore should be subject of a formal Rule-making process.

In lobbying against Mr. Oberstar's legislation of past Congresses, the River District has consistently held that resolution of uncertainties resulting from recent Court decisions regarding the reach and scope of the Clean Water Act is Congress' alone. While we did not agree with Mr. Oberstar's solution, our message was consistent that Congress must resolve the ambiguity of its legislation and clarify the current intent.

The House FY'12 Energy and Water Appropriations bill as it passed out of committee in early June, contained a rider which prohibits funds from being spent to pursue the EPA's Guidance initiative. There is also a rider that forbids the Administration from spending FY12 funds "to initiate, administer, promulgate, or enforce" any regulatory action which is defined as a rule with an annual implementation cost of \$100 million or more. I do not, however, expect these amendments to survive the full process.

Limits to Financial Awards in Environmental Suits:

H.R. 1996, called the "Government Litigation Savings Act," would make changes to the way the Equal Access to Justice Act (EAJA) is implemented. EAJA requires the federal government to pay attorneys fees when it loses cases under statutes that do not specifically call for such fees to be paid by the government. The legislation is sponsored by two Wyoming Republicans, Sen. John Barrasso and Rep. Cynthia Lummis, along with other members of the GOP-only Congressional Western Caucus. Republican lawmakers have been critical of EAJA because they believe environmental groups active in litigation have been gaming the system by filing large numbers of lawsuits they win on procedural grounds because the government cannot keep up with the caseload.

**The bill passed House Judiciary on a largely party line vote.**

State Supremacy under Clean Water Act:

H.R. 2018, the "Clean Water Cooperative Federalism Act," would give each state the final say in whether a revised state water-quality standard satisfies the Clean Water Act.

Under present law, EPA may veto a new state water-quality standard for a previously regulated pollutant if the EPA determines that the new standard is not consistent with the CWA. Water Act. The bill passed the committee 35-20, with 30 Republicans and five Democrats supporting the bill; 19 Democrats and 1 Republican opposed the bill. In mid-July, by a 239-184 vote, the House approved the bill. The Senate is expected to sit on the bill without action.

DeGette Wilderness Legislation:

Congresswoman DeGette introduced her wilderness bill of 2011, H.R. 2420. There are fewer than the historical 50-60 areas, but there are still nearly 40 new or expanded wilderness areas. None duplicate those included in Congressman Polis' bill for his Hidden Gems wilderness areas in Eagle and Summit Counties. H.R. 2420 includes language similar to that negotiated for the Dominguez Wilderness enabling legislation that defers to (but does not completely rely on) a CWCBC instream flow appropriation for wilderness water rights.

H.R. 1701: Hidden Gems:

Congressman Polis (D-CO) re-introduced his Hidden Gems wilderness legislation in May. As he did last session of Congress, he introduced a bill to establish or expand various wilderness areas in Summit and Eagle Counties. The River District convened water users in each county in 2010 to fully vet water-related issues. Summit County and Summit County water users were satisfied once changes were made. Several Eagle County entities and out-of-basin water users remain concerned about specific proposals in Eagle County. The bill is assigned to the House Resources Committee and its National Parks, Forests, and Public Lands subcommittee.

Recovery Program Authorization:

The Upper Colorado River and San Juan River Recovery Programs require Congressional authorizing legislation to extend their annual operations appropriations. Current authorization expires this year. The on-going and evolving confusion concerning funding restrictions and guidelines for Congressional appropriations continues to stymie plans to introduce authorizing legislation for the programs. Sponsors are lined up and delegation support from Colorado, Wyoming and New Mexico is secure as are key committee members.

Senator Bingaman introduced S.1224 authorizing annual base funding for the Upper Colorado River and San Juan River Recovery Programs. It has been assigned to the Energy and Natural Resources Committee, **which held a hearing but took no action.**