



To: Subcommittee on Water, Oceans and Wildlife Republican Members
From: Subcommittee on Water, Oceans and Wildlife Republican Staff; Kiel Weaver (Kiel.Weaver@mail.house.gov), Annick Miller (Annick.Miller@mail.house.gov), and Rob MacGregor (Robert.MacGregor@mail.house.gov)
Date: November 1, 2021
Subject: Legislative Hearing on H.R.4832, H.R. 5001, H.R. 5345 and H. Res. 320

On **Thursday, November 4, 2021, at 10:00 a.m. EDT, via Cisco Webex**, the Subcommittee on Water, Oceans and Wildlife will hold a remote legislative hearing on four bills.

Member offices are requested to notify Annick Miller no later than Wednesday, November 3, at 4:30 p.m. EDT, if their Member intends to participate in person in the hearing room or remotely from his/her laptop from another location. Submissions for the hearing record must be submitted through the Committee's electronic repository at HNRCDocs@mail.house.gov. Please contact David DeMarco (David.DeMarco@mail.house.gov) or Everett Winnick (EverettWinnick@mail.house.gov) should any technical difficulties arise.

I. KEY MESSAGES

- Two bills (H.R. 5001 and H.R. 5345) represent regional efforts to address environmental and water-related matters in parts of the western United States.
- The other two bills (H.R. 4832 and H. Res. 320) are broader in scope, aimed at providing and measuring water availability.
- This hearing will examine the appropriate federal nexus and the use of American taxpayer dollars in carrying out the bills' purposes.

II. WITNESSES

Panel I

- **The Honorable Tanya Trujillo**, Assistant Secretary for Water and Science, Department of the Interior, Washington, DC

II. WITNESSES (cont'd)

Panel II

- **The Honorable Joel Ferry**, District 1 Representative, Utah House of Representatives, Brigham City, Utah [*Republican witness testifying on H.R. 5345*]
- **Ms. Rebecca Mitchell**, Director, Colorado Water Conservation Board, Denver, Colorado [*testifying on H.R. 5001*]
- **Ms. Bidtah Becker**, Associate Attorney, Navajo Tribal Utility Authority, Gallup, New Mexico [*testifying on H. Res. 320*]
- **Ms. Sara Porterfield**, Water Policy Associate, Trout Unlimited, Boulder, Colorado [*testifying on H.R. 4832*]

III. BACKGROUND

[H.R. 4832](#) (Rep. Susie Lee, D-NV), the *Open Access Evapotranspiration Data Act. To establish the Open Access Evapotranspiration (OpenET) Data Program.*

The bill establishes an Open Access Evapotranspiration (OpenET) Data Program within the United States Geological Survey (USGS) and authorizes \$70 million over five fiscal years for its implementation. H.R. 4832 defines evapotranspiration (ET) as “the process by which water is transferred from the land to the atmosphere by evaporation from soil and other surfaces, and transpiration from plants”.¹

OpenET already exists, as it was launched on October 21, 2021, and is being funded within existing authorities.² The goal of the Open ET program is to provide consistent consumptive water use data to guide water management and conservation efforts. Open ET was developed through a public-private collaboration led by the National Aeronautics and Space Administration (NASA), the Environmental Defense Fund, the Desert Research Institute, Google Earth Engine and HabitatSeven.³ Additionally, the development included researchers and practitioners from the U.S. Department of Agriculture (USDA), USGS, the University of Nebraska, the University of Idaho, the University of Wisconsin, the University of Maryland, California State University Monterey Bay, and the University of Montana.⁴

OpenET uses publicly available data to provide satellite-based information on ET in areas as small as a quarter of an acre and at daily, monthly, and yearly intervals.⁵ The primary satellite dataset for OpenET is from the Landsat program, a satellite imagery partnership between NASA and USGS.⁶ According to a press release, OpenET has received funding from the NASA

¹ <https://www.congress.gov/bill/117th/congress/housebill/4832/text?q=%7B%22search%22%3A%22h.r.+4832%22%7D&r=1&s=1>

² <https://openetdata.org/press-release-10-2021/>

³ <https://www.nasa.gov/feature/transforming-water-management-in-the-us-west-with-nasa-data>

⁴ *Id.*

⁵ <https://openetdata.org/>

⁶ *Id.*

Applied Sciences Program Western Water Applications Office and several other non-profits and foundations.⁷

H.R. 4832 requires that OpenET program data be integrated into activities under the Bureau of Reclamation’s WaterSMART program, which funds water efficiency projects. The intent being the data will be used for “determining consumptive water use on irrigated or other vegetated landscapes for use in water allocation decisions, water budget accounting, and water use reporting.”⁸ The bill has two cosponsors: Representatives Chris Stewart (R-UT) and Jared Huffman (D-CA).

H.R. 5001 (Rep. Joe Neguse, D-CO), the *Upper Colorado and San Juan River Basins Recovery Act*. To authorize the Secretary of the Interior to continue to implement endangered fish recovery programs for the Upper Colorado and San Juan River Basins, and for other purposes.

The Upper Colorado and San Juan River Basins provide key sources of water in the western United States. The Bureau of Reclamation has constructed numerous water and power projects to store and use the water for irrigation, drinking water, hydropower, and flood control purposes, and to benefit recreation and fish and wildlife in the western United States. Facilities include the Colorado River Storage Project’s (CRSP) Flaming Gorge Unit, which can store over 3.5-million-acre feet of water and can generate over 150 megawatts of power.⁹ The three dams that make up the Aspinall Unit, also in the CRSP system, store more than 1-million-acre feet of water and can generate more than 275 megawatts of power.¹⁰

The Endangered Species Act of 1973 (ESA, 16 U.S.C. 1531 et seq.) has significant impacts on the CRSP and other Reclamation and non-federal water projects. The Colorado and San Juan Rivers are home to 14 native fish species. In 1988, four of these species—the Colorado pikeminnow, razorback sucker, humpback chub and bonytail—were listed as “endangered” under the ESA. Those designations led to the threat of water and power-use restrictions. As a result, the States of Colorado, New Mexico, Utah, and Wyoming signed a cooperative agreement that year (another one was signed in 1992) with the federal government to help achieve the dual goals of recovering endangered fish populations while continuing water and power facility development and operations.¹¹ Other partners include water and power users, tribes, and environmental organizations.¹²

These cooperative agreements led to the creation of the Upper Colorado and San Juan Recovery Implementation Programs (Programs) to help provide ESA compliance for over 2,500 water and power projects that withdraw more than 3.7-million-acre feet of water.¹³ The Programs’ goals are to recover the humpback chub, razorback sucker, bonytail and the Colorado pikeminnow while continuing facility operations to meet current and future human needs, with the ultimate goals of

⁷ <https://openetdata.org/press-release-10-2021/>

⁸ H.R. 4832, Sec 2 (e).

⁹ [United States Bureau of Reclamation, CRSP Flaming Gorge Unit Operations](#)

¹⁰ [United States Bureau of Reclamation, CRSP Aspinall Unit Operations](#)

¹¹ [Upper Colorado River Endangered Fish Recovery Program](#)

¹² *Id.*

¹³ [Upper Colorado and San Juan Rivers Endangered Fish Recovery Program Briefing Book](#)

species delisting.¹⁴ As a part of the Programs, genetically diverse, hatchery-based fish are raised at federal, State, and tribal hatcheries.¹⁵ These hatchery-raised fish help establish sustainable species populations since the hatchery-produced fish are counted as part of the recovery criteria under the ESA once they reach adult status.¹⁶

Federal participation and non-federal cost-sharing for the Programs were authorized in the year 2000 with the enactment of Public Law 106–392. Under this law, a cost share between the impacted States, water and power users and the federal government was established. The Cooperative Agreements that implement both programs will sunset in 2023. In 2019, the John D. Dingell, Jr. Conservation, Management, and Recreation Act (P.L. 116-9) made several changes to the Programs’ federal authorizations. These changes included an authorization of appropriations of \$10 million per year from fiscal years 2020 through 2023 for the implementation of the Programs. These funds were deemed non-reimbursable, which means the American taxpayer pays for the Programs. In addition, P.L. 116-9 required the Secretary of the Interior to submit a Report to Congress by September 30, 2021, on recommendations for the programs post-2023.

The Report is required to include a description of the Programs’ accomplishments, the current listing status of the four listed species and their projected status in 2023, the programs’ total expenditures (by funding source) through fiscal year 2021 and projected expenditures through 2023, and the identification of recovery activities and projected costs by the Programs beyond 2023. To date, this report has not been sent to Congress.

On January 21, 2020, the FWS proposed to reclassify the humpback chub from endangered to threatened under the ESA.¹⁷ On October 18, 2021, FWS published the final rule to reclassify the humpback chub in the Federal Register with the rule being effective on November 17, 2021.¹⁸ In addition, on July 6, 2021, FWS proposed to downlist the razorback sucker from endangered to threatened under the ESA.

H.R. 5001 extends the Programs’ base taxpayer funding until 2024 and delays the Report to Congress deadline until September 30, 2022. The bill does not have cosponsors.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ <https://www.federalregister.gov/documents/2020/01/22/2020-00512/endangered-and-threatened-wildlife-and-plants-reclassification-of-the-humpback-chub-from-endangered>

¹⁸ <https://www.regulations.gov/document/FWS-R6-ES-2018-0081-0036>

H.R. 5345 (Rep. Blake Moore, R-UT), the *Saline Lake Ecosystems in the Great Basin States Program Act of 2021*. To authorize the Director of the United States Geological Survey to establish a regional program to assess, monitor, and benefit the hydrology of saline lakes in the Great Basin and the migratory birds and other wildlife dependent on those habitats, and for other purposes.

This bill requires the USGS to establish an Assessment and Monitoring Program to address the hydrology of saline lake ecosystems in the Great Basin. According to the USGS, the Great Basin lies mostly in Nevada and extends into parts of California, Oregon, Idaho, and Utah.¹⁹

Under the program, the USGS is authorized to assess, monitor, and conserve saline lake ecosystems in the Great Basin as well as the wildlife that depend on those ecosystems. Water that is saline contains significant concentrations of dissolved salts.²⁰ The concentration is the amount of salt by weight in water and is expressed in parts per million (ppm).²¹ Fresh water contains less than 1,000 ppm of salt and anything above that is considered saline water.²² Ocean water contains about 35,000 ppm of salt.²³ Saline lakes in the Great Basin include Lake Abert in Oregon, Lahontan Valley Wetlands in Nevada, the Great Salt Lake in Utah, and Mono Lake in California.²⁴

The bill authorizes \$5 million for each of fiscal years 2022 through 2027 for the USGS, in coordination with the FWS and other federal, state, tribal, and local agencies, research universities, non-profit organizations, and other partners, to develop a multi-year action plan to assess, monitor, and conserve saline lake ecosystems. The bill specifically states that the plan cannot affect water compacts or rights as well as the management and operations of Bear Lake in the Idaho–Utah border or Stewart Dam in Arizona.

H.R. 5345 has five cosponsors: Representatives Jay Obernolte (R-CA), Jim Costa (D-CA), Jared Huffman (D-CA), Mike Thompson (D-CA), and Susie Lee (D-NV).

H.Res. 320 (Rep. Joe Neguse, D-CO), Recognizing the critical importance of access to reliable, clean drinking water for Native Americans and Alaska Natives and confirming the responsibility of the Federal Government to ensure such water access.

H. Res. 320 expresses the sense of the House of Representatives that access to reliable and clean drinking water is important to the health and welfare of American Indians and Alaska Natives and calls upon the federal government to provide water access to tribal communities. The resolution mentions programs administered by Departments and Agencies, such as the Indian Health Service of the U.S. Department of Health and Human Services, the Environmental Protection Agency and the U.S. Department of Agriculture, none of which are under the jurisdiction of the Water, Oceans and Wildlife Subcommittee. The Subcommittee does have jurisdiction over Indian water rights settlements, but does not have jurisdiction over the Clean

¹⁹ <https://greatbasin.wr.usgs.gov/>

²⁰ [USGS Saline Water and Salinity](#)

²¹ *Id.*

²² [USGS Saline Water and Salinity](#)

²³ *Id.*

²⁴ <https://www.ducks.org/utah/utah-conservation-projects/waterfowl-facts-the-great-salt-lake>

Water Act or the Safe Drinking Water Act. House Resolutions, even if passed by the House and Senate, are not presented to the President for action and do not have force of law.

Related to the Subcommittee's jurisdiction, the 1908 Supreme Court decision in *Winters v. United States*²⁵ held that the federal government implicitly reserved water rights sufficient to fulfill the purposes of an Indian reservation.²⁶ As a result, some tribal communities have sought federally reserved water rights claims under the "Winters Doctrine." These rights, while implicitly reserved and generally senior to other rights, can be controversial given Western water scarcity and existing junior water rights. In addition, such Winters Doctrine rights are often not quantified. Since 1990, the Department of the Interior's (DOI) policy has been that Indian water rights should be resolved through negotiated settlements rather than litigation.²⁷ As such, DOI published a list of criteria and procedures regarding negotiations including that "settlements should be completed in such a way that allowing water claims are resolved and finality is achieved"²⁸ and that "the total cost of a settlement to all parties should not exceed the value of the exciting claims".²⁹ To date, Congress has approved 34 such settlements.³⁰

H.Res. 320 has four cosponsors: Representatives Nanette Barragan (D-CA), Jared Huffman (D-CA), Grace Napolitano (D-CA) and Teresa Leger Fernandez (D-NM)

IV. MAJOR PROVISIONS & ANALYSIS

H.R. 4832 (Rep. Susie Lee, D-NV)

- Authorizes \$70 million over five fiscal years for the USGS to implement an Open Access Evapotranspiration (OpenET) Data Program.

H.R. 5001 (Rep. Joe Neguse, D-CO)

- Extends the Programs for one year (until 2024).
- Extends the Report to Congress deadline for one year (until 2022).

H.R. 5345 (Rep. Blake Moore, R-UT)

- Authorizes \$30 million (over six years) for the USGS, in coordination with the FWS and other federal, state, tribal, and local agencies, research universities, non-profit organizations, and other partners, to form an action plan for a multi-year integrated program to assess, monitor, and conserve saline lake ecosystems.

²⁵*Winters v. United States*, 207 U.S. 564, 575-77 (1908).

²⁶ *Id.*

²⁷ [Department of the Interior, "Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Groups," 55 Federal Register 9223, March 12, 1990.](#)

²⁸ *Id.* Criteria #3.

²⁹ *Id.* Criteria #4.

³⁰ [Congressional Research Service: Indian Water Rights Settlements. \(R44148\), by Charles V. Sterne, updated May 22, 2020.](#)

[Note: Since publication, Congress enacted two additional Indian water rights settlements in P. L. 116-260.](#)

H.Res. 320 (Rep. Joe Neguse, D-CO)

- Resolution expressing the sense of the House of Representatives that access to reliable and clean drinking water is important to the health and welfare of American Indians and Alaska Natives.

V. COST

The bills have not received a Congressional Budget Office cost analysis.

VI. ADMINISTRATION POSITION

Unknown at this time.

VII. EFFECT ON CURRENT LAW (RAMSEYER)

H.R. 5001 (Rep. Joe Neguse, D-CO)