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WESTERN REGIONAL OVERVIEW

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INTRODUCTION

Nearly 25 years ago, the Western States Water Council was created by resolution of the Western Governors' Conference (now the Western Governors' Association). Western governors recognized that the future growth and prosperity of western states depended upon the availability of adequate water supplies of good quality. The express purpose of the council is to promote effective cooperation among western states in matters relating to the planning, conservation, development, management, and protection of their water resources. Council members are appointed by their respective governor. New Mexico is represented by Steve Reynolds, Charles DuMars, Frank DuBois, and Wayne Cunningham (alternate). The governors themselves are ex officio members.

When the council was organized in 1965, western states found themselves in an era of rapid federal water resources development, and regional or basin-wide planning, without a direct unified voice in the use of their own water resources. Water availability to meet ever increasing needs and potential interbasin transfers of water were important issues. Since its organization, the Western States Water Council has provided a united voice on behalf

of western governors on water policy issues. The emphasis and focus of the council has changed over the years as different water policy problems have evolved. However, there has been a continuing commitment to working toward a regional consensus on issues of mutual concern.

The council strives to protect western states' water resources interests, while at the same time serving to coordinate and facilitate efforts to improve western water planning and management. At present, there are fifteen member states and two associate member states. The latter includes the recent inclusion of the State of Minnesota. The council has proven it is a dynamic, flexible institution providing a forum for the free discussion and consideration of many western water policies and problems that are vital to our future welfare. As originally envisioned by the Western Governors' Conference, it has succeeded as a continuing body, serving the governors in an expert advisory capacity.

Nevada Governor Grant Sawyer addressed the first meeting of the council in 1965. He observed water availability in the West was a major obstacle to an expanding economy. In addressing future water problems, the governor suggested the role of the Western States Water Council should be to provide guidance on behalf of western states in the

development of needed water resources. Governor Sawyer praised western governors for recognizing the necessity for cooperative state action to "resolve our own problems rather than looking elsewhere for their solutions."¹ The governor added: "We must act as fast as we can, for I guarantee, if we cannot get this moving among the states, it is going to be done, and it may be done at a level which may not take into account the public interest as we see it. If we cannot work together as combined states, we certainly cannot complain if someone else, specifically the federal government, resolves our problems for us. We cannot complain about federal control when it is invited by our own inaction."²

Two years later, California's new governor, Ronald Reagan added: "I am impressed with the need for the states of the West to look beyond sectional interests and to approach water resources development on a regional basis.... I am convinced that the best approach to westwide regional planning is through cooperative state action. I see no need, certainly at this time, for the states to look to Washington to act as a broker in this endeavor." In 1985, President Reagan renewed this conviction stating that "...cooperation among the states was the best way to achieve optimum use of water resources in the West. States are primarily responsible for the management, regulation and development of water resources. A federal interest in western water resources remains, but here too, cooperation is the key."³

Hopefully, the following discussion will provide a regional perspective on various water resources issues, focusing on appropriate state and federal roles in national water resources management.

National Water Policy and the West

In 1965, the same year the governors created the Western States Water Council, the U.S. Congress enacted the Water Resources Planning Act establishing the national Water Resources Council to encourage the conservation and development of our water resources on a comprehensive and coordinated basis. The intent was to encourage the cooperation of all federal agencies, state, and local governments, and other public and private concerns. Most concede the Water Resources Council failed to fully achieve its major objectives. However, the need for cooperative action remains.

The Western States Water Council worked closely with the Water Resources Council as well as through subsequent federal administrative forums. We have reviewed recent calls for a new national water commission, a President's water council, White

House conference on water resources, and other national water policy forum proposals. The Western States Water Council has not taken a position on any of these proposals, but generally, western states support greater cooperation and coordination.

North Dakota Governor George Sinner, chairman of the Western Governors' Association, is particularly concerned with improving coordination between federal and state water policies and programs. Based on his experiences in dealing with the recent drought, Governor Sinner has concluded that the present system (or lack thereof) promotes divisiveness, decisional gridlock, and an increasing incapability of dealing effectively with growing water resources concerns. Governor Sinner has further referred to the pending Environmental Protection Agency (EPA) veto of a 404 permit under the Clean Water Act by the Army Corps of Engineers for the nonfederal Two Forks Project as exemplifying the failure of the current system to address effectively water supply and management problems. The project would provide a future water supply for the metropolitan Denver area in Colorado.

While supporting greater cooperation, many western state water resources managers are concerned that any federal water policy and program coordination mechanism might become merely another "bureaucratic paper machine." To be effective, any new federal agency must have sufficient authority to implement its decisions and it must have visible, high-level support in the Administration and from the Congress. Further, states must have an active and strong role.

Any successful effort at establishing a truly effective national water policy must focus on defining roles and improving the process - recognizing no static policy statement will survive for long. Over the years, a great many committees, task groups, and commissions have produced a very long list of suggestions with respect to national water policy. A few far-sighted recommendations have been, or are being implemented, while others await a more favorable social, political, or economic climate. However, none of our past efforts have resulted in a truly comprehensive national water policy. Nor, if history is any guide, would it appear any such document is possible or even desirable. While we are not totally without vision, the field of water policy and management is truly an area requiring that we muddle through muddy waters, braving the sometimes treacherous currents. Our challenge is to improve the present process for developing national water policy and build bridges across our national water problems.

Western Regional Overview

We are constantly defining and redefining appropriate intergovernmental roles with respect to national water resources management. In the past, federal attitudes have relegated states to the status of a "junior partner" in determining and implementing national water policy. Too often, discussions of national water policy have focused almost exclusively on federal policy and program changes. New roles are evolving as a result of changing water needs and uses, changing public values, federal fiscal problems, and other trends. Recently, federal actions appear to be shifting the weight of responsibility for water policy, planning and management to the states.

Western states believe a fundamental principle for establishing any effective national water policy is that states have the primary authority and responsibility for water resources planning and management. Generally, the states are in the best position to weigh competing interests and appropriately allocate and protect our water resources to maximize our social, environmental, and economic health and welfare. However, while states generally welcome the opportunity to reassert their role as the "managing partner," too often recent federal fiscal and regulatory reforms have resulted not only in the delegation, but sometimes the abdication of responsibility for implementing "national water policy."

Cooperation - Not Pulling Up Fence Posts

While the West is often viewed as the home of rugged independent individuals, cooperation was the key to its successful settlement and development. In July of 1847, looking over the Great Salt Lake Valley from the mouth of Emigration Canyon, the Mormon Prophet Brigham Young declared, "This is the right place, drive on." Compared to the rich lands of their homes in Illinois, Missouri, Ohio, Pennsylvania, and New York, many of the emigrants probably did not see the Great Salt Lake Valley, largely sagebrush, as a Promised Land flowing with milk and honey. However, the next day, these Mormon pioneers began plowing fields, planting crops, and diverting the local streams for irrigation. With vision and hard work, the desert did blossom. Their cooperative endeavors and other similar examples, such as the Spanish missions in the Southwest and New Mexico's acequia, or community ditch systems, were key to the successful settlement of the West. Western water resources were and are scarce, but careful planning and management and cooperative development helped meet past needs and set a pattern directing future growth and now allowing for new uses.

My great great grandfather, William Lee, was called by Brigham Young to lead a mission among the Indians of the Great Basin. He had a special gift with the Indian language and baptisms followed his efforts. However, his journal talks more about irrigation than conversion. The church mission included a farm to help the Indians improve their lifestyle. My grandfather records arising early and working long hours irrigating fields and supervising the work of the missionaries and Indian workers. He also records spending time mending fences, often because the Indians tended to pull up the posts for firewood. With regard to water policy, too often we find that given different needs and values (or misunderstandings), we spend too little time working together and too much time pulling up fence posts.

CONTEMPORARY PUBLIC VALUES AND ISSUES

My great great grandfather's journal largely speaks of farming and hard work. He sometimes mentions gentle evening rains in the summer, but otherwise very little refers to aesthetics. There is no mention of recreation. He said nothing about fish and wildlife or wetlands. Nothing is said about non-point source pollution, selenium, fertilizer, pesticides, and herbicides. There is no mention of lawsuits, water right adjudications, federal reserved rights, or the Indians claiming any right to the stream used to irrigate the fields. There is nothing about water policy and planning, or any intergovernmental or interagency jurisdictional disputes. Occasionally there were quarrels among the workers. There is no mention of many other contemporary water policy concerns. He does not mention ground water, drought, wilderness, hydropower, global warming, or interbasin transfers. All of these and other contemporary issues are now before the Western States Water Council, and I want to discuss a few.

Ground Water

In recent years, ground water has become a prominent national concern. Ground water has always been an important resource in the West, and generally states have sufficient authority to effectively manage and protect the resource. However, faced with the potential threat of comprehensive federal legislation regulating the management and use of ground water, the Western States Water Council has developed an "alternative" bill which delineates appropriate state and federal roles. The purpose is primarily as a defense against any federal intrusion

in what has been primarily a state responsibility. In our play, the states star and the federal government is cast in a supporting role. We go so far as to suggest federal actions should be consistent with state policies and programs. However, our writers have yet to reach a consensus in refining the script. Congress' interests in federal ground-water legislation appears to have waned. Therefore, the council's bill may never play. We have recently testified on federal ground-water legislation at congressional hearings based on general principles. We have also participated in the development of a unified state position with several interstate agencies.

Ground Water Recharge

The Western States Water Council is a nonprofit organization, an interstate agency which is funded almost exclusively by state dues. We have not sought grants or contract work. However, this past spring, the Bureau of Reclamation and the council signed a cooperative agreement to perform a study of legal, institutional, economic, and cost sharing considerations related to ground-water recharge. The bureau was required to contract with the states for this study by federal statute. We are currently gathering information from our member states and other Reclamation states, which will be summarized in a draft report. The first rough draft is scheduled to be released for comment in January 1990, with the final report completed before August 1990.

Interbasin Transfers

I know ground-water and interbasin transfers are issues important to this part of New Mexico. The Western States Water Council was organized during an era of grandiose proposals to move water from the water rich areas of Canada and the Northwest United States, to the arid Southwest. Of the original eleven member states, it has been said five states joined the council seeking additional water supplies, five joined to protect their water resources from export, and one joined to protect its interests in both directions. The state of Texas requested membership in 1966 citing the complicated problem of providing a dependable water supply for the high plains of West Texas, and their deep interest in the possibility of solving this problem on a regional basis by the interstate importation of water. Texas' request was deferred, though the state was granted observer status. In 1978, Texas became a full member.

In 1969, the council published *A Review of Inter-Regional and International Water Transfer Proposals*. Considerable controversy had arisen among member states over water transfer proposals, many of which were merely "lines on maps." At least one member observed that none of the schemes justified study in depth. It was suggested major inter-regional surface water transfers were perhaps 50 years away. They are probably not yet any closer to becoming reality. Still, as you are well aware, the U.S. Supreme Court's *Sporhase* decision and the *El Paso* suit have changed how we look at water and water transfers. The council has previously reviewed state statutes restricting water exports and monitored water transfer issues.

This past year, the Nevada state legislature adopted a joint resolution asking that the council study the "orderly and optimum development of inter-regional transfer of water resources in the western states to meet the needs of the wildlife and the people who live in the arid Southwest." In response to this request, the council intends to prepare a report on the current status of state and federal statutes regarding the interstate transfer and use of water, analyze related case law, describe any current major transfer proposals, and evaluate the pros and cons of interbasin transfers. We intend to approach this delicate topic carefully.

State Water Planning

While I have previously mentioned our interests and effort with regard to national water policy proposals, the council is also striving to improve state water planning and management. Last month, the council sponsored a symposium on state water plans. Twenty state representatives presented papers and the meeting drew participants from as far away as Alabama, Alaska, Hawaii, and Minnesota. Many western states are revising their state water plans, as well as reviewing existing state water institutions and organizations. The diversity of state water needs necessarily requires that the planning process and state institutions vary from state to state. State programs, policies, and plans address differing water problems. The council sponsored the symposium in response to interest for information regarding western state planning and management processes and programs. We intend to review the papers presented and very briefly summarize any special approaches or unique examples of resolving water resources planning and management problems.

Western Regional Overview

Drought

The council has also specifically focused on drought response planning in recent years. The Western States Water Council was very active in state and federal response efforts during the 1976-77 drought. In 1986, the council prepared a report on *Western State Drought Management*, and in 1987, *A Model for Western State Drought Response Planning*. This work has been well received and used by the states in responding to the current continuing drought. The drought is not over, though the extent and intensity of its impacts are continually shifting. In some instances, it has been more serious than in 1976-77, but westwide the impacts have been less serious. This past summer, the council has periodically prepared a summary of current drought conditions and various western state response activities. The council has and will continue to work with the Western Governors' Association toward improving coordination of state and federal response activities and highlighting successful state drought response measures. A work group is being formed to develop policy recommendations.

Clean Water Act and Safe Drinking Water Act

More and more water quality issues require western water managers attention. States are continually faced with growing regulatory and management responsibilities under federal statutes providing little, if any, increased financial support (in proportion to the increasing responsibilities). Water quality regulation perhaps best illustrates the previous administration's religion of "fiscal federalism." It might also be termed "fiscal flight," given the political panic associated with the present federal budget deficit problem. There appears to be no reasoned approach to dividing intergovernmental responsibility based on principles of economic efficiency and social equity.

The states' experience has been that they are left to implement and fund programs to meet national goals (such as fishable, swimmable, and drinkable waters) created by federal statutes. Where the federal government has established such rights, a financial obligation remains, which it should not abdicate. Further, in many instances, while abandoning programs by withdrawing financial support, the federal government nevertheless expects that the states, as the adoptive parents, comply with its every wish and command in raising the orphans. The Western States Water Council continues to raise these concerns with EPA and the Congress. Fur-

ther, the council is completing a report on state alternative/innovative funding programs related to water quality.

Treatment of Indian Tribes as States

One rather innocuous, and at the time, noncontroversial provision of the Clean Water Act amendments of 1986, was Section 518. It directed that Indian tribes be treated as states for many purposes. The council has been active in evaluating proposed regulations implementing the amendment and insisting that EPA adequately consult with the states as specifically directed by the statute. To date, few tribes have applied to exercise such authority, and EPA must first find that they have the capacity to administer federal water quality programs. However, the potential for serious conflicts within basins checkered by various reservations as well as state and federal lands is obvious.

Moreover, EPA has yet to clarify the status of past state water quality standards and other regulatory authorities on reservation lands given the new provisions. The best EPA has been able to do is state that it assumes without determining that state standards are still applicable pending acceptance of jurisdiction by the tribes. The present confusion reminds me of a previous speech by Governor Carruthers, then Assistant Secretary of Interior for Land and Water Resources, about the first rule of wing walking. That is, "Don't leave hold of what you have ahold of until you have ahold of something else."

Nonpoint Source Pollution

Also regarding water quality, this past year, the council sponsored a very successful workshop on technical issues related to non-point source pollution control in western states. The workshop followed a survey conducted by the council in 1986 on related problems. The workshop proceedings have been published as a resource book to aid states in the preparation of nonpoint source pollution management programs under Section 319 of the Clean Water Act. It highlights successful state strategies and nonregulatory methods of dealing with nonpoint source pollution control. The council is also interested in water quality problems related to irrigation and has invited the National Research Council's Water, Science and Technology Board's Committee on Irrigation-Induced Water Quality Problems to present a workshop for council members next January.

Federal Reserved Water Rights and State General Adjudication Procedures

Earlier this month, the council sponsored a workshop for state representatives to exchange ideas regarding the efficient and effective adjudication of appropriative water rights and federal reserved water rights. Among the issues discussed and under continuing discussion include the negotiation and litigation of Indian reserved water rights claims and water for wilderness areas. Also of note, the council participates in an ad hoc group on Indian reserved water rights which includes representatives of the Western Governors' Association, tribal organizations, and industry interests.

Conflicts Between Federal Statutes and Western State Water Law

The council strongly supports the appropriation doctrine as a flexible and dynamic institutional mechanism for allocating and regulating water use. Conflicts continue to arise between state water law and the implementation of federal statutes, primarily environmental laws. The council has prepared a draft report summarizing examples of conflicts in various areas and describing methods to reduce difficulties. Rather than pulling up fence posts, we believe in mending fences. Legitimate state and federal water needs can be accommodated.

Federal Hydropower Licensing

Last, but not least, the council has been directly and heavily involved in a continuing conflict with the Federal Energy Regulatory Commission (FERC) over federal hydropower licensing and state water rights in water resources management. Until 1940, FERC's predecessors deferred water-use decisions related to hydropower development to the states in compliance with Section 27 of the Federal Power Act. In 1940, the U.S. Supreme Court issued its *First Iowa* decision, which clouded the state's claim to exclusive jurisdiction regarding the appropriation of water for all purposes, including hydropower.

The issue has recently come to a head in California in the *Rock Creek* case. While this small project would produce an insignificant amount of power, given national energy needs, FERC claimed exclusive jurisdiction to regulate water release requirements for instream flow purposes. FERC disregarded the state of California's jurisdiction and water right requirements under state law. The Ninth

Circuit Court of Appeals recently upheld FERC's claims stating the Supreme Court had already decided the question. The decision was not unexpected, and California has petitioned the Supreme Court for a writ of certiorari. The Western States Water Council prepared an amicus brief before the Ninth Circuit that was revised and circulated by the state of Idaho. Fifteen states signed. Idaho has now prepared an amicus brief before the Supreme Court, which some 43 states have agreed to sign.

Hopefully, the Supreme Court will put FERC in its place, but if not, federal legislation may be possible to restore the states' previous authority. As it now stands, FERC claims comprehensive jurisdiction over any waterway with federal hydropower development, including authority to grant or deny any upstream diversion for any use so as to protect flows for hydropower. FERC has refused to subordinate federal hydropower use to future upstream diversions under state permits (even domestic use). FERC also refuses to require preliminary permit applicants to acquire or demonstrate the ability to acquire state water rights for a project, which can be condemned under the federal statute.

FERC has also run afoul of the states with respect to state water quality certification requirements for federal projects under Section 401 of the Clean Water Act. FERC unilaterally waived state authority to make certification decisions on some 227 projects in 32 states, claiming states were unduly delaying required certification action. FERC has refused to reconsider its order, despite numerous state petitions and federal legislation which passed both the House and Senate last year, but died before the differing versions could be reconciled. However, the Fourth Circuit Court of Appeals in Virginia recently revoked the license for a project issued improperly by FERC after waiving the state's certification authority in the *Fredericksburg* decision.

CONCLUSION

I have touched on many issues before the council only briefly. I want to emphasize again the growing importance of the state role in water resources management and the necessity of working together with federal agencies, Indian tribes, and other public and private interests toward resolving western water resources problems.

¹ Minutes of the 1st Western State Water Council meeting held at Harvey's Resort Hotel in Stateline, Nevada on Lake Tahoe, on August 3, 1965.

²Ibid.

³Letter to the Western States Water Council dated April 5, 1985, in marking its 20th anniversary.