THE WESTERN STATES WATER COUNCIL

PRESENTS

ITS FOURTH BIENNIEL

WATER POLICY SEMINAR

SEMINAR HIGHLIGHTS

- REMARKS BY MEMBERS OF CONGRESS ON ***WATER POLICY ISSUES IN THE 102nd CONGRESS***
- ROUNDTABLE DISCUSSIONS WITH CONGRESSIONAL STAFF MEMBERS, ADMINISTRATION OFFICIALS AND REPRESENTATIVES OF EIGHTEEN WESTERN STATES ON ***PROTECTING STATE INTERESTS IN THE FERC HYDROPOWER LICENSING PROCESS AND WATER QUALITY/ WATER QUANTITY ISSUES IN THE CONTEXT OF REAUTHORIZ-ATION OF THE CLEAN WATER ACT***
- LUNCHEON FEATURING REMARKS BY WATER LAW EXPERTS ON THE SUBJECT OF **ACCOMMODATING FEDERAL INTERESTS IN STATE WATER REGULATION**

APRIL 11TH - - 8:30 - 10:30A.M., 3:00- 5:00P.M.; - **AT THE HALL OF THE STATES** SOCIAL HOUR AT 6:00P.M. - - **AT THE QUALITY HOTEL ON CAPITOL HILL**

APRIL 12TH - - 10:30A.M. - 1:30P.M. - - **AT THE SENATE DIRKSEN OFFICE BUILDING** (10:30A.M. - 12:00P.M., in Room 192; 12:15 - 1:30P.M. luncheon, in Room 325, **SENATE RUSSELL OFFICE BUILDING**)

APRIL, 1991 WASHINGTON, D.C.

Foreward

On behalf of the members and staff of the Western States Water Council I want to take this opportunity to welcome you to our Water Policy Seminar. To help ensure that you find this a beneficial experience, we have prepared these briefing materials for you.

This forward is followed by the agenda and schedule for the Seminar and a table of contents for the other materials in this booklet. Some background regarding the Western States Water Council and the purpose of this Seminar is next. There follows information on the three topics which will be the focus of roundtable discussions during the Seminar and the luncheon on Friday. The information regarding each topic for discussion concludes with a listing of relevant questions. Finally, a list of Council members and staff is included for reference.

While the issues to be addressed during the Seminar will not be new to many of you, we hope that this Seminar will provide a valuable opportunity for you to gain new perspectives and share fresh insights. In this regard, we would appreciate any comments you may have regarding this Seminar.

The Council desires to acknowledge with appreciation the efforts of its Water Policy Seminar Subcommittee, chaired by David Kennedy. The Council also wishes to express its gratitude to Senator Mark Hatfield and his staff for their assistance in arranging the facilities for the Seminar and the Friday luncheon.

Thank you for coming.

Craig Bell

D. Craig Bell

Executive Director

SCHEDULE AND AGENDA

WATER POLICY SEMINAR
of the
WESTERN STATES WATER COUNCIL
April 11-12, 1991
Washington, D.C.

Thursday, April 11 **8:30 a.m. - 10:30 a.m., 3:00 p.m. - 5:00 p.m.**
Room 237, Hall of the States, 444 North Capitol

7:30 a.m. Registration with pastries, coffee and juice

8:30 a.m. - 10:30 a.m. Remarks by the Honorable **JAMES JEFFORDS**, Senator from Vermont and member of the Senate Committee on Environment And Public Works

Roundtable Discussion on Protecting State Interests in the Hydropower Licensing Process of the Federal Energy Regulatory Commission

Moderator: Gary Fritz, Administrator, Montana Department of Water Resources and Conservation

FERC: **Fred Springer,** Chief of the Hydrolicensing Division

CONGRESS: **Gary Ellsworth**, Senate Committee on Energy and Natural Resources

Bill Conway, Senate Subcommittee on Water and Power

Dave Finnegan, House Committee on Energy and Commerce

John Zirschky, Legislative Assistant to Senator James Jeffords

Nils Johnson, Legislative Assistant to Senator Larry Craig

OTHERS: **John Echeverria**, American Rivers

STATES: Representatives of 18 Western States

3:00 p.m. - 5:00 p.m. Remarks by the Honorable **ALAN SIMPSON**, Minority Whip and Member of the Senate Subcommittee on Environmental Protection

Roundtable Discussion on Water Quality/Water Quantity Issues in the Context of the Reauthorization of the Clean Water Act

Moderator: Randolph Wood, Director, Arizona Department of Environmental Quality

EPA: **Bill Matuszeski**, Associate Assistant Administrator

CONGRESS: **Gabe Rozsa**, House Committee on Public Works

Errol Tyler, House Subcommittee on Water Resources

Steve Shimberg, Senate Environment and Public Works Committee

Jim Beirne, Senate Committee on Energy and Natural Resources

Trent Clark, Legislative Assistant to Senator Steve Symms

Bob Kenney, Legislative Assistant to Senator Harry Reid

STATES: Representatives of 18 Western States

6:00 p.m. Social Hour for Registrants, Council Members, and Guests Sponsored by Boyle Engineering Corporation, Quality Hotel on Capitol Hill, Executive/Judicial Room

Friday, April 12 **10:00 a.m. - 1:30 p.m.**
Room 192, Senate Dirksen Office Building

10:00 a.m. Registration

10:30 a.m. Welcome and Introductions - Dee Hansen, Executive Director, Utah Department of Natural Resources

10:35 a.m. Remarks by **DENNIS UNDERWOOD**, Commissioner of the Bureau of Reclamation

11:15 a.m. Remarks by the Honorable **JAMES HANSEN**, Representative from Utah and Ranking Minority Member of the Subcommittee on Water and Power, House Interior Committee

Room 325, Senate Russell Office Building

12:15 p.m. Luncheon

Opening Remarks and Introductions, David Kennedy, Director, California Department of Water Resources

Topic: **Accommodating Federal Interests in State Water Regulation**

Speakers - **"The Law" - Charles DuMars**, Professor of Law, University of New Mexico

- **"The Reality" - Keith Higginson**, Director, Idaho Department of Water Resources

Contents

Background Regarding the Western States Water Council

Fifteen states are members of the Western States Water Council which was organized in 1965. Each Governor appoints up to three representatives who serve at the Governor's pleasure. In addition, the states of Hawaii, Minnesota, and Oklahoma are associate members and participate in Council meetings and activities. According to its Rules of Organization, "the purpose of the Western States Water Council shall be to accomplish effective cooperation among western states in matters relating to the planning, conservation, development, management, and protection of their water resources."

The need for cooperation among the states was based on the premise of primary state authority to manage water resources in the western appropriation states. Through the exercise of such authority, decisions are reached which shape the future growth and destiny of the West.

However, as the federal government has increasingly asserted its interest in the management of this scarce resource, traditional state authority has been challenged.

Many of the activities of the Council over the years have been directed at finding ways to accommodate legitimate federal interests, while maintaining vital state prerogatives in water resources allocation and management. This Seminar represents one such activity.

Seminar Objective

The objective of the Seminar is to promote open discussion between state and federal representatives responsible for development of water policy, regarding issues of particular concern to the western states. The discussions will particularly focus on appropriate federal and state roles, with the aim of providing an enhanced perspective on how federal interests can best be accommodated within the framework of state water management prerogatives and responsibilities.

State Water Law and FERC Hydropower Licensing

INTRODUCTION

Over the past year, a number of events have renewed interest in the appropriate relationship between state water law and Federal Energy Regulatory Commission (FERC) hydropower licensing. In light of the U.S. Supreme Court's California v. FERC decision, western states have called upon Congress to re-evaluate federal/state relationships and enact legislation to clarify its intent that the control and use of water for all purposes be balanced under state law. Recently, legislation that would affect state regulation of hydropower has been introduced and will be considered in relation to national energy policy.

States contend FERC's assertion of exclusive authority over water use for hydropower projects, without regard to state law relating to the use and appropriation of water for all other purposes, is unreasonable and unworkable. States recognize hydropower development as a beneficial use of water. However, to maximize and protect the public interest, water use for hydropower projects must be subject to valid existing proprietary rights and state permit conditions. States maintain that they should retain primary authority to administer existing proprietary water rights and manage and regulate water for all uses, including hydropower.

Appropriation Doctrine

Under state water law, rights to use water are created by applying water to publicly defined beneficial uses. States grant permits, as evidence of the ownership, under administrative systems used to manage the interrelated water rights. One important characteristic of appropriative rights is that the use first-in-time is considered first-in-right. In other words, senior water rights are protected from encroachment by junior users. This assures that in times of shortage sufficient water will be available to meet some needs.

State administrative systems enforce this chronological hierarchy. Appropriative water rights are constitutionally protected property interests. State water right agencies must weigh and balance public interest factors when a right is granted or an application to transfer a right to a new use is proposed. They act to protect the public interest and balance all water uses. Congress has traditionally deferred to state water law to balance competing water uses.

The Federal Power Act

When Congress passed the Federal Power Act (FPA) in 1920, it inserted Section 27 to assure that states would retain the authority to manage and regulate water use while the federal government would regulate hydropower generation. Section 27 reads:

"Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses or any vested right acquired therein." (16 U.S.C. 821).

During the 1920's, 30's, and early 40's, the Federal Power Commission (FPC), now the Federal Energy Regulatory Commission (FERC), required hydropower permit applicants to demonstrate full compliance with state water law as a prerequisite to obtaining a hydropower license. This practice stopped after the U.S. Supreme Court's 1946 First Iowa decision, which narrowly construed state permitting authority under Section 9(b). The Court held the FPC could license a hydropower project even though the licensee was in violation of Iowa laws requiring a state permit to build a dam and prohibiting the de-watering of a river. Thus, First Iowa contradicted the clear meaning of Section 27. Since the late 1970's and early 1980's, western state water resource managers have increasingly experienced serious conflicts with FERC hydropower licensing decisions.

California v. FERC

On May 21, 1990, the U.S. Supreme Court unanimously affirmed a Ninth Circuit Court of Appeals decision that FERC has exclusive jurisdiction to determine minimum bypass flow rates for hydropower projects to protect fish and wildlife. The California State Water Resources Control Board had issued a state water permit for the Rock Creek project with minimum flow rates exceeding FERC's requirements. The Court held, "The California requirements for minimum streamflows cannot be given effect and allowed to supplement the federal flow requirements."

The Court said, "Were this a case of first impression, petitioner's argument based on the statute's language could be said to present a close question.... But the meaning of section 27 and the pre-emptive effect of the FPA are not matters of first impression. Forty-four years ago, this Court in First Iowa construed the section and provided the understanding of the FPA that has since guided the allocation of state and federal regulatory authority over hydroelectric projects.... We decline at this late date to revisit and disturb the understanding of section 27 set forth in First Iowa....

The Court continued, "There has been no...intervening change in the law, or indication that First Iowa has proved unworkable or has fostered confusion and inconsistency in the law, that warrants our departure from established precedent.... It is more important that the applicable rule of law be settled than that it be settled right.... Congress remains free to alter what we have done."

Western states urge Congress to accept this invitation to redress the following problems associated with state water law and FERC hydropower licensing.

Preliminary Permits

During the energy crisis of the 1970's, Congress passed statutes providing important incentives for development of renewable resources. Federal hydropower permit applications jumped from less than 100 in 1979 to nearly 1,900 in 1981. In some cases, FERC granted preliminary permits to develop hydropower sites to entities unable to obtain a water right under state law. FERC suggests the Federal Power Act gives a licensee power to condemn necessary rights to develop a project. However, this alternative will unnecessarily create turmoil and uncertainty regarding all water rights in an affected river basin, and will only delay hydropower development. FERC could avoid such problems by requiring preliminary permit applicants to demonstrate compliance with state water law.

Comprehensive Planning

Ironically, FERC asserts and the Rock Creek case appears to uphold preemption of state water use decisions under the comprehensive planning provisions of FPA Section 10(a). However, FERC has testified before Congress that it has no authority "...to 'plan' a waterway in the sense of issuing a 'plan' that determines what all the various uses of the waterway should be. Rather, ...the commission analyzes proposed licensed projects in

light of the entire record in the proceedings, as developed by the applicant, the commission staff, interveners, commenting state and federal agencies, and others." FERC's quasi-judicial proceedings fall far short of a comprehensive plan for balancing competing water uses. On the other hand, states do have authority to plan for and regulate all water uses. Where state river basin plans exist, states believe FERC decisions should be consistent with those plans.

Subordination Issues

In many states, hydropower use is subordinate to future upstream development and water diversions necessary for new uses. FERC contends such conditions threaten the hydrologic and financial feasibility of federally licensed projects and has refused to subject licensees to such state regulation even where state requests have been reasonable and new uses foreseeable. Changing public and private values and new uses of the waterway will inevitably create future conflicts. FERC contends it may later amend a license to accommodate future uses which it determines to be in the public interest. In other words, from a state perspective, once FERC licenses a hydropower project it claims the authority to regulate all uses, upstream and downstream, that might affect that project. Unfortunately for the licensee, FERC has neither the administrative nor legal capacity to protect the developer from subsequent conflicting uses.

For example, can FERC control upstream irrigation developments or diversions for municipal use or even domestic wells which often don't require a permit or even notice under state law. Western states can and do regulate such uses. State law can also protect hydropower uses, but not if FERC grants permits outside the state system and creates an undefined right to the use of water for power purposes. Without a state water right, a licensee's only legal protection against subsequent conflicting uses would be through the federal courts, a time consuming and expensive process.

Instream Flows

The Supreme Court's California decision was a result of conflicting flow requirements for the Rock Creek project mandated by the California Water Resources Control Board and FERC. While the court settled the preemption issue in favor of FERC, many issues remain unresolved. State agencies have in the past required hydropower developers to maintain instream flows to protect downstream proprietary rights and public uses. To the extent that FERC continues to assert exclusive authority over all water uses related to or affected by hydropower development, serious conflicts will continue to arise. Instream and offstream water uses cannot be effectively managed separately. By granting FERC exclusive authority to set minimum bypass flows, the Supreme Court has, perhaps unintentionally, clouded all state granted water rights in any basin susceptible to hydropower development and provided FERC with an excuse to claim authority to determine and balance the public interest in all water uses.

Water Quality

One of the few remaining checks on FERC's power to license non-federal projects is the states water quality certification requirement under Clean Water Act Section 401. Legislation now before Congress would severely restrict the breadth of this review and allow FERC to override state certification conditions, which are now mandatory. Again, water use and water quality issues are intricately related, and attempts to grant FERC exclusive powers and relegate states to only an advisory role will only further polarize interests and slow hydropower development.

Summary

The U. S. Supreme Court's California decision, in the Rock Creek case, fails to resolve many of these outstanding issues related to state water law and FERC hydropower licensing. States are convinced that the Rock Creek case is inconsistent with the spirit and intent of the Federal Power Act and Congress' longstanding deference to the special role states fill with respect to water allocation and management and use decisions. FERC cannot fill that role. Congress must act to restore an appropriate balance.

Questions

1. What's the federal interest in non-federal hydro? Energy? The environment? How important is new hydroelectric development to national energy security?

2. Is FERC balancing all the beneficial uses of a waterway? Can FERC? Can the states?

3. Should projects of a certain size be exempt from federal regulation? 1.5 Mw? 5 Mw?

4. Do states have the capacity to comprehensively regulate small hydro development? Can states adequately protect instream values under state law?

5. Should hydropower development be subordinate to other uses? Under what circumstances? Is it practical to amend licenses, as some FERC orders suggest, to accommodate future uses?

6. What protection do FERC licensed projects have from future upstream diversions? Can FERC approve or disapprove new diversions?

7. Can FERC prepare a "comprehensive plan" for developing a waterway in the sense of issuing a "plan" determining what all the various uses should be?

8. How is the consultation process working? How can states better work within the FERC hydropower licensing process to protect their interests?

9. How might FERC do the same with respect to state water law? Should preliminary permit applications require evidence of the ability to obtain necessary rights for development?

Water Quality/ Water Quantity Issues in the Context of the Clean Water Act Reauthorization

INTRODUCTION

For the last few months a number of EPA task forces have been scoping various CWA reauthorization issues. One set of issues relates to water quality/water quantity relationships. A draft document entitled, "Arid Areas and Water Use Efficiency," has been produced. It explains these issues from the agency's perspective and outlines options to deal with them. The document is careful to point out that it does not "recommend an agency position, but attempts to display the full range of options available for resolving these issues."

Although the arid area document does not mention that its focus is strictly the western United States, a thoughtful reading of the document indicates that this is the case. For example the document notes "a significant reduction in water quality degradation and ecosystem risk can be achieved by addressing water quality and management issues related to dry weather flows." Two of the document's principal concerns are augmenting stream flows and dealing with the pollution effects of agricultural irrigation, the major water use in the West. Four specific issues are dealt with: Flow Standards, Irrigation Return Flows, Ephemeral and Intermittent Streams, and Water Reuse. To understand western state concerns regarding the EPA issues document, some background is necessary.

HISTORICAL BACKGROUND

The arid conditions that prevail in the West demanded development of a water law system different from the riparian doctrine of the humid east. From its very inception the appropriation doctrine has required that water be put to a publicly defined beneficial use. The law initially emphasized offstream uses, consistent with the desire to settle and reclaim the arid West. Thus, in its initial form, the law provided little protection for environmental or aesthetic values. In the recent past, however, the states have made substantial changes in their water law and policy to enhance environmental protection. This evolution of the appropriation doctrine has included, among other important developments, increased public interest protection generally and particularly the establishment of laws to protect instream values.

a. Public Interest Criteria

Both state legislatures and state courts have established and defined public interest criteria that must be met when an application to appropriate water or transfer a water right is considered. Under these provisions states may review the impact of a proposed water use on water quality and the environment. Also, other less formal arrangements have been established whereby states may protect the public interest related to the interplay between water quantity and water quality issues.

b. Conditioning Water Rights

States may also protect environmental concerns by conditioning rights to use water. Decisions regarding water use under the appropriation doctrine often involve a complex balancing of interests. Water quality impacts are clearly important in this process. States may condition water rights to prohibit waste, restrict method of use, or otherwise mitigate pollution. In this effort, the states have developed and are enhancing their capacity and expertise to weigh all important considerations. Such decisions, however, must be based on site-specific factors.

As a result of these and other developments in western water law, states maintain that they have the capacity to protect water quality and the environment while at the same time providing for beneficial water use under state law.

EPA AND WATER QUANTITY

a. Introduction

In contrast to the states, EPA lacks experience in the field of water allocation, and the balancing of water quantity and water quality issues. In addition, EPA, as a general rule, is driven by uniform national guidelines and criteria that are not suited to address the local concerns inherent in water use and management decisions.

b. Past Efforts to Impose Federal Requirements

Notwithstanding the lack of federal experience, some have argued that federal involvement in water quantity allocation is necessary. In 1977, in a major federal water study, the United States Water Resources Council (WRC) suggested that federal regulation might be used to establish minimum stream flows in prior appropriation states. The WRC wished to address problems created from diversions which cause "a quality impact by reducing the assimilative capacity of the stream or further concentrating existing pollutants."

Congress responded by adopting Section 101(g) as part of the 1977 CWA. That section says "...that the authority of each state to allocate quantities of water within its jurisdiction shall not be superceded, abrogated, or otherwise impaired by this Act...." Similar language appears in most other federal statutes that have the potential to affect western water allocation. The amendment's sponsor explained that the purpose of the amendment was to protect the states' historic role in allocating quantities of water for uses recognized by state law. Congress understood that each and every diversion of water both reduces the assimilative capacity of a water course (an arguably negative result) and provides for some beneficial water use (an arguably positive result). Congress determined that states were best able to balance the competing equities and interests involved in determining whether diversions should be allowed.

In 1980, EPA released a draft report stating that "minimum flows...may be necessary to meet the objectives of the CWA." One of EPA's western regions, Region VIII, then circulated a draft policy advocating that it was an EPA responsibility to "maintain instream flows to protect aquatic life and recreation." The region argued "attaining the [CWA's] fishable and swimable goal by 1983 will require that certain minimum flows be kept in the streams." None of these efforts proceeded beyond the preliminary stage because a Congressional cosponsor of Section 101(g) demanded and obtained withdrawal of the proposed policy, which he called "a blatant overreaching of the agency's actual authority which threatens the fundamental principles under which Congress has given executive agencies authority to exist and act."

c. The Current EPA Issues Document

The EPA document outlining arid area issues raises a number of important questions. As earlier indicated, two major issues relate to instream flows to protect water quality and the treatment of irrigation return flows under the Act.

1. Instream Flows

The arid area document states that a basic question involves the ability of state laws to protect instream flows, concluding that "not all states provide for instream flow as a beneficial use," and that "in some places, water must be diverted to be put to use." However, in stark contrast to what the situation may have been as recently as 20 years ago, virtually every western state now has in place a legal or institutional mechanism for establishing and maintaining instream flows. These mechanisms have been integrated into the procedures states use to balance water management generally. That such mechanisms exist is more important than the method states have chosen to safeguard instream values.

2. Irrigation Return Flows

The EPA document raises the question of whether irrigated agriculture return flows should be treated as point source discharges under the NPDES programs. Most water use in the West is for agriculture, where irrigation leaches from the soil dissolved solids. In determining the appropriate approach to address such potential pollution problems, EPA has, in the past, reported to Congress that "the localized nature of non-point source pollution makes a national strategy ineffective, by not providing enough flexibility and specificity to solve local problems. State management of non-point source control programs is the key to achieving water quality objectives."

Western states are likely to view this advice as sound, on the basis that they are clearly in the best position to consider the effects of non-point source pollution and the ways to address those effects. States recognize that serious pollution problems can result from irrigation return flows, but have maintained that subjecting irrigators to a nationally mandated pollution control program would be unworkable and unnecessary. This is particularly true given that indirect sanctions already exist for failure to address non-point source pollution and considering that states and the regulated community are generally making concerted efforts to develop effective and reasonable controls within the framework of existing water law and policy.

CONCLUSION

Many other questions which are of concern to western states are raised in the EPA document. Most importantly, several of the options raised in the issues document, if adopted, would place EPA in the business of water allocation in the western states. Congress has inserted provisions in the CWA to guard against such a result.

Therefore, the western states could be expected to oppose any changes in the current CWA provisions deferring to state water quantity laws. States maintain that they are in the best position to protect water quality and the environment in the context of the management of water resources generally. They have the capacity and experience to weigh all important interests involved. This capacity has been enhanced significantly in the last few years.

As matters related to water quality and the CWA reauthorization are considered, answers to the following questions will be important to western states:

1.Should the Clean Water Act be amended so that instream flows can be imposed under federal law to protect water quality?

2. Would a federal agency such as EPA be capable of making water quantity decisions in the western states?

3. Would uniform national standards affecting such matters as water reuse and water efficiency generally be appropriate in the management of western water resources?

4. Does sufficient authority exist under state law to protect instream values and the public interest?

5. What would be the results of attempting to require uniform national regulation of the water quality affects of irrigation return flows, both in terms of pollution mitigation and stress on federal administrative capabilities?

6. How can state and/or EPA better promote enforcement of existing laws and enhancement of existing management strategies to meet Clean Water Act goals regarding non-point source pollution?

Accommodating Federal Interests in State Water Regulation

Western water planning, development, and management have traditionally been carried out under the auspices of state water law. However, the federal government has asserted a growing interest in scarce western water resources. As a consequence, traditional state authority has been challenged.

Water management in the arid western United States differs from water management in the humid East. Because water is scarce, laws and policies traditionally focused on offstream water needs to further policies of settlement and reclamation of the arid West. The prior appropriation doctrine developed in response to these western needs. The underlying prerequisite to an appropriative water right is that water must be put to a publicly defined beneficial use. A related rule is the use or lose it principle. This rule penalizes non-use by forfeiture. Another principle of the appropriation doctrine is that priorities are based on the proposition that first in time is first in right. The doctrine thus protects those who put water to beneficial use against impairment of their use by subsequent appropriators. An important characteristic of the appropriative water right is that, once vested, it becomes a constitutionally protected property interest which can be sold, leased, or otherwise alienated.

The appropriation doctrine has often been criticized as outdated, inflexible, or otherwise unable to meet current water resource management needs. Regardless of the merits of this criticism in times past, all would agree that the states have since modified the doctrine to meet changing needs, and particularly to enhance public interest protection.

Both state legislatures and state courts have established and defined public interest criteria that must be met when an application to appropriate water or to transfer a vested water right is considered. These criteria vary from state to state. Most western states, however, have some statutory public interest review provisions in their laws governing new appropriations of water. Furthermore, several states require consideration of the public interest in determining whether to approve a proposed water right transfer.

Public interest protection in western water resource management is also enhanced by

establishing and maintaining instream flows. As previously indicated, the traditional law of prior appropriation favored offstream uses. Now, however, in every western state, legal mechanisms are in place to provide some protection for instream flows.

Public interest values in western water resource management are also protected by the public trust doctrine. This doctrine, enunciated in the Mono Lake case in California, exists apart from the appropriation doctrine and provides a procedural tool to reexamine and, in some instances, retroactively modify vested appropriative water rights to protect the public trust. Thus, where public trust uses have received inadequate protection, the public trust doctrine may provide a basis for challenging the resulting decisions. However, case law confirms that some state systems of water law, as they presently function, may adequately protect the public trust.

Transfers may also promote the public interest by allowing established uses to change with evolving values and needs. The ability to make such transfers was recognized early in the development of the prior appropriation doctrine.

Thus, the appropriation doctrine has evolved in the West to protect and enhance public interest values. This is accomplished primarily pursuant to (1) provisions requiring consideration of the public interest in water allocation and transfer decisions, (2) laws and programs to enable establishment of instream flows and protection of instream values, and (3) provisions and policies to facilitate and encourage water transfers. These measures are supplemented in varying degrees by the public trust doctrine.

The federal government has also moved to protect and enhance public interest values in western water resources, as defined for its purposes by federal public land and environmental laws. These federal efforts, however, have resulted in conflicts with western state water law systems.

Traditionally, Congress repeatedly deferred to state water laws by including in most major public land and environmental laws a state water law "savings clause" which disclaimed any effect on state laws pertaining to the control, appropriation, use, or distribution of water. However, notwithstanding this expressed deference by Congress to state water law, implementation of a number of federal statutes has conflicted with western state water resource management.

One principal federal interest is derived from the clause that gives power to Congress to regulate commerce. While this power was originally confined to waters determined to be actually navigable, the Commerce Clause has more recently been used as a basis to safeguard the environment, regardless of navigation. This is true for example of Section 404 of the Clean Water Act, which requires a permit from the Corps of Engineers for dredge or fill activities in navigable waters. Here the term navigable waters includes all waters subject to the reach of the Commerce Clause.

Another federal interest in western water management stems from federal land ownership in the West. The Supreme Court has implied to Congress an intent to reserve water rights when it set aside lands from the public domain to be used for specific purposes. These reserved rights constitute an exception to the rule that the land and water estates in the West were severed and that rights to use water must be obtained under state law. The federal interest in securing reserved rights for federal lands ranges from assuring drinking water for military installations to providing water to fulfill the purposes of national forests, monuments and parks. Courts have also implied a congressional intent to reserve water for use on Indian reservations.

In recent years, federal interests in western water management have increasingly revolved around environmental protection, aesthetics, and recreational uses. This federal interest has occurred concurrently with the states' efforts to protect these same values through management of western water resources. These state efforts have provided more water for recreational uses and environmental protection. More importantly, these efforts have created a favorable environment for the protection of federal interests. Nevertheless, many conflicts have developed as a result of federal actions to protect federal interests. Examples of such conflicts are described in the section of this booklet on protecting state interests in the FERC hydropower licensing process.

The Endangered Species Act is also a source of conflict. Specifically, the Endangered Species

Act requires that endangered species be designated and listed and prohibits the taking of such endangered species. Conflicts with state water rights have usually arisen from actions to protect endangered species habitat. A related issue is the potential of such federal actions to affect water entitlements under congressionally approved interstate water compacts.

According to a report of the Western States Water Council, over half of the sixty species of fish listed by the Fish and Wildlife Service (FWS) as endangered or threatened in 1985 had a historic range covering one or more of the Western states, including Arizona, California, Colorado, Nevada, New Mexico, Oregon, Texas, Utah, and Wyoming. The proposed listings each reflected the belief that the species faced existing or potential adverse impacts due to destruction or modification of habitat by water-related activities such as construction of dams, impoundments, or other instream barriers, water diversions and depletions, channelization, siltation, the lining and dredging of irrigation canals, ground water pumping, livestock watering, and water pollution. The Council concluded that, as the list of endangered species lengthens, conflicts with western water-related water resource management would increase. Subsequent experience has proven this to be true.

Section 404 can also affect the exercise of state water rights because a federal permit is often required for construction of water diversion or impoundment structures. Denial of such a permit, or issuance of a permit with specific conditions, may preclude or limit the exercise of state water rights. Also some special conditions in Section 404 permits may conflict with conditions included in water use permits issued under state law.

Although the number of conflicts decreased from the late 1970s and early 1980s, recent expansion in the wetlands protection efforts of the Environmental Protection Agency (EPA) and the FWS threatens to result in further conflicts. As a result of this increased emphasis on protecting wetlands, water development projects based on state authorization may become more difficult to construct. Furthermore, an increased number of special conditions are expected to be included in section 404 permits. These conditions will relate to maintenance of minimum continuous flows and purchase of lands for mitigation. Such conditions may be contrary to state laws and decisions.

Although conflicts with respect to section 404 may arise independently of the implementation of another federal statute, this is usually not the case. For example, as described above, the Corps of Engineers, in consultation with other federal agencies, sometimes denies a permit because there will be an adverse impact on endangered species habitat from the construction of facilities utilizing state-granted water rights. Thus, in many instances a section 404 permit is the vehicle for asserting the federal government's interest in protecting endangered species.

Another area of conflict involves the reserved rights doctrine. Some 50 cases are pending where reserved rights claims are at issue. Many of the questions involving the scope of the doctrine have yet to be resolved. However, we know that reserved rights do not depend on state-defined beneficial uses. Furthermore, reserved rights are rarely stated in terms of a definite place or time of use, in contrast to state water rights. Moreover, abandonment and forfeiture characteristics of appropriative rights are not applicable to reserved rights. In summary, there are many differences between reserved water rights and appropriative water rights. These differences help explain the conflicts between reserved rights and rights created under western state water law.

In order to reduce conflicts, several options are possible. One option which some have suggested is that state laws be amended so that federal interests can be accommodated. This was one of the recommendations of the National Water Commission in 1973, and appears to be one of the few of its recommendations that has been implemented. Many changes in state law have been made, as previously described, to provide an environment under which federal interests can be protected. Legal mechanisms now exist in virtually every state to protect the public interest and to enable the establishment and maintenance of instream flows. Moreover states act in numerous ways to facilitate transfer of water rights to enhance efficiency in the use of existing supplies. Most states also require consideration of the public interest in determining whether to approve a transfer. These laws have repeatedly been used to recognize interests expressed in federal laws.

Although several commentators acknowledge this evolution in state water law policy, it is often not recognized by proponents of federal interests.

Western states are well aware that it is in their interest to accommodate legitimate federal interests in water resource management. Moreover, there is considerable public support for protecting instream values, and that support will grow and continue to express itself in state forums. At the same time, federal interests must not expect more than a level playing field. Their claims should receive the same scrutiny as to those of other claimants. But federal representatives should recognize that the rules of the game have changed so that the interests they seek to protect and enhance can be furthered under state law. If they do so, and thus discard past attitudes, they will find many opportunities now afforded by state law, and a great many conflicts in federal/state relationships can be avoided.

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