

# **WATER POLICY AND GROWTH MANAGEMENT**

A Report Prepared for the Western Governors' Association  
by Staff of the Western States Water Council



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## I. Introduction

Pursuant to a request of the Western Governors' Association, Council staff has prepared this report to discuss and refine issues associated with water policy and growth management, as well as to offer suggestions for consideration by western states. While not necessarily representing the views of the Council or its member states, the staff wishes to acknowledge the input provided by Council members from which the report has benefited significantly.

## II. The Challenge

Praise without end for the go-ahead zeal  
Of whoever it was invented the wheel;  
But never a word for the poor soul's sake  
That thought ahead and invented the brake.

--Howard Nemerov, United States Poet Laureate

### A. Overview of Growth Trends in the West

The West is growing at an unprecedented rate.\* The Rocky Mountain West has been the fastest growing region in the United States throughout this decade. The last federal census shows that nine of the ten fastest growing states are in the Intermountain West and the Pacific Northwest.<sup>1</sup> According to a recent report, three counties in the Rocky Mountain West -- Douglas County, Colorado, and Summit and Washington Counties in Utah -- represent three of the four fastest growing counties in the nation. Although the focus areas of population growth may change, there appears to be no end to growth in sight, at least in the near term.

Surveys show that the primary attractions of the western migration of this decade are: "a quality environment," "a good place to raise a family," "scenic beauty," and also traditional jobs.<sup>2</sup> Important economic activities in the areas attracting burgeoning populations are retirement and recreation.<sup>3</sup> The primary factors pushing people out of urban areas are: "fear of crime, even in previously 'safe' bedroom communities; dissatisfaction with public schools; urban congestion and pollution; racial tension; the high costs of living and housing; general dissatisfaction with the perceived rootlessness of metropolitan living; [and] corporate down-sizing; ...."<sup>4</sup> Some of these negative factors relate directly or indirectly to growth.

Telecommunications and other modern developments are increasingly making it possible for people to live and work outside metropolitan areas.<sup>5</sup> The target areas of new growth are the

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\*It should be made clear in preface that this paper deals with **managing** growth, such as the pace, location, and character of new development, not with stopping growth.

suburbs of metropolitan areas, small and medium sized cities (populations under 200,000), stand-alone towns, resort communities, gateway towns to national parks, and bedroom communities to cities, resorts and gateways.<sup>6</sup> Between 1990 and 1992, the population of non-metropolitan counties (i.e., without a major urban hub) nationwide grew by about 880,000, of which 350,000 in 1992 alone were in the Rocky Mountain West.<sup>7</sup> By 1992, 51% of Americans were living in suburbs.<sup>8</sup>

Further, a good deal of new growth is occurring in agricultural valleys, largely in unzoned and unplanned rural areas. This growth is occurring in areas where key resources are often fragile and scarce. The West is shorter on private land and water than any other region of the United States. In part because of the scattered pattern of this growth, little data are available at the national, regional, state or local level to help in assessing the overall costs or effects of this development. More commonly, the consequences emerge piecemeal into the consciousness of affected communities.

Certain consequences have been identified. In general, farmland is being directly converted to house lots, and indirectly through water transfers to growing suburbs and rural communities. Natural amenities of the Rocky Mountain West, which include the "largest expanses of relatively undeveloped natural areas and wildlife preserves in the middle latitudes of the northern hemisphere"<sup>9</sup> are being subdivided and displaced. Ironically, these natural elements are key factors attracting the very population movement which is destroying them. As open spaces vanish, buffer zones and landscapes like wetlands and floodplains that perform essential functions are disappearing. Costs of engineered facilities, public services, land, housing and food are rising, often significantly, impacting native residents, as well as newcomers.

## B. Water Policies and Perceptions and Their Relation to Growth Management

Historically, water policies in the West were inextricably linked to the region's desire to grow crops, develop industries, extract minerals, and satisfy the thirst of its small and scattered cities. The federal government supported these desires by constructing massive dams to store water and supply power to farms, industries, and cities. This investment provided substantial benefits to the nation by stimulating the economy, strengthening agriculture, developing energy resources, satisfying recreational needs, and preventing floods.

However, the demographics of the West have changed. It is no longer predominantly rural. Ninety percent of the people living in the Pacific states now reside in metropolitan areas, and 65 percent of the population in the Rocky Mountain states are urban dwellers.<sup>10</sup> Although irrigated agriculture remains the largest water user and retains considerable influence regarding water law and policies, cities are increasing their impact on the politics of water. At the same time, public support is increasing for instream values -- water for fish and wildlife habitat, recreation, and aesthetic values.

Support for instream values comes relatively late, however. Most of the West's water already has been allocated, and providing new water supplies through the construction of large storage projects is generally not in the offing. The best sites for large dams are largely taken, and the few remaining sites are, for the most part, off limits due to economic and environmental considerations.

To solve the region's "new" water challenges, many observers urge water conservation to achieve greater efficiency in the use of existing supplies and reallocation from agriculture to urban uses and to support instream values. To achieve these goals, they support changes in current laws and policies to encourage conservation and to foster "water markets" to aid the transfer of water to urban and environmental needs.<sup>11</sup>

It makes good sense to provide appropriate incentives for conservation and to use water markets to transfer water to higher-valued uses (this generally is deemed to mean transfer from agriculture to municipalities and industries who can pay more for it). Applying these tools to help solve the complex water supply problems in the West, however, may be difficult for a number of reasons. For example, water conservation results in "new" water for use only to the extent that water is salvaged that otherwise is being lost to the hydrologic system. Also, water conservation may result in adverse consequences such as loss of valuable wetlands and ground water recharge. Further, it must be recognized that agricultural land use preserves open space values. Many communities in California, for example, include provisions in their zoning plans to limit uncontrolled suburban sprawl onto neighboring agricultural lands. Indeed, California's broadly supported Williamson Act provides explicit recognition of the value of preserving agricultural land from urban sprawl, and provides for financial incentives to keep land in agricultural use.<sup>12</sup>

Given such complexities, another alternative is to address a shortage of water to meet growth by reducing growth. An importantly distinct idea receiving increasing consideration, and which is the primary focus of this report, is to manage growth by limiting water availability; that is, the fact that the West is largely a water-short region justifies and perhaps even commends the use of water policy as a tool to manage growth.

In dealing with these challenges, one should recognize that the region exhibits an institutional schizophrenia about whether to treat water as a private or public good. Water law in the West developed on the basis that: (1) water is a scarce resource; (2) it should be allocated under the prior appropriation doctrine, which essentially holds that water users acquire private property rights to the use of water on a first-come, first-served basis so long as water is available and meets "beneficial use" definitions prescribed by state law; (3) once water is allocated, it may be reallocated through the marketplace; and (4) free markets will be restrained only when the water rights of others are compromised or violated.

This system was designed to settle and develop the West, not to protect its environment and lifestyle. It emphasizes security in the long-term use of water -- a necessary prerequisite for

investment. However, the public, in contrast to private water right holders, generally views water as a common good. Therefore, many argue that decisions regarding its allocation and use should be made to serve the public good. This perception lies at the heart of calls for government reallocations to increase instream flows in order to support public values.<sup>13</sup> Such pressures, however, often conflict with a free-market system of private water rights. Water rights holders generally view those rights as absolute property, and any government-imposed restriction on the use of that property as a “taking.”

It is this tension between the perception of water right holders on the one hand, and public perception on the other, that is at the center of many of today’s conflicts over water in the West. This tension also exists regarding the debate about water as a tool to manage growth in the West.

Historically, the political agenda in the West has been premised on promoting regional growth. Scarcely populated states endeavored to attract further growth, while states with climate and amenities already attracting growth welcomed such growth as desirable. Since much of this growth took place in cities, much of the focus has centered on the question of how urban communities can deal with growth.

As an example of this issue as it relates to water development, a leading California Court of Appeal’s case determined that a community may impose a water moratorium and thus put an end, either temporarily or permanently, to growth and the resulting demand for water if it had a valid reason for doing so. In this regard, the existence of an actual water shortage was found to be a precondition for declaring a moratorium on new water hookups. The water provider could consider the need to maintain reserves to offset the effects of future drought, and need not delay action until a shortage actually occurred to declare a water emergency and thus justify a moratorium.<sup>14</sup> However, the California Supreme Court has opined that a water company has a (limited) public duty to provide water to residents of the community. The Court in *Lukrawka v. Spring Valley Water Co.*, albeit in dictum, further concluded that the provider has, as part of its duty, a responsibility to anticipate the future growth of the community and to make plans to augment water supplies accordingly.<sup>15</sup>

Further, courts have noted that an emergency does not last forever and have indicated that a water provider has an affirmative duty to act so that the moratorium will be lifted. Thus, an effort to extend a moratorium in a covert attempt to control growth would be suspect. The California appeals court in *Swanson v. Marin Municipal Water District* concluded that it is beyond a water district’s authority to enact an emergency water moratorium in order to carry out a no-growth policy.<sup>16</sup> Indeed, the court stated in dictum that California law implies an obligation on the part of the water district “to exert every reasonable effort to augment its available water supply in order to meet increasing demands.”<sup>17</sup>

This line of reasoning is consistent with the long-held historical view in the West that growth should be encouraged, or at least accommodated, and that water laws and policies should

support this policy by making water available and then granting private property rights to the use of that water to settlers and developers.

However, as the desire to preserve natural amenities and lifestyles has increased, so too have attempts by communities to impose restrictions on growth by restricting access to water, in order to promote what they view as the public good versus the private interests represented by new development.

For example, in another California Court of Appeal's case, *Wilson v. Hidden Valley MWD*,<sup>18</sup> the court upheld a decision by a water district formed for the sole purpose of preventing the Metropolitan Water District of Southern California from importing water into an agrarian community in rural Ventura County. In upholding the district's refusal to allow two farmers to exclude their lands from the district so that they could seek water from other providers, the court determined that a water district could be formed for the express purpose of controlling growth within its borders. Here, too, the question raised the private-versus-public debate. The action, according to the court, posed "fundamentally political questions" which call for the district to balance the private interest of landowners against the public welfare in determining the community's "water future."<sup>19</sup> In upholding the district's decision relative to this determination, the court concluded it was an appropriate exercise of the right of political self-determination.

While the *Swanson* and *Hidden Valley MWD* cases may be reconciled based on the nature of the action by the local provider -- the *Swanson* court disapproved of prolonging an emergency moratorium to covertly carry out a no-growth policy, while the *Hidden Valley Water District* explicitly adopted an overall policy of refusing to look for new water -- they exemplify the fundamental policy questions which are associated with the use of water policies as tools to manage growth.

As states have increasingly become involved in growth management, they have faced similar questions relative to water, which at their heart raise issues of private interest and the public good. This report will examine the experience to date of states and localities in dealing with water policies as tools in growth management. It will then explore the legal framework for the use of such tools. It will conclude with a section on lessons learned from these experiences and some options for consideration by states as they look to the future.

### **III. The Role of Water Policy in Growth Management**

#### **A. Approaches Taken to Implement Growth Planning**

In response to unprecedented growth, efforts to limit, direct, or manage growth are emerging in the West. According to Luther Propst, co-founder of the Sonoran Institute (a nonprofit organization in Tucson, Arizona which advises western communities on managing

growth), communities don't engage in planning "unless there are at least three or four things happening that indicate real change is already occurring. That's just human nature."<sup>20</sup>

Oregon led the way with its state planning act in 1973. Then-Governor Tom McCall spearheaded the effort to try a grand experiment to stem the "sagebrush subdivision, coastal 'condomania' and the ravenous rampage of suburbia in the Willamette Valley."<sup>21</sup> The act asserted state interests in achieving specified development goals, laid down requirements for development planning by local governments, and set standards for those planning efforts.<sup>22</sup> It did not institute a comprehensive state planning effort, but directed local governments to plan for growth. After thirteen years, every city and county had developed a 20-year plan, despite ballot initiatives to overturn the process in 1976, 1978 and 1982 brought by rural interests allied with the real estate industry and some legislators. Voters solidly rejected each attempt. The results of Oregon's efforts include a fifteen-fold reduction in conversions of agricultural land to urban use and denser development within the boundaries of cities and towns.<sup>23</sup>

A number of eastern states have followed suit in legislating a mandate for local planning.<sup>24</sup> Among the western states, Washington<sup>25</sup> and Montana<sup>26</sup> have passed legislation mandating local growth planning. However, none of the nine states that have enacted legislation calling for growth management is in the Rocky Mountain West--the area experiencing the greatest growth of this decade nationwide.

Despite the lack of a state mandate, some western citizens and community councils have initiated their own efforts to manage growth in their venue. For example, many California cities and counties have voluntarily adopted numerous growth control measures through council-enacted ordinances and voter-sponsored ballot initiatives.<sup>27</sup> According to a 1988 survey, over 70% of the state's cities and over 75% of counties in the state have adopted interim ordinances or permanent measures to deal with dramatic population growth over the past two decades.<sup>28</sup> In the 1990s, however, although the number of initiatives on the ballot continues to increase, the passage rate is falling.<sup>29</sup> With regard to water policy in particular, the California Water Code includes provisions that enable water suppliers to deal with conditions resulting from growth in various ways. Further, California's Environmental Quality Act requires discussion of growth inducing impacts in environmental documents prepared pursuant to the Act.

## B. Growth Management Tools Involving Water Policy

Various growth management tools have been developed and tried in various locations. Many of these involve water policy, either directly or indirectly, as an incident of growth management. This section will briefly discuss the various approaches identified with a relationship to water policy.

First, **water moratoria** have been declared the “simplest, cheapest and most effective one [approach] for any city faced with an existing or prospective water shortage. By declaring a water moratorium, a community may put an end--either temporarily or permanently--to growth and the resulting demand for water.”<sup>30</sup> Water moratoria are sometimes expressly authorized by statute for cases when there is a bona fide water shortage.<sup>31</sup>

Legal challenges have arisen, however, against moratoria in certain circumstances. The first can occur when emergency moratoria have been extended “in a covert attempt to control growth. Instead of aggressively seeking new sources of supply, the water board sits back and lets the moratorium remain in force.”<sup>32</sup> Authorized moratoria must be necessitated by appropriate circumstances: e.g., if moratoria are authorized in emergency situations, they cannot be applied or unreasonably extended into nonemergency circumstances.<sup>33</sup> This issue ties in with the notion of a utility's duty of service. A second type of challenge pertains to the duty of service as well as additional constitutional issues associated with providing water. If moratoria are expressly authorized for use as a tool in growth management, the supplier cannot act arbitrarily in denying extensions.<sup>34</sup>

Capping growth is a related means of limiting burgeoning populations. In 1976, Boulder, Colorado was among the first communities to enact a growth limitation ordinance.<sup>35</sup> That ordinance capped growth at 2% per year and is enforced by the city's granting of building permits. Similar efforts are gaining momentum in St. George, Utah, where a group called Citizens for Moderate Growth has been collecting signatures for a referendum to set a limit of 3% growth per year.

A fundamental question which growth raises is: who should pay for the costs incurred in accommodating growth? A number of growth management techniques focus directly on the problem of allocating the costs of growth. The utility model of water suppliers and the use of water moratoria are backed up by the notion that water suppliers are responsible to make water available for new growth. Traditionally, many of the costs of acquiring and extending new water supplies have been averaged out among all of the supplier's or utility's customers.

Today, “[w]ith increasing frequency, planning advocates are allying with fiscal conservatives to insist, ‘Make growth pay its own way.’”<sup>36</sup> Several economically based approaches are being developed to shift the costs of new development to the developers and newcomers. These approaches are based on notions of equity, in not penalizing long-term residents for costs resulting from population influx, and on the idea that, if development is desirable enough, those who will benefit from it will be willing to pay the price for it. One such tool in growth management involves **marginal pricing**. In the context of water services, this means charging new users a price for water which reflects the costs of augmenting supplies to meet their needs, rather than averaging the additional cost among all water users. Provided that newcomers recognize the fact that marginal pricing will be employed, this pricing acts as a form of growth management.

Impact fee arrangements are similar in approach. Under this approach, new development is assessed the direct costs of additional infrastructure necessary to support development, including extensions of water services. Plant investment fees have a similar purpose, although they generally do not cover the full cost of extending water service. Summit County, Utah is currently considering imposing an exaction fee on new development to pay the costs of extending city services to newcomers.<sup>37</sup> In the meantime, Summit County is limiting development to areas where services are already in place. On the other hand, Idaho's senate recently rejected a bill intended to make newcomers pay for developmental costs associated with the population influx.<sup>38</sup>

A related approach can also be seen in areas that require developers to assure future supplies of water. This approach was taken by Arizona's Ground Water Management Act, requiring developers to provide assurances of water supplies for the next hundred years.<sup>39</sup> A more far-reaching example of this approach was taken by El Paso County, Colorado, which requires assurances of a 300-year water supply from developers as a precondition to subdivision plat approval for development proposing to utilize non-renewable ground water sources from the bedrock aquifers of the Denver basin.<sup>40</sup>

Another tool in growth management involving water resources is **comprehensive planning**. The comprehensive planning mandated under various state laws includes planning for water resource development and preservation of areas associated with other water values, such as wetlands, lakes, rivers and floodplains. Two basic approaches have emerged: land-use planning and policy planning. Comprehensive planning may include various elements and combinations of the following techniques.

Land-use planning involves the use of maps and traditional zoning approaches. This can include such features as open space planning, floodplain and streambed development restrictions, and designation of wildlife habitat areas, in addition to traditional residential, commercial and agricultural zoning. Boulder, Colorado enacted a "blue line" ordinance, establishing a line along the foothills above which no water or sewer service would be extended. Conservation easements are also being successfully implemented in areas throughout Colorado, such as Elk River Valley, northwest of Steamboat Springs, Colorado, to protect and preserve areas with significant environmental amenities. Conservation easements differ from open space planning in that landowners voluntarily enter into them and are able to obtain tax benefits. "It's the carrot instead of the stick," says Pamela Lichtman of the Jackson Hole Alliance for Responsible Planning, after successful negotiations with a local ranger to protect over 500 acres of big game habitat in the Snake River floodplain.<sup>41</sup>

A variant of comprehensive planning is known as policy planning. Rather than focusing on rigid map-based limits on development, policy planning focuses on the quality or character of development. This approach was taken in the master plan for Flathead County, Montana. To help preserve prime agricultural lands, the plan offers incentives in the form of density bonuses. The system allows developers to build additional structures (exceeding the house-per-acre limits

otherwise applicable) if the developer will agree to cluster housing and leave the rest of the land permanently off-limits to construction. Kurt Culberson, whose Aspen planning team drew up the Flathead County master plan, says the plan “doesn’t have hard lines” like classic zoning plans. It is, however, based on a state-of-the-art mapping of the existing county features that gives developers the data and flexibility needed to determine “where the path of least resistance will be.”<sup>42</sup>

A variant of this approach, used in communities such as Breckenridge and Ft. Collins, Colorado, involves the use of performance-based zoning standards. Development proposals are “evaluated on criteria such as impacts on natural resources, public health and safety and neighborhood compatibility, and then given a numerical score. If the development scores high enough, it can proceed.”<sup>43</sup> Point systems are “more difficult to draft and administer because of the necessity to establish a proper relationship between point values and the relative importance of each provision and to create a proper balance among the various point values.”<sup>44</sup> Despite these difficulties, point systems may be acceptable in communities that are resistant to more rigid approaches, due to the perceived flexibility in weighing of various factors and the possibility of compromise they offer.

#### **IV. Analysis of Legal Issues Pertaining to Water Policy and Growth Management**

##### **A. Challenges to Limitations on Water Development**

Attempts to limit or control growth through the use of water policy can be subject to legal challenges. The two primary bases of potential challenge are the constitution and utilities’ duty of service. Although the legal parameters of these challenges in the context of growth management have not yet been fully developed they probably do not pose insurmountable obstacles to such efforts.

##### **1. Constitutional Challenges**

Primary constitutional issues include challenges under the right to travel, equal protection and takings claims. The following discussion considers each of these potential challenges in turn. The overall message implied by Supreme Court rulings on related issues thus far seems to be that, while the states cannot adopt policies designed to shift the costs of dealing with a national problem to another state, states can protect against overuse of limited state resources.\*\*

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\*\* For purposes of this section, the analysis generally applies to local governments and other subdivisions of the state, as well as to the state proper.

Several constitutional issues involved in growth management may be brought under the general rubric of the “**right to travel**.” This implied constitutional right was first recognized in *Edwards v. California*.<sup>45</sup> The Supreme Court “long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”<sup>46</sup>

The right to travel protects non-residents from local favoritism and wealth-based discrimination in providing public services.<sup>47</sup> It requires that growth controls are racially and economically neutral. Courts may reject right-to-travel challenges by ruling that the regulation does not stop growth, but rather temporarily shifts the growth to another location.<sup>48</sup> This doctrine may, however, ultimately prove a significant issue in growth management by imposing a “more stringent duty on states to accept growth because it imposes a high burden on the state to justify regulations which infringe on interstate mobility.”<sup>49</sup>

The doctrine of the right to travel has been analyzed under various constitutional privileges, including, among others: “the Commerce Clause, the Privileges and Immunities Clause of Art. IV, § 2; the Privileges and Immunities Clause of the Fourteenth Amendment; and the Due Process Clause of the Fifth Amendment.”<sup>50</sup> The precise application of the doctrine may vary depending on the constitutional source implicated in a particular challenge. For example, in *Shapiro v. Thompson*, the right to travel was subjected to heightened “**equal protection**” scrutiny because the duration of residency required in the state welfare law could deprive new residents of “food, shelter, and other necessities of life.”<sup>51</sup> Heightened scrutiny requires a compelling interest, rather than a merely legitimate interest, in state objectives. The law in that case was found to violate both the Fifth Amendment’s due process clause (by restricting the fundamental right of interstate travel) and equal protection (in its duration of residency requirements). The issue was “whether the challenged requirement erects a real and purposeful barrier to movement, [or] whether the effects on travel, viewed realistically, are merely incidental and remote.”<sup>52</sup>

Associated with the right to travel, growth management efforts may be subject to **dormant commerce clause** analysis which applies to forms of commerce which Congress has not chosen to regulate. The Supreme Court “woke this dormant [commerce] clause from its slumber” in *Hood and Sons v. DuMond*.<sup>53</sup> The line of cases applying it “demonstrates that this clause is not silent and it certainly has not been dormant.”<sup>54</sup> The doctrine prohibits state protectionism burdening interstate commerce and allows the judiciary (subject to Congressional review) to invalidate state legislation that discriminates against the free flow of goods and people among states. The Supreme Court’s concern under dormant commerce clause jurisprudence has focused more on states’ rent-seeking than attempts to respond to resource conservation problems.

Importantly, commerce clause analysis sometimes has been applied to state actions which might be characterized as “of a purely local character . . . ‘[i]f it is interstate commerce that feels the pinch . . . .’”<sup>55</sup> It is not clear how dormant commerce clause analysis would affect intrastate

efforts at growth management; however, it might apply if they resulted in significant effects on interstate commerce. Thus, if states enact growth restrictions which significantly restrict interstate commerce (although purporting to act only intrastate), presumably dormant commerce clause analysis might be employed to block such efforts.

However, despite increasing application of dormant commerce clause analysis generally, the line of cases provide insufficient guidance to states faced with difficult problems associated with growth. Thus, the legal framework appears inadequate to help states analyze "reasonable state programs that impose painful but necessary costs on interstate commerce."<sup>56</sup> Presumably, however, attempts to use water policy to limit growth might be attacked under the dormant commerce clause by showing that the water policy favored citizens over nonresidents. This challenge could emerge against various forms of attempts to cap growth.

The Supreme Court has established a uniform balancing test for dormant commerce clause jurisprudence. It provides that a state action is valid if: 1) it has a legitimate regulatory purpose; 2) it is evenhanded; and 3) any burdens on interstate commerce are incidental. If a regulation is found to pass this test, it will be upheld, even if its effect is to burden interstate commerce excessively as compared to local benefits.

In *Sporhase v. Nebraska*, the Supreme Court recognized that the unique problem of western water allocation requires a dormant commerce clause analysis that gives greater weight to state conservation interests.<sup>57</sup> Until recently, western states had not asserted "a strong public interest in water beyond setting the ground rules for private use; therefore, [most] state interests asserted to defend their refusals to share water have been [after the fact] rationalizations."<sup>58</sup> Such *ex post facto* rationales appear to be easy targets for dormant commerce clause challenges.<sup>\*\*\*</sup>

Regulatory efforts would likely elicit more favor when they are part of a state planning process to conserve scarce natural resources from overuse. This context would help the state establish a legitimate regulatory purpose and ensure that any effects on interstate commerce are incidental to the state's purpose. When a comprehensive plan is not yet in place but studies are underway, courts "presume a good faith effort."<sup>59</sup> Study documentation also helps to defeat charges of "hidden illegal motives to deter growth"<sup>60</sup> and to demonstrate that growth planning by western states "may produce net national benefits."<sup>61</sup>

Another potential constitutional challenge involves **equal protection**.<sup>62</sup> In the growth-control context, this challenge primarily relates to different standards imposed on properties that

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<sup>\*\*\*</sup> It should be noted that this report does not deal with potential challenges to requirements a state may wish to impose regarding proposed transfers of water outside the state. Rather, the above dormant commerce clause analysis is designed to shed light on the scope of restrictions that may be placed on the availability of water to people moving to areas of new development within the state.

are similarly situated. So long as government has a legitimate basis for distinguishing between different classes of development, any equal protection challenge to regulations will likely fail.<sup>63</sup> Again, growth-control measures must be economically and racially neutral under this provision.<sup>64</sup>

Finally, **takings** claims might be brought against growth-control measures that divest owners of property rights. A regulation constitutes a taking where "it imposes too heavy a burden on property rights to be sustained as a police power regulation."<sup>65</sup> Compensation for a taking is required when a regulation: 1) does not substantially advance legitimate state interests, or 2) denies a landowner the economically viable use of his property.<sup>66</sup>

The first test, the so-called "facial challenge," weighs the interests asserted by the government against the regulation's economic impact. This involves considerations of whether the regulation is a legitimate exercise of the state's police power. Courts have recognized "a hierarchy of interests the police power serves."<sup>67</sup> Exercises of the police power to prevent public harm may be given greater judicial deference than those aimed at conferring a public benefit at the expense of a few property owners.<sup>68</sup> The police power can authorize temporary measures needed to prevent a public danger, or permanent measures to preserve public health, safety and welfare.

In general, it appears indisputable that "[t]ying the level of growth to the adequacy of water and sewer . . . promotes both the physical and psychological well-being of the local inhabitants."<sup>69</sup> Furthermore, water moratoria are presumably "clearly aimed at preventing a harm: the lack of water."<sup>70</sup> Thus, it appears likely that a state's water policy in the growth-control context will survive a facial takings challenge if it is closely tied to the state's legitimate exercise of police power. However, if an emergency water moratorium is imposed and the water providers make no attempt to augment water supplies when it is possible to do so, a semi-strict scrutiny might possibly be applied pursuant to *Nollan v. California Coastal Commission*,<sup>71</sup> and the moratorium be found to constitute a taking.

If the measure is found to be a legitimate exercise of the police power, the court will look to see whether the regulation unfairly burdens a relatively small group of property owners. This part of the test focuses on whether the regulation as applied deprives an individual landowner of all reasonable use of his or her property. Under this test, a court will examine the extent to which property owners' "investment-backed expectations" have been defeated.<sup>72</sup>

Historically, courts have upheld growth control regulations against takings challenges, even where the economic values of properties were greatly diminished.<sup>73</sup> It is important to note that in *First English Evangelical Lutheran Church v. County of Los Angeles*, the Supreme Court held that temporary regulations may constitute takings under the Fifth Amendment.<sup>74</sup> On remand, however, the California Court of Appeal distinguished the Supreme Court's holding from situations involving "moratoriums and other interim land use restrictions . . . [unless] these interim measures are unreasonable in purpose, duration or scope."<sup>75</sup> Generally, in resolving

temporary takings claims, the property interest is viewed in its entirety over both present and future time.<sup>76</sup>

Under current law in most states, property owners do not have an absolute right to water service.<sup>77</sup> Thus, takings challenges brought by potential water users (as opposed to existing water users) will generally fail, because they have not been deprived of a vested property right. However, it will be important to monitor developments in takings legislation at the state and federal levels. Federal legislation has been introduced which would lower the threshold for regulatory takings.<sup>78</sup> Some state legislatures are also considering bills that would increase governments liability to compensate holders of property rights (including water rights) for economic losses resulting from regulations or other restraints.<sup>79</sup>

## 2. Challenges Based on Utilities' Duty of Service

A second form of challenges may confront attempts to control growth through water service and price. An impediment to using water to control growth is the traditional principle of utility law that "all persons who can pay for the service are entitled to it."<sup>80</sup> "As a result of their close relationship to the public interest, utilities are granted certain rights by our various levels of government and have special obligations associated with those rights."<sup>81</sup> The obligation of utilities to serve the public interest is known as the regulatory compact. "Public and private water suppliers have supported growth through the price they charge for water service and by the use of the public utility principle of non-discriminatory service to those who can pay."<sup>82</sup> Most water suppliers "consider themselves under a duty to find adequate supplies to meet anticipated demands."<sup>83</sup>

However, as public policy shifts from accomodating to managing growth, recent cases increasingly demonstrate courts' willingness to uphold the use of utility service to regulate the location and timing of growth.<sup>84</sup> It should also be recognized that "the duty to serve has never been absolute."<sup>85</sup> Municipal discretion to refuse to extend water service for various legitimate reasons is well recognized in the law.<sup>86</sup> Cities' right under certain circumstances to use moratoria to adjust growth rates to available water supplies has also been recognized.<sup>87</sup> Provided that an insufficient quantity of water is available, courts have determined that a water supplier has the discretion to deny service: for inordinate cost<sup>88</sup>, growth control,<sup>89</sup> or for water conservation.<sup>90</sup> Indeed, it appears the "public utility theory of strict service duties is being replaced by one which allows cities to subordinate utility service to growth management objectives."<sup>91</sup>

Although the use of utility service to manage growth is not a new idea, "in the past it has been a quiet tool rather than official policy."<sup>92</sup> Today, using utility services as a tool in growth management has been recognized as a valid option in several cases. Furthermore, "[b]ecause of the expense and uncertainty involved in developing new water supplies, it would be impossible for the law to impose and enforce a duty on public water companies to supply all new users on demand."<sup>93</sup>

## B. The Prior Appropriation Doctrine and Growth Management

### 1. History

With some exceptions, the West is an area of water scarcity. This fact, coupled with an historic public policy of promoting settlement and development of the West, meant that laws and policies focused on off-stream water needs. Storage facilities were constructed to capture spring run-off for use at other times. Such facilities also helped assure sufficient water to meet at least some uses during times of drought.

These western needs explain the development of the prior appropriation doctrine. Principles of prior appropriation were applied by early settlers, and were gradually recognized in the statutes of the western territories and states over a period of years.<sup>94</sup> The doctrine was used to grant water rights to individual holders, subject only to publicly prescribed “beneficial uses.” According to the doctrine, beneficial use is in fact the limit and extent of the water right. Although the definition of beneficial use has evolved over time, the necessity of using water beneficially has remained constant. The “use it or lose it” principal is a related rule which penalizes non-use by forfeiture, in order to avoid speculative claims and ensure protection of the public interest in the continuous and beneficial use of water. Water relinquished because of non-use returns to the water source and may be appropriated by others.

Another basic tenet of appropriation doctrine bases priority on the proposition that “first in time is first in right.” The doctrine thus protects those who put water to beneficial use against unauthorized injury by other appropriators. This principle has provided certainty which promotes the investment of capital necessary to develop water supplies. In turn, such water development sustained social and economical growth in the West. Importantly, pursuant to this doctrine, most of the West’s water has been allocated, primarily to agriculture.

While the doctrine has often been criticized as outdated and inflexible, or otherwise unable to meet current water resource management needs, an impartial observer would have to agree the states have made significant modifications to the doctrine to enhance public interest protection.<sup>95</sup> Like basic tenets of the doctrine itself, these modifications have significant implications with regard to growth.

### 2. Public Interest

Traditionally, appropriative water law did not explicitly consider the protection of public values in determining whether to grant a water right. In doing so, the state official considered three primary factors: the date of application, the amount of water available, and the potential adverse impacts to existing rights. Because it ignored other factors, the public interest was often equated with the maximization of potential economic benefit.<sup>96</sup>

However, in recent times, both the state legislatures and courts have established and defined public interest criteria that must be satisfied when an application to appropriate water or to transfer a vested water right is considered. While these criteria vary from state to state, most western states have some statutory public review provision in their laws or regulations governing new appropriations. Several states also require consideration of the public interest in determining whether to approve a proposed transfer.<sup>97</sup>

Idaho law, for example, requires consideration of the public interest with regard to both new appropriations and transfers. The Idaho Supreme Court has broadly interpreted the term "public interest" to require consideration of numerous factors, including assurance of minimum streamflows, encouragement of conservation, protection of aesthetics and the environment, and an assessment of the appropriation's effect upon vegetation, fish, and wildlife. Significantly, the Idaho Supreme Court defined the state legislature's use of the term "local public interest" by concluding that the legislature "intended to include any locally important factor impacted by proposed appropriations."<sup>98</sup>

A Utah law mandates that the State Engineer determine whether approval of an application for a new water use will "unreasonably affect public recreation or the natural stream environment."<sup>99</sup> Three statutory criteria guide the State Engineer in Nevada: namely; (1) the availability of unappropriated water, (2) the effect on existing rights, and (3) the public interest.<sup>100</sup>

Arizona law requires the Director of the Department of Water Resources to reject an application for surface water where the proposed use is contrary to public values. In a case involving the Department's predecessor agency, an application was denied which, if granted, would have resulted in the loss of 1.7% of the total recharge of one of Arizona's ground water basins. The agency determined it would not have been in the public interest to place additional strain on a source of ground water supply already experiencing substantial overdraft. In a decision with clear implications relative to growth, the Arizona Court of Appeals upheld the denial, emphasizing that, in an area of water shortage, even a small reduction in recharge might cause substantial injury to the public welfare, particularly if followed by additional reductions.<sup>101</sup>

Drawing from this sampling of western state laws relative to public interest review of new water applications and transfers of existing rights, two conclusions seem evident: (1) none of the statutes explicitly grant authority to consider the impacts of the proposed new use or transfer relative to "growth"; and yet (2) virtually all of them grant sufficiently broad discretion to enable consideration of such impacts.<sup>102</sup>

This is not to say that a public interest review process should be utilized as a tool to manage growth. Some argue that state water agencies are largely ill-equipped to determine questions of the public interest in general, and have argued for alternative mechanisms. For example, regional planning boards have been proposed as a more appropriate vehicle to ascertain the public interest. Further, without explicit authority, state water officials would be

understandably reluctant to engage in matters which have traditionally been handled primarily at the local level.

This is to say, however, that various public interest laws in the West have the potential of being utilized as a tool for managing growth. But in the absence of explicit statutory authority and guidelines for application of public interest review within the framework of state goals and policies concerning growth, it seems very unlikely that a public interest review process would be an effective tool. On the other hand, pursuant to such authority and guidelines, the process could be used to help assure consistency with state and local plans and policies relative to growth when considering applications for new water uses and transfers, and thus serve as a valuable component of a comprehensive growth management strategy.

### 3. Instream Flows

As previously indicated, the appropriation doctrine traditionally focused on facilitating off-stream uses. Instream flows were primarily provided as an incidental affect of institutional constraints created by existing water rights and priorities, as well as interstate compacts. Now, however, in virtually every western state legal mechanisms exist to provide some protection for instream flows.<sup>103</sup> Public interest review of an application for a new use or transfer can result in a number of outcomes, commensurate with the scope of interests involved, which may or may not have significant implications for growth. In contrast, the application of instream flow laws and mechanisms will generally always have a direct and broader impact on growth, since such decisions determine to what extent water will be available off-stream for consumptive use and development. Indeed, many mechanisms for establishing instream flows in the western states provide a proactive opportunity to determine the level of protection for public values instream, in contrast to the reactive nature of the public interest review in response to applications for new uses and transfers. Again, instream flow laws vary from state to state.

In California, public interest statutes form a legal basis to protect "use of water for recreation and preservation and enhancement of fish and wildlife resources [as] a beneficial use of water."<sup>104</sup> However, a diversion or impoundment of water must be made to establish an appropriative right to affect protection of instream values. State agencies in California, Oregon, and other states may also protect instream flows under state statutes that allow terms and conditions to be included in appropriative rights to maintain by-pass flows.<sup>105</sup>

In Montana, a public entity may acquire a water reservation to secure the equivalent of a right for instream flow.<sup>106</sup> Laws in California, Oregon and Washington also provide for water reservations by a state agency, or a similar process.<sup>107</sup>

Wyoming has defined instream flow and water storage for subsequent release to maintain instream flow to be beneficial uses under certain conditions, and has established a procedure for appropriating water for such uses.<sup>108</sup> A similar statute in Utah enables the state to acquire established water rights to provide "water for instream flows in natural channels necessary for

the preservation or propagation of fish within a designated section of natural stream channel.”<sup>109</sup> The Colorado Water Conservation Board may appropriate and acquire “such waters of natural streams and lakes as the Board determines may be required for minimum streamflows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree.”<sup>110</sup>

The Washington legislature declared in 1949 “that a flow of water sufficient to support game, fish and food fish populations be maintained at all times in the streams in the state.” The Director of the Department of Ecology may refuse to issue permits where instream flow needs would be harmed. The Director may also insist on conditions to protect instream flows in granting permits. Further, the Department on its own initiative or when requested by the Department of Fisheries may establish minimum streamflows and lake levels to protect fish and wildlife resources, recreation, or aesthetic values.

In a few states where instream flow appropriations or their equivalent are not recognized by statute, state administrators may provide protection pursuant to public interest provisions. In both Arizona and Nevada, state officials have interpreted their laws requiring a diversion to establish a water right to allow for an instream water use.<sup>111</sup>

Again, this sampling of state statutes is devoid of an instance of explicit authority to establish instream flows or to condition new permits upon by-pass flows in order to address growth. Nevertheless, to the extent that existing authorities are utilized to maintain water in the stream, such water will not be available for consumptive uses off-stream conducive to growth and development. Like the public interest review process such instream flow laws would seem to be inappropriate tools by themselves to deal with growth. However, their utilization has even clearer implications for growth and development, and therefore, could be one important tool in an arsenal of tools within a comprehensive framework of state goals and policies relative to growth.

## **V. Lessons Learned - The West's Love/Hate Relationship With Growth**

Throughout western history, growth has been perceived in a generally favorable light. Growth has provided jobs, income, and an increasing range of goods and services to people in the West. Growth is a key element in the paradigm of progress that says there can be more for everyone. Developers and many residents of growing areas often see growth management as antithetical to the “growth is good” paradigm.

Strong values of isolationism, self-reliance and self-determination further characterize many rural communities. Many westerners are descendants of pioneers, trappers, miners and others who wanted a chance to establish an independent order. This strand of western thought is today contributing to a grassroots rebellion against planning efforts that is reaching revolutionary

proportions in some areas.<sup>112</sup> Many rural residents are resisting growth planning as unwanted evidence of bureaucratic efforts to control their way of life.

On the other side of the spectrum are communities that have recognized undesirable attributes of rapid population growth in their area, and have implemented growth management techniques. The city of Boulder, Colorado is a noteworthy example, illustrating both the achievements that growth management can offer, and its costs and limitations.<sup>113</sup> In 1959, Boulder enacted its "blue line" marking an elevation across the foothills beyond which water and sewer services would not be extended. Citizen activity led a stream of progressively tougher measures aimed at protecting open spaces and limiting commercial and residential development. In 1967, Boulder became the first US city to enact a sales tax for open space protection. In 1970, Boulder enacted its first comprehensive land-use plan, which was then adopted by Boulder County, allowing the governments to work together to manage land use in the Boulder Valley, and directing growth into urban service areas. In 1976, Boulder enacted a growth cap at 2% per year, enforced by the granting of building permits. In 1978, the city and county revised the comprehensive plan to concentrate urban density and reduce sprawl. In 1981, a software company promising 4000 jobs offered to move to Boulder and locate on a parcel planned for open space acquisition. Boulder turned it down, despite a threat of lawsuit. In 1993, Boulder amended its plan to deal with congestion and pollution.

The results of Boulder's efforts are considerable, but not without detractors. They point out that open spaces around Boulder have become a recreation Mecca, with more visitors per year than Yellowstone Park. Housing costs have risen to the point that housing is unavailable to many middle and low-income earners. Towns outside of Boulder have boomed, leading to criticisms that Boulder's efforts have only slightly displaced growth. Boulder's comprehensive planner Joe Mantione says these problems reveal a significant lesson: No community or county can plan in isolation. "So many of our problems are connected to problems in other cities. We can't do it all," he says.<sup>114</sup>

## **VI. Recommendations**

Before presenting conclusions and recommendations for consideration by states relative to water policy as a tool in managing growth, it should be said the evidence that water would be an effective tool in growth management is at best ambiguous. It seems clear growth management has been and should remain primarily a local responsibility. Even if preemption of this local responsibility were desirable, given the history of strong resistance to any efforts to curb this local power, such preemption does not appear to be a politically viable option.<sup>115</sup> Yet, the history of success by local governments to manage growth by controlling water availability is checkered.

First of all, the law is in many cases unclear as to what steps a water provider must take to meet the needs of perspective water users. A moratorium on water service will in most instances not serve as a permanent solution. There is evidence to suggest that political pressures would

make it impossible for an emergency moratorium to remain in effect indefinitely.<sup>116</sup> This evidence, together with other recent developments, underscore the notion that a growth-control strategy based solely on limiting access to water resources will likely be ineffective. Short-term gains may be acquired through such a strategy, but appear fragile over the long term. Therefore, states and communities seriously concerned with the effects of growth would seem to be better advised to confront the problem directly by adopting and implementing more comprehensive long-term planning measures.<sup>117</sup>

However, the success of such comprehensive state growth and management efforts is hard to gauge. There are simply few definitive answers as to how well such acts have worked, given the dearth of information available concerning their effects.<sup>118</sup> Nevertheless, indications from Oregon's landmark State Planning Act of 1973 are that it has had a positive effect. As indicated earlier, Oregon's law declared the state's interest in achieving specified development goals, set forth requirements for local governments to plan for development and to set standards for that planning. As a result of its requirements for urban growth boundaries, it fostered the empowerment of regional agencies in the formulation of inter-local agreements. Significantly, Oregon law did not call for state level planning. The focus was to encourage effective, reasonable planning by local governments. Although it took thirteen years to achieve the goal, every city and county now has a plan and the Oregon law has survived three statewide ballots.<sup>119</sup> Within the context of such an approach, water policy would seem to have a role. Based on that assumption, the following recommendations are set forth for consideration.

1. Clarify at the state level the duty of service obligations of water suppliers.

A coherent policy with regard to the obligations of water suppliers to provide new service connections would assist local communities dealing with growth management. As previously indicated, the law is unclear regarding the scope of this authority and, as a result, much depends on court interpretation of the appropriateness of the vehicle the provider has chosen to achieve the growth-management objective. Within the framework of an overall state growth-management policy and plan, guidance as to appropriate methods to manage growth by controlling access to water service would provide valuable information for water providers and courts alike. Such state legislation could include guidelines for shifting the burden of developing new supplies to developers. The guidelines should be sufficiently flexible, within the framework of relevant constitutional constraints, to give appropriate discretion to locally elected officials within the overall growth-management scheme. Such flexibility should facilitate negotiated development approvals centering on the extent of the infrastructure improvements which the developer, rather than the provider, would be obligated to provide.<sup>120</sup>

State policies could also facilitate local timing of development in such a way as to assure that public infrastructure can keep pace with growth. Such tempo controls with regard to water and other infrastructure development, combined with appropriate locally driven decisions on the location and character of growth, can also influence the type of growth that occurs.<sup>121</sup> State

technical assistance to local communities regarding methodology to support such timing efforts would also be helpful.

2. Facilitate implementation of watershed planning which identifies areas where development is most desirable and where natural amenities that depend on water should be protected, and otherwise assist, as appropriate, local agencies responsible for land-use planning and development approval.

In recent years, there has been substantially increased interest in voluntary, locally driven watershed planning as a tool to address a variety of challenges, ranging from water supply to water pollution, soil conservation, fishery protection and so forth. For example, in Washington State, watershed efforts abound. There are at least 240 significant water resource management and protection efforts focused on or within 62 Water Resource Inventory Areas (WRIA) which follow watershed boundaries. Among these, there are examples of almost every configuration of governmental, non-governmental and private watershed efforts represented, sometimes all within one WRIA.<sup>122</sup> Further, policy makers and communities alike are increasingly seeing the potential for the broader use of watershed planning for problem solving. There appears to be a growing consensus that, as watersheds emerge as the unit for management and action, they become a rational framework for undertaking integrated resource management.<sup>123</sup> Seen in this context, it seems clear that addressing growth-management concerns is well within the ambit of issues that local stakeholders involved in watershed planning may wish to pursue.

While watersheds have always been considered logical units to study resources, and river basins have generally been regarded as planning units for development, the new emphasis on watersheds incorporates a process with the following characteristics: (1) decisions are reached by consensus; (2) all relevant stakeholders participate and are allowed opportunities for input; (3) unique structures and solutions appropriate to the watershed and its inhabitants are allowed; (4) adequate time for communication, education and discussion is provided, so as to achieve broad agreement and buy-in; and (5) recognizing that a watershed is dynamic and ever-changing, a continuous process is incorporated for evaluating progress and adapting to change.<sup>124</sup>

Watershed planning efforts with these characteristics are having success in the West, and states have played a significant role in encouraging such efforts. This is not to say, however, that growth management should be the driving force behind a watershed planning effort. But growth management would seem to be a legitimate area of emphasis in many watersheds, particularly where involved citizens are motivated to identify local values they want to preserve, and to implement methods of preserving them in the face of anticipated development. In this regard, it is important to recognize that watersheds can be scaled in size to encompass the so-called "problem-shed," encompassing the constellation of problems that need simultaneous attention.<sup>125</sup> Indeed, while generally confined to regions within one state, watershed efforts can encompass more than one state.<sup>126</sup> One of the difficulties that plague growth management efforts is the inconsistency between neighboring jurisdictions.<sup>127</sup>

Thus, growth management strategies should recognize and take full advantage of the potential of watershed efforts to deal effectively with issues associated with growth. Given the traditional reliance on local entities to deal with such issues, the increasing emergence of watershed planning efforts presents a timely opportunity to tap into valuable local resources. At the same time, local water planning efforts are often strapped for resources, and technical assistance, as well as some financial assistance, would be very helpful. In particular, states may wish to consider establishing criteria for identifying sensitive areas and values that would be detrimentally affected by development, e.g. floodplain, riparian habitat, etc.

It should also be noted that states can play a significant role assisting local communities in growth management in the absence of local watershed efforts. Given the essentially voluntary nature of these watershed efforts, there must be a willingness on the part of citizens, communities and government to work together. The responsibility for land-use planning and development approval rests with local agencies, typically cities and counties. Local governments may be understandably reluctant to share this highly valued prerogative in a larger context.<sup>128</sup> Nevertheless, state water agencies can assist cities and counties in these functions in several ways, principally by serving as sources of information and expertise on water resources and by facilitating regional water planning among local jurisdictions.

Typically, state water management agencies maintain data on hydrology, water quality, water use, flood plain delineation, etc. This information may be accessed by local agencies as part of their planning programs. With the ever increasing interest in common data architecture and geographic information systems development, there is significant potential for state and local government collaboration in developing GIS applications that would be of use for local and regional water planning. State agencies can also make their staff available to serve as resource persons to local advisory committees and other public participation efforts sponsored by the city or county.

Facilitating regional planning and management of water resources is an important function that states can perform. The political boundaries which define cities, counties, and special districts seldom match the geographic limits of a watershed, ground water basin, or other hydrologic feature. State water agencies, which generally do evaluate water resources on the basis of hydrologic units, can first assist the local agencies by disaggregating their data to match local political boundaries, and then by working with the local agencies to illustrate the impacts of changes within a political boundary to the basin-wide resources.

3. Assure that local plans and decisions with regard to growth management and the protection of local values are respected in the public interest review of applications for new water uses and transfers, and in decisions regarding the establishment and maintenance of instream flows.

If one assumes the state's role is to encourage and assist local communities regarding growth management, then decisions reached by local communities should be given considerable

weight in determining whether new applications to appropriate water or to transfer existing rights are in the public interest. Providing explicit authority to water officials to do so, again within the framework of a comprehensive strategy, would seem to be an appropriate step in this direction. Such authority can be easily implied from many public interest statutes, but explicit authority and/or direction as part of an overall state growth management strategy would appear to be desirable. Absent such direction, it is not realistic, or perhaps even desirable, to expect water officials to deal with growth management, even if statutory discretion might allow them to do so.

In like manner, determinations by state water officials regarding instream flows should be informed by local and regional plans and priorities. A state-initiated process to guide development of such plans and priorities may be a useful tool in encouraging local efforts, and serve as a *quid pro quo* for state assistance. Once such plans are determined to meet general state criteria, then they should have substantial influence with regard to state decisions regarding instream flows.

## VII. Conclusion

As indicated at the outset, this report is not intended to address the efficacy of growth management efforts per se. It does conclude, however, that water resources policies and processes in and of themselves are most often ineffective tools to manage growth. But where a state undertakes to develop and implement a comprehensive growth-management strategy, water resources policy would appear to be an appropriate component of that strategy. Indeed, many believe the future of growth-management efforts will revolve around natural resource constraints.

The report also echoes the general consensus that state efforts should not attempt to preempt local prerogatives, but rather endeavor to inform, guide, and assist those efforts. While such assistance may appropriately be made conditional upon local plans meeting general state guidelines, such guidelines should be flexible. Once local plans and values are identified through appropriate processes, they should be incorporated as part of the definition of the public interest with regard to related water resource decisions. In these ways, the report suggests that water resource planning and allocation policies could serve as important tools to supplement and support local efforts within state comprehensive strategies to manage growth.

1. California, with almost 32 million people, is contributing most of the people moving into the growing western states. Between 1985 and 1991, California contributed: 44% of those who moved to Nevada; 26% of those who moved to Arizona; 25% of immigrants to Utah; 22% of those who moved to Idaho; and 19% of those who moved to Montana. *New York Times*, 1993 (cited in R. Lamm, et al., "The West At Risk," (1994)).
2. R. Rasker, *A New Look at Old Vistas: The Economic Role of Environmental Quality in Western Public Lands*, 65 U. Colo. L. Rev. 369, 381-82 (1994).
3. S. O'Malley, *The Rural Rebound, in American Demographics* (1994) at 24-29.
4. R. Lamm, et al., "The West At Risk" (abstract) 4 (1994).
5. The *New York Times* quoted a Whitefish, Montana resident: "It's easier to get from here to someplace than from the L.A. airport to someplace. Between modems, fax machines and computer discs, I can handle it all from here. I can get on a plane and be in L.A. by noon. No one cares where I was at 7 in the morning." E. Bard, "Commuter Homes Rise in Montana Valley," (6/19/94, Real estate section at 24).
6. *Op. cit.* at 5-6.
7. J. Bonfante, "Sky's the Limit," *Time* (9/6/93 at 20-27).
8. H. Richmond, "Need Assessment for a National Land Use Policy Institute," National Growth Management Leadership Project (1994) (cited in R. Lamm, *supra* n.1, at 10).
9. P. Jobes, *Population and Social Characteristics in the Greater Yellowstone Ecosystem, Society and Natural Resources*, Volume 6 (1993).
10. *The Dynamic West: A Region in Transition, Western Region: The Council of State Governments*, at 19 (1989).
11. This trend may be changing, as appreciation and protection of open spaces and green belts increases. See, e.g., *Water Transfers in the West*, 16-19, National Research Council (1992).
12. Williamson Act, Cal. Gov't Code §§ 51200-51298 *et seq.* (Deering 1987).
13. See, e.g., Legislative history of the California Central Valley Project Improvement Act.
14. *Swanson v. Marin Mun. Water Dist.*, 56 Cal. App. 3d 512, 519-20, 128 Cal. Rptr. 485, 489-90 (1976).
15. 169 Cal. 318, 146 P. 640 (Cal. 1915).
16. *Swanson* at 56 Cal. App. 3d 524, 128 Cal. Rptr. 493.

17. *Id.* at 524.
18. 256 Cal. App. 2d 271, 63 Cal. Rptr. 889 (1967).
19. *Id.* at 285.
20. Quoted in "Can Planning Rein in a Stampede," High Country News (9/5/94) at 6.
21. Quoted in P. Larmer, "Some State Governments Try Planning from Top Down," High Country News (9/5/94) at 14.
22. Land Conservation and Development Act, ch. 80, 1973 Or. Laws 127 (codified as amended at Or. Rev. Stat. § 197 (1993)).
23. *Op. cit.*
24. Florida passed such a law in 1975 and strengthened it in 1985. Fla. Stat. Ann. §§ 163, 166, 186, 187, 380 (West 1990). Maine, (Me. Rev. Stat. Ann. tit. 30, § 4961 (1978)), Rhode Island (R.I. Gen. Laws § 45-22 (1988)), Georgia (Ga. Code Ann. §§ 12-2, 36-70, 45-12, 50-8 (Harrison 1973)), New Jersey (N.J. Stat. Ann. § 52:18A-16 (1986)) and Vermont (Vt. Stat. Ann. tit. 32, § 4300 (1981)) have also passed laws calling for growth planning.
25. Growth Management Act of 1990, Wash. Rev. Code Ann. § 36.70A *et seq.* (West 1991).
26. Mont. Code Ann. §§ 76-1-600 *et seq.* and 76-6-100 *et seq.* (1993).
27. *See generally* D. Curtin & T. Jacobson, *Growth Control by the Ballot Box: California's Experience*, 24 Loyola of Los Angeles L. Rev. 1073 (1991).
28. *Id.* at 1074 (citing a 1988 survey conducted by the League of California Cities in cooperation with the County Supervisors' Association of California).
29. *Id.* at 1074-75.
30. D. Herman, Note, *Sometimes There's Nothing Left to Give: The Justification for Denying Water Service to New Consumers to Control Growth*, 44 Stanford L. Rev. 429, 435 (1992).
31. *See, e.g.*, Cal. Water Code §§ 350-359, 71640-71644 (Deering 1977); Nev. Rev. Stat. Ann. § 416.010 (1993); Wash. Rev. Code Ann. §§ 43.83B.400-.83B.425 (Supp. 1995).
32. *Op. cit.*, 437.
33. *See, e.g.*, *Swanson v. Marin Municipal Water District*, 128 Cal. Rptr. 485 (1976).
34. *See, e.g.*, *Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318, 146 P. 640 (1915).

35. "Boulder's ingenuity has a few drawbacks," High Country News (9/5/94) at 11.
36. "A toolbox to shape the future," *id.* at 9.
37. *Id.*
38. "Idaho Senate Rejects Tax Plan for Growth," Salt Lake Tribune (2/28/95) at A9 (Associated Press).
39. *See, e.g.*, National Research Council, Water Transfers in the West, at 196.
40. D. Tarlock, *Western Water Law, Global Warming, and Growth Limitations*, 24 Loyola of Los Angeles L. Rev. 979, 1008 (citing discussion of ordinance in *Cherokee Water & Sanitation Dist. v. El Paso County*, 770 P.2d 1339, 1340 (Colo. Ct. App. 1988)). Tarlock argues:

These fantastic efforts to guarantee water for future generations should be modified. . . . They can distort water allocation needs by creating a race among water suppliers to acquire reserves at the expense of social and environmental uses, and such supplies may blunt efforts to find alternative ways of meeting urban demand.
- Id.* at 1009.
41. "A soft-paths approach to land conservation," High Country News (9/5/94) at 10.
42. "A toolbox to shape the future," *supra* at 9.
43. *Id.*
44. A Primer on Land Use Planning and Regulation for Local Governments (Montana Department of Commerce and the U.S. Dep't of Housing and Urban Development) at 28.
45. 314 U.S. 160 (1941).
46. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (Brennan, J., opinion).
47. *See, e.g.*, *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 261-62 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972).
48. *See, e.g.*, *Associated Home Builders v. City of Livermore*, 557 P.2d 473 (Cal. 1976); *Builders Ass'n v. Superior Court*, 529 P.2d 582 (Cal. 1974), *appeal dismissed*, 427 U.S. 901 (1976).
49. D. Tarlock, *Western Water Law, Global Warming, and Growth Limitations*, 24 Loyola of Los Angeles L. Rev. 979 at 1007 (1991).
50. *Shapiro v. Thompson*, 394 U.S. at 666 (Harlan, J., dissenting) (footnotes omitted).

51. *Id.* at 627.
52. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 285 (1974) (Rehnquist, J., dissenting).
53. C. DuMars & D. Tarlock, *Symposium Introduction: New Challenges to State Water Allocation Sovereignty*, 29 Nat. Res. J. 331, 337 (1989). *Hood and Sons v. DuMond*, 336 U.S. 525 (1949).
54. *Id.*
55. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964)(quoting *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949)).
56. D. Tarlock, *supra* n.49 at 1004.
57. 458 U.S. 941 at 956-57 (1982)
58. D. Tarlock, *Western Water Law, Global Warming, and Growth Limitations*, 24 Loyola of Los Angeles L. Rev. 979 at 1006-07 (1991).
59. R. Freilich & S. White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis*, 24 Loyola of Los Angeles L. Rev. 915, 956 (1991) (citing, e.g., *Beck v. Town of Raymond*, 394 A.2d 847, 852 (N.H. 1978)).
60. *Id.* (citing *Wincamp Partnership v. Anne Arundel County*, 458 F. Supp. 1009 (D. Md. 1978)).
61. *Id.*
62. U.S. Const. amend. XIV, § 1.
63. *See, e.g., Begin v. Town of Sabattus*, 409 A.2d 1269 (Me. 1979); *Candid Enters. v. Grossmont Union High School Dist.*, 705 P.2d 876 (Cal. 1985); *Loup-Miller Constr. Co. v. City & County of Denver*, 676 P.2d 1170 (Colo. 1984).
64. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976), *Douglas v. California*, 372 U.S. 353 (1963).
65. D. Hagman & J. Juergensmeyer, *Urban Planning and Land Development Control Law* § 10.7 (2d. ed. 1986).
66. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987).

67. *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353 at 1366, 258 Cal. Rptr. 893 at 901 (1989).

68. This principle has been sometimes termed “conceptual severance.” See, e.g., Herman, *supra* n.30 at 463 (citing F. Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1614 (1988); M. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676 (1988).

69. R. Freilich & S. White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America’s Major Quality of Life Crisis*, 24 Loyola of Los Angeles L. Rev. 915, 951 (1991).

70. Herman, *supra* n.30 at 463.

71. 483 U.S. 825 (1987). *Nollan* requires that there be a close fit between the conditions imposed by government and the goal, or that the regulation substantially advance the state interest.

72. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 at 124 (1978).

73. In *Agins v. City of Tiburon*, the Supreme Court recognized the goal of preventing premature urbanization, which it termed an “aesthetic goal” in that case, as a legitimate state objective. 447 U.S. 255, 261 (1980). State courts have also upheld the goal, even where significant economic loss of value resulted. See, e.g., *Haas & Co. v City & County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (reduction in value from \$2 million to \$100,000 not a taking); *Orsetti v. City of Fremont*, 80 Cal. App. 3d 961, 146 Cal. Rptr. 75 (1978) (upheld open-space regulations reducing land values from \$187,000 to \$45,000).

74. 482 U.S. 304 (1987). The Court in that case expressly recognized the validity of normal delays in the development approval process.

75. *First English*, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989), *cert. denied*, 110 S. Ct. 866 (1990).

76. See, e.g., *Keystone*, *supra* at 501; *Andrus v. Allard*, 444 U.S. 51 (1979).

77. Herman, *supra* n.30 at 461.

78. See “Private Property Protection Act of 1995” (H.R. 925) which was approved by a 277-148 vote in the House on March 3, 1995, and S. 605 (introduced by Senator Dole and others).

79. See, e.g., Initiative Measure No. 164, State of Washington (amending Title 64 of the state code) (1995).

80. D. Tarlock, *supra* n.49 at 1008 (1991).

81. R. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 Nat. Res. J. 289 (1992).
82. *Op. cit.* at 1009.
83. *Id.*, 1009-10.
84. See, e.g., *Dateline Builders, Inc. v. City of Santa Rosa*, 146 Cal. App. 3d 520, 194 Cal. Rptr. 258 (1983) and Reynolds, *Local Subdivision Regulation: Formulaic Constraints in an Age of Discrimination*, 24 Ga. L. Rev. 525 (1990).
85. D. Tarlock, *supra* n.49 at 1010.
86. See e.g., *Moore v. City Council of Harrodsburg*, 105 S.W. 926 (Ky. 1907); Note, *Control of the Timing and Location of Government Utility Extensions*, 26 Stan. L. Rev. 945, 952 (1974); Biggs, *No Drip, No Flush, No Growth: How Cities Can Control Growth Beyond Their Boundaries by Refusing to Extend Utility Services*, 22 Urb. L. 285 (1990); Kelly, *Piping Growth: The Law, Economics, and Equity of Sewer and Water Connection Policies*, Land Use L. and Zoning Dig., July 1984 at 3; but citing *cf. Cantrell v. Henry County*, 250 Ga. 822, 301 S.E.2d (1983)(estoppel against county because it accepted water service deposits).
87. See e.g., *Gilbert v. State*, 218 Cal. App. 3d 234, 266 Cal. Rptr. 891 (1990); *Colorado Inv. Serv. v. City of Westminster*, 636 P.2d 1316 (Colo. Ct. App. 1981).
88. See e.g., *Crownhill Homes, Inc. v. City of San Antonio*, 433 S.W.2d 448 (Tex. Civ. App. 1968); see generally 2 A. Priest, *Principles of Public Utility Regulation* 763 (1969); Note, *The Duty of a Public Utility to Render Adequate Service*, 62 Colum. L. Rev. 312 (1965).
89. See e.g., *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Boulder Builders Group v. City of Boulder*, 759 P.2d 752 (Colo. Ct. App. 1988); *City of Boca Raton v. Boca Villas Corp.*, 371 So. 2d 154 (Fla. Dist. Ct. App. 1979), *cert. denied*, 449 U.S. 824 (1980).
90. See e.g., *Swanson v. Marin Mun. Water Dist.*, 128 Cal. Rptr. 485, 489 (1978) ("A water district is empowered to anticipate a future water shortage and to impose appropriate regulations and restrictions where, lacking such control, its water supply will become depleted and it will be unable to meet the needs of its consumers."); *P-W Inv. v. City of Westminster*, 655 P.2d 1365 (Colo. 1982); see also Note, *Public Utility Land Use Control on the Urban Fringe*, 63 Iowa L. Rev. 889 (1978).
91. D. Tarlock, *supra* n.49 at 1011 (footnote omitted).
92. J. Biggs, *No Drip, No Flush, No Growth: How Cities Can Control Growth Beyond Their Boundaries by Refusing to Extend Utility Services*, 22 Urban Lawyer 285, 287 (1990).

93. Herman, *supra* n.30 at 437.
94. W. Hutchins, *Water Rights Laws in the Nineteen Western States*, 159-65 (1971).
95. C. Bell, N. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation*, 21 *Environmental Law* 6 (1991).
96. *Id.*
97. *See generally*, Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 *Ariz. E. St. L. J.* 681 (1981).
98. *Shokal v. Dunn*, 109 Idaho 330, 338, 707 P.2d 441, 449 (1985); *but see Idaho Conservation League v. State of Idaho*, No. 94.14 ISCR 694 (Ida. 1994) (recognizing legislation eliminating the “local public interest” as a factor for the court to consider in the Snake River Basin adjudication relative to certain expansions and changes in water right uses).
99. Utah Code Ann. §73-3-8 (1989). This law was interpreted to extend to an application for change in use. *Bonham v. Morgan*, 788 P.2d 479 (Utah 1989).
100. Nev. Rev. Stat. § 533.370 (3).
101. *Arizona Game and Fish Dep’t v. Arizona State Land Dep’t*, 24 *Ariz. App.* 36-31 (1975) reh’g denied (1979).
102. *See, e.g., Shokal v. Dunn*, *supra* n.98.
103. *See Bell and Johnson, supra* n.95 at 10-15.
104. Cal. Water Code § 1243 (West 1971 & 1990 Supp.).
105. Cal. Water Code § 1243.5; Or. Rev. Stat. § 537.170 (5)(a) (1989).
106. Mont. Code Ann. § 85-2-316 (1989).
107. Or. Rev. Stat. § 536.410; Wash. Rev. Code Ann. § 90.22.010 (1962 & supp. 1990).
108. *See Wyo. Stat. §§ 41-3-1001 to 1014* (Supp. 1990).
109. Utah Code Ann. § 73-3-3 (11) (1989).
110. Colo. Rev. Stat. § 37-92-102(3) (Cum. Supp. 1987).
111. *McClellan v. Jantzen*, 26 *Ariz. App.* 223, 225, 547 P.2d 494, 496 (1976); *Nevada v. Morros*, 766 P.2d 263 (Nev. 1988).

112. *See, e.g.*, “Rural residents defy Washington law,” High Country News (9/5/94) at 15. The article describes rebels’ efforts to secede from five counties in western Washington “to form new counties that would have chest-beating names such as Freedom, Liberty, Pioneer and People.” The rebellion is a reaction to Washington State’s Growth Management Act, and the rebels hope to avoid land-use planning regulations by seceding from the state. So long as the new counties fall under the population threshold set by the law, they would not have to conform with its requirements. There are allegations that the “secessionists are funded at least in part by wealthy real estate developers who target rural areas.” *Id.*

113. The following recounting of events is derived from “Boulder’s ingenuity has a few drawbacks,” High Country News (9/5/94) at 11.

114. *Id.*

115. *See, e.g.*, “Placer rejects plan for more local say,” Sacramento Bee (June 22, 1995), describing the defeat of an initiative to broaden a commission or local development project reviews to include residents from communities outside Placer (April 24, 1995).

116. Herman, *supra* n.30, at 449-50; *see also* Biggs, *supra* n.92 at 287.

117. Herman, *supra* n.30 at 450.

118. D. Porter, *Do State Growth Management Acts Make a Difference? Local Growth Management Measures Under Different State Growth Policies*, 24 Loyola of Los Angeles L. Rev. 1015, 1017-18.

119. *Id.* at 1018.

120. D. Selmi, *Introduction: Growth Dilemma*, 24 Loyola of Los Angeles L. Rev. 905, 907 (1991).

121. Legates, *The Emergence of Flexible Growth Management Systems in the San Francisco Area*, 24 Loyola of Los Angeles L. Rev. 1035, 1036 (1991).

122. Western Governors’ Association and WSWC, Watershed Management Workshop, Feb 24-26, 1994 (Draft).

123. *See id.* at 9.

124. *See id.* at 6-7.

125. *Id.* at 9.

126. Some areas have instituted interstate planning for growth which directly affect interstate commerce. For example, the Tahoe Regional Planning Agency is a unique interstate body

responsible for regulating development in both the California and Nevada portions of the Lake Tahoe basin.

There was little construction around the lake and almost no winter recreational use of the area until after World War II, when substantial growth and year-round tourism began. The booming growth around the lake prompted discussions as early as the late 1940s and early 1950s on the need to regulate land use, in part reflecting conflicts among summer cabin owners and new developers of resorts, casinos, and other commercial enterprises.

Later, recognition of the need to protect the lake itself from the impacts of urban development would be added to basic concerns such as zoning and sewage treatment. The legislatures of each state ultimately adopted an interstate compact, which was ratified by Congress. This compact created the Tahoe Regional Planning Agency.

In conjunction with other state and local agencies in the basin, Tahoe Regional Planning Agency acts to control growth and regulate land use planning and development. Examples of methods to restrict growth at the Lake Tahoe include prohibiting development of environmentally sensitive parcels adjacent to streams and limiting the number of new sewer connections.

127. *See* article, *supra* n.115.

128. Selmi, *supra* n.125 at 905.

