

2000

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

Thirty-Fifth Annual Report

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	iii
MEMBER STATES and MEMBERSHIP	1
STAFF	5
COUNCIL MEETINGS	6
OTHER MEETINGS	14
Total Maximum Daily Loads Workshop	14
Water Law Workshop	19
Water Policy Seminar	24
Water Conservation Symposium	32
Drought in the Great Plains Workshop	36
Water Management Symposium - Western Water Law & Protection of Water Quality	37
Water Information Management Systems Workshop	39
Western Governors' Association Annual Meeting	39
OTHER IMPORTANT ACTIVITIES AND EVENTS	41
In Memoriam	41
New Council Member States	41
Membership Changes/News	42
Census/Population and Growth	45
Elections	47
Western States Water	47
Animas-La Plata Project	47
Border Water Issues	48
California/CALFED Bay-Delta Program	49
Clean Water Act - Total Maximum Daily Loads	50
Concentrated Animal Feeding Operations	55
Drought	55
Endangered Species Act	57
Legislative Activities	57
Administration Activities	62
Conservation Agreements	62
Habitat Conservation Plans	63
Indian Water Rights	63
Listing Moratorium	65
Takings and 4(d) Rule	65
Regional Activities and Events	65
Colorado River Basin	65
Columbia/Snake River Basin	66
Klamath River Basin	71
Missouri River Basin	71
Sacramento-San Joaquin River Basins	74
National Endangered Species Reform Act Coalition	74
Wild Atlantic Salmon	75
Federal Hydropower Licensing	76
Federal Non-Indian Claims to Water	81

OTHER IMPORTANT ACTIVITIES AND EVENTS (Continued)

Indian Water Rights Settlements	81
Arizona/San Carlos Apache Tribe	82
Shivwits Band of Paiute	83
Quechan Tribe	83
Ute Indian Tribe	84
Invasive Species	84
Snow Surveys and Water Supply Forecasting	84
Water Adjudication Fee Fairness Act	85
Water Conservation - Plumbing Efficiency Standards	85
RESOLUTIONS AND POLICY POSITIONS	86
Total Maximum Daily Loads	87
Indian Water Rights Settlements	102
Protecting Ground Water Quality	105
Federal Non-Tribal Fees in General Adjudications	107
Reclamation's Water Conservation Field Services Program	109
Snowtel Program	112
BUDGET AND FINANCE	115
RULES OF ORGANIZATION	126
COMMITTEE AND SUBCOMMITTEE MEMBERSHIP	130
ADDRESSES AND PHONE NUMBERS	134

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OF THE

WESTERN STATES WATER COUNCIL

INTRODUCTION

The first official meeting of the Western States Water Council was held on the south shore of Lake Tahoe, at Stateline, Nevada on August 3, 1965. The Western Governors' Conference approved the creation of the Western States Water Council during meetings in Portland, Oregon on June 10-13, 1965. The Governors' resolution explicitly stated: "The future growth and prosperity of the western states depend upon the availability of adequate quantities of water of suitable quality." Further, the governors felt that a fair appraisal of future water needs, and the most equitable means of meeting such needs, demanded a regional effort. Water availability and interbasin transfers of water were important issues. Western states found themselves in an era of rapid federal water resources development, and regional or basinwide planning, without a sufficient voice in the use of their water resources. The Western States Water Council has since provided a unified voice on behalf of western governors on water policy issues.

The emphasis and focus of the Western States Water Council has changed over the years as different water policy problems have evolved. However, the commitment towards reaching a regional consensus on issues of mutual concern has continued. The Council has proven to be a dynamic, flexible institution providing a forum for the free discussion and consideration of many water policies that are vital to the future welfare of the West. As envisioned by the Western Governors' Conference, it has succeeded as a continuing body, serving the governors in an expert advisory capacity. Over the years, the Western States Water Council has sought to develop a regional consensus on westwide water policy and planning issues, particularly federal initiatives. The Council strives to protect western states' interests in water, while at the same time serving to coordinate and facilitate efforts to improve western water management.

Council membership and associate membership status is determined based on a request from the governor. Originally, Council membership consisted of eleven western states: **ARIZONA, CALIFORNIA, COLORADO, IDAHO, MONTANA, NEVADA, NEW MEXICO, OREGON, UTAH, WASHINGTON and WYOMING**. In 1978, **TEXAS** was admitted to membership, after many years of participation in Council activities in an "observer" status. **ALASKA** requested and received membership in 1984. **NORTH DAKOTA** and **SOUTH DAKOTA** both received membership in 1988 after a long association with the Council. In 1991, **HAWAII** requested and received membership. In 1999, **OKLAHOMA** requested and received membership. Council membership is automatically open to all member states of the Western Governors' Association. In 2000, both **KANSAS** and **NEBRASKA** joined the Council at the request of their respective governors. Other states may be admitted by a unanimous vote of the member states.

Associate membership has also been granted states exploring the benefits of membership, experiencing financial hardship, or otherwise temporarily unable to maintain full membership. In 1999, there were two important changes in associate membership. **MONTANA** regained full membership, while **HAWAII** was excluded from membership pending payment of its dues. **ALASKA** continued to participate as an associate member.

Each member state's governor is an ex-officio Western States Water Council member. The governor may appoint up to three Council members or representatives, and as many alternate members as deemed necessary. They serve at the governor's pleasure. (Associate member states are limited to two representatives and two alternates.)

Council officers, including the Chair, Vice-Chair, and Secretary-Treasurer, are elected annually from the membership. State representatives are appointed to working committees, with one representative per state also appointed to an Executive Committee. The Executive Committee attends to internal Council matters with the assistance of a Management Subcommittee, which includes the Council officers, immediate past Chair, and Executive Director. The Council's working committees are the Legal Committee, the Water Quality Committee, and the Water Resources Committee. Each working committee is directed by a committee chair and vice-chair. Committee chairs, in turn, name special subcommittees and designate subcommittee chairs to study issues of particular concern.

Meetings of the Council are held on a regular basis, rotating among the member states, with state representatives hosting Council members and guests. In 2000, meetings were held in: Washington, D.C. on March 13-14; Rapid City, South Dakota on August 19-21; and Grand Junction, Colorado on October 18-20. Guest speakers are scheduled according to the relevant subjects to be considered at each meeting. The Council meetings are open to the public. Information regarding future meeting locations and agenda items can be obtained by contacting the Council's office. Included herein are reports on each of the Council meetings, positions and resolutions adopted by the Council, and a discussion of other important activities and events.

During 2000, the Council staff was comprised of: D. Craig Bell, Executive Director; Anthony G. (Tony) Willardson, Associate Director; James P. Alder, Legal Counsel; and a secretarial staff including Cheryl Redding, Lynn Bench, and Julie Stam.

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Hal Simpson - Colorado
Hal Anderson - Idaho
Tracy Taylor- Nevada
Nancy Knouse - New Mexico
Duane Smith - Oklahoma
Nancy McCann - Wyoming

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Safe Drinking Water Act Subcommittee

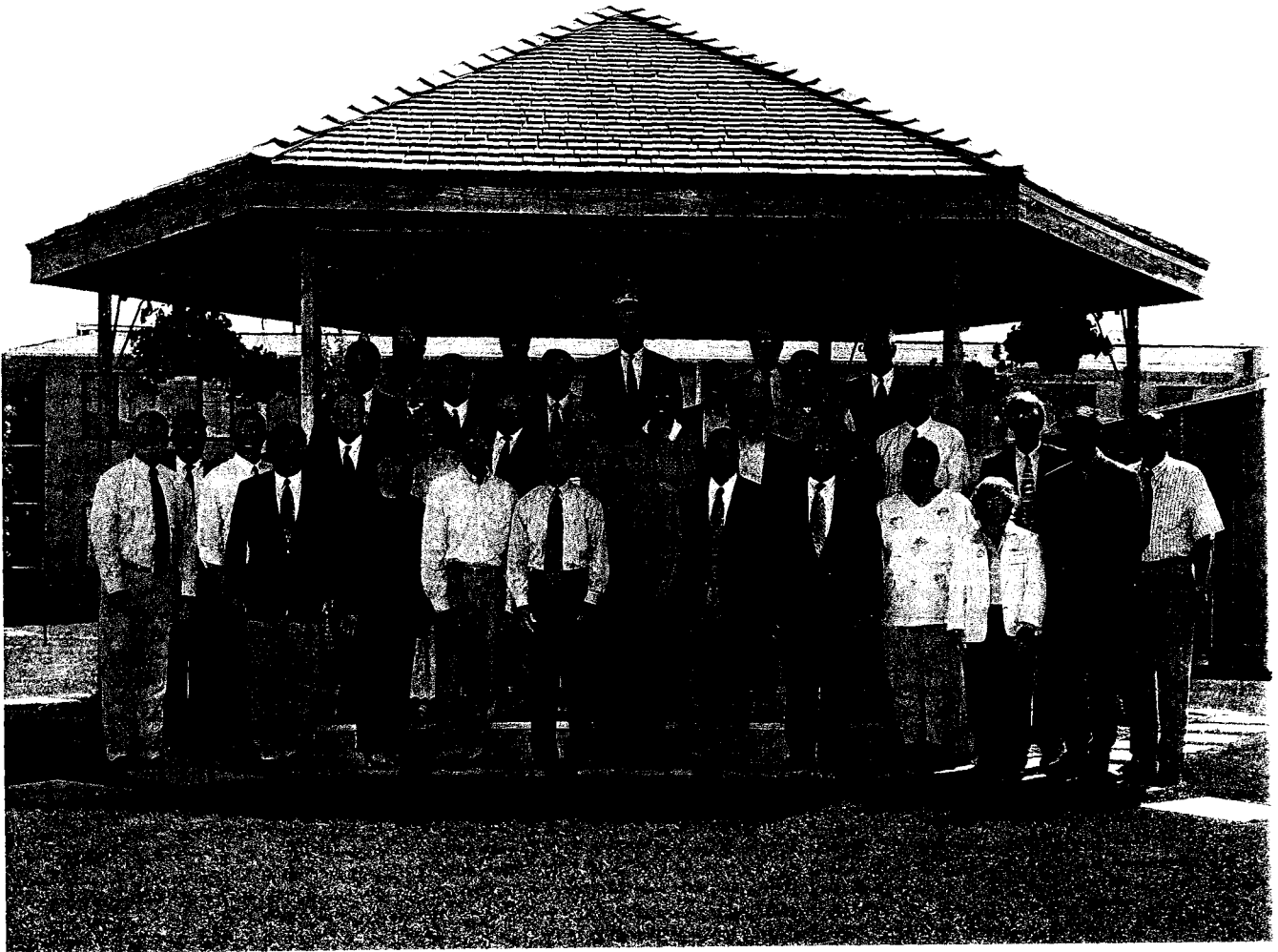
Francis Schwindt - North Dakota
Steve Pirner - South Dakota

Total Maximum Daily Load (TMDL) Subcommittee

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Steve Allred - Idaho
Jon L. Craig - Oklahoma
Mike Llewelyn - Oregon
Steve Pirner - South Dakota
Don A. Ostler- Utah
Gary Beach - Wyoming

COUNCIL MEMBERS

at Rapid City, South Dakota meeting on August 21, 2000



Front Row: James Davenport, Jamie Clover Adams, Roger Patterson, Don Ostler, Kent Holsinger, Francis Schwindt, Ed Anton, Deborah Mull, Jeanine Jones, Bob Bukantis (for Jack Stults)

Second Row: Paul Cleary, Steve Pirner, Keith Phillips, Mike Brophy, Julie Krenz, Tom Davidson, Roland Westergard, Duane Smith, Brian Griffin, Eric Gronlund, Garland Erbele, Dennis Hemmer, Larry Anderson

Third Row: Mike Pearce, Ron Hammerschmidt, Hal Simpson, Tom Maddock, J.D. Strong

Back Row: Curt Martin, Tom Davis, Karl Dreher, Mike Turnipseed, Dee Hansen



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- D. Craig Bell Executive Director
- Anthony G. Willardson (Tony) Associate Director
- James P. Alder (Jim) Legal Counsel
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COUNCIL MEETINGS

**132nd
Western States Water Council
Meetings
March 13-15, 2000
Arlington, Virginia**

The Western States Water Council held its 132nd meetings in Arlington, Virginia at the Crystal City Marriott outside Washington, D.C. on March 12-14, along with a biennial Water Policy Roundtable cosponsored this year by the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), Interstate Council on Water Policy (ICWP), and the Association of State Drinking Water Administrators (ASDWA). The WSWC's Water Resources Committee met on Monday morning and began with a presentation by Gerry Galloway, U.S. Secretary to the International Joint Commission (IJC), on IJC studies along the U.S.-Canadian border. He spoke on a report prepared for both governments on the use of waters along the border, and particularly protection of the waters of the Great Lakes.² Leona Dittus, Executive Director of the National Drought Policy Commission (NDPC), and Christian Kadas with the National Governors' Association, both addressed the NDPC's recent report, "Preparing for Drought in the New Millennium." Members briefly summarized water supply conditions. Next, Dr. Robert Hirsch, U.S. Geological Survey, reviewed recommendations for funding and improving the cooperative federal/state stream gaging program, which the WSWC has consistently supported. Lastly, the Committee reviewed a number of work plan items, and a proposed position.

The proposed position, recommended to the Council by the Committee and later unanimously approved, calls on the Administration and the Congress to "promote and encourage the negotiated settlement of Indian water rights disputes and assist in their implementation as appropriate." It specifically refers to H.R. 3112 to authorize a modified Animas-La Plata Project, endorsed by the State of Colorado and Colorado Ute Indian Tribes and their non-Indian neighbors, as a necessary and essential physical solution to develop water allocated to the Tribes as part of a final settlement agreement executed in 1986 and subsequently ratified by the Congress in 1988. The Animas-La Plata Project was originally authorized by Congress in 1968. The U.S. Fish and Wildlife Service has completed consultation on the project under the Endangered Species Act, and the Bureau of Reclamation has completed two supplemental Environmental Impact Statements, both supporting construction of the project, but environmental and other opposition has delayed full funding for construction.

The Legal Committee also met Monday morning. WSWC Vice-Chair Mike Brophy discussed activities of the Ad Hoc Group on Indian Water Rights and Indian settlement funding proposals. Senator Domenici (R-NM), Senate Budget Committee Chair, supports legislation, but is not sure any will be introduced this year. Montana's successes in reaching tribal settlements was described by

²*Western States Water*, Issue #1333, December 3, 1999.

Jack Stults, and Herb Dishlip of Arizona addressed San Carlos Apache settlement negotiations. Jim Alder, Council staff, reviewed the *Nevada v. South Fork Band of the Te-Moak* case.³ The Nevada Sixth District Court (with original jurisdiction) and the Federal District Court for Nevada have both issued injunctions enjoining the other from holding any further proceedings regarding this case. Jack Stults explained a Montana Supreme Court decision prohibiting the state from issuing any water use permit on fee lands within the Flathead Reservation until the tribe's rights have been quantified. Mike Brophy addressed an Arizona Supreme Court decision extending the federal Indian reserved rights doctrine to ground water to the extent necessary to fulfill the purposes of a reservation. A petition for *certiorari* has been filed with the U.S. Supreme Court.

David Cottingham, U.S. Department of the Interior, addressed a draft report on Indian Water Rights and Implementation of the Endangered Species Act. He stated that some revisions have been made in response to public comments, including an explanation of the report's assumptions and an attempt to tone down language addressing non-Indian water use so as not to place blame. The draft has been sent to Interior Solicitor John Leshy, and later Secretary Babbitt will decide whether to accept, reject or modify the report and implement its recommendations. It is now being treated as an internal policy document, not for public release.

Bill McDonald, the Bureau of Reclamation's new Pacific Northwest Regional Director, discussed attempts to formulate a new policy on transfers of federal project water and the use of federal facilities to transfer non-federal project water. Public comments on a staff draft will be accepted until June 2. The substance of the draft includes compliance with state water law and voluntary willing buyer/willing seller transactions. It was suggested that the Bureau host a workshop on the draft policy. Karl Dreher next addressed draft federal legislation, expected to be introduced soon, to require federal agencies to pay appropriate fees and costs in general adjudications.

The Executive Committee met over lunch on Monday and reviewed the Council budget and administrative matters. Nebraska was recognized and welcomed as a new member state, and Roger Patterson expressed appreciation for the opportunity to join.⁴ Shaun McGrath briefly summarized water-related Western Governors' Association work plan items and collaborative activities with the Council.

The Water Quality Committee met on Tuesday afternoon, and began with a discussion of a recent EPA headquarter's request to its regions for comments on whether interbasin transfers of water should be regulated with National Pollutant Discharge Elimination System (NPDES) permits. Thereafter, Chuck Sutfin, Director of EPA's Office of Wastewater, addressed the Committee on regulation of concentrated animal feeding operations (CAFOs). Shaun McGrath, WGA, next reviewed recent activities dealing with so-called Good Samaritan legislation to amend the Clean Water Act and limit the liability of government or other cooperating non-profit groups that step in to try and clean up abandoned polluted sites for which they have no ownership or operational responsibility. Shaun also discussed WGA activities with respect to EPA's proposed rule on Total

³*Western States Water*, Issue #1337, December 30, 1999.

⁴*Western States Water*, Issue #1342, February 7, 2000.

Maximum Daily Loads (TMDLs) for pollutants for waters identified by states as not meeting state water quality standards. He indicated that the next in a series of workshops on the issue will be timed to coincide with the release of EPA's final TMDL rule. WGA expects EPA grant funds to sponsor a cross-border TMDL coordination workshop. The Committee discussed and then directed staff to explore whether or not EPA has statutory authority to implement certain key provisions of its proposed TMDL rules.

The Committee next addressed three Council positions that were due to sunset, allowing two regarding implementation of the Safe Drinking Water Act Amendments of 1996 to expire, while revising and recommending that the Council readopt one reaffirming the primary responsibility of the states to protect ground water quality and regulate its use.

The full Council met on Tuesday afternoon. Each of the working Committee's reporting on their activities. The Council approved the position to support completion of the Animas-La Plata Project as well as the negotiation and implementation of Indian water right settlements. In addition, it readopted the sunset position regarding the protection of ground water quality and the primary role of the states in developing and implementing appropriate programs with federal financial assistance.

Council Chairman Francis "Fritz" Schwindt spoke on Wednesday morning before members of the water resource organizations jointly sponsoring the Roundtable on WSWC activities and opportunities for collaboration. A special report on the Roundtable discussions will follow. Also on Wednesday and Thursday, some WSWC members and staff met with staff of the Western Water Caucus and visited selected congressmen and their staff to discuss a number of priority issues and enlist their support for important legislation and funding.

**133rd Council Meetings
July 19-21, 2000
Rapid City, South Dakota**

The Western States Water Council's 35th annual meeting was held on July 18-21, in Rapid City, South Dakota at the Ramkota Best Western Hotel. As part of the meetings, the State of South Dakota hosted a tour of Custer State Park, Mount Rushmore, the Crazy Horse monument, and Pactola Reservoir. Joint meetings were also held on topics of mutual interest with the Conference of Western Attorneys General (CWAG) and a Western Governors' Association (WGA) sponsored Western Water Quality Forum meeting of state water quality administrators.

The joint CWAG/WSWC meeting was held at the Sylvan Lake Lodge at nearby Custer State Park on Wednesday morning. The group discussed federal non-Indian claims to water and recent efforts to expand the federal reserved water rights doctrine and the creation of so-called "regulatory rights" limiting the exercise of state-granted rights to water. Among the topics addressed were the Arizona Supreme Court's recognition of federal reserved rights to ground water, federal claims for reserved rights for wilderness areas, wild and scenic rivers, and national forests, federal claims for

the Bureau of Land Management in Idaho's Snake River Basin Adjudication, and federal filings for state water rights in Montana. The group also addressed requirements under the Endangered Species Act, the Total Maximum Daily Load (TMDL) program under the Clean Water Act (CWA), federal tribal trust responsibilities, federal land management agency claims for by-pass flows for instream flows, fish and wildlife habitat, and channel maintenance, as well as federal hydropower project relicensing requirements. These federal statutory and regulatory demands have a significant impact on the exercise of state granted water rights.⁵

The WGA sponsored Western Water Quality Forum was a joint WGA/WSWC effort to emphasize a number of water quality issues common to the western states. The meeting was co-chaired by Mike Llewelyn of Oregon and Dennis Hemmer of Wyoming, representing Governors John Kitzhaber and Jim Geringer, the WGA lead governors on water. The long list of issues discussed covered nonpoint source pollution control, TMDLs, Concentrated Animal Feeding Operations (CAFOs), trading pollutant loading limits, stormwater programs, CWA Section 401 certification and Section 404 permitting programs, CWA Section 303(d) lists of impaired waters, and the use of physical, chemical and biological data in water quality protection. Elizabeth Fellows, Environmental Protection Agency (EPA), Director, Assessment and Watershed Protection Division, was a special guest. She addressed EPA's Consolidated Assessment and Listing Methodology (CALM), but was unable to discuss questions related to EPA's recently released TMDL rules, given congressional appropriation directives.

Water quality administrators and others will be invited to a full-day meeting to discuss the final TMDL rule under the auspices of the WGA in Grand Junction, Colorado on October 18, the day before the next regular WSWC meetings. The Water Quality Forum plans to meet again in association with the WSWC regular meetings in March in Arizona.

The Water Quality Committee met and discussed proposed federal TMDL legislation, a "good Samaritan" bill supported by WGA and WSWC, related to the cleanup of abandoned mine wastes under the Clean Water Act, and the future of the Western Water Quality Forum. A Symposium on Western Water Law and the Protection of Water Quality to be held in Vancouver, Washington on September 6-8, was also discussed.

The Executive Committee met over lunch. Kansas was welcomed as a new member of the Council, bringing membership to eighteen states. Shaun McGrath and Carolyn Duffin addressed WGA activities. Lastly, Council finances, the budget and future meetings were discussed.

The Legal Committee met next, and Steve Magnussen, Bureau of Reclamation, reviewed for members comments received on a draft policy on the transfer of water from federal projects. The Council sponsored a related workshop in May.⁶ A number of lawsuits were discussed by members, including *Klamath Water Users Protective Association v. Patterson* in Oregon, *Phelps Dodge Corp.*

⁵*Western States Water*, Issue #1365, July 14, 2000.

⁶*Western States Water*, Issue #1360, June 9, 2000.

v. United States in Arizona, Pottlatch Corp. v. United States in Idaho, and the Nebraska v. Wyoming negotiated settlement principles. Other topics included U.S. Forest Service claims for instream flows in Colorado, tribal reserved rights claims to ground water in Arizona, and water right settlements with tribes in Utah. Lastly, the committee discussed the status of legislation requiring the United States to pay fees for their claims in state water right adjudications, followed by a presentation on the U.S. Interior Department's report on the effect of the Endangered Species Act on Indian Water Rights.

The Water Resources Committee included a panel of states discussing conjunctive management of surface and ground water, ground water recharge and banking, and other activities in Arizona, California, Colorado, Oklahoma and Oregon. Sue Lowry, Wyoming, reported on the recent WSWC workshop on water conservation and the use of conserved waters, and a subcommittee will be organized on water efficiency. The Endangered Species Act and WGA resolutions, recent legislative action, and a joint policy for the U.S. Fish and Wildlife and National Marine Fisheries Services' evaluation of non-federal conservation efforts when making ESA listing decisions were all discussed. Other topics were drought, the Animas-La Plata Project in Colorado/New Mexico, federal hydropower licencing, dam removal, infrastructure financing, current national plumbing efficiency standards, cooperative stream gaging, the Advisory Committee on Water Information, invasive species and the Lewis and Clark Rural Water Project in South Dakota. Lastly, the WSWC will sponsor a workshop on drought with the Bureau of Reclamation in Rapid City on August 29-31, and its own workshop on Water Information Management Systems in Sun Valley, Idaho on October 9-11.

The full Council met for its 35th annual meeting and 133rd meeting on Friday morning. Steve Pirner, Director of the South Dakota Department of Environment and Natural Resources, welcomed members on behalf of Governor Bill Janklow. He noted the Governor's strong support for the Council, and interest in water resources. He noted that the Missouri River is a defining feature of the state, not only geographically, but also politically. Water resource issues in South Dakota mainly involve the management and the use of Missouri River waters, mostly for municipal and rural drinking water supplies.

The Council also heard Rose Hargrave, U.S. Army Corps of Engineers, Project Manager, Missouri River Master Manual, describe past and present efforts to reach agreement on changes to the way the river and basin dams and reservoirs have been operated for a variety of purposes. The U.S. Fish and Wildlife Service has demanded its own plan be approved to protect endangered species, to the consternation of the basin states and their congressional representatives. She also discussed Corps permitting requirements and changes, specifically under CWA Section 404.

The working committees reported to the Council on their discussions and actions. Individual members also reported on various events and activities in their states. Resolutions of Appreciation were adopted for Martha Pagel of Oregon and John Hatch of South Dakota, both members retiring from state service and resigning their WSWC appointments.

Thereafter, the Council elected Mike Brophy of Arizona as its new Chairman, Karl Dreher of Idaho as Vice-Chairman and Hal Simpson of Colorado as the Secretary/Treasurer. Mike is a partner

in the law firm of Ryley, Carlock & Applewhite in Phoenix. Karl is Director of the Idaho Department of Water Resources, and Hal is the Colorado State Engineer and head of the Division of Water Resources.

**134th Council Meetings
October 18-20, 2000
Grand Junction, Colorado**

The 134th WSWC meetings were held in Grand Junction, Colorado on October 18-20. Sixteen member states were represented. At the full Council meeting on October 20, a resolution/position in support of the U.S. Bureau of Reclamation's Water Conservation Field Services Program and related partnership initiatives was adopted. It states that the Program's incentive-based, proactive, non-regulatory approach is appropriate and consistent with Enlibra principles promoted by western governors. It also supports the use of federal-state-local partnerships for encouraging water conservation and promoting the sustained and efficient use of western agricultural water supplies.

The Council considered a number of sunseting positions, leaving a position on administration of the Endangered Species Act for future reconsideration, and continuing two positions, one voicing concern with the recommendations of the defunct Western Water Policy Review Commission, and a second calling for the payment of federal non-Indian filing fees in state general adjudications. Further, a separate position adopted last January on EPA's revised rules for the Total Maximum Daily Load (TMDL) water quality program will be revisited at the next WSWC meetings on March 14-16, in Scottsdale, Arizona at the Ramada Valley Ho Hotel.

The State of Colorado hosted a field trip to begin the meetings on Wednesday afternoon. Members visited a fish hatchery raising razorback suckers and a new fish ladder on the Gunnison River related to the Upper Colorado River endangered fish recovery program. They also visited the Grand Valley Diversion Dam on the Colorado River and related canals, laterals and power facilities that supply irrigation water to farmers in the area. A significant portion of the distribution system has been piped for water conservation and salinity control. The system has been delivering water to some 40,000 acres of land since 1917.

Jim Souby, Executive Director of the Western Governors' Association, was a special guest. He met with the Endangered Species Act (ESA) Subcommittee, the Water Quality Committee, and the Executive Committee to discuss the western governors' priorities and work plan, which include Enlibra, a new shared doctrine for environmental and natural resource management that seeks to resolve issues by relying on greater stakeholder participation in decisionmaking, focusing on outcomes rather than just programs, and recognizing the need for a variety of tools beyond regulation to improve environmental and natural resource management. He welcomed WSWC support in addressing ESA issues related to water management, and WSWC participation in a WGA Environmental Summit in October 2001, and a Spring 2001 workshop on marketing pollution credits (described below).

The Water Quality Committee meeting began with a presentation on potential future pollution trading markets envisioned by CH2M Hill representatives Bill Wallace, John Rogers, Lisa Bacon and Lisa Nelowet. They described a scientific approach to pollution prevention and environmental restoration based on a market in tradeable credits across media (air, land and water) at different geographic locations, offsetting carbon emissions, reducing nutrient loading and stormwater discharges, and increasing wetlands and fish and wildlife habitat at the least cost by maximizing benefits under a so-called "value tent." For example, an electric utility might pay a farmer to plant trees along a river or stream as a riparian buffer to offset carbon emissions through a scientific process called "carbon sequestration." A market for such credits would benefit both landowners and industry, while creating environmental benefits in the most cost effective manner by "bundling values." Members asked a number of practical questions.

Dave Mabe, Idaho Department of Environmental Quality, discussed water quality improvement projects funded by the Northwest Power Planning Council. Mike Llewelyn of Oregon, Water Quality Committee Chair, spoke on issues involving both the Endangered Species Act (ESA) and Clean Water Act. The Committee also discussed planning for the next WGA TMDL Workshop, which will focus on pollution credits and markets, to be held on March 14, with the WSWC's meetings in Scottsdale, Arizona. The Committee then discussed changes to the WSWC's Clean Water Act position to incorporate concerns with EPA's TMDL rules, but tabled the issue until its next meeting. The Committee decided to let sunset as no longer needed a position urging EPA to exclude certain pipes and other conveyances used primarily for agricultural water deliveries from its definition of public water supplies under the Safe Drinking Water Act. Lastly, the Committee discussed and approved a 2001 work plan, and members reported on various water quality issues in their individual states.

The Executive Committee reviewed the Council's budget and finances, proposed 2001 work plan, future meetings, sunsetting positions, and the electronic distribution of the newsletter.

The Legal Committee recommended that the Council renew, with minor changes, the sunsetting position in support of federal payment of fees for non-tribal claims filed in state general water right adjudications. Idaho was inundated with thousands of claims from federal agencies, primarily the Bureau of Land Management, in its Snake River Basin Adjudication only to see all but a few dozen withdrawn after the state incurred substantial costs to process the initial applications. Unlike other water uses in the adjudication, the federal government can not be required to pay filing fees for costs related to its claims. The Committee also discussed appropriate legislative strategies for promoting the reintroduction and passage of the Water Adjudication Fee Fairness Act, introduced this year by Senator Mike Crapo (R-ID).

Mike Turnipseed, Director of the Nevada Department of Conservation and Natural Resources, discussed events related to *Nevada v. South Fork Band of the Te-Moak*.⁷ Deborah Mull, Assistant Attorney General for the State of Washington, reported on the WSWC Workshop on Western

⁷*Western States Water*, Issue #1373, September 8, 2000.

Water Law and Protection of Water Quality.⁸ Mr. Turnipseed then addressed an unsuccessful attempt to apply the Public Trust Doctrine to a case involving Walker Lake in Mineral County, Nevada and Jim Alder, WSWC staff, highlighted another case in which Hawaii's Supreme Court referenced the doctrine in affirming the rededication of flows no longer used for irrigation to instream purposes.⁹ Committee Chairman Norman K. Johnson of Utah next described jurisdictional claims by the Federal Energy Regulatory Commission over water releases from Bear Lake, on the Utah-Idaho border. Jennifer Gimbel, Colorado Assistant Attorney General, updated members on preparation for the American Bar Association Water Law Conference, which the Council cosponsors. It will be held in February 2001 in La Jolla, California. The Committee approved a 2001 workplan, and reorganized its subcommittees. Lastly, members listened to individual state reports.

The Water Resources Committee heard Carol DeAngelis, Western Colorado Area Manager, Bureau of Reclamation (BOR), describe the Water Conservation Field Services Program and then recommended the position adopted by the Council in support of the program. The Committee determined it will consider a position on state water rights and implementation of the Endangered Species Act at its next meeting. Next, members talked about water resources information management needs, including funding for USGS's cooperative stream gaging program and USDA's snow survey program, and problems obtaining USDA aerial photography surveys. A panel of members including Jeanine Jones of California, Karl Dreher of Idaho, David Pope of Kansas, Jack Stults of Montana and Craig Pedersen of Texas reviewed water resources infrastructure needs and state program financing challenges and mechanisms. Blaine Dwyer, Boyle Engineering, described activities related to endangered species recovery and adaptive management in the South Platte and Colorado River Basins, comparing and contrasting problems and management approaches. Finally, a 2001 workplan was adopted and subcommittees reorganized.

At the full Council meeting, Hal Simpson, Colorado State Engineer, spoke on water resource issues in his state and interstate compacts, transbasin diversions, growing municipal needs, ground water management, federal law and policies related to the ESA, USFS bypass flows, and the Animas-La Plata Project. He noted the increasing conflict between environmental and economic uses of water, despite water conservation and reuse initiatives. Charles Calhoun, Upper Colorado BOR Regional Director, represented Commissioner Eluid Martinez. He spoke on the Colorado River surplus guidelines, ESA, the Rio Grande silvery minnow, Upper Colorado endangered fish recovery, Indian trust responsibilities, BOR's budget, ground water recharge, water reuse, rural water system needs, and other issues.

⁸*Western States Water*, Issue #1374, Special Report, September 15, 2000.

⁹*Western States Water*, Issue #1372, September 1, 2000.

OTHER MEETINGS

Total Maximum Daily Loads Workshop

The Western Governors' Association (WGA) sponsored the latest in a series of workshops on Total Maximum Daily Loads (TMDLs) on February 3-4, in Tempe, Arizona.¹⁰ Held at the Fiesta Inn in Tempe, the focus was on "Developing and Implementing TMDLs." Karen Smith, Water Quality Director for the Arizona Department of Environmental Quality (ADEQ) and Shaun McGrath on WGA's behalf welcomed participants. Ms. Smith briefly addressed water quality-related developments in Arizona, and the state's "vision" for water quality. She described the state's frustration with the Environmental Protection Agency (EPA) in attempting to "juggle too many balls at once." Arizona's key to success has been leveraging its resources through an integrated approach. This is accomplished by breaking down walls between the many programs and integrating resources, planning and data. She focuses her agency's efforts like a "SWAT team." The pace of the TMDL work has exploded, with thirty TMDLs either completed or awaiting approval, where none had been established as late as 1998.

A roundtable discussion included Chuck Fox, Assistant Administrator for EPA's Office of Water. He reminded participants that the TMDL program is nothing new. It has existed since enactment of the CWA, but has only recently been implemented. Its purpose is to address the Nation's significant remaining water quality problems. Mr. Fox indicated that the final TMDL rules would be finished in late summer (see the report under Clean Water Act hereafter). Approximately 30,000 comments were received on the proposed rules, and about half dealt with silviculture issues. Mr. Fox stated that implementation plans are important to the program. Creation of TMDLs is not enough, they must also be implemented. He further explained that "reasonable assurances," as envisioned by the proposed rules, were created to insure that implementation plans are adequate. He maintained that this requirement was intended to provide flexibility and clarification as to the concept's meaning. Mr. Fox also insisted that non-point source pollution must be subject to TMDL regulation if the program is going to have any chance of success. He also addressed a need for more state spending to complement increased federal funding for the program.

David Holm, Director of Colorado's Water Quality Control Division, detailed Colorado's history in developing TMDLs. He listed a number of emerging issues in the field, with growth and development heading the list. There is substantial evidence that growth will result in a redistribution of discharge allocations, possibly affecting water rights use where effluent is discharged to streams that serve as drinking water sources. Another issue emerging in Colorado is the treatment of whirling disease in fish as a pollutant, with the introduction of infected hatchery fish treated as a discharge. Mr. Holm also discussed hurdles he faces, beginning with the need to double or triple staff and monitoring work. Public outreach also needs to increase. Also, the "boogie-man" factor, a fear of the unknown, results in resistance, rigidity and a desire for. He expressed a need for a

¹⁰*Western States Water*, Issue #1343, Special Report, February 11, 2000.

“Good Samaritan” provision in the Clean Water Act to facilitate acid mine clean-ups. Mr. Holm also addressed a number of useful tools, such as stakeholder outreach, increasing staff with federal funding, and having a very elaborate water quality standards program.

Mike Freeman, of the Earthjustice Legal Defense Fund, expressed his belief that the proposed rules represent an improvement in the TMDL program, due mainly to the implementation plan and non-point source pollution provisions. He stressed that these measures are vital to the success of the new rules, stating that if they are not included in the final version of the rule, “we might as well go home now.” Mr. Freeman also felt that to avoid the issue of water quantity is to “shoot ourselves in the foot.” He advocated active EPA involvement in setting instream flows, claiming that states are not capable of doing the job. He also believes that if a stream segment is listed for pollution impairment, including depletions, TMDL creation should be required.

Pete Test, Associate Director of Governmental Affairs for the Oregon Farm Bureau Federation, expressed the fear that farmers and ranchers have of the unknown, especially as to how these new rules might affect their operations. He felt that TMDLs should not be used to regulate non-point source pollution, claiming that to do so would violate the principles of the CWA and is outside the province of EPA. He addressed the importance of adaptive management principles. He claimed that people need to know what they must do. Further, programs need to be based on more than vague concepts and standards, to be successful, with outcome-based goals and objectives.

Don Brady, EPA Office of Wetlands, Oceans and Watersheds, began a second panel discussion. He reviewed some of the numerous comments EPA had received on the proposed rules. He also addressed EPA’s TMDL review elements, giving a number of examples of TMDLs submitted for review and stating that whatever form a submission may take, it must ultimately be labeled as a TMDL to be considered for approval. He said approval of TMDLs has been delegated from EPA headquarters to the regional offices.

Frank Metzler, TMDL and Water Quality Assessment Unit Supervisor, Arizona DEQ, described the great difficulty in deciding which streams are ephemeral, which are intermittent, and which are perennial, without the benefit of having USGS stream gages on all streams. In his experience, it is beneficial to talk to EPA’s regional office, avoid surprises and establish effective watershed groups. It is also important to identify opportunities for creating TMDLs ahead of schedule using new data, studies, grants and proven, qualified consultants. He has been able to develop a short list of dependable, experienced contractors that he can go to immediately, avoiding investigation delays. Mr. Metzler also recommended “diversifying staff members’ TMDL portfolio,” by assigning them responsibility for both ephemeral and perennial streams, avoiding any downtime when ephemeral streams may not be flowing. He recommended avoiding including pollution and stream flow issues in TMDLs, stating that “we will get squashed.” Finally, he recommended that EPA create a library of approved TMDLs, classified by stressor and region, as a reference for other new TMDLs.

Mike Ell, North Dakota’s Surface Water Quality Management Program Administrator, gave participants several essential keys to approvable TMDLs. First, TMDLs must result in attaining or

maintaining the state's water quality standards. TMDLs must also contain a quantified pollutant reduction target, which is the TMDL, expressed in any appropriate manner. The TMDL should consider all significant sources of the pollutant or stressor, including point and non-point sources, but only those that are significant and supported by an appropriate level of technical analysis. The TMDL must include an adequate margin of safety and must consider seasonality, as required by the Clean Water Act. Also, it is important that discharges are allocated responsibly among dischargers and other sources. He also stressed the importance of public involvement in the TMDL process.

John Roanhorse, Institute of Tribal Environmental Professionals, mentioned some existing tribal environmental standards, but stated that no tribes yet have approved TMDLs. He anticipates there will be tribal TMDL submissions to EPA within two years time. He spoke generally about the State of Washington's cooperative management program, and indicated that tribes are looking to establish a broader overall presence in the environmental arena. Tribes are behind the curve in this area and need assistance to catch up.

Kurt Segler, Utility Services Manager for the city of Henderson, Nevada, described efforts to create a TMDL for the Las Vegas Bay of Lake Mead. Initial reactions were negative, but reactions now are fairly positive, as the TMDL provides certainty for dischargers. Allocating wasteloads has occurred through voluntary negotiations. No permit violation is found if the overall TMDL is not violated. Problems with the proposed TMDL rules include: differentiating between monitored and evaluated data; obtaining resources to complete TMDLs within fifteen years; differentiating between physical modifications and water quality impacts; equating reasonable assurances for non-point source best management practices (BMPs) with quantifiable results; and determining future growth impacts on non-point sources for TMDL set-asides.

Larry Koenig, Texas Natural Resource Conservation Commission, discussed implementation plans for non-point sources in the Bosque River watershed. He said that reasonable assurances must be both technically and socially feasible to be successful. By technically feasible, he meant that the necessary technology must exist and be economical. Public support defines social feasibility. He said the proposed rules do not sufficiently accommodate non-point sources. It must be an interactive process, with some latitude for partial steps towards completion, and requiring implementation plans as a condition of TMDL approval is "putting the cart before the horse."

Nina Bell, Executive Director of Northwest Environmental Advocates, stressed that implementation plans are absolutely necessary to the success of the TMDL program, saying that the tremendous uncertainty surrounding non-point source pollution should not be used as an excuse for justifying a "phased" approach. She believes that post-development monitoring should be part of every TMDL, but that monitoring does not constitute the required margin of safety. She emphasized that it makes sense to state TMDLs in practical ways, but ultimately, we must take a look at what really is necessary to remedy impairment. She expressed disappointment that the proposed rules do not adequately address instream flows, or do enough to put water back into streams.

Jamie Clover Adams, Kansas Secretary of Agriculture, defined TMDL program success as making water quality improvements, while still retaining the possibility of continued agricultural

livelihood. She stressed that agriculture agencies must be engaged in the development process. She also noted the importance of credible data, stating that farmers "first need to recognize that they have a problem." She emphasized the necessity of coordination among affected agencies, one-on-one contact with producers, and effective public participation, although these processes may be costly and time-consuming. Finally, she called for taxpayers to "pony up" the money to help farmers incorporate changes that make taxpayers' values reachable, stating that 3% is a good profit margin for farmers, while one basin study estimates implementing BMPs could cost 4-5% of producers' product value.

Rich Bechtel, Director of the WGA's Washington, D.C. office, moderated a discussion on the intersection of the TMDL program and the consultation process under the Endangered Species Act (ESA). No one really knows yet how TMDLs and ESA consultation requirements are going to interact. "It is a work in progress." Gaylon Lee, Forest Activities Program Manager for the California State Water Resources Control Board, felt that while some landowners believe they can do anything they want with their land, many want to "do the right thing, and should be given the chance." Confidentiality is an issue, as landowners do not want their activities to be subject to public review. Landowners often require that the need for more regulation be proven in no uncertain terms, thereby demonstrating the need for a complete understanding of the full effects of the interaction between the CWA and the ESA. He also discussed a lack of understanding on the part of federal agencies, which should be more respectful of the states' situation. Courts have also contributed to the pressure states are facing by placing time constraints on development of TMDLs without accounting for the possibility of ESA consultation requirements.

Bruce Taubert, Assistant Director, Wildlife Management Division, Arizona Game and Fish Department, suggested that TMDL implementation is centered on who, what, when, where and how. The consultation process is a necessary step. TMDL development results in an implementation plan that is approved and adopted by EPA, which is a federal action requiring consultation. He suggested that states start early in developing TMDLs and involving their Fish & Game agencies.

Steve Chambers, U.S. Fish & Wildlife Service (FWS), explained that no case study was yet available, as no TMDL consultation has yet been completed. He agreed that TMDL approval appears to be an agency action necessitating consultation, although informal consultation might be the more appropriate process. He also agreed that maintaining landowner confidentiality is important to the TMDL/consultation process.

Dave Smith, TMDL Team Leader from EPA's Region IX, agreed that we can count on seeing some ESA consultations in the TMDL approval process. He encouraged state and local participants to get to know their EPA regional personnel and start talking to them about what they are facing. When the time comes to make decisions, this will facilitate a much smoother process. He indicated that EPA duties concerning ESA and TMDL interaction are currently being litigated in Montana. Also, EPA, FWS and the National Marine Fisheries Service (NMFS) convened a work group in December 1999, to devise policies and procedures for the consultation process. While no decisions have yet been made, some of the options may include programmatic consultations and a priority setting process. Mr. Smith also indicated that states can expect a 6-12 month wait to complete the

consultation process. He also stated that EPA will work with states to ensure early coordination with FWS or NMFS and agreed that informal consultations are the best approach to this problem, although resorting to the formal consultation process will be used if necessary to keep the process moving.

A general roundtable discussion followed this last panel, with Bruce Flinn of the Bureau of Reclamation's Denver office, moderating. Many participants were concerned with what would be required when pollutant/sediment load reductions do not restore water quality to levels appropriate for designated uses. Many felt that the answer might be to ensure that standards are appropriate for the waterbody. It was suggested that WGA convene a workgroup on the issue of what happens when background conditions and water quality standards conflict. Many participants questioned the extent of federal authority to control non-point source pollution under the CWA, and expressed a need to define jurisdictional issues regarding water rights and water quality. Numerous questions were raised as to what is meant by reasonable assurances. When asked for more clarity on this issue, it was explained that the goal of providing reasonable assurances is to better define what might make a TMDL acceptable, but to remain flexible as well. Participants pinpointed some inconsistency among EPA regions and its headquarters as to whether monitoring may provide an adequate margin of safety. Participants also suggested that WGA look into the issue of how the ESA or the CWA might be used to regulate water flows.

The workshop came to a close with wrap-up remarks from representatives of the WGA lead governors on the TMDL issue--John Kitzhaber of Oregon and Jim Geringer of Wyoming. Mike Llewelyn, Water Quality Division Administrator for the Oregon Department of Environmental Quality, summarized his perception of the workshop, stating that he believes EPA will not back away from the proposal that implementation plans be closely tied to preparation of TMDLs. He felt that this is true of the proposal to list waters impaired by non-point sources of pollution as well. He believes that TMDLs are making states re-think their water quality programs and that fish management is playing a role in this process. He urged states to not let the TMDL program become a "smoke and mirrors" attempt to avoid TMDL development, but also urged the environmental community to understand that there are legitimate reasons for water quality standards changes in some cases. Mr. Llewelyn expressed his apprehensiveness with having TMDL development be driven by the ESA consultation process. Therefore, he concluded, it is vital that states be brought in early--it won't work without a working relationship and understanding on the federal agencies' part. He also expressed his concern that consultation-related delays could be counterproductive to the entire TMDL program.

Gary Beach, of the Wyoming Department of Environmental Quality, stated that he believes that while an approveable TMDL must come from the top-down, there has to be flexibility in the process. The focus of the TMDL process must be results on the ground, so that this is not just a document preparation exercise. He felt that more must be said on the margin of safety issue, as this is not yet adequately clarified. Another issue needing clarification that he gleaned from discussion during the workshop is how to account for growth. He also believes we must address the financial support available to help people achieve the goals of the program. Mr. Beach stated that we will have to address the issue of flow impairment sooner or later, and that this should be addressed at the state

level. Finally, the consultation question is a huge concern for states, according to Mr. Beach. If we don't know how consultation will be approached, then there is no reasonable assurance for states that they will ever have completed TMDLs.

A final summary of this workshop will be posted on WGA's website at www.westgov.org. The final TMDL workshop is anticipated to be held sometime shortly after the release of the final TMDL rule later this summer.

Water Law Workshop

The American Bar Association Section of Environment, Energy and Resources, in cooperation with the Western States Water Council and the Western Attorneys General, held its 18th Water Law Conference in San Diego, February 24-25. Featured speakers included Governor Marc Racicot of Montana, John Leshy, Solicitor of the Department of the Interior, and David Hayes, Deputy Secretary, Department of the Interior.

The session began with an introduction on the evolution of western water law, provided by Roderick E. Walston, Special Counsel, California Attorney General's Office and a Council representative from California. Mr. Walston concluded that "...the appropriation doctrine is a dynamic doctrine that has changed in response to the West's changing public needs, not a static doctrine that protects historical uses frozen at a moment in time." He continued, "How the appropriation doctrine responds to future challenges will form the next important chapter in the continuing history of western water law." He noted particular challenges associated with the enactment by Congress of various environmental laws including the Clean Water Act (CWA) and the Endangered Species Act (ESA).

Janet C. Neuman, Professor of Law, Northwestern School of Law of Lewis and Clark College, agreed that western law had adapted in theory to changing public needs, but found its application to addressing such needs inadequate. She highlighted particularly her views as to the doctrine's ineffectiveness in curbing wasteful uses of water. She then outlined an agenda of proposed reforms for consideration by western courts, legislatures, and administrative agencies "to make the beneficial use doctrine more responsive in order to stretch scarce western water resources...."

Kevin M. O'Brien, associated with a law firm in Sacramento, also concluded that water conservation had "not achieved its promise as an element of water resource management in the western states." He noted, however, that conservation-based water transfers continued to be pursued, particularly in California. He saw the gap between theory and reality attributable to three principal factors: (1) the question of whether specific water conservation efforts have resulted in actual and quantifiable water savings is often difficult to answer; (2) other water users often have strong incentives to assert that a reduction of water use is mere non-use, subject to forfeiture rules; and (3) conserved water statutes were drafted under the prior appropriation system with little attention to the detail of how these new protections would interrelate with established water law doctrines.

The final speaker on the morning panel was Justice Gregory J. Hobbs of the Colorado Supreme Court. He described specifically the Santa Fe Trail Ranchers case in Colorado where the Colorado Supreme Court agreed with the water court that an undecreed change of use of a water right cannot be used to establish the historic use of that right, and therefore, upheld the trial court's dismissal of the application for change.

The next panel was entitled, "Navigating the CWA in the Century Ahead." Michael B. Cook, Director of the Office of Wastewater Management, Environmental Protection Agency (EPA) in Washington, D.C., addressed several current issues, including, "the expanding universe in 402 permitting," the total maximum daily load (TMDL) program, and the gap between needs and resources to achieve CWA goals. He expressed hope that this gap would be closed by increased federal, state and local resources and greater efficiencies.

Michael T. Llewelyn, Oregon Department of Environmental Quality, next addressed the topic. He described Oregon's TMDL program, which focuses on an "outcome based" approach to TMDL implementation, which "is not yet accepted by EPA as providing 'reasonable assurance' of attainment of load allocations." He noted that state water quality managers must now contend with the ESA, which has a substantive legal, political and technical impact on how CWA programs are administered. "In fact," he concluded, "it would behoove states to now consider both NMFS [the National Marine Fisheries Service] and USFWS [U.S. Fish and Wildlife Service] as much of a federal "oversight" agency [as EPA] if any federal approval is required for programs or actions that could be captured under the aegis of the ESA." He said that in order for state water quality managers to effectively administer the programs delegated to them under the CWA, EPA and the Services (NMFS and USFWS) must agree to first reform their fundamental working relationship. Second, the Services must fundamentally change how they assign staff to interact with states, and third, programmatic consolidation or agreements should be favored over project-by-project consultation.

The next speaker, Karen McGaffey, an attorney working in Seattle, concluded that the regulated community has the perception that water quality regulation is following two general trends -- the CWA's scope of regulation is expanding, and EPA's role in implementing and enforcing the CWA is increasing. She argued that the category of "point sources" subject to NPDES permitting requirements has expanded significantly. At the same time, regulation of non-point source pollution is increasing. Significantly, she said, "EPA has proposed TMDL regulations that would require identification of waters impaired solely due to non-point source pollution and development of TMDLs for those waters." Like earlier speakers, she noted also the expanding influence of the ESA in water quality administration. As far as EPA's role, she found it apparent that EPA "intends to continue to use 'guidance' documents as a means of expanding its regulatory control."

Governor Marc Racicot was the featured luncheon speaker. He focused on Montana's experience with both conflict and cooperation in water resources. He discussed in particular the successful efforts in his state to achieve settlements regarding Indian water right claims. He encouraged such efforts to find consensus solutions through negotiation and compromise. He also provided an overview of Montana's challenges as a headwater state in working with its neighbor states and Canada.

Next, attendees were asked to break out in one of two sessions, entitled "The Settlement in General Stream Adjudications-Fairness Standards," or "The CWA and the Endangered Species: The Emerging Challenge to Dams." The session on fairness was moderated by Charlotte Benson, Assistant City Attorney for the City of Tempe, Arizona. She introduced the topic by noting that "the nature of settlements as products of compromise may make it even more difficult for the court to judge the fairness of a proposed resolution of the claims." Further, "...because the elements of water rights are interlocking, a fair inter sese determination of rights arguably requires even more attention to the protection of non-settling parties than is the case in the class action settlements." The panel then focused on the evolving standards of fairness applied to settlements in general stream adjudications.

Thereafter, Dr. Francis McGovern, Professor of Law at Duke University and Stanford University (and the Mediator in the Snake River Basin Adjudication), and Judge Bruce Loble of the Montana Water Court in Bozeman, shared their perspectives. Judge Loble concluded that "a court's approval of an agreement on a unitary resource can produce a rippling effect through the river's spreadsheet of water rights and potentially generate adverse consequences for water users who are unaware of the agreement." However, he concluded that, given the fact that most decrees are not being enforced against water users, we will need to wait for some future date to find out whether the judicial standards applied to review stipulated agreements were fair and whether general stream adjudications result in certainty and finality.

A session on, the "Emerging Challenge to Dams," began with an overview of the history of the Columbia River and the CWA by John M. Volkman, NMFS Fisheries Administrator and Senior Policy Coordinator in Portland, Oregon. Mr. Volkman was followed by R. Nicole Cordan, Acting Director of the Western National Resource Center of the National Wildlife Federation (NWF), also in Portland. She described the lawsuit brought by the NWF alleging that the Corps of Engineers' operation of four dams on the lower Snake River violates Washington state's water quality standards and in so doing violates the federal government's obligations under Section 313 of the CWA. Section 313 generally provides that every federal agency and federal official is subject to and must comply with state water quality standards in the same manner and to the same extent as a non-federal entity. The lawsuit is based on the theory that this obligation can be enforced through a citizens' lawsuit. The principal motive for the lawsuit relates to protection of endangered species habitat. While recognizing that the ESA is still the primary statute for protecting such species, Ms. Cordan concluded that the CWA can also play "a significant role in protecting impaired species." Further, "the result of this case and others like it may have significant impacts for CWA implementation and enforcement generally, as well as for hydroelectric operations specifically, throughout the nation."

Representing the United States Department of Justice, Fred Disheroon noted that the NWF lawsuit challenged chiefly the presence of the dams itself rather than their operations, and thus did not present claims that could appropriately be brought by citizens pursuant to the Administrative Procedure Act. Mr. Disheroon concluded that even the operation of the dams would generally not be subject to judicial review under the CWA. He noted that there was not a private right of action to enforce the states water quality standards under state law, and therefore one could not imply such a private right of action pursuant to Section 313 of the CWA.

One of two breakout sessions focused solely on the ESA and its impact on municipal water supplies. Greg Ellis, General Manger of the Edwards Aquifer Authority, provided the background and a chronology of major events relating to management of the aquifer and the lawsuits which have been brought under the ESA challenging such management. He concluded that these cases added “a new dimension to state and local regulatory activities.” Municipalities and state and local regulatory agencies would be well advised to tread carefully when making regulatory decisions that might have implications for threatened and endangered species, because “a governmental entity can be held responsible for a ‘take’ for its failure to better guard against possible ‘takes’ by the actions of private parties.”

Sharon Metcalf, Director of the Environmental Protection Section for the City of Seattle’s Law Department, examined how the “take” prohibition in the ESA may apply to water suppliers, and then discussed some legal mechanisms for resolving issues of potential liability under the Act, habitat conversation plans (HCPs) and the 4(d) rule in particular. She concluded that among the available mechanisms for water suppliers to resolve ESA liability, Section 7 consultation may be the best option, if it is available. It was too early to tell whether 4(d) rules would be workable for this purpose. While HCP’s may be a reasonable way to go for some suppliers, she concluded that they might also be quite risky endeavors, unless public support is virtually unanimous.

Finally, Gary O’Dea, Assistant City Attorney for the City of Albuquerque, discussed endangered species challenges. He described specifically the litigation on the Middle Rio Grande over endangered species issues and the relationship of the ESA to federal water operations, particularly the San Juan-Chama Project. Mr. O’Dea’s presentation concluded on a positive note by describing a newly formed cooperative process between federal and non-federal entities that “may develop into the long-term ESA solution for the municipality and others stakeholders on the Middle Rio Grande.”

The other breakout session examined the ethical issues associated with government agency contacts in the water arena. Kathleen Marion Carr, U.S. Department of the Interior, Office of the Field Solicitor in Boise, Idaho, moderated the session and provided an overview of the standards of conduct for federal employees. The first panelist was George Reimer, Deputy Director and General Counsel for the Oregon State Bar Association. Mr. Reimer examined the ethical rule against lawyers having contact with an individual or entity represented by another lawyer without permission or unless otherwise authorized by law. He focused particularly on the “authorized by law” exception. He discussed the most difficult issues concerning this exception as it arises in the context of contact with government officials who are represented by legal counsel.

Jennifer Gimbel, Assistant Attorney General for Colorado, began her presentation on the panel by noting the numerous differences between a private attorney and a government attorney. In examining the aspects of the ethical rules, she noted that “one of the most frustrating experiences for a government attorney in contested case situations is to find that her client has been heavily lobbied by the other party’s lawyer without prior or even subsequent notice to the government attorney.” She concluded that both the American Bar Association and the Colorado Bar Association

caution practicing attorneys to take the safer course of action when in doubt about whether the government official is represented by counsel and to notify the government attorney.

The next general session on the continuing evolution of the federal reclamation program, began with an overview by the moderator, Peter Sly, East Bay Municipal Utility District in Oakland, California. He addressed the reclamation program from its origins based on agricultural water use (and project repayment) to a mission that attempts to meet both environmental goals and urban water supply needs. He noted, however, that the legal framework for federal reclamation projects developed around irrigation uses. The panel considered legal issues posed by these new and changing purposes for federal reclamation projects.

Larry MacDonnell, a consultant in Boulder, Colorado and former Professor of Law at the University of Colorado Law School, described supplying water for the environment in the context of the Platte River. He discussed potential sources of project water for transfer. In particular, he noted that transfers of project water requiring a change of use of an appropriative water right are subject to state law governing such changes. He discussed transfer principals under state law, and then discussed at some length additional considerations in federal reclamation projects. He concluded that water users must "be in compliance with both federal statutory and contract requirements and state water law to hold a protectable legal right to project water." His discussion suggested that there are likely to be multiple interests with some legal claim to project water sought to be transferred. The interwoven nature of these interests indicates "that in most incidences, transfers of project water to new, non-project uses will require agreement of the interests."

Clifford T. Lee, Deputy Attorney General for California, described the history of the Central Valley Project's (CVP) environmental obligations. He traced the evolution of the CVP, noting the layers that have been added by various interests over the years in a transition to serving new uses.

Robert Pelcyger, of the law firm of Fredericks, Pelcyger and Hester, described the evolution of the Truckee River operations and storage. He described the Truckee River as probably the most litigated stream in the West. He described the changes in reclamation projects that have resulted from this litigation, federal programs and regulations, as well as state legislation and agreements. He described the current situation as one where river and reservoir operations will be fully integrated and coordinated pursuant to the terms of an agreement among virtually all of the major stakeholders and interested parties. "Through ten years of negotiation," he said, "these parties have developed an appreciation not only of each other's interests, but also how all of their respective needs can be satisfied by working closely together and cooperatively managing their resources.... We have demonstrated, I think, that constructive change is possible, but that it takes a lot of hard work, creativity and perhaps most of all, endurance."

The final Water Law Conference session was entitled, "Living Within the Colorado River Compact - The Latest Chapter." The featured speaker was David J. Hayes, Deputy Secretary, U.S. Department of the Interior. He provided a history of the Department's efforts to facilitate a cooperative resolution among Colorado River interests. He focused in particular on recent progress

in California to develop plans to limit its use of Colorado River water in return for the cooperation of the Upper Basin states in determining "surpluses" that would benefit California.

Gerald Zimmerman, Executive Director of the Colorado River Board of California, also discussed California's efforts to limit its use of Colorado River water, describing in some detail the agreements that had been reached among California interests to achieve this goal.

Rita Pearson, Director of the Arizona Department of Water Resources, shared Arizona's perspective. Arizona is now in the process of developing principles with regard to the potential use of Arizona's ground water bank by Nevada and California.

Lastly, Patricia Mulroy, General Manager of the Southern Nevada River Authority, discussed the perspectives of her state with regard to the use of Colorado River water. Nevada is nearing the limit of its Colorado River water allocation, and has vigorously pursued options to augment its supplies. She discussed these opportunities, and her perspectives on the progress that has been made to meet this objective.

The ABA published written summaries of the presentations for a majority of the participants. If you have any questions regarding the foregoing, please contact Craig Bell, WSWC Executive Director, at the Council office: (801) 561-5300; (801) 255-9642 (fax); or cbell@wswc.state.ut.us.

Water Policy Seminar

The Western States Water Council, Interstate Council on Water Policy (ICWP), Association of State and Interstate Water Pollution Control Administrators (ASWIPCA), and Association of State Drinking Water Administrators (ASDWA) jointly cosponsored the "2000 State and Interstate Water Policy Roundtable: Intergovernmental Cooperation" at the Crystal City Marriott in Arlington, Virginia, near Washington, D.C. on March 13-15. The meeting was designed to promote an open discussion between state, interstate and federal representatives responsible for development of water policy, regarding issues of particular concern to states. The issues are not new, but the Roundtable offered an opportunity to gain new perspectives/fresh insights.

The first Roundtable panel addressed issues related to the Clean Water Act's (CWA) Total Maximum Daily Loads (TMDLs) program for waters identified as not meeting state water quality standards. The panel included: Carol Collier, Executive Director of the Delaware River Basin Commission; J. David Holm, Director of the Colorado Water Quality Control Division; Jon Craig, Director, Water Quality Division, Oklahoma Department of Environmental Quality; J. Dale Givens, Louisiana Department of Environmental Quality; Diane Shea, National Governors' Association (NGA); Gary Ingman, Bureau Chief, Montana Department of Environmental Quality; and Don Brady, Branch Chief, EPA Office of Wetlands, Oceans and Watersheds.

Carol Collier spoke of the role of river basin commissions in the TMDL process, discussing issues such as offsets and antidegradation. She suggested that EPA lacks statutory authority under the CWA to take the steps it is proposing in the new rules. She said that the proposed rules misapply

the definition of antidegradation, would strain an already overloaded National Pollutant Discharge Elimination System (NPDES) program and place undue burdens on new dischargers. She stated that river basin commissions can assist in the TMDL creation process, especially in regard to interstate monitoring. She felt that it is not appropriate for EPA to take the lead in shared interstate waters, as is suggested by the proposed rules.

David Holm spoke generally of water quality processes, focusing on monitoring and assessment. He commented on synoptic monitoring and evolving state programs that are consolidating through organizational restructuring, accomplishing multiple objectives with singular monitoring efforts, and establishing priorities. On the issue of adding threatened waters to a state's 303(d) list, Mr. Holm expressed his belief that the CWA does not require such action. He also felt that TMDLs for waters impaired by nonpoint sources present technical difficulties, and that EPA lacked the authority to support the proposed rules on this issue.

Diane Shea, NGA, talked in general terms about the governors' concerns with flexibility, funding and the federal state relationship. NGA comments on EPA's proposed TMDL rules have raised concerns over implementation plans, authorization for EPA to implement TMDLs, proposed timelines, federal funding, and EPA's CWA authority. She said that functionally equivalent state water quality protection plans should be acceptable, whether or not they use TMDLs as the main tool. Likely litigation is another major concern.

Gary Ingman addressed the proposed rules, water quality and quantity, endangered species, and other issues. He noted that the WSWC's position states EPA should not mandate TMDLs on waters degraded solely by "pollution." The bull trout example in Montana shows many streams are degraded by sedimentation, etc. His remarks focused on both quantity and quality issues, including flow limited streams and wildlife habitat. On ESA issues, he stated the WSWC believes a state should be free to pursue a prioritization process that meets their specific needs. He said that ESA/TMDL integration should be voluntary and consultation informal, as TMDLs will be hard enough to sell. He added the WSWC's position is that EPA should not mandate the listing and development of TMDLs for threatened waters. He also discussed the utility of functional equivalency provisions.

Don Brady announced that EPA had received about 32,000 comments (about half as post cards/cut outs), which have been reviewed and coded. EPA expects to publish a final rule by this summer. They are awaiting a final decision by Chuck Fox, EPA Assistant Administrator for Water, but the staff are now writing the final package. In response to questions about the comments, he stated that five congressional hearings have been held, with one more expected before the Senate Environment and Public Works Committee. All the comments on the rule have been broken down into definable issues. In addition to issues already discussed, he mentioned silviculture designation and implementation plans.

The second Roundtable panel focused on interrelationships between water quality and quantity. Ed Anton, Chief, Division of Clean Water Programs, California State Water Resources Control Board, opened the discussion with a number of examples of how water quantity and quality are

interrelated. He specifically noted EPA views CWA 101(g) -- which preserves state authority to allocate and manage water quantity and protects state granted water rights -- as only a policy goal without any substantive requirement -- in contrast to EPA's view of the CWA's so-called "fishable and swimmable waters" policy goal. Other panelists included: Sally Knowles, Assistant Chief, Bureau of Water, South Carolina Department of Health and Environmental Control; Alan Vicory, Executive Director, Ohio River Valley Water Sanitation Commission; Geoff Grubbs, Director, EPA Office of Science and Technology; Shannon Cunniff, Director, Office of Policy, Bureau of Reclamation; and Tom Yorke, Chief, U.S. Geological Survey (USGS), Office of Surface Water.

Sally Knowles further discussed TMDL regulations as related to water quantity. She mentioned that streamflow data is a necessary component of a water quality assessment. Flows affect wasteload allocations, and wet weather (or dry weather) affects stream water quality and CWA 303(d) listings of impaired waters. Biological community criteria and antidegradation criteria may require minimum flows. She added that the federal relicensing of hydropower projects by the Federal Energy Regulatory Commission (FERC) has created opportunities for South Carolina to address streamflow needs with CWA Section 401 authority.

Geoff Grubbs declared, "You can't have water quality, without water." Water quality management is a lot broader than TMDL issues, but TMDLs are a tool to meet overall CWA goals. Flow alterations may be a part of the solution in many watersheds. The TMDL rule had a provision that the states can express TMDLs in different terms to meet water quality standards for designated uses -- specifically endangered species, land use, and other purposes. He noted CWA Section 101(g) has another part -- addressed by a watershed approach -- saying federal agencies will cooperate with states to prevent, reduce and eliminate pollution "in concert with programs to manage water resources." He said there is no federal authority to enforce TMDLs.

Alan Vicory explained that his Commission is strictly an interstate water quality control organization. The Clean Water Act provides goals and structured programs, while water resources management [quantity] is more of a free-for-all [in eastern states]. He stated that on the Ohio River, the Corps is Mother Nature and the Commission takes the flow information it is given. Spills are also a major concern, given navigation on the river. The man-made impacts from pollution on the biology of the river are very small, compared to the hydrologic changes due to the locks and dams. Stormwater is another issue related to quantity. What does all this mean? There is no national answer to site-specific problems, given regional diversity.

Shannon Cunniff compared water quantity and quality issues to cats and dogs. What are some of the quantity/quality issues? States and tribes demand compliance with water quality standards. TMDLs have been raised as a priority issue. Stormwater from municipalities and industry ends up in irrigation canals. Who's responsible for such degradation? The Bureau of Reclamation (BOR) is developing watershed approaches to problems. Reservoir assessments are a new water quality concern. Water acquisitions for salmon and other purposes are taking place in the Snake River and other basins through direct and indirect acquisitions of water rights, storage rights and lands with water. A BOR rule is out on offstream storage in the Lower Colorado River Basin. There is a BOR water transfers initiative, and it addresses the use of BOR facilities to transfer water for a very

narrow list of purposes -- i.e., for irrigation, but not environmental or municipal and industrial purposes. Water reuse may change the meaning of "reclamation" in the Bureau of Reclamation. Operational changes at dams are under review. Temperature controls have been installed at Shasta Dam in California and may be installed at Glen Canyon Dam above the Grand Canyon. Reservoir releases to mimic spike spring streamflows have been initiated at Flaming Gorge and other dams. Selenium control and other national water quality protection programs have been spawned by the Kesterson National Wildlife Refuge pollution problem. There are important regional environmental protection efforts in the San Francisco Bay-Sacramento/San Joaquin River Delta and Platte River systems. She raised a number of questions: Are irrigation canals waters of the United States? How should stormwater runoff to BOR facilities be controlled? How should we handle changes in state and tribal point and nonpoint sources and their definitions? In the future, there will be greater challenges in the field to be addressed with limited resources.

Tom York described the USGS National Streamflow Information Program initiative. What are the issues? Our ability to meet long-standing federal goals for streamflow information are declining, and there are many more issues today that demand good science and good data. New technologies are needed to improve information reliability, decrease costs and decrease uncertainty. Some of the goals of the program are to: (1) enhance the nationwide streamgaging network; (2) undertake intensive data collection during major floods and droughts; (3) prepare periodic regional and national assessments; (4) improve streamflow information delivery to customers; and (5) facilitate methods development and research.

On Tuesday morning, Representative Sherwood Boehlert (R-NY), Chairman of the House Environment and Public Works Committee's Water Resources Subcommittee, addressed the Roundtable. He stated that the current debates in the Congress would determine the future of the Clean Water Act. He mentioned regulatory approaches to urban and agricultural runoff, pollution control program integration, flexible regulatory guidelines with enforceable backstops, and program functional equivalency. He said more work needs to be done with respect to TMDLs and Confined Animal Feeding Operations (CAFOs), adding that EPA must address public concerns and clarify the statutory basis for its initiatives. Rep. Boehlert supports the concept of offsets and pollution trading, and stated it has worked with the Clean Air Act. He ran through a long list of issues which included infrastructure funding, state revolving loan funds and CWA set-a-sides, public-private partnerships, aquifer storage and recovery, clean lakes, desalination, estuary restoration, Good Samaritan provisions, stormwater, water conservation, watersheds, wetlands, wet weather flows, and more. Mr. Boehlert expressed his deep conviction to environmental responsibility, saying, "The American People expect us to protect the water we drink, the air we breath and the food we eat." He added there is little time before the national political conventions to move "targeted" bills to improve clean water programs.

Also on Tuesday morning, a third Roundtable panel addressed tribal water administration issues. Victoria Wright, National Congress of American Indians, emphasized that land and water are very important to Indian culture. Tribes are very concerned about the environment, but they are also concerned about economic development. Unfortunately, tribal lands have sometimes been used as dumping grounds. About a dozen tribes have adopted water quality standards, which were

developed through negotiation and mediation. Tribal governments as sovereign entities have the same sort of problems as state and local governments, and are very willing to work out cooperative agreements with state and local entities.

Jack Stults, Administrator, Montana Department of Natural Resources, Water Resources Division, used the Flathead Reservation as an example of the complex water resource management, jurisdictional, cultural and other issues related to Indian and non-Indian fee ownership of lands within the reservation boundaries. The Montana Supreme Court has held that the state has no authority to issue water use permits within the boundaries of the reservation until the Tribes' water rights have been adjudicated. Other issues involve the jurisdiction of the tribes or state over non-Indians on reservations. The state is looking towards the future and is trying to leave lawsuits behind in favor of cooperative and collaborative agreements. They have had some success with hunting and fishing agreements, regulation of underground storage tanks, and development of the Tongue River Project. The key elements of any agreement include a jurisdictional disclaimer, acceptance of functional equivalence, creating a standing board or committee, agreement on standards, joint enforcement, consultation and notification (given split jurisdiction), a conflict resolution process, and some type of termination clause. Unfortunately, once an agreement had been reached on the regulation of underground storage tanks, EPA declined to approve the agreement.

Fred Leutner, Chief, Water Quality Standards, EPA Office of Water, recognized tribal administration issues are a problem that needs to be addressed. Of some 330 tribes, EPA has met with about 235. There are 34 tribes that have applied for treatment as states and 21 have received approval. Sixteen tribes have submitted water quality standards, of which fourteen have been approved. EPA is considering the adoption of a core set of water quality standards in the absence of approved tribal standards. It would likely include narrative (as opposed to numeric) standards, a basic antidegradation statement, and a "free from toxics" standard, without designating uses or identifying impaired waters. As tribes may still choose not to participate, some sort of way to opt out would likely be included. Staff proceed to write a draft rule, and a proposed rule could be out in July, but a final decision has yet to be made by Chuck Fox, Assistant Administrator for Water, or EPA Administrator Carol Browner. Mr. Leutner said EPA supports efforts of tribes and states to work together to avoid conflict.

A fourth Roundtable panel discussed the Endangered Species Act (ESA) and wildlife issues. John Pemberton, from the Majority Staff on the Senate Environment and Public Works Committee, represented the views of Senator Robert Smith (R-NH), Chairman. He emphasized the need for bipartisan cooperation and intergovernmental teamwork, together with good science, in finding solutions to environmental problems. He also noted that this takes time. The Committee hopes to clear legislation, without litigation, that will prioritize the use of resources. Mr. Pemberton summarized some of the issues of concern to Senator Mike Crapo (R-ID), Chairman of the Fisheries, Wildlife and Water Subcommittee. He discussed listings, delistings, recovery plans, consultation, landowner incentives, sound science, the Administration's no surprises policy, habitat conservation plans (HCPs) and safe harbor agreements.

Next, Mike Evans, the Chief Minority Staff Counsel, summarized the recent history of ESA legislation, including S. 1180 last year and targeted bills this year, such as S. 1100. S. 1100 was introduced by the late Senator John Chafee (R-RI) and covers listings, good science, and the designation of critical habitat as a part of recovery plans. The Committee reported the bill last July. He noted Senator Crapo has held hearings on HCPs. Since authorized in the 1982 ESA amendments, the number of HCPs has exploded -- beginning with a couple of dozen and now numbering in the hundreds. Concerns with HCPs include the underlying science, their timeliness and term, a net loss of habitat, getting locked into unproductive plans, the appropriate extent of public participation, measuring and monitoring success, and costs. Mr. Evans discussed the relationship between the Clean Water Act and ESA, water quality standards and ESA Section 7 consultations, TMDLs and HCPs. Senator Ron Wyden (D-OR) would like to integrate environmental permitting into one-stop shopping. He mentioned salmon issues -- a National Marine Fisheries Service (NMFS) biological opinion is expected within a couple of months -- and international species protection issues.

Liz Megginson referred participants to the House Resources Committee's website for information on H.R. 3160 and H.R. 1162 (www.house.gov/resources). H.R. 3160 encompasses four major issues, but is not a comprehensive ESA reauthorization. It encompasses the issues in S. 1100 regarding the designation of critical habitat, which a court has recently held is required at the time of listing. S. 1100 would benefit the federal wildlife services the most -- freeing resources for more listings. H.R. 3160 would create a new office of recovery planning. She noted \$46,000 in attorneys' fees were spent to require the designation of critical habitat for the northern speckled glider -- a bird that spends most of its time at sea -- when its greatest threats come from predators and lead poisoning from buckshot. She referred to an ongoing General Accounting Office investigation of U.S. Fish and Wildlife Service practices and authority requiring private landowners to enter into conservation easements that set aside millions of acres at an estimated cost of \$57 million. She also described extended ESA Section 7 and 10 consultation and mitigation requirements. H.R. 3160 would codify the use of safe harbor agreements to encourage private landowners to return land to its natural state without fear of future mitigation requirements. The bill also includes a reasonable and common sense approach to ESA consultation requirements for routine and emergency maintenance and repairs to public and private infrastructure such as levees, dams, powerlines, etc. She noted the public is losing confidence in the wildlife services. Ms. Megginson added H.R. 1162 would compensate landowners for the use of their property, and is based on the same concept as a U.S. Fish and Wildlife suit for \$26M in damages for aircraft overflights of national refuge lands near a public airport. She also added H.R. 701 is a bill to enhance and restore wildlife habitat, using funding from offshore oil leasing. Other topics mentioned included TMDLs, coastal zone management legislation, and the Pittman-Robinson program where funds from hunters' fees are supposed to go the states, but have been used by the U.S. Fish and Wildlife Service (FWS).

Nancy Gloman, Chief of the FWS Endangered Species Division, was the next panelist. She stated that everyday there is more news of imperiled aquatic species and noted the need to work together towards species recovery. She limited her remarks to ESA Section 7 consultations and a draft memorandum of agreement (MOA) between the FWS and NMFS and EPA. She explained Section 7 requirements for federal agencies to use their authorities to conserve species and ensure their actions or actions they permit will not result in endangering listed species. She stated that a

January 1999 MOA sought to encourage species preservation and coordinate and enhance the predictability of federal permitting actions under the Clean Water Act -- specifically Sections 404, 303(c), 304 (a) and others related to water quality standards, NPDES and other provisions that might affect candidate and listed species and their recovery. The result is binding guidance for federal agencies in the field, which should make ESA consultations more timely and efficient. The MOA addresses amending water quality criteria to protect species, guidance on consultations on EPA approved water quality standards, a natural resource data gathering program, creating interagency teams, coordination and hierarchical reviews. The MOA is under review internally, but should be public soon. Ms. Gloman also mentioned a FWS/NMFS policy on state conservation efforts and their role in determinations to list or not list candidate species. She noted a draft policy on the designation of critical habitat should be out in a couple of months following a series of workshops, and that the FWS by court order must list critical habitat for some 200 species. Lastly, she mentioned a 5-point policy addendum to the FWS handbook on review and development of HCPs which addresses goals and adaptive management.

Christopher Mobley, rather recently named as the NMFS West Coast Salmon Coordinator, provided a general overview of this unprecedented species management challenge to maintain a sustainable fishery. NMFS' ESA mission and mandates reflect changing social priorities. NMFS is now involved with many large and small water projects, from California's extensive Central Valley Project to fish protection measures on diversion dams and canals. He stated that fully appropriated streams are a problem given the growing needs of fish, but there can be a lot of common ground. Fish need reliable, predictable and clean water. Water exchanges, allowing diversions from mainstream rivers, rather than tributaries are an example of conservation measures that may work. States can help find ways to augment streamflows. Fishery biologists work with the best available and defensible science to come up with solutions to problems that work for salmon. In the absence of scientific certainty, creative adaptive management with some safety cushion is what is needed.

David Davis presented EPA's perspective. He talked about building a bridge between water quality and wildlife conservation, stating water quality standards and CWA Section 404 permitting obviously affect wildlife and the ESA affects water quality management. He stressed that expertise can be shared and that a multi-organizational effort -- not just government agency actions -- is critical to meet conservation needs. He noted that EPA's December 2000 TMDL guidance is being developed in consultation with the federal wildlife agencies. He mentioned a number of key federal programs, including requirements of the National Environmental Policy Act. He concluded stating the EPA can't always pick its priorities, given court decisions.

Rich Bechtel spoke for western governors, and summarized their position and that of the National Governors' Association on endangered species issues. This is the Western Governors' Association's number one legislative and policy priority. However, at present, the cooperative atmosphere necessary for a legislative remedy to many ESA problems is lacking. Still, a more effective collaborative federal/state relationship can improve ESA implementation. He called for more HCPs, noting that western governors are trying to bring landowners and the federal wildlife services together. There are now some 50-60 agreements pending at a cost of \$15,000-\$25,000 each.

There is an opportunity every year through the appropriations process to press forward, even if new authorizing legislation is unlikely for the foreseeable future. There is also a need for more tools that might be acquired through other authorizing legislation, such as the Water Resources Development Act, U.S. Department of Agriculture programs, and the proposed Conservation and Reinvestment Act of 1999 (CARA), which would provide permanent funding for state wildlife conservation and coastal programs with money from Outer Continental Shelf (OCS) oil drilling royalties. CARA legislation (H.R. 701 and S. 25) has been introduced by Rep. Don Young (R-AK) and Senator Frank Murkowski (R-AK).

Each of the sponsoring organization's leaders participated in a special Roundtable discussion of issues of particular interest to their members. David Spath, ASDWA President, focused on the Safe Drinking Water Act and its source water assessment (SWA) and protection requirements. February 1999 was the deadline for state assessments, and states are authorized to earmark 10% of state revolving loan funds for SWA activities, such as land acquisition and wellhead and watershed protection. Some \$112M-\$164M was set aside in the first year. There are many stakeholders, including agriculture. Pesticide loading and agricultural best management practices are important issues. Mr. Spath encouraged the use of partnerships promoting clean water as safe drinking water.

Next, David Holm, ASIWPCA President (and a WSWC member), described the ASIWPCA's history, since its formation in 1961 as an informal state organization, then dominated by sanitary engineers designing structural treatment solutions to water quality problems. He emphasized the long association and relationship with ICWP and WSWC, and the inherent connection with ASDWA.

Richard Kropp, ICWP Chairman, referred to previous joint ICWP/WSWC meetings, and welcomed the inclusion of ASIWPCA and ASDWA in addressing state and interstate issues involving water quality management. ICWP has broadened its focus over the years from ensuring the availability of adequate water supplies to many more issues ranging from cost sharing to wetlands. He highlighted ICWP's work in support of U.S. Geological Survey (USGS) appropriations and the availability of good information for decisionmaking. He expressed concern with the cooperative federal/state program and the increasing costs of streamgages and the progressive loss of many gages. USGS is proposing Congress fully fund a new core federal streamgaging system and fully fund a 50%-50% federal match for the coop program. He also called for expanding and improving the present system to increase the use of telemetry and real time analysis of data. He also mentioned watershed protection efforts, an EPA/ICWP project identifying threats under the SWA program, and an ICWP initiative to bring together interstate water commissions on issues crossing state boundaries, such as TMDL's. ICWP is circulating a partnership agreement that a number of organizations have signed.

Lastly, WSWC Chairman, Francis "Fritz" Schwindt, praised the efforts of the other organizations, before explaining the WSWC's origins, membership and purposes. He expressed his personal interest in non-point source pollution problems and the need to find workable, affordable and acceptable solutions. He was encouraged by the idea behind the Administration's Clean Water Initiative and the apparent realization that it could take some 50 years to address and control

nonpoint sources. However, he is disappointed with EPA's proposed TMDL rule. The WSWC intends to prepare a legal and policy analysis of related federal and state authorities, and welcomed participation by the other meeting cosponsors. Lastly, he discussed general water quality/quantity interrelationships, noting related state agencies are often not in the same department. However, he added that watershed management approaches hold promise. The session concluded with a discussion among the panel and participants of various issues.

The final hour of the Roundtable was devoted to FY2001 budget initiatives and other agency priorities. USGS Chief Hydrologist, Bob Hirsch noted states bear an increasingly disproportionate share of the cost of the cooperative streamgaging program as the federal match has declined from 1 to 1.19 in 1990, to 1 to 1.45 in 1995, and 1 to 1.55 in 1999. USGS received \$2M this past year to begin funding a basic core federal streamgaging system without cooperator money, and has asked for \$4M for FY2001. The overall USGS funding request for FY 2001 is around \$800 million, an increase of \$82 million. Other USGS priority interests include ground water, pesticides and arsenic. Next, Diane Regas, EPA Deputy Assistant Administrator for Water, mentioned a number of issues already discussed and growing concerns with pathogens in surface waters, toxics (in land, air and water) and environmental infrastructure funding. EPA's budget request includes \$200 million for Section 319 grants (\$250 million next year) and a proposed 20% SRF earmark for states' nonpoint source programs, plus a \$45 million increase for Section 106 to help states establish TMDLs.

Water Conservation Symposium

On July 12-14, the Council co-sponsored, together with the Wyoming State Engineer's Office, U.S. Bureau of Reclamation, and Natural Resources Conservation Service (NRCS), a symposium on Water Conservation and the Use of Conserved Waters in Casper, Wyoming. The meeting focused on state and federal statutes, policies and programs that provide incentives for saving water. It highlighted innovative and successful state water conservation activities, and tools to enhance partnering and foster cooperation in addressing future water needs using conservation.

Anne MacKinnon, former Editor of the Casper Star-Tribune and a water rights historian made a special presentation entitled, "Water Conservation and the Wyoming Connection: Tales from the Land of Elwood Mead," She suggested that in the West, water and conservation issues raise a classic continuing conflict between consumptive and non-consumptive uses. Although tradition is holding change at bay, western states must decide how water conservation activities will be incorporated into longstanding water laws. Elwood Mead, as Wyoming's first State Engineer, laid a foundation for water appropriation that emphasized putting water to its maximum beneficial use, in order to create and maintain economically viable communities in the arid West. Water use was viewed as a private property right, that largely excluded modern concepts of public need. What Mead established was a system of centralized state control that relied on the user for implementation. However, his vision of a highly productive agricultural economy in Wyoming failed to develop, while riparian areas, wetlands and streamflows have benefited from waters stored and released for agriculture and irrigation return flows from water diversions. She noted that talk of water conservation now focuses on competing uses stimulated by new values and downstream growth, largely unrestrained by water supply limits. There is an influx of newcomers with different values and interests, and capital to

finance reworking water rights for the benefit of the environment. Existing agricultural producers are interested in adding a cash generating enterprise based on fishing and other water-related outdoor tourism activities. Other current issues include increasing water use efficiencies, water quality concerns, leasing, salvaged water credits and the value of non-consumptive, in-stream uses.

Sue Lowry, Director of Policy and Administration for the Wyoming State Engineer's Office, talked about saving water in Wyoming and potential new uses. She addressed this in the context of where we go from here. Sue talked about the lack of incentives for water conservation and also about some of the options that may be available to improve this situation. She touched on the definition of beneficial use and the discretion of the State Engineer and the Board of Control in making such determinations. She also mentioned the development of trout ponds in the Jackson area and water rights to develop wetlands and waterfowl production areas. She concluded with a discussion of statutory limitations and potential changes that could address some of the issues related to water saving activities. These include recognition of and allowance for salvaged waters, allowing transfers through leases or sales, and a change to allow permanent, privately-held instream flow water rights.

A roundtable discussion focused on policy and program innovations and challenges in western states water conservation programs. Ms. Chris Bridges, with the U. S. Bureau of Reclamation, provided a review of their Water Conservation Field Services Program and their "Bridging the Headgate" initiative. The Bureau recognizes competing demands for existing water supplies and available storage. The Field Services Program is focused on the preparation of water conservation plans, the implementation of those plans, the demonstration of innovative technology, and promotion of public education and information.

Duane Klamm, with the U.S. Department of Agriculture's Natural Resources Conservation Service in Wyoming provided a description of his agency's water conservation-related programs. He explained the Environmental Quality Improvement Program (EQIP) and available technical and financial assistance. Their priorities include grazing lands, irrigation water management and water quality, which includes both nutrient management and pollutant movement through runoff. He also explained the snow survey measuring program and related water supply forecasting abilities. He commented on the difficulties in tracking saved water and raised concerns over the impacts of interrupting return flows and changing tail water releases at reservoirs.

A panel of speakers addressed successful state water conservation activities and innovations in state law and policy development, and putting saved water to new or additional uses. Mark Frank, Director of the Phoenix Active Management Area for the Arizona Department of Water Resources, talked about Arizona's water management approach. Their goal in the Phoenix Active Management Area is to reach a safe ground water yield target that balances pumping and recharge with no net loss of ground water. They anticipate the use of increased efficiencies for agricultural and municipal uses, as well as fallowing around 5,000 acres of irrigated lands annually. There has been no new agricultural use of water in Arizona since 1980. Also, new residential use has to find a renewable source of supply.

Naomi Duerr, Nevada Department of Conservation and Natural Resources, Administrator, State Water Planning, talked about water planning and conservation efforts in Nevada. Nevada is expecting its population to grow from the current 1.8 million people to 3.5 million people by 2020. Las Vegas is now expected to reach its water supply limit by the year 2013 (or sooner), while earlier estimates projected adequate supplies through 2030. Nevada requires the use of low flow fixtures, water conservation plans, local watering restrictions and landscaping requirements. Water rights in Nevada are usufructory rights that can be sold and traded.

Dallas Wall, an engineer with the Utah Division of Water Resources, opened his remarks by explaining that Utah requires water conservation plans. They estimate water use in Utah will increase almost three times in the next 50 years, from 645,000 acre feet to 1.7 million acre feet. The state will be facing a projected water shortage of 186,000 acre feet, even though water conservation measures and conversion of water from agriculture to municipal use will cut demand by 783,000 acre feet. Conservation is expected to provide more water than any other development in the state.

Bill Stanton, Chief of the Conservation Planning Section for the Colorado Water Conservation Board, talked about their instream flow program and a loan program for local water development. There is a \$12 million annual revolving loan program. Colorado's water conservation effort is largely unorganized, although water conservation plans are required. Projections show that the state's population is expected to double every 23 years, in part stimulating increasing interest in marketing agricultural water rights to cities. Colorado is starting water basin planning and water conservation as a part of their drought planning effort.

Mike McLane, Montana Department of Natural Resources and Conservation, described water conservation as a tool. He said Montana is a water-limited state, and as such they have closed eighteen basins, mostly in western Montana and primarily in areas with highly appropriated streams. Their objectives are to increase the security of existing water supplies and increase instream flows for fish. Montana law allows for responding to low flows through leasing or conversion of water to an alternate use through a salvaged water process.

Tommy Knowles, Texas Water Development Board, shared that many streams in Texas are now fully or over appropriated. To deal with water shortages, Texas allows for water marketing, generally from agriculture to municipalities, with tax credits for water conservation. Municipal use now accounts for 45% of water consumption. It is expected to reach 55% in the near future. There is a water development loan program that carries a conservation plan requirement. Texas is now drafting drought management plans and modeling for water availability.

Ron Vore, Water Conservation Officer, Wyoming State Engineer's Office, provided an update of Wyoming's fledging water conservation program. He is developing a multi-faceted approach to water management and conservation that encompasses a review of current information and regulations, available funding and technical assistance, adding a conservation component to the state water plan and providing public outreach. Wyoming can benefit from both improved agricultural irrigation efficiencies, and maintenance of existing riparian conditions dependent on current

irrigation practices. The challenge is to balance consumptive and non-consumptive uses through better water management and conservation incentives and options.

A tour was sponsored by the Wyoming Area Office of the Bureau of Reclamation in Mills, the Casper-Alcova Irrigation District (CAID) and the City of Casper. Pathfinder Dam and Reservoir was the first stop to view a proposed expansion project, followed by a stop at Alcova Reservoir to look at the irrigation outlet works. The tour traveled down the CAID irrigation system to look at conveyance loss mitigation measures such as canal linings and lateral rehabilitation. Ken Randolph, BOR, Butch Francis, CAID and Dave Hill, City of Casper, led discussions during the tour. The project was undertaken to improve irrigation water delivery efficiencies, with the saved water transferred to the City of Casper.

Larry MacDonnell, author of Water, Agriculture and the Environment in the West, was a special guest. He discussed irrigation as the core of the history and development of the West. The West is becoming more urbanized and the incoming population has interests in water resources and values that differ from those already here. A community-based program is crucial to gaining a better understanding of various points of view. Agricultural reuse of water is an important consideration. Irrigation is largely responsible for the creation of new fish and wildlife habitat and maintaining many environmental systems. Change is difficult without impacts. Irrigation demand has likely peaked and large, future water development projects are unlikely. Future pressure on existing uses of water will mount as a result of urban migrations. Urban demands will also be the least satisfied by conservation of agricultural water, because that results in only a change in timing and place of use, but not a reduction in consumptive use. Therefore, competing demands such as instream flow values and water quality issues will likely cause a movement towards a sustainable system. We started out with a rule of taking no more than what can be used, and now need to move toward a rule of taking no more than is needed. It will probably take a combination of incentives and regulations to achieve this goal.

A panel on water conservation in the Northwest began with Doug Parrow, Field Liaison/Program Coordinator with the Oregon Department of Water Resources. He talked about Oregon's water trust program. Oregon also has watermasters with the authority to distribute water within a district. Districts are empowered to reduce diversions to protect instream flows. There is also a water leasing program. Further, a water conservation incentive law allocates 75% of conserved water to the applicant, which carries a right one minute junior to the original right, and 25% to instream flow. The original legislation was intended to provide a conservation incentive. Although it made water a marketable commodity, to date they have had only five proposals. The Oregon water trust funds conservation measures in return for the water saved, but it is now cheaper to buy the water right.

Norm Young, Administrator, Water Management Division, Idaho Department of Water Resources, described expansion of irrigation in Idaho with the use of sprinklers. This has been largely driven by the energy and labor savings, with water conservation as an additional benefit. Idaho instituted a water bank in 1980, in cooperation with the Bureau of Reclamation. Idaho has also had an instream flow law since 1980. A water conservation bill has been proposed. Currently,

there is no statutory opportunity to protect instream maintenance flows. Outstanding issues included the definition and recognition of salvaged water, lack of ability to convert water from an established beneficial use to instream flows, and little flexibility within and changes to prior rights for irrigation.

The group discussed essential elements for future success. In many areas of the western United States, water quality and the Endangered Species Act are driving the need for water conservation. However, one national program will not fit all needs. Storage may still be an important component of water conservation as there is still a question of what to do with saved water. There is a need for better explanation of the benefits of water use efficiency. This can be partially addressed through better water use planning, but that is expensive. Some states are moving in the direction of moving water from one use to another, but this remains a difficult issue for many. There is a need to look at incentives to improve instream flows.

Water conservation is a tool to meet an end. There are many similarities throughout the region but there is a need for a process for sharing information and ideas on a timely basis, in addition to information exchange opportunities available through the Internet and electronic media. An opportunity to participate in conferences and symposiums is valuable in the development of water management and conservation programs. Many favored a second and biennial WSWC symposium.

Drought in the Great Plains Workshop

On August 29-31, the U.S. Bureau of Reclamation hosted a workshop on drought in the Great Plains in Rapid City, South Dakota.¹¹ It was cosponsored by the U.S. Army Corps of Engineers, Western Area Power Administration, Western States Water Council, Western Governors' Association, Mni Sose Intertribal Water Rights Coalition, Four States Irrigation Council, Upper Missouri Water Association and Mid-West Electric Consumers Association. Some 85 federal, state, tribal and local officials, and water and power users attended. Maryanne Bach, Reclamation's Great Plains Regional Director, welcomed participants. She highlighted the importance of intergovernmental interaction and the participation of tribes as sovereign nations. She briefly summarized drought conditions across the Great Plains, where many counties have been declared disaster areas, adding that the workshop discussions were very timely. The workshop was designed to share examples of various drought preparedness and planning processes and identify drought mitigation strategies and tools.

U.S. Bureau of Reclamation Commissioner Eluid Martinez was a featured speaker. He made some personal observations based on his past experiences with drought and water management, noting that as State Engineer in New Mexico he couldn't recall any significant periods of drought. However, since the mid-1990's, New Mexico, Texas and Arizona have experienced serious drought impacts and discovered that there are a lot of federal programs, but not much money, nor coordination and guidance. He recognized the efforts of the western governors in creating a Western

¹¹*Western States Water*, Issue #1372, September 1, 2000.

Drought Coordination Council - involving states, tribes, federal agencies, and local groups - and their support for the enactment of federal legislation which created a National Drought Policy Commission. Eluid represents Secretary of Interior Bruce Babbitt on the Commission, which has issued its final report with recommendations for drought mitigation. The Secretary of Agriculture is the chair, and USDA is preparing a memorandum of agreement (MOA) regarding various federal agencies' drought planning and response roles.

Commissioner Martinez's remarks highlighted the need for the federal government, and the states and the tribes, to invest in drought preparedness. Reclamation is the only federal agency currently authorized to provide nationwide drought planning and emergency assistance. He personally tried - unsuccessfully - to get \$5M for Reclamation's drought assistance program included in this fiscal year's supplemental appropriation. He intends to ask for more in the next budget cycle. He added that future federal drought activities will focus on preparation and mitigation as opposed to relief. Further, greater coordination of federal agencies' assistance is expected. Reclamation and the Corps of Engineers are working on a MOA under which the Corps would provide drought planning assistance to states in the East.

Mr. Martinez also discussed some immediate and long-term issues related to drought. He specifically mentioned new demands for water for environmental purposes and endangered species in the Rio Grande and Klamath River basins.¹² On the Rio Grande, some 170,000 acre-feet of water has been set aside this year for endangered species - more than the City of Albuquerque or Middle Rio Grande Conservancy District use each year. The hot weather has increased the demand for hydroelectric energy in the Northwest and in California, where moving water to environmental purposes means losing energy. He also noted upstream storage has got us through this year in many parts of the West, but unless we get a significant snow pack this winter, water supplies next summer will be very short.

Water Management Symposium - Western Water Law & Protection of Water Quality

On September 6-8, the Western States Water Council sponsored a workshop on Western Water Law and the Protection of Water Quality in Vancouver, Washington. It was co-hosted by the states of Washington and Oregon. Workshop participants gathered to explore ways in which water quality can be better protected under existing western water law. The purpose was to create a list of recommendations or tools for states to consider when attempting to address water quality concerns. New WSWC Chairman Mike Brophy of Arizona opened the meeting. Next, Tom Fitzsimmons, Director of the Washington Department of Ecology, and Paul Cleary, Director of the Oregon Department of Water Resources, both spoke to the workshop's objectives. Mr. Fitzsimmons explained that "eventually all pollution sources merge into one and a river runs through it." He urged workshop participants to share what they knew about the convergence of legal, public policy and regionalized issues, as well as about related failures, so that we might "better articulate how to more effectively manage conflicts." He also asked attendees to consider whether current laws are

¹²*Western States Water*, Issue #1368, August 4, 2000, and Issue #1369, August 11, 2000.

adequate to ensure protection of the quality of the resource. Mr. Cleary challenged workshop participants to search for solutions that are effective, proactive, and which provide certainty over time for water users, stating that water quality decisions need to withstand these tests.

Professor Charles DuMars of New Mexico addressed participants, reminding them that we are a nation of prosperity, and as such, we are capable of adequately protecting water quality because we can spread the costs among all of society. Mr. DuMars also reminded attendees that water quality protection has a much longer history in U.S. law than that of water rights law. Speaking of the Clean Water Act (CWA) and the Jefferson County case, he concluded that the CWA does have some built-in compromise in regards to water allocation decisions. He felt that the Jefferson County case is limited to narrow questions of the state of Washington's ability to place restrictions on the federal hydropower permit, stating that the case offers little help in predicting the outcome of federal regulatory law cases, as those outcomes stem from very fact-specific situations and are highly political. He urged participants to undertake a new analysis of the quantity/quality problem and find ways that federal intervention can be prevented and state actions upheld by federal courts, if states want to adequately address water quality problems within their water rights administrative systems.

Jay Manning, an attorney and previously a Washington State Assistant Attorney General, spoke. He wrote the state's Supreme Court brief for the Jefferson County case. After briefly reviewing the case and its origins, Mr. Manning stated that to ignore the issue of water quality when making water allocation decisions would only create a much larger problem at some time in the future. He urged states to make use of the public interest and public trust doctrine, and to address the cumulative impacts of water resource decisions. He also advocated the consideration of water quality and wildlife habitat concerns when setting minimum flow standards for bodies of water. In conclusion, he felt that the problem has two possible solutions. Either we can remodel our water codes and policies to address quality concerns, or else it is time to rewrite the Prior Appropriation Doctrine, an alternative that he didn't feel would be feasible.

During the workshop, participants were asked to identify issues that must be addressed and questions to be answered regarding how water law might be used to better protect water quality. Discussions were held on numerous related topics such as instream flow laws, use of public interest tests, the implications of creating Total Maximum Daily Loads, nonpoint source pollution management, reconciling existing water rights with water quality obligations, and addressing institutional arrangements. Participants were divided into break-out groups to identify recommendations for action, and then report back to the full group for discussion. Participants found the workshop very helpful in finding ways to better address the growing relationship between water quantity decisions and water quality concerns. Perhaps the most illustrative and humorous comment was made by Paul Cleary in closing remarks about the need to integrate water quantity/quality policy. He quoted the famous Borg statement from the Star Trek TV series, "Resistance is futile; you will be assimilated." The recommendations and the proceedings of the workshop will be compiled in a report for the Council, with the hope that they will serve as a resource or set of tools that states may choose from when addressing quality/quantity concerns in the future.

Water Information Management Systems Workshop

The Seventh Annual WSWC Water Information Management Systems (WIMS) Workshop was held on October 9-11, at the Sun Valley Resort, in Idaho. Karl Dreher, Director of the Idaho Department of Water Resources welcomed those attending, which included representatives from eleven states: Arizona, Colorado, Idaho, Montana, Nevada, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming. Special guests included Ed Sheffner, National Atmospheric and Space Administration, Technology Division, and Jeremy Williams, with Ross & Associates, a private firm specializing in managing information assets for water rights adjudications. The workshop was held in conjunction with the Association of Western State Water Right Adjudicators annual meeting on October 11-13, also at the Sun Valley Resort.

State representatives discussed current challenges, needs and successes related to state water information systems used for water resources planning and decisionmaking, highlighting state water rights administration and adjudication processes. Speakers addressed, among other topics, Arizona's Gila River Water rights adjudication and ground water use accounting system, serving map-based water resources data over the internet, Idaho's water rights database migration project, Montana's online Natural Resources Information System (NRIS), state water resources data management in Oklahoma since the Oklahoma City bombing, interactive web mapping of water rights, mapping agricultural evapotranspiration from satellite data for water resources accounting models, water rights imaging, and data conversion. States also participated in an informal roundtable discussion and demonstrations of state website services.

Western Governors' Association - Annual Meeting

The Western Governors' Association (WGA) wrapped up its three-day annual meeting by electing Idaho Governor Dirk Kempthorne as their new chairman, adopting nearly 30 policy resolutions, and agreeing to work together during the next year on developing and implementing comprehensive strategies for reducing the demand for illicit drugs.

Previous discussions organized by Governor Ben Cayetano of Hawaii, WGA Chair for the past year, focused on efforts to develop strategies that would assist states in developing a highly skilled workforce. In this regard, the governors created the Western High Technology Council, consisting of representatives of states, the private sector and academia.

Newly elected Chairman, Governor Kempthorne indicated that his central focus will be to enhance WGA's ability to influence debates over Western issues at all levels in government. He noted: "The election and transition to a new administration and the organization of a new Congress provides special opportunities for us to present our views and successfully implement our proposals." He said development of effective drug strategies also will be a cornerstone of his chairmanship, focusing on prevention, treatment and rehabilitation.

With regard to the policy resolutions adopted by the governors, they covered a wide range of subjects. Included was a new resolution on reauthorization of the Endangered Species Act. In so doing, the governors emphasized that reauthorization of the Act remains their number one legislative

priority. Three main goals of their policy are to increase the role of the states, streamline the Act, and increase certainty and technical assistance for landowners and water users.

Federal agencies were urged to begin immediately developing and extending a partnership with the governors on the recovery of species to ensure a higher likelihood of success. The governors also adopted a resolution urging Congress to increase appropriations for the Land and Water Conservation Fund (LWCF) and to amend the LWCF to increase the percentage of LWCF funds allocated to the states to 50%. These actions, according to the resolution, would revitalize the partnership among various levels of government, necessary to enhance the success of this program. A complete description of the discussions, activities and resolutions from the WGA's annual meeting can be found at the WGA web site, www.westgov.org.

OTHER IMPORTANT ACTIVITIES AND EVENTS

In Memoriam

Clarence J. (C.J.) Kuiper died in Denver at the age of 82 on December 18, 1999.¹³ Born in Wyoming, he graduated from the University of Wyoming, later moving to Colorado. A retired Colorado State Engineer, we was an early member of the Western States Water Council (1969-79). He also worked for the Bureau of Reclamation. In Colorado, he initiated many rules for the management and preservation of the waters of the state. In World War II, he served in the Army Air Corps and reached the rank of Lieutenant Colonel. He is survived by his wife Jeanne, a daughter Gretchen and son Greg. We wish them the best.

Robert Miller, a long-time Council representative passed away on September 27, 2000.¹⁴ He enjoyed a 37-year career with the California State Department of Water Resources. His wife, LaVon, noted his obituary stated that Bob's "most satisfying activity was as one of several governor appointees representing California on the Western States Water Council." We have missed Bob since his retirement, and express our condolences to his family.

New Council Member States

Nebraska

As the Council began its 35th year, having been created in response to a resolution of the Western Governors in 1965, Nebraska Governor Mike Johanns requested membership in the Western States Water Council. In a January 17 letter, he stated, "I have taken an active role in the Western Governors' Association and have experienced first hand the benefit of western states working closely together. I understand the Council was created by the governors to provide a forum among the western states to cooperate on water resource issues. Nebraska shares many of the goals and interests of the Council and would benefit significantly from membership."¹⁵

The WSWC Rules of Organization, Article V - Membership, state : "Member states of the Western Governors' Association, which are not members of the Council, shall be added to membership if their respective Governors so request." Governor Johanns named as members representing Nebraska: Mike Linder, Director, Department of Environmental Quality; Roger Patterson, Director, Department of Water Resources; and Dayle Williamson, Director, Natural Resources Commission; with David Vogler, Assistant Director, Policy Research Office as an alternate member.

¹³*Western States Water*, Issue #1338, January 7, 2000.

¹⁴*Western States Water*, Issue #1378, October 13, 2000.

¹⁵*Western States Water*, Issue #1342, February 7, 2000.

Kansas

Governor Bill Graves of Kansas requested membership in a letter dated June 9th.¹⁶ He noted that he looked forward to working with the other western states on issues of mutual concern. As a member of the Western Governors' Association, membership was automatically granted. To represent Kansas the governor selected: Ron Hammerschmidt, Director, Division of Environment, Kansas Department of Health and Environment; David Pope, Chief Engineer, Division of Water Resources, Kansas Department of Agriculture; and Jamie Clover Adams, Secretary of Agriculture.

Membership Changes/News

Colorado

Peter Evans resigned as Director of the Colorado Water Conservation Board and a WSWC member in order to pursue other opportunities with his family in New York.¹⁷

Rod Kuharich was named to the position, effective December 4, and as a WSWC member. He is very familiar with water development, water rights, environmental, social and financial issues in his past position as manager of government affairs for Colorado Springs Utilities, where he was responsible for legislative, regulatory, legal and policy matters related to water, wastewater, and power. He has also served as President of the Colorado Water Congress. Lewis Entz, CWCB Chairman, said, "Rod brings many years of experience in water issues, and in government, to this important assignment. He will hit the ground running...."

Kent Holsinger, Assistant Director of the Colorado Department of Natural Resources, was also named by Governor Bill Owens as an alternate WSWC member.¹⁸

Idaho

Sherl Chapman retired as Executive Director of the Idaho Water Users Association (IDWA), a position he held for 26 years, and resigned as a member of the Council.¹⁹ We will miss our regular association and Sherl's contributions to water management, but wish him the best in the future. The Council adopted a resolution of appreciation recognizing Sheryl's many achievements.

Norman M. Semanko, the new IDWA Executive Director, has been named by Governor Dirk Kempthorne as a new WSWC member. Formerly a shareholder with the law firm of Rosholt, Robertson and Tucker, in Twin Falls, he has also served as a legislative assistant to Senator Larry Craig (R-ID). He is a Georgetown University Law Center and the University of Idaho graduate.

¹⁶*Western States Water*, Issue #1362, June 26, 2000.

¹⁷*Western States Water*, Issues #1363 and #1380, June 30 and October 27, 2000.

¹⁸*Western States Water*, Issue #1366, July 25, 2000.

¹⁹*Western States Water*, Issue #1380, October 27, 2000.

Nevada

Allen Biaggi, Administrator of the Nevada Division of Environmental Protection, was named by Governor Kenny Guinn as an alternate WSWC. The Governor noted, "I believe Mr. Biaggi will be an asset to the Council because of his background and experience in the many water quality issues that face not only Nevada, but also the other Western States."²⁰

Pete Morros retired as Director of the Nevada Department of Conservation and Natural Resources, a position he held for over ten years.²¹ Pete was the Assistant Director for two years, served as Nevada's State Engineer for nearly a decade, and had worked in various positions in the Department since 1962. Pete represented Nevada on many boards, commissions and task forces. He was President of the Association of Western State Engineers. He was named as a WSWC alternate member in 1991 and a full member in 1994. He actively participated in Council meetings and other activities. We all wish Pete and his family the best.

Mike Turnipseed, Nevada's State Engineer, was appointed by Governor Kenny Guinn to succeed Pete, effective August 1st. The Governor stated, "Mike Turnipseed is a dedicated and hard-working engineer, who has repeatedly proven himself to be an innovative problemsolver..., I'm looking forward to having [him] at the helm of the department." Mike has been with the Division of Water Resources since 1990, and spent thirteen years with the Utah Division of Water Rights. Mike said, "Taking over as director...is a huge challenge, but one I'm certainly looking forward to."²²

Oregon

Martha O. Pagel resigned as Director of the Oregon Department of Water Resources, effective on June 30, in order to enter private legal practice with the Portland-based law firm of Schwabe, Williamson & Wyatt.²³ Martha was named as Director and appointed as a WSWC member in 1992 by Governor Barbara Roberts. Prior to that she served as an environmental and natural resources advisor to Governor Roberts. She served on the Water Resources Committee, which she chaired, and as the Council's Secretary/Treasurer. Over the past eight years, she has made many significant contributions towards the wise management and protection of water in Oregon and the West. A source close to her perhaps put it best, "MOP will be a hard act to follow." We wish her well.

Paul Cleary, Director of the Oregon Division of State Lands since 1995, was named by Governor John Kitzhaber to succeed Martha as Director of the Water Resources Department (DWR),

²⁰*Western States Water*, Issue #1339, January 14, 2000.

²¹*Western States Water*, Issue #1363, June 30, 2000.

²²*Ibid.*

²³*Western States Water*, Issues #1348 and #1359, March 20 and June 2, 2000.

and as a WSWC member.²⁴ He came to Oregon from Cheyenne, where he served as Deputy Director of the Wyoming State Land and Farm Loan Office. He also served as a natural resource advisor in the Wyoming Governor's Office from 1978 to 1987. Governor Kitzhaber declared, "Paul brings experience and dedication to this position. His desire to protect public waters and provide leadership to long-term water management in Oregon will serve this agency well."

Governor Kitzhaber also named as WSWC members: **Meg Reeves**, DWR Deputy Director; and **Langdon Marsh**, Director, Oregon Department of Environmental Quality (DEQ). **Mike Llewelyn**, DEQ Water Quality Division Administrator, and **Sharyl Kammerzell**, Assistant Attorney General, were named as alternate members.

South Dakota

John Hatch retired as Chief Engineer and Administrator of the Water Rights Program after 35 years of service in the South Dakota Department of Environment and Natural Resources.²⁵ John was appointed as a member when South Dakota joined the Council in 1988. John has since served as a member of the Legal Committee, which he recently chaired. "John Hatch is a true-to-life example of what public service is all about," said Governor William Janklow.

Garland Erbele was named to take John's position with the state and on the Council. He is a 21-year veteran of the Department, serving since 1978 in a number of engineering positions in the Drinking Water Program. He recently said, "The road to the future will follow water in South Dakota. It doesn't matter if you are discussing...recreation, economic development, municipal, agricultural or domestic use, water is the common denominator."

Washington

Deborah Mull, Assistant Attorney General, Ecology Division, Water Section, State of Washington, was appointed as a member of the Council by Governor Gary Locke. She replaced **Tom McDonald**, who left the Attorney General's Office for a position in private law practice.²⁶

Wyoming

Governor Jim Geringer very reluctantly accepted the resignation of **Gordon W. "Jeff" Fassett**, stating, "Jeff's service to Wyoming as State Engineer over the past thirteen years has been exceptional. Jeff's term of service has been a challenging time for the management of Wyoming's water resources, marked by periods of drought, legal controversies, regulatory challenges and new, contemporary water supply demands. Jeff's dedication and thoughtful approach to these issues have

²⁴*Western States Water*, Issues #1359, #1366 and #1370; June 2, July 25, and August 17, 2000.

²⁵*Western States Water*, Issues #1348 and #1349, March 20 and March 24, 2000.

²⁶*Western States Water*, Issue #1339, March 24, 2000.

well served the water users of the state.”²⁷ Jeff is the second longest serving State Engineer since statehood. He was appointed by Governor Mike Sullivan in 1987, after serving as the Deputy State Engineer. Jeff represented Wyoming on the Western States Water Council since his appointment, and was elected as Chairman in July 1996. He was also a member of the Water Resources Committee, which he chaired from 1992 to 1994.

Patrick T. Tyrrell was appointed by Governor Geringer to replace Jeff as the Wyoming State Engineer after an extended search.²⁸ Pat, a Wyoming native, has 20 years experience in water issues and regulatory affairs, working for States West Water Resources Corporation in Cheyenne, Western Water Consultants in Laramie, Thunder Basin Coal Company and Wenck Associates. Governor Geringer stated, “Pat was highly recommended.... I was equally impressed by the credentials he brings and the commitment that he has made to the position of state engineer. We are fortunate that Pat has chosen to move from the private sector to public service.” Tyrrell said, “As a Wyoming native who has spent a career in water-related work, this is the ultimate compliment. Over the years I’ve...developed a great respect for the position and my predecessors. I look forward to what I’m sure will be challenging work, but the staff...is incredibly talented and knowledgeable...”

Census/Population and Growth

On December 28, the Census Bureau released numbers showing a U.S. population of over 281 million, up nearly 33.4 million since 1990. The figures will be used for redrawing Congressional district lines before the 2002 elections. Western states will gain the most seats, with Arizona, Texas, Florida and Georgia each gaining two more House seats, and California, Nevada, Colorado and North Carolina each gaining one seat. On the other hand, New York and Pennsylvania will lose two seats each, and Connecticut, Illinois, Indiana, Michigan, Mississippi, Ohio, Oklahoma and Wisconsin will each lose one seat. Likewise, electoral votes will change. The West and South continue to grow.

Albuquerque, Austin, Boise, Dallas, Denver, El Paso, Las Vegas, Los Angeles, Phoenix, Sacramento, Salt Lake, San Diego, Santa Fe, Seattle, Sioux Falls and other cities across the West enter the new millennium with an old challenge -- finding the water necessary for present and future uses.²⁹ Nearly 35 years ago, western governors created the Western States Water Council by means of a brief resolution stating: “The future growth and prosperity of the western states depend upon the availability of adequate quantities of water of suitable quality; and...the most equitable means of providing for the meeting of such requirements demands a regional effort....” At that time, western water leaders were faced with projections that by 1975 the population of the states in the West would increase by about 70% to 70 million, with accompanying demands for food, fiber and power. Population projections suggested that by the year 2020, the Nation would reach 400 million. While those projections were overestimated, as growth slowed, the current estimated population for the

²⁷*Western States Water*, Issue #1353, April 21, 2000.

²⁸*Western States Water*, Issue #1386, December 8, 2000.

²⁹*Western States Water*, Issue #1338, January 7, 2000.

seventeen western states, plus Alaska and Hawaii, stands at 90,239,176. The Census Bureau estimated the Nation's population at the beginning of this New Year to be 274,024,000. The Census 2000, the largest and most complete census ever to be taken, began on April 1.

The West and the South continue to lead the Nation in population growth, both in real numbers and in percentage change. The Census Bureau released its estimates for the past year and past decade. The Mountain West grew at a rate of 1.9% and 25.4% respectively, the Pacific by 1.3% and 12.4%, and the South West Central region by 1.2% and 13.6%. California, with 33.1 million residents, is the Nation's most populous state, followed by Texas, which topped 20 million this year. Nevada was the Nation's fastest growing state for the 14th consecutive year, followed by Arizona, Colorado, Georgia, and Idaho. Utah had the highest internal growth rate at 1.6%, and 1.4% overall. Alaska, Montana, New Mexico, Oklahoma, and South Dakota's growth rates were below the national average. The District of Columbia, Hawaii, North Dakota, Pennsylvania, West Virginia and Wyoming lost people.

The population estimates for July 1, 1999 and the percentage change for one and ten years by state are: Alaska 619,500 (0.7% and 12.6%); Arizona 4,778,332 (2.4% and 30.4%); California 33,145,121 (1.4% and 11.2%); Colorado 4,056,133 (2.2% and 23%); Hawaii 1,185,497 (-0.4% and 7%); Idaho 1,251,700 (1.7% and 24.3%); Kansas 2,654,052 (.06% and 7.1%); Montana 882,779 (0.4% and 10.5%); Nebraska 1,666,028 (0.3% and 5.6%); Nevada 1,809,253 (3.8% and 50.6%); North Dakota 633,666 (-0.6% and -0.8%); Oklahoma 3,358,044 (0.6% and 6.8%); Oregon 3,316,154 (1% and 16.7%); South Dakota 733,133 (0.3% and 5.3%); Texas 20,044,141 (1.7% and 18%); Utah 2,129,836 (1.4% and 23.6%); Washington 5,756,361 (1.2% and 18.3%); and Wyoming 479,602 (-0.1% and 5.7%).

Seven of the ten fastest growing metropolitan areas (1990-1998) are in the West: (1) Las Vegas, Nevada 1,321,546 (up 55%); (2) Laredo, Texas 188,166 (41.2%); (3) McAllen-Mission, Texas 522,204 (36.2%); (4) Boise, Idaho 395,953 (33.8%); (5) Naples, Florida 199,436 (31.1%); (6) Phoenix-Mesa, Arizona 2,931,004 (30.9%); (7) Austin-San Marcos, Texas 1,105,909 (30.7%); (8) Fayetteville, Arkansas 272,616 (29.3%); (9) Wilmington, North Carolina 218,248 (27.4%); and (10) Provo-Orem, Utah 335,635 (27.3%). Over 80% of the U.S. population now lives in metropolitan areas, a slight increase over 1990. Further, 31.5% live in the top ten urban areas, which include New York, Chicago, Washington-Baltimore, Philadelphia, Boston and Detroit. The Los Angeles area is the second most populous in the Nation at 15,781,273 (up 8.6%). The San Francisco-Oakland-San Jose area is fifth at 6,816,047 (up 8.6%). Dallas-Fort Worth and the Houston-Galveston-Brazoria metropolitan areas in Texas come in at ninth and tenth with growing populations of 4,802,463 (up 19%) and 4,407,579 (up 18.1%) respectively.

Water has always been and remains a strategic resource influencing growth. California, Colorado, Idaho, Nevada, Oregon, Texas, Utah and Washington are among the fastest growing states in the Nation, supported by past and present water resource development. These and other western states face their own water supply and water quality problems. "Where is the water for more growth going to come from, and at what price?" Those are the questions across much of the West. Challenges and conflicts over water use will doubtlessly continue to arise in the next millennium.

Elections

After November 7, when all the dust settled, Republican George W. Bush, Governor of Texas, was elected as the next President of the United States. Also, Republicans retained control of the U.S. Senate and the House by a slim margin. Western states provided a substantial tally of electoral votes for both Presidential candidates. Vice President and candidate Al Gore took California, Hawaii, New Mexico, Oregon and Washington, while Governor Bush won fourteen western states. In the Senate races, most incumbents won easily. However, in the State of Washington, incumbent Slade Gorton (R) lost in a very close race to Maria Cantwell (D). In Nebraska, former Governor Ben Nelson (D) narrowly defeated his opponent for the seat of retiring Senator Bob Kerrey (D). In Nevada, John Ensign (R) won the seat of retiring Senator Harry Reid (D). Westwide, incumbent House members faced few serious challenges, but there were a few changes.

Few western governors faced reelection. In Montana, Lt. Governor Judy Martz (R) was elected over Mark O'Keefe (D), to succeed retiring Governor Marc Racicot (R), as the state's first woman governor. In a surprising victory, John Hoeven (R) defeated Attorney General Heidi Heitkamp (D) to replace retiring Governor Ed Schafer in North Dakota. Utah Governor Mike Leavitt was easily reelected, defeating former U.S. Rep. Bill Orton (D). Governor Gary Locke of Washington (D) was reelected over John Carlson (R).

Western States Water

Since the first issue in 1974, the Council's weekly newsletter, *Western States Water*, has been one of its most visible and well received products. Its primary purpose is to provide governors, members, and others with accurate and timely information with respect to important events and trends, in order to promote better federal, state, and local decisionmaking and problemsolving. It is intended as an aid to help achieve better water management, improve intergovernmental relations, promote western states' rights and interests, and point out policy trade-offs. Further, it covers meetings, changes in Council membership, and other Council business. The newsletter is provided as a free service to members, governors and their staff, member state water resource agencies, state water users associations, selected multi-state organizations, key congressmen and their staffs, and top federal water officials. Other public and private agencies or individuals may subscribe for a fee.

Animas-La Plata Project

The omnibus FY2001 federal funding package approved by Congress on December 15, included authorization for construction of the Animas-La Plata Project (ALP), a vital part of the Colorado Ute Indian water rights settlement. The House passed the bill by a 292-60 vote, and it was approved in the Senate by voice vote. The amendment authorized a scaled-back version of the original Animas-La Plata Project, sometimes called "A-LP Ultra Lite." It authorizes and allocates an average annual depletion of 57,100 acre feet (af) of water for municipal and industrial uses for the Southern Ute Tribe (16,525 af), Ute Mountain Ute Tribe (16,525 af), San Juan Water Commission (10,400 af), State of Colorado (5,230 af), Animas - La Plata Conservancy District (2,600 af), Navajo Nation (2,340 af), and La Plata Conservancy District of New Mexico (780 af). Project costs allocated to the delivery of water to the tribes is nonreimbursable.

On March 14, the Western States Water Council adopted the position included hereafter in this report reiterating its continuing support for negotiated settlement of Indian water rights disputes as sound public policy for the quantification of Indian water rights claims in a fair, efficient, and cost effective manner. The position specifically refers to the Colorado Ute Indian Water Rights Final Settlement Agreement and calls on the Congress, the President, and the Secretary of the Interior to promote and encourage negotiated settlements of Indian water rights disputes and assist in their implementation as appropriate.

Border Water Issues

Canada

In February 1999, the Governments of the United States and Canada last February asked the International Joint Commission (IJC) to address the issue of water use along their common border.³⁰ The reference was a result of an ill-defined proposals to export water by tanker from Lake Superior, as well as other potential water uses affecting the Great Lakes and other areas of the United States and Canada. In part, the letter read, "The Governments are concerned that individual projects of apparently minor effect will set a precedent of bulk removal of water from the Great Lakes basin, opening the Great Lakes and other water bodies to subsequent water removal initiatives, with unpredictable consequences.... Boundary water resources continue to be the subject of ever-increasing demands in the light of expanding populations.... The Governments are concerned that current management principles and conservation measures may be inadequate to insure the future sustainable use of our shared waters."

As a result the governments asked the IJC to review and report on the following matters: (a) existing and potential consumptive uses of water; (b) diversions of water in and out of the transboundary basins, including withdrawals of water for export; (c) the cumulative effects of existing and potential diversions, and removals of water, including removals in bulk for export; and (d) the current laws and policies as may affect the sustainability of the water resources in boundary and transboundary basins. First priority was to be given to an examination of the Great Lakes Basin, with interim recommendations for the protection of the waters of the Great Lakes to be made within six months, and a final report by February 2000. The Governments also directed that the IJC, as part of this final report, address any additional work that might be required to assess and "better understand the implications of consumption, diversions and removal of water, including removals for export from other boundary waters, waters of trans-boundary basins, and groundwater of shared aquifers."

On March 15, the International Joint Commission (IJC) released its final report to the governments of Canada and the United States on Protection of the Waters of the Great Lakes from the potential impacts of water removals and consumptive uses.³¹ The report was prepared by an interdisciplinary bi-national team in consultation with experts on climate change, cumulative impacts

³⁰*Western States Water*, Issue #1333, December 3, 1999.

³¹*Western States Water*, Issue #1349, March 24, 2000.

and international trade and water law. An interim report was the subject of twelve public hearings.³² The IJC has nearly completed an options paper on a proposed plan of study for the rest of the boundary, in response to a reference from the governments, which will cover myriad water issues. A copy of the proposed work plan is available from the WSWC office.

Mexico

Mexico has released almost 140,000 acre-feet of water from reservoirs on tributaries to the Rio Grande in response to repeated requests from Texas Governor George W. Bush and the efforts of John Baker, Texas Natural Resources Conservation Commissioner, the International Boundary and Water Commission and others.³³ Under terms of the 1944 Treaty, Mexico is to release an average of 350,000 acre-feet (af) of water per year to Falcon and Amistad Reservoirs, which supply Texas irrigators and other water users in the Lower Rio Grande Valley. Since 1992, Mexico has failed to make sufficient releases to meet its obligation and had accumulated an estimated "debt" of some 1.4M acre-feet of water. While the treaty provides for a five-year window within which to account for and repay any deficiencies, Mexico's debt has continued to grow, and Texas authorities and water users feared the treaty would be breached unless Mexico began releasing some water now. Drought conditions in South Texas in recent years have led to substantial agricultural losses due in part to the under-delivery of water from Mexico.³⁴ Commissioner Baker praised "...state and local leaders who have worked together to achieve this vital first step in resolving an ongoing stalemate with Mexico over these waters, which rightfully belong to Texas. As we near the summer months, with a continuing drought situation in the Valley, it is critical to the economy of South Texas that the region receive its entitlement of water." Negotiations continue with Mexico to ensure releases of water are scheduled to payout the deficit by October 2002.

California/CALFED Bay-Delta Program

On June 9, California Governor Gray Davis and U.S. Department of Interior Secretary Bruce Babbitt released "California's Water Future: A Framework for Action," otherwise known as the CALFED Action Plan. The components of the Plan address ecosystem restoration, watersheds, water supply reliability, storage and water conveyance, an environmental water account, Endangered Species Act commitments, water use efficiency and conservation, water quality, water transfers, flood control levees, good science, and governance approaches. The plan has supporters, as well as critics.

³²*Western States Water*, Issue #1333, December 3, 1999.

³³*Western States Water*, Issue #1358, May 26, 2000.

³⁴*Western States Water*, Issue #1327, October 22, 1999.

Clean Water Act

Total Maximum Daily Loads

The Western Governors' Association circulated for the governors' signature a letter in support of S. 2417 introduced by Senators Mike Crapo and Robert Smith (R-NH), respectively the Chairman of the Environment and Public Works Committee and its Fisheries, Wildlife and Water Subcommittee.³⁵ The Water Pollution Program Enhancements Act of 2000 authorizes increased funding for state non-point source pollution control programs and directs EPA not to release final Total Maximum Daily Load (TMDL) rules for eighteen months.³⁶ The letter reads: "We, as governors in the West, wish to express our support for your proposed legislation that would add resources to the national effort currently underway to improve water quality and define reasonable and responsive programs to achieve the desired results. As you know there is a tremendous work load to be accomplished by states in better defining where we have water quality problems and developing responsible solutions. As we focus more and more on the non-point source contributors, we must be able to provide credible representations of the problem and reasonable and affordable solutions."

The letter continues, "Without doubt, the added funding you are considering in your bill will be a welcome addition. All states can benefit from these added resources. Your bill would also require the National Academy of Sciences to take a fresh look at the proposed TMDL rules that have been advanced by the Environmental Protection Agency. These rules have been very controversial. Since closure of the public comment period the Administration has been rushing these rules through for adoption. We certainly support the concept of an additional independent evaluation to weigh the merits of these proposed rules. We do not feel the delay resulting from the study will result in irreversible harm to the environment or any state program, as each state has already engaged a TMDL program to accomplish the fundamental requirements of the Clean Water Act. These programs shall continue in their current form."

Draft Final Rule

On June 19, the U.S. Environmental Protection Agency (EPA) formally submitted the draft final copy of the new rule for Total Maximum Daily Loads (TMDLs) to the White House Office of Management and Budget (OMB) to complete the interagency review process.³⁷ By agreement, OMB will have sixty days to finalize their review. There is speculation, according to one source, that since EPA and OMB have been communicating extensively during the rule-making process, the OMB review may not take the full sixty days. The draft final rule contains significant changes to the proposal that was initially published on August 23, 1999. These changes seek to address some of the concerns raised in more than 30,000 comments submitted on the proposed rule.

³⁵*Western States Water*, Issue #1355, May 5, 2000.

³⁶*Western States Water*, Issue #1353, April 21, 2000.

³⁷*Western States Water*, Issue #1362, Special Report, June 23, 2000.

The Western States Water Council submitted detailed comments on the proposed rule on January 19, 2000.³⁸ A number of the issues raised in the Council's comments have experienced significant changes in the draft final version. In its comments, the Council first raised the issue of requiring the listing of threatened waters as part of a state's 303(d) list, questioning EPA's legal authority to establish such a requirement. The Council urged that EPA leave the decision to list threatened waters to the individual states. In the draft final, threatened waters will no longer be required to be included on the 303(d) list, although the rule provides that they may be included.

Waterbodies impaired by pollution was the second issue of concern for the Council. It recommended that listing for these waterbodies not be required, stating that because "the listing itself clearly implies that water diversions and other hydromodifications represent a polluting activity" and EPA "is ill-equipped to deal with the legal and institutional interrelationships between water quantity and water quality," public policy "should respect the accommodation contemplated by the Clean Water Act, Section 101 (g)." The Council also urged EPA to reconsider the decision to require a multi-part 303(d) list of impaired waters, claiming that to do so would be "inherently confusing and inimical to the involvement of affected stakeholders." However, the draft final version retains both elements of the proposed rule, placing pollution-impaired waters on Part 2 of the list (not requiring a TMDL, and maintaining a four-part list.

Thirdly, the Council addressed the issue of atmospheric deposition of pollutants, recommending that "EPA make clear that waters impaired primarily by air deposition do not currently require TMDL development, due to the technical difficulties presented." The draft final would require to be included within the scope of a list of impaired waterbodies, any waterbody that, "based on all existing and readily available water quality-related data and information using appropriate quality assurance/quality control, are impaired by atmospheric deposition."

The Council also urged EPA to review the proposed listing methodology requirement of the proposed rule, stating that it "would be an inefficient use of resources to mandate a totally separate process and submission deadline for the listing methodology," as it would "necessitate an additional administrative process that will detract from efforts to develop and submit Section 303(d) lists in a timely manner." Under the draft final version, submission of methodology will be delayed until May 1, 2001, when states will be required to submit a summary of public comments and their methodology that will apply to the list required in 2002. Beginning in 2004, states must submit their final methodology two years in advance of their lists. While EPA will not approve or disapprove the methodology, it will provide comment within sixty days of receiving it and will consider it "in its review and approval or disapproval of [the] next list."

How TMDLs are expressed presented another area of concern for the Council, as "surrogate measures of TMDL effectiveness, in lieu of actual pollutant loading data, have become the norm for many states as their TMDL effectiveness monitoring responsibilities increase relative to the available monitoring budgets." The Council urged that EPA "carefully consider the implications" of "a rigorous requirement that all TMDLs must include an expression of the pollutant load or load reduction..." However, the draft final remains substantially unchanged, requiring that a TMDL

³⁸*Western States Water*, Issue #1340, January 21, 2000.

“must contain a quantitative expression of the pollutant load or load reduction necessary to insure that the waterbody will attain or maintain water quality standards...”

The Council also urged EPA to include a “functional equivalency” provision in the rule, which would “recognize that many states have already developed processes, methods and approaches to meet court, legislative or stakeholder demands for their existing TMDL programs” and argued that states should be allowed “to demonstrate that a process, method or approach not fully recognized in the regulations can be approved in a state program on the basis that it achieves the same desired results as envisioned by the rules.” EPA has not recognized the value of such a “functional equivalency” provision within the draft final version of the rule, relying solely on the “quantitative expression” requirement instead.

The Council supported the establishment of a five-year 303(d) listing cycle, instead of the current two-year cycle. In the draft final rule, EPA has settled on a four-year listing cycle, with submission required by April 1, beginning in 2002. Prioritization and scheduling of TMDLs was also an issue of concern for the Council, which found it unwise to equate a “priority ranking of listed waterbodies with the development of a schedule for TMDL development.” The Council felt it “very inefficient to require that all TMDL development for lower priority waterbodies be delayed -- potentially for many years -- until all of the complex TMDLs needed for higher priority waterbodies are completed.” The Council also recommended that EPA encourage, but not mandate, that “waterbodies where threatened or endangered species are impacted by impaired water quality be given a high priority....”

The draft final rule does make some movement in this direction, discarding the high, medium and low priority ranking system envisioned by the proposed rule and allowing states greater flexibility in establishing their priorities and schedules. States are encouraged to assign higher priorities to those waterbodies that are designated as a public drinking water supply or “where threatened or endangered species under Section 4 of the Endangered Species Act are present in the waterbody.” States are allowed the option to assign such a waterbody a lower priority if they demonstrate why a different priority is appropriate. Otherwise, impaired waterbodies that impact endangered or threatened species or serve as drinking water supplies must be given a higher priority under the draft final version of the rule. EPA has also provided that schedules for development of one or more TMDLs may be extended by no more than five years, if a state can “demonstrate to EPA as part of [the] list submission that, despite expeditious actions, establishment of all TMDLs on Part 1 of [the] list within 10 years is not practicable.” The Council had encouraged EPA to reevaluate the “potential need for modifications of schedules during subsequent listing cycles and establish some parameters for such modifications.”

Transitional TMDLs were an issue which the Council supported in its comments on the proposed rule, as EPA had proposed a twelve-month window in which it would approve submissions meeting either preamendment requirements or the post-amendment requirements. EPA has elected to extend this period for transitional TMDLs to an eighteen-month window following the publication of the final rule in the Federal Register.

Although it supports the implementation of TMDLs, the Council recommended in its comments that EPA reconsider its proposal to require the establishment of implementation plans as

part of a TMDL, stating that these “new provisions add confusion and controversy to an already burdened process.” Detailed implementation plans will still be required as part of a TMDL according to the draft final version. Although EPA “does not expect the implementation plan to be a complex, lengthy document,” the implementation plan requirements take up over four pages of the draft final rule.

EPA has also removed the public petition process from the draft final, which would have allowed any person to petition EPA “to carry out the actions that states are directed to perform under CWA Section 303(d).” Extensive public participation requirements are included in the latest version of the rule, but this controversial provision, which the Council questioned as to its legal basis, will apparently not be pursued in the final rule.

Silviculture provisions of the proposed rule were also a source of concern for the Council. EPA has also dropped these provisions from the draft final and has indicated by a June 8, 2000 letter from Chuck Fox, EPA Assistant Administrator for Water, to Senator Robert Smith, Chairman of the Senate Committee on Environment and Public Works, stating that EPA will “repropose provisions of the August [1999] proposal related to forestry later this fall along the lines described in the USDA/EPA Joint Statement. We intend to engage stakeholders extensively in reviewing the forestry provisions prior to the reproposal this fall. Based on the comments received on this repropose rule, the Agency will decide sometime next year how best to proceed to address this important issue.” This Fox letter also confirms the removal of pollutant offset provisions (as well as the public petition process) from the anticipated final version of the rule. The Council had believed it “premature to impose such requirements,” “absent new Congressional authority....”

Other modifications of interest include the definition of “reasonable assurances,” which has been a topic of much discussion at TMDL workshops sponsored by the Western Governors’ Association.³⁹ The new definition has been expanded substantially, taking up three complete pages of the document. Another addition of interest is the requirement that a 303(d) list “must include any waterbody for which biological information indicates that it does not attain and maintain water quality standards” (emphasis added). A copy of the draft final version of the rule is available from Council offices in either PDF or hard copy format.

Final TMDL Rule

On July 11, EPA Administrator Carol M. Browner signed the agency’s new TMDL rules at a press conference at EPA headquarters.⁴⁰ The agency decided to release the new rules after Congress took action to prevent EPA from implementing the rules through the addition of a rider to the FY 01 Military Construction/Emergency spending bill H.R. 4425. That piece of legislation, which had to be signed or vetoed by July 13, contains language prohibiting EPA from using any of the funds made available for FY 00 and FY 01 to “make a final determination on or implement any new rule relative to the Proposed Revisions to the [NPDES] Program and Federal Antidegradation Policy and

³⁹*Western States Water*, Issue #1324, 1999 and Issue #1343, February 11, 2000.

⁴⁰*Western States Water*, Issue #1365, July 14, 2000.

the Proposed Revisions to the Water Quality Planning and Management Regulations Concerning [TMDLs], published in the Federal Register on August 23, 1999.”

The early release of the rules circumvents the efforts of Congress to block their issuance, but EPA will still not be able to fund the enforcement or implementation of the rules until at least October of next year. Congress now has sixty days to review the rules and vote to disapprove if it so decides, as the new rules have been upgraded to “major rule” status under the Congressional Review Act. Although the addition of the rider to the military bill was engineered by Republicans, Democratic lawmakers were among those supporting at least delaying the regulations. “All of this is no more than a political power grab by the people running the EPA,” complained Rep. Marion Berry (D-AR). “They have no sound scientific reason for doing any of these things.” Several members of Congress from both sides of the aisle decried the administration as “simply trying to cement its environmental legacy in the final months of its term.”

As part of the press conference, a conference call allowed state water quality administrators to take part in a question and answer session. It was explained that the effective date of the new rule had been changed to October 1, 2001 to coincide with the limitation placed on EPA by the military bill rider. According to EPA, the final version of the rule contains several last minute changes and differs from the version sent to the Office of Management and Budget for review. The new rule will first apply to the April 2002 303(d) list. The state listing methods submittal will also be required in April, rather than six months in advance as initially proposed. The agency will not require TMDLs to comply with the new regulations until 9 months after the rule effective date, or July 2002. The forestry, concentrated animal feeding operations and aquaculture permitting requirements have been dropped from the final version, as well. The baseline date for TMDL scheduling has been changed to 2000 from 1998, and states would have until 2015 to complete TMDLs if certain conditions are met. The existing TMDL regulations apply in their entirety until the 2001 effective date of the new rule.

TMDL funding increases are still anticipated this next federal fiscal year and the President’s budget request includes major new 106 grant money. States will be allowed to use these dollars for their TMDL programs (including enhancements that may relate to the new rules), though EPA will not be able to conduct activities that relate to implementation of the new regulations until FY 02, as a result of the military rider language. This will probably include interacting with states on the new rules. A copy of the new rules, as well as press release materials, is available from EPA’s Office of Water website at: www.epa.gov/owow/tmdl/finalrule.

In related news, Senator Ron Wyden (D-OR) has reportedly developed draft legislation addressing the proposed TMDL rule. Wyden’s legislation would allow states to move the TMDL program implementation plan from Section 303(d) of the CWA to Section 202(e). Doing so would provide that EPA could approve the scientific determination of the TMDL process, but would place approval of the individual plans outside the agency’s approval authority. The proposed legislation would also provide funding to assist states in developing and implementing their TMDL water quality plans, as well as funding to landowners to implement them. Legislative counsel is currently reviewing a draft of the language with introduction reportedly targeted in the “next few weeks.”

Concentrated Animal Feeding Operations

On December 15, EPA proposed strict new regulations aimed at reducing water pollution from large industrial animal feedlots. According to EPA release, the new rules would apply to as many as 39,000 concentrated animal feeding operations (CAFOs), which have previously been defined as having 1,000 or more cattle or comparable "animal units" for other livestock. EPA Assistant Administrator for Water, J. Charles Fox, described polluting wastes coming from CAFOs as some of "the greatest threats to our nation's waters and drinking supplies." EPA states that currently only an estimated 2,500 livestock operations have enforceable permits under the Clean Water Act. One purpose of the proposed rules would be to bring smaller CAFOs under regulation, in order to hopefully redress the estimated 60 percent of river pollution that comes from agricultural runoff, including livestock operations.

The announcement states that the livestock industry has undergone "dramatic changes in the past 20 years, consolidating scattered, smaller facilities into fewer but vastly larger feeding operations that result in greater and more concentrated generation of wastes." The proposed rule suggests two options for a new CAFO definition. The first would define CAFOs as operations with more than 500 cattle or other animal units. The second would require operations with 300-1000 cattle or other animal units to obtain a waste water permit, if they meet "certain risk-based conditions." The proposed rules would also: (1) require poultry, veal, and swine operations to prevent all discharges from their waste storage pits and lagoons where wastes are collected; (2) eliminate potential exemptions presently used in some states, requiring all large livestock operations to acquire permits; (3) allow EPA and the states to issue co-permits for corporations and contract growers to ensure financial resources exist to meet environmental requirements; and (4) limit the spreading of manure on land owned by livestock facilities to protect waterways. The proposed rules will be published in the Federal Register in early January 2001. EPA will accept public comment for 120 days from the date of publication, and will hold public meetings around the country. More information and a copy of the proposed rule is available on EPA's Office of Water website at: www.epa.gov/owm/afo.htm.

Drought

On March 8, the National Drought Policy Commission released for comment its draft report, "Preparing for Drought in the New Millennium."⁴¹ The Commission's recommendations focus on the basic premise, "We can reduce this nation's vulnerability to the impacts of drought, and thus reduce the need for emergency relief, by making preparedness the cornerstone of national drought policy." Congress also charged the Commission to find how best to integrate federal drought laws and programs with ongoing state, local and tribal programs, improve public awareness and coordinate public and private responses to drought.

⁴¹*Western States Water*, Issue #1347, March 10, 2000.

On May 16, the National Drought Policy Commission approved its final report to the Congress.⁴² The members of the Commission signing the report include: U.S. Department of Agriculture Secretary Dan Glickman; Bureau of Reclamation Commissioner Eluid Martinez; Joseph Westphal, Assistant Secretary of the Army (Civil Works); and twelve others representing different federal, state and local agencies and interests. The report refers to studies that show that the federal government spent \$3.3B responding to the 1953-56 drought, \$6.5B on the 1976-77 drought, and \$6B during the 1988-89 drought. The Commission suggests that "...we can reduce this nation's vulnerability to the impacts of drought by making preparedness the cornerstone of national drought policy." Preparedness includes drought planning, plan implementation, proactive mitigation, risk management, resource stewardship, consideration of environmental concerns, and public education. As a matter of policy, the Commission states, "National drought policy should use the resources of the federal government to support but not supplant nor interfere with state, regional, local, tribal, and personal efforts to reduce drought impacts." It adds, "The guiding principles of national drought policy should be: (1) Favor preparedness over insurance, insurance over relief, and incentives over regulation; (2) Set research priorities based on the potential of the research results to reduce drought impacts; and (3) Coordinate the delivery of federal services through cooperation and collaboration with nonfederal entities."

The Commission continues, "Our recommendations are based on our findings about the gaps among what is needed and what is provided by state, regional, local, tribal, and federal drought programs and laws.... In keeping with the law that established the Commission, our recommendations relate primarily to the federal government's role in national drought policy. We view the federal government as one of many partners needed to reduce the impacts of drought.... [M]uch of the work appropriately lies outside the federal government." In addition, the report includes a disclaimer, stating, "None of our recommendations should be construed as diminishing the rights of states to control water through state law, as specifically directed by the National Drought Policy Act, nor as interfering in any way with state, local and tribal sovereignty."

H.R. 4733, the FY2001 Energy and Water Appropriations bill, extended authorities under the Reclamation States Emergency Drought Relief Act of 1991 through 2001.⁴³ Of note, the Congress specifically stipulated that "not more than 25 percent of the amount provided for drought emergency assistance may be used for financial assistance for the preparation of cooperative drought contingency plans under Title II of P.L. 102-250...." Further, section 202 reads, "Funds under this title for Drought Emergency Assistance shall be made available primarily for leasing of water for specified drought related purposes from willing lessors, in compliance with existing State laws and administered under State water priority allocation. Such leases may be entered into with an option to purchase: Provided, That such purchase takes place and the purchase does not cause economic harm within the State in which the purchase is made."

⁴²*Western States Water*, Issue #1358, May 26, 2000.

⁴³*Western States Water*, Issue #1376, September 29, 2000.

Endangered Species Act

Legislative Activities

On January 3, the National Marine Fisheries Service (NMFS) published a proposed rule to govern the taking of seven threatened salmon species under Section 4(d) of the Endangered Species Act. It applies to the conservation of certain coho, chinook, chum and sockeye species, which NMFS determines are threatened by human actions such as harvesting, past and ongoing destruction of freshwater and estuarine habitats, poor hatchery practices, hydropower development, and other causes. Specifically, the rule states, "NMFS believes the following activities are very likely to injure or kill salmonids, and result in a violation of this rule unless within a limit on the take prohibitions provided...in most circumstances to one coho..., three chinook..., two chum..., and one sockeye salmon...." The rule listed activities and categories of activities most likely to trigger enforcement actions.⁴⁴

On February 2, the House Resources Committee held a hearing on the Common Sense Protections for Endangered Species Act (H.R. 3160), introduced by Chairman Don Young (R-AK).⁴⁵ The bill had 32 cosponsors. Title I contains changes designed to improve the scientific integrity, validity and credibility of listing decisions. Title II would balance federal agencies responsibilities under the Act with other laws and agency missions. Title III further limits permitting and enforcement activities by excluding from the definition of a "taking of a species" any activity to address a critical, probable threat to public health or safety or a catastrophic natural event or actions incidental to an otherwise lawful activity. Title IV addresses and enhances recovery planning requirements for species "indigenous to the United States or in waters with respect to which the United States exercises sovereign rights or jurisdiction...." Lastly, Title V would authorize \$130M for fiscal year 2001, increasing to \$160M by FY2004, to carry out the duties required by the Act, as amended, of the Secretary of Interior, with another \$30M-\$45M for FY2001-FY2004 for the Secretary of Commerce, \$4M for the Secretary of Agriculture, and \$10M annually for safe harbor agreements.

Chairman Don Young (R-AK) made it clear he will aggressively push to amend the Endangered Species Act (ESA) and planned to mark up the bill by early spring. Testifying for the National Water Resources Association, Bennett Raley stated that the ESA is "fatally flawed" with respect to water use and allocation issues in the West. He referred to problems in the California Bay Delta area, Columbia River Basin, Edwards Aquifer in Texas, and Rio Grande and Pecos Rivers in New Mexico. "Throughout the West, federal agencies routinely assert that they may obtain water for use for federal ESA purposes through the exercise of regulatory authority irrespective of existing water rights allocations," Raley testified. He argued, "...existing federal law provides that all federal claims to the use of water, whether for national defense, fulfillment of the federal trust responsibility to Indian tribes, ecosystem protection, or protection of endangered species, must either be asserted in McCarran Amendment water adjudications or be subordinated to other rights to the use of water..."

⁴⁴*Western States Water*, Issue #1341, January 28, 2000

⁴⁵*Ibid.* and *Western States Water*, #1342, February 7, 2000.

established in these proceedings. If the United States needs water for ESA purposes, it must acquire senior water rights through purchase or condemnation.” He added, “I think that it is clear that the ESA is not being implemented in a fair and efficient manner. In fact, ...I believe that the existing law should be repealed and Congress should start over and develop a program that achieves national interests in the protection of endangered species without encroaching on private property and the prerogatives of the states. However, in light of the political realities...incremental changes are the best that we can hope for....”

On March 1, the House Resources Committee held another hearing on H.R. 3160, introduced by Chairman Don Young (R-AK).⁴⁶ Montana Governor Marc Racicot testified, together with U.S. Fish and Wildlife Service (FWS) Director Jamie Clark and Penelope Dalton, NMFS Assistant Administrator for Fisheries. Governor Racicot testified, on behalf of the Western Governors’ Association, that reauthorization is their highest legislative priority. “Our states and communities must deal with the effects of proposals to list species and management decisions made under the ESA on literally a daily basis. Recent salmon, steelhead, and bull trout listings affect nearly every watershed in the Pacific Northwest.... Unfortunately, listing...places a cloud of uncertainty over nearly every economic and social activity where the species may occur....” Governor Racicot summarized twelve principles for reform on which the governors have agreed. He added, “H.R. 3160 clearly reflects a close reading of the governors’ suggestions.... H.R. 3160 also addresses many issues...upon which we as governors labored, but could find no consensus.... [T]hese reforms will bring important relief that is too important to lose while debate rages over the other issues. It is for that reason, that the Western Governors urge the members of the committee to reach across the table to each other in an attempt to develop legislation that can be enacted and signed into law this year.”

Ms. Clark’s testimony was direct and to the point. “The Administration strongly opposes H.R. 3160, and the Secretary would recommend that the President veto the bill.... H.R. 3160 eliminates the essential protections that are available to listed species under current law. It shatters the underlying principle of Section 7 that requires Federal agencies to take primary responsibility for the conservation and recovery of listed species. It bogs down the listing process under Section 4 by creating so many obstacles and procedural requirements that it becomes onerous to add species to the list, and the requirement to retroactively apply those standards to species already on the list would lead to premature delisting of many species. It alters the important requirement of current law that decisions be based only on sound scientific principles. And, it erodes the Section 9 take prohibitions to such an extent that listed species would no longer have the essential protection from take that is the very foundation of the Endangered Species Act. The impact to our nation’s most imperiled species would be immediate and disastrous. Without adequate protections for listed species, we would lose much of the unique biodiversity of our nation....”

Ms. Dalton testified, “NMFS is responsible for over 50 listed species that are, for the most part, wide-ranging, highly migratory and cover millions of square miles in the oceans and thousands of miles of U.S. rivers, streams and coastline. The breadth of our challenge in recovering salmon...and other marine and anadromous species is so great that we cannot do this important job without cooperating with non-Federal landowners such as states, Tribes, counties, and private entities.... We

⁴⁶*Western States Water*, Issue #1346, Special Report, March 3, 2000.

have been successful in providing both flexibility and certainty for private landowners under the current Act, and any bill to reauthorize the ESA should build on the Administration's constructive efforts...." She noted that habitat conservation plans (HCPs) cover close to two million acres of salmon habitat in California and the Northwest.

Dalton testified that any ESA amendments must include the Administration's reforms that provide certainty and flexibility to private landowners, and preserve the "full force and effect of the restrictions set out in Sections 7 and 9 [requiring federal agency consultations and prohibiting the takings of species]." She said, "H.R. 3160 does not maintain the essential conservation thrust of the existing Act, nor does it include many of the Administration's reforms.... Parts of H.R. 3160 are contrary to the fundamental goals of the existing law and program and would undermine the protection and recovery of endangered and threatened species...[adding] H.R. 3160 amends Section 7 to shift the burden to the Services to demonstrate the impact of other Federal agencies' actions on listed species and allow a project to proceed if the Secretaries have not completed consultation within a given time.... Both the current law and S. 1180, a bill drafted by Senators Chafee and Kempthorne in the 105th congress and supported by the Administration, retain the responsibility of a Federal action agency to ensure that a project it authorizes, funds, or carries out will not jeopardize listed species. Both also affirm the responsibility of Federal agencies to develop programs for the conservation of listed species."

Dalton objected to H.R. 3160's "taking" exemptions for listed species under ESA Section 9 which would "erode our ability to recover species. The exemptions are so numerous that in many situations non-Federal activities that might injure species could proceed without an incidental take permit. According to a report of the Nature Conservancy, over half of the currently listed species have 80 percent of their habitat on private lands. Recovering species has to be shared by both Federal and non-Federal entities. Neither can do it alone." She raised a number of other objections to other provisions in H.R. 3160, stating that the bill would also create a long list of activities excepted from implementation of the Act which might pose serious harm to species, add layers of unnecessary non-scientific requirements to the listing process, deny "subspecies" protection, require a time-consuming and costly social and economic analysis at the time of listing "without any apparent purpose," require federal agency conservation action "only to the extent consistent with their primary mission," and except routine federal and non-federal facility operation, maintenance, repair and replacement work "without any consideration for listed species...."

On April 12, the Senate Energy Committee's Water and Power Subcommittee, chaired by Senator Gordon Smith (R-OR), held a hearing on the Columbia River system and hydropower operations.⁴⁷ Testifying were: J. William McDonald, Pacific Northwest Regional Director, Bureau of Reclamation; William Stelle, National Marine Fisheries Service (NMFS) Regional Director; Stephan Wright, Bonneville Power Administration (BPA); and Brigadier General Carl Strock, Northwestern Division Engineer/Commander, Army Corps of Engineers. General Strock emphasized the ongoing efforts to restore salmon in the basin stating, "No single factor is solely responsible for the decline of the salmon, and it will require efforts across all life cycle influences to restore listed stocks." He referred to a caucus of federal agencies that developed the "All-H

⁴⁷*Western States Water*, Issue #1352, April 14, 2000.

Paper" that addresses the influences of habitat, harvest, hatcheries and hydropower on salmon and a new biological opinion expected this summer. He emphasized the caucus' work was not a referendum on dam breaching, though that was a major focus of many comments. He added that if breaching the four lower Snake River dams were to be part of a final biological opinion, under the Endangered Species Act, the Corps would seek authorization and funding from the Congress.

The General addressed the downstream migration of juvenile fish stating their in-river survival has increased from 10-40% in the 1960s and 1970s to 50-60%, which combined with a 98% survival rate for fish transported by barges and trucks, produces a combined survival rate of 70-80%. He acknowledged the fact that little is known about indirect mortality rates from transportation. Other efforts to improve survival rates include incorporation of minimum gap runner (MGR) turbine design technology in powerplant rehabilitation to improve fish survival and reducing predation by Caspian terns (which took nearly 10 million salmon smolts in 1998) by eliminating nesting on Rice Island created from dredge spoils. On April 10, a federal district court judge granted a motion by the National Audubon Society, Defenders of Wildlife and American Bird Conservancy to temporarily enjoin the Corps from relocating the birds.

Mr. Wright focused his testimony on the need for a unified regional plan that incorporates the "All-H Paper," ESA biological opinions, amendments to the Northwest Power Planning Council's Fish and Wildlife Program, and tribal and other fish recovery efforts. He said such a plan should be based on performance standards for each of the "Hs" while providing the flexibility to use resources "where they will do the most good and be the most cost-effective...." He emphasized Bonneville's willingness to fund its fair share of the plan, and called for continuing coordination among the federal agencies. Under a memorandum of agreement (MOA) BPA has made available an average of \$252M annually for fish and wildlife recovery and \$127M for direct reimbursable expenses for fish mitigation efforts undertaken by federal agencies. Some unspent MOA funds remain available to repay the federal Treasury for capital improvements for which the Congress has not appropriated money as expected, and BPA will not reprogram these funds for other uses. BPA has also developed and Vice President Al Gore has endorsed eight Fish and Wildlife Funding Principles which address uncertainty surrounding future fish and wildlife costs and Bonneville's power rate development process.

Mr. Stelle reported that NMFS received a biological assessment from Bonneville and the Corps and Bureau of Reclamation outlining planned operations for the Federal Columbia River Power System (FCRPS) and expected impacts on listed fish on December 21, 1999. NMFS is developing a new biological opinion (BO) to replace a 1995 BO which will cover the entire FCRPS and all 12 Evolutionarily Significant Units (ESUs) of salmon and steelhead within the Columbia Basin. He said, "It will establish performance standards for the hydro system based upon productivity improvements needed by each listed ESU to avoid extinction and achieve a recovery trajectory." The term of the opinion would be from 2-10 years. A draft BO is expected for state and tribal comment by May 22, then revised and finalized by mid-July. This is not a formal public review. He next addressed the "All-H Paper" and its context and purpose. He noted nearly 10,000 attended the 15 public hearings and about 1,500 testified. Some 60,000 written comments have been submitted. He described the five basic goals of the paper: (1) conserve species, avoid extinction and foster recovery of ESA-listed fish and wildlife; (2) conserve ecosystems on which salmon and

steelhead depend; (3) assure tribal fishing rights under treaty and trust obligations; (4) balance the needs of other species; and (5) minimize adverse human effects.

Mr. McDonald focused on Reclamation's role, under the 1995 BO, to deliver 427,000 acre-feet of water for flow augmentation per year from the Snake River, which has been done through "a variety of means including the use of unallocated storage and purchase or rental of water rights from willing sellers throughout the system, in accordance with state law." In addition, Grand Coulee and Hungry Horse dams provide flow augmentation. Other efforts include the design and construction of fish screen and passage facilities at numerous sites. Bill testified that straightforward solutions to minimizing adverse effects on listed or candidate species from federal project operations are elusive. For example, he noted proposals to use Lake Roosevelt to assume a greater burden for flood control and produce a greater volume of water at specific times for flow augmentation for listed species would significantly reduce peaking power generation, recreation opportunities and revenue important to the Spokane and Colville Indian Tribes. He stated, "Reclamation is working to fulfill ESA requirements in a manner consistent with our other obligations." This includes working to resolve Nez Perce tribal water claims and negotiating water acquisitions with Idaho.

On April 27, the House Resources Committee held a field hearing in Pasco, Washington on the hydropower, river management and the salmon recovery issues in the Columbia/Snake River System.⁴⁸ Representatives Doc Hastings (R-WA), George Nethercutt (R-WA), Helen Chenoweth-Hage (R-ID), and Mike Simpson (R-ID) were at the hearing. With respect to the issue of dam removal, Rep. Hastings said, "We should not miss the opportunity to make real progress toward salmon recovery now, while we wait months or years for the outcome of the debate on the dams. Nor is it clear that we should trust the recommendation of our federal agencies on the dams once it is made."

At the Pasco hearing, Rep. Nethercutt opined, "For members outside of our region, it's been very easy to make a decision on whether or not to support dam removal without fully understanding the impacts of that decision and the efforts...to restore salmon." Rep. Chenoweth-Hage declared, "Those who have a different agenda other than saving salmon have hijacked this issue...[and] sought to fulfill their own special purposes - whether it be returning the river system to its pre-Columbian condition or thriving on the cash cow of research and grant dollars...." Three panels of federal, state, tribal and local officials, academicians, and water, power and fisheries interests testified for five hours.

Nathan Mantua and Jim Anderson, professors from the University of Washington, testified. Dr. Mantua stated, "Though scientists are not certain of all the factors controlling salmon marine survival in the Pacific Northwest, several ocean-climate events have been linked with fluctuations in northwest salmon health and abundance." He described El Niño, La Niña and other climate related events that have an important influence on ocean temperatures, phytoplankton abundance, and other conditions favorable or unfavorable to salmon.

⁴⁸*Western States Water*, Issue #1356, May 12, 2000.

Dr. Anderson, who has studied Columbia River salmon and the influence of the hydrosystem and climate for over two decades, testified that salmon runs have declined to levels never seen in recorded history, adding, "We are poised to make major decisions that will affect the future of the Pacific Northwest, its people, its economy, and the state and health of the environment. In the Columbia River Basin there has always been conflict between economic development and the health of the fish and wildlife.... It is not my concern to suggest how these forces balance; my concern is how we use the science upon which this balance must be based." He concluded analysis of the status of salmon runs over the past five years is based on out-dated data, and that fortunately, the newest information suggest a very different situation with dramatic improvements in ocean survival and adult salmon returns. He noted recent figures for adult spring chinook passage at Bonneville Dam may be the best ever. "For this year, jack [adult males] returns through April 20 are 925% of the ten-year average.... Further, the one-day maximum of 8635 adults is nearly equal to the entire 12,000 spring chinook return in 1995.... We expect the adult returns for 2001 and 2002 will be very large, if not near record."

Colonel Eric Mogren, Deputy Commander of the Northwestern Division of the Army Corps of Engineers, testified that a \$20M draft environmental study that was completed by his Portland office last year recommended barging more salmon smolts downstream around the system of dams and other fish-friendly improvements, rather than breaching the four lower Snake River dams (based on the uncertainty of the science). However, he was later given verbal guidance that the environmental study should take no stand on the future of the dams, which he said is rare (when pressed by the Committee).

Administration Activities

Conservation Agreements

On June 13, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service published in the *Federal Register* a draft policy identifying criteria that conservation agreements and other conservation efforts must satisfy in order to affect decisions on listing species under the Endangered Species Act.⁴⁹ The proposed policy is intended as a guide for use by the Services in making decisions to list -- or not to list -- species as endangered or threatened. The Services authority for considering future conservation efforts and voluntary conservation efforts is discussed, followed by key criteria for determining when conservation efforts may make listing unnecessary or support a decision to list a species as threatened, rather than endangered. The policy also addresses the level of certainty required for implementing proposed voluntary future actions and monitoring the effectiveness of such actions.

The policy is also intended as a guide for states, local governments, and others in preparing conservation agreements or other plans designed to encourage species conservation and avert the need for listing declining species. A June 9, U.S. Fish and Wildlife Service (FWS) new release states, "Although development and implementation of conservation agreements and plans have been effective means of achieving protection of species and restoration of habitats, the Fish and Wildlife

⁴⁹*Western States Water*, Issue #1363, June 30, 2000.

Service's decision to withdraw a proposal to list the Barton Springs salamander in Texas and the National Marine Fisheries Service's decision to withdraw a proposal to list the Oregon Coast coho salmon based on conservation plans developed by the States were overturned by the courts. The Services then listed those species. This policy will help define for all parties a set of standards by which the Services will evaluate all future and voluntary efforts in determining whether to use those efforts in making a decision not to list.... [T]he Services must find that the conservation effort is sufficiently certain to be implemented and effective."

Jamie Rappaport Clark, FWS Director says, "Keeping species off of the endangered species list should be our goal. We hope this policy will encourage States and others to initiate and expand efforts to conserve species before they reach this critical stage."

Habitat Conservation Plans

The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) released a new five-point policy on Habitat Conservation Plans (HCPs) to improve the process and encourage landowners to use their property to help conserve and protect plants and animals listed under the Endangered Species Act (ESA). HCPs were authorized by Congress in 1982 ESA amendments to allow the Services to permit the "taking" of individual endangered or threatened species -- incidental to other-wise lawful activities -- given agreed upon conservation measures to minimize or mitigate the effects of the taking. There are now more than 270 HCPs covering more than 20 million acres of land and another 200 HCPs are under development. The new policy is an addendum to the HCP handbook and provides guidance in five areas: the establishment of biological goals and objectives, adaptive management, monitoring, public participation, and the duration of incidental take permits that are granted as part of the process.⁵⁰

Jamie Rappaport Clark, Director of the U.S. Fish and Wildlife Service, says, "HCPs are working exactly the way Congress intended, letting landowners develop their property while meeting the needs of threatened and endangered species. Over the years, we've learned a great deal about how to make HCPs work even better as we've worked with hundreds of landowners. This new policy captures what we learned and incorporates it into our HCP Handbook so that we can improve the process for both landowners and listed species.... Every HCP will clearly state its conservation objectives and, if necessary, the future adjustments that might be required by the landowner.... This provides assurances all around that the needs of the species will be met while landowners know the limits of what might be asked of them in the future."

Indian Water Rights

A Department of Interior Working Group on the Endangered Species Act and Indian Water Rights was convened in 1997 to "examine the issue of the implementation of the ESA in relation to the exercise of Indian water rights in the West, and evaluate the process and criteria for the development of environmental baselines pursuant to section 7 of the ESA and existing regulations." In response to a draft working group report, in a letter dated January 20, 2000, western states noted,

⁵⁰*Western States Water*, Issue #1360, June 9, 2000.

“Each State has developed different policies and approaches for addressing Indian water issues.... However, despite the States’ differences, there are several overriding principles upon which the...Western States agree. First, the draft report seeks to address certain issues related to the Endangered Species Act that cause fundamental problems for all water users, not just the Tribes.... Second, [it] seeks to address issues that appear to have arisen primarily from isolated examples in Arizona and New Mexico.... The States appreciate the concerns of the southwestern Tribes and the problems they are facing in dealing with the Endangered Species Act. However, while it is not clear in the draft report, it appears there could be some adverse impacts on non-Indian water users if the recommendations are implemented. This shift in responsibility to meet the requirements of the Endangered Species Act is a major concern of the Western States.”

The letter continues, “Third, while some of the Western States continue to litigate Indian water issues, others have had success or made progress in negotiating Indian water rights settlements.... [T]he Working Group’s recommendations are likely to hamper settlements and promote further litigation between States and Tribes...[by limiting] the flexibility the States and Tribes have to reach the compromises necessary to achieve water rights settlements.... Fourth, all Western States agree that the draft report deals with sensitive political topics and extremely complicated legal issues. The states are troubled that the Interior Department would attempt to address such volatile issues within such a short time period and with so little opportunity for the States...to provide input.... Finally, many of the Working Group’s recommendations are too vague.” Given the importance and complexity of some of the issues addressed in the report, the western states suggested the working group collaborate with the states, tribes, water users, U.S. Fish and Wildlife Service and other federal agencies.

On July 6, the Department of the Interior’s Working Group on the Endangered Species Act and Indian Water Rights announced the release of its Final Report and Recommendations in the *Federal Register* (46 FR 41709).⁵¹ The notice stated, “No action will be taken to implement any of the Recommendations of the Working Group until all comments have been received and analyzed.”

On October 4, seven states’ water resource officials wrote Elizabeth Birnbaum, Special Assistant to the Solicitor of the Department of Interior, expressing their concern that the final report of Interior’s Working Group on the Endangered Species Act (ESA) and Indian Water Rights failed to satisfactorily address state objections. Further, the letter says that the final report raises new concerns. The states renewed a request made with their original comments, submitted on January 20, that Interior open a dialogue with the western states to address their concerns.⁵² The letter was signed by: Rita Pearson, Director of the Arizona Department of Water Resources; Dan McCallough, Acting Director of the Colorado Water Conservation Board; Hugh Ricci, Nevada State Engineer; Richard Stockdale, Acting Wyoming State Engineer; Jack Stults, Administrator, Montana Water Resources Division; Paul Cleary, Director, Oregon Water Resources Department; and Bob Morgan, Utah State Engineer. Karl Dreher, Director of the Idaho Department of Water Resources and Tom Turney, New Mexico State Engineer, have since joined the other seven states in calling for talks.

⁵¹*Western States Water*, Issue #1364, July 7, 2000.

⁵²*Western States Water*, Issue #1377, October 6, 2000.

Listing Moratorium

In a November 22 press release, the U.S. Fish and Wildlife Service announced it is suspending new listings, except on an emergency basis, through the remainder of FY2001 in order to focus limited funds on conducting critical habitat designations required by court orders or settlement agreements. Service Director Jamie Clark declared, "We have reached the point where the staff time and funding needed to list species have been consumed by the requirement to do court-ordered critical habitat designations stemming from a flood of lawsuits. Unfortunately many species that should be listed in the coming year won't be.... We won't be able to complete the listings of species we already proposed as needing protection such as the Chiricahua leopard frog in Arizona, the Mississippi gopher frog..., the Mountain yellow-legged frog in California, the Vermilion darter in the Southeast, the coastal cutthroat trout in the Pacific Northwest, and the Buena Vista Lake shrew in California."⁵³

Takings and 4(d) Rules

On July 10, NMFS published in the *Federal Register* its final ESA 4(d) rules governing the taking of endangered and threatened salmon and steelhead species as a result of otherwise lawful private activities (to take effect on September 8).⁵⁴ In announcing the new "fish friendly and people friendly" rules, NMFS Regional Administrator William Stelle said, "They reflect our twin commitments to protect the fish and to provide powerful incentives for local conservation efforts.... These protections are required by the law and needed by the fish. It's that simple." However, he adds that certain state and local conservation efforts will be exempt from "take" prohibitions. "These exemptions will reduce red tape, appreciably cut back the need for ESA-related permits for activities covered by approved conservation plans, and create powerful incentives for state or local conservation programs which can benefit the fish enormously."

Stelle states, "Our approach to enforcing these rules will be based upon old-fashioned common sense and good science. We'll look to those harmful activities that clearly kill salmon, like bulldozers in streams with spawning salmon, and we'll look to other federal, state or local conservation efforts to address more marginal activities that may, nonetheless, have cumulative effects on the listed fish and their habitats." The new rules were completed after a series of 25 public hearings in the Northwest, and NMFS received more than 6,500 comments in response to the draft rule. The comments and responses are summarized and accompany the new rule.

Regional Activities and Events

Colorado River Basin

On June 28, a group including the Defenders of Wildlife, the Center for Biological Diversity, the Sierra Club, the Humane Society and four organizations from Mexico, filed suit in the District

⁵³*Western States Water*, Issue #1385, December 1, 2000.

⁵⁴*Western States Water*, Issue #1367, July 28, 2000.

Court for the District of Columbia alleging that Bruce Babbitt, Secretary of the Interior, Eluid L. Martinez, Commissioner of the Bureau of Reclamation (BOR), and other federal officials were violating the Endangered Species Act and the Administrative Procedures Act (APA) and requesting that the court require FWS and NMFS to engage in consultation with BOR, taking "into account the impacts of [BOR]'s ongoing activities on the lower Colorado and all listed species in Mexico," and require FWS to "issue a Recovery Plan for the Southwestern willow flycatcher."⁵⁵

Columbia/Snake River Basins

In a February 19th speech to the American Fisheries Society, Oregon Governor John Kitzhaber publicly called for the removal of four lower Snake River dams in Washington as "the single most beneficial action we can take...for the Snake River salmon listed under the Endangered Species Act. If we don't remove the four Lower Snake River dams, we will need to do more and with greater intensity in the areas of hatcheries, habitat and harvest..."⁵⁶ He continued, "Dam breaching alone -- while it will certainly help some runs of salmon -- will not necessarily restore them. Regardless of whether we reach a breaching strategy or a non-breaching strategy we must come to terms with other steps that will be necessary." Among some of the steps mentioned by Governor Kitzhaber were dam and system reoperations to address dissolved gas and temperature problems and comply with the Clean Water Act, increased flows to help fish move downstream, fish passage improvements and "fish-friendly" turbines, extensive habitat restoration and protection, changes in hatchery operations and location, and further reductions in salmon harvests.

Governor Kitzhaber observes, "Dam breaching has acquired a life of its own in the Northwest -- dominating the political debate, the news stories, and the editorials almost to the exclusion of everything else. It is important ...that we put this issue into context and bring it into perspective." He emphasizes, "My point is this: if we can move beyond the symbolism of the four Snake River dams -- and look at the policy trade-offs involved, at the other choices we must make if we choose to leave them intact -- breaching emerges as a responsible and cost effective option." He continues addressing other proposed alternates, without dam breaching. "In other words, the tradeoff for maintaining the...dams is an increased responsibility for habitat restoration by private landowners and a reduction in existing water rights in the region...not just continuing the current moratorium on the issuance of new water rights in the basin -- an actual reduction in existing water rights." Further, according to Governor Kitzhaber, leaving the dams would mean radical limits on salmon harvests in both the ocean and rivers, totally restructuring hatchery and hydropower system operations, significant changes in some land uses and other measures. He said, "It is time to act.... It is now time for the region to step up to the plate and make some choices.... The salmon can't wait.... The people can't wait...." He quotes President Theodore Roosevelt, "In any moment of decision, the best thing you can do is the right thing. The worst thing you can do is nothing."

On July 19, George Frampton, the Acting Chair of the White House Council on Environmental Quality (CEQ), announced that the Administration would not ask the Congress to authorize removal

⁵⁵*Western States Water*, Issue #1365, July 14, 2000

⁵⁶*Western States Water*, #1348, March 10, 2000.

of four dams on the lower Snake River to help wild salmon runs.⁵⁷ "Dam breaching is one step among many that holds promise for recovering Snake River runs. But it is also clear that breaching...may not be essential ...and probably would not be sufficient. And it would do nothing for the other listed stocks on the main stem of the Columbia." Frampton previewed the Administration's strategy, stating it would not "subscribe to the premise championed by some that the region faces a simple, binary choice between breaching and not breaching these dams, and that salmon recovery hinges on that decision." Frampton also said, "There is not a single elected representative in Congress from the region that in any way supports breaching, and it would take substantially more than a decade to execute that strategy even if they did. These fish need immediate action."

On July 27, Frampton announced the release of a draft biological opinion (BO) by the National Marine Fisheries Service (NMFS) with respect to the continuing operation of 29 federal dams on the Columbia and Snake Rivers and their tributaries.⁵⁸ The opinion and a draft Basin-Wide Salmon Recovery Strategy (formerly known as the All-H Paper) will not be completed until some time later this year, following a public review period. Frampton stated, "The federal government is fully committed to doing its part to restore the imperiled salmon of the Pacific Northwest. Today, we propose a long-term strategy grounded in the best available science. This strategy is practical and comprehensive, and places the highest priority on those actions likely to produce the greatest benefit for the broadest range of species throughout the basin. Bringing back the region's salmon while strengthening its economy is an extraordinary challenge.... Achieving these goals will also require a genuine commitment by the people and...governments of the Pacific Northwest." Frampton added, "We welcome the support and input of the region's tribes and states, and are committed to forging a strong and lasting partnership with them. And, if our common efforts do not achieve the progress we need, we all must prepare to take even stronger action. Extinction is not an option."

NMFS Regional Administrator William Stelle said, "This is a very ambitious plan. It takes a broad-based approach to rebuilding salmon stocks in the Columbia Basin and establishes strong mechanisms to insure that our recovery efforts can be adjusted to reflect the best and latest science." This Administration has not totally ruled out dam breaching, but will not pursue that option (for at least eight years), while the newly announced strategy is implemented.

The Administration's strategy has critics on both sides of the dam breaching issue. It has been denounced by Indian tribes, environmentalists and others that support dam breaching. They have called the Administration's plan a "death sentence" for salmon, and "a plan for more planning." The Columbia River Alliance, an industry group, believes the recovery plan is too costly and too vague, while the ultimate threat of removing the dams remains. Northwest citizens would pay through higher power rates. The Bonneville Power Administration's cost alone is estimated to be \$430M-\$730M a year.

⁵⁷*Western States Water*, Issue #1365, July 14, 2000

⁵⁸*Western States Water*, Issue #1367, July 28, 2000.

On July 25, meeting in Boise, four Northwest governors announced their own regional strategy for the recovery of salmon and steelhead in the Columbia Basin. Governors Dirk Kempthorne of Idaho, Marc Racicot of Montana, John Kitzhaber of Oregon, and Gary Locke of Washington agreed on specific recovery goals and recommendations. They also recommended that the President designate one official in the region to oversee federal agency fish recovery efforts in the basin and serve as the regular point of contact for state, local and tribal leaders. The governors endorsed local recovery efforts for aquatic species, and called for the development of consistent federal and regional plans, in consultation with Indian tribes, by January 2001. With respect to the four Snake River dams, the governors recognized the federal decision not to recommend breaching at this time, and focus their recommendations on improving fish passage and accessibility to habitat with all dams remaining in place. Further, they stated, "We support further modifications to the configuration and operation of the hydrosystem where appropriate and necessary to benefit fish and so long as the modifications do not jeopardize the region's reliable electricity supply."

On September 13-14, the Senate Environment and Public Works Committee held a hearing on the status of biological opinions on the operations of the federal Columbia River power system and the federal caucus draft basinwide salmon recovery strategy. In an opening statement, Senator Mike Crapo (R-ID), Chairman of the Fisheries, Wildlife and Water Subcommittee, declared, "Several decades of work by Federal, State and Tribal governments and many organizations and individuals have failed to stop the steady decline of [ESA listed salmon and steelhead]. These efforts have cost taxpayers and electricity rate-payers an estimated \$3B; yet, the fish have continued to decline to the point where they may soon become extinct...[which] is culturally abhorrent to the Northwest and illegal under the ESA, and would violate tribal treaties.... Extinction must be avoided and recovery must happen."⁵⁹ However, Senator Crapo added, "How to recover these fish is controversial and laden with economic impacts, cultural and spiritual emotion, scientific intrigue, courtroom maneuvering, and publicity spinning. Let me state very clearly... that I do not see any evidence that any significant amount of flow augmentation will recover these fish. Furthermore, I do not support the dam breaching alternative because the people of the Pacific Northwest are not convinced it will work.... No recovery plan will ever be implemented without public and political support.... [F]or the first time in history, the Governors of the four Pacific Northwest states...have jointly released a series of recommendations that outline the process the Governors feel must be followed to achieve anadromous fish recovery. Getting the four governors together...is remarkable and encouraging..., given the widely varied constituencies they each must represent.... Let me note the openness, transparency and real collaboration that characterized the process used by the governors.... The Federal Caucus would have done well to have followed the same type of process...."

Idaho Governor Dirk Kempthorne testified he had recently observed the return of 36 marvelous salmon (ten hatchery raised fish) to Redfish Lake near Stanley, Idaho some 900 miles inland from the Pacific Ocean. "It is Idaho's intent...to perpetuate this stock and all stocks of Idaho's fabulous salmon. Our commitment is unquestionable. The questionable part is whether the federal agencies are to help or to hinder our efforts. Conflicting federal laws and past haphazard coordination have substantially contributed to the decline of our salmon.... The federal agencies...believe that they need Idaho water to help flush the fish out to the ocean. Some groups argue that the four Snake River

⁵⁹*Western States Water*, Issue #1374, September 15, 2000.

dams, which support important transportation and agriculture components in Idaho, should be destroyed. Meanwhile, some of the fish that leave Idaho in the spring are being eaten alive by birds in the estuary before they even have a chance to migrate to sea. Once out in the ocean, they might be harvested. Several years later, if they are lucky, they will return and could be eaten by predators at the mouth of the estuary or, further up the river, subject to tribal harvest. My point [is] from Idaho's perspective, sacrificing our state's water and voluntarily improving our native habitat may seem like a futile exercise when it is such a Herculean effort to get anadromous fish out and back to our state." He went on to describe the Northwest governors' recommendations⁶⁰ (WSW #1367).

Also testifying at the hearing were representatives of Montana Governor Marc Racicot, Oregon Governor John Kitzhaber and Washington Governor Gary Locke. They were joined by federal and tribal representatives, as well as fishery, recreation, energy and water user interest groups.

On November 20, Oregon Governor John Kitzhaber (D) and Montana Governor Marc Racicot (R), held a public meeting in Portland to unveil a proposal to bring diverse interests together to save endangered salmon. They propose amending the Northwest Power Planning Act of 1980, by adding a new six-member advisory committee to help the eight-member Northwest Power Planning Council (NWPPC) to fulfill its charge to strike a balance between fish and wildlife and energy needs in the Columbia River Basin. Two NWPPC members are appointed by each of the four Northwest governors to represent Idaho, Montana, Oregon and Washington. They are organized into two major committees - the Fish and Wildlife Committee and the Power Committee.⁶¹

The Kitzhaber/Racicot proposal would create a new Fish and Wildlife Committee composed of one representative from each of the states, with one member appointed by the tribes, and a federal representative appointed by the President. The new committee would be charged with coming up with a single salmon recovery plan, to replace plans now proposed by the NWPPC, including amendments to its Columbia River Basin Fish and Wildlife Program, as well as plans of the Army Corps of Engineers, Bonneville Power Administration, National Marine Fisheries Service, Northwest governors, and tribes. The new plan would have to meet the requirements of existing federal law, including the Endangered Species Act, and tribal treaty obligations. Governors Kitzhaber and Racicot will consider comments on the proposed plan and possible legislation before seeking a congressional sponsor.

According to Eric Bloch, NWPPC Vice-Chair and a Kitzhaber appointee, "There's a crying need to improve fish and wildlife planning.... We're pushing forward with this because it's the right thing to do.... We're convinced that if we keep at it, over time we will pick up the support we need to make it happen." However, support for the new proposal is lacking. H.D. Palmer, a spokesman for Idaho Governor Dirk Kempthorne raised, "...concerns about shuffling the deck." A spokesman for Washington Governor Gary Locke, Sandi Snell said, referring to expanding NWPPC's role, "We think its a poor idea." Lastly, the Columbia River Inter-Tribal Fish Commission, which represents tribes with treaty fishing rights, is skeptical. Spokesman Charles Hudson said, "We do not think it's

⁶⁰*Western States Water*, Issue #1367, July 28, 2000.

⁶¹*Western States Water*, Issue #1384, November 24, 2000.

adequate. It's a thoughtful idea, but it lacks a key understanding of the legal issues. Our treaties are with the federal government, not with the states."

Separately, on the same day in Boise, Senator Mike Crapo (R-ID), Chairman of the Senate Subcommittee on Fisheries, Wildlife, and Water, conducted a field hearing to receive testimony on the Draft Biological Opinions by the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service on the operation of the Federal Columbia River Power System and the Federal Caucus draft Basinwide Salmon Recovery Strategy. He called on federal agencies to delay final approval of biological opinions for two to six months while working towards a consensus with the states and tribes. He said, "I am offended that the federal agencies are not doing everything possible to organize people...in a systematic effort to get this right." Approval is scheduled for December 15, one year after a deadline set by U.S. District Court Judge Malcolm Marsh. Mitch Sanchotena, Executive Director of Idaho Steelhead and Salmon Unlimited, opined, Janet Sears, a NMFS spokesperson, added, "We could theoretically delay indefinitely as the science keeps changing, but what the federal caucus came out with was a plan that takes the changing science into account."

Breaching the four dams on the lower Snake River is a hotly contested alternative for salmon recovery which proponents and opponents continue to debate. Recent revelations that the original draft NMFS biological opinion called for breaching the dams has fanned the flames. Ed Bowles, Idaho Department of Fish and Game, declared, "This ghost opinion shows us that the NMFS was poised to take a position that was most risk-adverse for the fish. Information from non-scientific sources changed their mind. The original document is a presumption of dam breaching and the July document is a presumption of non-breaching." He adds, "We do not feel that there are any plan B options besides dam removal that will provide recovery. That has been our position since 1998 and...a lot of new scientific information reinforces our position." While salmon numbers have been climbing in recent years, Bowles explains, "We find that when conditions [streamflows] are average, stocks will decline toward extinction, and when they are below average (in conditions of drought) the salmon slide very rapidly towards extinction.... We need to better address the human caused factor of mortality."

On December 21, nine federal agencies released a Coordinated Federal Strategy for the Recovery of the Columbia-Snake River Basin Salmon. The basinwide, so called "All-H Strategy," is a framework for federal actions over the next ten years.⁶² George Frampton, Chair of the Council on Environmental Quality, stated, "The strategy calls for immediate actions to restore critical habitat, reform hatchery operations, limit harvest, improve river flows, and modify dams and their [hydropower] operations. If it is funded and implemented as written, this strategy will reverse the decline of threatened and endangered salmon and steelhead.... Pacific Northwest salmon can thrive again if local citizens, state officials, tribes, and the federal government continue to work together.... To succeed, this strategy requires extensive restoration of estuary and tributary stream habitat and modification of hatcheries, in part to address the hydropower system impacts that will continue. Salmon science indicates that these actions have the best chance of providing solid, predictable improvements needed to ensure the continued existence of salmon...."

⁶²*Western States Water*, Issue #1389, December 29, 2000.

The plan doesn't recommend removing four Snake River dams. A press release states, "The National Marine Fisheries Service is not recommending it at this time...for several reasons. There is scientific uncertainty about whether breaching dams is necessary to achieve recovery and whether breaching alone can lead to recovery. Only Snake River fish would benefit from breaching, with minimal benefit to the other eight listed populations in the Columbia Basin. Dam removal is not within the existing authority of the federal agencies. It would take years to implement. Its high cost could preclude other actions needed through out the basin." However, Donna Darm, acting NMFS Regional Director, said, "Breaching those dams remains an option if the recovery efforts don't meet strict performance standards included in the strategy." Implementation of the strategy will be reviewed in 2003, 2005 and 2008.

Idaho Governor Dirk Kempthorne declared, "The federal report contains much of what the Northwest governors had already negotiated among ourselves. What is important in [the] final fish plan is that it does not call for breaching the lower Snake River dams, and it puts Idaho in control of its water through the ongoing Snake River Basin Adjudication negotiations." He added, "The federal plan shows what we've known all along -- that there's no 'silver bullet' to restoring salmon runs. Instead it favors taking steps to improve habitat, hatcheries, harvest and dam operations on a regional basis. That's exactly what the four governors called for earlier this year."

Klamath River Basin

The Klamath River Basin covers 5,700 square miles in south central Oregon and north central California. Private water development began in 1882, and by 1903 some 13,000 acres of land were irrigated. In 1905, the federal Klamath Project was authorized to transform 225,000 acres of rangeland into productive farm land. The U.S. Fish and Wildlife Service manages the Lower Klamath, Tule Lake and Clear Lake National Wildlife Refuges in the basin.⁶³ Klamath Basin water right holders are involved with litigation over the Endangered Species Act and its effect on their operations as well as those of the Bureau of Reclamation in managing the Klamath Project. Further, farmers must also deal with many other issues, prompting many to consider selling their land to the U.S. Fish and Wildlife Service in order to avoid regulatory and financial pressures on farming.

Missouri River

On December 1, the U.S. Army Corps of Engineers and U.S. Fish and Wildlife Service announced the release of a final biological opinion, following consultation under the Endangered Species Act (ESA), regarding the operation of the Missouri River dams and reservoirs, as well as bank stabilization and navigation projects, and related operations of Kansas River tributary reservoirs. They conclude that continuing current operations is likely to jeopardize the continued existence of the listed least tern, piping plover, and pallid sturgeon. They identify a number of actions, which combined, make up a "reasonable and prudent alternative" for returning the Missouri River to a more natural state and avoiding jeopardy. This includes: propagation/augmentation; habitat restoration, creation, and acquisition; flow enhancement; unbalanced system regulation; and adaptive management/monitoring. Brig. Gen. Carl Strock, the Corps' Northwestern Division

⁶³*Western States Water*, Issue #1369, August 11, 2000.

Engineer, stated, "There is significant agreement between the Corps and Service on the known biological attributes necessary to recover the listed species. The Corps is absolutely committed to its role in recovery..., but we also have an obligation to support other project purposes."⁶⁴

Rio Grande River Basin

On July 6, 2000, BOR acted to ensure that sections of the Rio Grande in New Mexico do not dry up by ordering the Middle Rio Grand Conservancy District (MRGCD) to operate in compliance with federal law (under the ESA) after declaring the District an agent of the United States.⁶⁵ The Rio Grande is home to the silvery minnow, an endangered species, and the subject of a lawsuit filed by environmental groups against BOR and the Army Corps of Engineers. The order calls for BOR to allow 300 cubic feet per second (cfs) of water to bypass the San Acacia Diversion Dam north of Socorro to protect an important section of the minnow's habitat. BOR attorneys determined that MRGCD operates "transferred works" as an agent of the United States. In addition, the agency claims the U.S. retains title to the project facilities, and therefore MGRCD must operate those facilities in compliance with the ESA.

Interior Solicitor John Leshy issued a brief opinion on June 19, 2000 stating that the BOR has title to MRGCD facilities. An official of MRGCD has been quoted as saying "to keep 300 [cfs] flowing at San Acacia, the district will need to release 1,200 acre-feet of water a day from its upstream reservoirs. That is more water than the district has available to keep in the river this summer. Everybody will be out of water--the minnow and the farmers." Senator Pete Domenici (R-NM) criticized Interior's decision to "federalize" the district and usurp what have been described as "some of the oldest water rights in state of New Mexico." Senator Domenici asserted that "[t]he district owes the federal government no money. It paid off its last rehabilitation and construction loan last year. Solicitors at the Interior Department or other federal lawyers should not be nationalizing assets. It certainly isn't the American way."

BOR Commissioner Eluid Martinez recently testified at hearings of the Senate Energy and Natural Resources Subcommittee on Water and Power that the Bureau had already acquired all water available on the market in terms of buying or leasing water to sustain the minnow.

BOR also requested that the Fort Sumner Irrigation District provide water for the endangered bluntnose shiner on the Pecos River within six months, or the federal government will take over that district's facilities. MRGCD has indicated in a letter to BOR that it will not give up its irrigation water without a fight, stating that "because [MRGCD] is not a federal agency, [the order] is meaningless and will not be followed. Finally, within the stroke of a pen, you have taken action, which if accepted by [MRGCD], would cause needless millions of dollars in damage to hard-working New Mexicans who have lived, irrigated and developed a culture of which all the state should take great pride."

⁶⁴*Western States Water*, Issue #1385, December 1, 2000.

⁶⁵*Western States Water*, Issue #1365, July 14, 2000

The Federal District Court hearing the case of the *Rio Grande Silvery Minnow v. Martinez* has tentatively set a hearing for July 24, 2000, to hear the plaintiff environmental groups' request for an emergency injunction to keep the river "wet."

In a related matter, on July 27, Interior Secretary Bruce Babbitt and Senator Pete Domenici (R-NM) agreed to delay implementation of an Interior Solicitor's Opinion designed to provide water for the silvery minnow and drop appropriations language to block its effect.

On August 2, U.S. District Court Judge James A. Parker approved a negotiated agreement designed to meet the water needs of fish, farmers, and others -- for the present -- along the Middle Rio Grande in New Mexico.⁶⁶ Drought and out-of-stream water uses dried up stretches of the Middle Rio Grande this summer and prompted fish salvage operations and efforts to find water for instream environmental purposes. Conflicts over water use increased and numerous lawsuits have been filed.

Last November, the Land and Water Fund of the Rockies filed *Rio Grande Silvery Minnow v. Martinez*, a suit to protect the endangered minnow and southwestern willow flycatcher and stop the decline of the Rio Grande ecosystem. Judge Parker ordered mediation, and called the recent agreement a "very ingenious achievement," but "only a very temporary solution." The Land and Water Fund represents the Defenders of Wildlife, Forest Guardians, National Audubon Society, New Mexico Audubon Council, Sierra Club, and Southwest Environmental Center in challenging management of the Rio Grande by the U.S. Bureau of Reclamation and U.S. Army Corps of Engineers. Susan George, Defenders of Wildlife, said, "The decline of the silvery minnow is merely a symptom that the river itself is dying. We need immediate action to protect not only the minnow and flycatcher, but the multitude of life the river supports, including humans."

El Vado Dam on the Rio Chama in the upper Rio Grande basin has a storage capacity of 196,500 acre-feet (af) of water. It was built in 1934-35 by the Middle Rio Grande Conservancy District, which also built three downstream diversion dams, as well as canals, laterals and drains to irrigate nearly 90,000 acres of land, including over 20,000 acres of Indian water-right lands. The federal Middle Rio Grande Project was authorized in 1948 with the Bureau of Reclamation rehabilitating El Vado Dam and the diversion dams and distribution system, while the Corps of Engineers provided flood control by building Cochiti Dam, levees and channel improvements. A major objective was stabilization of the economy of the Middle Rio Grande Valley, the oldest continuously inhabited region of the United States. The irrigation system and El Vado Dam rehabilitation work was completed in 1954-58 by Reclamation, and in 1965-66 some 110,000 acre-feet of water for municipal and industrial use in the Rio Grande Basin was brought in by means of the federal San Juan-Chama Project from the upper tributaries of the Colorado River Basin in New Mexico and Colorado. Of note, the Middle Rio Grande Conservancy District repaid its remaining obligations for the federal work last December.

The key provisions of the recent settlement involve the City of Albuquerque giving up 45,000 af of its San Juan-Chama water this year, with the District repaying the City half of that water in

⁶⁶*Western States Water*, Issue #1368, August 4, 2000.

annual installments beginning in 2005. The District will give up 20,000 af of water that it is owed by the City, and put up 20,900 af of San Juan-Chama water this year in exchange for repayment of that water by next spring. The Bureau of Reclamation will pay the City and District about \$1M water. Farmers will receive about 36,000 af, enough irrigation water to last through October. While applauded as a historic workable solution, Andrew Smith, U.S. Department of Justice, warns, "This is a stopgap measure. We are cautiously optimistic it will get us through this year." New Mexico State Engineer Tom Turney added, "It's sure an extravagant use of water. There's not enough water in the system to do this again."

Sacramento-San Joaquin River Basins

U.S. Federal District Court Judge Oliver Wanger rejected as "arbitrary and capricious" the U.S. Fish and Wildlife Services' February 1999 listing of the Sacramento splittail as threatened (despite California Department of Fish and Game expert objections and evidence that the fish reached near record numbers in 1998). California State Water Project contractors and others challenged the listing, which the judge found was based on biased studies. The judge also ruled the Service failed to adequately explain how it reached its decision. The court has asked plaintiffs to submit a proposed judgement consistent with his decision and their request that the listing be invalidated.⁶⁷

National Endangered Species Reform Act Coalition

On November 16, the National Endangered Species Reform Act Coalition (NESARC) sponsored a forum on the future of the Endangered Species Act (ESA) in Denver, Colorado. Notable guest speakers included Senator Mike Crapo (R-ID), Chairman of the House Environment and Public Works Committee's Subcommittee on Fisheries, Wildlife and Drinking Water, Senator Larry Craig (R-WY), Interior Secretary Bruce Babbitt, Greg Walcher, Executive Director of the Colorado Department of Natural Resources, and Jim Souby, Executive Director of the Western Governors' Association.⁶⁸ Former Senator Jim McClure (ID) chairs the NESARC Board of Directors.⁶⁹

Secretary Babbitt expressed his personal deep regard for the Endangered Species Act, which he described as our Nation's most comprehensive and visionary environmental statute, and characterized it in terms of moral and religious values based on a belief in the design of God's creations. He also highlighted the overwhelming public support for the Act, which he said is here to stay. He has personally invested a lot of time and energy in looking for common ground and trying to make it work better. He described a "burst of innovation" that has led in recent years to a multispecies ecosystem approach utilizing habitat conservation plans (HCPs), candidate conservation agreements, the no surprises policy, safe harbor agreements, and other tools. These innovations came out of negotiations involving the Northwest spotted owl, red cockaded woodpecker, California gnatcatcher and other species affected by timber harvesting, real estate development and other activities. Secretary Babbitt expressed optimism the use of these tools and others, with greater

⁶⁷Ibid.

⁶⁸*Western States Water*, Issue #1383, November 17, 2000.

⁶⁹*Western States Water*, Issue #1383, November 17, 2000.

involvement and a stronger role for states and tribes, could lead to the development and implementation of effective recovery plans. He urged stepping away from the controversy surrounding designation of critical habitat and the taking of private property, and other polarizing issues. Rather he suggested moving more to the center and building support out from there, which he suggested would be of enormous value to NESARC's constituencies and our natural environment. Of note, he also criticized the federal government's splitting ESA administration between the National Marine Fisheries Service and Interior's Fish and Wildlife, which he blamed for the "most incredible tangle of snafus," particularly with regard to Northwest salmon.

Senator Crapo promised his subcommittee would reconsider comprehensive and targeted ESA reforms, but noted environmentalists would oppose any changes. It will be difficult to move any bill in the next Congress with the tight party lines. In response to a question, he added no bill with language addressing the primacy of state water rights would likely pass. The outcome of the Presidential election will also affect any ESA reforms. He has talked with every member of his subcommittee, and Senators Harry Reid (NV) and Max Baucus (MT) are both willing to again sponsor an ESA reform bill. Crapo specifically mentioned changes involving improvements to innovations Babbitt mentioned, as well as addressing problems with listing and delisting, critical habitat, dikes and levees, and consultation.

Senator Craig echoed the same themes, referring to his own bill. He added that changes won't happen without broad support. Mr. Walcher described Colorado's proactive approach to protecting listed and candidate species and encouraging recovery through multispecies management. He talked about the Upper Colorado and Platte Rivers, and prairie dogs. Mr. Souby's remarks focused on the governors' commitment to Enlibra principles, which as it relates to ESA involve support for incentives for private land owners and water users, the use of the best science, and a greater role for the states. The emphasis should be on avoiding listings and then on recovering species.

Wild Atlantic Salmon

On December 7, the State of Maine filed suit in the U.S. District Court in Portland, Maine challenging the decision of the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) to list wild Atlantic salmon as endangered on several Maine rivers. *State of Maine v. Bruce Babbitt* (as Secretary of Interior) seeks injunctive relief under the Administrative Procedure Act (APA) citing a number of reasons the State believes the listing was unjustified. Among the arguments, the State notes that less than two years ago the Services determined wild Atlantic salmon were "not likely to become endangered in the foreseeable future." The State believes the policy reversal was arbitrary and an abuse of discretion. Further, the State challenges the determination that the eight Maine runs listed constitute a "distinct population segment," as not supported by sound science. Moreover, many of the fundamental reasons given for the listing conflict with positions taken by the federal government in this and other cases. Governor Angus King declared, "I completely agree that Atlantic salmon in Maine need to be restored, but precedent, science, and common sense dictate that the Endangered Species Act simply doesn't apply in this case."⁷⁰

⁷⁰*Western States Water*, Issue #1386, December 8, 2000.

According to the complaint, the Services' listing was based on threats from agricultural water withdrawals and aquaculture, potential disease and inadequate regulatory mechanisms to address these threats. The Services ignored current regulations on water withdrawals and failed to point to any scientific or commercial data indicating that...water withdrawals pose any threat to the Gulf of Maine population of Atlantic salmon.

Federal Hydropower Licensing

On March 30, the House Commerce Committee's Subcommittee on Energy and Power, Chaired by Rep. Joe Barton (R-TX), held a hearing on a number of hydropower bills, including H.R. 2335, to improve the federal licensing process.⁷¹ Introduced by Rep. Edolphus Towns (D-NY), the bill would require, as part of the licensing and relicensing process, that a "consulting agency" with conditioning authority, consider and document the "full effects of their mandatory and recommended conditions," which would be subject to both a scientific and administrative review. Such a review would have to be completed within 180 days or the Federal Energy Regulatory Commission (FERC) could treat the proposed conditions as only recommendations. The bill directs that proposed conditions be provided to a license applicant at least 90 days before they must file their application with FERC. After a license application is submitted, it gives FERC authority to set a date by which a consulting agency must submit its final conditions.

Ms. Lynne Kennedy, the Hydroelectric Certification Program Coordinator for the Oregon Department of Environmental Quality, testified on behalf of the State of Oregon and the Western Governors' Association. She opposed H.R. 2335. While supporting the goal of improving the federal hydroelectric relicensing process, she testified the bill would result in inefficiency, inequity and less protection for natural resources. Western governors recognize the economic importance of hydropower development, but believe the relicensing process provides the only opportunity for 30-50 years to address current public policy concerns that include impacts on water quality, fisheries (particularly salmon) and other natural resources. She testified that in Oregon state and federal agencies exercise their respective authorities in a "collaborative and productive manner" to set a "floor" for natural resource protection.

She added, the Federal Power Act limits FERC's ability to "balance away" certain requirements left to the jurisdiction of other federal agencies and states. This promotes a "level playing field" with the energy sector subject to the same requirements as agriculture, forestry and urban development projects. She noted that H.R. 2335 would require consulting agencies to consider such diverse factors as economic values, air quality, irrigation and drinking water supplies (without adequate information and expertise), as well as other agencies' conditions, before submitting their own, creating and promoting rather than alleviating administrative inefficiency. She concluded by highlighting existing administrative efforts to improve the licensing process without legislation.

⁷¹*Western States Water*, Issue #1350, March 31, 2000.

On May 16, the Subcommittee marked up HR. 2335.⁷² The legislation and mark up have raised considerable controversy and debate. The National Hydropower Association (NHA) has stated, "Hydropower is one of the most economical electric power resources available currently and is the nation's leading renewable energy resource, representing...10 percent of the total generation in the United States. Benefits from this clean, reliable and domestic energy include recreation, irrigation, flood control and water supply. Hydropower is also emissions-free, displacing 327 million tons of carbon dioxide in 1996 alone. Today, however, due to layers upon layers of regulatory burdens and costs associated with the federal licensing process, many hydropower projects face uncertain futures." NHA adds, "With half the nation's hydro capacity up for renewal over the next decade, it is absolutely critical that process improvements be made...."

American Rivers and a coalition of environmental groups contend H.R. 2335 threatens our nation's rivers and rather than improve -- will only burden -- the licensing process with new procedural and oversight requirements. They have dubbed the bill "...nothing but a wolf in sheep's clothing, designed to minimize the responsibility of the hydropower industry to protect and restore the natural environment." They quote President Theodore Roosevelt saying, "The public must retain control of the great waterways. It is essential that any permit to obstruct them for reasons and on conditions that seem good at the moment should be subject to revision when changed conditions demand." They add, "Hydropower has dominated many of our nation's rivers for more than 100 years. It is time to share the resource!"

Chairman Barton offered an amendment in the nature of a substitute, which was further amended and adopted by the subcommittee and sent to the full Committee. The amendments modify public interest factors that federal resources agencies must consider in development of their mandatory licensing conditions, preserve the ability of federal resource agencies to conduct environmental reviews, eliminate the administrative review provisions, provide for public notice of draft mandatory conditions and an opportunity for public hearings, delete proposed authority for the Federal Energy Regulatory Commission (FERC) to supervise development of mandatory conditions, eliminate requirements for scientific peer review, authorize FERC to extend time limits on submission of final mandatory conditions, delete provisions affecting Section 10(j) recommendations related to fish and wildlife, eliminate a proposed study of small hydroelectric power generation, provide incentive payments for qualified hydroelectric facilities, and direct the Department of Energy to conduct a study of opportunities for increasing hydroelectric generation at federal dams. They were approved by voice vote.

With respect to the Barton Amendment, American Rivers has said, "While it is a vast improvement over the original version of the bill, the substitute...maintains a significant bias that will only serve to corrupt the relicensing process and harm the environment. The substitute removes several of the most egregious process requirements and simplifies several of the deadlines and requirements for review, but severe problems remain." Among other things, American Rivers claims the bill: (1) fails to acknowledge any of the impacts that dams and hydropower project operations have on river ecosystems; (2) removes the floor of basic environmental protections that balance power and non-power values; (3) generally duplicates FERC's role in analyzing the impacts of

⁷²*Western States Water*, Issue #1358, May 27, 2000.

project alternatives; (4) shifts the burden of proof and supplying information from the license applicant to the resource agencies -- without providing any additional resources or expertise; (5) fails to include fish and wildlife and water quality as beneficial public uses of water; (6) fails to account for indirect and cumulative project impacts and provide for enhancement in addition to mitigation; (7) requires agencies to submit conditions for comment before a license application is filed with FERC, "the most egregious element of the legislation;" and (8) lacks authority for resource agencies to reopen a license condition (based on substantial new evidence).

NHA reports the Barton substitute "preserved the Towns bill's fundamental purpose of restoring balance to the licensing process.... [It] continues to require that federal resource agencies, when mandating operating conditions of a hydro project, consider and document the impacts of their decision on a broad range of factors. However, it removed language that would have created a higher scientific standard for license conditions, created an administrative appeals process to contest conditions, and made the Federal Energy Regulatory Agency the lead agency in conducting an environmental review." The substitute included an amendment by Rep. John Shadegg (R-AZ) and Rep. Albert Wynn (D-MD) that would provide a half cent per kilowatt hour incentive for all new hydro development at an existing dam, provide payments for 10% of the capital costs for efficiency improvements of 3% or greater at an existing project, and call for a study to examine expanding capacity at federal dams. NHA concluded, "We are greatly pleased with the outcome of today's mark-up.... While we respect the passion felt by the bill's opponents, when the smoke clears, it will become apparent that the bill makes reasonable changes to a licensing process that is badly in need of repair. We look forward to working with individual members of Congress, the administration and environmental groups on alleviating any outstanding concerns they may have."

Rep. John Dingell, the ranking minority member on the Commerce Committee, is one member still very much opposed to H.R. 2335. He was the primary force behind passage of the Electric Consumers Protection Act, which requires FERC to equally balance economic benefits of hydropower development with environmental values. With fiery words, he accused hydro industry interests of "finking" on a deal that led to passage of ECPA, of trying to undercut the Federal Power Act by cutting it into "tiny pieces," and warned when the bill gets to the full committee he will give them the "drubbing of their lives." He was also quoted as saying, "Anyone who supports this legislation is going to understand the meaning of pain. Rivers are a precious natural resource owned by all the American people and managed for them by the resource agencies and the states. They are not luxury swim clubs to be run by FERC for the exclusive benefit of our nation's utilities." He added if the bill was passed, three cabinet secretaries would recommend a veto.

On the Senate side, on May 23, the Energy and Natural Resources Committee's Water and Power Subcommittee held a hearing on the Hydroelectric Licensing Process Improvement Act (S. 740), introduced by Senator Larry Craig (R-ID).⁷³ The bill is cosponsored by Senators Mike Crapo (R-ID), Conrad Burns (R-MT), Craig Thomas (R-WY), Rod Grams (R-MN), Jessie Helms (R-NC) and Strom Thurmond (R-SC). It's findings state that the federal hydropower licensing process: (1) does not produce optimal decisions, because the agencies that participate in the process are not required to consider the full effects of their mandatory and recommended conditions on a license;

⁷³*Western States Water*, Issue ##1355, May 5, 2000.

(2) is inefficient, in part because agencies do not always submit their conditions in a timely manner; (3) is burdened by uncoordinated environmental reviews and duplicative permitting authority; (4) is burdensome for all participants and too often results in litigation; and further that (5) available alternative licensing procedures provide important opportunities for the collaborative resolution of many issues, but are not appropriate in every case and cannot substitute for statutory reforms of the hydroelectric licensing process.

S. 740 would amend the Federal Power Act to require federal agencies with mandatory license conditioning authority, under a new Section 32, to consider and document specific factors as part of the license renewal process, including the economic impact of proposed conditions, as well as impacts on air quality, flood control, irrigation, navigation, recreation and drinking water supplies. It would also limit conditions to only apply to direct environmental impacts of a project, and do so at the lowest possible project cost. Further, it would require that license conditions be subjected to "appropriately substantiated scientific review."

Under S. 740, federal agencies would be required to submit to FERC proposed mandatory and recommended conditions at least 90 days before an applicant is required to file for a license, and provide an opportunity for an expedited independent review before an administrative law judge or other body as to the reasonableness of the proposed condition and its effect on the energy and economic values of the project. This review must be completed within 180 days, or the proposed conditions would be treated as recommendations which FERC may, but is not required to include in the license. After an applicant files for a license, FERC would set a date by which a consulting agency must submit its final conditions. If a consulting agency does not, it shall not thereafter have authority to recommend or establish a condition to the FERC license.

S. 740 would also add a new Section 33 outlining a coordinated environmental review process, with FERC as the lead agency under the National Environmental Policy Act. It states that a consulting agency shall not perform "any environmental review in addition to any... performed by the Commission in connection with the action to which the condition relates." FERC would set a deadline for the submission of comments by federal, state and local government agencies on any environmental impact statement or environmental assessment taking into account the need of the license applicant for a prompt and reasonable decision, the resources of interested agencies, and applicable statutory requirements. Lastly, the bill directs FERC to conduct an 18-month study of the feasibility of establishing a separate licensing procedure for small hydroelectric projects with a generating capacity of five megawatts or less.

Deputy Interior Secretary David Hayes testified, "We strongly oppose S. 740, and if it were presented to the President in its present form the Secretary of the Interior would recommend that he veto it... Rather than contributing to...efforts to improve hydropower licensing, we believe that S. 740, as written, would interfere with the Department's responsibilities under the Federal Power Act, add multiple delays to the licensing process, and make the Department's involvement in Federal Power Act licensing proceedings unworkable." He emphasized that over the last two years, Interior has been working aggressively in a variety of forums to improve the hydropower licensing process, and he highlighted the cooperative efforts of the Interagency Task Force on Hydropower Licensing (ITF), which was initiated by Interior and includes participation by the Departments of Agriculture,

Commerce, and Energy, as well as the Council on Environmental Quality (CEQ) and Federal Energy Regulatory Commission (FERC).

FERC Chairman James Hoecker testified, "The Commission's hydropower program faces significant challenges today, particularly in relicensing the important projects whose licenses expire in the next 10 years.... Other Federal and State agencies have important environmental conditioning authority. Moreover, the multiple economic, environmental, cultural, and recreational interests involved in the relicensing of most existing projects require extensive consultation and due process. As we have seen, hydropower licensing cases can lead to contentious debates among interested parties and even among different Federal agencies that have statutory responsibilities in the process. Chronic concerns have therefore arisen about whether licensing decisions can be more timely, and whether support for decisions can be better developed.... I support the underlying purpose of the bill [S. 740], which is to promote sensible and timely decisions by all agencies involved in licensing matters.... Establishing reasonable deadlines for submission of conditions (as the Commission's regulations now provide) could help make licensing more timely and efficient.... I am much less confident about the effectiveness and practicality of some other procedures that would be established by the bill, such as those requiring scientific peer review of conditions, mandating detailed administrative review procedures and requiring the Commission to review the economic impact of mandatory conditions and to opine on whether the resource agencies have complied with the bill's requirements. My primary concern is that, individually and especially in the aggregate, such processes will add burdensome, time-consuming steps to the licensing process, increasing its costliness and further delaying Commission action.

Others testifying included American Rivers, Pacificorp and the Columbia Inter-Tribal Fish Commission.

After FERC issued an order rescinding the license for a 4.1 megawatt hydropower facility owned by Public Utility District No.1 of Okanogan County at Enloe Dam on the Similkameen River in the State of Washington, citing irreconcilable differences, FERC Commissioner Curt Hérbet said in a stinging February 23 rebuke of the National Marine Fisheries Service, "[T]he Commission resisted the efforts of a single agency...to attach a mandatory condition to the license.... At that time, the Commission believed that it had some discretion not to adopt the proposed condition.... Unfortunately, the Commission's hope that this protracted dispute could result in a mutually-acceptable agreement has been undermined by the recalcitrance of a single agency. NMFS...is advancing the fish passage condition...under the Endangered Species Act to minimize the impact of the Enloe Dam project (an "incidental taking"...) on protected steelhead trout. In today's order, the Commission states that it no longer has the discretion to continue to resist NMFS' overtures. I reluctantly...agree with the Commission's legal analysis."⁷⁴

Hérbet explained that during the relicensing process, "NMFS has insisted on a license article requiring the construction and operation of a fish ladder.... Even without the obligation to install and operate an upstream fish ladder, the project would cost about \$700,000 more than the current cost of alternative [energy] resources.... NMFS, unfortunately, decided not to work to advance a

⁷⁴*Western States Water*, Issue #1346, March 3, 2000.

collaborative, regional solution. Instead, armed with authority under the ESA that, for all essential purposes, requires the Commission to impose, and the licensee to accept, the fish passage remedy it favors...it need not concern itself with the interests of different entities with different perspectives on the licensing process. This is, of course, a problem with the hydroelectric licensing process that is not specific to this case or these particular parties.”

Hérbet continued, “The fishway concerns articulated by NMFS are not new. Today’s order...spells out in considerable detail the historical efforts of numerous parties to minimize the role of Enloe Dam in blocking fish passage. Among other things, the District consulted with pertinent agencies and Indian tribes, conducted studies to support minimum flow and other mitigation requirements, and redesigned project features to address the fish passage problem. The Northwest Power Planning Council, authorized by Congress to protect, mitigate and enhance fish and wildlife resources affected by hydro-electric projects in the Columbia River Basin, was satisfied with the District’s efforts.... Moreover, the... Bonneville Power Association [sic], and the Bureau of Reclamation were no longer advocating or suggesting removal of Enloe Dam as a means of providing upstream passage.... Canadian authorities remain adamantly opposed to the installation of fish passage facilities at Enloe Dam that would introduce anadromous fish into Canadian waters. And the various bands of the Okanogan Tribal Nation oppose fish passage at Enloe Dam, based on concerns of negative impacts to fish stocks and on tribal legend.”

Federal Non-Indian Claims to Water

As report earlier herein, the Council held a joint meeting with the Conference of Western Attorneys General (CWAG) in conjunction with the summer meetings in South Dakota at the Sylvan Lake Lodge in Custer State Park on July 19. The group discussed federal non-Indian claims to water and recent efforts to expand the federal reserved water rights doctrine, as well as the creation and evolution of so-called “federal regulatory rights,” limiting the exercise of state-granted rights to water. Among the topics addressed were the Arizona Supreme Court’s recognition of federal reserved rights to ground water, federal claims for the Bureau of Land Management in Idaho’s Snake River Basin Adjudication, federal filings for state water rights in Montana, and federal claims for reserved rights for wilderness areas, wild and scenic rivers, and national forests. The group also addressed requirements under the Endangered Species Act, the Clean Water Act’s Total Maximum Daily Load program, federal tribal trust responsibilities, federal land management agency claims for by-pass flows for instream flows, fish and wildlife habitat, and channel maintenance, as well as federal hydropower project relicensing requirements. These federal statutory and regulatory demands have a significant impact on the exercise of state granted water rights.⁷⁵

Indian Water Rights Settlement

On December 23, President Bill Clinton responded to a November letter from WSWC Chairman Francis Schwindt regarding funding for Native American land and water rights settlements

⁷⁵*Western States Water*, Issue #1365, July 14, 2000.

and acknowledged the importance of the issue to “our citizens in the West.”⁷⁶ The President promised, “[M]y Office of Management and Budget Director Jack Lew will respond to your concerns directly.” Of note, on December 9, the President signed into law S. 438, to settle the water rights claims of the Chippewa Cree Tribe of the Rocky Boy’s Reservation in Montana.⁷⁷

Arizona/San Carlos Apache Tribe

The San Carlos Apache Water Rights Settlement was recently approved by Judge Susan Bolton of the Gila River Adjudication in Arizona, shortly before federal settlement authority would have expired. Eighteen objections to the proposed settlement had been filed by the July 1, 1999 deadline, including objections by the cities of Globe and Glendale, and the Central Arizona Water Conservation District (CAWCD).⁷⁸ Special Master John E. Thorson heard arguments on motions for summary judgement last August, and determined in September that the proposed settlement could not be finalized without the approval of certain parties, including Globe and the CAWCD.

Governor Jane Hull stepped in to mediate remaining differences between Globe and the Tribe, after many of the initial objections had been successfully mediated by Gregg Houtz, Indian Water Rights Settlement Facilitator for the Arizona Department of Water Resources. An agreement was reached in late October. Under that agreement, the city will be allowed to continue a limited amount of pumping from their wellfield straddling the western border of the San Carlos reservation. The Special Master filed his final report on November 9, with the City of Glendale and the CAWCD as the only remaining objectors. Judge Bolton overruled the Special Master’s findings in December, finding that the consent of CAWCD and Glendale were not necessary before the settlement could be approved, determining that neither party was required to do anything as a result of the agreement or the 1992 settlement act.

In 1992, Congress approved broad parameters for a settlement and authorized \$50M in federal economic development funds for the Tribe once an agreement was signed and accepted by a state court as part of the Gila River Adjudication, under procedures and criteria that were adopted by the Arizona Supreme Court in 1991. Several extensions of time have been granted in order to complete negotiations and details of the settlement.

When a March 30, 1999 deadline to file an agreement with the state court arrived, Secretary of the Interior Bruce Babbitt chose to sign a settlement with only a few of the parties, hoping (some speculate) that outstanding disagreements could be worked out and the other parties would eventually join and sign, or that the court would accept the settlement without more signatures. The San Carlos settlement is the fourth to be approved as part of Arizona’s ongoing adjudications. The approved settlement provides the Tribe with 7,300 acre-feet of water per year (af/y) from the Black and the Salt Rivers, plus 60,665 af/y of Central Arizona Project water, surface water in on-

⁷⁶*Western States Water*, Issue #1339, January 14, 2000.

⁷⁷*Western States Water*, Issue #1331, November 19, 1999.

⁷⁸*Western States Water*, Issue #1302, April 30, 1999.

reservation tributaries, ground water beneath the reservation, and all effluent developed on the reservation. Negotiations are continuing with the Gila River Indian Community and the Hopi, Navajo, San Juan Southern Paiute, and Zunis.

Shivwits Band of Paiute

On April 4, the House Resources Committee held a hearing on H.R. 3291, introduced by Rep. Jim Hansen (R-UT), to memorialize and approve a settlement negotiated between the State of Utah and the Shivwits Band of the Paiute Indian Tribe of Utah. The same day, Senator Orrin Hatch (R-UT) introduced S. 2351. The settlement would provide 2,000 acre-feet of water per year (af/y) to the tribe and authorize construction of a pipeline across the Shivwits' reservation to deliver the water. Included is a grant of 100 af/y of ground water. Both bills would also establish a water rights and habitat acquisition program for the benefit of species and plants in the Santa Clara and Virgin River Basins, which have been listed or are likely to be listed, or are part of an approved Endangered Species Act conservation agreement.

Quechan Tribe

Reserved water rights for a small reservation which straddles the Colorado River on the Arizona and California state line were the focus of recent arguments before the U.S. Supreme Court.⁷⁹ The Quechan tribe wants more water to irrigate its Fort Yuma Reservation. Arizona and California both argued that the tribe relinquished any claims to reserved rights in a \$15M settlement over disputed land and water back in 1983. Entitled *Arizona v. California (No. 8, Original)*, arguments were heard on April 25, as to whether the Supreme Court's previous decisions precluded the tribe from asserting their water rights claims.

The volume of water involved in the dispute is relatively small, about one percent of the Colorado River water that is divided between the lower basin states. The reservation was established by presidential order in 1884, and was granted enough water to raise crops. In 1893, the tribe then negotiated an agreement to give up 25,000 acres of land in exchange for construction of irrigation canals needed to settle the rest of the reservation. The canals were never built. Former Interior Secretary Cecil Andrus ruled in 1978 that the tribe had been cheated, and in 1983, the government paid the tribe \$15M "for damages for the taking of parts of the reservation after 1893 and the loss of use of other parts of the reservation from 1893 to 1978."

The tribe contends that it still deserves water to accompany the land, while the states argue that it already enjoys its full right. Special Master Elbert Tuttle ruled in prior proceedings on this case that the tribe was entitled to 78,519 acre-feet of water per year from the Colorado. The states objected to this conclusion and the Supreme Court rejected that allocation, in part because the reservation's boundaries were still in dispute. The tribe and the federal government are now asking for a special master to take another look and finally settle the boundary and water rights issues. The case's current special master, Frank McGarr, ruled last year that the 1983 settlement ended the tribe's claim to the extra water. State and municipal parties agree with that ruling, claiming that giving

⁷⁹*Western States Water*, Issue #1356, May 12, 2000.

more water to the tribe would “exacerbate potential water shortage problems” for the states, as communities from Phoenix to Los Angeles depend on the water that the tribe would win. A decision is expected in June of 2000.

Ute Indian Tribe

Senator Orrin Hatch, along with Rep. Chris Cannon (R-UT), have introduced legislation in their respective chambers that would settle a dispute between the city of Duchesne, Utah and the Ute Indian Tribe of the Uintah and Ouray Reservation. Under S. 2350 and H.R. 3468, water rights appropriated under state law by the former U.S. Indian Service for the reservation, would be conveyed to the city of Duchesne, which is located within the reservation. Members of the tribe, or any person leasing or using land held in trust for the tribe, would be allowed to connect to the municipality’s water system without paying a connection or impact fee.

Invasive Species

The National Invasive Species Council, a federal cabinet-level group, released a first draft National Management Plan for preliminary review on July 10. Following a formal comment period, a second draft was released on October 2. The plan is designed to encourage action at the state, local, regional and tribal levels; develop recommendations for international cooperation; provide guidance on prevention and control of invasive species; facilitate development of a communications network; and initiate an information-sharing system.⁸⁰ The Council is to ensure federal actions are coordinated, effective and efficient.

Snow Surveys and Water Supply Forecasting

The plight of the federal snow survey and water supply forecasting program was brought to the attention of the Council. Years of increasing costs, without a corresponding increase in federal appropriations, threatened a loss of vital information provided by the National Water and Climate Center (NWCC) in Portland, Oregon.⁸¹ Funded as part of USDA’s Natural Resources Conservation Service, NWCC and state conservationists gather and disseminate data on snow pack and snow water content, as well as project spring and summer streamflows. Level funding over the past five years, with operation and maintenance costs continuing to rise, had slowly eroded the monitoring system to the point of considering discontinuing a number of sites. State water managers depend on this critical information, and determined to seek sufficient federal funding to adequately maintain the existing network of some 1,100 snow courses and 640 SNOTEL (SNOW TELEmetry) sites. The Council wrote the Administration and the Congress, followed by personal visits, explaining the importance of this program to the West. Please see the letter included hereafter under the Council’s policy positions.

⁸⁰The plan is available at www.invasivespecies.gov.

⁸¹*Western States Water*, Issue #1383, November 17, 2000.

Water Adjudication Fee Fairness Act

The Council continued to call for requiring federal agencies that file claims in state general water rights adjudications to pay adjudication fees and costs as would any other user of water.⁸² The Water Adjudication Fee Fairness Act, S. 2363, cosponsored by Sen. Larry Craig (R-ID), Sen. Mike Enzi (R-WY) and Sen. Gordon Smith (R-OR) was drafted with the help of the Council. A policy position in support of the bill is included hereafter.

Water Conservation - Plumbing Efficiency Standards

On April 12, by a 13-12 vote, the House Commerce Committee's Energy and Power Subcommittee voted down Rep. Joe Knollenberg's (R-MI) bill to repeal uniform national plumbing efficiency standards, enacted as part of the 1992 Energy Policy and Conservation Act.⁸³ Rep. Heather Wilson (R-NM) and Rep. Michael Bilirakis (R-FL) joined eleven Democrats to defeat the bill, H.R. 623, despite the support of Subcommittee Chairman Joe Barton (R-TX). In March, WSWC members met with the Western Water Policy Caucus on Capitol Hill and reiterated our opposition to H.R. 623. In June 1999, the Council testified against H.R. 623, as states now rely on enforcement of the federal standards as an important water conservation tool.

Rep. Knollenberg pushed the bill based on privacy issues and personal choice, promising to "get the federal government out of the bathroom." Rep. Barton adding, "We never should have been there in the first place." The current water use standards apply to the manufacture of new fixtures and require toilets use no more than 1.6 gallons per flush (compared to 3.5 gallons in many older models). Plumbing supply manufacturers also testified against H.R. 623. Consumers experienced some problems with the performance of early low-flow toilets, but design changes have resolved most of the problems. Many municipalities have documented very significant water savings.

The debate over this serious issue has been colorful. Rep. Ed Markey (D-MA) pontificated at the markup, "Ever since H.R. 623 was dropped into the hopper, there has been a debate swirling and swirling around the Congress on whether or not to flush away all of the federal water conservation standards for toilets and showers.... Before we apply H.R. 623's dose of regulatory Kaopectate to the Energy Policy and Conservation Act, I would suggest that we carefully think through the consequences.... I would suggest that there is one thing more asinine than federal regulation of plumbing supplies, and that's 50 different state standards. Such an outcome could have a severe constipating effect on interstate commerce." However, Rep. Charles Norwood (R-GA) argued, "The American people are being forced to use toilets and showers that simply don't work. Privacy and freedom are the only things that are being flushed away." Rep. Frank Pallone, Jr., (D-NJ) said, "We should be conserving more water, not less."

⁸²*Western States Water*, Issue #1352, April 14, 2000.

⁸³*Western States Water*, Issue #1353, April 21, 2000.

POSITIONS AND RESOLUTIONS

Under the Council's rules of organization, its functions include the investigation and review of water-related matters of interest to the western states. Moreover, from time to time, the Council adopts policy positions and resolutions, many of which address proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management, and protection of western water resources. The following were adopted by the Western States Water Council in 2000.

TOTAL MAXIMUM DAILY LOADS

On January 19, the Western States Water Council submitted detailed comments, in the form of the following letter/position, on the Environmental Protection Agency's proposed rule regarding total maximum daily loads (TMDLs) under the Clean Water Act (CWA).⁸⁴ A number of the issues raised in the Council's comments, but not all, were addressed in significant changes in the draft final version.⁸⁵ EPA formally submitted a draft final TMDL rule to the White House Office of Management and Budget on June 19, 2000. The Council raised the issue of requiring the listing of threatened waters as part of a state's 303(d) list, questioning EPA's legal authority to establish such a requirement. Listing threatened waters was not required in the final draft. The Council challenged the listing of water bodies due solely to the impact of water diversions, and asked EPA to reconsider the decision to require a multi-part 303(d) list of impaired waters, claiming that it was confusing. However, the draft final version retains both elements of the proposed rule, placing pollution-impaired waters on Part 2 of the list (not requiring a TMDL), and maintaining a four-part list.

The Council also addressed the issue of atmospheric deposition of pollutants, recommending that given the technical difficulties presented, EPA should make it clear that development of a TMDL would not be required for waters impaired primarily by air deposition. The draft final rule would require to be included any waterbodies impaired by atmospheric deposition. The Council also urged EPA to review the proposed listing methodology and not mandate a totally separate process and submission deadline. The draft final version delayed submission of the methodology to be used in preparing their 2002 lists, until May 1, 2001. Beginning in 2004, states would submit their final methodology two years in advance of their lists. While EPA would not approve or disapprove the methodology, it would provide comment and consider the methodology in its review and approval or disapproval of the next list. The Council also supported the use of surrogate measures by many states in lieu of actual pollutant loading data. The draft final remained largely unchanged.

The Council further urged EPA to include a "functional equivalency" provision in the rule, to recognize that many states have already developed processes, methods and approaches to achieve the same desired results, but EPA chose not to recognize alternative state strategies, relying solely on the "quantitative expression" requirement. The Council called for a five-year 303(d) listing cycle, instead of the current two-year cycle, while EPA settled on a four-year listing cycle, with submission required by April 1, 2002. Prioritization and scheduling of TMDLs was also an issue of concern for the Council, questioning delaying development of TMDLs for lower priority waterbodies for many years--until all of the complex TMDLs needed for higher priority waterbodies are completed. The Council recommended that EPA encourage, but not mandate, that waterbodies where threatened or endangered species are impacted by impaired water quality be given a high priority. The draft final rule made some movement in this direction, discarding the high, medium

⁸⁴*Western States Water*, Issue #1340, January 21, 2000.

⁸⁵*Western States Water*, Special Report #1362, June 23, 2000.

and low priority ranking system envisioned by the proposed rule and allowing states greater flexibility in establishing their own priorities and schedules. States are encouraged to assign higher priorities to those waterbodies that are designated as a public drinking water supply or that support threatened or endangered species, under the final draft rule.

EPA did provide in the final draft that schedules for development of one or more TMDLs might be extended by no more than five years, if a state demonstrated that “despite expeditious actions,” establishment of all TMDLs on Part 1 of the list within 10 years was not practicable. The Council supported the concept of transitional TMDLs and EPA elected to establish an eighteen-month window following the publication of the final rule in the Federal Register within which it would approve submissions meeting either pre-amendment requirements or the post-amendment requirements. Although it supports the implementation of TMDLs, the Council recommended in its comments that EPA reconsider its proposal to require the establishment of implementation plans as part of a TMDL, as it added “confusion and controversy to an already burdened process.” Detailed implementation plans would still be required as part of the draft final rule.

EPA removed the public petition process from the draft rule, but extensive public participation requirements were included. The Council questioned EPA’s legal authority, and EPA chose not to pursue the issue in the final rule. Silviculture provisions in the proposed rule were also a source of concern for the Council, “absent new Congressional authority....” EPA dropped those provisions from the draft final, but announced they would be re-proposed later after extensively engaging stakeholders in reviewing the forestry provisions. Other modifications of interest included the definition of “reasonable assurances,” and the addition of the requirement that a 303(d) list “must include any waterbody for which biological information indicates that it does not attain and maintain water quality standards.”

On July 11, EPA Administrator Carol M. Browner signed new TMDL rules preempting action by the Congress intended to prohibit EPA from using any funds made available for FY2000 and FY2001 to make a final determination on or implement any new TMDL rule.⁸⁶ EPA will still not be able to fund the enforcement or implementation of the rules until at least October 2001. Several members of Congress from both sides of the aisle decried the action as the Administration “simply trying to cement its environmental legacy in the final months of its term.” The effective date of the new rule was to be October 1, 2001 to coincide with the limitations placed on EPA by the Congress, and would apply to the April 2002 303(d) list. EPA would not require TMDLs to comply with the new regulations until nine months after the rules effective date, or July 2002. The baseline date for TMDL scheduling was changed to 2000, and states would have until 2015 to complete TMDLs if certain conditions were met. The existing TMDL regulations apply in their entirety until the 2001 effective date of the new rule. For a copy of the new rule visit: www.epa.gov/owow/tmdl/finalrule.

Subsequently, the Congress directed EPA to initiate a number of TMDL-related studies.

⁸⁶*Western States Water*, Issue #1365, July 14, 2000.



WESTERN STATES WATER COUNCIL

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Position No. 228

January 19, 2000

Comment Clerk for the TMDL Program Rule
Water Docket (W-98-31)
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

RE: Proposed Revisions to the Water Quality Planning and Management Regulation and Proposed Supporting Revisions

Dear Comment Clerk for the TMDL Program Rule:

The Western States Water Council is an organization of representatives appointed by the governors of sixteen western states. The governors have appointed heads of state water resources and water quality agencies and others, so that we are able to address a broad spectrum of water policy issues that affect the West. In this capacity, we are concerned with several provisions of the Proposed Revisions to the Water Quality Planning and Management Regulation and Proposed Supporting Regulations. The attached comments address these concerns.

These comments make clear that the Council supports efforts to improve the quality of impaired water bodies, and appreciates EPA's efforts to provide national leadership toward this goal. For these efforts to be successful, however, the national TMDL program should be based upon realistic requirements that are achievable with available resources; are supported by applicable law; and allow sufficient flexibility on the part of states in implementing the program to deal with the variety of characteristics and circumstances that exist in the respective states. The Council is concerned that the TMDL program as now proposed by EPA constitutes a complex and resource-intensive effort which may hinder the success of many ongoing state programs.

In response to this concern, the Council recommends the following:

1. EPA should adopt a functional equivalency provision in the rules that will allow states to demonstrate that a process, method or approach, although not fully recognized in the regulations, is acceptable if it achieves the same desired results.
2. EPA should not mandate the listing and development of TMDLs for threatened waters or waters impaired solely by "pollution." These decisions are best left to individual states.
3. The proposed rules would significantly reduce states' flexibility with regard to how approvable TMDLs may be expressed and their effectiveness evaluated. EPA must instead retain a considerable degree of latitude in how TMDLs may be expressed, and continue to accommodate states' use of surrogate measures of load when appropriate.
4. EPA should establish a five-year listing cycle under Section 303(d), instead of the current two-year cycle. EPA should also provide that year 2000 lists be based on the existing regulations with the next list thereafter to be based upon the new requirements. Alternatively, EPA could move immediately to a five-year listing cycle, so that the next list (after the 1998 list) is due in 2003, based upon the new regulations.

5. As long as equivalent results can be realized, a state should be free to pursue a prioritization process geared to its circumstances and needs. A high priority ranking for segments with threatened or endangered species should be considered by states within their respective prioritization processes only if "existing and readily available information" indicates a reasonable potential that the impairment adversely affects the species.
6. To help avoid unrealistic expectations and an illusion of certainty regarding the submission of state TMDL development schedules, EPA should explicitly recognize the potential need for modifications of those schedules during subsequent listing cycles and establish some parameters for such modifications.
7. Any TMDL submitted within 12 months of the final rule changes should be approved if it meets either the pre-amendment requirements or the post-amendment requirements.
8. TMDL implementation should be emphasized but established regulatory mechanisms should be utilized rather than adding new requirements.
9. The new requirements for public participation may be neither legal nor necessary. But if the specific requirements for petitions to EPA are to be established, petitioners should be required to demonstrate that they have made a good faith effort to seek the relevant state to take the requested action and that the state has declined to do so. Further, petitioners should be required to submit any available information as to why a state has declined to take the requested action. In addition, EPA's process should explicitly provide an opportunity for states to submit any comments they may have on a public petition before EPA determines an appropriate response. Any action that EPA might take should be predicated on a finding that the State has failed to perform its duties as required under the Act.
10. EPA should not subject silviculture activities to NPDES permitting or Section 401 certification and thereby create duplication of effort by various state agencies, particularly in those states with mandatory best management practices for silviculture activities.
11. The issue of pollutant offsets should be delayed until more thorough proposals for implementation are developed and additional Congressional authority obtained.
12. The new rules should be revised with the goal of maximizing funding toward actual achievement of Clean Water Act goals and avoiding administrative overhead.

Thank you for the opportunity to comment on the important issues raised by EPA's TMDL program rule proposal. The Council believes the enclosed comments will help EPA develop rules that are realistic and achievable, and which will therefore expedite future efforts to improve the quality of impaired water bodies.

Sincerely,



Francis Schwindt, Chair
Western States Water Council

Enclosure

**Detailed Comments
by the Western States Water Council
on Proposed TMDL Rule**

Introduction

The Council supports efforts to improve the quality of impaired water bodies, and appreciates EPA's efforts to provide national leadership toward this goal. In order for these efforts to be successful, it is important for the national TMDL program to be based upon realistic requirements that are achievable with available resources; are supported by applicable law; and allow sufficient flexibility on the part of states in implementing the program to deal with the variety of characteristics and circumstances that exist in the respective states. The Council is concerned that the TMDL program as now proposed by EPA constitutes a complex and resources-intensive effort which may hinder the success of many ongoing state programs.

The proposed TMDL program revisions, which were portrayed as an incremental refinement of the existing program, would result in a substantial new resource burden. Water quality monitoring and assessment needs would experience a tremendous increase, in an effort to support defensible decisions to list (or not list) particular water bodies and to develop appropriate and defensible TMDLs. The time and expense associated with developing a more complex Section 303(d) list, in the face of heightened concerns regarding the implications of listing decisions, would also increase. Further, the costs of developing TMDLs that satisfy the rigorous expectations of the proposed rule would be substantially greater than is the case at present, particularly in view of EPA's expectation that a detailed implementation plan be developed as part of each TMDL.

By expanding the functions of Section 303(d), including requirements for implementation plans accompanied by "reasonable assurances", the proposed rules would leave states with the burden of implementing a controversial program in ways that Congress has not explicitly sanctioned. The Council supports implementation as a component of the TMDL program, but in the absence of such action by Congress, the Council urges caution in formulating revisions to EPA's TMDL program. Western states have established explicit statutory frameworks for the TMDL program. These programs vary because of

local characteristics and circumstances, but have been developed with the involvement and support of affected stakeholders and elected officials. The Council therefore urges EPA to allow states maximum flexibility in administering and implementing the program. To this end, the Council proposes that EPA adopt a functional equivalency provision in the rules that will allow states to demonstrate that a process, method or approach, although not fully recognized in the regulations, is acceptable if it achieves the same desired results.

Listing Requirements - Threatened Waters

Section 303(d)(1)(A) of the Clean Water Act does not establish authority to require the listing of threatened waters. The reference to water bodies for which existing controls “are not stringent enough to implement any water quality standard applicable to such water bodies” is most logically read to refer to water bodies not currently attaining water quality standards. This interpretation is particularly appropriate when the practical and resource implications of EPA’s alternative interpretation are considered.

While some states have chosen to list “threatened waters”, others have not. For the latter, the new rules would, therefore, be especially burdensome. In light of naturally occurring variations in water quality as a result of seasonal and annual variations in hydrologic conditions, substantial data would be needed to ascertain that a “declining trend” that will result in nonattainment of standards exists. Despite EPA references to “existing and readily available data and information”, the expansion of the listing requirement to include threatened waters could lead to numerous debates about what constitutes adequate data to reach a conclusion that a water body is threatened. Such questions suggest that addressing issues regarding the listing of threatened waters would require substantial resources. These decisions are best left to individual states. The Council does not believe it is wise to mandate the listing and development of TMDLs for threatened waters.

Water Bodies Impaired by “Pollution”

Water bodies impaired by “pollution” are to be included on Part 2 of the list. While such water bodies are then exempted from TMDLs for such “pollution”, the listing itself clearly implies that water

diversions and other hydromodifications represent a polluting activity. Thus, even though TMDLs are met for pollutants, a water body would remain listed if determined to be impaired by "pollution." State laws and regulations provide the appropriate basis, for addressing water quality impacts from water development. As competition for various water uses becomes more intense, including those related to instream uses, states are increasing their capacity and efforts to protect water quality associated with these instream uses. EPA, on the other hand, is ill-equipped to deal with the legal and institutional interrelationships between water quantity and water quality. Nevertheless, according to the proposed rules, flow impairment activities would be considered to be pollution and affected impaired waters would be listed. Thus, the question of how to adjust the loading in order to meet water quality standards would clearly be before the agency.

Such a measure would only sharpen the debate, undoubtedly lead to additional litigation, and thus be counterproductive to the overall goals of the Clean Water Act. With respect to the controversial issues associated with quantity and quality interrelationships in the West, public policy should respect the accommodation contemplated by the Clean Water Act, Section 101(g).

Furthermore, the Council believes that having more than one list of impaired waters will be inherently confusing and inimical to the involvement of affected stakeholders. For the program to be successful, public acceptance and engagement is vital. Having multiple lists with many of the same water bodies on each list would be contrary to this goal. Further, the one list should not be segregated into parts.

EPA's regulatory proposal should not mandate the listing of waters impaired solely by "pollution." States can address this matter based on state specific policies. This is not to suggest nor to prevent states from reporting the conditions of these water bodies in their 305(b) assessments nor to prevent a state from deciding for valid reasons to list these water bodies on its 303(d) list.

Atmospheric Deposition

EPA should make clear that waters impaired primarily by air deposition do not currently require TMDL development, due to the technical difficulties presented. The absence of appropriate data and

analytical models for determining and allocating loads in such circumstances present major barriers to TMDL development at present. Until such capabilities advance, it would be an inefficient use of limited resources to develop technically weak TMDLs for these water bodies.

Listing Methodology

EPA's proposal would require that states "develop a methodology that explains how you will consider and evaluate all existing and readily available data and information" to develop a Section 303(d) list and determine priority rankings. The Council believes such a demonstration is appropriate and reflects the degree of flexibility for states that the Council feels is critical. EPA then proposes to require the submission of this methodology to EPA eight months prior to submission of the Section 303(d) list. The Council believes that it would be an inefficient use of resources to mandate a totally separate process and submission deadline for the listing methodology. It is appropriate for EPA to require that a listing methodology be developed with public input. However, establishing a separate submission requirement with a separate deadline would necessitate an additional administrative process that will detract from efforts to develop and submit Section 303(d) lists in a timely manner. Instead, EPA should merely require that states identify the listing methodology as part of the Section 303(d) list submission.

States agree that consistent criteria are essential for determining whether water bodies should be listed (or de-listed) pursuant to the requirements of Section 303(d) of the Clean Water Act. Moreover, these criteria should be consistent with the guidance for preparing state 305(b) reports. However, listing decisions must be based, in part, upon the available data (which are often limited) and in part on the policy judgements of public officials responsible for such decisions. The critical issue is that listing decisions be made in public proceedings where input from all interested parties is both welcomed and encouraged. Inevitably, there will be differences in the listing decisions made among the states using similar criteria in different circumstances.

EPA should engage in the 303(d) listing process in each state and provide continuous input as states proceed during the development of their list. The 303(d) list along with all pertinent supporting

information, including listing methodology and response to public input, should be submitted for approval in one package after EPA's input has been fully factored into the state's decision-making process.

How TMDLs Are Expressed

The proposed rules will significantly reduce states' flexibility with regard to how approvable TMDLs may be expressed and their effectiveness evaluated. The potential consequences include significantly increased monitoring costs, reduced public acceptance of TMDL program requirements, and an overall decrease in states' abilities to effectively address water quality impairment problems. The existing rules accommodate TMDL expression in terms of pollutant loads or other appropriate measures. This provision has allowed many western states to define impairment problems, and to establish restoration goals and implementation plans, in terms that are not only understandable by stakeholders, but which are also more cost effective relative to states' abilities to monitor for TMDL effectiveness. These are key issues with many western states. Our experience has shown the need for flexibility and innovation in order to stretch available budgets, and to accommodate the needs and secure the participation of the many, varied stakeholders that must be engaged in resolution of the prevailing nonpoint source pollution problems. Surrogate measures of TMDL effectiveness, in lieu of actual pollutant loading data, have become the norm for many states as their TMDL effectiveness monitoring responsibilities increase relative to the available monitoring budgets.

A rigorous requirement that all TMDLs must include an expression of the pollutant load or load reduction is, in our view, impractical, expensive to implement, and discouraging to the many current western efforts to develop, implement and evaluate TMDL plans for nonpoint pollution problems. The Council encourages you to carefully consider the implications of Sections 130.2, 130.33 and 130.34, as proposed, and to retain a considerable degree of latitude in how TMDLs may be expressed.

Functional Equivalency Provision

In adopting these new rules, EPA must also recognize that many states have already developed processes, methods and approaches to meet court, legislative or stakeholder demands for their existing

TMDL programs. In many cases, these new substantive rules may be disruptive to programs that have already developed effective TMDL programs that have been endorsed by their stakeholders and elected officials. Existing processes and approaches that either meet court decrees or provide positive and beneficial results should not be set-aside by these new rules. At the same time, states should be encouraged to be innovative in developing new processes and approaches that achieve the results envisioned by these rules in a more efficient manner. The Council encourages EPA to add a "functional equivalent" provision to the regulations that will allow states to demonstrate that a process, method or approach not fully recognized in the regulations can be approved in a state program on the basis that it achieves the same desired results as envisioned by the rules. There are numerous examples of these cases, including how states prioritize their lists, incentives that states have built into their programs to achieve correction of impaired conditions in lieu of a TMDL, and recognition of various approaches to implementing TMDLs, such as adaptive management and use of bottom up watershed management planning.

Listing Cycle

The Council supports the establishment of a five-year listing cycle under Section 303(d), instead of the current two-year cycle. The Council agrees with EPA's suggestions that a shorter listing cycle tends to "over-emphasize the listing of water bodies as opposed to establishing and implementing TMDLs" and that a shorter cycle is "inefficient because states...generally do not find significant changes in water quality over such a short period of time." The shorter cycle disproportionately skews resources toward listing efforts and away from TMDL development efforts, preventing a more optimal allocation of limited resources in making progress in improving water quality.

EPA also proposes to change the year 2000 list submission deadline to October 1, and to require that the year 2000 lists be based upon the new requirements. The Council believes it is unrealistic to expect the year 2000 lists be based upon the anticipated new regulations. Indeed mandating that year 2000 lists be based upon major revisions to the regulations with little lead time will simply encourage confusion, controversy and challenges to the next round of listing and will not advance efforts to improve water quality. Many states have already begun the process of working with the public toward the development of the year 2000 Section 303(d) list. In view of the time required for EPA to review and react to the many comments

it will receive on this major regulatory proposal and to finalize revisions to the regulation, and in view of the substantial lead time required to implement any major changes to the current system, EPA should provide that year 2000 lists be based on the existing regulations, with the next list thereafter to be based upon the new requirements. Alternatively, EPA could move immediately to a five-year listing cycle, so that the next list (after the 1998 list) is due in 2003, based upon the new regulations.

Prioritization and Scheduling

EPA unwisely equates priority ranking of listed water bodies with the development of a schedule for TMDL development. The proposal would require that "TMDLs for high-priority water bodies and pollutant combinations should be established before medium and low-priority water body and pollutant combinations." This absolute requirement ignores the fact that TMDL development for some high priority water bodies can be complex and time-consuming. On the other hand, the development of TMDLs for some lower priority water bodies may be relatively simple and easy to accomplish. It is very inefficient to require that all TMDL development for lower priority water bodies be delayed -- potentially for many years -- until all of the complex TMDLs needed for higher priority water bodies are completed.

Consistent with our proposal for a functional equivalency provision, the Council also believes that states should be allowed to develop their own prioritization process. Many states have such a process in place. As long as equivalent results can be realized, a state should be free to pursue a process geared to its circumstances and needs.

Encouraging, but not mandating, that water bodies where threatened or endangered species are impacted by impaired water quality be given a high priority is appropriate. However, EPA's proposed mechanism for achieving this goal is inappropriately based on requiring states to prove a negative. Instead, the rules should require states to consider the effects on endangered and threatened species in establishing priorities and schedules.

Schedule Modifications

It is unrealistic to expect that a comprehensive schedule for the development of all TMDLs needed in a state (over, e.g., a 15-year time frame) can be maintained without modification over time. To help avoid unrealistic expectations and an illusion of certainty regarding the initial schedules submitted, EPA should explicitly recognize the potential need for modifications of schedules during subsequent listing cycles and establish some parameters for such modifications. For example, modifications should be allowed where a rationale is provided by the state that demonstrates that substantial efforts have been undertaken and that new information or unanticipated difficulties make the previous schedule unrealistic or make a revised schedule more effective in making overall progress toward water quality improvement. In order to evaluate the need for such modifications, a review should be performed periodically, perhaps every five years. Alternatively, EPA may wish to consider requiring states to set more definitive, shorter term TMDL development goals. This option would be especially compatible with our proposed five-year reporting cycle and would allow greater assurances of compliance on the part of states.

Transitional TMDLs

EPA is proposing that it will approve any TMDL submitted within 12 months of the final rule changes if it meets either the pre-amendment requirements or the post-amendment requirements. The Council strongly supports this proposal. TMDL processes are often lengthy and many TMDL development efforts are currently underway. Without a provision in the amended rule such as that proposed to address transitional TMDLs, there would be a need to stop and re-evaluate or revise pending TMDL development efforts to assure that the new requirements were met. This result would be an inefficient use of resources and would hinder the progress of efforts toward water quality improvement.

Implementation Plans

EPA proposes that an implementation plan be developed and submitted to EPA for approval as part of each TMDL. The new provisions add confusion and controversy to an already burdened process. The Council supports implementation of TMDL's, however suggests that EPA should utilize the established

function of water quality management plans under current regulatory provisions of Section 130.6(b) or even under Section 319 of the Act rather than adding new requirements under Section 303(d) with no statutory basis.

Public Petition Process

In Section 130.65, EPA proposes a new public petition process, by which any person can petition EPA “to carry out the actions that states are directed to perform under CWA Section 303(d).” While we recognize that public participation is an essential element of any successful water quality management program, we are not convinced that this proposal is legal or necessary.

The new rule proposes additional mechanisms to ensure full public participation in listing of impaired waters and development of TMDLs. However, the language of Section 303(d) provides no explicit authority for EPA to “carry out the actions that states are directed to perform.” In any case, the existing language creates an incentive for petitioners to circumvent state efforts.

If the process is to remain in the rule, it should be revamped to have petitioners demonstrate that they have made a good faith effort to have the relevant state take the requested action and that the state has declined to do so. Further, petitioners should be required to submit any available information as to why a state has declined to take the requested action. EPA’s process should explicitly provide an opportunity for states to submit any comments they may have on a public petition before EPA develops a response to the petition. Any action that EPA might take should be predicated on a finding that the state has failed to perform its duties as required under the Act.

These proposed modifications to a public petition process are necessary to recognize states’ primary role in implementing Section 303(d) and to support, rather than hinder, the viability of states’ efforts. EPA should encourage states’ efforts by explicitly discouraging efforts to circumvent states’ Section 303(d) processes.

Silviculture

The Council is also concerned about EPA's proposal to recognize silvicultural activities as point sources. This proposed rule changes more than two decades of consistent and intentional Congressional and agency recognition of silvicultural activities as nonpoint sources not subject to NPDES permit requirements. The character of most silvicultural activities as nonpoint and the policy determination to manage those activities through planning and management techniques rather than permits is firmly rooted in the CWA and its legislative history. In many cases state programs are built around the differences between point and nonpoint source discharges and the responsibilities are split between state agencies. Subjecting these activities to permitting or Section 401 certification will only add duplication of effort by various state agencies, particularly in those states with mandatory best management practices for silviculture activities. EPA itself expressed the statutory basis for identifying most silvicultural sources as nonpoint in its original proposal for the regulatory definition of nonpoint silvicultural activities:

“Taking [public] comments, as well as the legislative history, the statutory language, the NRDC v. Train decision, and the technical data available on silvicultural activities into consideration [i]t has been determined that most water pollution related to silvicultural activities is nonpoint in nature. The potential risk and the cost of litigation over forcing this issue may well be out of proportion to any possible benefits.”

Pollutant Offsets

The proposed regulations would require pollutant load offsets for new or significantly expanding discharges in impaired waters. Absent new Congressional authority, the Council believes it is premature to impose such requirements. The complexity of administering such a pollution offset program should not be minimized. There has not been sufficient work and discussion to properly address the many significant implementation issues that would immediately surface. Resources would be inappropriately drawn to the many legal disputes this would cause. The Council believes that the issue of pollutant offsets must be delayed until more thorough proposals for implementation are developed including obtaining additional Congressional authority.

Resources

As the foregoing comments should make clear, the Council foresees that the TMDL program will necessitate significant expansions to existing programs for water quality assessment, TMDL development and implementation, leading to a substantial increase in water program costs. At the least, it will be critical to maximize available funding toward actual achievement of Clean Water Act goals and to avoid administrative overhead. Unfortunately, the proposed rules would lead us in the opposite direction.

Conclusion

Thank you for the opportunity to comment on the important issues raised by EPA's TMDL program rule proposal. The Council believes these comments will help EPA develop rules that are realistic and achievable, and which will therefore expedite future efforts to improve the quality of impaired water bodies.

INDIAN WATER RIGHTS SETTLEMENTS

The Colorado Ute Indian Water Rights Final Settlement Agreement, resolving all of the reserved water rights claims of two Colorado Ute Indian Tribes, was executed on December 10, 1986. In 1988, the U.S. Congress renewed its support for the Animas-La Plata (ALP) Project, which was authorized for construction in 1968 as an integral part of the Colorado River Storage Project, when it ratified the Settlement Agreement by passage of the Colorado Ute Indian Water Rights Settlement Act of 1988. However, construction funding languished in the face of continuing environmental opposition and cost concerns. The State of Colorado, the two Colorado Ute Indian Tribes and their non-Indian neighbors negotiated and endorsed a modified ALP proposal. Rep. Scott McInnis (R-CO) introduced HR 3112 to authorize construction of a modified ALP and to revise the terms of the Settlement Act of 1988.

On March 14, the Western States Water Council adopted the following position reiterating its continuing support for negotiated settlement of Indian water rights disputes as sound public policy for the quantification of Indian water rights claims in a fair, efficient and cost effective manner. Negotiated settlements allow states and tribes, as well as other interested parties, including the federal government to be flexible and to tailor solutions to problems to the unique circumstances of each situation. In some cases the successful resolution of certain claims may require "physical solutions," and the United States has a responsibility to assist in resolving conflicts.

The Council expressed its support for policies encouraging negotiated settlements of Indian water rights disputes, as the best solution to a critical problem that affects almost all of the Western States, and called on the Congress, the President, and the Secretary of the Interior to promote and encourage negotiated settlements of Indian water rights disputes and assist in their implementation as appropriate.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
INDIAN WATER RIGHTS SETTLEMENTS,
THE COLORADO UTE INDIAN WATER RIGHTS SETTLEMENT,
and construction of
THE ANIMAS-LA PLATA PROJECT
Washington, D.C.
March 14, 2000

WHEREAS, the Western States Water Council has consistently supported negotiated settlement of Indian water rights disputes; and

WHEREAS, the public interest and sound public policy require the resolution of Indian water rights claims in a manner that is least disruptive to existing uses of water; and

WHEREAS, negotiated quantification of Indian water rights claims is a highly desirable process which can achieve quantifications fairly, efficiently, and with the least cost; and

WHEREAS, the advantages of negotiated settlements include: (i) the ability to be flexible and to tailor solutions to the unique circumstances of each situation; (ii) the ability to promote conservation and sound water management practices; and (iii) the ability to establish the basis for cooperative partnerships between Indian and non-Indian communities; and

WHEREAS, the successful resolution of certain claims may require “physical solutions,” such as development of federal water projects and improved water delivery and application techniques; and

WHEREAS, the United States has developed many major water projects that compete for use of waters claimed by Indians and non-Indians, and has a responsibility to both to assist in resolving such conflicts; and

WHEREAS, Congress recently approved and the President signed the Rocky Boys Settlement in Montana; and

WHEREAS, the Colorado Ute Indian Water Rights Final Settlement Agreement (Settlement Agreement), executed on December 10, 1986, resolved all of the reserved water

rights claims of the two Colorado Ute Indian Tribes in a way that produced comity and cooperation; and

WHEREAS, the Animas-La Plata Project (ALP) and the allocation of a significant portion of the project's water supply to the two Tribes are essential features of the Settlement Agreement; and

WHEREAS, the U.S. Congress authorized ALP construction in 1968 as an integral part of the Colorado River Storage Project, and again renewed support for the project when it ratified the Settlement Agreement by passage of the Colorado Ute Indian Water Rights Settlement Act of 1988; and

WHEREAS, HR 3112 has been introduced to authorize construction of a modified ALP and to revise the terms of the Settlement Act of 1988; and

WHEREAS, the State of Colorado, the two Colorado Ute Indian Tribes and their non-Indian neighbors have endorsed a modified ALP proposal; and

WHEREAS, the U.S. Fish and Wildlife Service has favorably completed its consultation under the Endangered Species Act on the modified ALP and the Bureau of Reclamation has completed two supplemental EIS's which evaluated the impacts of ALP construction and both have supported a structural alternative.

NOW, THEREFORE, BE IT RESOLVED, that the Western States Water Council reiterates its support for the policy of encouraging negotiated settlements of Indian water rights disputes as the best solution to a critical problem that affects almost all of the Western States; and

BE IT FURTHER RESOLVED, that in light of the fact that HR 3112, which authorizes the modified ALP, is before the Congress, and other settlements are in the process of being finalized, the Western States Water Council calls upon the Congress, the President, and the Secretary of the Interior to promote and encourage negotiated settlements of Indian water rights disputes and assist in their implementation as appropriate.

PROTECTING GROUND WATER QUALITY

The Council again reaffirmed the position on the following page, which as originally adopted on July 10, 1992 in response to the release of an EPA report entitled, "Protecting the Nation's Groundwater: EPA's Strategy for the 1990s." That position was revised and reaffirmed on March 14, 1997. The position highlights the federal government's longstanding policy of deferring to the states to manage and protect ground water, and opposes a proposed EPA policy that would have required states to develop comprehensive ground water protection plans for EPA's approval. The Council asked EPA to modify its ground water strategy to recognize a true state-federal partnership, consistent with its statutory authority and urged adequate federal financial assistance for state ground water pollution control programs.

Position No. 230
(See also No. 215)
adopted March 14, 1997

POSITION
of the
WESTERN STATES WATER COUNCIL
on
PROTECTING GROUND WATER QUALITY
March 14, 2000
(revised and reaffirmed)

WHEREAS, ground water is a critically important natural resource, especially in the mostly arid West; and

WHEREAS, ground water management - the protection of its quality and its orderly, rational allocation and withdrawal for beneficial use - requires cooperation among all levels of government; and

WHEREAS, states recognize the importance and role of comprehensive ground water planning in overall water management; and

WHEREAS, the federal government has a longstanding policy of deferring to the states to develop and implement ground water management and protection programs; and

WHEREAS, western states have legal systems to allocate ground water rights and further have the responsibility for ground water quality protection; and

WHEREAS, EPA lacks statutory authority to impose ground water program requirements on states.

NOW THEREFORE BE IT RESOLVED that the Western States Water Council urges the U.S. Environmental Protection Agency that its ground water strategy reflect a true state-federal partnership, consistent with its current statutory authority, and supported by an adequate level of grant funding for states that does not simply re-direct funds that would otherwise be available to state water pollution control programs.

FEDERAL NON-TRIBAL FEES IN GENERAL ADJUDICATIONS

On April 5, Senator Mike Crapo (R-ID) introduced legislation -- drafted largely through the efforts of the Legal Committee of the Western States Water Council (WSWC) -- aimed at requiring federal agencies that file claims in state general water rights adjudications to pay adjudication fees and costs as would any other user of water.⁸⁷ The Water Adjudication Fee Fairness Act of 2000 (S. 2363) was cosponsored by Senators Larry Craig (R-ID), Mike Enzi (R-WY) and Gordon Smith (R-OR). Representative Mike Simpson (R-ID) sponsored companion legislation in the House. The Council worked with Senator Crapo, when he was a member of the House, and with former Rep. Bob Smith (R-OR), to have such a bill introduced.⁸⁸

The Western Governors' Association supported the bill, and adopted a resolution urging the Congress to pass legislation to establish that the United States, when a party to a general adjudication, shall be subject to fees and costs imposed by the state to conduct the proceedings to the same extent as private users.

If passed, S. 2363 would help prevent frivolous claims by federal agencies that end up costing taxpayers and the states millions of dollars spent notifying other users and preparing to contest such federal claims. "States not only face the threat of losing their water to federal claims, they also face devastating legal bills and other costs in defending those claims and the federal government needs to be accountable and pay its fair share in filing those water rights claims in the first place," Senator Crapo said. Representative Simpson was quoted as saying, "It's only fair that the federal government pay fees when it files for water rights. Right now the federal government takes extreme liberty to file as many claims as it wants without any consequences.... This bill would stop this practice."

⁸⁷*Western States Water*, Issue #1352, April 14, 2000.

⁸⁸*Western States Water*, Issue #1244, March 20, 1998.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
FEDERAL NON-TRIBAL FEES IN GENERAL ADJUDICATIONS
Grand Junction, Colorado
October 20, 2000
(revised and reaffirmed)

WHEREAS, states must conduct lengthy, complicated and expensive proceedings to establish the relative rights to water in water rights adjudications; and

WHEREAS, Congress recognized the necessity and benefit of requiring the United States' claims to be adjudicated in these state adjudications by adoption of the McCarran Amendment; and

WHEREAS, those claiming and establishing their right to water, including federal agencies, are the primary beneficiaries of adjudication proceedings by having the states officially quantify and record these water rights; and

WHEREAS, the courts have determined that under the McCarran Amendment the United States need not pay fees for processing federal claims; and

WHEREAS, the federal claims are typically among the most complicated and largest of claims in state adjudications; and

WHEREAS, if the United States does not pay a proportionate share of the costs associated with adjudications, the burden of funding the proceedings unfairly shifts to the state and other water users and often delays completion of the adjudications by depriving the states of the resources necessary to complete them; and

WHEREAS, delays in completing adjudications result in inability to protect private and public property interests or determine how much unappropriated water may remain to satisfy important environmental and economic development priorities.

NOW THEREFORE BE IT RESOLVED that the Western States Water Council again ask the Congress to recognize that requiring states and private users to fund processing of federal, non-tribal claims in water rights adjudications unfairly shifts the burden of funding these proceedings away from the parties who derive the greatest benefit from the proceeding and effectively establishes an unfunded mandate; and

BE IT FURTHER RESOLVED that the Council continue urging Congress to pass legislation narrowly tailored to establish that the United States, when a party to a general adjudication shall be subject to fees and costs imposed by the state to conduct the proceedings to the same extent as private users.

RECLAMATION'S WATER CONSERVATION FIELD SERVICES PROGRAM

The Reclamation Reform Act of 1982 (RRA) directed the U.S. Bureau of Reclamation (Reclamation) to encourage water conservation on federal water projects throughout the seventeen western states, and required districts receiving water from those federal projects to develop water conservation plans. The Council opposed attempts to create a new regulatory program with Reclamation defining criteria for and approving district conservation plans. However, in 1996, Reclamation adopted an incentive-based approach to promoting water conservation that focused on technical and financial assistance in lieu of mandatory regulations and other top-down, command-and-control approaches to conservation. Reclamation's Water Conservation Field Services Program (WCFSP) was established in 1997 to encourage the efficient use of water on federal water projects and, in cooperation with States and other entities, assist water districts, in accordance with state law, develop and implement effective water conservation plans required by the RRA. The following position supports this voluntary, but proactive water management approach.

POSITION STATEMENT
of the
WESTERN STATES WATER COUNCIL
in support of
RECLAMATION'S WATER CONSERVATION FIELD SERVICES PROGRAM
AND "BRIDGING-THE-HEADGATE" PARTNERSHIPS
Grand Junction, Colorado
October 20, 2000

WHEREAS, the Reclamation Reform Act of 1982 (RRA) directed the U.S. Bureau of Reclamation (Reclamation) to encourage water conservation on federal water projects throughout the seventeen western states, and required districts receiving water from those federal projects to develop water conservation plans; and

WHEREAS, in March 1996, Reclamation adopted an approach to promoting water conservation that would focus on the development of an incentive-based program of technical and financial assistance to districts in lieu of mandatory regulations and other top-down, command-and-control approaches to conservation; and

WHEREAS, Reclamation's Water Conservation Field Services Program (WCFSP) was established in 1997 to encourage the efficient use of water on federal water projects and, in cooperation with States and other entities, provide a non-regulatory, incentive-based approach to assisting water districts, in accordance with state law, develop and implement effective water conservation plans required by the RRA; and

WHEREAS, since 1997, Reclamation's 21 Area Offices have offered local programs that provide assistance and non-binding guidance to districts in four areas of emphasis: 1) water management planning; 2) conservation education; 3) demonstration of innovative conservation technologies; and, 4) implementation of effective conservation measures; and

WHEREAS, the WCFSP's incentive-based conceptual approach is being well-received by water districts and other stakeholders at the local level as an appropriate role for Reclamation in encouraging water conservation on federal water projects and fostering improved water management on a watershed, statewide and regional basis; and

WHEREAS, in July 1998, as part of the program outreach under the WCFSP, Reclamation initiated a "Bridging-the-Headgate" conservation partnership with USDA-Natural Resources Conservation Service (NRCS), the National Association of State Conservation Agencies (NASCA), and the National Association of Conservation Districts (NACD), three organizations that have traditionally worked very closely together to support and encourage conservation and resource stewardship among private landowners, farmers, and water users on the "on-farm" side of the water use's headgate; and

WHEREAS, proactive water management planning and implementation activities under Reclamation's WCFSP complement drought preparedness programs; and

WHEREAS, the objectives of Reclamation's WCFSP Program are consistent with the Enlibra principles espoused by western governors.

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council supports Reclamation's commitment to a proactive, but non-regulatory, approach to administering the water conservation provisions of the RRA, and to the continuing development -- with further state and local input -- of the WCFSP as an incentive-based program of technical and financial assistance, through voluntary federal-state-local partnerships, as the appropriate long-term role for Reclamation in encouraging water conservation; and

BE IT FURTHER RESOLVED, that the Western States Water Council supports the overall objective of the "Bridging-the-Headgate" partnership to work together as federal-state-local partners for the sustained and efficient use of western agricultural water supplies; and

BE IT FURTHER RESOLVED, that the Western States Water Council, representing western governors and state water resource agencies throughout the 17 western states, be included as supporting the concepts underlying the Bureau of Reclamation's Water Conservation Field Services Program; and

BE IT FURTHER RESOLVED, that the Bureau of Reclamation, in its promotional materials for the program, may use the Council's name as a supporter of the program's incentive-based approach subject to review and approval of promotional materials by the Executive Director of the Council.

SNOWTEL PROGRAM

The cooperative federal snow survey and water supply forecasting program, operated by the National Water and Climate Center (NWCC) includes a network of some 1,100 manual snow courses and 640 automated SNOTEL(SNOw TELelemetry) sites that gather data on temperature, precipitation and snow water equivalent. The program is funded through the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS). The NWCC provides a number of products, including spring and summer streamflow forecasts and projections of reservoir storage. Each automated SNOTEL site costs about \$20,000 to install and the existing investment is valued at around \$30 million. Without new money, some 10-15% of the SNOTEL sites might have to be abandoned. NRCS forwarded to the Office of Management and Budget a FY2002 budget request that included an increase to maintain the existing snow survey/SNOTEL system, and cover central operations and water supply analysis. However, it would take an estimated \$2.3 million more to adequately fund the maintenance backlog. In addition, NRCS had requested funding to expand the SNOTEL system to meet growing demands for data, and separately requested money to initiate a nationwide Soil Climate Analysis Network (SCAN) that would gather information not only on precipitation, snow depth and snow water content, but also air temperature, relative humidity, wind speed and direction, solar radiation, barometric pressure, soil moisture and soil temperature.

On November 13, the WSWC Executive Committee approved a letter that was sent to both OMB and the Council on Environmental Quality (CEQ) with respect to funding for the federal snow survey and SNOTEL system.⁸⁹ Level federal funding over the past five years, while operation and maintenance costs continued to rise, had slowly eroded the system to the point that the Council raised concerns over the potential loss of critical data. The letter, which represents an external policy position of the Council, was sent to OMB Director Jack Lew and CEQ Chair Kathleen McGinty.

⁸⁹*Western States Water*, Issue #1383, November 17, 2000.



WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/wswc

November 14, 2000

Kathleen A. McGinty, Chair
Council on Environmental Quality
Old Executive Office Building, Room 360
17th Street and Pennsylvania Avenue, NW
Washington, DC 20501

Dear Ms. McGinty:

This letter is written on behalf of the Western States Water Council ("the Council") to call your attention to the urgent need for additional appropriations for operation and maintenance of the existing snow course and SNOTEL automated site snow pack monitoring program, which provides water supply information gathered and disseminated through the USDA's snow survey and SNOTEL program, administered by the National Water and Climate Center ("NWCC") in Portland, Oregon.

As you may be aware, the Council is composed of members appointed by the Governors of eighteen states and serves as a policy advisory board. The Council has long been involved in western water conservation and management issues. Its members, who manage water resources throughout the west, depend on the availability of accurate and timely water supply data provided by NWCC in order to make water management decisions. Moreover, water supply information provided by NWCC through the snow survey and SNOTEL program is critical not only to States in managing water supplies, but is used by numerous levels of government and other stakeholders to project spring and summer water supplies and forecast flooding or drought. Without the information provided by NWCC through the snow survey and SNOTEL program, human life, property, and important environmental resources are at considerably greater risk of catastrophic loss.

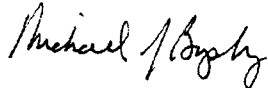
A number of our States have recently become aware that NWCC is preparing a protocol for the discontinuance of a significant number of snow course and SNOTEL automated sites. This is occurring because NWCC does not have sufficient funding to pay the operation and maintenance costs associated with the existing snow course and SNOTEL network. NWCC's work is funded through appropriations to the conservation operations account of the Natural Resources Conservation Service, and appropriations to NWCC for operation and maintenance of the SNOTEL system have been level since 1995, while costs have continued to steadily rise. This erosion in operation and maintenance funding, unchecked, will inevitably result in the decommissioning of snow course and SNOTEL sites, many of which are supported by non-

Ms. McGinty
November 14, 2000
Page 2

federal cooperator money and in-kind services, and all of which are vital for the protection of human life, property, species and other environmental interests.

The Council has not made a practice of requesting funding from an Administration during the preparation of the President's budget. However, we believe that the current state of the snow course and SNOTEL network requires this extraordinary step. We respectfully urge the Administration to request sufficient funding to adequately operate and maintain the current system of snow course and SNOTEL automated sites and reverse the erosion that threatens this vital information network.

Sincerely,



Michael J. Brophy, Chair
Western States Water Council

cc: Sally Ericsson, CEQ
Senator Ted Stevens, Chair, Senate Appropriations Committee
Senator Richard Lugar, Chair, Senate Agriculture Committee
Rep. C.W. Bill Young, Chair, House Appropriations Committee
Rep. Larry Combest, Chair, House Agriculture Committee

WESTERN STATES WATER COUNCIL

**REPORT OF INDEPENDENT ACCOUNTANTS
AND
FINANCIAL STATEMENTS**

June 30, 2000

HANSEN, BARNETT & MAXWELL
A Professional Corporation
CERTIFIED PUBLIC ACCOUNTANTS

WESTERN STATES WATER COUNCIL

TABLE OF CONTENTS

	Page
Report of Independent Accountants	117
Financial Statements:	
Combined Balance Sheet - General Fund and Account Groups - June 30, 2000	118
General Fund Statement of Revenues and Expenditures and Changes in Fund Balance - Budget and Actual for the Year Ended June 30, 2000	119
Notes to Financial Statements	120
Accompanying Information:	
Schedule of Changes in General Fixed Assets for the Year Ended June 30, 2000	124
Report Required by Government Auditing Standards:	
Report on Compliance and on Internal Control Over Financial Reporting Based on an Audit of Financial Statements Performed in Accordance with <i>Government Auditing Standards</i>	125

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REPORT OF INDEPENDENT ACCOUNTANTS

To the Executive Committee
Western States Water Council

We have audited the accompanying combined balance sheet of Western States Water Council as of June 30, 2000, and the related general fund statement of revenues and expenditures and changes in fund balance - budget and actual for the year then ended. These financial statements are the responsibility of the Council's management. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with generally accepted auditing standards and the standards applicable to financial audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Western States Water Council as of June 30, 2000, and the results of its operations for the year then ended in conformity with generally accepted accounting principles.

Our examination was made for the purpose of forming an opinion on the financial statements taken as a whole. The schedule of changes in the general fixed assets is presented for the purpose of additional analysis and is not a required part of the basic financial statements. Such information has been subjected to the auditing procedures applied in the examination of the financial statements and, in our opinion, is fairly stated in all material respects in relation to the financial statements taken as a whole.

In accordance with Government Auditing Standards, we have also issued a report dated August 7, 2000 on our consideration of Western States Water Council's internal control over financial reporting and on our tests of its compliance with certain provisions of laws and regulations. That report is an integral part of an audit performed in accordance with *Government Auditing Standards*, and should be read in conjunction with this report in considering the results of our audit.

HANSEN, BARNETT & MAXWELL

Salt Lake City, Utah
August 7, 2000

**WESTERN STATES WATER COUNCIL
COMBINED BALANCE SHEET
JUNE 30, 2000**

ASSETS

	<u>General Fund</u>	<u>Account Groups</u>		<u>Totals (Memorandum Only)</u>	
		<u>General Fixed Assets</u>	<u>General Long-Term Debt</u>	<u>June 30, 2000</u>	<u>June 30, 1999</u>
Assets					
Cash	\$ 186,746	\$ —	\$ —	\$ 186,746	\$ 145,477
Account receivable	—	—	—	—	12,927
Prepaid expenditures	3,832	—	—	3,832	3,832
Deposits	1,501	—	—	1,501	1,501
General fixed assets (office equipment)	—	105,228	—	105,228	96,180
Other Debits					
Amount to be provided for payment of compensated absences	—	—	20,654	20,654	16,504
Total Assets	<u>\$ 192,079</u>	<u>\$ 105,228</u>	<u>\$ 20,654</u>	<u>\$ 317,961</u>	<u>\$ 276,421</u>

LIABILITIES AND FUND BALANCE

Liabilities					
Accounts payable	\$ 5,413	\$ —	\$ —	\$ 5,413	\$ 8,821
Obligations for compensated absences	—	—	20,654	20,654	16,504
Total Liabilities	<u>5,413</u>	<u>—</u>	<u>20,654</u>	<u>26,067</u>	<u>25,325</u>
Fund Balance					
Investment in general fixed assets	—	105,228	—	105,228	96,180
Designated fund balance - equipment replacement	2,404	—	—	2,404	29,846
Undesignated fund balance	<u>184,262</u>	<u>—</u>	<u>—</u>	<u>184,262</u>	<u>125,070</u>
Total Fund Balance	<u>186,666</u>	<u>105,228</u>	<u>—</u>	<u>291,894</u>	<u>251,096</u>
Total Liabilities And Fund Balance	<u>\$ 192,079</u>	<u>\$ 105,228</u>	<u>\$ 20,654</u>	<u>\$ 317,961</u>	<u>\$ 276,421</u>

The accompanying notes are an integral part of these financial statements.

**WESTERN STATES WATER COUNCIL
GENERAL FUND
STATEMENT OF REVENUES AND EXPENDITURES AND
CHANGES IN FUND BALANCE - BUDGET AND ACTUAL
FOR THE YEAR ENDED JUNE 30, 2000**

	Budget	Actual	Variance Favorable (Unfavorable)	Actual 1999 (for Comparison Only)
	<u>2000</u>	<u>2000</u>	<u>2000</u>	
Revenues				
Member states' assessments	\$ 362,500	\$ 412,500	\$ 50,000	\$ 350,000
Bureau of Reclamations contract	12,900	—	(12,900)	—
Newsletter receipts	11,350	10,450	(900)	11,205
Symposium fees	38,455	23,467	(14,988)	9,505
Miscellaneous income	—	116	116	13,030
Interest income	<u>14,140</u>	<u>17,024</u>	<u>2,884</u>	<u>13,647</u>
Total Revenues	<u>439,345</u>	<u>463,557</u>	<u>24,212</u>	<u>397,387</u>
Expenditures				
Current				
Salaries	202,358	202,818	(460)	197,423
Travel	16,032	26,398	(10,366)	19,502
Payroll taxes and employee benefits	82,196	80,968	1,228	78,555
Printing and reproduction	16,037	12,525	3,512	16,032
Rent	22,406	22,500	(94)	21,753
Freight and postage	11,162	8,451	2,711	11,944
Telephone	3,984	4,040	(56)	4,335
Utilities	2,792	2,138	654	2,567
Maintenance contracts	5,232	7,347	(2,115)	5,641
Office supplies	2,683	6,703	(4,020)	2,589
Reports and publications	3,364	2,858	506	2,932
Meetings and arrangements	3,875	2,315	1,560	3,792
Accounting	3,193	3,234	(41)	3,100
Insurance	1,245	1,120	125	1,209
Contingencies	2,099	2,636	(537)	2,057
Miscellaneous expense	—	52	(52)	23
Pension management	2,380	2,482	(102)	2,122
Symposium expenses	22,516	13,950	8,566	7,746
Capital outlay	<u>3,572</u>	<u>29,272</u>	<u>(25,700)</u>	<u>7,387</u>
Total Expenditures	<u>407,126</u>	<u>431,807</u>	<u>(24,681)</u>	<u>390,709</u>
Excess of Revenues Over Expenditures	32,219	31,750	(469)	6,678
Fund Balance - Beginning of Year	<u>154,916</u>	<u>154,916</u>	<u>—</u>	<u>148,238</u>
Fund Balance - End of Year	<u>\$ 187,135</u>	<u>\$ 186,666</u>	<u>\$ (469)</u>	<u>\$ 154,916</u>

The accompanying notes are an integral part of these financial statements.

**WESTERN STATES WATER COUNCIL
NOTES TO FINANCIAL STATEMENTS
JUNE 30, 2000**

NOTE 1--SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

The Western States Water Council was formed in 1965 as a cooperative endeavor among States in the Western United States. Its purpose is to coordinate programs which will lead to integrated development of water resources by state, federal and other agencies in the region. The Council receives funding through assessments of member states. Each member state is represented on the Council's Executive Committee which comprises the administrative body.

The accounting policies of the Western States Water Council conform to generally accepted accounting principles as applicable to governmental units. The following is a summary of the significant policies:

The Reporting Entity — The Western States Water Council is an independent reporting entity and is not a component unit of any other government. The Council's Executive Committee is the governing authority. The Executive Committee establishes Council policy, approves the annual budget, and appoints those responsible for administrative and fiscal activities.

Generally accepted accounting principles require that the reporting entity include the primary government, all organizations for which the primary government is financially accountable, and other organizations which by the nature and significance of their relationship with the primary government would cause the financial statements to be incomplete or misleading if excluded. Based on these criteria, there are no component units requiring inclusion in these financial statements.

Fund Accounting — The accounts of the Council are organized on the basis of funds and account groups, each of which is considered a separate accounting entity. The operations of each fund are accounted for with a separate set of self-balancing accounts that comprise its assets, liabilities, fund equity, revenues, and expenditures. Resources are allocated to and accounted for in the fund based upon the purposes for which they are to be spent and the means by which spending activities are controlled.

Governmental Fund — *The General Fund* is used to account for all financial resources of the Council not accounted for by a separate specialized fund.

Account Groups — Account Groups (not "funds") are concerned only with the measurement of financial position. They are not involved with measurement of results of operations. There are two account groups, as follows:

The General Fixed Assets Account Group is used to record the cost of the capital assets owned, or acquired through capital lease

obligations, by the Council, and to aid in maintaining physical control over these assets. Cost of assets acquired through a capital lease is the fair market value at the lease inception date. Purchased general fixed assets are recorded as expenditures in the governmental fund at the time of purchase. These assets are then concurrently recorded, at cost, in the General Fixed Assets Account Group.

The General Long-Term Debt Account Group is used to record long-term liabilities expected to be financed from the governmental fund.

Basis of Accounting — The modified accrual basis of accounting, under which expenditures, other than interest on long-term debt, are recorded when the liability is incurred and revenues are recorded when received in cash unless susceptible to accrual (i.e. measurable and available to finance the Council's operations, or of a material amount and not received at the normal time of receipt), is followed for the General Fund.

Use of Estimates — The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect certain reported amounts and disclosures. Actual results could differ from those estimates.

Totals Column on Combined Balance Sheet — The totals column on the Combined Balance Sheet is captioned "Memorandum Only" to indicate that it is presented only to facilitate financial analysis. Data in this column does not present financial position, results of operation, or changes in financial position in conformity with generally accepted accounting principles. Neither is such data comparable to a consolidation.

Designated Fund Balance — The council has designated funds to replace office equipment as needed. See Note 2.

NOTE 2--CASH

The Council's major cash funds were held in the Utah Public Treasurer's Investment Fund during the years ended June 30, 2000 and 1999. Deposits and withdrawals may be made at any time and interest payments are added to the investment balance monthly. The balance in the Investment Fund at June 30, 2000 and 1999, was \$172,107 and \$101,151, respectively.

During the fiscal year ended June 30, 1991, the Council established an office equipment replacement fund. This fund will be used to purchase new equipment as it is needed. Deposits into this fund are made monthly in the amount of \$100. The fund is also held by the Utah Public Treasurer's Investment Fund and accrues interest at the same rate as the Investment Fund. The balance in the Equipment Replacement Fund at June 30, 2000 and 1999 was \$2,404 and \$29,846, respectively.

At year end, the carrying amount of the Council's bank deposits was \$12,145 and the bank balance was \$58,958. All of the bank balance was covered by federal depository insurance. Collateralization of deposits is not required by state statute.

NOTE 3--LEASE COMMITMENTS

The Council leases office space under an agreement classified as an operating lease. The lease expired March 1, 2000 and was renewed for three more years, expiring on February 28, 2003. Monthly payments are \$1,866. Future lease payments to be made during the year ended June 30, 2001 total \$22,392.

NOTE 4--RETIREMENT PLAN

The Council has a defined contribution retirement plan that covers substantially all of its employees. To be a member of the Plan the employee must have completed 12 months or 1,000 hours of service in a 12 month period. Vesting accumulates at a rate of 20% a year, beginning with the second full year of service until the member is fully vested after 6 years of service.

The Council contributes to the Plan an amount equal to 17% of each plan member's gross wages less the total of all amounts to be reallocated during the taxable year by reason of recoveries attributable to contributions arising out of termination of employment of members of the Plan prior to full vesting. The total contribution for the years ended June 30, 2000 and 1999, were \$34,479 and \$33,586, respectively.

NOTE 5--COMPENSATED ABSENCES

Employees of the Western States Water Council are entitled to compensated absences in the form of paid vacation, paid sick leave, and paid administrative leave. According to policy, the vacation pay accrues at a rate of 8.5 hours per full month of service rendered for the first 5 years. The next 5 years accrues at the rate of 11 hours per month and for years thereafter the rate is 13 hours per month. The number of unused vacation days, up to 40, carries forward to the beginning of the next calendar year.

As of July 1, 1999, employees with 21 years of service will begin receiving administrative leave. Seven hours of administrative leave will be accrued each pay period or 14 hours each month.

Since sick leave is not paid upon termination, it is not accrued.

The Obligation for Compensated Absences has been classified as part of the General Long - Term Debt Account Group because presently the obligation is not expected to be paid in the current year.

ACCOMPANYING INFORMATION

**WESTERN STATES WATER COUNCIL
SCHEDULE OF CHANGES IN GENERAL FIXED ASSETS
FOR THE YEAR ENDED JUNE 30, 2000**

	<u>2000</u>
Investment in General Fixed Assets - June 30, 1999	\$ 96,180
Office equipment additions	29,210
Office equipment retirements	<u>(20,162)</u>
Investment in General Fixed Assets - June 30, 2000	<u>\$105,228</u>

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REPORT ON COMPLIANCE AND ON INTERNAL CONTROL OVER FINANCIAL REPORTING BASED ON AN AUDIT OF FINANCIAL STATEMENTS PERFORMED IN ACCORDANCE WITH *GOVERNMENT AUDITING STANDARDS*

To the Executive Committee
Western States Water Council

We have audited the financial statements of Western States Water Council as of and for the year ended June 30, 2000, and have issued our report thereon, dated August 7, 2000. We conducted our audit in accordance with generally accepted auditing standards and the standards applicable to financial audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States.

Compliance

As part of obtaining reasonable assurance about whether Western States Water Council's financial statements are free of material misstatement, we performed tests of its compliance with certain provisions of laws, regulations, contracts and grants, noncompliance with which could have a direct and material effect on the determination of financial statement amounts. However, providing an opinion on compliance with those provisions was not an objective of our audit and, accordingly, we do not express such an opinion. The results of our tests disclosed no instances of noncompliance that are required to be reported under *Government Auditing Standards*.

Internal Control Over Financial Reporting

In planning and performing our audit, we considered Western States Water Council's internal control over financial reporting in order to determine our auditing procedures for the purpose of expressing our opinion on the financial statements and not to provide assurance on the internal control over financial reporting. Our consideration of the internal control over financial reporting would not necessarily disclose all matters in the internal control over financial reporting that might be material weaknesses. A material weakness is a condition in which the design or operation of one or more of the internal control components does not reduce to a relatively low level the risk that misstatements in amounts that would be material in relation to the financial statements being audited may occur and not be detected within a timely period by employees in the normal course of performing their assigned functions. We noted no matters involving the internal control over financial reporting and its operation that we consider to be material weaknesses.

This report is intended for the information of the executive committee and management.

HANSEN, BARNETT & MAXWELL

Salt Lake City, Utah
August 7, 2000

RULES OF ORGANIZATION⁹⁰

Article I - Name

The name of this organization shall be "THE WESTERN STATES WATER COUNCIL."

Article II - Purpose

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.

Article III - Principles

Except as otherwise provided by existing compacts, the planning of western water resources development on a regional basis will be predicated upon the following principles for protection of states of origin:

- (1) All water-related needs of the states of origin, including but not limited to irrigation, municipal and industrial water, flood control, power, navigation, recreation, water quality control, and fish and wildlife preservation and enhancement shall be considered in formulating the plan.
- (2) The rights of states to water derived from the interbasin transfers shall be subordinate to needs within the states of origin.
- (3) The cost of water development to the states of origin shall not be greater, but may be less, than would have been the case had there never been an export from those states under any such plan.

Article IV - Functions

The functions of the Western States Water Council shall be to:

- (1) Undertake continuing review of all large-scale interstate and interbasin plans and projects for development, control or utilization of water resources in the Western States, and submit recommendations to the Governors regarding the compatibility of such projects and plans with an orderly and optimum development of water resources in the Western States.
- (2) Investigate and review water related matters of interest to the Western States.
- (3) Express policy positions regarding proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management, and protection of water resources in Western States.
- (4) Sponsor and encourage activities to enhance exchange of ideas and information and to promote dialogue regarding optimum management of western water resources.
- (5) Authorize preparation of amicus briefs to assist western states in presenting positions on issues of common interest in cases before federal and state courts.

⁹⁰The rules incorporate changes that were adopted in November 1997 at the Council's 125th meetings in Carlsbad, New Mexico.

Article V - Membership

(1) The membership of the Council consists of not more than three representatives of each of the states of Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming appointed by and serving at the pleasure of the respective Governors. Member states of the Western Governors' Association, which are not members of the Council, shall be added to membership if their respective Governors so request. The Executive Committee may, upon unanimous vote, confer membership upon other western states, which are not members of the Western Governors' Association, if their respective Governor so requests.

(2) Member states may name alternate representatives.

(3) Any state may withdraw from membership upon written notice by its Governor. Further in the event any state becomes delinquent in paying dues as set forth in Article V (5) for a period of three years, the state will be excluded from Council membership unless and until the current year's dues are paid.

(4) The Executive Committee of the Council may, by unanimous vote, confer the status of Associate Member of the Council upon states it deems eligible. Associate Membership may be granted for a period of up to three years, during which time the state may appoint two official observers to participate in Council activities and receive all printed material disbursed by the Council. Associate Member states shall have no vote in Council matters. The Executive Committee shall, through regular Council voting procedures, establish the appropriate level of dues for Associate Member states. In addition to determinations concerning Associate Member states, the Executive Committee may, when appropriate, establish fees for participation in Council activities by non-members.

(5) If any state fails to pay the appropriate level of dues established by the Executive Committee of the Council, the privilege afforded by virtue of its membership to participate in Council activities and to receive all printed materials dispersed by the Council shall be withheld pending the payment of dues, beginning at the start of the fiscal year following the delinquency.

Article VI - Ex-Officio Members

The Governors of the member states shall be ex-officio members and shall be in addition to the regularly appointed members from each state.

Article VII - Officers

The officers of the Council shall be the Chair, Vice-Chair and Secretary-Treasurer. They shall be selected in the manner provided in Article VIII.

Article VIII - Selection of Officers

The Chair, Vice-Chair and Secretary-Treasurer, who shall be from different states, shall be elected from the Council by a majority vote at a regular meeting to be held in July of each year. These officers shall serve one-year terms. However, the Chair and Vice-Chair may not be elected to serve more than two terms consecutively in any one office. In the event that a vacancy occurs in any of these offices, it shall be filled by an election to be held at the next quarterly Council meeting.

Article IX - Executive Committee

(1) Each Governor may designate one representative to serve on an Executive Committee which shall have such authority as may be conferred on it by these Rules of Organization, or by action of the Council. In the absence of such a designation by the Governor, representatives of each state shall designate one of their members to serve on the Executive Committee. Any Executive Committee member may designate an alternate to serve in his/her absence.

(2) The Council may establish other committees which shall have such authority as may be conferred upon them by action of the Council.

Article X - Voting

Each state represented at a meeting of the Council shall have one vote. A quorum shall consist of a majority of the member states. No external policy matter may be brought before the Council for a vote unless advance notice of such matter has been mailed to each member of the Council at least 30 days prior to a regular meeting and 10 days prior to a special meeting at which such matter is to be considered; provided, that such matters may be added to the agenda at any meeting by unanimous consent of those states represented at the meeting. In any matter put before the Council for a vote, other than election of officers, any member state may upon request obtain one automatic delay in the voting until the next meeting of the Council. Further delays in voting on such matters may be obtained only by majority vote. No recommendation may be issued or external position taken by the Council except by an affirmative vote of at least two-thirds of all member states; provided that on matters concerning out-of-basin transfers no recommendation may be issued or external position taken by the Council except by a unanimous vote of all member states. On all internal matters; however, action may be taken by a majority vote of all member states.

Article XI - Policy Coordination and Deactivation

With regard to external positions adopted after being added to the agenda of the meeting by unanimous consent, such external policy positions shall be communicated to the member governors of the Western Governors' Association (WGA) and the WGA Executive Director for review. If after 10 days no objection is raised by the governors, then the policy position may be distributed to appropriate parties. In extraordinary cases, these procedures may be suspended by the Executive Director of the WGA, who will consult with the appropriate WGA lead governors before doing so.

Policy positions will be deactivated three years after their adoption. The Executive Committee will review prior to each regular meeting those policy statements or positions due for sunset. If a majority of the Executive Committee members recommend that the position be readopted by the Council, then such position shall be subject to the same rules and procedures with regard to new positions that are proposed for Council adoption.

Article XII - Conduct of Meetings

Except as otherwise provided herein, meetings shall be conducted under Robert's Rules of Order, Revised. A ruling by the Chair to the effect that the matter under consideration does not concern an out-of-basin transfer is an appealable ruling, and in the event an appeal is made, such ruling to be effective must be sustained by an affirmative vote of at least 2/3 of the member states.

Article XIII - Meetings

The Council shall hold regular meetings three times each year at times and places to be decided by the Chair, upon 30 days written notice. Special meetings may be called by a majority vote of the Executive Committee, upon 10 days written notice.

Article XIV - Limitations

The work of the Council shall in no way defer or delay authorization or construction of any projects now before Congress for either authorization or appropriation.

Article XV - Amendment

These articles may be amended at any meeting of the Council by unanimous vote of the member states represented at the meeting. The substance of the proposed amendment shall be included in the call of such meetings.