# 1979
# ANNUAL REPORT
## OF THE
# WESTERN STATES
# WATER COUNCIL

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Richard D. Lamm

**IDAHO**
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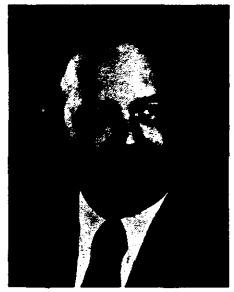
John V. Evans



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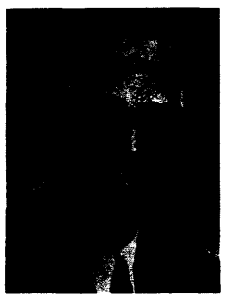

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*Governor Member
**Executive Committee Member

## STAFF

Jack A. Barnett ..... Executive Director

D. Craig Bell ..... Assistant Executive Director

Tony Willardson ..... Research Analyst
4-1-79

Pearl Pollick ..... Office Manager

Fae Drake ..... Report Secretary

Virginia Jensen ..... Legal Secretary

Colleen Slade ..... Clerk
6-1-79



## HISTORY
## of
## WESTERN STATES WATER COUNCIL OFFICERS
## and
## EXECUTIVE DIRECTORS

| | | |
|---|---|---|
| CHAIRMEN: | Freeman Holmer - Oregon | 8/65 to 10/66 |
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| | William S. Holden - Idaho | 7/69 to 3/71 |
| | William R. Gianelli - California | 7/71 to 7/73 |
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| | Donald L. Paff - Nevada | 7/78 to 7/79 |
| | George Christopulos - Wyoming | 7/79 |
| VICE CHAIRMEN: | Raphael J. Moses - Colorado | 8/65 to 12/66 |
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| | George Christopulos - Wyoming | 7/78 to 7/79 |
| | Daniel F. Lawrence - Utah | 7/79 |
| SECRETARY-TREASURERS: | Donel J. Lane - Oregon | 8/65 to 4/70 |
| | Floyd A. Bishop - Wyoming | 4/70 to 7/73 |
| | Daniel F. Lawrence - Utah | 7/73 to 7/79 |
| | Charles Nemir - Texas | 7/79 |
| EXECUTIVE DIRECTORS: | Wright Hiatt | 2/66 to 7/67 |
| | Jay R. Bingham | 3/68 to 12/69 |
| | Thomas E. Cahill | 1/70 to 9/73 |
| | Jack A. Barnett | 3/74 |

# WESTERN STATES WATER COUNCIL

## 1979 ANNUAL REPORT

The Western States Water Council was organized in June 1965 by the Governors comprising the Western Governors' Conference with the stated purpose of accomplishing effective cooperation among the western states in planning for programs leading to integrated development by state, federal and other agencies of their water resources. The Governors of the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming unanimously adopted the following resolution on June 13, 1965:

*WHEREAS, the future growth and prosperity of the western states depend upon the availability of adequate quantities of water of suitable quality; and*

*WHEREAS, the need for accurate and unbiased appraisal of present and future requirements of each area of the West and for the most equitable means of providing for the meeting of such requirements demands a regional effort;*

*NOW THEREFORE, BE IT RESOLVED by the Western Governors' Conference that it approves the creation of a Western States Water Council to be established in general conformity with the organizational pattern of the attached SUGGESTED RULES OF ORGANIZATION developed by the Western Water Resources Task Force appointed by the members of this Conference; and*

*BE IT FURTHER RESOLVED, that the members of this Conference will take all feasible steps to provide the support to give effective meaning to the creation of such a Council, including the establishment, upon recommendation of the Council, of a staff and central office to be financed in an amount not to exceed the sum of $150,000 for the first year from appropriations by each of the member states equally.*

In 1974 the original unanimity rule for adoption of external positions was changed in Article X of the Council by laws to read:

*"No recommendations 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."*

In October of 1978 the State of Texas was admitted to the Council with full voting rights and privileges, bringing the total state membership to 12 states.

As the issues confronting the Council broadened, the Water Policy and Legislative Committee was dissolved in 1975 and the Water Quality Committee and the Legal Committee were organized. These two committees, along with the Water Resources Committee, brought the Council to three separate hard working committees.



Nineteen seventy-nine saw increased Council interest and action in all facets of water oriented activities. Western States Water Council quarterly meetings were held in San Diego, California, January 25; Reno, Nevada, April 20; Sitka, Alaska, July 27 and Keystone, Colorado, October 25.

At the San Diego meeting, R. Keith Higginson, Commissioner of the Bureau of Reclamation, spoke on the reorganization of natural resource agencies of the federal government and the planning, construction, operation and maintenance of water projects. Representatives of the federal task forces working on President Carter's water policy reform gave progress reports and the problems associated with implementation of Section 404 of the Clean Water Act were explained by representatives of Idaho, Colorado and Wyoming. The following resolution concerning the appropriation of funds for the construction of publicly owned treatment works under the Clean Water Act of 1977 was passed unanimously:

*RESOLUTION*
*RELATING TO THE*
*APPROPRIATION OF FUNDS FOR THE CONSTRUCTION*
*OF PUBLICLY OWNED TREATMENT WORKS*
*UNDER THE CLEAN WATER ACT OF 1977*
*January 26, 1979*

*WHEREAS, members of the Western States Water Council represent states that receive annual allotment of funds appropriated in accordance with the Clean Water Act of 1977 for the construction of publicly owned wastewater treatment works.*

*WHEREAS, the construction of such works requires several years of preparatory planning and design in accordance with the requirements of the Clean Water Act of 1977.*

*WHEREAS, the construction of such works generally requires the preparation, voter approval and sales of general obligation and revenue bonds by state and local governments.*

*WHEREAS, federal appropriations for construction of such works directly affects the ability of state and local governmental agencies to carry out the requirements of the Clean Water Act of 1977.*

*WHEREAS, federal appropriations proposed in the President's FY 1980 budget request are insufficient to meet the municipal wastewater treatment plant construction funding needs, including those of the Western States.*

*WHEREAS, Congress previously authorized the appropriation of $5 billion in FY 1979.*

*NOW THEREFORE BE IT RESOLVED that the Western States Water Council requests the Congress of the United States to reinstate a $5 billion level of funding for FY 1980.*

Also at the San Diego meeting the Council unanimously adopted the following resolution concerning dam safety legislation:

*RESOLUTION*
*CONCERNING*
*DAM SAFETY LEGISLATION*
*January 26, 1979*

*The Western States Water Council has been actively discussing various programs and proposals that relate to dam safety and federal and state responsibilities. All of the western states have ongoing dam safety programs. Many of these programs have been in existence for three quarters of a century and all of the states are fearful that existing federal programs and proposed federal initiatives might move to usurp states' responsibilities, rights and prerogatives in theses areas.*

*The western states are not collectively supportive of federal dam safety legislation at this time. However, because there are federal proposals being considered it was determined that it would be appropriate for the western states, collectively, to identify the type of federal legislation that they feel would be acceptable if federal legislation is to be enacted.*

*The western states have examined the legislation passed by the Senate in the 95th Congress that is identified by Calendar Report No. 765 and the western states find that if federal dam safety legislation is to be enacted, many of the concepts found within that legislation are favored by the states. The Western States Water Council urges, however, that if this legislation is to be considered by the 96th Congress that certain amendments be made to that legislation.*

*In the first paragraph of Section 8(a) the states urge that the language in that paragraph be amended so that a governor might certify that the state has an adequate program if a governor so chooses in lieu of certification by the Secretary of Army. Further under Section 8(a) of the previously passed legislation, the concepts should be changed so the* ***states can*** *instead of* ***will be able*** *to review the construction and operation of dams and further, the inspection of dams should be on a regular basis rather than on a federally prescribed period of time.*

*Under Section 8(a) states should only be required to accomplish what would be set forth in that paragraph through the word "imminent" and the remainder of that paragraph should be striken so as not to prescribe in detail exactly how states might choose to operate their dam safety program.*

*The western states believe that Section 8(a) (8) should be changed to read that the states should have or can be expected to have authority and capabilities if the owner does not take action to take steps necessary as expediently as possible in order to protect human life and property.*



*Section 13 of the Senate adopted legislation the states believe should be added to allow the states to request from federal entities both technical and administrative advice and assistance on a wide spectrum of dam safety concerns.*

*With respect to the concept of a Federal Dam Safety Review Board, as identified in Section 11, the states feel that if a governor is given the authority to certify that the state has an adequate dam safety program, then the value and the need for such a Federal Dam Safety Review Board is greatly lessened. From the state point of view the board could best be used to examine federal programs in dam construction and inspection and to act as an appeal board for states from decisions made by the Secretary of Army.*

*With respect to the concept of insurance or reinsurance as identified in Section A of the Senate enacted legislation, the states recognize the there is a significant need for owners and citizens to be protected by an adequate insurance program. Further, the states recognize that often it is difficult for this insurance to be obtained at a reasonable rate. However, the states feel that for this to be offered as proposed in the legislation without giving a governor the prerogative of identifying whether or not his dam safety program is an adequate one gives federal officials too much authority and too much leverage if they try to force states to implement a federal dam safety program instead of a state program that might reflect the choices and prerogatives of the states. Therefore, the states would urge that the Congress consider many procedures that might be available to provide adequate protection in the event of a failure of a dam, but further that the Congress recognize that the needed protection should not ever be held in ransom until a state adopts a program that some federal administrator might perceive is the appropriate program to be implemented in a state or across the nation.*

*In summary, the states are concerned that federal legislation could be enacted in such a way that states' rights and prerogatives to administer dam safety programs might be lost either through direct usurpment of rights or by incentives that are offered to insure the implementation of a federal program.*

*The states urge the Congress to be most sensitive to these issues and to consult with all states that have or chose to have a viable dam safety program before proceeding with federal legislation.*

Implementation of Section 404 of the Clean Water Act remained an issue of discussion at the Council's April meeting in Reno, Nevada, as did the proposed 160-acre legislation. Federal representatives presented updates on the reorganization of federal government natural resource agencies, the future of the snow survey program, the future of the U.S. Water Resource Council and the status of state grant proposals under Title III of the Water Resources Planning Act. The Environmental Protection Agency's Section 102(d) draft report was the subject of extensive discussion. Council members noted there were many errors and inconsistencies in the EPA report, and also that misconceptions could be drawn from the way it was written. Council members approved a letter to EPA Administrator Douglas Costle informing him that the draft report failed to

meet the objectives of Section 102(d), that there had been no meaningful opportunity for consultation with the states, and that the report contained many deficiencies and inaccuracies. The letter further advised of the intention of the Western States Water Council to draft its own independent analysis of Section 102(d) of the Clean Water Act. Enclosed with the letter sent to Mr. Costle was an attachment pointing out some of the misleading statements in EPA's 102(d) draft report.

The Reno Council meeting also produced the following position opposing cost sharing legislation (with New Mexico dissenting) as proposed by the Carter Administration and identifying specific objections to the proposal.

*POSITION*
*on*
*PROPOSED COST SHARING LEGISLATION*
*April 20, 1979*

*WHEREAS, The Carter Administration has proposed cost sharing legislation to the United States Congress that will have widespread and potentially adverse impacts on the Western States; and*

*WHEREAS, the states and other non-federal entities have long shared in the cost of past water development projects and will continue to do so in the future; and*

*WHEREAS, the current proposal expresses an intention that the states have increased involvement in all phases of water projects, yet, the proposal contains practically no provision for State participation in the planning, construction, and operation of water projects, and*

*WHEREAS, the Western States Water Council, while not opposed to the principle of equitable cost sharing, can find little support for the cost sharing legislation being advanced.*

*NOW, THEREFORE, it is the position of the Western States Water Council to:*

*(1) Seek removal of objectionable features and add needed features in the draft legislation.*

*(2) Communicate to Congressional delegations of the member states and the Congressional committees of appropriate jurisdiction the reasons for opposition to the current bill.*



*SPECIFIC SUGGESTIONS TO COST SHARING PROPOSAL*

1. *State Responsibilities*

*The proposal expresses an intention that the States have increased involvement in the development and management of water and land resources. However, the proposal contains practically no provisions for increasing state participation in the planning, construction, and operation of water projects. The bill should contain a guarantee that States will participate in all phases and that they will be given authority and responsibility commensurate with their sharing of costs. State laws must be given full recognition in project planning and management.*

2. *Present Cost Sharing*

*States and local governments have been contributing significantly to water resource development over the years. These contributions do not appear to be adequately recognized in the current proposal. In some cases on federal projects the real contributions are greater from the non-federal entities and, in fact, cost sharing has long been a requirement in flood control and recreational projects.*

3. *Double Banking Problems*

*Because municipal, industrial and hydroelectric projects have historically paid back 100% of their costs plus interest to the federal treasury, the cost-sharing proposal will have little, if any, impact on these users. The probable effect of the proposal on such users will be to require two bankers instead of one, i.e. 90% payable to the federal government, 10% payable to the state. Thus creating additional burdensome requirements for the states and these water users.*

4. *Economics to Drive Decisions*

*The legislation proposes to place additional burdens on state and local government as well as project sponsors. Upon analysis, it appears that less economically feasible projects are most often those projects that will enhance the environment through instream flow provisions, recreation provisions, or environmentally acceptable agricultural development. The proposed cost sharing legislation would drive the decision making process to the projects that are most economically feasible at the disadvantage of the projects that might enhance stream values, fish and wildlife and general aesthetics.*

5. *Cost Sharing Determination*

*Under this proposal, the federal agency responsible for a project unilaterally determines the state share of costs, vendibles, and revenues. Procedures should be established to make this a joint effort between the federal and non-federal entities.*

6. *Agriculture*

*Water development projects designed to enhance irrigated agriculture as a means of achieving social and economic goals are important to western states.*

*These projects not only provide food for the nation but bring economic growth, balanced state economies, stabilization of rural communities, enhancement of open space and wildlife values, and many other benefits to the West. The achievement of these goals should continue to be of a valid aim of federal water resources policy. Any proposed changes in cost-sharing must therefore be evaluated in light of its impact upon these important goals and the contribution which irrigated agriculture makes to the West.*

*In particular, it must be noted that worthy agricultural water projects would be severely impacted by the proposed cost sharing formula placing agriculture at a disadvantage with other more economically competitive water uses. Thus, the cost sharing proposal would alter important, long standing programs that are designed to promote agricultural development and, in turn, the growth and economic stability of the West.*

*Specifically, the cost sharing proposal would substantially detract from several of the basic programs which have been established to assist irrigators:*

*(a) The 1902 Reclamation Act waived all interest payments incurred by irrigation districts borrowing money from the federal treasury. Under the cost sharing proposal, the State (rather than the federal government) would be losing interest on the 10% monies advanced on the front end. This is a loss of revenues states historically have not faced, and over a fifty year repayment period will exceed (by a factor of many times) the actual 10% front end contribution.*

*(b) Irrigators in the West have been able to repay federal water projects partly through personal contributions (based on what they could afford to pay) and partly through allocation of "river basin funds" to which states or irrigation projects are entitled.*

*Such "river basin funds," generated from the sale of hydroelectric power from specific federal projects, were earmarked exclusively to help irrigators meet repayment requirements of individual irrigation projects. This mechanism has been heavily relied upon by the states and irrigators to keep agriculture in a competitive position. Under the Carter cost sharing proposal, the river basin funds are indirectly denied the states and their irrigators. Ostensibly, the states advance 10% of the project cost (vendibles) and receive 10% of the project revenues. But the proposal does not recognize the river basin funds as "revenue." Hence the states are returned only 10% of what the irrigator directly pays; not 10% of the total contribution from the irrigator and river basin revenues.*

*(c) For example, assume an agricultural project costing $100,000,000. The state is required to advance 10% or $10,000,000 on the front end with the federal government putting up the balance of $90,000,000. The state, under the proposal, should receive 10% of the project's revenues. The irrigators, in this instance, are able to repay only $20,000,000 (20%) of the total $100,000,000 cost—said $20,000,000 based on what the irrigators are capable of paying. Therefore, the remaining $80,000,000 is repaid to the federal treasury by river basin funds. Under the Carter proposal, the state would only be repaid $2,000,000 of the $10,000,000 it advanced since the irrigators repaid only 20% of the total project cost. The remaining 80% river basin contribution is not considered as "revenue;" therefore, the state cannot claim the additional $8,000,000 it advanced. It is indeed ironic that the federal government, after receiving $20,000,000 from the irrigator and $80,000,000 from the river basin funds in*



*return for its $90,000,000 loan, returns only $2,000,000 of the states' $10,000,000 investment. Without question, state legislatures will be reluctant to cost share irrigation projects when most of the money advanced by the state will not be returned and the states will not be given credit for contributions from river basin funds. Moreover, the states will lose interest on the 10% advance throughout the life of the project.*

*(d) Therefore, the Council cannot support a cost sharing proposal that deviates from the benefits extended to agriculture in the 1902 Reclamation Act and that refuses to consider as "revenue" contributions made to the federal treasury from the river basin funds.*

*7. Flood Control*

*The proposals under this section are very confusing. Several interpretations could be made as to the percent of cost sharing that will be required in the future. In any event, and regardless of the various interpretations, the Council favors retaining the present cost sharing that is required with federal projects for flood control purposes. It is uncertain whether flood control cost share (20% through non-federal entities and 5% through the state) is in addition to existing contributions or is a limit to overall cost sharing responsibilities by non-federal entities.*

*The Council belives that the existing contributions by non-federal entities are adequate. If additional requirements are needed, the Council believes that there should be a limitation on non-federal cost sharing at a maximum of 20%.*

*8. Recreation*

*The Council opposes any additional cost sharing in recreational features of water projects. The Council notes that often 50% of the recreational costs are now being advanced by the states, and can find no reason for the states to assume an additional 5% or 10% burden.*

*9. Navigation*

*The Council finds that navigational benefits, whether they be river channel improvements or deep water ports, are so widespread that it would be impractical for a single state to manage the cost sharing contributions that might equitably be requested from many states and a multitude of beneficiaries. Therefore, the Council believes that navigation should be removed from cost sharing provisions.*

*10. Dam Safety*

*The Council feels that the financing of dam safety improvements on federal projects as authorized by the Congress last year should not be re-examined at this time and, further, cost sharing legislation is an inappropriate place to reconsider that congressional decision. Presumably, the cost sharing that is being proposed by the Carter Administration, is a state/federal cost sharing coordinated effort and the cost sharing that would be required by reversal of last year's congressional actions with respect to the funding of improvements for federally owned dams, would be a direct arrangement between the federal government and the contracting users of the federal project.*

*11. Environmental Enhancement Projects*

*It is unclear as to whether or not the legislation would apply to projects that might be designed and authorized strictly for the purpose of enhancing the*

*environment. These projects might include fish and wildlife refuge improvements, instream flow provisions, and water quality control projects. Because it is unclear as to whether the cost sharing legislation would apply to water quality projects, it is difficult to speculate upon the impact that this might have, but it is recognized that there is a significant amount of money being spent nationwide by the federal government at the present time for water quality and environmental purposes. An example might be the question as to whether or not projects that are designed to improve the salinity of the Colorado River to meet treaty obligations with Mexico would be subject to cost sharing requirements. The legislation should be clarified where projects are excluded.*

*12. Congressional Intent*

*The draft legislation, at best, is vague in setting out implementation procedures and clarifying congressional intent. Specifics are left to be developed and guidelines promulgated by the Water Resources Council and rules and regulations adopted by individual federal agencies. Past experiences have shown us that this procedure can lead to excessive regulations and requirements that go beyond the original intent of the legislation.*

*13. Funding Limitations*

*The provision for a cap of ¼ of 1% of a state's general revenue is not equitable. It would, in effect, put a larger burden on states having larger budgets and it would be totally unfair in the event of multi-state projects where only some states would come under this cap.*

*14. Federal Commitments*

*The draft legislation requires the states to furnish binding commitments to put up funds in proportion to future federal appropriations, the amounts and timing of which are uncertain. The amounts and timing must be firmly established by equally binding federal commitments in order for non-federal investments to be protected and fully secured.*

*15. Exempting Emergencies*

*The proposed authority to exempt "emergencies" from cost sharing rules is unclear. It allows a departure from the rules but does not clearly define conditions required for this exemption.*

*16. Multi-State Projects*

*The proposals for cost sharing in multi-state projects and the division of costs among states are totally unworkable as they now appear in the draft legislation.*

The Council at its Reno meeting also adopted a position (with California abstaining and New Mexico dissenting) on proposed legislation amending the Water Resources Planning Act (HR 2610). The position sets forth suggested revisions to the bill.



*POSITION*
*on*
*LEGISLATION AMENDING THE WATER RESOURCES PLANNING ACT*
*April 20, 1979*

*To protect the viability and independence of state water planning and to preclude the imposition of federal criteria, procedures and regulations on those programs and dilution of state authority by including Indian reservations within the State Grant Program, the Council urges the following amendments to Section 2 of HR2610 as marked up on April 5, 1979 by the House Subcommittee on Water and Power:*

| | |
|---|---|
| *Page 4. Line 10.* | *Add the following after the word **goals** - to the extent deemed appropriate by each State.* |
| *Page 4. Line 15.* | *After the word **programs**, delete period and add -without the imposition of federal planning criteria, procedures and regulations not acceptable to the State.* |
| *Page 5. Line 4.* | *Delete sentence beginning with These guidelines and add a new sentence to read as follows: No requirement that is consistent with Section 301(a) shall be imposed upon a State unless such requirement has been promulgated by rule and is within the purposes of this Act.* |
| *Page 6.* | *Delete Section 302(f). (Line 21 on Page 6 to Line 19 on Page 8)* |
| *Page 9. Line 7.* | *Between the word **policy** and the word **to**, add - and to the extent deemed appropriate by the State,* |
| *Page 9. Line 19.* | *Between the word **public** and the word **in**, add - as deemed appropriate by the State,* |
| *Page 10. Line 2.* | *After the word **provide**, delete dash (-) and add - in a manner deemed appropriate by the State* |
| *Page 11. Line 25.* | *After the word **requirements**, delete semi colon (;), and add - adopted under the provisions of Section 301(c);* |

*The Council recognizes the need for federal financial assistance in water management planning and water conservation technical assistance and supports the level of appropriations recommended by the Administration, provided the legislation is amended to accomplish the purposes as proposed above. In addition, the Council supports augmented financial assistance to the Indian tribes for water resources planning through separate legislation or a new title to P.L. 89-80.*

At the invitation of Governor Hammond of Alaska, the Council held its 55th quarterly meeting at Sitka, Alaska on July 27. New Council officers for the year 1979-80 were elected. Geroge Christopulos, Wyoming, received the gavel as the new chairman and Daniel F. Lawrence, Utah, was elected as vice-chairman. Mr. Christopulos appointed Charles Nemir, Texas, as secretary-treasurer.

The Council passed (with California abstaining) the following resolution giving its formal support to the principles set forth in The Reclamation Act of 1979 (S.14), as reported by the Senate Committee on Energy and Natural Resources on June 21, 1979.

*POSITION*
*concerning*
*AMENDMENT OF THE FEDERAL RECLAMATION LAW*
*July 27, 1979*

*WHEREAS, the 160-acre limitation on water deliveries from federal reclamation projects was adopted in 1902 in light of the then existing agricultural economy and as a means of encouraging the establishment of family-size farms on undeveloped public lands of that time without allowance for changes in farm technology and economics; and*

*WHEREAS, there is need for a reasonable size of farm unit that may receive water deliveries from federal reclamation projects under conditions relevant and appropriate to each respective area of the nation in order that such units may be operated efficiently and maintain a competitive position in the agricultural economy of the United States;*

*NOW THEREFORE BE IT RESOLVED that the Western States Water Council support the principles set forth in S.14, (Reclamation Act of 1979), as reported by the Senate Committee on Energy and Natural Resources on June 21, 1979.*

*(This resolution shall not repeal the prior Council resolutions on acreage limitations nor restrict the right of any state to offer amendments to S.14)*

Recent developments were discussed concerning the U.S. Water Resources Council, the state grant program under Title III of the Water Resources Planning Act, the Council's report addressing the requirements of Section 102(d) of the Clean Water Act, the National Wildlife Federation lawsuit against EPA, the Fish and Wildlife Coordination Act, the recently released Interior Solicitor's Opinion on federal water rights and the report of the Federal Task Force on Non-Indian Reserved Rights. A position was taken at the July meeting regarding implementation of Section 404 of the Clean Water Act by the U.S. Army Corps of Engineers. It appeared to Council members that the Corps threatened to use the Section 404 program as a vehicle to usurp state water management prerogatives. The following resolution, as adopted unanimously, was conveyed to Congressmen and the Senators who were asked to forward the resolution to the Corps of Engineers:



*POSITION*
*regarding*
*IMPLEMENTING SECTION 404 OF P.L.92-500 BY THE U.S. ARMY CORPS OF ENGINEERS, July 27, 1979*

*WHEREAS, the Army Corps of Engineers has certain responsibility for implementing Section 404, P.L.92-500 as amended, and*

*WHEREAS, the President of the U.S. has assured the Governors and the people of the U.S. that the federal government will not preempt state prerogatives to allocate water of the states, which is a state function, and*

*WHEREAS, the Congress amended P.L.92-500 to specifically establish under law that the federal government, in implementing this Act, would not interfere with the right of states to allocate their water, and*

*WHEREAS, the Army Corps of Engineers, in implementing Section 404 of P.L.92-500, has established a policy contrary to the stated position of the President and in violation of the intent of Congress which would allow the federal government to subordinate the States' rights to allocate water if such rights would interfere with other federal goals for implementing P.L.92-500, and*

*WHEREAS, the Western States Water Council has continually defended the rights of the states to allocate the waters of the states, and*

*WHEREAS, the Division Engineer of the Corps of Engineers North Pacific Division has advised the Idaho Department of Water Resources in a letter dated May 7, 1979, that Corps policy may require denial of a Section 404 application "where the withdrawal cannot be conditioned in a manner sufficient to avoid unacceptable impact from the public interest," and*

*WHEREAS, the interpretation by the Corps of Engineers as to their authority under P.L.92-500 would have the direct effect of interfering with the rights of states to allocate water by denying a federal permit for reasons which are not a prerogative of the federal government.*

*NOW THEREFORE, it is the position of the Western States Water Council to (1) seek a retraction of the position set forth by the Corps of Engineers that they may base permit decisions on the fact that water is withdrawn from the water source, and adoption of a position that such questions are more properly handled through state water management, allocation and policy determinations, (2) in the event such retraction is not forthcoming in a manner sufficient to assure that state water management, allocation and policy determinations are recognized and not interfered with, seek congressional action to assure that 404 permits do not include any condition that conflicts or fails to recognize the actions of a state to authorize or allocate diversions of water, and (3) seek congressional action to withhold funding for studies or other federal activities which fail to recognize the primary role and authority of the states to allocate water within their respective boundaries.*

The Rural Clean Water Program was also of keen interest to Council members at the July meeting. A formal Council position was taken indicating to the Senate Appropriations Committee that the Western States Water Council supported the Committee's action in appropriating $75 million for the FY80 Rural Clean Water Program and also urged that the House conferees accept the Senate provision.

*POSITION*
*concerning*
*RURAL CLEAN WATER PROGRAM FUNDING*
*July 27, 1979*

*WHEREAS, the Western States are highly dependent upon irrigated agriculture, and*

*WHEREAS, it is recognized that the application of Best Management Practices to irrigated agriculture will have widespread beneficial effects which are both environmental and economic, and*

*WHEREAS, the Rural Clean Water Program (RCWP) provides assistance and incentives for farmers and ranchers to implement proposed agricultural Best Management Practices.*

*THEREFORE BE IT RESOLVED that the Western States Water Council supports the Senate Appropriations Committee's action in appropriating $75 million for FY80 Rural Clean Water Program and urges that the House conferees accept the Senate provision.*

Also at the July quarterly meeting, at the recommendation of the Executive Committee, the Council voted unanimously to amend the Executive Committee Charter and to change the Rules of Organization to reflect those changes. The changes enable the Executive Committee to call special meetings of the Council upon ten days written notice, and provide that the chairman and vice-chairman of the Council need not also be members of the Executive Committee. The Executive Committee Charter and Rules of Organization, as changed, are printed in the back of this report.

At the October meeting in Keystone, Colorado the Western States Water Council unanimously adopted a response to the Interior Solicitor's opinion on federal water rights. The document concluded that the Solicitor's opinion was inconsistent with recent U.S. Supreme Court decisions and also contrary to the President's water policy message. The Council also approved (with California dissenting) a document setting forth its observations on the report of the federal task force concerning non-Indian reserved rights in connection with water policy reform efforts. Further, Council members unanimously adopted a resolution dealing with the President's water policy concerning federal water rights. The response to the Solicitor's opinion, the Council observations on the federal task force report and the resolution on the President's water policy on federal water rights are printed here as part of this annual report.



*RESOLUTION*
*of the*
*WESTERN STATES WATER COUNCIL*
*concerning*
*PRESIDENTIAL WATER POLICY ON FEDERAL WATER RIGHTS*
*Keystone, Colorado*
*October 25, 1979*

*WHEREAS, federal-state relations involving various aspects of water regulation and management have been unsatisfactory for many years; and*

*WHEREAS, the tensions between the federal government and the states over water rights have inceased dramatically in the past generation largely as the result of policies established and espoused by the federal executive branch, primarily through the Departments of Justice and Interior, which intrude into fields of water allocation and management historically vested with the states; and*

*WHEREAS, the President, in 1977, initiated a federal policy evaluation program involving an examination of a wide range of water policy issues; and*

*WHEREAS in the water rights area the President's program, contrary to the policy thrusts of his predecessors of the last two decades, commendably emphasized the objective of reducing federal-state frictions by drawing back from recent federal executive intrusions into fields of water rights administration long occupied by the states and by recognizing the states as the dominant sovereign in those fields; and*

*WHEREAS the President's Water Policy Program, through "task force reports," is now in its implementation stage, with a Task Force Report No. 5(a), Non-Indian Reserved Rights (and related opinions of the Solicitor of the Interior Department, dated June, 1979) being subjected to public hearings; and*

*WHEREAS, the Western States Water Council has carefully examined Report No. 5(a) and concluded that, while it contains significant initiatives which promote harmony in federal-state relations on a limited basis, the overall impact of the Report is to exacerbate already strained relations; and*

*WHEREAS, the detrimental aspects of Report No. 5(a) primarily center upon (1) the intended reliance by the United States upon a heretofore unknown and legally suspect "non-reserved federal right" basis to estblish new water rights outside state water laws, (2) a reluctance to support general adjudications as the primary means to accomplish quantification of federal reserved rights, and (3) the decision not to promote legislative proposals designed to confirm the policy of limiting the scope of reserved rights and other commendable features of Task Force No. 5(a).*

*THERFORE IT IS RESOLVED by the Western States Water Council that:*

*1. The use of the "non-reserved federal right" theory, announced in the Task Force Report No. 5(a) and opined upon in the Solicitor's opinion, as a base for establishing new water rights by the United States be immediately withdrawn from further consideration by the President and the Secretary of the Interior and terminated, and*

*2. The Secretary modify the Task Force Report by placing a strong emphasis on a national policy of quantification by general state adjudication, rather than by preparation of mere statement of claims by the United States.*

*BE IT FURTHER RESOLVED by the Western States Water Council that the President and the Secretary of Interior, working in close association with the western states, develop and support enactment of legislative proposals which include elements, among others, which reaffirm the dominant state role in water rights administration, set forth a policy of deference to state general adjudication of water rights, limit the scope of exercised reserved rights and terminate unexercised reserved rights, and determine those occasions in which the reserved rights doctrine may be relied upon in the future to establish water rights.*



## *INTRODUTION*

*Under date of June 25, 1979, the Solicitor of the Department of the Interior issued an opinion concerning "Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation, and the Bureau of Land Management."[1] The opinion was issued in response to directions in President Carter's water policy message of June 6, 1978.[2]*

*In his water policy message, President Carter instructed federal agencies to work promptly and expeditiously to inventory and quantify reserved rights claims. The President directed the federal agencies to "utilize a reasonable standard when asserting federal reserved rights which reflects true federal needs, rather than theoretical and hypothetical needs based on the full legal extension of all possible rights."[3]*

*The President's intention of providing a means whereby finality and certainty can be brought to the government's reserved rights claims is laudible. Certainly no other issue has been so controversial in federal-state relations in water law than the government's claims under the reservation doctrine.[4] Such claims deter future water resources planning and development, and pose the threat that new federal uses will be given turn-of-the century priorities that can take water from currently valuable uses established pursuant to state law without payment of compensation.[5]*

*However it is the position of the Western States Water Council that the Solicitor's opinion is in many respects inconsistent with the President's directive to use a reasonable standard in asserting federal rights. Most serious is the Solicitor's assertion of the existence of so-called non-reserved federal water rights.*

*The Solicitor concludes that, since the federal government has never granted away its right to make use of unappropriated waters on federal lands, ". . . the United States has retained its power to vest in itself water rights in unappropriated waters and it may exercise such power independent of substantive state law."[6]*

*The Supreme Court has never sanctioned such water rights by the federal government. Indeed, an objective examination of Supreme Court decisions, particularly its landmark decisions in* ***United States v. New Mexico***[7] *and* ***United States v. California***[8]*, reveals that the United Staes must comply with state substantive laws in acquiring water, except in the case of federally reserved rights.*

*For these reasons, the Western States Water Council finds it necessary to point out several areas of the opinion which do not accurately reflect the state of the law with respect to federal reserved rights, and to refute its assertion of a right on the part of federal agencies to appropriate water without compliance with state law and without basis in the reservation doctrine.*

## *BACKGROUND*

*In order to understand the importance of the issues raised by the Solicitor's opinion, it is necessary to understand some background.*

*In vast areas of the West rainfall is slight, and land is virtually worthless without an adequate supply of water. For these reasons, western water laws came to be based on beneficial use of water rather than correlative rights and the appropriation theory rather than the riparian. Under the appropriation approach the first to make a beneficial use of water is protected in that right to the extent of his use.*[9]

*At the time these water laws developed, federal policy stressed disposition of the public domain by encouraging homesteading and settlement. By a series of acts in 1866, 1870, and 1877, Congress legitimized the appropriation approach practiced in the western states and declared that the water on public lands was open to use, and water rights thereto were to be obtained under the laws of the states and territories.*[10] *It was settled that even government patentees had only received land titles and had to acquire water rights in accordance with state law.*[11] *As a result, the states at this point had every reason to feel secure in their ability to legislate as they chose in relation to the non-navigable waters within their boundaries. This feeling of security, however, was soon to be diminished.*

*By the end of the 19th Century, the emphasis on settlement and development of western lands gave way in part to a concern for conservation of natural resources resulting in a series of vast federal reservations of what had previously been public lands. Thus, national monuments, national parks, national forests, Indian reservations and defense establishments were withdrawn from those lands open to public settlement. With respect to the water needs associated with the programs on these lands, however, it was customary for the federal government to appropriate water in accordance with state laws.*[12] *Indeed, despite the increase of federal activity in the western lands, nothing in the federal enactments providing for these programs and projects precipitated concern on the part of state legislatures. Western states' congressmen were repeatedly successful in securing disclaimers in federal enactments of any effect or interference with state laws concerning the control, appropriation, use, or distribution of water, or any vested right acquired thereunder.*[13]

*The 1902 Reclamation Act contained such a disclaimer and furthermore, in Section 8 directed the Secretary of Interior, in carrying out the provisions of the Act, to proceed in conformity with such state laws.*[14] *Thus, Congress directed that the Bureau of Reclamation in developing water resources in the West respect the states' regulatory authority in securing unappropriated water in the state for development of a particular project.*

*Despite the clearly evinced policy of Congress to defer to state law with respect to the acquisition, control, and distribution of water,*



*the Supreme Court gradually eroded this congressional policy in a series of decisions which were apparently the result of its philosophy that the federal government should control the allocation of the nation's water resources.*

*One substantial exception from federal deference to state water laws came with the Supreme Court's development of the reservation doctrine.*

*The real beginning of the doctrine came in the case of* ***Winters v. United States***[15] *in which the Supreme Court held that when Congress created an Indian reservation, an unspecified quantity of water, without which the land would be valueless, had been impliedly set aside for the Indian's use and that this reserved right was superior to the rights of subsequent appropriators who had obtained water rights under the applicable state laws, even though the Indians had not made a diversion for beneficial use.*

*The Winters Doctrine, as it became known and accepted, was universally thought of as a special rule of Indian law*[16]*, for there were special circumstances in the case of an Indian reservation that justified an implication of intent to reserve water for the Indians that did not exist in the context of other federal establishments. However, in the landmark case of* ***Arizona v. California***[17] *in 1963, the Court agreed with the Master's conclusion that the principle underlying the reservation of water rights for Indians applies equally to other federal establishments. As a result, the Court upheld reserved rights not only for Indian reservations, but for national forests, national recreation areas, and wildlife refuges.*[18]

*The effect of reservation doctrine, with respect to appropriations under state law, has been described as follows:*

> *"An appropriator, complying with state law cannot obtain title to it and his right applies only to surplus water, if any, remaining after the federal right is satisfied. The reserved water so withheld, is the property of the United States, and the government exercising its proprietary powers and rights can put it to use without compliance with state law. The block of water that will ultimately be needed on the reserved lands may be used in the meantime by an appropriator who complies with the state laws, but if that water is later put to use by the government, it takes no property from the temporary user and owes him no compensation."*[19]

*Thus, the doctrine poses the threat that new federal uses will be given turn-of-the century priorities that can take water from currently valuable uses establised pursuant to state law without paying any compensation.*[20] *The concern with which the western states view this threat is obvious by the fact that as the result of federal reservations and withdrawals from those lands open to public settlement, as of June 30, 1963, approximately 40% of the total acreage within those states (with the exception of North and South Dakota) included in the Desert Land Act is under the responsibility of federal agencies: a total of over 360 million acres in the eleven contiguous*

*western states.*[21] *Approximately 61% of the total surface water runoff is derived from federally reserved lands.*[22] *It should be thus apparent that the uncertainties generated by the doctrine with respect to state-granted water rights have adversely affected water resources planning and development. As the National Water Commission concluded in its report of 1973:*

> *". . . the reservation doctrine frustrates sound planning in the public and private sectors of the economy. The prospective claims of the government are highly uncertain as to time, manner and quantity of use. Consequently, no planner or investor can establish a meaningful water budget. It is impossible to prove how many non-federal projects were not undertaken because of these uncertainties, but statements to the Commission revealed profound concern on the part of state officials."* [23]

*Concurrent with the development of the reservation doctrine, the Supreme Court was narrowly construing the scope of the state role under the reclamation laws. Astonishing though it seems, since 1902 when the Reclamation Act was enacted, the Supreme Court, prior to its most recent decision, had decided only three cases which actually presented questions of interpretation of Section 8 of the Act:* ***Ivanhoe Irrigation District v. McCracken,***[24] ***City of Fresno v. California,***[25] *and* ***Arizona v. California.***[26]

*Both* ***Ivanhoe*** *and* ***City of Fresno*** *dealt with the impact of Section 8 upon the 160-acre rule and upon the irrigation priority provision of the reclamation laws. The Court determined that where Congress has laid down a specific and mandatory prerequisite as binding in the operation of reclamation projects, that specific mandate may not be ignored in favor of a general policy of deference to state law. This reflects a quite narrow and traditional canon of statutory interpretation that the specific controls the general. Nevertheless, the Court in both cases proceeded to discuss the Section generally in the broadest possible terms.*[27] *"As we read Section 8," the Court said in* ***Ivanhoe*** *without any explanation or citation of authority, "it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein."* [28]

*This very sweeping limitation was reinforced in the* ***City of Fresno*** *case. There, after noting disapprovingly the city's claim that Section requires compliance with California's state statutes relating to the priority of domestic over irrigation uses, Mr. Justice Clark said that the effect of Section 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made. This interpretation of Section 8 would apparently eliminate state law entirely from control over the distribution and use of project water, and would represent a total repudiation of the states' position. It was, in fact, an almost verbatum adoption of the interpretation which the United States in its briefs had urged upon the Court. With their very narrow holdings and very broad dicta, these cases left the status of Section 8 clouded in considerable uncertainty.*[29]



*In the subsequent case of* ***Arizona v. California,*** *a central issue was how the waters apportioned to each state were then to be distributed to users within the state. The case rose under the Boulder Canyon Project Act,*[30] *a separate reclamation law dealing with the waters of the lower Colorado. Section 14 of that Act incorporates by reference Section 8 of the 1902 Act.*

*Unlike the* ***Ivanhoe*** *and* ***City of Fresno*** *cases, the issue in* ***Arizona v. California*** *was not limited to a narrow conflict between state law and a particular federal policy expressed in the statute. Instead, the issue was the right of the Secretary in general to ignore state priorities in distributing project water intrastate in favor of some other scheme. Thus, the problem was raised in the broadest possible form -the authority of the Secretary to contravene a fundamental principle of state water law in favor of a federal purpose not even articulated in the Act. In upholding the authority of the Secretary so to act, the Court seemed to have realized the worst fears of the states. In its view, the majority said, "Where the Congress has undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws. Where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place."* [31]

*Nevertheless, two unanswered questions remained. Did the opinion apply only to the Boulder Canyon Project Act where a comprehensive congressional scheme pursuaded the majority that state law must be preempted? And did the opinion apply only to interstate projects? Thus, the status of Section 8 in reclamation projects generally was considered as still in some doubt.*[32] *Proponents of national power contended that federal administration according to federal policies is what Congress wants, and that Section 8 only demands reference to state law for definitions of compensable property.*

*Such a position was urged successfully by the federal government before a federal district court in California in 1975.*[33] *The trial court ruled that the Bureau must apply to the State Board for a permit to appropriate unappropriated water, as a matter of comity. However, the court ruled that the State Board must issue such a permit once it determines that unappropriated water is available and could not impose any conditions in such a permit.*

*The case of* ***United States v. California***[34] *or the so-called New Melones case was ultimately reviewed by the Supreme Court where the Court, perhaps for the first time, was afforded an adequate perspective on the problem. To the surprise of many observers, the Supreme Court decided in a 6-3 decision in favor of the states' position, namely that the state may impose any condition on the control, appropriation, use or distribution of water in a federal reclamation project that is not inconsistent with clear congressional directives respecting the project.*

*In reversing, the Supreme Court considered the language in its earlier decisions in* ***Ivanhoe, City of Fresno*** *and* ***Arizona v. California****. The Court disavowed that language "to the extent that it would prevent California from imposing conditions on the permits granted to the United States which are not inconsistent with congressional provision authorizing the project in question."*[35] *The Court concluded that it was clear "that state law was expected to control in two important respects. First, and of controlling importance to this case, the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law . . . Second, once the waters were released from the dam, their distribution to individual landowners would again be controlled by state law."* [36]

*At the same time, as the Supreme Court handed down this landmark decision on the Reclamation Act, it determined another significant case concerning the reservation doctrine, entitled* ***United States v. New Mexico***[37] *or the Mimbres Valley case. The Supreme Court ruled that the United States, in setting the Gila National Forest in New Mexico aside from other public lands, reserved the use of water out of the Rio Mimbres only where necessary to preserve the timber in the forest or to prudently manage the watershed in such a way as to maximize yield to appropriators under state law, and hence the United States is not entitled to reserved rights for aesthetic, recreation, wildlife-preservation, and stock watering purposes.*

*Justice Rehnquist writing for the majority, found that "each time this Court has applied the implied-reservation-of-water doctrine, it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."*[38] *This careful examination was required, according to the Court, because of the history of congressional deference to state law whenever the question was addressed as to whether federal entities must abide by state water law.*

*The Court found that, despite this congressional deference, where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude that the United States intended to reserve the necessary water. However, the Court, went on to determine that "where water is only valuable for a secondary use of the reservation, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator."*[39]

*The Supreme Court's decisions in these cases came on the heels of another decision by the Court a month earlier in* ***Andrus v. Charlestone Stone Products***[40] *reaffirming that private water rights on federal public lands are to be governed by state and local law and that Congress, in writing the Mining Act and subsequent amendments, had not set up a competing, federally controlled system of assigning water rights.*



*Just prior to these landmark Supreme Court decisions reaffirming the primary role of the states in water resources development and allocation, President Carter announced his proposals to reform national water policy.*[41] *In his water policy message he instructed federal agencies to work promptly and expeditiously to inventory and quantify reserved rights claims. The President directed the federal agencies to "utilize a reasonable standard when asserting federal reserved rights which reflects true federal needs, rather than theoretical and hypothetical needs based on the full legal extension of all possible rights."*[42]

*Pursuant to the President's directive, a task force was established with leadership delegated to the Solicitor of the Department of the Intertior.*[43] *One of the tasks assigned to each member agency of the task force was to describe the reserved rights claimed by the agency. In response, the Solicitor issued an opinion on June 25, 1979, identifying and explaining the legal basis for the water rights for lands managed by the Parks Service, Bureau of Land Management, Fish & Wildlife Service, and the Bureau of Reclamation.*[44]

*The task force was convinced that it could not fully carry out its responsibilities without addressing generally the mechanisms by which the federal government secures water rights to carry out congressionally-mandated management programs on federal lands. Therefore, the Solicitor's opinion not only identifies and describes reserved rights for the respective federal agencies, but also so-called non-reserved federal water rights. These rights exist, according to the Solicitor's opinion, because the federal government has never granted away its right to make use of unappropriated waters on federal lands, but retains its power to vest in itself water rights in unappropriated waters. This power may be exercised independent of substantive state law.*[45]

## *ANALYSIS*

### *I. RESERVED RIGHTS*

*No attempt will be made to respond comprehensively to all of the reserved rights claims asserted by the Solicitor for the respective federal agencies. However, it is submitted that the Solicitor's opinion fails to accurately state the law in several areas. The following are examples.*

*(1) Bureau of Land Management*

*The Solicitor asserts the existence of reserved rights in springs and water holes on lands withdrawn pursuant to the Executive Order of April 17, 1926.*[46] *This order was issued pursuant to the authority granted by Congress in the Stockraising Homestead Act of 1916.*[47] *The term "spring" is said to include sources which are tributary to a water course or other body of surface water.*[48] *According to the Solicitor, the order operates to withdraw available public lands upon abandonment or forfeiture of a state water right in a spring or water hole existing prior to the date of the 1926 order.*[49] *The purposes for which the water is reserved is said to be stock watering, human consumption, agriculture and irrigation, including sustaining fish, wildlife and plants, and flood, soil, fire and erosion control.*[50]

*No court has held, nor is there any evidence leading to the conclusion, that the Stockraising Homestead Act of 1916, upon which the Solicitor relies, involved a reservation of water rather than merely land. Section 10 of the 1916 Act stated as follows:*

> *"Lands containing water holes or other bodies of water needed by the public for watering purposes shall not be designated under Sections 291-301 (for stock raising homesteads) of this title, but may be reserved under the provisions of Sections 141-143 of this title (the Pickett Act) . . .*[51]

*The Act thus authorized the withdrawal of lands containing water holes under a prior Act, namely the Pickett Act. In a decision by the Department issued on October 23, 1916,*[52] *it was determined that such withdrawals were to prevent anyone from entering on the withdrawn lands for the purpose of constructing works for the diversion of water without the consent and approval of the proper officers of the government. However, to the extent that water is rising on or within such reserved lands flowed in such a way that they thereafter became subject to appropriations and use under state law outside of the reservation, the Department conceded that a valid right thereto could be acquired: . . ."There is in the withdrawal of these lands nothing which prevents any person filing such an appropriation under the laws of Utah at any time."*[53]

*Although the Department reversed this interpretation in a subsequent Department decision in 1947*[54] *and in a 1950 Solicitors' opinion,*[55] *no court has upheld the reserved right claimed by the United States to water in springs and water holes located on lands withdrawn pursuant to the 1916 Act.*



*There is further no support for the Solicitor's assertion that (1) the 1926 Executive Order applies to lands which become of the character contemplated in the order subsequent to the date of the order,*[56] *and (2) also applies to lands upon which is located a spring or a water hole for which a private vested right to use the water was granted under state law, but which was subsequently abandoned or forfeited.*[57]

*As previously noted, Section 10 of the Stockraising Homestead Act of 1916 speaks in terms of the withdrawal of lands under a prior act; namely, the Pickett Act. As noted by the authors of the exhaustive study of reserved rights prepared for the Public Land Law Review Commission in 1969: "The Pickett Act does not appear to authorize the issuance of such "floating" orders, but contemplates withdrawals by the executive of specific lands."*[58]

*While conceding that the language and legislative history of public and water hole withdrawals compels the conclusion that the purposes were "relatively narrow and specific,"*[59] *the Solicitor concludes that the quantity of water reserved at each and every public water hole and spring is the total yield of each source.*[60] *Furthermore, contrary to a decision by the Tenth Circuit in 1976,*[61] *no exception is made for springs which are a tributary to water courses or other bodies of surface water off the reservation. The Solicitor's opinion in this regard is contrary to recent Supreme Court pronouncements concerning the scope of reserved rights.*

*In* ***United States v. New Mexico,***[62] *the Court reviewed its earlier decision in* ***Cappaert v. United States.***[63] *There, the Court upheld the government's claims to reserved rights in a pool of water in Devil's Hole in order to preserve a species of desert pupfish. However, the Court emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." In discussing this case, the Court in the* ***New Mexico*** *case stated as follows: "Without a certain quantity of water, these fish would not be able to spawn and would die. This quantity was therefore impliedly reserved when the monument was proclaimed . . ." The Court, however, went on to note that the pool, "need only be preserved, consistent with the intention expressed with the proclamation, to the extent necessary to preserve it's scientific interest . . . The district court thus tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the proclamation."*[64]

*The decisions by the Court in these cases came as a result of a careful examination of both of the asserted water right and the specific purposes for which the land was reserved. It is difficult to conceive of the same court accepting the kind of blanket claim to the entire yield of springs and water holes on lands withdrawn from the public domain around the western states, as asserted by the Solicitor's opinion. If a reserved right is relied upon, at the very least it is required that it be limited to minimal need.*

*The Solicitor asserts that the purposes of the spring and water hole withdrawals are stock watering, human consumption, agriculture*

*irrigation, and flood, soil, and erosion control. Such a broad interpretation must be considered as based entirely on speculation, for no such purposes are enumerated in the legislation or the legislative history of the statutes authorizing the withdrawals. Further, no court has sanctioned such broad purposes for these reserves. But even assuming the validity of the Solicitor's opinion in this area, reserved rights exist only in the amount necessary to accomplish those purposes, and no more. A blanket claim to the entire yield of these water sources is without merit.*

*(2) National Parks Service*

*(a) National Parks*

*The Solicitor claims reserved water rights for national park areas for a wide variety of uses for the purposes of (1) scenic, natural and historic conservation, (2) wildlife conservation, (3) sustained public enjoyment, and (4) national parks service personnel.*[65] *The Solicitor bases his conclusions as to park purposes primarily on the National Park Services Organic Act of 1916.*[66] *However, the Solicitor claims that the priority date for such claims is the pre-1916 date of each national park area's enabling legislation.*[67]

*The Supreme Court in the* ***New Mexico*** *case also cited the language of the National Parks Services Act in order to compare its broader language with the relatively narrow purposes for which national forests were to be reserved. For this purpose the Court also referred to legislation establishing Yosemite National Park and an act passed in 1897 authorizing the establishment within individual national forests of fish and game sanctuaries.*[68] *Referring to this discussion by the Court, the Solicitor concludes that "the Court intimated in* ***dictum*** *that the early park legislation's expressed concern for the natural curiosities and biotic elements would allow the assertion of reserved water rights required to fulfill such purposes."*[69] *That this is not a fair reading of the Court's discussion is made clear by a footnote accompanying the text of the Court's opinion. Footnote 19 reads as follows: "In comparing the 1897 Organic Act with enabling legislation for national parks and particular national forests, and with the Act of March 10, 1934, we of course* ***do not intimate*** *any views as to what, if any, water Congress reserved under the latter statutes."(emphasis added.)*[70]

*The assertion in the Solicitor's opinion that the purposes set forth in the 1916 Organic Act relate back to pre-1916 national parks is also contrary to the Supreme Court's most recent decision concerning the reservation doctrine in the New Mexico case. Similar to the argument advanced by the Solicitor, the government in the* ***New Mexico*** *case argued that the Multiple Use-Sustained Yield Act of 1960 merely confirmed the purposes for which national forests had always been administered so that reserved rights for recreational, aesthetic, and wildlife preservation uses were justified with an 1897 priority date, the date of the enabling legislation. The Supreme Court*



*rejected the notion of any retroactive effect of the Multiple Use-Sustained Yield Act. The Court concluded that Congress intended the Act to broaden the purposes for which national forests are to be administered. Thus, as the Court pointed out, even assuming that the 1960 Act expanded the reserved water rights of the United States, such rights would be subordinate to any appropriation of water under state law dating to before 1960.*[71]

*The same rationale is applicable to the Solicitor's argument. The 1916 National Parks Service Act is a general provision establishing a new agency with duties that would include the operation of national parks, national monuments, and national historic areas, each having a distinct public purpose warranting protection. The language cited was merely a summary of the separate purposes. But even assuming the 1916 National Parks Service Act expanded the reserved water rights of the United States, such rights must be considered subordinate to any appropriation of water under state law prior to 1916.*[72]

*(b) National Monuments*

*The National Parks Service Organic Act of 1916 also cannot have a retroactive effect, as the Solicitor suggests, so as to allow reserved rights to be asserted for the purposes enunciated in the Act, but with pre-1916 priority dates. The legislation actually authorizing the withdrawal of public lands for national monuments, the Act for the Preservation of American Antiquities Act of 1906,*[73] *specifically refers to withdrawals of public land for "historic" and "scientific" purposes, "the limits of which in all cases shall be confined to the smallest areas compatible with the proper care and management of the objects protected."*[74] *There is no evidence in the language of the Act to indicate that Congress intended the national monument lands to serve the much broader purposes now asserted by the Solicitor. But again, even if the 1916 National Parks Service Act is considered to have broadened the reserved rights of the United States for national monuments, the respective priority dates cannot be prior to 1916.*

## *II. NON-RESERVED WATER RIGHTS*

*Most egregious from the viewpoint of the states is the Solicitor's assertion of a new basis for federal water rights. The Solicitor concludes that, "Since the federal government has never granted away its right to make use of unappropriated waters on federal lands, . . . the United States has retained its power to vest in itself water rights in unappropriated water and it may exercise such power independent of substantive state law."*[75]

*Such water rights are available to fulfill authorized congressional purposes on the public domain, reserved and acquired lands, according to the Solicitor. Such uses may be consumptive or non-consumptive uses such as for "fish and wildlife, scenic values, and*

*areas of critical environmental concern."*[76] *The priority date is the date of initial use, and the quantity of the right is determined by the requirements necessary to carry out "congressionally authorized management objectives on federal lands."*[77] *The Solicitor admits that the Supreme Court has never sanctioned such rights by the federal government, but rather refers to "inconsistent dictum" on this subject.*[78]

*The Solicitor thus demonstrates little respect for the most recent decision by the Supreme Court concerning the reservation doctrine,* ***United States v. New Mexico.***[79] *After noting traditional congressional deference to state water law, the Court found that where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude that the United States intended to reserve the necessary water. However, the Court went on to determine that "where water is only valuable for a secondary use of the reservation, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator."*[80] ***In*** *other words, except in the case of reserved rights to carry out the primary purpose of the reservation, the Court determined that federal agencies are to acquire water for other congressionally authorized uses pursuant to state laws, like any other appropriator.*

*The Solicitor's Opinion suggests that the Court may have been referring to mere compliance with state procedures, rather than with procedural and substantive state water law. However, an objective reading of the language of the Court in context makes it clear that the Supreme Court intended compliance with both substantive and procedural state laws.*

*In the sentence immediately following the Court's conclusion that the government, with the exception of reserved rights, would acquire water in the same manner as any other public or private appropriator the Court stated that "Congress indeed has appropriated funds for the acquisition under* ***state law*** *of water to be used on federal reservations."*[81] *(emphasis added) The Court then cited an example in the National Parks Act where, "Congress authorized appropriations for the "invest(i)gation and establishment of water rights in accordance with local custom, law, and decisions of courts, including the acquisition of water rights or of lands or of interest in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments."*[82]

*Again in supporting its earlier conclusion, the Supreme Court referred to the fact that "the agencies responsible for administering the federal reservations have* ***also*** *recognized Congress' intent to acquire under* ***state law*** *any water not essential to the specific purposes of the reservation." (emphasis added)*[83]



*Moreover, a distinction between procedure and substance with respect to the appropriative doctrine is conceptually untenable. The procedures by which an individual acquires an appropriative water right consists of a permit which represents a state determination that the water will be used for "beneficial" purposes. This right is inherently limited by the duty, usually found in the conditions in the permit, to stop using water when its use ceases to be "beneficial."*[84] *Substantive rights can therefore only be acquired by following specified procedures, and in following successfully these procedures, substantive obligations are imposed related to beneficial use. Thus, requiring federal agencies to comply with state "procedures," but not substantive water law would be entirely incongruent with state systems for allocating water in the West.*[85]

*That the Congress intended no such result in the* ***New Mexico*** *case is also clear from the decision which was issued on the same day in* ***United States v. California.***[86] *The Court in the* ***California*** *case rejected a similar argument that Section 8 of the 1902 Reclamation Act merely required the Secretary of Interior to file a notice with the states of its intent to appropriate and to thereafter ignore the substantive provisions of state law. In support of its conclusions, concerning the need to observe state water law, the Supreme Court cited from the Senate report on the McCarran Amendment,*[87] *which subjects the United States to state-court jurisdiction for general stream adjudications:*

> *"In the arid western states, for more than eighty years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the state in which it is found, which state is vested with the primary controls thereof . . .*
>
> *Since it is clear that the states have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the state, if there is to be a proper administration of water law as it has developed over the years."*[88]

*The Solicitor rejects this philosophy because "then the federal land manager would have to manage the same kind of federal lands significantly differently in different states, depending on local law."*[89] *This argument, however, fails to recognize what the Solicitor himself concedes in another part of the opinion; namely, that other methods are available to the United States by which it can acquire water rights for use on federal lands besides acquiring water rights in unappropriated waters pursuant to state water laws. As the Solicitor notes, "chief among these well recognized methods are purchase, donation, exchange or condemnation."*[90] *Indeed, Congress has given federal agencies the authority, and federal agencies have used these methods for this purpose, as the Solicitor himself concedes.*

*Beyond this, the Solicitor takes no cognizance of the problems that would result for federal agencies as well as state administrators and water right holders if the agencies were allowed to ignore substantive state law in acquiring non-reserved federal water rights. In discussing Congress' insistence in the Reclamation law that federal agencies comply with substantive state law in acquiring and distributing water from Reclamation projects, the Supreme Court cited a statement from then Representative Sutherland that, "If the appropriation and use were not under the provisions of the state law the utmost confusion would prevail." The Court noted that different water rights in the same state would be governed by different laws and would frequently conflict . . . "The principal motivating factor behind Congress' decision to defer to state law was the legal confusion that would arise if federal water law and state law reigned side by side in the same locality."*[91]

*This is the result that would occur if the courts upheld the Solicitor's theory concerning non-reserved federal water rights. Unless federal administrators determined that state substantive law "recognizes federal appropriative rights in all pertinent respects,"*[92] *so-called non-reserved water rights would exist side by side with state appropriative rights, both governed by different laws, leading to precisely the kind of confusion that the Supreme Court found inconsistent with congressional intentions concerning federal-state relations in water law.*

*The Solicitor states that the case law supports his assertion of the existence of non-reserved federal water rights. However, an examination of the cases cited, in addition to the recent Supreme Court pronouncements on federal water rights, leads to the opposite conclusion.*

*The Solicitor relies heavily upon the* ***dictum*** *of* ***United States v. Rio Grande Irrigation Co.****: ". . . in the absence of specific authority from Congress the state cannot by its legislation destroy the right of the United States, as the owner of land bordering on a stream, to the continued flow of the water; so far at least as may be necessary for the beneficial uses of the government property."*[93] *This represents a simple statement of the supremacy doctrine. It means if the United States needs water to implement a federal statute, it has the constitutional power to take it.*

*In the first case actually involving a reserved right,* ***Winters v. United States***[94] *the Court referred back to the* ***dictum*** *in* ***Rio Grande*** *for the proposition that "the power of the government to reserve the waters and exempt them from appropriation under state laws is not denied, and could not be."*[95] *In the case of* ***Arizona v. California,***[96] *where the reservation doctrine was extended to non-Indian reservations, the Court again spoke in terms of supremacy: "we have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property."*[97] *Thus, the Court itself has interpreted its earlier language to mean that the United States has the constitutional power to reserve waters*



*and exempt them from state jurisdiction. This has always been the premise upon which the reservation doctrine has been based.*

*On the other hand, the Supreme Court has never upheld a claim by the federal government to appropriate waters without compliance with state law and without basis in the reservation doctrine. To the contrary, recent decision of the Supreme Court should have been dispositive of this issue.*

*The Court in* ***California,*** *in what was obviously intended as a landmark decision, discussed the* ***Rio Grande*** *case as follows:*

*"In* ***United States v. Rio Grande Dam and Irrigation Co., supra*** *for example, New Mexico's authority to adopt a prior appropriation system of water rights for the Rio Grande river was challenged. The Court, unhesitatingly, held that 'as to every stream within its dominion, a state may change the common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.' The Court noted that there are two limitations to the States' exclusive control of its streams — reserved rights "so far at least as may be necessary for the beneficial uses of the government property" and the navigation servitude. The Court, however, was careful to emphasize with respect to these limitations on the states power that, except where the reserved rights or navigation servitude of the United States are invoked,* ***the State has total authority over its internal waters."*** *(emphasis added).*[98]

*Although the* ***California*** *case did not involve a claim by the United States to a reserved right, the case was cited by the Court in its* ***New Mexico*** *decision, which was issued on the same day. In that case, the Supreme Court stated that where the United States was not entitled to a reserved right to carry out the primary purposes of a reservation, "Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator."*[99]

*Considering both decisions, it is difficult to conceive of a clearer statement by the Supreme Court to the effect that the state has been given exclusive power to allocate water from its streams, except where the United States invokes the reservation doctrine or the navigation servitude.*

*The Solicitor also places reliance on court decisions not involving a federal water rights claim.* ***United States v. Little Lake Misere Land Co.,***[100] *is basically a choice of law case. The United States brought a title action to land parcels that it acquired for a wildlife refuge in Louisiana. The parcels, which were acquired in 1937 and 1939 reserved to the grantor the right to extract minerals for 10 years. The Court held that the United States had acquired mineral rights in spite of a 1940 Louisiana statute that had provided mineral rights reserved by the grantor in conveyances to the United States are "inprescriptable."*[101]

*The Court noted that the United States is governed generally in its ordinary proprietary relations by state law, but it said that this case bore heavily upon a federal regulatory program, and the choice of law here was a task for federal courts. The Court declined to apply the Louisiana Statute because it deprived the United States of an interest for which it had specifically bargained. The Court specifically declined to overturn the general rule that state property law should govern federal land acquisitions.*

*It is difficult to see how the* ***Little Lake Misere*** *case can be general authority for a non-reserved water right. The case recognized that the state law generally applies to property acquisition. Moreover, the case appears to be an unusual exception to the general rule that there is no federal common law.*

*The Solicitor also cites the decision of a federal district court in* ***Nevada ex. rel. Shamberger v. United States.***[102] *The Court held in that case that the federal government could use underground waters located under a naval depot without obtaining a permit from the state. The court reasoned that since the United States possessed both ownership and control of the land within the scope of its delegated functions under the war power, it enjoyed a superior position under the supremacy clause and state laws need not be observed.*

*It must first be noted that the court was not dealing with federal claims to water rights as against private users. Secondly, the Ninth Circuit on appeal directed that the case be dismissed because the district court was without jurisdiction.*[103] ***Shamberger*** *thus has little or no value as a precedent in support of the Solicitor's assertion of non-reserved water rights.*

***Kleppe v. New Mexico***[104] *was also not a water rights case. The Court held that the federal Wild Free-Roaming Horses and Burros Act preempts enforcement of the New Mexico's estray law. A three-judge court had held that the Wild Horses Act was unconstitutional, because it was in excess of Congress' power under the property clause. The Supreme Court reversed. The Court noted the detailed findings which Congress had made on the need to protect wild horses and burros as an integral part of the public lands. In reviewing congressional intent, the Court noted that "while courts must eventually pass upon them, determinations under the property clause are entrusted primarily to the judgement of Congress."*[105] *Thus, while the case makes it clear that the property clause gives Congress the authority to enact legislation protecting federal property, it does not sustain similar prerogatives on the part of an administrative agency in the absence of explicit congressional directions.* ***Kleppe*** *is particularly inappropriate where congressional intent has been declared to be that federal agencies will comply with state law for the acquisition of water rights, with the exception of the reservation doctrine and the navigation servitude.*



*The case of* ***United States v. Grand River Dam Authority***[106] *involved the question of whether the construction of a hydroelectric power project on a non-navigable river by the United States involved a taking under the 5th amendment, because it frustrated the dam authority's expectations to develop a hydroelectric project at the same site. The federal power project was a part of a comprehensive plan for regulation of navigation, flood control and power development on the Arkansas River, a navigable river in Oklahoma. The Supreme Court held that the dam authority's interests were not compensable because an assertion of the United States superior authority under the commerce clause to improve navigation is not a taking under the fifth amendment. Thus, the case does not support a so-called non-reserved water right, but rather involves United States supremacy over navigation under the commerce clause.*

*The Supreme Court's decision in* ***United States v. District Court for Eagle County***[107] *is also cited by the Solicitor. The Court held that the United States is subject to the jurisdiction of state courts in a general stream adjudication pursuant to the McCarran Amendment. The Court specifically held that all federal rights are subject to such adjudication. The Solicitor refers to the phrase in the McCarran Amendment "water rights which the United States has otherwise acquired" as an indication of the existence of non-reserved rights. However, the Court in Eagle County specifically interprets "otherwise" to mean reserved rights.*[108]

*The Solicitor draws particular attention to the language by the Supreme Court in* ***Cappaert v. United States***[109] *to the effect that "federal water rights are not dependent upon state law or state procedures . . ."*[110] ***Cappaert*** *was a reserved rights case, which upheld the government's claim to reserved rights to protect a species of pupfish. The cited language must be examined in context and there is nothing in the opinion to show that the Court was considering anything other than a reserved right. The Court's language was in response to the petitioner's argument, as restated by the Court, that "the federal government must perfect its implied (reserved) water rights according to state law."*[111] *Thus, the language cited by the Solicitor does not support the proposition of another exception to state jurisdiction in the form of non-reserved federal water rights.*

*The Solicitor's opinion also claims that the existence of non-reserved federal water rights is "unanimously recognized by commentators and others."*[112] *However, the Solicitor misconstrues the statements which he cites in support of his conclusion. It cannot be denied that the United States has ample constitutional power to acquire water it needs to carry out a program authorized pursuant to its constitutional responsibilities. No state law could block or limit the use of water by an agency if a constitutionally enacted statute gave that agency the power to acquire water without reference to state law for a federal function on any federal land in any state.*[113]

*This is the thrust of the statements cited by the Solicitor. However, the fact that constitutional power exists does not mean that constitutional power has been exercised. As has been previously pointed out, the Supreme Court in two recent landmark decisions stated clearly that Congress has deferred to the states the allocation of waters from state streams, except in the case of reserved rights and as necessary to improve and protect navigation.*

*The deference to state jurisdiction over water allocation does not mean federal agencies are powerless to acquire water to carry out federal programs. Congress, in many instances, has granted federal agencies the authority to acquire water rights pursuant to state laws to carry out federal programs on federal lands.*[114] *As the Solicitor points out, the claims for appropriations which he asserts would be "recognized under the water law of most of the western states, and therefore no conflict with state systems should generally exist."*[115] *Furthermore, as the Solicitor himself concedes, the federal government has the power to acquire water rights through purchase, exchange, donation, and condemnation.*[116] *No reliance on the Solicitor's theory of the existence of non-reserved water rights is necessary.*



## *CONCLUSION*

*That the Solicitor has fashioned a new theory on which to base federal water rights seems clear. No court has ever sanctioned this new theory. To the contrary, recent Supreme Court decisions leave no room for establishment of a new exception to state jurisdiction over allocation of water resources. While Congress unquestionably has the constitutional power to control such allocation, it has wisely deferred such decisions to the states, with the exception of reserved rights and the navigation servitude. At the same time, Congress has given federal agencies ample authority to acquire water rights for federal purposes pursuant to state laws. There is no need to rely on a tenuous theory of a retained proprietary right in unappropriated waters, but which only "arises from actual use."*

*The reasons for development of this new theory by the department can also be surmised. The Supreme Court in the New Mexico case denied the government's claims to reserved rights for instream uses on forest lands for aesthetic, recreation, wildlife-preservation, and stockwatering privileges. Besides being a vital source of timber, national forest system lands are considered the most important watershed areas under any agency of the United States. In the eleven western states, more than half of the stream flow comes from national forests.*[117]

*Having lost the effort to claim such instream rights through the reservation doctrine, it is not difficult to conceive that federal agencies will try again in light of the Solicitor's opinion to claim that such instream non-consumptive uses have been "appropriated" by the federal government for congressionally authorized purposes and therefore should be upheld without reference to state substantive law. Such claims could be anticipated not only from the Forest Service, but also from the National Park Service, the Fish and Wildlife Service and the Bureau of Land Management as well.*

*If such claims were asserted, there would be little consolation in the Solicitor's instruction to the federal agencies to comply with state procedural laws "to the greatest practical extent" and state substantive law "where that law recognizes the federal appropriative rights in all pertinent respects." Such qualifications on the Solicitor's instructions jeopardize even their one useful purpose of providing notice of federal claims.*

*In light of the clear language recently enunciated by the Supreme Court concerning state-federal relations in water law in general, and the reservation doctrine in particular, the Solicitor's opinion must be seen as espousing the kinds of hypothetical and theoretical claims which the President denounced in his water policy message of June 6, 1978. Such claims must be rejected.*

## *FOOTNOTES*

## *WSWC PROPOSED RESPONSE TO THE SOLICITOR'S OPINION*

1. *Solicitor's Opinion No. M-36914, U.S. Dept. of Intertior (June 25, 1979) (hereinafter referred to as the Solicitor's Opinion).*
2. *14 Weekly Comp. of Pres. Doc. 1043-51 (June 6, 1978).*
3. *U.S. Dept. of Interior, Second Progress Report on the Implementation of the President's Water Policy Initiatives 16 (Jan. 23, 1979).*
4. *C. Wheatley & C. Corker, **Study of the Development, Management, and Use of Water Resources on the Public Lands** 80 (1969).*
5. *F. Trelease, **Federal-State Relations in Water Law** 257 (1971).*
6. *Solicitor's Opinion at 11.*
7. *438 U.S. 696 (1978).*
8. *438 U.S. 645 (1978).*
9. *For a general description of state water laws, see R. Dewsnup & D. Jensen, **A Summary-Digest of State Water Laws** (1973) (a study prepared for the National Water Commission).*
10. ***California-Oregon Power Co. v. Beaver Portland Cement Co.,** 295 U.S. 142 (1935).*
11. ***Id.***
12. *C. Martz, **The Role of the Government in State Water Law,** 5 Kan. L. Rev. 626, 633 (1957).*
13. *E.g. Reclamation Act of 1902, Section 8, State. 390, 43 U.S.C. Sections 372, 383, (1962); Federal Power Act of 1920, Section 27 Stat. 1077, 16 U.S.C. Section 821 (1952).*
14. *32 Stat. 390 (1902), 43 U.S.C. Section 383 (1970).*
15. *207 U.S. 564 (1908).*
16. *F. Trelease, **supra** note 5 at 105.*
17. *373 U.S. 546 (1963).*
18. ***Id.***
19. *F. Trelease, **supra** note 5 at 114.*
20. ***Id.** at 257.*



21. *Note, **Western Water and the Reservation Theory - The Need for a Water Rights Settlement Act,** 26 Mont. L. Rev. 199, 204-5, n. 31 (1965).*
22. *Note, **Federally Reserved Rights to Underground Water - A Rising Question in the Arid West,** 1973 Utah L. Rev. 43, 46.*
23. *National Water Commission, **Water Policies for the Future** 467 (1973).*
24. *357 U.S. 275 (1958).*
25. *372 U.S. 627 (1963).*
26. *373 U.S. 546 (1963).*
27. *Sax, **Problems of Federalism in Reclamation Law,** 37 U. Colo. L. Rev. 49 (1964).*
28. *357 U.S. at 291.*
29. *Sax, **supra** note 27 at 53.*
30. *45 Stat. 1057 (1928), 43 U.S.C. Section 617 (1970).*
31. *373 U.S. at 587.*
32. *Sax, **supra** note 27 at 55-56.*
33. ***United States v. California,** 403 F. Supp. 874 (E.D. Cal. 1975).*
34. *438 U.S. 645 (1978).*
35. ***Id.** at 674.*
36. ***Id.** at 665.*
37. *438 U.S. 696 (1978).*
38. ***Id.** at 700.*
39. ***Id.** at 702.*
40. *436 U.S. 604 (1978).*
41. *14 Weekly Comp. of Pres. Doc. 1043-51 (June 6, 1978).*
42. ***Id.** at 48-49.*
43. *U.S. Dept. of Interior, **Second Progress Report on the Implementation of the President's Water Policy Initiatives** 15 (Jan. 23, 1979).*

44. *Solicitor's Opinion No. M-36914, U.S. Dept. of Interior (June 25, 1979).*

45. *Solicitor's Opinion at 11.*

46. *Public Water Reserve No. 107, Executive Order of April 17, 1926.*

47. *Act of December 29, 1916, 43 U.S.C. Section 291* ***et. seq.***

48. *Solicitor's Opinion at 29-31.*

49. ***Id.***

50. ***Id.***

51. *Section 10 of the Act of December 29, 1916 (formally 43 U.S.C. Section 300) and the Pickett Act, 43 U.S.C. Section 141, were repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. Section 1701* ***et. seq.***

52. *State of Utah, 45 L.D. 551 (1960).*

53. ***Id.*** *at 554.*

54. *Jack A. Medd, 60 I.D. 83 (1947).*

55. *Solicitor's Opinion M-33969, U.S. Dept. of Interior (Nov. 7, 1950).*

56. *Solicitor's Opinion at 31.*

57. ***Id.***

58. *C. Wheatley & C. Corker,* ***Study of the Development, Management, and Use of Water Resources on the Public Lands*** *265 (1969).*

59. *Solicitor's Opinion at 23.*

60. ***Id.*** *at 24.*

61. ***Hyrup v. Kleppe,*** *Nos. 76-1452 and 76-1767 (10th Cir., Nov 7, 1977).*

62. *438 U.S 645 (1978).*

63. ***Cappaert v. United States,*** *426 U.S. 128 (1976).*

64. *438 U.S. at 700-702, n.4.*

65. *Solicitor's Opinion at 43.*

66. *Act of August 25, 1916, 39 Stat. 535,* ***as amended,*** *16 U.S.C. Section 1 (1970).*



67. *Solicitor's Opinion at 45.*

68. *438 U.S. at 659-61.*

69. *Solicitor's Opinion at 42.*

70. *438 U.S. at 711.*

71. ***Id.*** *at 713-14, n.21.*

72. ***See, id.***

73. *Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. Section 431 (1970).*

74. ***Id.***

75. *Solicitor's Opinion at 11.*

76. *Solicitor's Opinion at 70.*

77. *Solicitor's Opinion at 15.*

78. ***Id.*** *at 9.*

79. *438 U.S. 696 (1978).*

80. ***Id.*** *at 702.*

81. ***Id.***

82. ***Id.***

83. *438 U.S. at 703.*

84. *R. Dewnsup & D. Jensen,* ***A Summary - Digest of State Water Laws*** *29-31 (1973) (A Study Prepared for the National Water Commission).*

85. *W. Hutchins,* ***Water Rights in the Nineteen Western States,*** *Vol. I, 292-343 (1971).*

86. *438 U.S. 645 (1978).*

87. *Dept. of Justice Appropriation Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. Section 666 (1970).*

88. *S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951).*

89. *Solicitor's Opinion at 17.*

90. *Solicitor's Opinion at 6.*

91. *438 U.S. at 668-69.*

92. *Solicitor's Opinion at 18.*

93. *174 U.S. 690, 703 (1899).*

94. *207 U.S. 564 (1908).*

95. ***Id.***

96. *373 U.S. 546 (1963).*

97. ***Id.** at 598.*

98. *438 U.S. at 662.*

99. ***Id.** at 702.*

100. *412 U.S. 580 (1973).*

101. ***Id.** at 604.*

102. *165 F. Supp. 600 (D. Nev. 1958),* ***aff'd on other grounds,*** *279 F. 2d 699 (9th Cir. 1960).*

103. *279 F. 2d 699 (9th Cir. 1960).*

104. *426 U.S. 529 (1976).*

105. ***Id.** at 536.*

106. *363 U.S. 229 (1960).*

107. *401 U.S. 520 (1971).*

108. ***Id.** at 524.*

109. *426 U.S. 128 (1976).*

110. *Solicitor's Opinion at 17.*

111. *426 U.S. at 143.*

112. *Solicitor's Opinion at 16.*

113. *F. Trelease,* ***Federal-State Relations in Water Law*** *147 N (1971).*

114. ***United States v. New Mexico,*** *438 U.S. 696, 702-703 (1978).*

115. *Solicitor's Opinion at 17.*

116. ***Id.** at 18.*

117. *C. Wheatley & C. Corker,* ***supra*** *note 4 at 211.*



## *OBSERVATIONS OF THE WESTERN STATES WATER COUNCIL CONCERNING THE REPORT OF THE FEDERAL TASK FORCE ON NON-INDIAN RESERVED RIGHTS (Task Force 5a) PRESIDENT'S WATER POLICY IMPLEMENTATION*

*October 25, 1979*

### *INTRODUCTION*

*The twelve western states, members of the Western States Water Council, express the following observations concerning the 77 page Task Force report, released by the President's water policy implementing team in June of 1979.*

*The detailed comments which will follow this introduction are intended to be constructive and helpful and are directed specifically to the various sections of the report and the many recommendations made by the Task Force. However, it would be inappropriate to make these constructive suggestions without preliminary comment regarding the setting and atmosphere which the western states sense as they make these comments.*

*More than two years ago, the President announced his intentions to institute significant water policy reform. The states were concerned that there would be an encroachment upon areas of state responsibility and those fears were heightened by initial widesweeping options that were published by the federal government.*

*The water rights area was the area in which the western states felt the most concern. The many months of deliberations allowed for a great number of meetings and the exchange of many ideas. Much has been accomplished to eliminate proposals that would not be in the interest of either the states or the federal government. Still, there lingers the concern over the potential encroachment into the area of states' responsibilities. On several occasions, federal officials given specific responsibility for the implementation of the President's reform, have assured the states that the water right doctrines of the various states will be respected. Assurances have been given by the Assistant Secretary of Interior for Water and Land, by the Secretary of Interior, and by the Vice-President. However, because of continuing concern expressed by officials of western states, including western governors, the President met with the governors and stated, "I want to make clear from the very beginning that there absolutely will be no preemption of state or private prerogatives in the use of management of water. This is not the purpose of the policy at all." This assurance by the President addressed the total spectrum of water management and did not limit his promise to the question of state-federal water rights.*

*This promise was welcomed by western governors and did much to facilitate further cooperation among state and federal officials working on the details of the potential reform effort in the water right area. This built on a previous presidential statement which indicated*

*that the federal government would be willing "to negotiate in the area of reserved water rights and settle such rights in an orderly and final manner, seeking a balance with conflicting and established water uses." The President went on to say that agencies are to, "Utilize a reasonable standard when asserting federal reserved rights which reflect true federal needs rather than theoretical and hypothetical needs based on the full legal extension of all possible rights. In consultation with the Department of Justice, each of you shall develop procedures and standards for the purpose of implementing these directives."*

*In the past, western states have found it difficult in many cases to adjudicate federal water rights because of the insistence of federal attorneys claiming in court the most "hypothetical" rights that can be conceived, with the hope that a maximum right might be adjudicated to the federal government. These presidential promises gave new hope to the states that expedient determination of federal reserved rights could be accomplished.*

*Following the President's promise, the Supreme Court in the summer of 1978 ruled on three important cases,* ***United States v. New Mexico, Andrus v. Charlestone Stone Products,*** *and* ***United States v. California,*** *and found the federal reserved right to be limited. The Supreme Court further found that federal agencies were to comply with state law in establishing water rights with the exception of reserved rights.*

*Recently, the Solicitor for the Department of Interior released an opinion as to the water rights held by the Department of Interior. The Solicitor's opinion flies in the face of the promises of the President and stands as a potential major obstacle in the cooperative and expedient determination of federal and state water rights in the West. In fact, the western states view the document not as an opinion impartially prepared, but rather, an advocate's statement trying to do what the President had pormised not to do; that is, to stretch the theoretical and hypothetical claims of the federal government to their maximum in preparation for extensive litigation. The most repugnant aspect of the Solicitor's opinion is the attempt to establish a new federal right identified by the Solicitor as a federal non-reserved water right. This new doctrine espoused by the Solicitor appears to be an attempt to circumvent the clear determination of the Supreme Court with respect to the limitation of federal water rights. (**United States v. New Mexico,** 438 U.S. 696,702 (1978)*

*Governor Matheson of Utah recently evaluated the effort of the Solicitor of the Department of Interior with the following statement: "In its assertions concerning non-reserved federal rights, the Solicitor's opinion must at best be seen as espousing the kind of hypothetical and theoretical claims which the President rejected. At worst, it is flatly contemptuous of the Supreme Court's recent decisions on the issue."*



*We do not intend to address the Solicitor's many faceted opinion in detail in this introductory statement. The Western States Water Council is currently preparing a detailed legal analysis of the positions taken by the Solicitor in his recent "opinion." However, even though the Solicitor's opinion must be limited to the Department of Interior which he serves, it should be noted that the Department of Interior chairs the Task Force on Non-Indian Reserved Rights. It should further be noted that the Solicitor, when explaining the relationship between the Task Force report and the Solicitor's opinion, stated that, "It is from the Solicitor's opinion that the Task Force report must flow."*

*The Carter Administration's view that the establishment of new water rights by the federal government to satisfy federal purposes based on state law is on the mark. However, the approach which contemplates the establishment of new* ***non-reserved*** *federal law-based water rights relying on general congressional directives on resources management, should be abandoned immediately. Use of this new federal device for establishing rights, even applied in a limited fashion, is not only on thin ice from a legal base, but it would add further confusion and new friction to an already strained federal-state relationship. Additionally, it appears to be inconsistent with President Carter's policy directives.*

*A major emphasis of the task force report seems to be aimed at the establishment of "instream flow rights." Before the federal government attempts to establish such a right based on federal laws and outside the state laws, the federal government should carefully evaluate the laws of the various states to determine if establishment of such "rights" is required.*

*As a general observation, the Task Force report makes some reasonable recommendations with respect to alleviating the uncertainty and acrimony surrounding reserved rights claims by the federal government. However, the report should integrate the reserved rights portion of the Solicitor's opinion of June 23, 1979, and should recommend that the assertion of non-reserved rights for public lands which appeared in that opinion be withdrawn as a matter of policy, in keeping with the President's directive to end the uncertainty surrounding federal water claims within the states and to "strengthen federal-state relations in the water policy area."*

*The comments that follow are made with respect to* ***non-Indian*** *reserved rights. The determination to remove the federal reserved Indian water rights from this analysis was made by the federal government and in the western states' view was an error. Federal reserved Indian water rights must be considered as a part of the total problem and therefore, Task Force 5a has been forced to address only a portion of the problem and has also been required to thread its way through the effort wearing blinders. There is no basis in law upon which to distinguish the adjudication of federal proprietary reserved rights from those held in trust for the Indians. In fact, the*

*United States Supreme Court, in both the* ***Eagle County*** *and* ***Akin*** *cases, specifically provided that the McCarran Amendment allows the several states to adjudicate all forms of federal water rights, both Indian and non-Indian. Constitutionally it is not possible to adjudicate Indian water rights and Non-Indian water rights in different forums. Due to the nature of Indian water right claims, those claims are by far the most threatening to existing state water users and their exclusion from state adjudication proceedings would make a sham of the efforts of the federal government to settle the controversy surrounding federal reserved water rights. Suggesting that the federal government may determine that state adjudications may result in "manifest unfairness to federal interests," constitutes an affront to the western states and their judicial systems. Those systems are governed by the same principles of federal constitutional law that apply in federal courts and include the additional safeguards of state constitutional law.*



## *COMMENTS CONCERNING SPECIFIC RECOMMENDATIONS OF THE TASK FORCE*

### *A. Timetable for Identification and Quantification of Federal Water Rights*

*1. The Western States Water Council believes it should be acknowledged that this recommendation is relevant only where a state does not have a procedure under which the United States can be joined under the McCarran Amendment. The procedure provided by the McCarran Amendment is both an adequate and highly satisfactory method for adjudication and quantifying federal water rights. This recommendation with respect to the establishment of consumptive water rights should include some very precise instructions when implemented as to the nature of the claims that should appropriately be alleged by the federal agency. Previous litigation has been significantly hampered by the federal government citing theoretical and hypothetical needs that were based on full legal extension of all possible rights. For this to continue would be in direct disregard of the President's memorandum of July 12, 1978, and would significantly delay, complicate, and increase the cost of the federal water right determination process.*

*If reasonable standards are used to assert the federal reserved right, the five year timetable proposed by this recommendation is reasonable to at least identify claimed federal water rights in priority areas.*

*2. The ten year period for the identification of non-consumptive uses as proposed, is too long and is not reasonable. State courts are not going to be willing to give federal agencies this period of time to quantify their non-consumptive uses. The Western States Water Council sees no reason for the federal government to delay their quantification of reasonably foreseeable uses (if such rights do exist) beyond the five year period proposed by the Task Force for consumptive uses. On page 39 of the explanation for the recommendation, it is stated that, "It is essential, however, that all these uses be quantified by the Federal Government." It must be recognized that, pursuant to the McCarran Amendment, as litigation is pursued in state courts quantification will be accomplished by the state court process. Therefore, it is not essential that quantification be conducted initially in all cases by the federal government.*

*The acknowledgement that there should be some exceptions for agencies that are involved with planning cycles, is appropriate, as long as it is recognized that the federal agency has no option if, under the McCarran procedures, the state brings the agency into a state determination and therefore could not be granted the 15 year exemption proposed.*

*3. The federal government has no rights for sustaining groundwater levels for general ecosystem maintenance. Such a "water right" is nothing more than a way of articulating a new doctrine of federal dominion over groundwater. Any task force recommendation which would lend support or credence to such rights would frustrate federal-state relations and undermine the President's stated objectives.*

*4. The Task Force recommendation is only a statement that federal agencies cannot perform necessary services and meet previously identified commitments unless necessary funds are appropriated. It should be pointed out, however, that sometimes it is necessary for the agencies to do the best possible with funds available; for example, when the federal government is joined by the states in a general adjudication of a stream under the McCarran Amendment.*

*B. Procedures for Integrating Federal Water Rights in State Systems*

*5. On its face, this recommendation may appear to be conciliatory toward state water administration systems in that it urges, "as much as practicable," the use of state law procedures where the United States is claiming a right to use water other than under a reserved water right. However, the nature of the "as much as practicable" qualification contained in the recommendation might as easily signify to state water administrators that they are witnessing the attempted conception of a quasi-reserved rights doctrine which in potential would bolster, if not overshadow, its older brother.*

*The second sentence of the recommendation suggests that in those instances where the United States finds it "not practical" to use state law procedures, the state should nevertheless be notified of the nature and extent of the federal water use.*

*The discussion in the Task Force report following recommendation number 5 appears to support a conclusion that what is being suggested, more importantly than integration or cooperation with state law procedures, is a legal theory recognizing the establishment of federal non-reserved water rights outside the provisions of substantive state water law. The recommendation is an apparent reaction in part to language in the recent United States Supreme Court decision in* **United States v. New Mexico,** *438 U.S. 696, 702 (1978) stating in effect that rights to the use of non-reserved waters by the United States must be acquired in the same manner as any other public or private appropriation, i.e., through compliance with the procedural and substantive provisions of state water law.*

*Discussion following the recommendation attempts to soften its effect by noting that perhaps the only purpose for which the United States would "appropriate" non-reserved water outside the provisions of state substantive law is for instream flow maintenance on reserved and non-reserved federal lands. Limiting such appropriations to instream flow purposes might lessen their overall effect, but the impact on potential upstream water uses could still be severe depending upon the relative location of the federal land tract. Downstream*



*water users would also be adversely affected in that the right to transfer an existing point of diversion upstream would be denied to the extent that it caused interference with the instream flow use.*

*In any event it is clear that non-reserved federal rights do not exist. If they did exist the Court never would have had to distinguish between public domain and reserved lands, and the development of the reservation doctrine would have been unnecessary. Further,* **United States v. New Mexico** *specifically held that the reservation doctrine is the only exception to the relinquishment of plenary control over non-navigable western waters to the individual states.*

*More important, however, than the actual effects from any instream flow maintenance requirements would be the establishment and inevitable expansion of a new doctrine for acquiring federal water rights outside the state systems for purposes not yet recognized in law.*

*It is noted that the discussion in the Task Force report suggests following state appropriation procedures where state law recognizes the proposed federal water use as beneficial. No indication is made, however, that the Task Force views this as anything more than a mere courtesy to the states. It may be wondered whether a federal agency having had its application for a water permit appropriately denied under state law would thereafter proceed to exercise its use of the water outside the provisions of state water law.*

*The Task Force identifies three alternatives available to a federal agency in states which do not recognize instream flows as a beneficial use. These alternatives are in effect to (1) ignore the congressional directive to manage the land in part for instream uses, or (2) establish or claim a water right outside the provisions of state law, or (3) seek to create a land reservation with an accompanying reserved water right. Absent from the list is an obvious fourth alternative. It is, simply, that the agency manage the federal land in part for congressionally-authorized instream flow uses without claiming a proprietary or an appropriative right to the instream flow. Frequently, the stream flows to be managed will flow through federal lands located upstream from any private development. This factor, together with the fact that downstream flows may be fully appropriated, should minimize interference with the federal management objectives.*

*Finally, a few practical questions may be raised in response to the discussion in the Task Force report. How, for example, will it be determined when an agency begins "actual use" of a minimum stream flow for a congressionally-established management objective? Is it the date of congressional action, the date of notification or application to the state, or, the date the first fish is planted, or the first float trip is licensed?*

*In conclusion, it may be stated that to the extent that recommendation number 5 suggests that the United States may appropriate non-reserved waters outside the provisions of state procedural and substantive law, it is not acceptable. To the extent that the recommendation urges federal compliance with the provisions of state law in appropriating non-reserved water rights, it is to be commended.*

*6. The first sentence of recommendation number 6 directing federal agencies to give notification to states concerning the identifying and quantity of their claimed reserved rights should be encouraged and applauded. The planning functions of state water administrators have long been hampered by the element of uncertainty which is generated by the existence of unquantified reserved water rights.*

*The Task Force report suggests that upon notification of the reserved rights claimed by the United States, each state should "incorporate" such rights into its water law system. The procedure for incorporating federal reserved rights into the state system will likely vary somewhat among the states. It is, however, unclear from the report exactly what legal significance the Task Force would attribute to the act of incorporating federal claims into the state water law system.*

*If, by use of the word incorporate, the Task Force is proposing that states accord to all federal reserved right claims a status comparable to decreed or adjudicated water rights, the state systems will be unable to comply with the proposal. Generally, a notice of a claim to a water right serves as notice to later right holders or subsequent appropriators and for the state that such a right may exist. It also provides vital information to the states necessary to assess current and future water needs. The ultimate existence of a water right cannot, however, be established upon the basis of a claim. Whether the right actually exists, and the scope and purpose of the right, can only be definitely determined through the adjudicatory process.*

*The Task Force report points out the difficulty encountered by some federal agencies claiming reserved water rights which are later determined invalid by the courts. The agency may then be forced to the state system to perfect a comparable water right. The problem described arises because the priority date assigned to the water right by the state may be the date of actual filing for a permit in full compliance with state procedure, rather than an earlier date corresponding to the date of a notice of claim to a reserved right, the date of a filing of notice with a disclaimer, or the date of first use of the water.*

*The report goes on to describe the disadvantages of receiving a later priority date, which is that, in low water years the available streamflow may be fully appropriated by downstream appropriators. Where the upstream federal use is for minimum stream flow purposes, there should not be a problem. If the upstream federal use*



*requires a diversion, or if there are other water users upstream from the federal minimum flow use, there may of course be an allocation problem.*

*Faced with this problem, the Task Force has set out four alternative courses of action available to the federal agency to be followed when a state refuses to grant a priority date as of the date the notice of claim was filed. The alternatives are as follows:*

*(a) Forego the reserved right claim and file under the state system in order to obtain a water right with an earlier priority date;*
*(b) institute a federal court action to determine as promptly as possible whether the reserved right exists;*
*(c) do nothing and leave the priority date to future litigation; or*
*(d) avoid, in appropriate circumstances, cutting back on water use in low flow years in order to avoid losing right to downstream users who begin uses after the date of the federal use.*

*To spare a federal agency from having to resort to any of these alternatives, the Task Force believes that states should agree to accept claims to federal reserved rights as adequate to create a water right with a priority date commensurate with the date of first use or the date of filing the notice of claim, if the reserved right as claimed is later found by a court not to exist. The Task Force says that the states have incentive to follow this procedure in order to avoid alternatives (b) and (d) set out in the previous paragraph.*

*The solution to the problem which the states are asked to accept demonstrates less than a full appreciation for how most state systems are operated. For states operating under a mandatory permit system, it is generally not possible for the state to assign to a new permit right a priority date other than the date of filing of the application for permit. Prior to a state having adopted a mandatory permit system, it is possible to have established a water right with a priority dating from first application of the water to beneficial use. This distinction perhaps explains the diverse treatment which the Task Force says federal agencies have received from the states.*

*Lastly, the recommendation of the Task Force that the federal agencies and the individual states sit down and agree on the procedures to be followed in notifying each state of all federal reserved right claims should be welcomed by all parties.*

### *C. Cut-Off Date for Assertion of New Reserved Rights on Existing Reservations*

*7. The policy statement emphasizes quantification. Certainty as to federal reserved water rights is highly desirable. However, the quantification process described in the statement falls far short of the desired objective. Quantification* **cannot** *be achieved by the federal government merely setting forth what it claims even if they are set forth in precise formula. Quantification in the desired sense can only be reached through the vehicle of adjudication in some judicial or quasi-judicial testing process. Normally the general adjudication*

*process as that term is generally understood in western water law, should be the vehicle followed to obtain quantification of federal water rights.*

*Assuming the desirability of quantification as the term is used in the report, the Western States Water Council believes the policy of cutting off or determing not to assert reserved rights which are not identified under the "quantification of use" by the government, is a sound policy. This is a policy now in effect where the federal government has participated in state adjudications and has waived the right to assert any additional or new reserved rights. The difficulty with this policy as to the effect on a subsequent administration as pointed out in the report, should be emphasized. Indeed, the present administration will not be in office when the policy would first be effectuated. A concern raised by the Department of Justice as to whether a President can relinquish property rights of the United States, is also worthy of careful evaluation. An argument might reasonably prevail to the effect that if the right is not identified under the quantification of use process by the government, there is then, in fact, no further right to abandon or fail to assert.*

*Further, the western states believe that national policy should be that the federal Executive should not assert any* ***reserved*** *rights to* ***satisfy*** *future needs, even for a reasonably "forseeable" period, based on* ***any*** *presently existing reserved rights. The Western States Water Council also believes there is a good legal argument that a reserved right is not an openended right.*

*D. Creation of Reserved Rights in New Reservations*

*8. New federal water rights should, whenever possible, be established under state law! The Task Force has identified that serious problems are created by the mode in which federal reserved water rights have been created in the past. The Western States Water Council concurs with this conclusion. Therefore, it is very appropriate that a comprehensive look now be given to the way in which reserved water rights can be created in the future. As is pointed out by the Task Force, this Administration cannot even by formally instituted policy, such as an executive order, bind another administration. It would, however, be a step in the right direction for the Executive to issue an order whereby no future reserved water rights are to be established by the Executive unless the right is precisely described in the order. A great majority of reserved water rights, however, have been created by interpretations of legislation by attorneys of the Executive branch and by the Judicial branch.*

*The Western States Water Council believes it would be very important to the solving of problems created by this procedure, to request the Congress to also look comprehensively at the problems created by previous procedures, and that they consider a legislative*



*remedy. The western states do not understand the timidity of the Task Force in making recommendations to Congress, as the President's water policy reform has not expressed that kind of reservation on other issues with respect to taking initiatives and urging Congress to follow the policies deemed appropriate by the Administrative branch. In fact, legislation may be the very best solution to the problem. In this way, future administrations would be bound more effectively than by the executive order proposed by the Task Force.*

*The Western States Water Council believes that in the future, reservations should only be created by legislation and not by executive order. Further, all water rights reserved in the future should be precisely identified in the legislation after very meaningful consultation with the states involved. The Western States Water Council has, for a number of years, worked on various legislative proposals intended to solve the problems created by the previous practice of establishing reserved water rights. The Secretary of Interior has, at this time, offered his support and cooperation to western states in urging Congress to enact reforms which the states feel are necessary with respect to issues created by the water policy reform effort announced by the President. It may well be that the states and the Administration should seriously consider legislation which could be supported by both parties and would significantly limit the way reserved water rights are to be created in the future.*

*The Western States Water Council also believes that it would be appropriate for the Administration to consider the option that water rights in the future are to be created only through the established state systems and not by the dual, cumbersome, confusing, and ineffective process that has resulted from the exercise of the reservation doctrine in the past.*

*The Western States Water Council agrees with the Task Force in that all new water rights must respect existing rights with priorities that are subsequent and subordinate to the existing rights. This must be explicit in any creation of new federal rights and can most effectively be accomplished within the established state water right systems.*

*As a minimum, the Western States Water Council concurs with the Task Force recommendation that when specific quantities of water are not identified in the future, a reserve of water shall be deemed not to have been made. The Council urges that at least this portion of the Task Force recommendation be enacted by legislation.*

*Finally, the Western States Water Council in its rejection of the Solicitor's opinion with regard to the existence of non-reserved water rights across the West, feels that the Task Force position under Item 9 is correct and is effective in rebutting the Solicitor's opinion that there are from coast to coast, in every state, non-reserved water rights. The Western States Water Council believes that as legislation is contemplated to identify the way in which reserved water rights*

*may be created in the future, that the legislation should include a declaration by Congress that there are no non-reserved water rights which can be exercised absent compliance with state substantive, as well as procedural, water law.*

*E. Procedures for Adjudicating Federal Reserved Rights*

*9. The Task Force report provides for greater participation by the federal government within state water right adjudication systems, and the Task Force should be commended for this position. Unfortunately, the recommendation suggests the federal government might challenge state jurisdiction where "manifest unfairness to federal interests would result."*

*As an alternative to the majority recommendation, the Department of Justice recommends that the United States only participate in judicial proceedings meeting the requirements of the McCarran Amendment. We take issue with the Justice Department's alternative on page 56, by which it would require establishment of federal standards to ". . . govern the participation of the United States in any and all state proceedings regarding water . . ." The McCarran Amendment speaks for itself in setting out the parameters for federal participation in state water proceedings. Furthermore, the promulgation of additional criteria or standards under which the sufficiency of state proceedings is to be scrutinized is solely within the province of the courts and should not be interfered with by any agency of the executive branch of the federal government.*

*10. The McCarran Amendment is unfortunately ambiguous on the question of whether or not state administrative proceedings meet the requirements of the amendment so as to provide states with jurisdiction to adjudicate federal reserved rights within their state administrative systems. The legislative history of the act, however, indicates an intent to allow all the western states to adjudicate federal water rights within the several state water resources management systems. Furthermore, the Western States Water Council cannot understand the basis for recommending federal participation in state judicial proceedings and against participation in administrative proceedings which, of necessity, are reviewable before both state and federal judicial machinery. The Justice Department's position does nothing to further President Carter's goals of allowing states to continue their primary role in water resource management. The recommendation that the United States participate in administrative proceedings is a much more reasonable and worthwhile position.*

*The position of the Justice Department, and to a lesser extent, that of the Task Force itself, fails to recognize that the interrelationship between federal and non-federal water rights on any given stream system as well as related considerations of due process was the impetus for providing consent to join the United States in unified proceedings to adjudicate rights to the use of water.*



*11. The western states agree with the Task Force in its finding that the federal government attempt to determine a legal basis for the payment of reasonable, non-discriminatory state filing and other fees relating to applications for water rights. In our view, when the federal government, acting in either its proprietary or fiduciary capacity, seeks to acquire the right to use water within state boundaries, it should be required to pay the same scheduled fees as anyone else.*

*F. Administration of Federal Water Rights*

*12. The Western States Water Council supports the Task Force decision that once federal water rights are quantified and adjudicated they should be subject to the administration of the state water right systems. The western states can also support the two exceptions identified as (a) and (b) in the recommendation.*

*The western states do not, however, agree with the third exception, nor with the Justice Department's recommendation for deletion. The notion that federal officials should be able to determine whether or not there is ". . . manifest unfairness to the United States . . ." is absurd. In essence, the policy would result in the federal government going its separate way any time a prudent and equitable decision was made by a state administrator that found in favor of someone that might be taking a position opposed by the federal government, or any time a state administrator determined that in equity the distribution of water required less than a full allocation of water to federal claims and rights. In fact, the idea is inconsistent with the tenor of the Supreme Court's decision in* ***U.S. v. California*** *(New Melones). The United States should not be allowed to follow state law only when it is convenient, and unilaterally avoid state law when it suits the federal purpose.*

*The western states further contest the Justice Department's recommendation and conclusion that the entire idea should be dropped because the McCarran Amendment does not grant jurisdiction over the United States for administration of federal water rights. Although final decrees for distribution of water must come out of the adjudicatory process, as the Justice Department has stated, in the spirit of the President's announced cooperation with the states, the federal government should stand ready at all times to help incorporate the reasonable management of federal and non-federal rights in a common state system.*

*G. Coordinating Federal Expenditures Dependent Upon State Water Rights*

*13. The Western States Water Council supports Task Force recommendation 13. As with the expenditure of any funds from public sources, it is important that administrators invest them wisely. The conflict with potential federal reserved water rights has been a problem for many decades with regard to both the investment of state and federal dollars as well as private dollars. The wise utilization of western water resources has been extremely important to the*

*economy of the West, and often the public interest is best served by a limited exercise of federal reserved rights. There may be times in the future when federal administrators will determine that only a limited exercise of a given federal reserved water right is appropriate in view of the investment the federal government already has in programs and facilities dependent upon the limited water resource upon which the federal claim could be made.*

*14. The Western States Water Council totally supports recommendation 14. The twelve member states of the Council particularly appreciate the statement by the Task Force that the agreements must be tailored to the circumstances of the individual states.*

*15. The proposal for a standing inter-agency committee appears to be a worthwhile suggestion as the anticipated coordination would seem to be helpful among federal agencies. The states would welcome an opportunity for a central point from which to discuss the state-federal relationships and the anticipated agreements.*

*16. The Western States Water Council believes that if an appropriate set of recommendations are forwarded to the President that can be based on a reasonable legal standing by federal attorneys, that the mechanism of formalizing the Administration's policy executive order would be useful, as the Task Force has concluded.*

*As previously stated, however, the Western States Water Council feels that further consideration should be given to going beyond an executive order, and in certain areas, seeking legislation to clarify issues, including the establishment of federal reserved rights in the future. If the Task Force recommendations are to flow out of the Interior Department's Solicitor's opinion and alleges new federal water rights such as the non-reserved water rights doctrine espoused, the Council will be opposed to any formalization of the Task Force recommendations.*

*Further, the western states see little value in the Task Force report unless all federal participants are to be bound by the decisions made. The Western States Water Council has sensed a certain aloofness in the Justice Dept. with respect to the entire exercise. If the Justice Dept. is not a full partner in the decisions rendered by the Task Force, and does not feel bound by administrative or executive orders, the entire water policy effort in this subject area will be of little value.*



Also at the October meeting of the Council the staff was instructed to write a letter to the White House inquiring if the Corps of Engineers response to a previous Western States Water Council resolution regarding Section 404 permits was federal policy. Council members questioned how Corps policy could be consistent with the President's policy statements made in Albuquerque, New Mexico to Western Governors in September regarding the non-interference with the states' rights to allocate water within the state.

Council again addressed the cost sharing proposals being considered in Congress, particularly the bill advanced by Senators Domenici and Moynihan. The Council adopted the following resolution (with California dissenting) noting the lack of understanding and appreciation by the Congress and the Administration of existing cost sharing programs and calling for a study in this area:

*POSITION*
*on*
*PROPOSED COST SHARING LEGISLATION*
*Keystone, Colorado*
*October 25, 1979*

*WHEREAS, the Western States Water Council has previously expressed its opposition to cost sharing proposals of the Carter Administration, and*

*WHEREAS, the Western States Water Council has numerous concerns and reservations regarding cost sharing proposals advanced by Senators Domenici and Moynihan, and*

*WHEREAS, the Western States Water Council has expressed concern over the lack of understanding and appreciation by the Congress and Administration of existing cost sharing programs, and*

*WHEREAS, the Western States Water Council believes that there needs to be a comprehensive, meaningful and accurate evaluation of cost sharing proposals before any new legislation is enacted,*

*NOW THEREFORE BE IT RESOLVED, that the Western States Water Council urge the Congress to:*

*(1) Authorize and fund immediately a 12-month joint federal/state review of cost sharing, including participation by members of Congress or their representatives, wherein the states will contribute resources to the review and will be given equal voice in proposed recommendations.*

*(2) Focus the review on the following subject areas:*

*(a) Analysis of the magnitude and significance of the existing non-federal cost sharing contributions and the role of such contributions in future cost sharing programs (e.g. river basin revenues),*

*(b) Analysis of the appropriateness of cost sharing for smaller, intrastate water projects (e.g. less than $15 million), particularly under terms generally in accord with terms advanced by Senators Domenici and Moynihan,*

*(c) Analysis of the adverse impacts that front-end cost sharing could have upon state and local governments in contrast to existing cost sharing mechanisms,*

*(d) Analysis of the general mechanisms available to the States to raise their share of any cost sharing proposals, the effect of the use of those mechanisms on money markets, and the changes required in federal tax and other laws necessary to facilitate those mechanisms.*

*(3) Undertake the analysis in a manner that will be responsive to water resource concerns of the geographic regions of the United States.*

*AND BE IT FURTHER RESOLVED, that members and representatives of the Western States Water Council stand ready to participate in the formulation and implementation of the review.*

Council members discussed at the October meeting the funding problems faced by the U.S. Water Resources Council and the river basin commissions, as well as the Title III grant program to the states. This prompted a Council resolution concerning the authorizations for the expenditure of funds provided in H.R. 4388.

*POSITION*
*concerning*
*AUTHORIZATION FOR EXPENDITURES OF FUNDS APPROPRIATED IN H.R. 4388*
*Keystone, Colorado*
*October 25, 1979*

*WHEREAS, the authorization for the U.S. Water Resources Council and the associated authorization for funding of river basin commissions and the grants to the state has expired, and*

*WHEREAS, the Western States Water Council has supported in the past, full and consistent funding of the state grant program and the river basins programs, and*

*WHEREAS, the Congress has appropriated funds but the current lack of authorization is having a serious impact on existing ongoing state programs and may very soon result in the discharge of valuable state water resource staff.*

*NOW THEREFORE BE IT RESOLVED that the Western States Water Council urges the Congress of the United States to proceed with a two year extension of authorization of H.R. 4388, and*



*FURTHER, the Western States Water Council urges that the U.S. Water Resources Council act expediently to provide funds to the States as authorized by the Congress at the earliest possible date.*

Council members also considered proposed legislation designed to expedite the construction of energy projects. A resolution concerning this so-called "fast-track " energy legislation was passed, urging the inclusion of language to protect state water management prerogatives.

*POSITION*
*concerning*
*FAST TRACK ENERGY LEGISLATION*
*Keystone, Colorado*
*October 25, 1979*

*WHEREAS, the federal government is seeking ways to cut red tape that would be delaying energy projects which are judged to be important to the Nation, and*

*WHEREAS, there is legislation currently being considered by Congress that would create an energy mobilization board, and*

*WHEREAS, there are certain proposals being considered that would waive state procedural and substantive law, and*

*WHEREAS, the Western States Water Council finds that this proposed legislation has the potential of encroaching upon states' rights and prerogatives in the area of water right, water allocation and water management.*

*NOW THEREFORE BE IT RESOLVED that the Western States Water Council opposes any federal legislation that would allow any federal official or entity to waive state procedural or substantive laws relating to the allocation, use, management or control of the states' water resources.*

*BE IT FURTHER RESOLVED that the Western States Water Council supports the inclusion of the following language in any legislation considered by Congress relating to the development of priority energy projects:*

*1. Nothing in this Act shall be construed as expanding or conferring upon the United States, its permittees, or licensees and right to appropriate, use or divert water, except, pursuant to and in compliance with State law, regulation or rule of law.*

*2. The Congress finds that the establishment or exercise of terms or conditions, or termination pursuant to state law of permits or authorizations for the appropriation, use or diversion of water for priority energy projects shall not be deemed to constitute a burden on interstate commerce, and*

*3. No waiver within this Act shall apply to or alter in any way, any provision of state law, regulation or rule of law, or of any interstate compact governing the apportionment, use or diversion of water.*



## BUDGET AND FINANCE

At the quarterly meeting held January 24, 1979 in San Deigo, California the Executive Committee adopted a budget of $214,278 and a schedule calling for increased yearly state assessments to $16,500 for FY80. The schedule also called for an increased yearly assessment for FY81 to $17,700 per state. The Executive Director and the Secretary-Treasurer were given authority by the Executive Committee in April at the Reno, Nevada meeting to make line-item adjustments to the FY79 budget and the amount of the total budget was not changed.

Daniel F. Lawrence, Secretary-Treasurer, presented the Auditor's Report to the Executive Committee at the July quarterly meeting held in Sitka, Alaska. The Auditor's Report was accepted unanimously as written. The accounting policies of the Western States Water Council conform to generally accepted accounting principles as applicable to governmental units. The Council utilizes the modified accrual basis of accounting. The modified FY79 budget is reflected in the financial statement.

HANSEN, BARNETT & MAXWELL
A PROFESSIONAL CORPORATION
CERTIFIED PUBLIC ACCOUNTANTS

345 EAST BROADWAY
SALT LAKE CITY, UTAH
84111

July 6, 1979

Members of the Council
Western States Water Council
Salt Lake City, Utah

We have examined the general fund comparative balance sheets and statements of general fixed assets of the Western States Water Council as of June 30, 1978 and June 30, 1979 and the related statement of revenue and expenditures and fund balance, and statement of investment in fixed assets for the years then ended. Our examination was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the aforementioned financial statements present fairly the financial position of the Western States Water Council at June 30, 1978 and June 30, 1979 and the results of its operations for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis.

Hansen, Barnett & Maxwell
SIGNED



## WESTERN STATES WATER COUNCIL
## GENERAL FUND
### Statement of Revenue and Expenditures and Fund Balance
### For the Year Ended June 30, 1979

| | Budget Note D | Actual | Actual Over (Under) Budget | Actual Prior Year |
|---|---|---|---|---|
| **Revenues** | | | | |
| Member States' assessments | $156,000 | $156,000 | $ - | $143,000 |
| Texas assessment | 6,000 | 6,000 | - | - |
| Drought assessments | - | - | - | 19,656 |
| Interest income | 6,800 | 14,290 | 7,490 | 10,400 |
| Other | 500 | 55 | (445) | - |
| **Total Revenues** | 169,300 | 176,345 | 7,045 | 173,056 |
| **Expenditures** | | | | |
| Salaries | 89,000 | 87,761 | (1,239) | 87,340 |
| Travel | 26,000 | 25,205 | (795) | 27,277 |
| Contract services | 3,000 | 2,115 | (885) | 24,213 |
| Payroll taxes and employee benefits | 19,500 | 19,036 | (464) | 15,191 |
| Printing and reproduction | 11,500 | 11,298 | (202) | 14,711 |
| Rent | 11,000 | 10,336 | (664) | 9,322 |
| Freight and postage | 5,300 | 5,149 | (151) | 4,951 |
| Telephone | 6,500 | 6,143 | (357) | 4,794 |
| Furniture and equipment | 3,700 | 5,206 | 1,506 | 2,856 |
| Office supplies | 3,000 | 2,944 | (56) | 2,810 |
| Reports and publications | 2,200 | 1,964 | (236) | 1,695 |
| Meetings and arrangements | 1,000 | 693 | (307) | 1,127 |
| Accounting | 950 | 950 | - | 795 |
| Insurance | 700 | 506 | (194) | 632 |
| Contingencies | 2,600 | 764 | (1,836) | 575 |
| **Total Expenditures** | 185,950 | 180,070 | (5,880) | 198,289 |
| **Excess (Deficiency) of Revenues Over Expenditures** | (16,650) | (3,725) | 12,925 | (25,233) |
| **Fund Balance - Beginning of Year** | 116,161 | 116,161 | - | 141,394 |
| **Fund Balance - End of Year** | $ 99,511 | $112,436 | $ 12,925 | $116,161 |

**These Rules of Organization were changed at the Sitka, Alaska meeting on July 26, 1979.**

# APPENDIX A
# RULES OF ORGANIZATION

APPENDIX A
RULES OF ORGANIZATION

### 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 planning for programs leading to integrated development by state federal, and other agencies 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) Prepare criteria in the formulation of plans for regional development of water resources to protect and further state and local interests.

(2) 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.

(3) Investigate and review water related matters of interest to the Western States.

### Article V - Membership

(1) The membership of the Council shall consist of not more than three representatives of each of the states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming appointed by and serving at the pleasure of the respective Governors. The states of Alaska and Hawaii shall be added to membership if their respective Governors so request.

(2) Member states may name alternate representatives for any meeting.

(3) Any state may withdraw from membership upon written notice by its Governor.



### 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 Chairman, Vice Chairman, and Secretary-Treasurer. They shall be selected in the manner provided in Article VIII.

### Article VIII - Selection of Officers

The Chairman and Vice Chairman, 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. The Secretary-Treasurer shall be appointed by and serve at the pleasure of the Chairman and need not be a member of the Council. The Chairman and Vice Chairman shall serve one-year terms but may not be elected to serve more than two terms consecutively in any one office.

### Article IX - Executive Committee

Representatives of each state shall designate one of their members 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. Any Executive Committee member may designate an alternate to serve in his absence. ~~All standing, working, special or other committees of the Council may report to the Council through the Executive Committee~~.

### 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 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 the meeting at which such~~ to a regular meeting and 10 days prior to a special meeting at which such matter is to be considered; provided, that 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 - 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 as 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 ⅔ of the member states.

### Article XII - Meetings

~~The Council shall have one regular meeting each year in the month of July at a time and place to be decided by the Chairman. Special meetings may be called by the Chairman or by a majority of the member states, upon 30 days written notice.~~

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

### Article XIII - 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 XIV - 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.

**The Executive Committee Charter was changed at the Sitka, Alaska meeting on July 26, 1979.**

## EXECUTIVE COMMITTEE CHARTER

This charter of the Executive Committee of the Western States Water Council was adopted by resolution on January 29, 1970, at the meeting of the Council in Seattle, Washington. It is the administrative and steering committee of the Council on matters outlined in this Charter and such other matters as may be related thereto.

### Objective

The committee shall assist the Council in carrying out effective cooperation among western states in planning for programs leading to integrated development of water resources by state, federal, and other agencies; by acting as a steering committee; by making sure there is consistency and no overlap of Council liaison with national organizations, including the ~~National Water Commission~~, Interstate Conference on Water Problems, National Governors' Association, Water Resources Council, federal departments, National Water Resources Association, Council of State Governments; and by establishing and maintaining liaison with western organizations such as the Western Governors' Conference and the ~~Interstate Conference on Water Problems~~, Western Governors' Policy Office.

### Authority

The authority of the Executive Committee derives from the Council itself and includes the following powers: (1) To act upon internal and administrative matters between meetings of the Council; (2) To call special meetings of the Council on external matters when prompt action by the Council before the next regular meeting is deemed necessary by a majority of Executive Committee members; (3) To create working groups and ad hoc groups; (4) To make assignments to committees; (5) To receive committee reports; and (6) To implement actions and programs approved by the Council.

### Program

The Committee shall correlate the Council's liaison with national and regional agencies, and correlate the Council's efforts to keep abreast of broad-scaled developments as they relate to Council programs. The Committee shall be authorized to initiate recommendations for Council actions at conferences, hearings, and special meetings with national water leaders. The Committee may make assignments to other committees and may give direction as to the scope and nature of their activities, and may delegate authority it deems appropriate to the Management Subcommittee of the Executive Committee. The Management Subcommittee is composed of the immediate past chairman, the chairman, the vice-chairman, the secretary-treasurer, and the Executive Director. In the event that one of these positions is vacant, the position on the Management Subcommittee can be filled by a member of the Executive Committee at the discretion of a majority vote of the Management Subcommittee.



### Organization and Voting

The Executive Committee of the Western States Water Council consists of one representative from each member state in accordance with Article IX - Executive Committee - of the "Rules of Organization." ~~The Chairman and Vice Chairman of the Council shall represent their states on and be members of the Executive Committee and serve as officers of the Executive Committee~~. The Chairman and Vice-Chairman of the Council shall serve as officers of the Executive Committee but do not necessarily have to be voting members of the Executive Committee. The Council staff furnishes necessary assistance as desired and requested by the Executive Committee.

Each member of the Executive Committee shall have one vote in conducting business. A quorum consists of six (6) members, and a simple majority of those voting shall prevail on internal matters. If an external matter comes before the Executive Committee between Council meetings, and the Executive Committee finds an emergency exists, it may take final action by unanimous vote of all members.

### Meetings

Regular meetings of the Executive Committee ~~shall be held at least thirty (30) days prior to each Council meeting and also in conjunction with meetings of the Council.~~ may be held in conjunction with meetings of the Council. Special meetings of the Executive Committee may be called by the Chairman, or by the Vice-Chairman in the event the Chairman is incapacitated, or by any six (6) members, upon five-days' notice to all members, stating the time and place of the meeting. When all members are present, no notice is required. All meetings may be adjourned to a time certain by majority vote of those present.

### Reporting

The Committee shall report to the Council at each Council meeting as to any actions it may have taken between meetings.

## WATER RESOURCES COMMITTEE CHARTER

**Objective**

The Committee shall assist in initiating, establishing and carrying out objectives of the Council by providing guidance on water resources planning, conservation, and developments that are of common interest to the eleven Western States.

**Program**

To review and develop recommended Council positions on current legislation, regulations, criteria, plans and problems relating to water planning, management and conservation development for all purposes, and utilization.

**Organization**

Committee membership is by appointment by the states of the Council, one member from each state, but not necessarily one of the state's delegates to the Council. Any Water Resource Committee member may designate an alternate to serve in his absence. A quorum shall consist of six (6) members. A majority of those members present and voting is required for Committee action. Each state shall have one vote. Except as otherwise provided herein, meetings shall be conducted under Robert's Rules of Order, Revised.

The Committee chairman shall be appointed by the Chairman of the Council from Committee membership. The Committee chairman will appoint a vice chairman, and subcommittees as needed.

The Council staff will furnish necessary assistance as desired and requested by the Committee. A member of the staff will serve as secretary.

**Meetings**

The Committee will meet at the call of the Committee chairman.

**Reporting**

The Committee shall submit its reports and/or recommendations to the Council and to the Executive Committee if so requested. The Committee shall not issue any public statements or reports except as may be directed by the the Council and the Executive Committee.

**Charter Adoption**

This Charter of the Water Resources Committee of the Western States Water Council was adopted by resolution on January 16, 1976, at the meeting of the Council in San Diego, California.



## WATER QUALITY COMMITTEE CHARTER

**Objective**

The Committee shall assist in initiating, establishing and carrying out objectives of the Council by providing guidance on the water quality and environmental aspects of all programs of interest to the Council.

**Program**

To review and develop recommended Council positions on water quality and environmental standards and problems relating to the water resources of the Western United States.

**Organization**

Committee membership is by appointment by the states of the Council. One member shall be from each state, but need not be one of the state's delegates to the Council. Any Water Quality Committee member may designate an alternate to serve in his absence. A quorum shall consist of six (6) members. A majority of those members present and voting is required for committee action. Each state shall have one vote. Except as otherwise provided herein, meetings shall be conducted under Robert's Rules of Order, Revised.

A Committee chairman shall be appointed by the Chairman of the Council from the Committee membership and serve at his pleasure. The Committee chairman will appoint a vice chairman and subcommittees as needed. The staff of the Council shall furnish such assistance to the Committee as is requested. A member of the staff will serve as secretary.

**Meetings**

The Committee shall meet at the call of the Committee chairman.

**Reports**

The Committee shall submit reports and/or recommendations to the Council and to the Executive Committee as requested. The Committee shall not issue any public statements or reports except as may be directed by the Council or the Executive Committee.

**Charter Adoption**

This Charter of the Water Quality Committee of the Western States Water Council was adopted by resolution on January 16, 1976 at the meeting of the Council in San Diego, California.

## LEGAL COMMITTEE CHARTER

**Objective**

The Committee shall assist in initiating, establishing and carrying out the objectives of the Council by providing guidance on the social, ethical, legal and political aspects of the programs relating to water resource and water quality.

**Program**

To review and develop recommended Council positions on current legislation, laws, administrative rules and activities relating to water resources, water rights, related land use and Indian issues and to examine and keep the Council current on all ongoing pertinent court cases.

**Organization and Voting**

Committee membership is by appointment by the states of the Council. One member shall be from each state, but need not be one of the state's delegates to the Council. Any Legal Committee member may designate an alternate to serve in his absence. A quorum shall consist of six (6) members. A majority of those members present and voting is required for Committee action. Each state shall have one vote. Except as otherwise provided herein, meetings shall be conducted under Robert's Rules of Order, Revised.

A Committee chairman shall be appointed by the Chairman of the Council from the Committee membership and serve at his pleasure. The Committee chairman will appoint a vice chairman and subcommittees as needed. The staff of the Council shall furnish such assistance to the Committee as is requested. A member of the staff will serve as secretary.

**Meetings**

The Committee shall meet at the call of the Committee chairman.

**Reports**

The Committee shall submit reports and/or recommendations to the Council and to the Executive Committee as requested. The Committee shall not issue any public statements or reports except as may be directed by the Council or Executive Committee.

**Charter Adoption**

This Charter of the Legal Committee of the Western States Water Council was adopted by resolution on January 16, 1976, at the meeting of the Council in San Diego, California.



## PRINCIPLES - STANDARDS - GUIDELINES

### PREAMBLE

The Constitution of the United States and the Constitutions of the individual States shall be adhered to in Western regional water planning and development.

This statement of principle reaffirms, expands and clarifies principles set forth in Article III, "Rules of Organization" of the Western States Water Council.

### 1.0 PRINCIPLES

1.1 Comprehensive regional planning, transcending political boundaries, is a major consideration in the maximum proper utilization of the water and related resources of the West. Development of those resources to meet all reasonable needs as they may arise is essential to the continuing prosperity of the region and each of its economically interdependent parts.

1.1.1 The planning process should include or supplement rather than supersede existing water resource developments; it should complement and strengthen local and state planning activities rather than displace them; it should result from cooperative effort of all agencies concerned.

1.1.2 The planning program should be aimed to achieve a reasonably equitable balance among all existing and potential uses of water, insofar as the supply available or to be developed will permit, consistent with established rights.

1.1.3 Water resources of the region should be put to beneficial use to the fullest practicable extent in an efficient manner in accord with the needs and types of use in the particular area and wasteful and inefficient practices or those that unnecessarily degrade water quality should be eliminated.

1.1.4 New uses of western water resources should make the most practical and efficient use of water resources and should minimize any necessary reductions in the quality of western water resources.

1.1.5 Water resource developments should be implemented when they are well planned, endorsed by local and state governments and provide for maximum social and economic benefits from the use of western water resources and integrate maximum use concepts with conservation, environmental enhancement and the preservation of natural resources.

1.1.6 The States should be the lead governmental body in the administration of water rights and in the preparation of statewide water plans so that wise use and best conservation practices can be assured.

1.1.7 It is imperative that all States, as expeditiously as possible, make thorough studies of their water needs in accordance with Guidelines and Standards similar to those adopted by the Council.

1.1.8 Long-range water plans should be expeditiously developed which are flexible enough to permit modifications to meet changing long-term needs and advances in technology, yet specific enough to provide solutions for immediate water supply problems.

1.1.9 Water exportation studies shall include a thorough examination of efficiency of water use and cost-price relationships and a comprehensive economic evaluation that considers all costs and benefits accruing to the area of origin and costs and benefits accruing to the area of import. The economic analysis must include similar studies for alternative sources of supply. Aesthetic values shall be considered in over-all project evaluation.

1.1.10 Close cooperation and free-interchange of ideas and reporting of data on a uniform basis among all affected local, State and Federal interests, shall be sought.

1.1.11 Water resource planning shall consider water quality, as well as quantity.

1.2 Regional water planning should be designed to avoid interference with existing rights to the use of water. Any taking of land or water rights shall be governed by the law of eminent domain. Interstate compact allocations shall be honored.

1.2.1 Any entity studying transfer of surplus water shall recognize the economic, social, legal, political and ethical implications of the transfer on both the exporting and importing areas. Such entity must plan so as to assure social and economic growth and development, by either:

(a)The return or replacement of the water exported to the area of origin; or

(b)Providing equivalent beneficial programs acceptable to the area.

1.2.2 The rights to water of regions; states or individuals must be recognized and guaranteed through due process of law.

1.3 Except as otherwise provided by existing law, the planning of water resources development in the Western states shall be predicated upon the following principles for protection of and assistance to states of origin.

1.3.1 Inter-basin or inter-regional transfer of water shall contemplate only the transfer from the area of origin of those quantities of water deemed to be surplus. The States shall endeavor to agree upon determination or quantities of water that are surplus.

1.3.2 In making determination of possible surplus water, all water-related needs of the States and areas of origin bearing on environmental protection, economic prosperity and social well being shall be recognized.

1.3.3 All water requirements, present or future, for uses within the drainage area of any river basin, shall have priority and right in perpetuity to the use of the waters of that river basin, for all purposes, as against the uses of water delivered by means of such exportation works, unless otherwise provided by treaty, interstate agreement or compact.

1.3.4 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.

1.3.5 In the study of interstate diversion, any interstate diversion project shall neither impede nor minimize the development of water resources in the state of origin, and shall result in substantive net advantage to such State over the advantage it could have obtained, by itself or otherwise, without such diversion project.

1.3.6 All plans for inter-basin diversion of water shall provide for such financial arrangements with the states of origin as may be necessary to comply with Section 1.3.4 and 1.3.5 above.

1.3.7 The exportation of water shall not change an area of origin from a water-rich to a water-deficient economy and shall not adversely affect the competitive position of the area of origin.

1.3.8 State or area of origin priority shall be explicitly set forth in all contracts for the use of imported water. Should such priority ever be denied, through subsequent action of the Congress, or otherwise, areas of origin will be entitled to just compensation.

1.3.9 Federal statutes designed to protect areas and states of origin, in any regional interstate plan of origin in any regional interstate plan of water development, should include the consent by the United States for any such state of origin to sue in the Federal Courts, to compel Federal officials to comply with such statutes and for such other relief as deemed equitable.

1.4 This statement of principles shall not be considered as any support or advocacy for the diversion of water from one river basin to another.

1.5 The public should be educated concerning the various and many uses of water and the wise and prudent management thereof. Sound water resource and related land management concepts and the needs and issues confronting the region and the nation should be disseminated. All means and possibilities of financing, development of, and implementing an education program should be explored.

## 2.0 STANDARDS FOR GUIDANCE IN THE FORMULATION OF CONCEPTS AND PLANS FOR STAGED REGIONAL DEVELOPMENT OF WATER RESOURCES



2.1 A Western States water resource program shall be developed and maintained by the Western States Water Council through compilation and analysis of available state-wide plans and Federal inter-basin and interstate plans, to provide a broad and flexible pattern into which future definite projects may be integrated in an orderly fashion.

2.2 A basic objective of the program is to provide a framework within which projects may be developed to meet the requirements for water to the extent feasible as and where they arise.

2.3 A determination of the advantages and disadvantages of alternate methods of meeting water needs should be included in the Western States water resource program.

2.4 In order to provide the uniformity necessary to facilitate compilation and analysis of the various state-wide water plans, it is recommended that such plans contain projects of usable water resources and an inventory of need for the years: 1980, 2000, 2020, 2040.

2.5 Each Member State should strive to complete, no later than June 30, 1977, a preliminary water plan, including estimates of water resources and estimates of current and long-range water needs.

## 3.0 GUIDELINES AND PROCEDURES FOR CORRELATION OF PLANS AND SCHEDULES AMONG WESTERN STATES

3.1 Interstate Exchange of Information and Data.

3.1.1 When a state publishes reports or takes any action which may affect the plans or objectives of other States, the affected States and the Western States Water Council staff should be furnished copies thereof. Request for basic data and supporting information should be initiated by the state needing the data or information.

3.1.2 The request for the exchange of basic data and supporting information should be coordinated through one state agency.

3.1.3 The name, official position address and telephone number of the designated state office will be forwarded to the Western States Water Council staff. The staff will prepare a consolidated list of designated offices and distribute copies to all States through the State's member of the Executive Committee, Western States Water Council.

3.1.4 The type of reports and actions which should be sent to other States and the Western States Water Council staff includes, but is not limited to, copies of the following:

3.1.4.1 Summaries of current and long-range estimates of various types of water needs and usable water resources.

3.1.4.2 Planning schedules for developments of all large scale interstate and interbasin plans and projects.

3.1.4.3 State evaluation of programs such as weather modification, watershed management, groundwater recharge, desalination, and waste water reclamation.

3.1.4.4 Major legal and administrative decisions pertaining to water resources.

3.1.4.5 State or Federal legislation as proposed by any state materially affecting Western States water planning.

3.2 Correlation of Plans and Schedules.

3.2.1 A master list shall be prepared and maintained at the headquarters of the Western States Water Council of items furnished pursuant to Section 3.1 with copies to be furnished to member States at appropriate intervals.

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