

1994 ANNUAL REPORT

OF THE

WESTERN STATES WATER COUNCIL

INTRODUCTION

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

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

Originally, Council membership consisted of eleven western states: **ARIZONA, CALIFORNIA, COLORADO, IDAHO, MONTANA, NEVADA, NEW MEXICO, OREGON, UTAH, WASHINGTON and WYOMING.** In 1978, **TEXAS** was admitted to membership, after many years of participation in Council activities in an "observer" status. **ALASKA** requested and received membership in 1984. **NORTH DAKOTA** and **SOUTH DAKOTA** both received membership in 1988 after a long association with the Council. In 1991, **HAWAII** requested and received membership. Council membership is automatically open to all member states of the Western Governors' Association (which also includes the **State of Nebraska**). Other states may be

admitted by a unanimous vote of the member states. **OKLAHOMA** was admitted as an associate member in January 1990, but withdrew in 1994 following an extended trial period as the state was unable to secure funding for full membership. Associate membership may be granted for up to three years in order to explore the benefits of membership. Oklahoma continues to seek funding for full membership. During 1993, due to severe budget cuts, **MONTANA** requested and the Council approved temporary associate member status. In 1994, similarly severe budget cuts forced the states of **ALASKA** and **WASHINGTON** to also request associate membership, which was granted. Council membership now stands at sixteen states.

Each member governor is an ex-officio member of the Western States Water Council. The governor may appoint up to three representatives to the Council, and as many alternates as deemed necessary, to serve at the governor's pleasure. Council officers, including a Chair, Vice-Chair and Secretary-Treasurer, are elected annually from the membership. State representatives are appointed to the working committees, with one representative per state also appointed to the Executive Committee. The Executive Committee attends to internal Council matters with the assistance of the Management Subcommittee, which includes the Council officers, immediate past Chair, and Executive Director. The Council's working committees are the Legal Committee, the Water Quality Committee, and the Water Resources Committee. Each working committee is directed by a committee chair and vice-chair. Committee chairs, in turn, name special subcommittees and designate subcommittee chairs to study issues of particular concern.

Meetings of the Council are held on a regular basis, rotating among the member states, with state representatives hosting Council members and guests. In 1994, meetings were held in: Maui, Hawaii on January 12-14; Seattle, Washington on April 13-15; Cody, Wyoming on August 17-19; and San Antonio, Texas on December 7-9. Guest speakers are scheduled according to the relevant subjects to be considered at each meeting. The Council meetings are open to the public. Information regarding future meeting locations and agenda items can be obtained by writing or calling the Council's office. Included herein are reports on each of the Council meetings, positions and resolutions adopted by the Council, and a discussion of other important activities and events.

The Council staff are: D. Craig Bell, Executive Director; Anthony G. (Tony) Willardson, Associate Director; Ricky S. Torrey, Legal Counsel; and a secretarial staff including Lynn Bench, Carrie Curvin and Cheryl Redding. Pearl Pollick retired in 1994, and Norman K. Johnson left the Council's employ to work for the Utah Attorney General's Office.

The Western States Water Council offices are located just south of Salt Lake City, in Midvale, Utah. The address is:

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| INTRODUCTION | i |
| MEMBERSHIP | 1 |
| QUARTERLY MEETINGS | 3 |
| OTHER IMPORTANT ACTIVITIES AND EVENTS | 14 |
| Council Member and Staff Changes | 14 |
| Western States Water | 15 |
| Water Law Workshop | 15 |
| Water Policy and Management Workshops - Watershed Management | 15 |
| Information Systems Management Conference | 16 |
| Western Governors' Association Annual Meeting | 16 |
| Water Management Symposium - Endangered Species Act | 17 |
| Water Policy Seminar | 18 |
| Western Drought Conference | 18 |
| Elections | 19 |
| Endangered Species Act | 19 |
| Federal Energy Regulatory Commission | 19 |
| Ground Water Recharge Demonstration Program | 20 |
| State Water Use Fees | 21 |
| Water Conservation | 21 |
| Water Rights Permitting Programs | 22 |
| Water Transfers - Intrastate Approaches, Problems and Related Issues | 23 |
| Western Water Policy Review Commission | 23 |
| RESOLUTIONS AND POSITIONS | 24 |
| Clean Water Act Reauthorization | 24 |
| Wilderness Area Reserved Water Rights | 41 |
| Safe Drinking Water Act | 51 |
| Endangered Species Act | 54 |
| BUDGET AND FINANCE | 55 |
| COMMITTEE and SUBCOMMITTEE MEMBERSHIP | 69 |
| RULES OF ORGANIZATION | 73 |
| ADDRESSES AND TELEPHONE NUMBERS | 76 |

WESTERN STATES WATER COUNCIL

MEMBER STATES

ARIZONA

- *Governor Fife Symington; 1-91
 - **Rita Pearson; 6-91
 - Michael Brophy; 6-91
 - Edward Z. Fox; 7-91
 - C. Laurence Linser (Alt.); 6-88

CALIFORNIA

- *Governor Pete Wilson; 1-91
 - **David Kennedy; 10-83
 - David G. Kelley; 1-83 to 7-83
 - reappointed 3-84
 - Thomas S. Maddock; 5-94
 - Roderick E. Walston (Alt.) 1-86
 - Edward C. Anton (Alt.); 2-91
 - James M. Stubchaer (Alt.); 6-93
 - Ruben Ayala; 2-78 to 1-83
 - reappointed 7-84 to 4-94

COLORADO

- *Governor Roy Romer; 1-87
 - **Daries (Chuck) Lile; 8-92
 - J. David Holm; 1-90
 - Harold D. Simpson; 3-92
 - Wendy C. Weiss (Alt.); 4-87
 - Jim Lochhead (Alt.); 8-92

*Ex-Officio Member

**Executive Committee Member

HAWAII

- *Governor Ben Cayetano; 12-94
 - Keith W. Ahue
 - Manabu Tagomori; 2-88

IDAHO

- *Governor Phil Batt; 1-95
 - **R. Keith Higginson; 10-87
 - Gene M. Gray; 10-83
 - Joe Nagel; 3-91
 - Wayne T. Haas (Alt.); 10-83
 - J.D. Williams (Alt.); 5-91

NEVADA

- *Governor Robert J. Miller; 1-89
 - **Roland D. Westergard; 5-68
 - Joseph E. Dini, Jr.; 7-83
 - Janet Rogers; 5-94
 - Peter G. Morros (Alt.); 3-91
 - Thomas E. Cahill; 7-92 to 5-94

NEW MEXICO

- *Governor Gary Johnson; 1-95
 - **Don Lopez; 11-94
 - Charles DuMars; 2-84
 - Frank A. DuBois; 4-87
 - Wayne P. Cunningham (Alt); 7-88
 - Richard A. Simms (Alt.);
 - 10-82 to 2-84
 - reappointed 4-91
 - Eluid L. Martinez; 4-91 to 11-94

The date after each name is the month and year the appointment was made by the governor, and a second date indicates when the appointment ended. Alternate (Alt.) members are also listed.

Mr. Ahue of Hawaii is listed above as a member by virtue of his position, pending receipt of a letter of appointment from the governor.

NORTH DAKOTA

- *Governor Ed Schafer; 1-93
 - **David A. Sprynczynatyk; 9-89
 - Francis Schwindt; 9-88
 - Julie Krenz; 11-90
 - Michael A. Dwyer (Alt.); 11-90

OREGON

- *Governor John Kitzhaber; 1-95
 - **Martha O. Pagel; 6-92
 - Steve Sanders; 7-90
 - Lorna Stickel; 7-90 to 8-94

SOUTH DAKOTA

- *Governor Bill Janklow; 1-95
 - **Reese Peck; 6-88
 - John Hatch; 6-88
 - Steve Pirner; 6-88
 - John Guhin (Alt.); 6-88

TEXAS

- *Governor George W. Bush; 1-95
 - **John T. Montford; 10-83
 - Charles W. Jenness; 7-91
 - Ron Lewis; 7-91
 - Fred N. Pfeiffer (Alt.); 10-83
 - Pam Reed (Alt.); 11-91
 - J. David Montagne (Alt.); 9-92

UTAH

- *Governor Michael O. Leavitt; 1-93
 - **D. Larry Anderson; 3-85
 - Thorpe A. Waddingham; 6-65
 - Dee C. Hansen; 3-85
 - Dallin Jensen (Alt.); 7-71
 - Don A. Ostler (Alt.); 10-87

WYOMING

- *Governor Jim Geringer; 1-95
 - **Gordon W. Fassett; 3-87
 - Myron Goodson
 - 6-65 to 3-83
 - reappointed 10-86
 - William L. Garland (Alt); 10-90

ASSOCIATE MEMBER STATES

ALASKA

- *Governor Tony Knowles; 12-94
 - **Leonard D. Verrelli; 2-95
 - Jules Tileston; 2-95
 - Mead Treadwell (Alt.); 10-91
 - Ric Davidge; 7-91 to 7-94

MONTANA

- *Governor Marc Racicot; 1-93
 - **Gary Fritz; 10-83
 - Steve Pilcher; 4-88
 - Donald D. MacIntyre (Alt); 2-85
 - Harley R. Harris (Alt.); 6-91

WASHINGTON

- *Governor Mike Lowry; 1-93
 - **Carol Fleskes; 4-94
 - Tom McDonald; 11-91
 - Michael Llewelyn (Alt.); 11-91
 - Hedia Adelsman; 1-87 to 4-94

QUARTERLY MEETINGS

113th Quarterly Meetings January 12-14, 1994 Maui, Hawaii

The 113th quarterly meetings of the Western States Water Council were held January 12-14, in Hawaii at the Royal Lahaina Resort on Maui. John Leshy, Department of Interior Solicitor, spoke on a number of issues, including wilderness water rights, federal grazing and related water right reforms, and the Endangered Species Act. He pointed out that many current Interior officials are former state government leaders and, in response to a question, he assured members that they are not engaged in a "war on the West." However, the Interior Department has been handed a difficult agenda that includes many unresolved issues such as grazing and mining reform.

On grazing and related water rights matters, Mr. Leshy noted Interior began a formal rulemaking process that became embroiled in the budget legislation and Interior's appropriations bill. The latter included water rights language that was defeated by filibuster.¹ Although some of its provisions were ambiguous, they were not intended to overturn state law. A new rulemaking proposal, includes acquisition of water rights for grazing allotments under state law, if possible in the name of the United States. Mr. Leshy requested comments on how states deal with water rights on state lands leased for grazing.

With respect to wilderness water rights, Mr. Leshy stated that the Tarr opinion, reversing previous efforts to assert such claims, had been suspended and would be reexamined.² This action was prompted by a state court-imposed filing deadline in Idaho's Snake River Basin adjudication, and federal agencies' desires to protect their water rights. While the opinion is being reviewed, agencies have been directed to file protective claims, as necessary. Interior has also taken the unusual step of informally encouraging comments on legal *and* policy questions associated with federal water rights in wilderness areas. Mr. Leshy pointed out that since 1986, legislation creating federal reservations has addressed water rights questions on a case-by-case basis. Considerable controversy remains, however, over federal water rights for wilderness areas created between 1964 and 1986.

Mr. Leshy also addressed a concern that a federal "non-reserved water rights" theory might be resurrected. In an opinion which he had helped draft under former Solicitor Krulitz, the theory asserted claims to water for many Bureau of Land Management purposes for which there were no

¹ Western States Water, Issue #1017, November 12, 1993.

² Western States Water, Issue #1023, December 23, 1993.

reserved rights, and no state-recognized beneficial uses. The opinion was later overturned.³ Mr. Leschy noted that western water law has changed substantially since 1979. He cited *Nevada v. Morros*, which recognized the *in situ* water needs of federal land management agencies as beneficial uses, as an example of how state laws can now accommodate federal interests, thus precluding the need for the “non-reserved rights” theory. Regarding the theory’s future he said, “While I never say never, I cannot imagine it resurfacing.... The issue is dead.”

Mr. Leschy also discussed the pervasive impact and inflexible application of the Endangered Species Act (ESA). He suggested ESA reauthorization could take several years, as there are no easy solutions to many ESA issues. He added that the Bush Administrations exemption application for the spotted owl was a mistake that set back progress towards workable solutions. He believes federal agencies must work out internal policy conflicts, and added that Interior is looking for opportunities to resolve problems through flexible rulemaking and the use of habitat conservation plans. In response to a question regarding interstate water allocations, he suggested that where there is a “clear-cut conflict,” ESA requirements probably override interstate compact allocations, in his opinion. If such a situation were to arise, he suggested, a negotiated settlement should be reached between affected states to share any loss that would occur. He declined to express an opinion concerning whether ESA would override an international treaty obligation.

On other issues, Mr. Leschy opined that federal land management agencies need to find a way to protect their water rights where new applications for water are made that may threaten their rights, but where a McCarran Amendment proceeding will not resolve the problem. He called for a joint federal/state effort to craft a coherent federal policy to enable federal agencies to voice their objections in this context without subjecting themselves to state jurisdiction generally, because of Justice Department concerns. With respect to the issue of federal payment of filing fees in state courts, he suggested that the *U.S. v. Idaho* decision⁴ and federal budget concerns make it unlikely states will see financial relief. Regarding Indian water rights, he added that federal policy continues to support negotiated settlements, but again the problem is money.

Mr. Leschy also mentioned the interesting internal debate that took place between federal agencies over state authority under Clean Water Act Section 401, as it relates to hydropower licensing by the Federal Energy Regulatory Commission.⁵ In the end, the Justice Department filed a brief urging the U.S. Supreme Court to uphold the Washington Supreme Court decision recognizing the state’s authority to set minimum instream flows as a condition for water quality certification under Section 401. Finally, Mr. Leschy mentioned that Interior will soon release proposed regulations for the Lower Colorado River Basin to allow limited water marketing between states. He emphasized, however, that the scheme will be confined to that basin, and is not intended to be a precedent for other areas.

³ Western States Water, Issue #1023, December 23, 1993.

⁴ Western States Water, Issue #990, May, 7, 1993.

⁵ Western States Water, Issue #1022, December 17, 1993.

Next, Alan Murakami, a member of the review commission on Hawaii's state water code, spoke to the full Council. He described the history of Hawaii's water law. Legislation was enacted in 1987 to begin to resolve longstanding conflicts, settle water rights claims, and establish a permit system. However, given considerable political pressure for home rule, counties remain largely responsible for controlling water use, with state regulation only in critical areas. The review commission was created last year and has identified 20 major issues, including protection of Native Hawaiian water rights. An interim report was released on December 15, 1994. A final report with recommendations to improve the water code will be submitted to the legislature by the end of 1995. Mr. Murakami answered a number of questions covering the Hawaiian Homestead Act, watershed management, water transfers and leasing, protection of instream flows, and water for environmental purposes.

The Council's standing committees addressed a number of issues. The Water Resource Committee listened as Tom Donnelly, Executive Vice-President of the National Water Resources Association, encouraged members to consider supporting H.R. 3392, to reauthorize the Safe Drinking Water Act (SDWA) and H.R. 1490, an ESA reauthorization. The Committee reviewed state water use fees, ground water recharge, drought, and changes within the Bureau of Reclamation. Of note, the committee amended its workplan to include a continuing item on water conservation. The Water Quality Committee discussed the SDWA and CWA reauthorization bills. Council staff were asked to send a letter to Senate staff reaffirming the Council's support for Section 602 of S. 1114, which clarifies state authority to set conditions to protect designated uses under CWA Section 401. The Committee also discussed national wetlands policy, watershed management, and CWA Section 518. The Legal Committee reviewed events related to federal/state hydropower licensing issues, and a number of cases and other actions dealing with wilderness water rights, water transfers, general adjudication fees, and the ESA. Council staff asked for comments on a draft discussion paper on improving consultation between federal entities and state water managers under ESA. The Executive Committee reviewed the Council budget and the schedule for future meetings.

**114th Quarterly Meetings
April 13-15, 1994
Seattle, Washington**

The 114th quarterly WSWC meetings were held on April 13-15, at the Edgewater Inn in Seattle. The Council approved two external policy positions and amended an existing policy statement. The Council modified its position on reauthorization of the Clean Water Act (CWA). Next, the Council approved a letter to Senator Max Baucus (D-MT) commenting on S. 1114, to reauthorize the CWA. It asserted that the bill's section on watershed management is a positive step, but that it is too prescriptive in its approach. The letter suggested changes to improve this section. It endorsed Section 602, clarifying that the state's scope of authority under Section 401 to certify that any federally licensed activity will comply with water quality standards, includes the protection, attainment and maintenance of designated and existing uses included in the standards. The letter called for "state savings clause" language to be added to CWA Section 510, and opposed the presumptive applicability of federal water quality criteria. Next, it suggested that S. 1114 be amended to require that any federal promulgation of standards be subject to replacement by state standards, when those standards are adopted, and opposed including ground water quality criteria

in the CWA. It also suggested that a subsection of S. 1114 on outstanding natural resource waters be replaced by language requiring each state to designate, protect and maintain such waters.

The letter on S. 1114 also acknowledged that the "Reid Amendment" added to the bill concerning intermittent and effluent-dominated streams is a step in the right direction. It noted that the bill's provisions on non-point source pollution control are overly restrictive, and suggested ideas for improvement. It gave qualified support for S. 1114 Title VII, on wetlands, noting that the bill could be enhanced by greater emphasis on recognizing regional differences in wetlands delineation and protection. It called for state revolving fund (SRF) capitalization at \$5B annually. Further, it noted that the EPA Administrator's role in implementing CWA programs should be based on risk assessment and management. The position asserts no conceptual difficulty with according Indian tribes the same opportunity as states to assume primacy over tribal lands within their reservations, but opposed language in S. 1114 that could leave some areas without environmental protection. The position called for a stronger role by the federal government in trans-border issues, and lastly requested protection from liability for states involved in abandoned mine cleanups by creation of a "good Samaritan" status.

The Council adopted a position statement endorsing a letter sent by Western Attorneys General to Interior Solicitor Leshy regarding the assertion of federal reserved water rights for some wilderness areas.⁶ The letter is based on the premise that the United States earlier decision not to assert such rights is legally correct and practical, and that the states and the federal government should work together to protect the values associated with wilderness areas under state legal systems.

The Water Resources Committee reviewed a number of issues and subcommittee reports. The Council is working on a draft report for the Bureau of Reclamation on ground water recharge projects in the West. The Committee also agreed to explore preparing a comparative summary and update of the 1990 WSWC legal review of recharge laws in the West. A draft matrix and summary containing survey findings and recommendations concerning state water user fees were also discussed. Both were revised and distributed for comment. The Committee also considered the City of Aberdeen's purchase of the U.S. Corps of Engineers Wynoochee project. With respect to transfer issues, the Corps determined it could not legally shed liability for the project and agreed to a unique compromise where the Corps directs project operations once flood flows reach a certain level. The Committee also discussed language on state water rights in recent regulations on grazing reform.⁷ The Committee also heard a report on a water information management systems workshop held last month in Albuquerque,⁸ and agreed to create a subcommittee to monitor related issues and plan another workshop in 1995.

⁶ Western States Water, Issue #1023, December 23, 1993.

⁷ Western States Water, Issue #1037, April 1, 1994.

⁸ Western States Water, Issue #1036, March 25, 1994.

The Legal Committee began its meeting by reviewing the position statement on federal reserved water rights for wilderness areas. Next, the Committee discussed federal policy regarding environmental regulation in Indian Country. The Committee also heard a report on the Twelfth Annual Water Law Conference,⁹ cosponsored by the Council, and began planning next year's conference. The Committee heard reports on a number of cases, including *U.S. v. Colorado*,¹⁰ and *Musser v. Higginson*.¹¹ The Committee also considered a final draft discussion paper on improving coordination between federal entities and state water managers in the implementation of the Endangered Species Act.

The Executive Committee reviewed the status of the current budget, the proposed budget for the next fiscal year, and dues projections. It determined to postpone until 1996 the Council's Washington, D.C. Seminar. Further, the Committee considered a number of matters of internal Council business. Of note, the Committee agreed to try a three-meeting-per-year format, rather than the traditional quarterly meetings, in order to reduce travel expenses.

The Water Quality Committee began its meeting with a legislative update on the Clean Water Act reauthorization, which included a report on House and Senate activities and the efforts of various organizations in response to pending legislation, particularly the Senate bill. Next, the Committee discussed and refined the Council's CWA position statement and the letter to Senator Baucus on S. 1114. This was followed by an update on the reauthorization of the Safe Drinking Water Act. Lastly, the Committee heard a report on the Watershed Management Workshop sponsored by the Council and the Western Governors' Association.¹²

The Council's 114th quarterly meeting began with Bob Schwartz describing the City of Seattle's Highline Well Field ground water recharge project, which was completed with funding under the Bureau of Reclamation's demonstration program. Seattle relies on surface water to supply 98% of its needs. While the recharge project will provide only a small amount of water, it is important for meeting peak summer demands, and providing an emergency winter supply. Next, the Council listened as Dave Monthie, with the Association of State Drinking Water Administrators (ASDWA), describe efforts to reauthorize the SDWA. He explained the difficulty and financial strain involved in meeting current SDWA requirements. A "coalition bill," introduced in the House by Representatives Jim Slattery (D-KS) and Thomas J. Bliley, Jr. (R-VA) as H.R. 3392, would make many needed changes. The bill currently has 151 cosponsors, but is not favored by key House leaders.¹³ In the Senate, the Environment Committee has approved S. 1547, to amend the SDWA.

⁹ Western States Water, Issue #1031, February 18, 1994.

¹⁰ Western States Water, Issue #1029, February 4, 1994.

¹¹ Western States Water, Issue #1035, March 18, 1994.

¹² Western States Water, Issue #1033, March 4, 1994.

¹³ Western States Water, Issue #1027, January 21, 1994.

It would make helpful changes, according to Mr. Monthie, but not as many as H.R. 3392. Committee reports followed these presentations.

The meetings concluded with the presentation of an Interstate Council on Water Policy award to the Council for "outstanding leadership in the field of water resource management and policy."

**115th Quarterly Meetings
August 17-19, 1994
Cody, Wyoming**

The 115th quarterly meetings of the Western States Water Council were held in Cody, Wyoming on August 17-19. The state hosted a tour of the Bureau of Reclamation's Shoshone Project and Buffalo Bill Dam, which provides water to four districts irrigating 93,000 acres of land. The dam was started in 1905. When completed in 1910, it was the tallest concrete arch dam in the world, rising 325 feet high in a narrow granite canyon. It cost \$929,658. Modifications completed in 1993 raised the dam by 25 feet, adding 260,000 acre-feet to the original 375,900 acre-feet of reservoir storage capacity. The spillway was also enlarged and gates added to control releases. Another 25.5 megawatts of power generating capacity were added. The State of Wyoming provided \$52M or 40% of the \$130M construction cost. The state retained the right to the additional storage capacity, and shares in the additional power revenues. Local interests paid half the cost of a new visitor's center.

The Council's usual committee meetings began with the Water Quality Committee discussing the Clean Water Act and Safe Drinking Water Act. CWA reauthorization does not appear likely this year, but the Committee reviewed possible changes related to arid states, tribes, abandoned mines, non-point source pollution, Section 510 water rights protection and Section 401 water quality certification. With respect to the latter, the Committee briefly discussed the U.S. Supreme Court's *Elkhorn* decision,¹⁵ upholding state authority under the Clean Water Act to include minimum streamflows as a condition of certification under Section 401.¹⁶ The Committee also discussed concerns regarding the addition of hundreds of rivers and streams to state inventories of impaired or threatened waters under CWA Sections 303(d) and 305(b). The Committee amended and recommended a position later adopted by the Council, encouraging the Congress to reauthorize the Safe Drinking Water Act and supporting legislation passed by the Senate.¹⁷

¹⁵Western States Water, Issue #1048, June 17, 1994.

¹⁶Western States Water, Issue #1055, August 5, 1994; and
Western States Water, Issue #1022, December 17, 1993.

¹⁷Western States Water, Issue #1045, May 27, 1994.

The Legal Committee discussed in greater depth the implications of the *Elkhorn* case, as well as an Idaho case limiting the scope of the public trust doctrine with respect to the appropriation of water.¹⁸ Nancy Kaufmann, Assistant Director of Ecology Services for the U.S. Fish and Wildlife Service, addressed implementation of the Endangered Species Act, and commented on the WSWC's draft discussion paper, pledging support for cooperative action. The Committee also discussed a meeting of state water and fish and wildlife management agency officials to be held in October. Further, of note, the Committee discussed a draft paper on intrastate water transfers in the West. Members were asked to provide comments.

The Executive Committee met and reviewed the auditor's and budget reports, as well as current membership. While participating for some time as an associate member, the state of Oklahoma has been unable to secure funding for full membership. Also of note, the state of Alaska recently eliminated its entire Division of Water, with some of its responsibilities transferred to the Division of Mining within the Department of Natural Resources. With respect to other matters, the state of Oregon asked that WSWC staff compile information on the number of water rights applications received by states annually, staffing levels, and any current backlogs. Oregon has a goal of processing applications within eight months.

The Water Resources Committee reviewed a report on state water use fees previously presented to western governors.¹⁹ Further information may be catalogued to present the amount, as well as the types of fees charged. The Committee discussed activities in the Lower Colorado River Basin, ground water recharge, the Corps of Engineers Missouri River Operations Master Manual, and hearings on water spreading.²⁰ Professor William Lord and Jim Henderson of the University of Arizona presented members with the findings of a study regarding severe sustained drought in the Colorado River Basin. Using computer models, they showed that under current operating criteria, over a number of decades of drought, federal reservoir levels could drop precipitously. The models allow water managers to experiment with a number of potential policy changes and examine the effects on water supplies and reservoir levels in the basin. Of note, record heat, combined with continuing drought, still threaten water supplies in a number of western states.

Ed Osann, Director of Policy and External Affairs for the Bureau of Reclamation, was a special guest. He addressed the Water Resources Committee on water spreading issues and water conservation planning guidelines. He expressed Reclamation's interest in working with the states, possibly under cooperative agreements, to inventory state water rights for federal reclamation projects, as part of a review of water spreading, i.e., the illegal use of water outside of statutory or contract limitations. He also suggested Reclamation might contract with the states to review proposed conservation plans. He further noted criteria were to be developed with respect to the value of "saved" water, in order to help evaluate economic alternatives and conservation incentives. However, the proposed conservation guidelines do not prescribe future uses of saved water.

¹⁸Western States Water, Issue #1053, July 22, 1994.

¹⁹Western States Water, Issue #1052, July 15, 1994.

²⁰Western States Water, Issue #1053, July 22, 1994.

Also of note, Mr. Osann referred to the so-called "Galloway" report, by an Interagency Floodplain Management Review Committee, which evaluated flooding in the Midwest in 1993. The report made a number of recommendations with respect to current policies, programs, and activities. He suggested the Council might wish to comment on recommendations that the President activate the Water Resources Council, reestablish river basin commissions to coordinate federal-state-tribal activities, and revise current principles and guidelines for evaluating federal projects and programs. Lastly, Mr. Osann expressed an interest in the work of a WSWC Subcommittee on Water Information Systems Management, and offered Reclamation's support.

The 115th Council meeting was Chaired by Dave Kennedy of California. Jeff Fassett, the Wyoming State Engineer, and Mike Purcell, Administrator of the Wyoming Water Development Commission, described a number of water issues and challenges facing the state. Federal permitting requirements, for state projects designed to meet growing water supply needs, are "out of hand," according to Mr. Purcell. He specifically referred to the National Environmental Policy Act (NEPA) and CWA Section 401(b)(1) requirements. He also referred to required "purpose and need" statements, limited planning horizons (10-25 years), and designation of Aquatic Resources of National Importance (ARNI) as issues that are particularly troublesome.

Jeff noted that Wyoming is at the top of the Colorado, Columbia, and Missouri River basins. As a result, Wyoming is involved in many water issues that inevitably "ricochet" upstream. He mentioned growing demands for water and conflicts between agricultural, environmental, municipal and industrial uses. Further, he mentioned regional water banking and transfer proposals, Endangered Species Act requirements, tribal/state water management challenges and other issues. He also noted that since 1987, Wyoming has had only 60-70% of average precipitation, and drought is a very real and continuing problem.

The Council's working committees reported on their meetings. The Safe Drinking Water Act position recommended by the Water Quality Committee was unanimously adopted. Further, resolutions of appreciation were approved for Hedia Adelsman, Ruben Ayala, Tom Cahill, Ric Davidge, Lorna Stickel and Norman Johnson. They were all praised for their contributions to the Council.

Thereafter, Mike Brophy of Arizona discussed the future of negotiated Indian water rights settlements. While there has been considerable progress, and agreements have been reached with a number of tribes in Arizona and elsewhere, some past settlements must be modified, and many claims remain unresolved. There are about twenty federal negotiating teams working, but Mike expressed disappointment over an apparent lack of leadership at the federal level, which may presage a reluctance to fund any new settlement agreements.

Lastly, the Council unanimously elected new officers. Larry Anderson of Utah was elected as Chair, and Jeff Fassett of Wyoming as Vice Chair, with Francis Schwindt of North Dakota as Secretary-Treasurer.

**116th Quarterly Meetings
December 7-9, 1994
San Antonio, Texas**

The Council's 116th quarterly meetings were held in San Antonio, Texas on December 7-9. On Wednesday afternoon, Fred Pfeiffer, General Manager of the San Antonio River Authority, hosted a tour highlighting flood control and ground water recharge activities in the area, as well as Comal Springs, a major discharge point for the Edwards Aquifer. Thereafter, the Endangered Species Act and Clean Water Act subcommittees met and extensively reviewed proposed legislative and administrative changes.

Thursday morning, Commissioner Dan Beard, U.S. Bureau of Reclamation, addressed the Water Resources Committee reiterating that Reclamation is now a water management agency. Staff levels have dropped from 7,500 to 6,500 and another 700 will be retiring over the next 2-3 years. Authorized spending is down from \$850M to \$740M, with \$45M less appropriated than last year. The construction budget is down from \$750M to \$400M. Reclamation has eliminated two layers of management, given field offices more authority, converted its Denver offices into a customer service center, and changed program priorities. Mr. Beard discussed conservation planning criteria and activities, water spreading problems and solutions, water service contracts and repayment policies, Reclamation revenues, transfer of operation and ownership of federal projects, and salmon recovery. The committee also addressed national water policy initiatives, including the Corps "Galloway" report and proposed Senate legislation.²¹ Patty Eaton of Oklahoma, the new Chair of the Interstate Council on Water Policy, described ICWP's National Water Policy Project and asked for support.

Next, Keith Higginson noted he had received a letter apologizing for the delay in a decision on the status of the Advisory Commission on Western Water Resources.²² Keith and other Commission members were only recently named, and have yet to meet. The Administration has not issued a charter required for the Commission to act, and it is unlikely now that the Commission could prepare a meaningful report by its October 1995 deadline. Committee members discussed the future of the Commission, and will individually advise their governors regarding any extension of the current legislative authority to allow the Commission to undertake the review.²³ The Committee meeting concluded, discussing the status of work related to ground water recharge, state water permitting

²¹Western States Water, Issue #1057, August 24, 1994; and
Western States Water, Issue #1060, September 9, 1994.

²²Western States Water, Issue #1072, December 2, 1994.

²³Western States Water, Issue #936, April 24, 1992;
Western States Water, Issue #963, October 30, 1992; and
Western States Water, Issue #1056, August 12, 1994.

programs, and state water information management systems. It approved its 1995 work plan. Also, Colorado State Engineer Hal Simpson asked for information on state water plans and water banking.

Mike Evans, General Counsel to the Senate Committee on the Environment and Public Works, addressed the Water Quality Committee. He stated that no environmental legislation is slated for the new Congress' first 100-day agenda. However, the Safe Drinking Water Act is likely to move in the second-tier of legislation. The House favors a new omnibus Clean Water Act bill, while the Senate is more likely to package "passable" components. Among the key issues Mr. Evans listed were stormwater, state revolving funds (SRFs), and possibly wetlands. Mr. Evans also stated that legislation will be reintroduced by Senator J. Bennett Johnson (D-LA) to try to reverse the Supreme Court's "*Elkhorn*" decision.²⁴

Next, Linda Eichmiller reported on activities and priorities of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA). She endorsed coordination of state natural resource programs, adding that the National Governors' Association's Natural Resources Committee would soon meet to discuss national environmental legislation. Next, Louise Wise, EPA's Director of Policy, Office of Oceans, Wetlands and Watersheds described voluntary approaches to watershed management, opportunities to streamline EPA's reporting requirements and increase regulatory flexibility, and federal funding. At present, EPA is involved in about 100 watershed management programs, excluding cooperative interagency watershed efforts.

Of note, Fritz Schwindt of North Dakota presented a proposal for Safe Drinking Water Act reauthorization. EPA standards are controversial because they are difficult and expensive for small systems serving populations of less than 100,000 (about 80% of U.S. water systems). He recommended that EPA continue to establish levels of unreasonable risk and maximum contaminants levels, but allow states and local communities to conduct risk assessments and cost analyses, then determine the level of risk they are willing to accept. He also suggested that EPA could assist in the development of water treatment technologies. He asked members for comments on the proposal.

John Leshy, Solicitor of the Interior Department, addressed the Legal Committee regarding an informal proposal for resolving unadjudicated federal reserved rights in state water rights proceedings outside the general adjudications process. He noted that a variety of approaches have been taken, and recognized concerns over setting any unworkable precedent. He proposed a memorandum of understanding, between state and federal entities, which would offer an opportunity for greater consultation and coordination, and help avoid litigation. A number of activities on federal land require state water permits, and state decisions are often similarly affected by federal land management decisions. Mr. Leshy welcomed comments.

The Committee also discussed western governors' interest in developments regarding the Endangered Species Act and a working group the Western Governors' Association will convene to develop recommendations on ESA amendments, as well as improving ESA implementation. The

²⁴Western States Water, Issue #1046, June 3, 1994.

Council has been invited to participate, along with representatives from the Western Association of Fish and Wildlife Agencies, as well as federal administration and congressional officials. The Legal Committee identified a number of concerns, for the benefit of the WSWC representatives, to add to past Council ESA positions.

The Executive Committee addressed a number of important items. It adopted its 1995 work plan, and approved a request from the state of Alaska for associate membership. The committee also unanimously approved increasing the subscription fee for *Western States Water*, the Council's weekly newsletter, from \$75 to \$100 per year.

On Friday, Commissioner Pam Reed, Texas Natural Resources and Conservation Commission (TNRCC), welcomed fellow members to Texas. Laura Koesters, TNRCC's Deputy Director, addressed watershed management issues within the state, focusing on Texas' Clean Rivers Program, which involves water quality assessments and then a geographic approach to problem solving. Jack Tatum, Development Coordinator for the Sabine River Authority, also addressed members regarding water development in East Texas, and the Authority's focus on environmental services.

Next, Denise Fort, Chair-Designate of the Advisory Commission on Western Water Resources, reviewed the status of the Commission and the prospects for its future.²⁵ While the Congress authorized \$10M for its work, and \$2M has been appropriated in each of the last two years, without a required administrative charter the money has gone unspent. There appear to be two primary reasons for the delay. First, there is little consensus over the need for a national water policy for the West. A de facto policy is inherent in federal statutes and administrative rules, etc. Moreover, many decisions are moving to the state and local level. Second, the Commission may present a no-win political situation for the Administration, which remembers the effect of the Carter Administration's water projects "hit list." Interior is looking at alternatives.

The working committees reported on their meetings. There were no external policy positions presented, but the Council did identify a number of concerns with respect to the Endangered Species Act in anticipation of the WGA discussions to be sponsored at the request of Chairman Michael Leavitt, Governor of Utah. Also, the Council approved a resolution of appreciation for outgoing member Ric Davidge of Alaska.

In 1995, under the newly approved schedule, Council meetings have been set for: April 12-14, in Durango, Colorado; August 2-4, in Rapid City, South Dakota; and November 15-17, in Scottsdale, Arizona.

²⁵Western States Water, Issue #1067, October 28, 1994.

OTHER IMPORTANT ACTIVITIES AND EVENTS

In addition to the Council's regular quarterly meetings and formal resolutions and position statements, which are described elsewhere, several other important activities and events occurred.

Council Member and Staff Changes

At the end of the year, **Pearl O. Pollick** retired after 23 years of service. Pearl came to work for the Council in 1972 as a secretary, and was our office manager for many years. Well past retirement age, she continued to work part-time, handling most of the Council's financial affairs. Her work was always top quality, and her dependability and managerial skills made her a very valuable employee. However, we will miss most her pleasant manner, quick wit and concern for others that made her a pleasure to work with. We wish her well in her "golden years!"

After some fourteen years of service to the Council, **Norman K. Johnson** resigned as Legal Counsel in order to take a position with the Utah Attorney General's Office in their natural resources division. Norm joined the Council in 1980 as a legal intern and upon graduation from law school he was offered a position. The Council sincerely appreciates his significant contributions during his tenure as Legal Counsel, and his service as staff to the Legal and Water Quality Committees. In addition, his friendly disposition and concern for others will be greatly missed.

There were also a number of changes in Council membership. A long-time member, California State Senator **Ruben Ayala** was replaced. While his duties as chair of the California Senate's Agriculture Committee kept him from attending many meetings, he was always a dependable supporter. **Hedia Adelsman** represented the state of Washington on the Council from 1987 until her recent departure as Water Resources Program Manager in the Department of Ecology. She ably chaired the Water Resources Committee and served as a member of the Executive Committee. We will miss our professional and personal association. **Tom Cahill** was associated with the Council long before he was named as a member from Nevada in 1992, when he became Director of the Colorado River Commission of Nevada, a position he left in 1994. Tom was Executive Director of the Western States Water Council during some of its early formative years from 1970 to 1973. Tom has been a true friend and valued colleague.

Also, **Ric Davidge** was a very active member of the Executive and Legal Committees for three years until his departure when his position and the Alaska Division of Water were dissolved. He will be remembered for his vigorous promotion of the beneficial use of Alaska's abundant waters. After three years of service, **Mike Menge** of Alaska was also replaced. **Lorna Stickel** left after resigning her water planning position with the City of Portland and her position as Chair of the Oregon Water Resources Commission. She had served on the Council since 1990, and was an active and valuable member of the Water Quality Committee. She and the other retiring members will be greatly missed, but not forgotten.

Western States Water

For twenty years, the Council's weekly newsletter, Western States Water, has been one of its most visible and well received products. Its primary purpose is to provide governors, members, and others with accurate and timely information with respect to important events and trends, in order to promote better federal, state, and local decisionmaking and problem solving. It is intended as an aid to help achieve better water management, improve intergovernmental relations, promote western states rights and interests, and point out policy trade-offs. In addition, it covers meetings, changes in Council membership, and other Council business. The newsletter is provided as a free service to members, governors and their staff, member state water resource agencies, state water users associations, selected multi-state organizations, key congressmen and their staffs, and top federal water officials. Other public and private agencies or individuals may subscribe for a fee, which was raised to \$100 in 1994. For information contact the Council office.

Water Law Workshop

The 12th Annual Water Law Conference was held February 10-11, in San Diego, California. It is sponsored by the American Bar Association's Section on Natural Resources, Energy, and Environmental Law, in cooperation with the Western States Water Council, and the Conference of Western Attorneys General. Some 235 people attended. Issues discussed included the Endangered Species Act and water resource use and development. Interior Solicitor John Leshy and Assistant Secretary of Interior Betsy Rieke discussed the Department's agenda and programs. A panel representing state, municipal, and tribal interests focused on emerging legal issues in the Colorado River Basin. Commissioner Dan Beard addressed new directions for the Bureau of Reclamation, along with representatives of the irrigation and environmental communities. Other issues discussed included litigation related to Clean Water Act Section 401, modifying reservoir operations to meet changing regulatory water supply requirements, and the intersection of water law and land use law.

Water Policy and Management Workshops - Watershed Management

On February 24-26, the Western Governors' Association and the Western States Water Council cosponsored a workshop on watershed management in Boise, Idaho. Approximately 75 people attended, representing an array of federal, state and local agencies, as well as public and private interest groups. The group addressed three basic questions: (1) What types of problems are best suited to a watershed approach? (2) Are there particular methods and processes that are most likely to succeed? and (3) What immediate issues and actions offer opportunities for use of the watershed approach? David Rosgen, a noted hydrologist, spoke on the topic of "healthy rivers/healthy watersheds," and Todd Harris, Water Quality Officer at Metro Wastewater in Denver, discussed "altered watersheds." Dave Getches, Professor of Law, University of Colorado, was the workshop facilitator and described how watershed management fits within the Park City Principles that were developed with WGA/WSWC assistance. Frank Gregg, a former professor at the School of Renewable Natural Resources, University of Arizona, and former Director of the Bureau of Land Management under the Carter Administration, described the history, opportunities, and realities of watershed management. The group also heard five presentations on case studies covering the Rio Grande River/City of El Paso in New Mexico and Texas, Muddy Creek in Montana, the John Day Watershed in Oregon, the San Pedro River in Arizona, and the Henry's Fork Watershed in Idaho.

After the general sessions' discussion, participants focused on recommendations and future actions. A summary report is to be prepared by WGA staff.

Information Systems Management Conference

On March 21-22, the New Mexico State Engineer's Office, Information Management Systems Division, in association with the Western States Water Council, sponsored a conference in Albuquerque, New Mexico on water information management systems. About 140 attended, representing fourteen states, eight federal agencies, three Indian tribes, numerous state and local agencies from New Mexico, and a number of private interests. New Mexico State Engineer Eluid Martinez was the keynote speaker.

The agenda included 20 presentations on topics covering geographic information and global positioning systems, hydrologic modeling, water demand/supply modeling, environmental databases, integration of water quantity and quality assessments, integrating water rights-related data, water use inventories, and remote sensing technology. Of note, the U.S. Geological Survey demonstrated its National Water Information System, which integrates water quality, meteorologic, and hydrologic data from many monitoring sites across the country. The New Mexico Commission on Public Records also described guidelines established by the state for legal acceptance of electronic records.

The conference concluded with a valuable roundtable discussion among state representatives on their current information management programs, including existing data bases, past and present hardware and software, information systems management applications, and a number of issues such as establishing data collection and management standards, federal/state interfacing, avoiding duplication, identifying available databases, data conversion problems, and the need for a continuing exchange of information and ideas. The state of New Mexico later recommended and the Council approved establishment of a water information management systems subcommittee to address these and other issues and consider sponsoring an annual conference.

Western Governors' Association Annual Meeting

Of note, the Western Governors' Association held its annual meeting in Lake Tahoe, Nevada on June 12-14. The governors discussed several matters of regional and national importance. George Frampton, Assistant Secretary of Interior for Fish and Wildlife and Parks, and Jim Lyons, Assistant Secretary of Agriculture for Natural Resources and the Environment, discussed federal programs and policies. Mr. Frampton announced proposed policy changes regarding ESA implementation would be out soon. WGA Chairman, Governor Mike Leavitt of Utah, urged increased cooperation among the member governors to "raise the rhetoric" about how the federal government treats western concerns. He promised to work in the coming year for a "stronger voice, a better balance, and a West that works." Governor Leavitt concluded by stressing that governors must look to themselves in making states more effective competitors in the public opinion forum.

Further, Governor Leavitt noted that he had benefitted from the work of the Western States Water Council on several occasions during the past year, and that he considered the Council a very valuable

resource. His positive comments were echoed in a report prepared for the governors by an outside consultant, pursuant to a request made last year for a review of multistate organizations in the West. The report stated that WGA/WSWC "coordination...on policy development and national lobbying is a model" for other organizations. The report noted with approval examples of the presentation of joint testimony, close staff-to-staff communication, and WSWC participation in the WGA work plan. The report made a number of suggestions for improving other groups efficiency and accountability.

Water Management Symposium - The Endangered Species Act

The Western States Water Council, together with the Western Governors' Association and the Western Association of Fish and Wildlife Agencies, cosponsored a Water Management Symposium on, "The Effect of the Endangered Species Act on Western Water Management: Improving ESA Implementation." The symposium was held on October 5-7, in Grand Junction, Colorado. State representatives organized a field trip of structures and facilities on the Colorado River for the protection and recovery of endangered fishes in the Upper Basin along a fifteen-mile critical reach. The symposium began with a useful overview of the Endangered Species Act and some persistent misperceptions. Subsequent speakers discussed both the challenges and opportunities that the Act provides affected state agencies. Chuck DuMars, Professor of Law at the University of New Mexico and a WSWC member, led an exercise to identify group perceptions on challenges to implementing the Act, particularly for states.

The second day was devoted to case studies. These included the complex and challenging situations in the San Francisco Bay/Sacramento-San Joaquin Delta in California and the Edwards Aquifer in Texas, as well as unique impacts in Alaska resulting from the decline of salmon runs in the Northwest. One session dealt with interstate effects in the Colorado River Basin, the Columbia-Snake system, and the Missouri River system. Over lunch, a California attorney involved in developing habitat conservation plans (HCPs) offered candid views on their advantages and disadvantages, and made recommendations for the group's consideration. The afternoon session focused on efforts to integrate water management and fish and wildlife management issues regarding protection of endangered species, both within states and river basins.

The case studies were followed by a brief group discussion and assignments to smaller working groups to develop recommendations to improve ESA implementation. These small groups met Friday morning. One group addressed how states can take a proactive role in preempting application of the ESA. A second group considered how to avoid arbitrary ESA implementation, particularly how to use the new policy directives issued by the Administration to change ESA implementation. A third group prepared recommendations for amending the Act. Later, the small groups reported, and there was a general discussion to refine and reach consensus regarding the recommendations of the smaller groups. Lastly, there was a discussion of what next steps would be appropriate to further the recommendations of the group. The recommendations will be reviewed by attendees and then forwarded to the members of the cosponsoring organizations for their consideration.

Water Policy Seminar

Given the significant number of changes in the new Congress, the potential difficulty with identifying and involving new congressional staff, and last year's problems with securing participation by Administration officials that had not yet been confirmed in their positions, the Council decided to postpone until next year its biennial water policy seminar in Washington, D.C. Moving from the even to odd years will avoid the confusion that follows the national elections.

Western Drought Conference

"Drought Management in the Changing West: New Directions for Water Policy," was held in Portland, Oregon on May 10-13. Over 100 people attended. The conference was organized and hosted by Don Wilhite, Director of the International Drought Information Center at the University of Nebraska, and cosponsored by the Western Regional Climate Center, SCS/USDA's West National Technical Center, and the Western States Water Council. Two pre-conference workshops addressed the need for and possible establishment of an integrated climate monitoring system and drought mitigation center. The conference addressed a wide range of issues related to drought planning, preparedness, and mitigation.

The program included prominent speakers such as: Anne Squier, Senior Policy Advisor to Oregon Governor Barbara Roberts; Charles Wilkinson, University of Colorado Law Professor; Dave Kennedy, California Department of Water Resources Director and WSWC Chairman; John Keyes, Pacific Northwest Regional Director for the Bureau of Reclamation; Richard Oppen, Missouri River Basin Association Executive Director; Arvid Thompson, Director of Civil Works and Planning for the Corps of Engineers in Omaha; Keith Higginson, Idaho Department of Water Resources Director and WSWC Vice-Chair; Martha Pagel, Oregon Department of Water Resources Director; Tom Graff, Senior Attorney with Environmental Defense Fund; John Rogers, Vice-President for Ecological and Strategic Systems for CH₂M Hill; Jim Lyons, Assistant Secretary for Natural Resources and the Environment, U.S. Department of Agriculture; and Craig Bell, WSWC Executive Director.

Among the many issues addressed were improvements in drought forecasting, integrating existing climate information, emergency preparedness, mitigation technologies, public and private partnerships, protection of environmental values, changing threats and opportunities in water policy, and virtual drought games. The conference proceedings were compiled and published. Of note, one product of the meeting was a "notice of intent," signed by several interested federal agencies, to integrate into a single system current climatological data gathered from many sources and disseminated in different ways. The conference was directed towards using lessons from recent droughts and a number of studies to explore better ways to address drought management as an integral part of western water policy.

Elections

In the West and elsewhere, Republicans captured a majority of the governors races and open seats in the U.S. Congress.²⁶ In Alaska, former Anchorage Mayor Tony Knowles is the new governor, with Governor Walter Hickel retiring. Arizona Governor Fife Symington (R) was reelected, along with California Governor Pete Wilson (R), Colorado Governor Roy Romer (D), and Nevada Governor Bob Miller (D). New Mexico Governor Bruce King (D) lost his bid for an unprecedented consecutive term to Republican Gary Johnson. Hawaii's Lt. Governor Ben Cayetano (D) will move to the Governor's mansion, as will former Idaho Lt. Governor and longtime legislator Phil Batt (R). In Oregon, former Democratic State Senate President John Kitzhaber (D) will succeed retiring Governor Barbara Roberts. Former Republican Governor William Janklow was again elected in South Dakota, after earlier defeating Governor Walter Miller in a primary race. In Texas, Republican George W. Bush defeated Governor Ann Richards (D). Wyoming Republican State Senator Jim Geringer won the governor's seat, as Governor Michael Sullivan stepped down to run for the U.S. Senate, unsuccessfully. Sweeping Republican gains in the U.S. House and Senate will bring dramatic leadership changes to the Congress. Many seats will be open to new members, and new committee and subcommittee chairs will be named. This will likely mean significant shifts in policy, with western members gaining influence. A new tone will likely be set with respect to environmental and natural resource issues, and water-related legislation.

Endangered Species Act

In addition to the Water Management Symposium, which addressed implementation of the Endangered Species Act, the Council was actively engaged in discussions with the Western Governors' Association and participated in a working group convened to address western governors' interest in developing recommendations on ESA amendments, as well as improving ESA implementation. The Council was invited to participate, along with representatives from the Western Association of Fish and Wildlife Agencies, and federal and congressional officials. The Council identified a number of concerns, for the benefit of the working group, to accompany past Council ESA positions. However, the listed concerns were not a formal position of the Council. Throughout the year, Council staff also monitored a number of species listings related to water development.

Federal Energy Regulatory Commission

The U.S. Supreme Court's *Elkhorn* decision²⁸, upheld states' authority under the Clean Water Act to include minimum streamflows as a condition of certification under Section 401.²⁹ Thus, in effect, the Court restored to the states authority under federal law to accomplish what the Court had earlier

²⁶ Western States Water, Issue #1068, November 4, 1994.

²⁸ Western States Water, Issue #1048, June 17, 1994.

²⁹ Western States Water, Issue #1055, August 5, 1994; and
Western States Water, Issue #1022, December 17, 1993.

said they could not do under state law.³⁰ States had unsuccessfully tried to reverse the effect of the Court's earlier action through legislative and administrative efforts. The Court found that the state of Washington's minimum streamflow requirements were a permissible condition of certification, *P.U.D. No. 1 of Jefferson County v. Washington*, No. 92-1911 (May 31, 1994), sometimes called the *Elkhorn* case. The decision affirmed a Washington State Supreme Court ruling which held that the Federal Power Act (FPA) does not preempt the Washington Department of Ecology from including minimum streamflow conditions in a Section 401 certificate issued by the state in conjunction with a hydropower project licensed by the Federal Energy Regulatory Commission (FERC) under the FPA.³¹ Over 40 states, several environmental groups, and the U.S. Justice Department supported Washington's position before the U.S. Supreme Court, while various hydropower interests opposed it. FERC and the hydropower industry have long argued for a minimal state role in licensing hydropower projects. FERC was not a party to the *Jefferson County* suit.

The Court's 7-2 decision recognized a state's authority to impose conditions necessary to protect a designated use contained in a state's water quality standards. The utility district had claimed that the state could only impose water quality limitations specifically tied to a "discharge." The Court noted that Washington's instream flow requirement was a limitation necessary to protect the designated use of the affected river as fish habitat. The utility district had argued that the CWA water quality standard sections require states to protect designated uses solely by implementing specific numeric criteria. The Court noted that, under the language of the CWA Section 303, water quality standards contain two components - designated uses and water quality criteria - and that Section 401 should be interpreted to require a project to be consistent with both.

The Supreme Court also rejected the utility district's assertion that the CWA is concerned only with water quality, not water quantity. The majority opinion referred to the claim as "an artificial distinction." The Court also said that CWA Sections 101(g) and 510(2), the CWA "state savings clause" language, do not limit the scope of water pollution controls that may be imposed upon users that have obtained, pursuant to state law, a water allocation, but rather preserve each state's authority to allocate water quantity as between users. The Court also rejected an effort to read "implied limitations" into CWA Section 401 based on the utility district's claim of a conflict between CWA certification and FERC authority under the FPA. The utility district argued that the *First Iowa* line of cases limited Washington's authority to carry out Section 401 certifications.

³⁰Western States Water, Issue #836, May 25, 1990.

³¹Western States Water, Issue #987, April 16, 1993.

Ground Water Recharge Demonstration Program

Work under the Council's cooperative agreement with the U.S. Bureau of Reclamation continued through 1994, though other priorities and the delay in completion of many of the program projects necessarily delayed evaluation and completion on a summary report. Moreover, work was slowed by the departure of Reclamation's technical representative, Brad Crowder for EPA, and the lack of a replacement for an extended period. The Congress acted in 1992 to extend the program and authorized increased funding to complete a number of deferred projects. In response, the Council and Reclamation extended their cooperative agreement through June 1994. However, Commissioner Dan Beard soon thereafter announced that Reclamation would not seek funding for the deferred projects. Therefore, the report will focus mainly on those projects already completed or currently under construction. Only a few program projects remain to be visited, and most of the remaining work involves compiling a series of project reports to be added to an introduction, findings and recommendations in a draft program report.

State Water Use Fees

In 1994, the Council completed and distributed a summary report and matrix comparing water use fees among western states, and presenting the results of a survey made in December 1993. State legislative and administrative agencies are faced with maintaining and expanding water resource related services in the face of state budget cuts and dwindling federal support. As federal and other financial resources become more and more scarce, many states are evaluating various potential fees related to water use. Fees were defined as those assessed by and paid directly or indirectly to the states for the use of surface or ground water resources or for any state services related to such use. The survey included fees administered by state water resources planning and development agencies and state agencies handling water rights administration and adjudication. It did not address state fees imposed under state drinking water protection programs, nor state water quality monitoring and protection programs. Water service fees assessed to recover capital and operation and maintenance costs incurred by the state in the financing or construction and operation of water storage and delivery projects were also excluded from the survey.

State water use fees were categorized as actual use fees, administrative fees, and enforcement-related fees. The study found few states have anything resembling an actual water use fee that is recurring and based on the quantity of water used. Rather, most state water use fees are one-time application or filing fees. Most fees are flat fees, although some are graduated based on the amount of water to be used, or the cost and complexity of the required administrative action. While the cost of providing state services is increasing, opportunities to increase general funding is limited, leading to funding shortages and rationing of services (permitting backlogs). The study found fees now fund or offset only a small portion of the overall cost of state water management activities. Some fee revenue is earmarked for revolving funds or accounts, but most is returned to the general fund or a special fund and must be appropriated prior to use by state water management agencies. Further, public acceptance and political feasibility are major considerations in the successful establishment and application of water use fees. The primary interrelated purposes for water use fees are to increase efficient resource allocation, encourage conservation and raise revenue. Federal immunity granted agencies (and tribes) from most or many state fees is a serious problem that leads to inefficiency and creates inequities. Lastly, late fees and penalties increase compliance.

The governors expressed particular interest in the reports findings and recommendations. The report discussed the advantages and disadvantages of water use fees, and represented a number of conclusions, before recommending that western states carefully examine existing and potential fees and consider appropriate measures to authorize the use of fees to encourage the most efficient and equitable use of state water resources.

Water Conservation

The Council continued to gather and disseminate information on state water conservation programs, building on a summary report and matrix comparing state programs that was completed in December 1993. Meanwhile, the U.S. Bureau of Reclamation moved forward with its own conservation program, including promulgating guidelines for water conservation plans required by federal statute. In light of the fact that several states now require some type of local conservation planning, and given Reclamation's limited staff resources, Commissioner Dan Beard began continuing discussions with the Council regarding the cooperative development and implementation of federal and state requirements.

Water Rights Permitting Programs

At the request of the state of Oregon, WSWC staff compiled information on the number of water rights applications received by states annually, staffing levels, and any current backlogs. Oregon has a goal of processing applications within eight months. Many western states face the problem of trying to maintain and improve services with declining resources. As this isn't always possible, more and more states find that there is a growing backlog of permits to be issued and other regulatory actions to be taken. Across the board comparisons are difficult as states' administrative responsibilities and jurisdictions vary and so do the reasons for any backlog.

Westwide there does not appear to be any clear trend revealing either an increasing or decreasing number of permit applications. What is apparent is that applications are becoming much more complex, are more often contested, and therefore require greater time and staff resources. The types of applications are also changing, as more and more streams are fully appropriated and change or transfer applications out number new appropriations requests. Depending on resources and statutory deadlines, state agencies may begin processing applications upon receipt, or within a few days or weeks. If there are no complications, most final permits are generally issued within two to six months. However, the process can be extended for years if there are protests or insufficient information is available upon which to base a decision.

Almost every state has some backlog of pending permit actions, though states define the problem differently. In general, state program resources are lacking or are barely adequate. There does seem to be a possible correlation between those states that set deadlines for action by statute and those that provide adequate resources to meet those requirements. Further, states are experimenting with a number of alternatives in an attempt to compensate for the lack of resources, including processing large numbers of applications in batches (some by watersheds), raising permit fees, exempting some

1994

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

Twenty-ninth Annual Report

smaller uses and otherwise streamlining and reducing permitting requirements, putting more of the burden of proof on applicants, and using computer automation.

Water Transfers - Intrastate Approaches, Problems and Related Issues

During 1994, Council staff completed a draft report addressing issues related to intrastate water transfers, which was extensively reviewed and revised. The paper provides a historical background and synopsis of current laws relating to transfers. It also discusses traditional impediments to intrastate water transfers, including barriers based on the public welfare. The paper also describes means to facilitate intrastate transfers, such as marketing programs and incentives, well-defined property rights, and ways to reduce high transaction and information costs. It specifically addresses water banks, shared storage capacity, lease-back arrangements and exchanges. Experiences to date with various state water markets are covered in a number of case studies in Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon and Washington. Lastly, it presents marketing issues related to equity and third-party impacts, including out-of-basin transfers and their effects. A number of conclusions and recommendations are presented.

Western Water Policy Review Commission

In 1992, Congress authorized the Commission to advise the Secretary of Interior as part of a comprehensive review of federal activities in nineteen western states related to the allocation and use of surface and ground water. Following an extended delay, President Clinton announced his intention to name a number of new members to what was called the Advisory Commission on Western Water Resources in July 1994. The announcement named Denise Fort, University of New Mexico, as Chair, and the following members: Bruce Babbitt, Secretary of Interior; Togo West, Secretary of the Army; Huali Chai, an attorney and expert in biochemistry; Janet Neuman, an attorney specializing in water and natural resources; Jack Robertson, Deputy Administrator of the Bonneville Power Administration; Harriett Wieder, Chair of the Orange County Board of Supervisors; John Echohawk, an attorney and Executive Director of the Native American Rights Fund; Patrick O'Toole, a Wyoming sheep rancher and former state legislator; and Keith Higginsom, Director of the Idaho Department of Water Resources and Vice-Chair of the Western States Water Council. Keith was named following a direct request from the Council to the Office of the President. Given various political considerations, the Commission was never chartered, as required by federal law, and it appears unlikely it will ever fulfill its legislative mandate.

RESOLUTIONS AND POSITIONS

Under the Council's rules of organization, its functions include the investigation and review of water-related matters of interest to the western states. Moreover, from time to time, the Council adopts express policy positions and resolutions regarding proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management and protection of western water resources. The following were adopted by the Western States Water Council in 1994.

CLEAN WATER ACT REAUTHORIZATION

The Congress continued to work on the Clean Water Act reauthorization in 1994, but despite great effort, was unable to come to a conclusion. With the Congress continuing to struggle with possible amendments to the Clean Water Act, the Council and Western Governors' Association worked closely with EPA officials and others to present western state concerns and consider alternative solutions to western water quality-related problems. Council staff spent numerous hours in meetings and conference calls negotiating potential legislative language and administrative policy with respect to several important issues, including risk assessment and management, federal program funding, watershed management, non-point source pollution control, water reuse and effluent-dominated streams, and wetlands. Further, particular attention was focused on special western issues regarding deference to the states' responsibility to allocate quantities of water and set minimum streamflows, treatment of Indian tribes as states under the law, delegation of federal program authority, and provisions to recognize and protect from liability states, or other "good Samaritans," that step in to help address water pollution problems. Many issues remain unresolved, as legislation in both Houses of Congress died. The Council actively participated in the congressional debate, and revised and restated its position with regard to the Clean Water Act.

The Council's position was included in a letter to Senator Max Baucus of Montana, Chairing the Senate Environment Committee. The letter addressed S. 1114, and focused on the states' role in protecting water quality and concerns particular to the West. Further, it touched on the overall ability of state, federal, local, and tribal governments to protect water quality, administer water rights, and manage water resources. Council members and staff also met with Senate staff to discuss the issues. The letter covered wetlands and watersheds, Section 401 water quality certification, savings clause language regarding state water rights, standard setting, outstanding national resource waters, intermittent and effluent-dominated streams, non-point source pollution control, state revolving loan funds, risk assessment and management, abandon mines, tribal authority and water quality controls, and trans-border issues.



WESTERN STATES WATER COUNCIL

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April 19, 1994

Senator Max Baucus
United States Senate
511 Senate Hart Office Building
Washington, D.C. 20510-2602

Dear Senator Baucus:

The Western States Water Council appreciates your effort to reauthorize the Clean Water Act (CWA) by drafting and refining S. 1114. As you know, the Council is an organization of representatives appointed by the Governors of seventeen western states. These representatives include the heads of several state water quality agencies, as well as state water resource agencies and attorneys who represent them, and some state legislators.

As you also know, in the West, water is a vital resource that must be managed considering all social, environmental, and economic needs and values. Because of their unique understanding of these matters, the Council believes states are best suited to manage and protect the waters within their borders. Therefore, the states' role is the central point of focus for our comments. Also, because the Council is a western organization, our comments concentrate on provisions of the bill of particular western concern.

The outcome of the CWA reauthorization debate will affect the ability of state, federal, local, and tribal governments to protect water quality, administer water rights, and manage water resources. Thus, the western states have offered input to you and your staff, and others, concerning the CWA reauthorization. Specifically, the Council has provided a copy of our July, 1993 CWA reauthorization position statement to you and other members of your committee and staff, as well as western Congressional delegations in both the Senate and House. We have met with members of your staff to discuss the issues it addresses. We appreciate your willingness to consider our point of view, and we commend you and your staff for your efforts to be sensitive to matters important to us.

We understand that while S. 1114 has been reported out of the Environment Committee, many of its provisions are currently subject to negotiation and modification before the bill is brought to the Senate floor. With this in mind, we offer the following comments on certain sections of the bill. Citations refer to the version of the bill printed by the committee and labeled "Discussion Draft."

Watersheds

The WSWC is supportive of the use of comprehensive watershed planning and management. It allows focus on the most critical problems that affect watersheds, while eliminating duplication and inconsistency between regulatory entities. It also allows public involvement to be focused on a defined area where results can be measured, and has the potential to foster cooperative problem solving. Further, it provides a feasible means of developing an "ecosystem approach" relative to the protection of water quality and related values. To encourage these benefits, the CWA amendments dealing with watershed approaches

should be in harmony with the nine watershed management principles outlined on pages 2 and 3 of the enclosed position statement.

As measured against the Council's position on watershed management, S. 1114 Section 303 is clearly a step in the right direction. However, there is still too much prescription in some sections, such as the following.

Fundamental to the success of many watershed approaches designed to meet state and federal standards is a voluntary, locally driven effort in collaboration with state and federal agencies. A federally mandated program is the antithesis of such an effort, and would doubtlessly be counterproductive. While the watershed provisions of S. 1114 are nominally voluntary, the set-aside from the SRF, beginning at 5% and increasing to 25%, may render the program mandatory in effect. This provision should be dropped in favor of watershed planning and management being eligible for funding under various provisions of the act, including the SRF.

S. 1114 Sec. 303 would add to the CWA a new section, Sec. 321 "Comprehensive Watershed Management." Subsection (a)(2)(B) would require that "outstanding national resource waters" and "sensitive aquatic habitat areas," which is vaguely defined, be included in each watershed management unit. So long as the states are free to define what these terms mean, this might be acceptable. However, other provisions in the bill and the guidance to be issued by EPA in subsection (b)(2) will define these on a national basis. Such nationally defined parameters should not limit watershed-based approaches which are designed to address priority problems. Subsection (a)(2)(B) should therefore be dropped. Individual states should designate watershed management units, which identify those waters described in subsection (A) and (C), and otherwise address priority objectives.

Subsection (b)(1)(B) of the new Section 321 would establish citizen participation procedures, but dictate the use of technical and citizen advisory bodies. This should be left to state discretion. Subsection (b)(2) requires guidance relative to minimum requirements for watershed designation, including legal authority and financial resources. Some of the most effective watershed entities have no independent legal authority and financial resources, but rely on the authority and resources of their members, as well as the power of consensus, to achieve results. These successful efforts should not be restrained. The second sentence of subparagraph (b)(2) should therefore be stricken. Subsection (b)(5) creates an interagency committee to support watershed planning, but there is no requirement to include state or tribal representatives. Given the delegation aspect of this Title, state and tribal representatives should be added.

In Subsection (c) of the new Section 321 on "Comprehensive Watershed Management Plans," a state may submit a plan to the EPA for approval, but the next subsection establishes certain "required elements" of the plan. There should be more discretion for the type of "elements" that a plan can include, and there should be a much more general description of the elements to be included. This is particularly true in light of the following subsection (3), which also has a list of required "contents" for a plan. It should be possible to retain subsection (3)(B), but then allow the required "elements" in (c)(2) (which address the required "contents") to be considerably more flexible.

In Subsection (c)(4)(E)(i)(II) of the new Section 321 there is a requirement that states provide funding for planning if delegation is to occur. Although the pass-through of federal funds should certainly be a requirement, states should not be required to provide funding for the development of plans. There should be more flexibility for joint uses of federal, state and local, or private funds in this arena. As long as financing mechanisms are in place, this should be sufficient.

The "inconsistency requirement" in the new Section 321(f) requires a governor to ensure that a facility located in more than one watershed is not subject to conflicting requirements. It is unclear whether the problem addressed by this subsection is of real concern. Further, the language could result in an inability to apply conditions needed to address site-specific local concerns. It is hard to understand how a facility can be located in more than one watershed in a state unless it is located at the confluence of more than one sub-basin, or on a ridgeline between two watersheds. In such circumstances different standards may apply to protect watershed health, but how they would be inconsistent is hard to understand.

CWA Section 401

The Council's position calls for an amendment to CWA Section 401 to clarify that any federally licensed activity that results in an alteration or hydrological modification of surface water must be preceded by a Section 401 certification that ensures compliance with all provisions of state law.

S. 1114 Section 602 would add a sentence to Section 401 clarifying that states may certify that federally permitted activities will comply with state water quality standards, and specifically allows for the protection, attainment, and maintenance of designated and existing uses included in the standards. The Council finds this language supportive of its position and therefore endorses the language, and recommends that it remain, unchanged, in the bill.

State Savings Clause Language

The Council is opposed to the EPA using the CWA to impose minimum flow requirements on western streams, in direct conflict with the authority of the states to allocate water both for instream and off-stream uses. We are concerned because, over the years, there have been various proposals to accomplish this result. In 1980, for example, EPA released a draft report stating that "minimum flows...may be necessary to meet the objectives of the CWA." One of EPA's western regions, Region VIII, then circulated a draft policy advocating an EPA responsibility to "maintain instream flows to protect aquatic life and recreation." Region VIII argued "attaining the [CWA's] fishable and swimmable goal by 1983 will require that certain minimum flows be kept in the stream." A few years ago, EPA released a draft document entitled "Arid Areas and Water Use Efficiency." It explained issues from the agency's perspective and outlined options to deal with them, including: (1) "amend the CWA to clarify that instream flow standards may be established where necessary to maintain physical, chemical and biological integrity of waters,...;" and (2) "issue guidance...requiring...States to adopt standards to assure flows necessary to maintain physical, chemical, biological integrity of waters."

In the meantime, the effective application of Section 101(g) has, in the eyes of some observers, been substantially eroded by court rulings. Thus, CWA Section 510(2) needs to be clarified in light of the above history, as well as some references in S. 1114 which could provide fodder for similar arguments in the future. Therefore, the Council recommends a strengthening amendment in this regard. While we could support other, stronger language, we suggest that, at a minimum, you combine the language of Sections 302(q) and 303(e) of S. 1114 and insert them in lieu of paragraph 510(2), so that these provisions would have general application to administration of the Act, rather than being restricted to the sections on non-point source pollution and watershed management. Further, the Section should be clarified to deflate a theory that the CWA may create "federal regulatory water rights."

Thus, the new Section 510(2) should read:

"...Except as expressly provided in the Act...."

(b) Nothing in this Act is intended to amend, supersede, or abrogate any right to a quantity of water that has been established by any interstate water compact, Supreme Court decree, or state water law, or to create a federal reservation, claim, or appropriation of quantities of water. Further, nothing in this Act is intended to supersede, abrogate, or otherwise impair the right of any state to allocate any quantity of water."

Standard Setting

Section 202 of S. 1114 calls for a plan by EPA every five years for development of water quality criteria. This section authorizes ground water criteria. Five years after enactment, all waters of the United States that have not had uses designated shall be designated as fishable and swimmable. This provision is somewhat mitigated by an added provision that subsequent designations of different uses by the state shall be considered the initial designation and not a change in designation for the purpose of the act.

EPA-published 304(a) criteria become the criteria portion of state water quality standards three years after passage of the act, or three years after issuance of the 304(a) criteria where a state has not adopted and submitted to the administrator criteria for the specific pollutants. The EPA 304(a) criteria are the state water quality standards unless or until the state adopts and the administrator approves a revised standard. The Council is opposed to presumptive applicability of federal water quality criteria and recommends that the current requirements for EPA promulgation of standards be retained.

Further, we suggest adding clear language to S. 1114 explaining that any federal promulgations of standards be subject to replacement by state standards when adopted. Likewise, automatic designation of fishable and swimmable uses under Section 304(a) does not consider real conditions that exist. Where EPA designation of water quality uses is necessary, it should be done only through the current promulgation process. The CWA should make it clear that, when evidence becomes available for a state to adopt standards, the state should be able to correct the promulgated standards with a minimum of difficulty. The section of S. 1114 on numeric criteria should have a provision added that a state-revised standard should be treated as an initial standard. This would prevent claims that the state is allowing degradation.

The Council is concerned by the apparent movement into standard setting for ground water envisioned under S. 1114. At this point it is unclear what uses of ground water are to be protected. Further, it is unclear how the ground water criteria are to be placed into water quality standards. The Council opposes inclusion of groundwater criteria in the CWA. Nearly all states have active groundwater protection programs. A prescriptive, nationwide program is not needed and would slow current ground water protection efforts.

A provision should be added to S. 1114 to strengthen the recognition of regional differences in water supply and availability, water uses, plant and animal species, hydrogeography, etc., in the standard-setting process.

Outstanding National Resource Waters

The Council is concerned with the program to protect Outstanding National Resource Waters (ONRWs) contained in S. 1114. The requirement that, within a mandated number of years, ONRWs be inventoried and designated is physically impossible in Alaska. The Council requests that the portion of S. 1114 Section 202(c) that focuses on ONRWs be replaced with language that requires each state to protect ONRWs designated by the state. Thus, ONRWs should be maintained and protected by the states, which should

have five years to consider for designation as ONRWs waters within national parks and wilderness areas, and waters of exceptional recreational or ecological significance. State antidegradation policies should allow citizens to petition states to designate particular waters as ONRWs. Also, the ONRW designation process should not proceed unless sufficient federal funds are provided to states to effectuate its implementation.

Intermittent and Effluent-Dominated Streams

The Council's position on this issue notes that Congress should recognize the need for special water quality standards for streams that are dominated by sewage effluent. These standards should be based on the concept of net environmental benefit, provide for reasonable protection of designated uses, and support the objectives of state and federal law. Our position also requests encouragement of the reuse of treated wastewater. And, it calls for EPA to assist with related research.

Senator Reid's amendment on Arid West Water Quality, now Section 608 of S. 1114, embodies much of what the Council suggests would be appropriate with respect to application of water quality standards in arid areas. If passed, it would constitute a positive move toward recognition of the different conditions that are found in many arid western environments. The Council views the amendment as a step in the right direction.

Non-Point Source Pollution Control

The Council's position on NPSP control calls for flexibility in implementing NPSP programs and expending funds to combat NPSP. Also, it requests language be added to the CWA to require that federal activities and the activities of users of federal lands comply with state NPSP plans. Further, the resolution requests that EPA not define national, mandatory management practices to control NPSP and that the irrigation return flow exemption from NPDES permitting for NPSP should not be rescinded. Also, states should have primary responsibility to control NPSP, and a voluntary approach should be acceptable provided states have authority to enforce mandatory requirements where water quality standards violations occur.

Section 302 of S. 1114 limits mandatory measures to instances where NPSP contributes to impaired waters, as opposed to a universal regulatory program. This approach is consistent with Council views that mandatory measures be used in cases where water quality standards are violated. Further, the bill contains incentives for federal actions to be consistent with approved NPSP plans relative to impaired waters, and also requires some consistency between federal activities, and activities on federal lands, and state NPSP programs.

The bill, however, is still too restrictive. For example, states should be provided more flexibility to rely on an appropriate mix of regulatory approaches (such as bad-actor laws, enforceable state water quality standards, permit programs, local zoning, or direct requirements contained in state or local statutes) and non-regulatory approaches (including cost sharing programs, state tax credits, fees, point/NPSP trading, and other economic incentives and disincentives). Also, S. 1114 would require that management measures for all existing NPSP in impaired watersheds be implemented within five and one-half years of enactment. This time frame is unreasonably short, since adequate technical and financial assistance cannot be made available in all cases. We suggest a goal of "within 15 years of enactment."

Wetlands

The Council's position on wetlands calls for an improvement in the existing protection system, including encouraging more state, regional, and local control of wetlands regulation, recognizing regional differences in such regulation, providing increased federal funding to states, and creating non-regulatory incentives to accompany regulatory mechanisms.

In many respects, the Council is encouraged by Title VII of S. 1114. It contains changes in administrative deadlines, clarifies some definitions, and makes direct assignments of programmatic responsibilities; all are improvements. It also envisions greater collaboration between state and federal entities in the delineation and classification of wetlands, which is also a positive step. The Council suggests the bill could be enhanced by greater emphasis on recognition of regional differences in wetlands delineation and protection. These regional differences are especially apparent when comparing a state such as Alaska to states in the arid southwest where the program envisioned in S. 1114 will probably fall short of protecting important riparian areas. Also, the funding envisioned under the bill is inadequate. Further, the Council supports enhancement of the state role in wetlands management by explicitly authorizing state programmatic general permits.

State Revolving Loan Funds

The Council has long taken the position that State Revolving Loan Funds (SRFs) should be more fully capitalized than has been the case in the recent past. The Council supports amendment of S. 1114 to extend the SRF funding authorization until at least FY2000, with an annual appropriation of \$5B, and with maximum flexibility in the expenditure of SRFs.

Risk Assessment and Management

Risk assessment deserves special consideration during the CWA reauthorization. The Administrator's role in implementation of CWA programs should be based on the magnitude of risk to human health, the protection of designated water uses, and the likelihood of prevention of degradation or restoration of degraded waters if no action is taken. To achieve this, the Council suggests that the development and implementation of CWA programs should produce benefits to the public health, safety, and the environment that justify the cost to the government and the public of implementation of and compliance with federal requirements. The cost-benefit analysis should consider both quantifiable and qualitative measures. The EPA Administrator should identify, assess, and document alternative regulatory approaches for protecting water quality and should develop regulations and guidance based upon the best obtainable scientific, technical, economic, and other information, including the risk reduction benefits achievable by the identified alternatives.

Water Quality Controls on Tribal Lands

The Council has no conceptual difficulty with the objective of according Indian Tribes the same opportunity as states to assume primacy over tribal lands within their reservations. However, S. 1114 Section 606 contains language which could have adverse consequences. Section 606(e) could diminish environmental protection on Indian reservations. If construed to preempt state law, it could create a significant regulatory void, since EPA does not have the regulatory presence on many reservations sufficient to compensate for the loss of state regulation. This will result in inconsistent environmental protection, and leave some areas without protection. The Council opposes this result. Also, the section could prevent state/tribal cooperative agreements unless it is modified to restrict its coverage to lands over which Tribes

can be granted status for treatment as states to avoid the difficulties caused by the exercise of tribal jurisdiction over non-tribal members on non-Indian owned land located within reservation boundaries. Indeed, we suggest you consider amending CWA Section 518 to clarify its intent to foster cooperative problem solving between states and tribes that is based on optimum resource protection, rather than resolution of jurisdiction-related disputes.

Trans-Border Issues

Approval of the North American Free Trade Agreement has stimulated increased development along the border of the United States and neighboring nations. In these areas, significant differences exist between the nature and effectiveness of environmental controls. While substantial agreements have occurred relative to these issues, the Council believes that a stronger role by the federal government is necessary for the issues to be resolved. To do this, the federal government needs to better coordinate authorities, responsibilities, and resources to deal with trans-border issues in these areas.

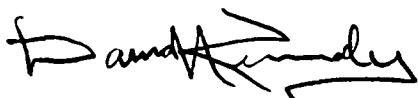
Abandoned Mines

There are a number of places nationwide where the largest source of heavy metals and other pollutants is from abandoned mine drainage. Apparently there are a number of states, municipalities, and other entities willing to put money, machinery, manpower, and their ingenuity towards cleaning up some of these abandoned mines if there were a way to avoid inheriting liability for the sites under CERCLA. Offering protection from liability in abandoned mine clean-up through some sort of "good Samaritan" standing would be an incentive for states and local governments to pursue watershed management. Point source dischargers may also prefer to use some resources and ingenuity to clean up abandoned mines to reduce these major sources of pollutants to get greater overall water quality improvements.

Conclusion

Again, we express our appreciation to you and the members of your staff for your willingness to consider our point of view on S. 1114. We look forward to continuing to work with you on the CWA reauthorization process.

Sincerely,

A handwritten signature in black ink, appearing to read "David Kennedy", with a stylized flourish at the end.

*David Kennedy, Chairman,
Western States Water Council*

**POSITION
OF THE
WESTERN STATES WATER COUNCIL
REGARDING
REAUTHORIZATION OF THE CLEAN WATER ACT
April 15, 1994**

BACKGROUND

Clean water is essential to the quality of life and health of the citizens of the nation. This is particularly true in the arid West, where water is a scarce and precious resource that must be managed considering all social, environmental, and economic values and needs. Because of their unique understanding of these needs, states are best able to manage the water within their borders. Much progress has occurred under the Clean Water Act (CWA) toward the goal of controlling water pollution. Western states have made great strides in integrating water quality and water quantity decision-making and have developed legislative and planning strategies for promoting these goals as well as promoting water conservation and water reuse.

The CWA is now being considered in Congress for reauthorization. The outcome of the debate will affect the ability of state, federal, local, and tribal governments to protect water quality, and could affect the ability of state governments to administer water rights. The Western States Water Council encourages the reauthorization of the CWA based upon the following principles. As issues become more clearly defined, the council will provide further comments in future position statements.

CROSSCUTTING ISSUES

There are three issues of importance, pollution prevention watershed management and risk assessment and management, which deserve special consideration during the CWA reauthorization process, because they potentially impact all programs authorized by the CWA.

POLLUTION PREVENTION

Pollution prevention has recently received a great deal of attention, but needs to be given more emphasis. The concept of pollution prevention cuts across all CWA programs by offering a means of avoiding complex and costly "command and control" approaches to water pollution control and clean up. Expanded funding should be provided to states for development of pollution prevention programs, and incentives such as greater flexibility in using existing grants should be provided to states with strong pollution prevention programs.

WATERSHED MANAGEMENT

The watershed approach offers great opportunities. It allows focus on the most critical problems that affect the watershed while eliminating duplication and inconsistency between regulatory entities. It allows public involvement to be focused on a defined area where results can be measured. It has the potential to foster cooperative problem solving where the important players can help each other solve mutual problems in a way that can result in an improved environment at less cost. It provides a feasible means of developing an "ecosystem approach" relative to the protection of water quality and related values. To encourage these benefits the CWA should embody the following principles:

1. States should be encouraged, but not mandated, to utilize a watershed approach for water quality and resources management.
2. Any absolute mandate contained in the CWA should be limited to water quality concerns.
3. While states should be allowed to craft their watershed management to meet their needs, the goals and the scope of such programs must be clearly defined. This definition is essential since "watershed management" has many different meanings to different people. In general, basin-specific goals and programs should be selected and prioritized on the basis of risk to quality-of-life, human health, and ecological concerns.
4. Watershed management should emphasize performance, not planning. A uniform set of best management practices should not be mandated. States should be allowed to identify appropriate individual strategies to be applied within, and for, a given basin.
5. There should be no interference with the rights of the states to manage allocation of their water supplies.
6. The internal structure of state government should not be mandated. States should be allowed to use existing authorities and programs or set up advisory committees and watershed councils to meet their needs as they understand them.
7. Flexibility should be provided in both the procedural and substantive requirements of clean water programs to meet the goals of improving water quality and the environment as soon as possible.
8. EPA should provide technical, financial, and research assistance. It should not mandate any particular approach or try to mandate its preferred methods.
9. Federal funding should be made available to the states to support watershed management. The funding should not be tied to following processes specified by EPA. There should be sufficient flexibility in funding to allow states to deal with watershed problems according to the priorities they have identified.

RISK ASSESSMENT AND MANAGEMENT

Implementation of programs authorized by the Clean Water Act should be based on the magnitude of risk to human health, the protection of designated uses, and the likelihood of further significant and unreasonable water quality degradation if no action is taken.

FUNDING

1. The minimum funding at the national level for the state revolving fund (SRF) should be \$2.4 billion annually for at least five additional years beyond the current authorization to meet the original funding commitment of the CWA. Funding levels must be restored in response to changes from the "stimulus package" which caused a reduction of funding to unacceptable levels. This funding is also needed to provide adequate assistance for new needs created by the 1987 reauthorization, such as controls on non-point source pollution, stormwater, and toxics. Adequate funding should also be provided to meet the water quality needs of small communities and rural areas. A grant program or combination loan/grant program with loan terms greater than 20 years should be implemented through new funding and/or in a manner that does not deplete SRF assets.

2. CWA Section 106 funding should be increased to a level that enables states to maintain effective water quality planning, ambient monitoring, permitting, and compliance. Funds available to states under CWA Sections 104, 319, and any new funding for pollution prevention and watershed management should be combined into Section 106, and a single grant should be awarded to each state. States should then have flexibility in targeting the expenditure of funds.

3. For any new federally mandated programs, new federal funds should be provided. The Council opposes any increased matching requirements for federal funds.

4. In providing SRF financial assistance to municipalities, federal requirements other than those specified by CWA Title VI should not be imposed. Once federal capitalization of the program ceases, EPA oversight should be limited to ensuring that the SRF is maintained. Federal crosscutting laws associated with the SRF program should be eliminated. Costs associated with the purchase of land, easements, and rights of way should be eligible for SRF funding.

5. The 4% limitation on SRF administrative costs should be based upon the authorized level rather than the appropriated capitalization grant amount, and provisions should be made for a minimum amount of federal assistance per state for administrative costs.

6. Separate funding and administrative requirements should be provided for any drinking water state revolving fund program. Money allocated for the drinking water fund should be from a source separate from the wastewater SRF.

7. Alternatives to typical "command and control" programs can be promoted through creative funding incentives. The elimination of "cross-cutter" requirements for states with 90% of

point sources meeting secondary treatment or for states with no or minimal National Pollution Discharge Elimination System (NPDES) permit backlogs are two examples.

NON-POINT SOURCE POLLUTION CONTROL

1. Maximum flexibility should be provided to states to effectively implement non-point source (NPS) pollution control programs. NPS funding should enable states to balance program elements and focus, as needed, on technology development and transfer, monitoring, assessment, demonstrations, local community technical assistance, and institutionalizing non-traditional water quality management programs.

2. NPS plans, demonstration projects, and program development as envisioned in the 1987 CWA amendments are not yet complete. To produce needed results, states must have the ability to use a significant portion of their CWA Section 319 funds to establish and maintain long term, consistent programs as envisioned by the 1987 amendments.

3. A provision should be added to the CWA to ensure that Section 319(k), requiring federal agency activities to comply with state NPS management plans, is implemented.

4. EPA should not define national, mandatory management practices to control agricultural runoff and other forms of NPS pollution. States, however, should be required to control such pollution where it causes violation of water quality standards. Both the management practices and the specific waters affected should be defined by the states. A voluntary approach should be acceptable if the states have authority to enforce mandatory requirements where water quality standards violations occur. The irrigation return flow exemption from the NPDES should not be rescinded.

5. Federal agencies should be required to develop incentives for implementing NPS controls on federal lands and for federally supported activities. For example, support payments could be increased to farmers with effective conservation plans and bonus acreage awarded to lumber companies with successfully implemented NPS plans.

WATER QUALITY STANDARDS

1. The states must have the primary role in establishing and interpreting water quality standards that meet the intent of the CWA. EPA should be required to provide necessary criteria development guidance to states in a clear and timely manner.

2. The CWA should clearly acknowledge that municipal stormwater systems are to implement best management practices to the maximum extent practicable with the goal of meeting water quality standards.

3. The various water quality assessment requirements should be integrated into a single, streamlined assessment under CWA Section 305(b). The assessment requirements should not be

overly burdensome and the 305(b) assessment should be prepared every three to five years rather than every two years.

4. The states should continue to review and revise water quality standards on a triennial basis. EPA should continue to be responsible for approving adopted state water quality standards to assure interstate compatibility and compliance. However, the application of water quality standards in support of state water quality protection goals must continue to be the prerogative of the states.

5. States must be allowed to establish water quality standards flexible enough to account for natural variations in water quality and background levels.

6. Not all waters should be classified as fishable, swimmable. For example, the CWA should be amended to recognize the unique nature of constructed drains and canals and allow water quality standards to be set that recognize the benefits provided by these waterways (many of which would not exist without the agricultural activity) and the nature of agricultural operations and their ability to reduce pollutants from non-point sources. In such cases, protection of receiving waters for designated beneficial uses should be assured. Also, there are waters which historically, for natural reasons and causes, cannot meet fishable/swimmable criteria.

EFFLUENT DOMINATED WATERS/WATER REUSE

1. Natural channels are often needed to transport reclaimed water to an area of reuse. Reuse of wastewater is an increasingly important source of water in the West. Effluent dominated waters also support riparian habitat. In the CWA reauthorization, Congress should recognize the interrelationship of such waters and water quality standards, riparian habitat, and water rights issues, and should develop policies that support the objectives of state and federal law, by allowing establishment of appropriate water quality standards, based on intended uses, for natural conveyance systems and man-made waterways that discharge flows to waters of the United States.

2. A policy statement should be added to the CWA such as: It is the policy of Congress to allow states to encourage the reuse of treated wastewater, as a component of water quality control as well as comprehensive water management.

3. The CWA reauthorization should allow the permitting authority maximum flexibility in establishing requirements pertaining to effluent dominated waters and ephemeral and intermittent streams based upon net environmental benefit under applicable law. States should be encouraged to adopt water quality standards for reclamation projects to control toxicity, nutrients, and other water quality parameters to provide for reasonable protection of designated water uses. EPA should assist with research to establish safe effluent discharge parameter levels for human contact water uses.

FEDERAL/WESTERN STATE ISSUES

1. Water pollution control programs are administered most efficiently and effectively at the state level. Delegated state programs should be approved if they meet the goals, objectives, and intent of federal statutes. They should not be less stringent than, but need not be identical to, EPA regulations, policies, or procedures.

2. CWA Sections 510(2) and 101(g) are clear expressions of Congressional intent regarding deference to the states' role to allocate quantities of water. This fundamental principle of deference, which is manifest in many other federal environmental statutes, must not be weakened in the context of the CWA reauthorization.

3. Virtually all western states have in place mechanisms to establish and maintain instream flows. Statutory requirements in the CWA for maintenance of such flows would affect water rights and impact water management in the West. No such requirements, either explicit or implicit, should be included in the CWA.

4. Additional federal research and technical assistance are needed on the following topics important to western states: turbidity, suspended solids, physical integrity of the water body, biotic methods applicable to ephemeral and intermittent waters, definition and regulation of ephemeral and intermittent waters, federal land and facility compliance with state water quality standards, mining activities as they relate to storm water, and turbidity.

5. To maintain an appropriate federal/state partnership, it is essential that state officials have a meaningful voice in EPA policy development, particularly in the early stages of such development before irreversible momentum leads toward prescriptive programs. State participation in EPA policy making should not be subject to the Federal Advisory Committee Act or the Administrative Procedures Act.

WETLANDS

1. The existing CWA Section 404 regulatory program must be improved. Sole authority for administration of the program should be vested in one agency. The program should encourage and enable states to assume full or partial permitting authority. Financial support should be provided to states that assume the federal program. The program should include research into and development of techniques to assess wetlands' functions and values.

2. The continuing loss and degradation of the nation's wetlands base is unacceptable. A no-net-loss policy is an important step toward reversing that trend. Such a policy, however, must provide flexibility and be implemented at different rates and in different ways in various regions of the country to reflect regional wetlands needs, conditions, and types.

3. National wetlands policy should lend itself to implementation through state, regional, and local plans and programs, and recognize individual state and local planning and regulatory efforts to preserve and protect wetlands.

4. The diverse needs and types of wetlands nationwide, and concern for human and economic impacts, will make it difficult to achieve a no-net-loss goal. To achieve such a goal, a broad range of non-regulatory programs (such as subsidies and tax incentives, public acquisition, conservation easements and leases, and other non-punitive approaches) and regulatory programs will be required.

GROUND WATER

1. A national regulatory program for ground water would be inappropriate and should not be part of the CWA reauthorization. Ground water protection and management are primarily the responsibilities of state and local governments. Such governments must have the flexibility to develop and continue existing programs appropriate for their own circumstances, including strategies and mechanisms appropriate to assure ground water quality protection and preserve their ability to allocate, manage, and protect rights to use ground water.

2. The federal role in ground water management should be to provide technical assistance, gather data, and promote research to support state programs. Also, any federal funds that are provided for ground water protection should be made available to support all phases of program development and implementation of state ground water quality programs, not just program development.

3. Federal agencies should be required to conduct their activities in accordance with, and without duplication of, state and local ground water protection programs.

4. EPA's Comprehensive State Groundwater Protection Program strategy is an acceptable approach to ground water protection to the extent that it is carried out on a voluntary basis. This approach provides flexibility to address the most pressing ground water problems within a given ground water basin.

STORMWATER

1. Existing requirements for NPDES permits applicable to stormwater discharges are often unrealistic and may, to a large extent, be unachievable, especially in arid areas. The CWA should clarify previous congressional intent that municipal stormwater dischargers are to implement best management practices and should not necessarily be subject to end-of-pipe treatment standards. Best management practices shall be developed through public participation and be designed to ensure that control of stormwater discharge is consistent with regulatory implementation of mandated stream standards. State regulatory agencies are encouraged to establish additional monitoring and performance criteria to assure meeting goals of watershed management programs.

2. The statutory deadlines for implementation of the stormwater program should be revised to establish realistic deadlines for permit issuance and to accommodate phased implementation of stormwater regulatory programs.

3. Recognition should be made of the tremendous responsibility placed upon states by federal stormwater regulations. Significant additional federal resources should be made available to avoid major cuts in other programs.

4. Stormwater pollution controls may include small ephemeral ponds and injection wells as part of on-site retention requirements which could result in significant pollution of ground water. Impact of these requirements may adversely affect the overall water management process. States need the flexibility to design optimum water quality/water quantity interfaces.

ANTI-BACKSLIDING

1. The CWA should be revised to clarify the application of anti-backsliding. EPA's inaction on guidance or regulations regarding anti-backsliding has been detrimental to the permitting process, resulting in delaying permits or causing less-restrictive permits to be written.

2. The CWA should be amended to allow removal or modification of effluent limits in cases where the limit is determined to be unnecessary because of errors in calculation, publication of new scientifically valid information, or determination that the substance being limited is not present in the discharge.

CLEAN LAKES

1. CWA Section 314 funding should be increased to a level that recognizes the key role the Clean Lakes Program plays in managing the nation's lakes for maximum beneficial use and enjoyment.

2. Appropriations should be sufficient to support meaningful efforts to continue assessment and identification/implementation of methods and procedures to restore lake quality.

COMPLIANCE WITH STATE LAW UNDER CWA SECTION 401

States have primary jurisdiction over water quantity issues and should retain primary jurisdiction under the CWA over integration of water quantity and water quality considerations through the water quality certification process set forth under Section 401. The CWA reauthorization should include an amendment to Section 401 that would ensure that any federally licensed activity that results in an alteration or hydrological modification of surface waters must be preceded by a Section 401 certification that ensures compliance with all provisions of state law.

TRANS-BORDER AREAS

EPA needs the authority, responsibility and resources to deal with water quality issues in trans-border areas. Also, mechanisms should exist for better coordination and participation between EPA, the states, other agencies, and our neighboring nations.

WATER QUALITY CONTROLS ON TRIBAL LANDS

In order to prevent voids in regulation, state water quality standards should be effective on Indian lands until replacement standards have been adopted by tribal governments which have been designated as states, or promulgated by EPA.

WILDERNESS AREA RESERVED WATER RIGHTS

In December 1993, the Departments of Justice, Interior, and Agriculture announced their intention to reexamine the decision of the Reagan and Bush administration's not to file claims for water rights in certain federally designated wilderness areas. The legal issue presented was primarily the interpretation to be given certain provisions of the Wilderness Act, and related federal legislation. Addressing the Council in January, Interior Solicitor John Leshy sought state comments on the suspension of a previous Interior Solicitor's opinion which found that no reserved rights were created by the designation of wilderness areas. Comment was sought not only on legal issues, but also on related practical and policy issues. Council members accepted the invitation to comment, and joining with other western interstate interests, wrote Mr. Leshy the following letter, with attachments.



WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201/942 East 7145 South/Midvale, Utah 84047/(801) 561-5300 / FAX (801) 255-9642

April 20, 1994

Mr. John Leshy, Solicitor
Department of Interior
Interior Building, Room 6352
1849 C Street, N.W.
Washington, D.C. 20240

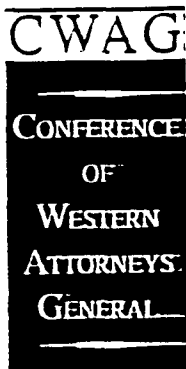
Dear Solicitor Leshy:

At our January meeting in Maui, you requested the Council's comments on the Department of Interior's reconsideration of its policy on asserting federally reserved water rights for certain wilderness areas. We appreciated your personal invitation to provide comments on this important matter.

Council members have reviewed the attached letter endorsed by Western Attorneys General. Except for the state of New Mexico, we concur with it. We are advised that the New Mexico Attorney General has submitted separate comments, representing New Mexico's position, that reach the same conclusion.

Sincerely,

David N. Kennedy
WSWC Chairman



April 6, 1994

John D. Leshy, Solicitor
Office of the Solicitor
Department of the Interior
Washington, D.C. 20240

Re: Claiming Implied Federal Reserved Water Rights for Wilderness Areas

Dear Solicitor Leshy:

Thank you for requesting our comments on the reevaluation of the federal government's current policy not to file claims for implied federal reserved water rights in congressionally designated wilderness areas. Simply by requesting our input you have opened the door for federal and state cooperation on this divisive issue. We ask you to go one step further--to work with the states and within their water law systems to provide water for federal wilderness areas without resorting to polarizing, expensive and unnecessary litigation to determine what protections, if any, are appropriate.

Your decision should not turn on preconceptions about who will more zealously protect wilderness water values. The states recognize that natural stream and lake values deserve protections and have implemented systems to protect those values. See Tarlock, Recognition of Instream Flow Rights: "New" Public Western Water Rights, 25 Rocky Mtn. Min. L. Inst. 24.1 (1979). On the other hand the U.S. Department of Justice has taken the lead in defeating the state's efforts to protect instream flows. California v. F.E.R.C., ___ U.S. ___, 110 S. Ct. 2024 (1990). Neither the federal government nor the states have a monopoly on wanting to protect important natural lake and stream values.

As explained in detail below, we believe that the federal government's earlier decision not to assert implied federal reserved water rights for wilderness in water right adjudications is the right decision legally and practically. This course is most consistent with Congress' historic intent, manifest in the 1964 Wilderness Act, that important water policy decisions be made under state water law systems. In the end, the issue you raise is not whether wilderness water values should be protected, but rather, where the best forum is to wisely protect and balance both wilderness water needs with other water needs.

The best protection for those values is not the assertion of implied federal reserved water rights, but the building of consensus regarding the appropriate protections for wilderness water values and carefully considering and mitigating the impacts, if any, those protections will have on other water users. We submit that the best forum for developing a consensus on those decisions among the federal government, the states and our nation's citizens is within the states' water law systems.

I. Congress' Long-Standing Policy Favoring State Water Law Recognizes That The Best Forum For Protecting Wilderness Water Values Is The States' Water Rights Systems.

The states in the West have developed comprehensive systems for water allocation and management embodied in state water law. These state systems are designed to carefully consider the various, competing demands for water for municipal and domestic uses, for recreation, for irrigation, for fish and wildlife, for hydropower, for aesthetics and so on. Underlying these systems is a recognition that water is often the limiting factor in the carrying capacity of the American West and that water rights and water allocations under the priority doctrine to an extent "freeze" economic and population development at the level of the oldest water rights. As a result, individualized and thoughtful consideration must be given to every water allocation decision to ensure that it does not unnecessarily cripple the future of the watersheds in which they are located.

Congress understands that this thoughtful consideration must be given to new water rights and has consistently recognized that the level of government within our federal system that can best make this careful balancing is at the state level. As the Supreme Court stated: "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." California v. United States, 438 U.S. 645, 653 (1978). The U.S. Congress, as a forum for making specific water allocation decisions, is simply too unwieldy and too far away to give them the requisite level of attention.

Recognizing this, the Supreme Court has stated that it will conclude that Congress used its power to impliedly reserve water for reserved and withdrawn federal public domain lands only in very narrow circumstances:

This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.

United States v. New Mexico, 436 U.S. 697, 701-702 (1978).

The Opinion of Solicitor Tarr dated July 26, 1988, objectively analyzed the legislative history and concluded that claiming implied federal reserved water rights for wilderness areas was not what Congress intended with the Wilderness Act of 1964. The Opinion offered the hope of a new spirit of cooperative action between the federal government and the states regarding the protections that should be afforded to wilderness water values. Your decision to re-examine that

Opinion has the potential of taking a significant step backward, before the federal government has even attempted to work with the states to see if state law alternatives are satisfactory. Given the substantial likelihood that the courts will find that there is no such implied water right, we see no benefit to a re-examination of the Opinion.

II. Congress Did Not Intend To Create An Implied Federal Reserved Water Right for Wilderness Areas.

The Supreme Court has imposed several prerequisites for finding an implied federal water right.

(1) There must be a reservation of land from the public domain, United States v. New Mexico;

(2) The primary purpose of that reservation must be entirely defeated without a reservation of water, United States v. New Mexico;

(3) The amount of water reserved is the minimum amount necessary to fulfill the purpose of the reservation. Cappaert v. United States, 426 U.S. 128, (1976).

In the context of the Wilderness Act of 1964, there is a substantial likelihood that the courts will find that these prerequisites for creation of the right do not exist and that the Wilderness Act of 1964 expressly disclaimed any intent to create federal reserved water rights.

This is the conclusion of the Tarr Opinion. That Opinion thoroughly and objectively analyzed the Wilderness Act and concluded that it did not create implied water rights for individual wilderness areas.

A. Congress expressly disclaimed an intent to create an implied federal reserved water right in the Wilderness Act.

As the Tarr Opinion recognized, the Wilderness Act of 1964, 16 U.S.C. §§ 1130 *et seq.*, did not create express federal reserved water rights for wilderness areas. In fact, the Act's primary provision on water rights expressly disclaims any intent to create a new type of federal reserved water right. Section 4(d)(7) of the Act addresses the question of whether Congress intended to create an exemption from state water law: "Nothing in this Chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from

State water laws." 16 U.S.C. § 1133(d)(6). The meaning of this ambiguous language can only be determined by reviewing the legislative history of the Wilderness Act.

Based upon a review of the Act's legislative history the conclusion that this provision was intended to disclaim the creation of federal reserved water rights in the Wilderness Act is inescapable. This legislative history is exhaustively reviewed in the Tarr Opinion at 10 through 19. The provision was originally proposed by California state agencies concerned that the wilderness designations would create federal reserved water rights. See Tarr Opinion at 12-13. The California state proposal was incorporated into the Act as Section 4(d)(7). See 104 Cong. Rec. 6344 (1958) (Statement of Sen. Neuberger). This legislative history indicates that the provision was adopted in order to meet the concerns of western states following the Supreme Court's opinion in Federal Power Commission v. Oregon, 349 U.S. 435 (1955), which recognized for the first time a federal reserved water right on non-Indian lands. The provision was described by the germane committee's chairman as a "disclaimer of any interference with State or Federal water rights through enactment of wilderness legislation." Hearings on S. 174 Before Senate Comm. on Interior and Insular Affairs, 87th Cong., 1st Sess., at 5 (1961).

The Tarr Opinion points to innumerable congressional statements showing that Congress intended the new legislation to leave state water law undisturbed. For instance, in explaining the intent Section 4(d)(7) in a predecessor bill, Senator Hubert Humphrey stated that

Paragraph; 5, the last in this section, contain language vital to colleagues from the West. When the first wilderness bill was being discussed, some of its opponents charged that its enactment would change existing water laws and would deprive local communities of water, both domestic and irrigation. Although this was certainly not the intention of the sponsors, it has seemed necessary to insert a short sentence to remove any doubts.

104 Cong. Rec. 11,555 (1958). In light of statements like these, it is unlikely that a court, after careful analysis of the Wilderness Act and its history, will conclude that Congress impliedly creates reserved water rights under the Wilderness Act when it designates wilderness areas.

The language in the provision stating that the Act does not constitute a "denial" of exemption from state laws does not change this conclusion. As originally proposed, Section 4(d)(7) only disclaimed an intent to make a "claim" for exemption from state water law. The legislative history of the Act indicates that the "no denial" language was added in order to address concerns of those who feared that the original proposal could be construed to abrogate pre-existing federal reserved rights in areas designated as wilderness. See Tarr Opinion at 15-20.

Importantly, the advocates of the original language that renounced any claim of exemption from state water law did not object to the addition of the "no denial" language and continued to assert that the provision answered their objections to the creation of a federal reserved water right. The intent of this provision was to state that Congress was making no changes to the water right position of the United States when it enacted the Wilderness Act; it was maintaining the status quo prior to the Act. It was not abrogating pre-existing reserved water rights nor was it creating new reserved water rights.

Advocates of implied federal reserved water rights for wilderness areas also interpret the provision as preserving the status quo. But they argue that this language simply means that nothing in the Act changes the implied reserved water right doctrine. As a result, their argument is that the Act may or may not create an implied federal reserved water depending upon the application the Supreme Court's standards for creating implied federal reserved rights.

The choice that a court will face in choosing between the two interpretations is whether this language means: 1) that federal reserved rights existing at the time of the Act were preserved and no new rights were created, or 2) the implied reserved rights doctrine was preserved and should be applied to the Wilderness Act. The second interpretation will almost certainly be rejected because it renders Section 4(d)(7) meaningless because the implied reserved water rights doctrine would be preserved and applied to the Act if Congress had said nothing. Further, the second interpretation contradicts the specific legislative history of the provision. In any case, as discussed earlier, the real status quo prior to the enactment of the Wilderness Act was one of congressional deference to state water law. In this context, Congressional neutrality is insufficient to establish the existence of a new type of implied federal reserved water right.

B. The wilderness areas are not a new federal reservation that could give rise to a federal reserved water right.

Even if the courts do not construe the disclaimer clause as disclaiming any intent to create implied federal reserved water rights, the Wilderness Act of 1964 did not necessarily create such rights. The Supreme Court has recognized creation of federal reserved water rights only in cases involving a federal reservation created from the public domain. The designation of a wilderness area, however, often does not create a new federal reservation from public lands. Instead, wilderness areas are created from existing federal reservations such as national forests and national parks.³² Thus, unlike the new reservations involved in Winters v. United States, 207

³² Under the Wilderness Act, wilderness areas were originally designated only from lands previously reserved as National Refuges, Parks and Forests. See Section 3; 16 U.S.C. § 1132. Unreserved public domain lands were not designated under the Wilderness Act until 1976 when Congress enacted the Federal Land Policy and

U.S. 564 (1908), wilderness designations often do not constitute new reservations from the public domain but rather the superimposition of additional purposes onto existing federal reservations.

This requirement is not simply a technicality that can be ignored. After the initial land reservations, the Supreme Court has indicated that it will not examine every change in management prescription to determine if Congress implied a new federal reserved right. The Supreme Court assumes that Congress will either expressly reserve the necessary water or expect the federal agencies to work within the state water laws. In the case of the Wilderness Act of 1964, this test is not met, and the federal government should work with the states to protect wilderness water values.

C. The Wilderness Act of 1964 did not expand the primary purposes for the original reservations of the federal lands to which it applies.

In United States v. New Mexico, the Supreme Court held that a federal reserved water right will be implied only if necessary to accomplish the specific, primary purposes of the original reservation, not for any secondary or incidental uses. 438 U.S. at 702. This distinction between primary and secondary purposes of a federal reservation led the Court to hold that the Multiple Use Sustained Yield Act (MUSYA) did not create federal reserved water rights because its purposes were "supplemental to but not in derogation of" the primary purposes for which the national forests were established as set forth in the Organic Act, 16 U.S.C. §§ 473, *et seq.* United States v. New Mexico, 438 U.S. 696, 713 (1978).

Likewise, wilderness purposes are not the primary purposes of the initial reservations of the lands to which the Wilderness Act of 1964 applies and hence do not give rise to federal reserved water rights. In language strikingly similar to MUSYA, the Wilderness Act provides: "The purposes of this chapter are hereby declared to be **within and supplemental to the purposes** for which national forests and units of the national park and national wildlife refuge systems are established and administered. . . ." 16 U.S.C. § 1133(d)(6). Although preservation as wilderness may be the dominant management prescription for these lands, this is not the primary purpose for which the lands were reserved. Again the Supreme Court held this requirement to be a prerequisite to the creation of an implied federal reserved water right.

The secondary, supplemental nature of wilderness purposes is confirmed by other provisions of the Act which retain the primary purposes of the original reservations: "[E]ach agency administering any area designated as wilderness shall . . . so administer such area for such

Management Act. See 43 U.S.C. § 1782.

other purposes for which it may have been established as also to preserve its wilderness character." 16 U.S.C. § 1133(b). The Act further provides that it does not interfere with the purposes for which national forests or national parks are established. 16 U.S.C. § 1133(a)(1) and (3). Again, the Tarr Opinion appropriately considered these points and recognized that there is a strong likelihood that an implied federal reserved water right will not be found for wilderness areas under the Wilderness Act of 1964.

III. Even If The Courts Should Find The Existence Of Implied Federal Reserved Water Rights, The Amount Of Such Rights And The Protection They Provide To Wilderness Values Will Be Minimal.

The Supreme Court has imposed very restrictive limitations upon the amount of water right that will be considered to be reserved under the doctrine. When determining the amount of a reserved water right, a fact specific, individualized analysis must be made of the particular reservation to determine the amount of water, if any, needed to be reserved. See Arizona v. California, 373 U.S. 546, (1963)(Amount of reserved water right dependent upon practicable irrigable acreage in reservation); Cappaert v. United States, 426 U.S. 128, 141 (1976)(District court appropriately curtailed pumping to achieve the minimal need of the reservation for water to preserve Devil's Hole pupfish). The quantity of water reserved must be "only that amount of water necessary to fulfill the purpose of the reservation, no more." Cappaert v. United States, 426 U.S. 141.

The great majority of the designated wilderness areas to which the 1964 Act applies lie at the top of the watersheds in which they are located and, hence would not benefit from reserved rights. The federal government should not be incurring litigation expenses simply to prove an academic point but rather should approach the states in a spirit of cooperation. Together we can assess whether any further protections, other than the wilderness management prescriptions already in place for these "top-of-the-watershed" wilderness areas, are needed.


We recognize that more wilderness areas are now being considered for designation low in the watersheds. Congress has the responsibility, in future legislation, to consider the protection of wilderness water values on a case-by-case basis. In this regard, it must be recognized that the entire flow of the streams running through such wilderness areas is necessary to preserve those areas as wilderness. If that was the case, many downstream areas could not be designated as wilderness in the first place. The flows through many such areas have already been diverted in whole or in part by upstream prior appropriators. Claiming that the entire unappropriated flow of those streams as necessary to preserve wilderness characteristics will cause substantial problems in the efforts to designate those areas as wilderness.

John D. Leshy, Solicitor
April 6, 1994
Page 8


If the entire flow is not necessary for the wilderness area, then a careful analysis of the amount of water required to fulfill the minimal needs of the wilderness areas becomes necessary. The Wilderness Act itself recognized that the construction of reservoirs, water conservation works and power projects might be compatible with wilderness designations. Section 4(d)(4), 78 Stat. at 895. We ask the federal government to work with the states to determine whether water right protections are needed for wilderness areas on a case-by-case basis. Focused consideration can then be given to the practical impact that water rights for the individual wilderness areas will have on the area impacted. Because the wilderness areas are such recent creations, this course will have virtually no negative impact on their relative priority dates.

The federal government's re-examination of the policy not to claim implied federal reserved water rights for wilderness areas will not be complete unless an examination is made of the efficacy of the alternative. That alternative is to work with the states to protect wilderness resource values through the state water law systems. In some instances the protections that are possible under the state law systems are more flexible and protective than the reserved water rights that the federal government claims. Thank you again for the opportunity to provide our comments.

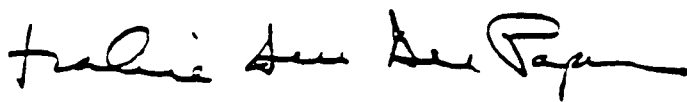
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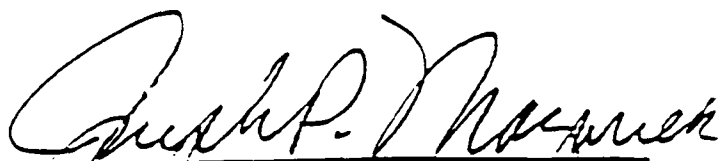
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Attorney General of Nevada
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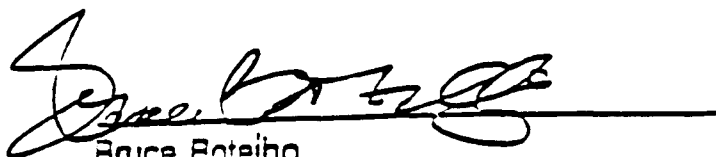
Joseph P. Mazurek
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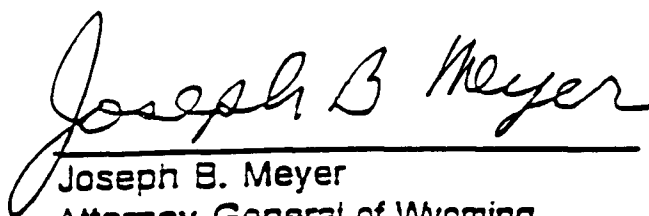
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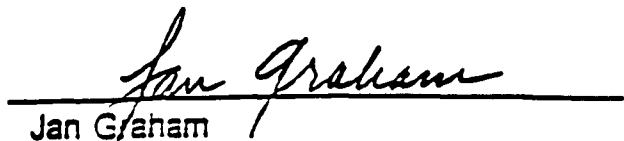
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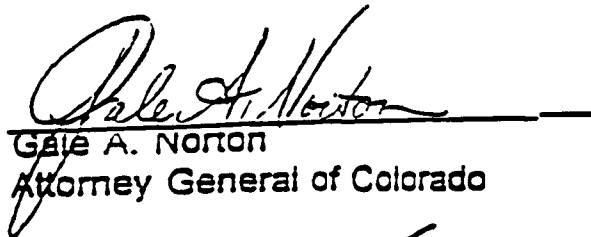
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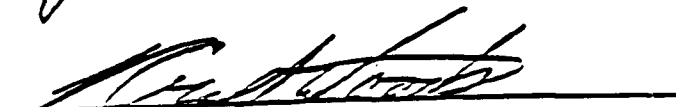
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SAFE DRINKING WATER ACT

Throughout the year, Council members and staff followed administrative and legislative developments related to the Safe Drinking Water Act (SDWA), and participated in discussions regarding SDWA regulations, development of drinking water standards, the need to provide states with flexibility in implementing the law, and financial assistance to help states meet the cost of mandatory federal regulations. The SDWA became almost synonymous with state and local complaints over unfunded federal mandates. While both the U.S. Senate and the House passed bills (S. 2019 and H.R. 3392) to address concerns with the act and its costs, Congress adjourned before differences between the Houses could be resolved.³³

POSITION of the WESTERN STATES WATER COUNCIL regarding REAUTHORIZATION OF THE SAFE DRINKING WATER ACT August 19, 1994

Background

To protect the public from health hazards resulting from contamination of drinking water, Congress in 1974 passed the federal Safe Drinking Water Act (SDWA) and amended the act in 1986. The 1986 amendments directed the US Environmental Protection Agency (EPA) to accelerate the federal effort to develop standards for the drinking water program.

In implementing the drinking water program, the federal government and states were to form a partnership in which EPA would develop the drinking water standards and the states would perform the basic program management. Public water supply systems were responsible for providing a safe drinking water supply by meeting the drinking water standards.

These partnerships have generally worked well as states and public water supply systems have made substantial progress in protecting drinking water. However, there is an increasing disparity between demands that the federal government places on states and localities and the resources available to meet those demands. Changes must be made in the way the drinking water program is implemented to ease the burden of federal mandates.

³³Western States Water, Issue #1065, October 14, 1994.

The Western States Water Council encourages Congress to reauthorize the Safe Drinking Water Act to provide flexibility to states and public water supply systems to provide a safe, dependable drinking water supply in accordance with the following principles.

Funding

The creation of a State Revolving Fund (SRF) is an essential element to provide options and relief to public water supply systems, particularly small systems. However, states should be allowed flexibility to transfer funds between the Safe Drinking Water Act SRF and the Clean Water Act SRF. States should be allowed that flexibility not only in the initial capitalization of the funds, but also during repayment and subsequent reloaning of the funds in the future.

Capitalization of the State Revolving Fund should not be used as a leveraging tool by EPA against delegated state programs or to force development of system viability or operator certification programs. If states do not have adequate programs to maintain delegation, there are provisions to allow withdrawal of the program without use of the State Revolving Fund as a punitive measure.

If the SDWA cannot be reauthorized this year, a separate law authorizing the SRF should be enacted.

Contaminant Selection and Standard Setting

Considerable debate has occurred around these two issues. The requirement that EPA establish standards for 25 new contaminants every three years must be eliminated. This task is too onerous for EPA, the states and the public water supply systems. EPA should only develop standards for contaminants that are found in drinking water supplies and have an adverse effect on public health. EPA should be required to consider risks and costs in establishing any new drinking water standard.

Small System Best Available Technology, Variances and Exemptions

The approval of small system best available technology, and the issuance of variances and exemptions must have greater flexibility than is currently allowed. The present system is costly and does not provide the states flexibility to issue meaningful variances and exemptions. Oftentimes the work and expense of issuing the variance or exemption is as great as meeting the requirement. Small systems must be allowed the option of reducing if elimination of the risk is not affordable. All systems must provide for protection of public health, but it must be done at a cost the systems can afford.

System Viability

System viability assessments will not provide relief for small systems. They should be used primarily to control the development of new nonviable systems. States should be allowed to develop criteria for system viability within their area and be allowed considerable latitude in addressing existing nonviable systems. Adequate time must be allowed for the state to develop a system

viability program since few states have viability programs and little guidance exists. Viability programs should not be a condition for state primacy or capitalization of the SRF.

Public Notification

The present public notification requirements of the Safe Drinking Water Act are overly burdensome and in the long run may decrease the effectiveness of public notices. It is not necessary to public notice each and every violation, especially those for monitoring and record keeping. Public notification should be reserved for serious violations that actually impact public health. A realistic timeframe of 72 hours, as is currently allowed, should be retained to provide public notification for acute violations. States should have flexibility to allow alternate methods of providing public notice, particularly for small systems, both community and noncommunity, where notification by electronic media is impractical and ineffective.

Operator Certification

Most states have a training and certification program for their water system operators. It is unnecessary for the federal government to establish operator certification criteria. Federal legislation is not needed.

Monitoring Requirements

Existing monitoring requirements are inappropriate and unnecessary in many cases due to regional differences in contaminant use and occurrence. Due to the high analytical costs, existing monitoring requirements have significantly impacted small systems in particular. States should be given greater flexibility to set alternate monitoring requirements based on local conditions.

Source Water Protection

Wellhead and watershed protection programs are an integral part of providing safe drinking water. However, it is not appropriate to require systems or states to establish source water protection programs. Requiring states to develop mandatory programs will mean significant staff increases and dedication of additional resources that are not readily available.

THE ENDANGERED SPECIES ACT

At the August meetings of the Council, the Legal Committee discussed and approved a proposed letter to Interior Secretary Bruce Babbitt supporting his recent actions related to the Endangered Species Act, in an effort to provide some surety in decisionmaking. Later, the Council adopted the following letter and authorized that it be sent, under the signatures of both the Council Chair and the President of the Western Association of Fish and Wildlife Agencies. Of note, it was clear that there are tremendous problems with communication and in the administration of the Act. Everyone was uniformly supportive of a July policy statement, issued by the Department of the Interior, which addressed peer review, consideration of economic and social issues as part of recovery plans and habitat conservation issues. The following letter was part of a continuing effort to try to move sound public policy steadily forward and build on common ground.

January 13, 1995

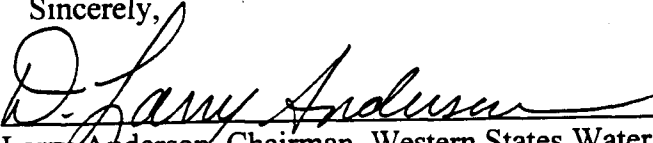
Secretary Bruce Babbitt
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

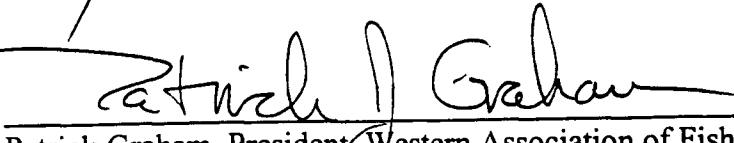
Dear Secretary Babbitt:

We, on behalf of the Western Association of Fish and Wildlife Agencies and the Western States Water Council, are writing to express support for the changes announced over the past year regarding Endangered Species Act administration. We are particularly encouraged by the new requirements relating to improved consultation and coordination with states. As you are undoubtedly aware, many state agencies have become frustrated with the process and results of Endangered Species Act implementation. The changes in policy announced by your Department offer the promise of resolving several of the key difficulties that we have identified.

We look forward to implementation of the policies announced by your offices. We plan to present our views and recommendations in this process. The intended improvements in consultation with states and affected private citizens, of scientific verification of biological assessments, and the "no surprises" policy on habitat conservation plans offer positive approaches to overcoming critical difficulties with Endangered Species Act administration. We will work in concert with the implementing federal agencies to ensure that your Department's announced policies help to resolve significant inadequacies in ESA implementation.

Sincerely,


Larry Anderson, Chairman, Western States Water Council


Patrick Graham, President, Western Association of Fish and Wildlife Agencies

WESTERN STATES WATER COUNCIL

**REPORT OF INDEPENDENT ACCOUNTANTS
AND
FINANCIAL STATEMENTS**

June 30, 1994

WESTERN STATES WATER COUNCIL

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| Report of Independent Accountants | 57 |
| Financial Statements: | |
| Combined Balance Sheet - General Fund and Account Groups - June 30, 1994 | 58 |
| General Fund Statement of Revenues and Expenditures and Changes in Fund Balance - Budget and Actual for the Year Ended June 30, 1994 | 59 |
| Notes to Financial Statements | 60 - 63 |
| Accompanying Information: | |
| Schedule of Changes in General Fixed Assets for the Year Ended June 30, 1994 | 65 |
| Reports Required by Government Auditing Standards: | |
| Report of Independent Accountants on Internal Control Structure Related Matters Noted in a Financial Statement Audit Conducted in Accordance With Government Auditing Standards | 66 - 67 |
| Report of Independent Accountants on Compliance with Laws and Regulations Based on an Audit of Financial Statements Performed in Accordance With Government Auditing Standards Issued By the GAO | 68 |

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REPORT OF INDEPENDENT ACCOUNTANTS

To the Executive Committee
Western States Water Council

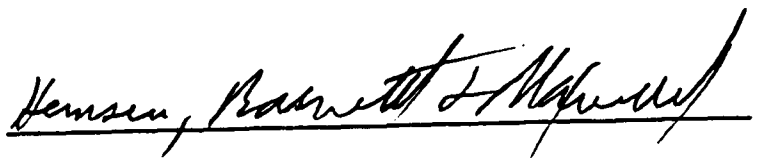
We have audited the accompanying combined balance sheet of Western States Water Council as of June 30, 1994, and the related general fund statement of revenues and expenditures and changes in fund balance - budget and actual for the year then ended. These financial statements are the responsibility of the Council's management. Our responsibility is to express an opinion on these financial statements based on our audit.

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

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Western States Water Council as of June 30, 1994, and the results of its operations for the year then ended in conformity with generally accepted accounting principles.

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

July 19, 1994



**WESTERN STATES WATER COUNCIL
COMBINED BALANCE SHEET
JUNE 30, 1994**

ASSETS

| | <u>General Fund</u> | <u>Account Groups</u> | | <u>Totals (Memorandum Only)</u> | |
|--|-------------------------|-------------------------------------|---------------------------------------|-------------------------------------|--------------------------|
| | | <u>General Fixed Assets</u> | <u>General Long-Term Debt</u> | <u>June 30, 1994</u> | <u>June 30, 1993</u> |
| Assets | | | | | |
| Cash - Note 2 | \$222,654 | \$ - | \$ - | \$ 222,654 | \$258,696 |
| Account receivable - government agreement | 1,801 | - | - | 1,801 | 2,344 |
| Prepaid expenditures | 1,563 | - | - | 1,563 | 1,549 |
| Deposits | 1,501 | - | - | 1,501 | 1,649 |
| General fixed assets | - | 90,573 | - | 90,573 | 71,577 |
| Other Debits | | | | | |
| Amount to be provided for payment of long-term debt | - | - | - | - | 431 |
| Amount to be provided for payment of compensated absences | - | - | 29,357 | 29,357 | 26,163 |
| Total Assets | <u>\$ 227,519</u> | <u>\$ 90,573</u> | <u>\$ 29,357</u> | <u>\$ 347,449</u> | <u>\$ 362,409</u> |

LIABILITIES AND EQUITY

| | | | | | |
|--|-------------------|------------------|------------------|-------------------|-------------------|
| Liabilities | | | | | |
| Accounts payable | \$ 18,901 | \$ - | \$ - | \$ 18,901 | \$ - |
| Payroll taxes payable | 300 | - | - | 300 | 290 |
| Obligations under capital lease - Note 3 | - | - | - | - | 431 |
| Obligations for compensated absences - Note 5 | - | - | 29,357 | 29,357 | 26,163 |
| Total Liabilities | <u>19,201</u> | <u>-</u> | <u>29,357</u> | <u>48,558</u> | <u>26,884</u> |
| Equity | | | | | |
| Investment in general fixed assets | - | 90,573 | - | 90,573 | 71,577 |
| Designated fund balance - equipment replacement | 9,473 | - | - | 9,473 | 20,951 |
| Undesignated fund balance | <u>198,845</u> | <u>-</u> | <u>-</u> | <u>198,845</u> | <u>242,997</u> |
| Total Equity | <u>208,318</u> | <u>90,573</u> | <u>-</u> | <u>298,891</u> | <u>335,525</u> |
| Total Liabilities And Equity | <u>\$ 227,519</u> | <u>\$ 90,573</u> | <u>\$ 29,357</u> | <u>\$ 347,449</u> | <u>\$ 362,409</u> |

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

**WESTERN STATES WATER COUNCIL
GENERAL FUND
STATEMENT OF REVENUES AND EXPENDITURES AND
CHANGES IN FUND BALANCE - BUDGET AND ACTUAL
FOR THE YEAR ENDED JUNE 30, 1994**

| | <u>Budget</u> <u>1994</u> | <u>Actual</u> <u>1994</u> | <u>Variance</u> <u>Favorable</u> <u>(Unfavorable)</u> <u>1994</u> | <u>Actual</u> <u>1993 (For</u> <u>Comparison</u> <u>Only)</u> |
|--|------------------------------|------------------------------|--|--|
| REVENUES | | | | |
| Member states' assessments | \$ 336,000 | \$ 309,600 | \$ (26,400) | \$ 342,600 |
| Bureau of Reclamations contract | - | 8,107 | 8,107 | 14,719 |
| Interest income | - | <u>13,252</u> | <u>13,252</u> | <u>14,418</u> |
| Total Revenues | <u>336,000</u> | <u>330,959</u> | <u>(5,041)</u> | <u>371,737</u> |
| EXPENDITURES | | | | |
| Current | | | | |
| Salaries | 196,000 | 192,894 | 3,106 | 190,337 |
| Travel | 29,500 | 29,748 | (248) | 29,081 |
| Payroll taxes and employee benefits | 70,000 | 79,208 | (9,208) | 65,794 |
| Printing and reproduction | 10,000 | 8,683 | 1,317 | 9,186 |
| Rent | 23,700 | 23,212 | 488 | 22,799 |
| Freight and postage | 10,000 | 8,304 | 1,696 | 9,536 |
| Telephone | 4,500 | 5,287 | (787) | 5,132 |
| Utilities | 3,000 | 2,107 | 893 | 2,540 |
| Maintenance contracts | 1,000 | 908 | 92 | 608 |
| Office supplies | 6,500 | 9,311 | (2,811) | 5,488 |
| Reports and publications | 4,500 | 2,655 | 1,845 | 7,257 |
| Meetings and arrangements | 4,000 | (1,633) | 5,633 | (339) |
| Accounting | 2,200 | 2,100 | 100 | 2,100 |
| Insurance | 1,000 | 1,014 | (14) | 992 |
| Contingencies | 4,000 | 3,350 | 650 | 5,461 |
| Interest | - | 14 | (14) | 254 |
| Bank charges | - | - | - | 94 |
| Capital outlay | 1,000 | 18,996 | (17,996) | 1,358 |
| Debt service - Note 3 | <u>6,528</u> | <u>431</u> | <u>6,097</u> | <u>1,525</u> |
| Total Expenditures | <u>377,428</u> | <u>386,589</u> | <u>(9,161)</u> | <u>359,203</u> |
| Excess of Revenues Over Expenditures | (41,428) | (55,630) | (14,202) | 12,534 |
| Fund Balance - Beginning of Year - Note 6 | <u>263,948</u> | <u>263,948</u> | - | <u>251,414</u> |
| Fund Balance - End of Year | <u>\$ 222,520</u> | <u>\$ 208,318</u> | <u>\$ (14,202)</u> | <u>\$ 263,948</u> |

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

**WESTERN STATES WATER COUNCIL
NOTES TO FINANCIAL STATEMENTS
JUNE 30, 1994**

NOTE 1--SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

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

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

The Reporting Entity

The Western States Water Council is an independent reporting entity and is not a component unit of any other government. The Council's Executive Committee is the governing authority. This determination has been made using the following criteria: the Executive Committee establishes Council policy, approves the annual budget, and appoints those responsible for administrative and fiscal activities.

Fund Accounting

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

Governmental Fund

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

NOTE 1--(CONTINUED)

Account Groups

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

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

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

Basis of Accounting

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

Totals Column on Combined Balance Sheet

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

NOTE 2--CASH

The Council's major cash funds were held in the Utah Public Treasurer's Investment Fund during the years ended June 30, 1994 and 1993. Deposits and withdrawals may be made at any time and interest payments are added to the investment balance monthly. The

balance in the Investment Fund at June 30, 1994 and 1993, was \$173,626 and \$211,363, respectively.

During the fiscal year ended June 30, 1991, the Council established an office equipment replacement fund. This fund will be used to purchase new equipment as it is needed. Deposits into this fund are made monthly in the amount of \$544. The fund is also held by the Utah Public Treasurer's Office and will accrue interest at the same rate as the Investment Fund. The balance in the Equipment Replacement Fund at June 30, 1994 and 1993 was \$9,473 and \$20,951, respectively.

At year end, the carrying amount of the Council's bank deposits was \$39,496 and the bank balance was \$46,532. All of the bank balance was covered by federal depository insurance. Collateralization of deposits is not required by state statute.

NOTE 3--LEASE COMMITMENTS

The Council renewed the lease agreement for its office location on March 1, 1994. The term of the lease is 3 years. Effective monthly payments are currently \$1,869.

The following is a schedule by years of future lease payments at June 30, 1994.

| | |
|------|------------------|
| 1995 | \$ 22,422 |
| 1996 | 22,422 |
| 1997 | <u>14,948</u> |
| | <u>\$ 59,792</u> |

The Council entered into a capital lease for a printer on October 2, 1990. The printer is included in the General Fixed Assets Account at the original cost of \$4,000. The lease term is three years with monthly payments of \$148.32. Interest expense on the capital lease for the years ended June 30, 1994 and 1993 was \$14 and \$254, respectively. The lease was paid off during the year ended June 30, 1994.

NOTE 4--RETIREMENT PLAN

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

The Council contributes to the Plan an amount equal to 12% of each plan member's gross wages plus an additional 3% of each member's gross wages in excess of the maximum social security taxable wage base, less the total of all amounts to be reallocated during the taxable year by reason of recoveries attributable to contributions arising out of termination

of employment of members of the Plan prior to full vesting. The total contribution for the years ended June 30, 1994 and 1993, was \$29,633 and \$23,799, respectively.

NOTE 5--COMPENSATED ABSENCES

Employees of the Western States Water Council are entitled to compensated absences in the form of paid vacation and paid sick leave. According to policy, the vacation pay accrues at a rate of 1.25 days per full month of service rendered. The number of unused vacation days, up to 40, carries forward to the beginning of the next calendar year. Employees also accumulate sick days at a rate of 1.25 days per month. The unused sick days accumulate without limit, but ordinarily do not vest. However, if an employee meets the retirement requirements of State of Utah employees, the employee's accumulated sick days vest at 25 percent. Currently one employee of the Council meets the requirements for this 25 percent vesting.

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

ACCOMPANYING INFORMATION

**WESTERN STATES WATER COUNCIL
SCHEDULE OF CHANGES IN GENERAL FIXED ASSETS
FOR THE YEAR ENDED JUNE 30, 1994**

| | <u>1994</u> |
|---|-------------------------|
| Investment in General Fixed Assets - June 30, 1993 | \$ 71,577 |
| Office equipment additions | 18,996 |
| Office equipment retirements | <u>-</u> |
| Investment in General Fixed Assets - June 30, 1994 | <u>\$ 90,573</u> |

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REPORT OF INDEPENDENT ACCOUNTANTS ON INTERNAL CONTROL STRUCTURE RELATED MATTERS NOTED IN A FINANCIAL STATEMENT AUDIT CONDUCTED IN ACCORDANCE WITH GOVERNMENT AUDITING STANDARDS

To the Executive Committee
Western States Water Council

We have audited the financial statements of Western States Water Council for the year ended June 30, 1994, and have issued our report thereon dated July 19, 1994.

We conducted our audit in accordance with generally accepted auditing standards and Government Auditing Standards, issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement.

In planning and performing our audit of the financial statements of Western States Water Council for the year ended June 30, 1994, we considered its internal control structure in order to determine our auditing procedures for the purpose of expressing our opinion on the financial statements and not to provide assurance on the internal control structure.

The management of Western States Water Council is responsible for establishing and maintaining an internal control structure. In fulfilling this responsibility, estimates and judgments by management are required to assess the expected benefits and related costs of internal control structure policies and procedures. The objectives of an internal control structure are to provide management with reasonable, but not absolute, assurance that assets are safeguarded against loss from unauthorized use or disposition, and that transactions are executed in accordance with management's authorization and recorded properly to permit the preparation of financial statements in accordance with generally accepted accounting principles. Because of inherent limitations in any internal control structure, errors or irregularities may nevertheless occur and not be detected. Also, projection of any evaluation of the structure to future periods is subject to the risk that procedures may become inadequate because of changes in conditions or that the effectiveness of the design and operation of policies and procedures may deteriorate.

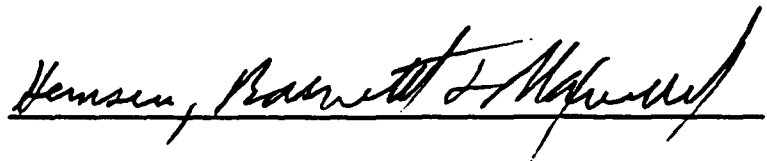
For the purpose of this report, we have classified the significant internal control structure policies and procedures in the following categories.

- Cash, petty cash
- Revenue and receivables
- Expenses for goods and services and accounts payable
- Payroll and related liabilities
- Property and equipment
- Debt and other liabilities

For all of the control categories listed above, we obtained an understanding of the design of relevant policies and procedures and whether they have been placed in operation, and we assessed control risk.

Our consideration of the internal control structure would not necessarily disclose all matters in the internal control structure that might be material weaknesses under standards established by the American Institute of Certified Public Accountants. A material weakness is a reportable condition in which the design or operation of one or more of the specific internal control structure elements does not reduce to a relatively low level the risk that errors or irregularities in amounts that would be material in relation to the financial statements being audited may occur and not be detected within a timely period by employees in the normal course of performing their assigned functions. We noted no matters involving the internal control structure and its operation that we consider to be material weaknesses as defined above.

This report is intended for the information of the executive committee and management. This restriction is not intended to limit the distribution of this report, which is a matter of public record.

A handwritten signature in dark ink, reading "Hensen, Barnett & McQuinn", is written over a horizontal line.

July 19, 1994

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REPORT OF INDEPENDENT ACCOUNTANTS ON COMPLIANCE WITH LAWS AND REGULATIONS BASED ON AN AUDIT OF FINANCIAL STATEMENTS PERFORMED IN ACCORDANCE WITH GOVERNMENT AUDITING STANDARDS ISSUED BY THE GAO

To the Executive Committee
Western States Water Council

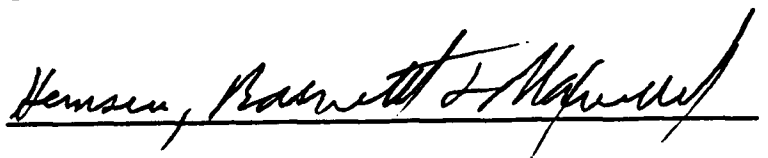
We have audited the financial statements of Western States Water Council as of and for the year ended June 30, 1994.

We conducted our audit in accordance with generally accepted auditing standards and Government Auditing Standards, issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement.

Compliance with laws, regulations, contracts, and grants applicable to Western States Water Council is the responsibility of the Council's management. As part of obtaining reasonable assurance about whether the financial statements are free of material misstatement, we performed tests of the Council's compliance with certain provisions of laws, regulations, contracts, and grants. However, it should be noted that our objective was not to provide an opinion on overall compliance with such provisions.

The results of our tests indicate that, with respect to the items tested, Western States Water Council complied, in all material respects, with the provisions referred to in the preceding paragraph. With respect to items not tested, nothing came to our attention that caused us to believe that Western States Water Council had not complied, in all material respects, with those provisions.

This report is intended for the information of the executive committee and management. This restriction is not intended to limit the distribution of this report, which is a matter of public record.

A handwritten signature in dark ink, appearing to read "Hansen, Barnett & Maxwell", is written over a horizontal line.

July 19, 1994

COMMITTEE and SUBCOMMITTEE MEMBERSHIP

EXECUTIVE COMMITTEE MEMBERS

| | |
|---------------------------------------|-----------------------------------|
| D. Larry Anderson - Utah - Chair | Roland D. Westergard - Nevada |
| Leonard D. Verrelli (Assoc.) - Alaska | Don Lopez - New Mexico |
| Rita Pearson - Arizona | Dave Sprynczynatyk - North Dakota |
| Larry Linser (Alt.) - Arizona | Martha Pagel - Oregon |
| David N. Kennedy - California | Reese Peck (Alt.) - South Dakota |
| Daries (Chuck) Lile - Colorado | John T. Montford - Texas |
| Keith W. Ahue - Hawaii | Charles Jenness (Alt.) - Texas |
| R. Keith Higginson - Idaho | Carol Fleskes - Washington |
| Gary Fritz (Associate) - Montana | Gordon W. Fassett - Wyoming |

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| | |
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| Gordon W. Fassett - Wyoming | Secretary/Treasurer |
| Vice-Chair | D. Craig Bell |
| David N. Kennedy - California | Executive Director |
| Past Chair | |

WSWC Water Policy Seminar Subcommittee

| | |
|---------------------------------------|-----------------------------|
| David N. Kennedy - California - Chair | Steve Sanders - Oregon |
| R. Keith Higginson - Idaho | Dee C. Hansen - Utah |
| Roland D. Westergard - Nevada | Gordon W. Fassett - Wyoming |
| Francis Schwindt - North Dakota | |

WGA/WSWC Steering Group/National Water Policy Subcommittee

| | |
|---|-----------------------------|
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| David Kennedy - California | D. Larry Anderson - Utah |
| J. David Holm - Colorado | Dee C. Hansen - Utah |
| R. Keith Higginson - Idaho | Gordon W. Fassett - Wyoming |
| Gary Fritz - Montana (Associate) | |

LEGAL COMMITTEE

| | |
|--|---------------------------------------|
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| Harley Harris (Alt.) - Montana (Associate) | Thorpe A. Waddingham - Utah |
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| Peter Morros - Nevada | |

Federal Reserved Water Rights Subcommittee

| | |
|-------------------------------------|-----------------------------|
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| Richard A. Simms - New Mexico | Gordon W. Fassett - Wyoming |

Endangered Species Act Subcommittee

| | |
|---------------------------------|---------------------------------------|
| Dee C. Hansen - Utah - Chair | |
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| Roland D. Westergard - Nevada | D. Larry Anderson - Utah |
| Charles DuMars - New Mexico | Tom McDonald - Washington (Associate) |
| Francis Schwindt - North Dakota | Gordon W. Fassett - Wyoming |

Legal Education Subcommittee

| | |
|--|-------------------------------|
| Roderick E. Walston - California - Chair | |
| Michael Brophy - Arizona | Richard A. Simms - New Mexico |

Amicus Brief Subcommittee

| | |
|--|-------------------------------|
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Vice Chair

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Gordon W. Fassett - Wyoming

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Peter Morros - Nevada

Martha Pagel - Oregon

D. Larry Anderson - Utah

Gordon W. Fassett - Wyoming

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Jim Stubchaer - California

Daries (Chuck) Lile - Colorado

Wayne Cunningham - New Mexico

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Mead Treadwell (Alt.) - Alaska (Associate)

Edward Z. Fox - Arizona

David G. Kelley - California

J. David Holm - Colorado

Joe Nagel - Idaho

Steve Pilcher - Montana (Associate)

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Safe Drinking Water Act Subcommittee

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RULES OF ORGANIZATION³⁴

Article I - Name

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

Article II - Purpose

The purpose of the Western States Water Council shall be to accomplish effective cooperation among western states in matters relating to the planning, conservation, development, management, and protection of their water resources.

Article III - Principles

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

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

Article IV - Functions

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

- (1) Undertake continuing review of all large-scale interstate and interbasin plans and projects for development, control or utilization of water resources in the Western States, and submit recommendations to the Governors regarding the compatibility of such projects and plans with an orderly and optimum development of water resources in the Western States.
- (2) Investigate and review water related matters of interest to the Western States.
- (3) Express policy positions regarding proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management, and protection of water resources in Western States.

³⁴ The rules incorporate changes that were adopted in January of 1989 at the Council's 93rd quarterly meetings in Las Vegas, Nevada.

(4) Sponsor and encourage activities to enhance exchange of ideas and information and to promote dialogue regarding optimum management of western water resources.

(5) Authorize preparation of amicus briefs to assist western states in presenting positions on issues of common interest in cases before federal and state courts.

Article V - Membership

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

(2) Member states may name alternate representatives.

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

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

Article VI - Ex-Officio Members

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

Article VII - Officers

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

Article VIII - Selection of Officers

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

Article IX - Executive Committee

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

Article X - Voting

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

Article XI - Conduct of Meetings

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

Article XII - Meetings

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

Article 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.

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