

2001

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

Thirty-Sixth Annual Report



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WESTERN STATES WATER COUNCIL

INTRODUCTION

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

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

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

Associate membership has also been granted states exploring the benefits of membership, experiencing financial hardship, or otherwise temporarily unable to maintain full membership.

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

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

Meetings of the Council are held on a regular basis, rotating among the member states, with state representatives hosting Council members and guests. In 2001, meetings were held in: Scottsdale, Arizona on March 14-16th; Missoula, Montana on July 11-13th; and Oklahoma City, Oklahoma on November 15-16th. Guest speakers are scheduled according to the relevant subjects to be considered at each meeting. The Council meetings are open to the public. Information regarding future meeting locations and agenda items can be obtained by contacting the Council's office. Included herein are reports on each of the Council meetings, positions and resolutions adopted by the Council, and a discussion of other important activities and events.

During 2001, the Council staff was comprised of: D. Craig Bell, Executive Director; Anthony G. (Tony) Willardson, Associate Director; James P. Alder, Legal Counsel (through May 2001) and Chad Shattuck, Law Clerk (beginning June 2001); and a secretarial staff including Cheryl Redding, Lynn Bench, and Julie Stam Groat.

The Western States Water Council offices are located in the metropolitan Salt Lake City area:

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MEMBER STATES and MEMBERSHIP⁺

ARIZONA

- *Governor Jane Dee Hull; 9-97
- †Joseph C. Smith; 6-01
- Michael Brophy; 6-91
- Karen L. Smith; 4-01
- C. Laurence Linser (Alt.); 6-88 to 6-01
- Rita Pearson Maguire; 6-91 to 6-01

CALIFORNIA

- *Governor Gray Davis; 1-99
- †Thomas Michael Hannigan; 1-99
- David G. Kelley; 1-83 to 7-83
- reappointed 3-84
- Thomas S. Maddock; 5-94
- Roderick E. Walston (Alt.) 1-86
- Jeanine Jones (Alt.); 2-97
- Edward C. Anton (Alt.); 2-91 to 7-01

COLORADO

- *Governor Bill Owens; 1-99
- **Harold D. Simpson; 3-92
- J. David Holm; 1-90
- Wendy C. Weiss (Alt.); 4-87
- Kent Holsinger (Alt.); 7-00
- Jennifer Gimbel (Alt.); 7-97 to 7-01

*Ex-Officio Member

**Executive Committee Member

†Council members denoted by this symbol are listed on this membership list by virtue of their office, pending receipt of a letter of appointment by their Governor.

MONTANA

- *Governor Marc Racicot; 1-93
- **Jack Stults; 3-98
- Donald D. MacIntyre (Alt.); 2-85
- Harley R. Harris (Alt.); 6-91
- Gary Ingman; 3-98 to 7-01

NEBRASKA

- *Governor Mike Johanns; 1-99
- **Roger Patterson; 1-00
- Mike Linder; 1-00
- David Vogler (Alt.); 1-00
- Patrick Rice (Alt.); 8-00
- Dayle E. Williamson; 1-00 to 6-01

IDAHO

- *Governor Dirk Kempthorne; 1-99
- **Karl Dreher; 7-95
- Steve Allred; 2-99
- Norman M. Semanko; 9-00
- J.D. Williams (Alt.); 5-91

KANSAS

- *Governor Bill Graves; 1-95
- **David J. Pope; 6-00
- Ron Hammerschmidt; 6-00
- Jamie Clover Adams; 6-00
- Karl Mueldener (Alt.); 11-01
- Tom Stiles (Alt.); 11-01

⁺The date after each name is the beginning date of tenure. A second date indicates the date that the appointment came to an end. Alternate (Alt.) members are also listed.

NEVADA

- *Governor Kenny C. Guinn; 1-99
- **Roland D. Westergard; 5-68
- Allen Biaggi; 1-00
- R. Michael Turnipseed; 8-96
- Joseph E. Dini, Jr. (Alt.); 7-83
- Jim Davenport (Alt.); 5-01
- Hugh Ricci (Alt.); 5-01
- Peter G. Morros; 3-91 to 4-01
- Richard Bunker (Alt.); 10-97 to 4-01

NEW MEXICO

- *Governor Gary Johnson; 1-95
- **Thomas C. Turney; 7-95
- Charles DuMars; 2-84
- Frank A. DuBois; 4-87
- Wayne P. Cunningham (Alt.); 7-88
- Tom W. Davis (Alt.); 8-96

NORTH DAKOTA

- *Governor Ed Schafer; 1-93
- †Dale Frink; 7-01
- Francis Schwindt; 9-88
- Julie Krenz; 11-90
- Michael A. Dwyer (Alt.); 11-90
- David A. Sprynczynatyk; 9-89 to 1-01

OKLAHOMA

- *Governor Frank Keating; 10-99
- **Brian C. Griffin; 10-99
- Mark S. Coleman; 10-99
- Duane A. Smith; 10-99
- Dean Couch (Alt.); 10-99
- Jon Craig (Alt.); 10-99
- J.D. Strong (Alt.); 10-99

OREGON

- *Governor John Kitzhaber; 1-95
- **Paul Cleary; 7-00
- Mike Llewelyn; 1-99
- Meg Reeves; 1-99
- Sharyl Kammerzell (Alt.); 7-00

SOUTH DAKOTA

- *Governor William J. Janklow; 1-95
- **Steve Pirner; 6-88
- Garland Erbele; 3-00
- John Guhin (Alt.); 6-88

TEXAS

- *Governor Rick Perry; 12-00
- **William B. Madden; 8-97
- John Baker, Jr.; 8-97
- J. E. (Buster) Brown; 8-97
- Fred N. Pfeiffer (Alt.); 10-83
- J. David Montagne (Alt.); 9-92

UTAH

- *Governor Michael O. Leavitt; 1-85
- **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
- Norman K. Johnson (Alt.); 10-97

WASHINGTON

- *Governor Gary Locke; 1/97
- **Tom Fitzsimmons; 4-98
- Kathy Gerla; 12-00
- Joe Stohr; 7-01
- Keith Phillips (Alt.); 4-98
- Stephen Bernath (Alt.); 7-01

WYOMING

- *Governor Jim Geringer; 1-95
 - **Patrick T. Tyrrell; 3-01
 - Tom Davidson; 10-96
 - Dennis Hemmer; 10-96
 - Gary Beach (Alt.); 3-01
 - Mike Besson (Alt.); 3-01
 - Sue Lowry (Alt.); 3-01
 - Gordon W. Fassett; 3-87 to 2-01

ASSOCIATE MEMBER STATE

ALASKA

- *Governor Tony Knowles; 12-94
 - †Bob Loeffler; 10-98
 - †Christopher Estes; 11-96
 - †Tom Chapple; 04-00
 - †Gary Prokosch; 5-99

COUNCIL MEMBERS

at Missoula, Montana meeting on July 13, 2001



Front Row (left to right): Karen Smith, Jeanine Jones, Jamie Clover Adams, Mike Brophy, Jack Stults, and Dennis Hemmer

Row 2: Fritz Schwindt, Meg Reeves, Duane Smith, Ed Anton, Norm Semanko, and Karl Dreher

Row 3: Don Ostler, Mike Besson, Roger Patterson, Norm Johnson, Gary Ingman, and Mike Llewelyn

Row 4: Jim Davenport, Tom Davidson, Bill Madden, Paul Cleary and Larry Anderson

Row 5: Tom Maddock, Mike Turnipseed, Pat Tyrrell, Hal Simpson, and Joseph C. Smith



Back Row: Craig Bell, Jim Alder and Tony Willardson
 Front Row: Lynn Bench, Cheryl Redding and Julie Groat

STAFF

D. Craig Bell	Executive Director
Anthony G. Willardson (Tony)	Associate Director
Jim Alder	Legal Counsel
Chad Shattuck	Law Clerk (June 2001)
Cheryl Redding	Office Manager
Lynn Bench	Bookkeeper
Julie Stam Groat	Receptionist/Secretary

The Council office is located in the metropolitan Salt Lake City area, and the address is as follows:

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COUNCIL MEETINGS

**135th
Western States Water Council
Meetings
March 14-16, 2001
Scottsdale, Arizona**

The 135th meetings of the Western States Water Council were held in Scottsdale, Arizona on March 14-16th, in conjunction with a number of other meetings. The Council adopted or renewed a number of policy positions covering the Environmental Protection Agency's (EPA) final rule governing total maximum daily load (TMDL) allocations under the Clean Water Act (CWA), the Western Water Policy Review Advisory Commission's recommendations, and federal funding for water and climate data collection and analysis programs. Moreover, with unanimous consent, the Council adopted a brief statement regarding EPA's recently published draft public participation policy.² Given the latter was not part of the 30-day notice of the meetings, it was sent to western governors for review for 10 days before being publicly released. Similarly, given extensive changes to the Council's past position on EPA's draft TMDL rule, it was also resent to the governors for their review. Further, while changes to the Council's CWA position were discussed, no action was taken at this meeting. The Council's original position was adopted in 1996 and has been periodically revised and reaffirmed.

With respect to the past recommendations of the now defunct Western Water Policy Review Advisory Commission (WWPRAC), the Council reformatted and readopted its earlier position, expressed in a letter, raising a number of concerns. The new Administration is not likely to take up the WWPRAC recommendations, but if it did, the WSWC wished to express its opposition to the "primary recommendations related to fundamental changes in institutional structure and government process" incorporating top-down ways to manage water, as well as recommendations that either "directly conflict with existing state water law and policy, or fail to provide for adequate partnerships between the state and federal agencies on key policy issues." The position continues stating, "The federal government's preemption of state authority is not the way to address the complex issues associated with western water management."

Another newly adopted policy position expresses the Council's strong support for federal water and climate data collection and analysis programs. The position states, "[W]ithout timely and accurate information, human life, health, welfare, property and environmental and natural resources are at considerably greater risk of loss...[and]...there is a serious need for adequate and consistent federal funding to maintain, restore, modernize and provide for targeted expansion" of the USDA's Snow Survey and Water Supply Forecasting Program and the U.S. Geological Survey's (USGS) National Streamflow Information Program (NSIP) and Cooperative Streamgaging Program.

²Western States Water, Issue #1395, February 9, 2001

In conjunction with the meetings, the Interstate Council on Water Policy (ICWP) and USGS, with the Council's cooperation, cosponsored a workshop on the National Streamgaging System. As part of an extensive review of national streamgaging needs and resources, a task force of the federal Advisory Committee on Water Information (ACWI) has identified fourteen goals and "metrics" for measuring progress towards meeting those goals. It also estimates the number of streamgages necessary to accomplish each goal. The USGS has in turn proposed fully funding gages needed to meet five of those goals (numbered without respect to priority): (1) supporting National Water Quality Networks; (2) flow information for borders and compacts; (3) quantifying flow from major river basins; (4) estimating regional trends in streamflow characteristics; and (5) supporting flood forecasting and warning. Many NSIP gages would replace those now funded cooperatively.

Workshop participants discussed the goals, metrics and relative priorities, given limited financial resources. At present the "national" streamgaging network is made up of a complex array of systems operated by various local, state, and federal agencies and other public and private entities with the USGS cooperatively gathering and disseminating much, but not all of the data, under various agreements and cost sharing arrangements. The loss of a number of gages in the 1990s, particularly long-term gages with over 30 years of record, due to a lack of cooperator funding (both federal and non-federal cooperators), led the USGS to propose the fully "USGS-funded" NSIP, separate from the cooperative program.

Workshop participants were also asked to advise USGS on the best way to spend available funds. Western state officials clearly expressed a preference for funding the cooperative program, leaving the states (with their cost sharing), to play a continuing key role in prioritizing streamgaging efforts. They also expressed a preference for using any new USGS appropriations to first reduce USGS overhead or federal "infrastructure" costs charged to the cooperative program. Two more workshops were scheduled in St. Louis, Missouri on May 11th, and in Orlando, Florida on May 24th.

The Western Governors' Association (WGA) also sponsored a well attended workshop before the WSWC meetings on "Pollution Trading as a Tool for Meeting TMDLs." Various panelists explained opportunities for trading and all participants engaged in a facilitated discussion focused on a set of key questions regarding how to administer trading programs and related issues. WGA staff prepared a summary of the workshop.

The Council meetings began with meetings of the Western Water Quality Forum and Water Quality Committee, both chaired by Don Ostler of Utah. A panel was comprised of Mary Henry, Larry Gamble and Brent Esmoil, with the U.S. Fish and Wildlife Service (FWS) headquarters, Region 6 and Montana field office, and Ed Stearns, EPA. They discussed coordinating implementation of the Endangered Species Act (ESA) and CWA, in light of a memorandum of agreement (MOA) published as a notice in the Federal Register on February 22nd (66 FR 11202). The MOA was signed by EPA, FWS and the National Marine Fisheries Service (NMFS). It is designed to enhance coordination on such actions as EPA's ESA consultation (under Section 7) on promulgation and approval of water quality standards under CWA section 303(c) and approval of state National Pollutant Discharge Elimination System (NPDES) permitting programs under CWA section 402(b). The Forum also reviewed a draft bill, the Watershed Stewardship Act, which Senator

Ron Wyden (D-OR) intends to introduce to encourage landowners to develop management plans to benefit water quality and threatened and endangered species. TMDL implementation and EPA's draft public involvement policy were also discussed.

The Water Quality Committee continued the TMDL discussion, revising the draft WSWC position statement. Shaun McGrath, WGA, described the scope of a National Academy of Sciences review of the scientific basis underlying the development and implementation of TMDLs, which was to be completed by June. CWA reauthorization was also discussed, as were new water quality regulations related to arsenic and confined animal feeding operations (CAFOs). EPA is proposing rules to reduce pollution and protect water resources and public health with more stringent requirements and effluent guidelines for as many as 39,000 CAFOs. The proposed rules were published in the Federal Register on January 12th, and are available through EPA's Office of Wastewater Management's website.³ More information is available from the CAFO Hotline at (202) 564-0766. Public hearings will be held in Denver, Colorado on March 27th, and Boise, Idaho on March 29th. With respect to arsenic, EPA published a rule on January 22 (66 FR 6976).⁴

The Water Resources Committee listened to Mike Somerville, Arizona's State Conservationist for the Natural Resources Conservation Service (NRCS), describe USDA's Snow Survey and Water Supply Forecasting System. The Committee recommended the position be adopted by the Council with few changes. Shaun McGrath described draft legislation designed to create a National Drought Policy Coordinating Council and members summarized drought conditions afflicting much of the West. Jeanine Jones of California briefly explained the state's energy crisis and the role of the Department of Water Resources in buying power. Dave Pope of Kansas reviewed a draft proposal for a High Plains Aquifer Conservation and Environmental Preservation Act, and Duane Smith of Oklahoma said his state is interested in discussing an interstate compact to allocate the waters of the Ogallala Aquifer.

The Legal Committee weighed legislative strategies for moving the Water Adjudication Fee Fairness Act (H.R. 507) introduced by Rep. Mike Simpson (R-ID) on February 14th.⁵ Efforts to secure federal funding for Indian reserved rights settlements were also discussed, along with other issues including the Lummi case,⁶ *United States v. Adair* happenings, U.S. Forest Service by-pass flow demands in Colorado, and a Public Trust Doctrine case before the Nevada Supreme Court. A panel including Charles DuMars, University of New Mexico, and Douglas Grant, University of Nevada - Las Vegas, law professors, and Martha Pagel, of Oregon, discussed use of public interest tests to protect water quality and instream uses.

³See www.epa.gov/owm/afo.htm.

⁴For information visit www.epa.gov/safewater/arsenic.htm or call the Safe Drinking Water Hotline at (800) 426-4791.

⁵*Western States Water*, Issue #1396, February 16, 2001

⁶*Western States Water*, Issue #1393, January 26, 2001

136th Council Meetings
July 11-13, 2001
Missoula, Montana

The Western States Water Council's 136th meetings were held in Missoula, Montana on July 11-13th. Mayor Mike Kadas welcomed members and friends at the full Council meeting on Friday. He described the early history of the area, noting Missoula was a passage way for tribes to the Plains to hunt buffalo, and the Clark Fork River canyon was a good place for an ambush. The name Missoula loosely translated means "damn scary place!" Later, European settlers called it Hellgate. Its water resources and fisheries have been impacted by logging, mining, smelting and irrigation. Growth has affected water quality as municipal wastewater and thousands of septic systems add nutrients to the river.

A panel representing different interest groups talked about "Collaborative Approaches to Water Management Issues in the Clark Fork of the Columbia River Basin," with Gerald Mueller as the moderator. The panel included: Stan Bradshaw, Montana Trout Unlimited; Bob Anderson, Avista Corp.; Brian Sugden, Plum Creek Timber Company; and Ruth Watkins, Tri-State Water Quality Council. They discussed tensions between off-stream and instream water uses and rights, particularly in recent years due to drought. Solutions to many problems have been found through collaborative efforts which involve stakeholders in local watershed based groups like the Tri-State Water Quality Council, Upper Clark Fork Committee, and Blackfoot Challenge.

Many members also enjoyed a Wednesday field and float trip up and down the Blackfoot River Valley, with a number of presentations on collaborative efforts to protect streamflows during drought for fisheries -- including Westslope cutthroat, brook and bull trout -- by a local landowner, Trout Unlimited, the Montana Fish and Game Department and others. Managed as a wild trout fishery since the mid-1970s, dozens of upland, river and riparian restoration projects have been completed to address impacts from past logging, mining and grazing practices.

The Council's working committees met on Thursday. The Water Quality Committee meeting took up the morning, with an extended discussion of EPA's water-related efforts, led by Charles Sutfin, Director, Assessment and Watershed Protection Division. He addressed non-point source pollution problems, Total Maximum Daily Loads, water quality monitoring and the Consolidated Assessment and Listing Methodology (CALM) Program under Clean Water Act Section 305(b), which requires states to submit biennial water quality reports, and Section 303(d), requiring states to list waterbodies that are not attaining state water quality standards. He also left open the possibility states may have to revisit their water quality standards where it is evident they can not be attained. He also suggested states should have the flexibility to adjust their lists of impaired waters with increased monitoring and focus their resources on priority waters actually impaired and in need of TMDLs.

Other issues discussed included regulation of the application of herbicides and pesticides to canals and other waterbodies for the control of algae, mosquitos and other nuisances in light of the

recent Talent decision.⁷ Ed Anton reported the California State Water Resources Control Board will hold a hearing on July 19, and then may adopt a general permit for the use of aquatic pesticides under the National Pollutant Discharge Elimination System (NPDES). Karen Smith, a recently appointed member from Arizona, reported on the possible implications of another suit, *Rice v. Harken*, with regard to the definition of "waters of the United States," as it relates to ground waters and ephemeral streams.⁸ Gary Beach of Wyoming talked about coordinating Endangered Species Act and CWA requirements under a January 2001 memorandum of agreement. He expects consultation on a broad array of federal CWA actions. EPA regulation of animal feeding operations was discussed with Mr. Sutfin. The deadline for comments is now July 30th, and changes are likely in view of so much significant new information. Don Ostler addressed stream quality impairment due to low flows, and the need to coordinate state decisionmaking.

Don also presented to the Committee a proposed position, later adopted by the Council, which expresses western states' concerns that a new federal grant program for combined sewer overflow control should not be funded out of monies now appropriated for the Clean Water State Revolving Fund (CWSRF). It is already underfunded, given estimated needs. In a letter to House and Senate Appropriations Subcommittees, the Council states, "We do not question the need to address these wet weather problems in certain areas of the nation. It is the Council's position that the wet weather grant program should not be funded at the expense of maintaining CWSRF funding. We urge your support for maintaining current funding levels for the CWSRF and that additional funds be provided to fund the new wet weather grant program. Merely shifting funding from one under funded program to another is not the way to solve the nation's water quality problems."

The Executive Committee addressed progress on priority issues, the budget and future Council meetings. It reviewed water-related activities of the Western Governors' Association with Carolyn Duffin. She noted several water-related positions will be renewed or allowed to sunset at the WGA's Annual Meeting in Coeur d'Alene, Idaho on August 12-14th. The Council reelected its current officers to another term unanimously.

Bob Hirsch, the U.S. Geological Survey's Associate Director for Water, told the Water Resources Committee the Congress has funded USGS at a level similar to last year, between \$200-\$205 million, compared to the \$44 million cut the Administration requested. Three western Senators, Jeff Bingaman (D-NM), Byron Dorgan (D-ND) and Gordon Smith (R-OR), wrote in support of maintaining funding and attached the WSWC's position. Mr. Hirsch also noted a new real-time streamflow map is available.⁹ Chairman Mike Brophy pointed out twelve senators signed a letter the WSWC staff drafted requesting a \$2,525,000 increase in the snow survey budget for the Natural Resources Conservation Service, and the outlook is favorable.

Jim Davenport reviewed the results and purpose of WSWC workshops in Albuquerque and Seattle on the ESA and state water law. Staff outlined the agenda for a meeting on Water

⁷*Western States Water*, Issue #1412, June 8, 2001.

⁸*Ibid.*

⁹Online at <http://water.usgs.gov/waterwatch>.

Information Management Systems to be held in Reno, Nevada on July 24-26th. Staff also distributed a summary of a meeting last year on water conservation, and a letter urging the appointment of a coordinator for the Bridging the Headgate Partnership, of which the Council is a member. Staff briefly highlighted hydropower-related provisions of national energy policy and proposed legislation. Doug Foss, with Harza Engineering, described a model for pulsing water releases from a hydropower project on the Missouri/Madison River system to meet water temperature needs. Lastly, there was considerable discussion surrounding proposed federal drought policy and planning legislation, which the WGA has developed and for which the WGA is looking for a sponsor. While the WGA hopes to have the bill introduced by August, staff are also considering opportunities to move pieces of it with separate bills. California expects to support the bill, while other states still have questions. Montana previewed its new drought website.¹⁰

The highlight of the Legal Committee meeting was a panel on federal water rights claims and uses, which covered issues of decisionmaking and problemsolving within state water laws. With respect to the latter, Bill McDonald, acting-Commissioner for the U.S. Bureau of Reclamation, stated that personally he believes it all comes down to the question: "Who has control?" The debate boils down to: Who has ownership of water rights appropriated for Reclamation projects, the water users or the federal government? What is the nature of that ownership? What conditions, if any, may be applied under state law? Paul Brouha, Associate General Counsel, U.S. Department of Agriculture, participated via conference call. He emphasized USDA's obligation to obtain favorable instreamflow conditions for federal purposes, including functional stream channels and species viability. He stated that USDA claims in state "McCarran Act" general stream adjudications had led to little success, and reaffirmed USDA's authority to require facilities on Forest Service lands to bypass flows as part of federal permitting requirements -- though USDA has used such discretionary authority with restraint.

Council members added their perspectives. Karl Dreher of Idaho emphasized the importance of state and local initiatives, as opposed to federal regulation, using local landowners' efforts along the Limhi River as an example. Mike Turnipseed of Nevada noted that states disagree over the application of the Winter's Doctrine to ground water, and the U.S. Supreme Court has yet to address the question. Meg Reeves of Oregon mentioned the Klamath Basin situation,¹¹ and an Okanogan County lawsuit in Washington's Methow Valley involving USFS and the U.S. Fish and Wildlife Service. Norm Johnson of Utah noted successful negotiations over National Park Service water needs have avoided litigation. The consensus of the discussion was that federal water right issues need to be focused on problemsolving rather than contending over who controls the situation. Other topics discussed included an upcoming Indian Water Rights Symposium, Congressional activity related to settlement legislation, and the *Trout Unlimited v. USDA*, *Tulare Lake Basin v. U.S.* and *Defenders of Wildlife v. Norton* cases. Work continues slowly toward the possible introduction of an Adjudications Fee Fairness Act. A draft questionnaire on state laws on ground water recharge and water reuse was distributed for comment.

¹⁰Available at <http://nris.state.mt.us/drought>.

¹¹*Western States Water*, Issue #1416, July 6, 2001.

**137th Council Meetings
November 15-16, 2001
Oklahoma City, Oklahoma**

The 137th meetings of the Western States Water Council were held in Oklahoma City, Oklahoma at the Westin Hotel on November 14-16th. The meetings were preceded by the annual Oklahoma Governor's Water Conference. The major topic of that meeting was a proposed compact between the state of Oklahoma and the Choctaw and Chickasaw tribes. Governor Frank Keating's Chief of Staff, Howard Barnett, described the compact and negotiations. Southeast Oklahoma has abundant water resources, with some 50-60 inches of rainfall annually. Each year, some two trillion gallons of water from six tributaries flow into the Red River, which is naturally high in chlorides. Under the compact, the state and tribes intend to develop this resource and sell the water to the growing Texas metropolis now edging northward from Dallas-Fort Worth. The compact would divide the revenues, which could only be used for public services and economic development opportunities in the area of origin, southeast Oklahoma. Half the money from any out-of-state water sales would go to the state, with 37.5% to the Choctaws and 12.5% to the Chickasaws.

All of the tribes' lands have long since been allotted to individual tribal members, and the state's position has been that the tribes hold no federal reserved water rights. However, as economic development is the primary objective, the compact sidesteps the issue by dividing the potential revenues from joint future development of the resource, rather than apportioning the waters. Moreover, the tribes recognize all existing state water rights and defer to the state to administer both Indian and non-Indian water rights on or off their reservations, as well as state jurisdiction over water quality standards. These are considered to be essential elements of the compact that are intended to avoid conflicting water quality and water rights requirements and provide greater certainty in order to encourage industrial development. Economics is the driving force bringing the tribes and the state together.

Also of note, the water needs of Oklahomans must be met first and protected in perpetuity. At present, local water uses only amount to 117,000 million gallons per day (mgd), and no reasonable projections of future in-state needs would appear to significantly limit future out-of-state sales. Any sales contract would require the buyer to renounce any downstream dependency rights, any right of eminent domain, agree to a drought contingency release, and include a price escalation clause based on the consumer price index. Moreover, each and every out-of-state water sale would require the approval of the Oklahoma legislature. The compact does not include ground water, which would not be sold. The compact and water sales would be administered by a compact commission with equal representation for the state and the tribes. The commission will hold all water rights related to out-of-state sales.¹²

¹²For information or a copy of the compact, see www.state.ok.us/~owrb.

Duane Smith, Executive Director of the Oklahoma Water Resources Board, further discussed the compact and other water issues at the full Council meeting. He noted the Oklahoma legislature had passed a resolution, HCR 1008, calling for a dialogue with the other High Plains states over a compact to govern use of the Ogallala aquifer. Also, Oklahoma is undertaking a major water planning initiative, paralleling Texas' recently completed regional water planning process. However, while the last state water plan focused on policy issues, the new plan will again address future project needs.

John Keys, Commissioner of the Bureau of Reclamation, also addressed WSWC members. He emphasized the close working relationship between Reclamation and western states, adding that the Bureau (BOR) has built and operates its projects within state water law and holds state water rights. He said that BOR's top priorities are operation, maintenance and protection of valuable existing projects, followed by working with states to meet increasing water demands in the West, including the ability to meet requirements of the Endangered Species Act. Also, many BOR facilities are growing older, and maintaining the aging infrastructure to ensure public safety downstream is a major challenge. Reclamation is striving to keep its technical expertise and attract new good young personnel as well.

BOR is also trying to define the role of its hydropower projects within the power grid. For example, the largest hydropower plant in the world is Washington's Grand Coulee Dam, generating nearly \$1 billion in wholesale sales each year, which is enough to cover BOR's entire budget. Many BOR reservoirs were drawn down this year, in the face of significant drought, to produce needed power. Water is used more than once for many purposes. Mr. Keys noted Palisades Reservoir in Idaho and Wyoming provides a fishery and recreation, as well as the head for hydropower releases, which also affect downstream water quality. Released waters are diverted for irrigation and also for salmon migration. BOR is also funding research on the use of wastewater resources.

The Commissioner next addressed security issues. Security plans for all facilities have been developed or are being prepared, including a review of information technology (IT) systems operating those facilities. Public "hard hat" tours inside dams are a thing of the past, but all visitor centers have reopened. Also, BOR now has law enforcement authority. BOR security officers won't carry firearms, but will have oversight responsibilities as BOR contracts with the nearest local, state or federal law enforcement agency or military unit for security services. Who will pay for these additional costs has not yet been determined, though BOR has recommended they should be nonreimbursable. With respect to other issues, BOR is in the process of changing its contract rules to lift the last Administration's 25-year term limit and return to the old 40-50 year contracts, with the support of financial institutions. BOR is also considering appropriate "boiler-plate" language to deal with water shortages, and further reviewing water conservation provisions in contracts.

Commissioner Keys referred to the Klamath Falls case and implementation of the ESA, which is a huge issue. BOR hopes to release a 10-year biological assessment this month that will cover project operations next spring and into the future. He mentioned problems with as yet unadjudicated state water rights in the basin, and offered BOR's help in finding funds to speed up decisionmaking. The Department of Interior is reviewing its ESA implementation processes. Other important issues he mentioned included: encouraging appropriate project title transfers, and trying to streamline the

process; using project power for irrigation, particularly as part of the Pick-Sloan Missouri Basin Project; funding large rural water supply projects (and operation and maintenance) without “killing” BOR’s budget; and fallout from the Talent Irrigation District case requiring a National Pollutant Discharge Elimination System (NPDES) permit for the use of herbicides or pesticides in any canals. The Environmental Protection Agency (EPA) is looking at issuing a general permit and authorization use in accordance with label requirements. Of note, BOR is planning a centennial celebration next year for the enactment of the Reclamation Act of 1902.

The Council revised and readopted a sunset position in support of legislation to require the federal government to participate in all state administrative and judicial water rights proceedings, to the same extent as all other persons, and pay applicable fees, including “filing fees (not Native American tribes) as well as comply with all other state substantive and procedural water right adjudication laws...for the appropriation, use and distribution of water rights...” with state administration of all water rights. Further, the Congress should “appropriate moneys for payment of unpaid fees to states that have incurred expenses as a result of processing federal claims or federal objections to private claims in state general stream adjudications.” Three other positions were allowed to sunset.

Council Chairman Mike Brophy read a letter to be sent on his own behalf to Senator Tom Harkin (D-IA) regarding the Farm Bill and suggestions the Council had approved certain provisions. The letter says the Council “...has not been asked to review or take any action regarding the draft Water Conservation Additions.... From my perspective, western states are not opposed to initiatives...to develop and implement partnership arrangements with individual states, in accordance with the laws of those states, to address demonstrated water quantity or water quality requirements for species listed under the Endangered Species Act. However, I believe it is highly unlikely that the...Council would support the...Additions as drafted, which propose...the temporary transfer or permanent acquisition of water rights by the...Department of Agriculture for lands enrolled in the Conservation Reserve Program.... [T]he goal...can be largely achieved under existing state laws. Therefore, I see no need for the Water Conservation Additions....”

In WSWC committee meetings, Council members extensively discussed Total Maximum Daily Load rule revisions with Charles Sutfin, Director, Assessment and Watershed Protection Division, EPA, as well as Confined Animal Feeding Operation rules, ESA and Clean Water Act (CWA) coordination and reauthorization, U.S. Geological Survey streamflow and Natural Resources Conservation Service snow data gathering work, BOR water conservation activities, drought, Indian water right settlements, recent water-related litigation, state water reuse and ground water recharge laws, and other topics.

OTHER MEETINGS

ABA Water Law Conference

The American Bar Association (ABA) held its annual Water Law Conference at the Harbor Island Sheraton Hotel in San Diego, California on February 15-16th. The Council participated in the planning and organization of the conference, which focused on "Watershed Management: A New Governance Trend." An estimated 300 lawyers, engineers and administrators attended. Lauren Caster, the ABA Water Resources Committee Chair welcomed participants, followed by an introduction from Jay Stein of New Mexico, one of the program co-chairs. The Keynote address was presented by the noted water law expert, Professor Joseph Sax, of the Boalt Hall School of Law, University of California, Berkeley. Professor Sax spoke of early legal doctrines which advocated the watershed protection concept. Speaking of the early riparian doctrine, he explained that the "area of origin" idea demonstrated the "pre-environmental intuition that water is a limited resource that can be over-stressed if competition for its benefits is not limited." On key issues in watershed management, he noted that a "striking paradox" exists, as some may call for centralized administration, while at the time, we experience "strong desires along a broad spectrum for more local autonomy." Professor Sax also spoke of the role that the Endangered Species Act (ESA) is playing as a driving force behind the watershed movement.

The first panel discussion focused on the "Evolving Role of ESA Consultation in Watershed Management." Moderating the discussion was Melanie Rowland, with the National Oceanic & Atmospheric Administration's General Counsel Office in Seattle. Tom Lindley of the Portland law office of Perkins Coie, LLP, first spoke of limitations on the ability of federal agencies to require ESA consultation on non-federal water rights and water management facilities. Richard Opper, the Executive Director of the Missouri River Basin Association, spoke of the role that ESA consultation has played in efforts to address problems associated with Missouri River management activities. He expressed a need for the participation of higher level Fish & Wildlife Service (FWS) employees in all phases of his organization's planning activities. Lastly, Wayne White, FWS Field Supervisor from Sacramento, California, spoke on how the role of the ESA in watershed management extends beyond consultation.

The second segment focused on "Creative Programs and Projects to Increase Water Supply," and was moderated by Douglas MacDougal, of the law firm Schwabe, Williamson & Wyatt, in Portland, Oregon. Alf Brandt of the Sacramento, California Regional Solicitor's Office for the Department of the Interior, addressed the concept of using an environmental water account to maximize and expand project yield for the environment. Former Oregon WSWC member Martha Pagel, now practicing with the law firm of Schwabe, Williamson & Wyatt in Portland, spoke on the use of mitigation and mitigation banking as strategies for meeting new supply needs in Oregon's Deschutes Basin. Finally, Jeanne Zolezzi of the Stockton, California firm of Herum Crabtree Brown, addressed the topic of using creative programs and projects such as aquifer storage and recovery to increase water supply.

Over lunch, former Bureau of Reclamation Commissioner Floyd Dominy provided a humorous and spirited presentation. He was at the helm during the Bureau's most active period of dam-building and development. Perceived by some as a controversial figure, Mr. Dominy fielded questions from the audience regarding what he might change if he were "able to do it all over again," and what he would do if he were Commissioner today. Not afraid to state his opinion, he earnestly stated his dislike for the ESA and the conflicts it causes, and detailed a couple of smaller projects that he would not pursue if he were to repeat his role as Commissioner, while ardently restating his support of the construction Glen Canyon dam.

The afternoon sessions featured tribal issues and watershed management, confidentiality in watershed processes, negotiation and evidentiary issues concerning scientific modeling and transactional due diligence. Council member Jeff Fassett, the former State Engineer from Wyoming, spoke on issues facing tribes from his experience in the Wind River basin of Wyoming. Tim Vollman, from Albuquerque, New Mexico, spoke on the value of the seniority of tribal water rights in light of ESA consultation. In the ethics component of the conference, Bradley Tellman, of the law firm Barran Liebman in Portland, Oregon, spoke of lawyer contact, conflict and confidentiality in dealing with experts and consultants. Cynthia Covell, of Alperstein & Covell in Denver, Colorado, addressed the topic of confidentiality and disclosure, and communication with government agencies and employees. During later breakout sessions, Steve Larson of S.S. Papadopoulos & Associates in Bethesda, Maryland and Stuart L. Somach, of Somach, Simmons & Dunn in Sacramento, California, both addressed the use of modeling in litigation. During the transactional due diligence session, participants were provided an overview of basic state water laws, as well as due diligence checklists.

Friday morning, Jerome Muys, of Muys & Associates of Washington, D.C. addressed the issue of equitable apportionment and interstate watershed protection and management. The conference continued with a panel discussion on interjurisdictional watershed management moderated by Council member Jennifer Gimbel, of the Colorado Attorney General's Office. The discussion also featured remarks by another Council member, Professor Chuck DuMars of the University of New Mexico School of Law in Albuquerque, who spoke on interjurisdictional compacts as tools for watershed management. Kara Gillon, of the Defenders of Wildlife in Washington, D.C., related experiences in the Lower Colorado River and the Middle Rio Grande. James Lochhead, of Brownstein Hyatt & Farber in Glenwood Springs, Colorado, brought an international perspective, contrasting the experiences of the Great Lakes and the Colorado River.

The conference concluded focusing on what makes watershed processes work. Reed Benson, with WaterWatch of Oregon, provided the "pessimist's perspective." He cautioned participants that watershed groups aren't the panacea for all water-related concerns. Mark Smith, Massachusetts Executive Office of Environmental Affairs, relayed the results and lessons learned from the Massachusetts Watershed Initiative. The last presenter was William Stell, Jr., with the law firm of Preston Gates Ellis, in Seattle, Washington. He addressed what he found to be the key ingredients for the emergence of successful watershed management initiatives.

Western Governors' Association - Annual Meeting

Fourteen governors and six Canadian premiers participated in the annual conference of the Western Governors' Association (WGA) held August 8-12th in Coeur d'Alene, Idaho. At the meeting, the governors and Secretary of the Interior Gale Norton and Secretary of Agriculture Ann M. Veneman committed formally to a collaborative 10-year strategy for addressing the threat and consequences of wildland fires. The strategy seeks to reduce wildfire risks to communities and the environment by emphasizing proactive fire management in addition to traditional reactive suppression actions. The document and a letter of endorsement were forwarded to Congress.

The governors also took steps toward ensuring adequate and cost-effective electric power transmission, including the signing of a memorandum of understanding with key federal agencies. Further, a Western States' Energy Policy Roadmap was adopted by the governors emphasizing that states must continue to play a pivotal role in electric power decisions, and Congress should allow states to create regional mechanisms to decide their common power issues.

A number of resolutions were adopted including positions supporting: (1) negotiated Indian water rights settlements; (2) state conservation agreements under the Endangered Species Act; (3) watershed restoration through partnerships; (4) payment of federal non-tribal fees in general water right adjudications; (5) an amendment to the Clean Water Act regarding cleaning up abandoned mines; and (6) reauthorization of the Clean Water Act, pertaining to issues of particular western concern. The position on settlements updated a longstanding WGA policy by specifically endorsing the recently introduced Fiscal Integrity of Indian Settlements Protection Act.¹³

Governor Jane Dee Hull of Arizona was elected as WGA's new chair to succeed Governor Dirk Kempthorne of Idaho.

House Resources Committee Hearing

At the request of the House Resources Committee's Water and Power Subcommittee, WSWC Chairman Michael Brophy appeared and testified in Washington, D.C. on March 27th, 2001. His testimony follows verbatim:

I am Chairman of the Western States Water Council. The Council is comprised of representatives appointed by the governors of eighteen western states. The Council has been charged with fostering interstate cooperation in water resources and protecting vital state prerogatives with regard to the management of water resources in the West. While necessarily expressing personal views in my testimony, I will rely heavily on positions of the Western States Water Council consistent with the request by the Subcommittee. To my written testimony, I will also append for the record positions of the Council for your reference.

¹³*Western States Water*, Issue #1420, August 3, 2001. For further information, refer to the WGA web site at www.westgov.org.

The Subcommittee has asked that I address the "Current Situation of Water in the Western United States from the Perspective of the Western States Water Council." This invitation is particularly appropriate, because states play the pivotal role in both water quantity allocation and water quality protection in the West. Further, a recent survey of our member states provides a basis for my remarks.

I wish to begin by emphasizing that in the arid West, providing adequate water supplies to meet future demands continues to be a priority. This priority is underscored by the current extent of drought in many areas of the West. Streamflows in much of the West are expected to be less than 70% of average, with the entire Columbia River Basin expected to produce the second driest year in recorded history. These drought conditions are a major factor in the current energy crisis. Western states are particularly cognizant of the water needs of rural communities. They also remain concerned about the claims being asserted by Indian tribes to water resources and the potential of such claims to disrupt existing rights in non-Indian communities, underscoring the desirability of cooperative efforts with the tribes and their federal trustee in addressing tribal needs. In this regard, the Council is active with other members of the so-called Ad Hoc Group on Indian Water Rights in encouraging the settlement of Indian land and water right claims, particularly with regard to identifying an alternative mechanism for funding such settlements. A recent letter by the Ad Hoc Group further explaining this effort is attached to my written testimony.

The federal government also has claims to substantial amounts of water in the West on its own behalf, given the extent of federal land ownership. These claims are most often presented within the context of state general stream adjudications, where the water rights of all claimants in a given stream system can be ascertained. In this regard, this Congress should address the inequity that now results from exempting the federal government from paying any filing fees or costs associated with these adjudications. I have attached the Council's position which explains our support for a remedy, now before the Congress in the form of H.R. 705.

While virtually every western state needs additional supplies to meet growing consumptive use demands, western states also recognize the need for existing water infrastructure rehabilitation. Further, they also recognize as a significant challenge, the need to sustain instream values generally, and specifically for maintaining and enhancing water quality, and for protecting endangered species. The West is often subject to wide swings in water supply. Thus, states identify drought planning and response as a priority problem, and similarly flag flood planning and response. Overlaying many of the above challenges are legal and institutional conflicts facing western states, involving federal/state relationships, conflicts between states, and disputes among water users, among others.

To meet these increasing demands, several states are considering additional surface reservoirs, which, for the most part, will be smaller in scale than the large projects of the past, more innovative, environmentally sensitive, and financed primarily from state and local resources. The reallocation of water from existing uses to other uses will likely accelerate, chiefly from agricultural uses to other uses, primarily municipal. While states will often facilitate such transfers to meet specific water supply and environmental challenges, in some cases they may restrain market transfers, not only to protect third parties, but also the public interest in general.

While recognizing the limits of water conservation in providing "new" water and additional caveats relating to the site-specific impacts of water conservation measures, states are carefully considering opportunities to "stretch" existing supplies of water through more efficient use, reuse, and reservoir reoperation (prior to the development of new storage facilities). States are further exploring opportunities to cost-effectively manage ground water recharge, recognizing it as a potentially significant storage alternative, and some states are further pursuing the potential of desalinization and weather modification to augment existing supplies.

As the emphasis on the importance of water conservation increases, states are developing and adopting a number of programs to encourage such measures as low water-use landscaping, and water rates that encourage conservation in urban areas, and development of conservation plans and incentives and leak detection programs in rural/agricultural settings. The reuse of wastewater effluent is also increasing. Many communities are currently reusing effluent for landscape and agricultural irrigation. To facilitate a reallocation of existing uses to augment supplies in areas of relative scarcity, some states have established water banks, while others have adopted measures to streamline the transfer process.

Western states have made innovations in their laws and institutions in order to augment and protect instream flows and to incorporate consideration of the public interest in their water right application and transfer processes. States are also endeavoring to incorporate innovations in their water quality programs, particularly regarding non-point source pollution. States have adopted various measures to deal with the problem of ground water depletion. States have also strengthened their capacity to deal with floods and drought. Innovations to improve information on water availability and use are common.

States in the West have recognized and moved to enhance the potential value of local watershed coordination initiatives. As conflicts over water use intensify in an era of both increasing and changing demands, states are also addressing the need to deal more effectively with these disputes. For a variety of reasons, states are also increasing their emphasis on maintaining and enhancing the environment. These reasons include, but are not limited to, federal mandates such as the Endangered Species Act and the Clean Water Act.

Given the diminishing federal resources available to carry out the requirements of these and other federal acts, and the concurrent increase in the state burden for environmental protection, states urge that increased flexibility be given regarding their implementation, so that states and others can tailor programs and prioritize resources to meet real needs. Streamlining federal permit processes is also important. The federal government should encourage innovations, which frequently involve market incentives and non-regulatory tools, as they have often been found to work more effectively than top-down regulation. The Council has, for example, urged flexibility in implementing the Total Maximum Daily Load program under the Clean Water Act. Further, the federal government continues to have an important role with regard to disaster response and other mitigation associated with droughts and floods.

There is a significant need for the federal government to maintain and rehabilitate its existing water storage infrastructure, and to work with states and others in providing reliable water data. In particular, as Congress considers the budget, we urge it to recognize the serious need for adequate and consistent federal funding to maintain, restore, modernize, and provide for targeted expansion of NWCC's SNOTEL System and Soil and Climate Analysis Network (SCAN), and USGS's Cooperative Streamgaging Program and National Stream Information Program, with a primary focus on coordinated data collection and dissemination. I have appended a position recently adopted by the Council explaining the western states' position in support of these programs.

Finally, I wish to reiterate the importance of the long-held Congressional policy of deference to states regarding water management. States are moving to address the challenges they face in water resources. Federal preemption of state authority is not the way to address the complex challenges associated with water management in the West. Rather, what is necessary is encouraging partnerships between the state and federal agencies in the development and implementation of key policies, supporting the pivotal role states must play in addressing these challenges, and affording flexibility for ongoing innovation at the state level in order to effectively carry out this role. Thank you.

Water Information Management Systems Workshop

The Nevada Department of Conservation and Natural Resources hosted the WSWC's annual Water Information Management Systems Workshop in Reno, Nevada on July 24-26th. Representatives from twelve states discussed information management needs and challenges, involving water rights and water use mapping and imaging, computing evapotranspiration, reporting consumptive uses and losses, decision support systems, implementing water quality standards, managing ground water resources and databases, and modeling water availability. Technical presentations also addressed software and hardware issues, applications and alternatives, as well as database migration issues. Several states demonstrated uses of the internet to deliver state services and allow for greater interaction with users. Lastly, attendees discussed activities of the Federal Advisory Committee on Water Information (ACWI), the U.S. Geological Survey's National Streamgaging Information Program (NSIP), cooperative state/federal streamgaging activities, and the Natural Resources Conservation Service's snow survey and water supply forecasting program.

Symposia on Endangered Species and Water Law in the West

The Southwest Albuquerque, New Mexico

The New Mexico State Engineer's Office and New Mexico Interstate Streams Commission hosted the Albuquerque symposium, June 27-29th. Eluid Martinez, former Commissioner of the U.S. Bureau of Reclamation, former New Mexico State Engineer, and a former member of the Western States Water Council was a featured speaker. He questioned the intent of the Congress with respect to ESA and any priority over other laws, but recognized we now have to deal with it. As Commissioner he was responsible for Section 7 consultations over federal project operations. While

trying to work for the common good, it was evident each state and federal agency has their own interests and agenda. Some use ESA to "...affect how water is used and how people live in the West." For example, some use ESA as a club and insist on free flowing rivers. As Commissioner, Eluid tried to implement ESA while protecting existing users by reoperating projects, leasing water and purchasing water from willing sellers. However, "There isn't enough money in the Federal Treasury to buy out every irrigator." With respect to the silvery minnow and the Rio Grande, he noted the fish have survived and will be here after we're gone. Still, values have changed and we need to preserve as best we can what's good about this country, while trying to meet new demands for water. Many issues take years to resolve.

Tom Turney, New Mexico State Engineer, summarized water law in the state, which was originally based on Spanish law, which recognized water scarcity. He noted it is easy to forget it is a desert state with a finite water supply, but that is becoming ever more evident as growth puts stress on available surface and ground water supplies. Albuquerque and Santa Fe rely mostly on ground water, but both own water in the federal San Juan-Chama Project, which includes the transfer of water from the Colorado River Basin in Colorado to New Mexico and the Rio Grande. The Rio Grande is subject to an interstate compact and international treaty. New Mexico is party to nine river compacts, and water managers are always concerned about a possible compact call. New Mexico has had to pay Texas for underdeliveries on the Pecos River, and is leasing water, providing other financial incentives, and purchasing water from users in New Mexico to try to ensure future deliveries. "Everyone wants all the water they can get, and there is not enough for everyone." The goal is to balance needs and uses. Some of the available tools include water planning, metering water diversions and return flows, and modeling surface and ground water relationships. With respect to endangered species, the State Engineer is working collaboratively with the U.S. Fish and Wildlife Service (FWS) to achieve compliance.

Norm Gaume, Director of the New Mexico Interstate Stream Commission, noted that ESA issues have been raised on all the major rivers in the state. He mentioned Congress' policy statement regarding resolving water resource issues in concert with the conservation of endangered species. With respect to the Rio Grande and the silvery minnow, he noted that state had offered a proposed short-term settlement that would put more water in the river, which was signed before the symposia ended. As part of that agreement, Albuquerque agreed to sell some of its San Juan-Chama water to preserve instream flows for the fish. However, as the water in storage is depleted, similar actions won't be an alternative in the future. There is barely enough water now to meet present and future needs, with out FWS demands. The Rio Grande is a relatively small river, with a wide, shallow channel, and two-thirds of its depletions are natural. Evapotranspiration is a significant loss. He also briefly described Pecos River issues. Texas filed suit over compact violations in 1974. The Pecos is one-tenth the size of the Rio Grande. It is home to the endangered bluntnose shiner. A five-year study of the needs of the fish continues. A biological consulting firm hired by the state initially accompanied FWS on populations surveys, which found no fish, and they are no longer invited to come along. FWS denied the state's request to conduct its own surveys. Other questions remain: What are the flow requirements for the fish? What are its habitat and food? While there is not enough information to determine a base-line population, there is evidence that a static population

exists with no significant downward trend apparent. Still the state has spent \$29 million dollars to purchase and retire water rights in the basin to maintain instream flows for the fish and Texas.

Tom Davis, Manager, Carlsbad Irrigation District (CID), also addressed issues along the Pecos. He described the geography and hydrology, and well as flood control and water storage and diversion structures. CID diverts water at Avalon dam. CID operations are very water efficient. Historic flows are erratic. It is a small watershed and there is little snow pack. Infrequent but intense thunderstorms produce flood flows that are captured in the reservoir. In addition the Avalon the Bureau of Reclamation has the Sumner and Brantley Projects, and the U.S. Army Corps of Engineers operates the Santa Rosa Project. The bluntnose shiner prefers broad sandy plains, but spawns during spike flows. Natural flows can reach up to 15,000 cfs, washing shiners into Brantley Reservoir. FWS biological opinions constrain project operations, and a 1992 memorandum of understanding initiated a study of release scenarios to test the most efficient movement of water and any benefits to the shiner. FWS data has yet to be released. It is intended to be a transparent process for recommending future target flows. It is difficult to meet all existing needs, and every Monday a conference call among stakeholders is held to review the situation. Unfortunately, FWS and Forest Guardians, an environmental group that brought suit over project operations on the Pecos, often are not on that call. Hopefully, wisdom will prevail with mediation. We can't go back to predevelopment conditions. Other options need to be considered.

Mike Gabaldon, Deputy Director of Operations for the Bureau of Reclamation, also discussed issues on the Rio Grande, Pecos and the Klamath Project in Oregon. On the Rio Grande, there is a conservation pool in upstream reservoirs, which a judge is considering as a source of water for the silvery minnow. That water is under contract to Albuquerque and others, and releases are under the control of the State Engineer. As described above, different parties are discussing an agreement to use some of this water for the benefit of the fish. Reclamation is also leasing water from willing sellers, mainly along the Rio Chama, and is also considering construction of some type of refugia for the fish. In April 1999, 26 miles of the Rio Grande above Elephant Butte Reservoir went dry for five days, and minnows were captured and moved to ensure their survival. Other measures to protect habitat include pumping water from a low flow channel that parallels the Rio Grande to keep river reaches with fish wet. The target flow is 50 cfs, but with no monsoon rains and high temperatures, it will be difficult to maintain. He noted that the drought was a significant reason for the "trainwreck" in the Klamath Basin. There isn't enough water for endangered suckers, salmon, farmers and fishermen, including tribes. Under an April 6 biological opinion, Reclamation had to shut off water to Klamath Project users, idling some 175,000 acres and reducing deliveries to 25,000 acres more. They are looking at other ways to provide water, including developing ground water.

Bryan Arroyo, Assistant Regional Director for the U.S. Fish and Wildlife Service addressed the silver minnow concerns, noting due to a lack of resources data is lacking on the ecology and habitat needs. FWS first priority is listings, followed by the designation of critical habitat and recovery plans. He emphasized negotiations as a new way of doing business, avoiding costly lawsuits that lead to decisions that limit flexibility. In the San Juan River Basin, FWS "tried to do it right," with the science first, flow models, and peer review to gather the information necessary to better manage fish recovery needs and the needs of the people. The ESA work group on the middle

Rio Grande is trying to involve everyone to resolve how we can all live together with a finite amount of water. Everyone has to be part of the solution. It is a difficult balancing act. Yesterday's dark clouds "made my day." Maybe we'll have some water to manage!

Chuck DuMars, with Law and Resource Planning Associates, provided a thoughtful analysis of the issues. Chuck is also a WSWC member representing New Mexico, and is an attorney representing the Middle Rio Grande Irrigation District. He noted it is hard to pin down FWS biologist on the specific needs of the silvery minnow. Their answers are elusive. The Congress has charged the agency with implementing ESA, but largely without the necessary budget and resources. FWS is trying to require the reoperation of water projects to mimic the natural hydrograph. It is social engineering of stream values. You comply or else. Imagine an endangered open space act. If too many people move in, you order them out, and if they don't move you charge them under Section 9 [the ESA takings provisions]. Conflict arises at virtually every level of society. Irrigators and environmentalists alike are demonized because of their values. Collaborative decisionmaking becomes very difficult. A major problem is the refusal of FWS to admit this should be an open, transparent public process, with the science scrutinized and subject to legal review. Another problem is determining what is in fact feasible. The case law continues to evolve, but challenges have been raised regarding the scope of the science, and lack of consideration of economics. Words -- such as extinction, jeopardy and waste -- are used as threats. Cause and remedy issues must be addressed by courts. Questions of physical and temporal proximity to the cause are raised. There are multiple causes, and we need affirmative solutions. The Middle Rio Grande and Klamath irrigators are "displaced" persons. There has to be equity. The Tulare case, mentioned earlier, is "sound and well reasoned." No one segment of society can impose its values on another.

The Northwest Seattle, Washington

The Washington Department of Ecology and Conference of Western Attorneys General cosponsored, with the Council, a symposium in Seattle, Washington on September 19-21st, 2001. Focusing on the Northwest, the meeting drew about 70 people from Washington, Oregon, Idaho, Montana and California, including federal, state and local officials. Jim Davenport, Chair of the WSWC's Endangered Species Act Subcommittee, welcomed those attending, noting that given the tragic events of the recent past, we all look at our conflicts differently. Despite the emotional confrontations of this past summer over water uses and endangered species' needs, we look forward to greater cooperation and agreement in the future. The purpose of the workshop was to bring together a broad range of parties to share information, explore the current status of a number of case studies, examine past practices, and prepare for future discussions.

Tom Fitzsimmons, Director of the Washington Department of Ecology, sought to provide a framework for the discussions stating that each of us and the constituencies we represent, from western governors down to individual stakeholders, find ourselves taking different positions based on our values, acceptable risks, costs and uncertainty. The challenge is to find common ground and build a workable future. As a climber, he used as an analogy a 10-member team, each wanting to take a different route or climb a different mountain. We need to ask: "What is the goal? How can

I contribute? What are the risks and costs? What are the rewards? Is the goal recovery of a fish species? What does that mean? Does recovery include providing for a reasonable harvest of fish? Is the goal to avoid "take?" Are there other goals? Given the greater uncertainty in the wake of terrorist attacks, should economic issues be given greater weight?" During the meeting, one of the Northwest's largest employers (Boeing) announced the layoff of 30,000 employees. "What can we afford to spend to save these fish?"

David Mears, Washington State Assistant Attorney General, reported that following a review of recent ESA court cases, he had utterly failed to find any consistent themes to guide future action. However, he observed that litigation is probably the worst way to try to address ESA issues generally. Washington faces a morass of state and federal environmental protection laws, including the ESA and Clean Water Act (CWA), state land use laws, and Indian treaty rights, as it seeks to protect salmon. He noted that in the Alsea Valley Alliance case, the judge held the National Marine Fisheries Service (NMFS) can't distinguish between hatchery and naturally spawned fish that are genetically identical in its coho salmon listing decisions. He then discussed litigation which had led to the coho listing, reversing the NMFS initial decision not to list the coho, but rather rely on Oregon's Coastal Coho Salmon Plan to protect the species. He noted the recent Alsea decision may have a huge effect on NMFS efforts to protect "wild" fish and their genetic diversity, with some 30 runs of anadromous fish now listed in the Northwest.

Mr. Mears also discussed the Tulare Lake Case, noting the Federal Court of Claims decided that the application of the ESA to limit the delivery of water under contractual rights amounted to a "taking" under the 5th Amendment to the Constitution. The court held, "The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so." The court will now consider awarding damages. The surprise was that the court found a "physical" taking, not a "regulatory" taking, which is the first such application to water rights. The case may have potentially disturbing implication for states, which have "jealously guarded" their discretion in administering water rights -- should it lead to federal courts quantifying water uses -- as Washington and other states have had a hard time completing general water rights adjudications. For example, in compliance with federal law, the state forestry agency has conditioned logging permits, putting some trees off limits to protect the spotted owl. While the state argues this is not a regulatory taking, it might be found liable for a physical taking. He also discussed the state's shoreline management act and other topics.

Clive Strong, Assistant Attorney General for Idaho, is the lead for the state's Snake River Basin Adjudication. He described anadromous fish issues in the Columbia River Basin as a classic "tragedy of the commons," with each group acting in their own self interest without consideration for what's best for the whole. ESA contributes to the problem as it has failed to recover most species, but has been wildly successful in engendering lawsuits and gridlock. He quoted Humpty Dumpty from *Through the Looking Glass* asking, "Which is to be master?" The potential conflict with state water rights administration was apparent in 1973 when the ESA was enacted. In 1982, Senator Alan Simpson (R-WY) proposed language similar to that under CWA Section 101(g) to protect states' rights, but the Congress added a lesser policy statement under ESA Section 2(c)(2) calling for cooperation in the resolution of water resources issues "in concert with the conservation

of endangered species.” We’re not there yet. Rather, the ESA is administered by the NMFS and U.S. Fish and Wildlife Service (FWS) by edict with virtually no discussion of cooperation. Salmon listings and drought have raised the issues to a new level of concern.

Mr. Strong continued stating that trying to decide in favor of either endangered species protections or protecting water rights and their priorities, was not the way to go. The ESA’s definition of “take,” or prohibiting the “taking” of a species, is absolute and easily applied directly, as in the complete dewatering of a stream. However, it is much more difficult to define an indirect take and even more difficult to apply the Services’ definition of a significant indirect taking. The Sweethome case upheld the definition of “harm” within the definition of “take,” but as a legal matter there remain difficult questions of proximity and degree. Nowhere is that more apparent than in the Northwest, where the U.S. Bureau of Reclamation (BOR) has shut off water to Klamath Project farmers, and is purchasing water from Idaho’s water bank in the Upper Snake River Basin -- for undefined ESA recovery efforts with uncertain impacts -- in essence reallocating water. While describing landowner efforts in Idaho’s Lemhi basin to protect salmon and comply with ESA requirements, he noted irrigators want to know how much water they must give, but there is no common definition of a reasonable flow standard to help achieve recovery. Moreover, in any “taking” case, the burden of proof lies with the Services, which have a difficult task to show proximate cause and fix liability for any individual irrigator. In addition, the task becomes even more complex under state water law and its seniority system, with “blame shifted down the line.”

Mr. Strong concluded that we don’t want to be asking, “What happened to the salmon?” There is enough risk and uncertainty to bring different parties together to try to address all the factors in the salmon life cycle across the entire Columbia River system and consider a range of issues and mitigating measures to find solutions.

Federal guests included: Bob Turner, NMFS; Bill Shake, FWS; Bill Mc Donald, BOR; Doug Arndt, U.S. Army Corps of Engineers; and Lorraine Bodi, Bonneville Power Administration (BPA). Mr. Turner noted the ESA is an unequivocal protection statement, which he described as a “don’t take a breath without talking to the feds first statute.” The federal “hooks” are Sections 7 and 9. However, he added, “After 20 years’ experience, I think there is a different way to look at it.” He discussed tools under Sections 4(d), 7 and 10 for finding acceptable compromises, specifically mentioning the Tacoma Water Habitat Conservation Plan (HCP) and Seattle City’s Cedar River Watershed HCP. He emphasized the need to get everyone involved and contributing to solutions, noting its difficult to ask private parties to act until the “feds have their act together.” He also urged states to address the need to “incorporate” ESA issues in their water rights systems, addressing junior, illegal and senior water rights subject to federal permits. He noted public policy inequities arising in different watersheds.

Bill Shake, a 34-year FWS veteran, began speaking about historic fish and wildlife management activities, concluding, “If we had been effective, maybe the Endangered Species Act wouldn’t have been needed.” He addressed habitat, hatchery, harvest and hydropower (All-H) issues, the Federal Columbia River Power System (FCRPS), and related biological opinions in 1994, 1995 and 2000. He noted that the creation of a federal caucus of senior agency officials and development

of a comprehensive salmon recovery strategy (All-H paper) were significant. While no one anticipated the events of this year, the collaborative process they created is helping improve river operations. They also recognize the need for outreach and stakeholder involvement in the decisionmaking process, but federal agencies must ultimately make the decisions. He added optimistically that HCPs are a vehicle to help solve ESA problems.

Bill McDonald said Section 7 requires BOR take affirmative actions to protect species, not just avoid jeopardy. Sometimes, as in the Klamath Basin, federal projects are unfairly called upon to shoulder the entire burden. While the project holds senior water rights under state law, BOR could not make a call on junior users as Oregon has yet to adjudicate the water rights. He said, "The failure of western states to have timely adjudicated water rights is part of the problem." There are issues of cost, risk and social equity. Who is going to pay? Who bears the risk of being shorted water? He went on to describe BOR's use of project reoperations, structural modifications, alternative water supplies, purchases from willing sellers and water conservation to try to meet conflicting demands for limited waters.

WSWC/NARF Indian Water Rights Settlement Symposium

On October 10-12th, the Native American Rights Fund (NARF) and Western States Water Council held their 7th Symposium on the Settlement of Indian Reserved Water Rights Claims at the Holiday Inn in St. George, Utah.¹⁴ John Echohawk, NARF Executive Director, welcomed those attending and spoke of the work of the Ad Hoc Group on Indian Water Rights Settlements. Its purpose is to resolve Indian water issues out of court. While progress slowed during a "gridlock period," under the Clinton Administration, Echohawk was encouraged that the new Administration had picked up the pace. He also expressed his hope for bipartisan support for legislation sponsored by Senator Pete Domenici (R-NM) and others (S. 1186), supported by the Ad Hoc Group, which would adjust the budget caps for the Department of Interior (DOI) and the Bureau of Indian Affairs (BIA), from which Indian water rights settlements have traditionally been funded, to facilitate appropriations to implement approved settlements.¹⁵

Mike Brophy, WSWC Chairman, also welcomed "all you brave Americans," who traveled to the symposium during this time of uncertainty due to the events of September 11th. He also shared his thoughts on the work of the Ad Hoc Group, reemphasizing that the group supports the notion that Indian water right settlements should be funded without the present constraints of the budget caps. He mentioned S. 1186 and encouraged attendees to contact their representatives and ask them to support the bill.

Susan Cottingham, Program Manager, Montana State Reserved Water Rights Compact Commission, gave the keynote address. She empathized with the natural temptation to put life on hold due to the September 11th tragedies, but asserted that this is an important time to rededicate

¹⁴*Western States Water Council*, Special Report, Issue #1432, October 26, 2001.

¹⁵*Western States Water Council*, Issue #1421, August 10, 2001.

ourselves to the work -- even though Indian water rights settlements may not be a high priority during this time of war. She reminded attendees that Klamath Basin type conflicts exist in most watersheds throughout the West.¹⁶ She proposed the idea of concluding settlements by the 100th anniversary of the 1908 *Winters* decision and shared her ideas regarding this quite ambitious, but intriguing goal which is worth pursuing.

Negotiation of Indian Water Rights Claims: The Basics

A panel discussed gathering background information in preparation for Indian water rights settlements. Christopher Kenney, Director of the Office of Native American Affairs, Bureau of Reclamation (BOR), spoke of the importance of a technical analysis, and the consideration of the needs of the tribe, neighbors, federal and local governments, and other involved parties. He sought to dispel the myth that settlements cost less than litigation. He weighed the difficulty that the Bureau of Indian Affairs (BIA), as trustee for the tribes, has had in moving settlements forward due to the lack of available federal funds. He agreed with the introductory remarks lamenting a lag in settlement efforts during the Clinton years, and expressed his hope for many successful negotiations and settlements in the future. In response to a question regarding inadequate support for settlement negotiations in California, Kenney recognized the problem, saying that the BOR is working on it, but has not attended to the problem as well as it should have. Regarding funding for Indian water rights settlements generally, Kenney affirmed it often comes from the BIA budget at the expense of other BIA programs, and that only the Congress could address this problem.

Greg Houtz, with Arizona's Office of Indian Water Rights Settlements Facilitation, Department of Water Resources, explained that from a state's perspective, due to the complexity and the importance of all the hydrologic data involved in negotiations, many may use the lack of data as an excuse to avoid having to answer detailed questions. He highlighted the importance of letting technicians help resolve the conflicts. Houtz shared three examples of successful negotiations where the lawyers were not involved in the process, concluding that attorneys usually make negotiations more difficult. The most important benefit of settlements over litigation is promoting good relations, as competing water users become neighbors rather than enemies.

Karen Fagg, President of HKM Engineering, voiced her opinion that it is far more beneficial for parties to negotiate than to litigate. It is essential, she said, to be able to trust that the technical information is accurate since it will be the basis on which negotiations will be carried out and presented to the Congress. Fagg said that water systems must be modeled in order to accurately assess the situation and to come out with an acceptable solution. Lastly, she said that it is vital to build in as much flexibility as possible since the solution has to work for years to come. During a question and answer period, she asserted that for a technician to claim that he needs more data is just a "cop out," and such an answer should not be acceptable.

Tracy Labin, NARF staff attorney, opened a discussion on identifying parties, issues, and how negotiations bind larger groups. She used the Tule River Indian Reservation situation as an

¹⁶*Western States Water Council*, Issue #1431, October 19, 2001.

illustration. The tribe was not getting enough water, and sought help to quantify and secure their water rights. Their only apparent options were to litigate or enter settlement negotiations. Since there was no litigation involved, the U.S. did not get involved. Labin urged the U.S. to get involved and help the Tule Indians define their water rights now in order to prevent future problems. She said that unless the tribes get their rights quantified, they will inevitably find themselves in the difficult situation of fighting to claim already claimed water. When asked when parties ought to get the federal government involved in negotiations, Labin responded as early on as possible as a courtesy that helps things run more efficiently later.

Mike Quealy, Chief of the Natural Resources Division of the Utah Attorney General's Office, shared two examples of successful water rights settlements in Utah: the Zion National Park water settlement and Shivwits Indian Reservation water settlement. In his opinion, identifying the parties is the most problematic stage in the negotiations process. The use of public briefings and publications of proposed decrees proved very helpful in identifying parties and concerns. In the case of the Zion settlement, which is currently a little further along than the Shivwits settlement, there were only six objectors to the settlement decree, and those were resolved within six weeks. He accredited such success to informing as many parties as possible early on in the negotiation process. Utah favors negotiations over litigation because they have the advantage of flexibility, so that all parties can benefit in some way, rather than a "winner take all" scenario. He added technical people have a strong role to play in the negotiation of settlements, and said that lawyers cannot do their job without the "techies." Regarding when to involve the federal government in negotiations, Quealy said that in Utah there are two views. First, once the U.S. is joined as a participating party, by necessity it then has an obligation to voice all claims on the water involved. For efficiency purposes, a second view, is not to join the U.S. until an agreement is already to go.

Susan Schneider, Department of Justice (DOJ), Indian Resources Division, shared a federal approach to settlements. She said that the DOI criteria for settlements are an important tool, and that the DOJ's role usually reflects the activity and size of the case. Schneider agreed that most of the identification of the parties is done by the state, rather than the federal government. She is also convinced that there are, as she put it, a "Christmas Tree" list of advantages that come out from successful settlements as opposed to litigation. From a federal perspective, the federal government's greatest interest is in the final decree.

Coordination of State and Tribal Water Quality Administration

Susan Williams, an attorney with Williams Janov and Conney, was the first panelist in a discussion of coordination of state/tribal water quality administration. She expressed her view that the area of water quality administration coordination is ripe for government action. She gave an overview of § 518 of the Clean Water Act (CWA), which allows EPA to grant tribes "treatment as state" (TAS) status. However, in the absence of tribal regulation, EPA asserts the authority to step in and regulate water quality on reservations.

Jim Uzzell, Wyoming Department of Environmental Quality, shared some experiences and suggestions from a state perspective. He encouraged parties to avoid jurisdictional battles since they take "exuberant amounts of time to resolve," using as an example the State of Wyoming and the

Wind River Indian Reservation tribes, reaching a cooperative water management agreement. He also said that lawyers often create problems and can alienate the tribes, making it hard to reach results. "If we leave our egos at the door," he suggested, "we can work together to reach an agreement."

Jim Grijalva, a Law Professor from the University of North Dakota, followed with a review of tribal jurisdiction over land and water issues on the reservations. In trying to figure out why there are so many issues brought up between states and tribes, and suspiciously less between separate states, he summarily asked, "the real question is... is this about bad blood?" He asserted that often disputes that would not arise between two neighboring states arise between a state and a tribe located within its boundaries. He cited an example of North Dakota's treatment of the Spirit Lake Nation in attempting to create a canal to drain Devils Lake. He said that North Dakota went to the tribe when it was in the state's best interest, but only after tribal objections. North Dakota did not want to acknowledge the tribe's stand. As a friendly caution to states, Grijalva concluded that often times when tribes do not want state machinery to come in and help with water issues, the states should not get offended, because the tribe may be fearful that later these actions could be used as an indication of surrender of authority in that area.

The Administration's Settlement Policy and the Implementation of Settlements

Bill Myers, DOI Solicitor, prefaced his comments with an overview of how life has changed since September 11, 2001. He also stated that the laws that we live under have not changed, and that Secretary Norton supports and intends to continue to focus on settlements. It is DOI's position that litigation is a poor way to deal with Indian water rights. It is lengthy, expensive, and worst of all, it is uncertain. Though there has been a general tightening of the belt to reduce the federal budget in an effort to support the war on terrorism, there are currently 38 negotiation assessment teams nationwide. He noted that the Working Group approach to settlements will continue, and that a Counselor to the Secretary will be appointed to oversee the Administration's efforts, in addition to the support provided by the Office of Water Rights. Mr. Myers then opened up the time for a question and answer session.

Floyd Franco of the Tule River Indian tribe mentioned that federal consultations are needed to assess needs of the tribes nationwide. He, as well as others at the symposium, asked what was the Administration's policy on continuing the Federal-Tribal Task Force on Funding. Solicitor Myers, while agreeing that it was a valuable asset, indicated that the Administration has not yet made a decision regarding the continuation of the task force.

When asked, Myers said that the DOI should be filling the position of Assistant Secretary for Indian Affairs soon. He said that most of his time is spent dealing with Native American issues, and he does not see that changing any time in the future. "We are always trying to get more qualified lawyers and better staff," he concluded.

The question was posed, "Does the Winters Doctrine apply to groundwater?" Solicitor Myers said that he was not sure about the interplay between groundwater and the Winters Doctrine.

Mike Jackson, mentioning the great concern for a reliable source of funding, and given that this could be provided by the Domenici bill, asked if the DOI was proceeding under the existing budget caps. Myers affirmed that as of yet, they are operating under the existing budget.

Tracy Labin asked if Solicitor Myers could foresee a federal mechanism for establishing water rights without the necessity of having a currently existing dispute. Myers said that he understood the frustration that the Tule River tribe felt, since the tribe wants to protect its rights through quantification before litigation arises. He responded that quantification is a matter of resources, and that there is no easy answer. This was followed by a tribal member's comment that the U.S., under the trust relationship between the federal government and Native Americans, had an affirmative duty to quantify the tribe's water rights. Myers promised that he would talk with Secretary Norton in this regard.

Mike Brophy, responded positively to the changes that have been implemented, and that are in the works with the new Administration. He said that the criteria and procedures for dealing with Indian water rights settlements need to be flexible in order to be successful. Brophy asked that the Administration be forthright with the hard questions, and to say "no" up-front, if there is not enough money to fund the settlement. He also said that the Domenici amendment is a plausible solution to the settlement conundrum.

Jim Morsette, Counsel for the Chippewa Cree Tribe expressed the need for togetherness during this time of war. He used his family members, who are in the military, as an example of the patriotism that Native Americans feel for this country. Morsette said that the lives lost in the Twin Towers tragedies are sacred, just as are the waters upon which Native Americans rely. He expressed the desire to set up a dialog with Secretary Norton to discuss: (1) funding Indian water rights settlements; (2) the Funding Task Force; and (3) regional consultations.

Representing the Western Governors' Association (WGA), Shaun McGrath gave a brief background and overview of the purposes of the organization. The WGA has a standing policy supporting negotiation rather than litigation. The WGA also holds the position that the federal government has the responsibility to participate on behalf of tribes, and to fund their share of water right settlement costs. McGrath reemphasized that it is absolutely a federal obligation, just as the U.S. has obligations to pay judgments. This duty cannot be dismissed or forgotten. In addition to stressing the importance of the Domenici bill, he mentioned that soon a bill would be introduced to create a National Drought Council and a National Drought Fund, which could assist in proper water resources planning. McGrath concluded by saying that we are in a new era, and that we have to get to the point where settlements are accepted as the way to do business.

Overview of the Shivwits Band of Paiute Settlement

An overview of an August 2000 settlement with the Shivwits Band of Paiutes was presented by Eve Woods, the Band's attorney, along with an historical background. Ron Thompson, Manager of the Washington County Water Conservancy District, described the Santa Clara River system and explained legal intricacies that involved both the local and state governments over the three year negotiation process. Cathy Wilson of the BIA concurred that the negotiations went very fast since

both parties were willing to forge a settlement. The role of the U.S. settling federally-reserved water rights is that federal funds are needed, and federal programs are always affected by the settlements. She then shared 5 key roles of the federal government in reaching Indian water rights settlements: (1) assure that the benefit package for the tribe is not illusory; (2) assure that the federal and non-federal contributions are fair and reasonable; (3) ensure that the waiver of water rights claims are clearly defined and not overreaching; (4) ensure compliance with ESA; and (5) identify and resolve federal agency conflicts.

Lou Leonard, with the DOI Indian Water Rights Office, shared his thoughts that the federal team approach worked well in the Shivwits Settlement. He feels that it created better relationships, and an amazingly sound and satisfying result. A bus tour of the Shivwits Paiute Tribes' Reservation and discussion of the settlement, as part of the symposium, started with a visit to Ivins and Gunlock reservoirs, which both play an essential role. The group also stopped along the Santa Clara River, and was privileged to see ancient petroglyphs found on the rocks within the reservation. Lastly, the Shivwits Band hosted a dinner and special presentation.

Settlement Legislation: Getting Bills Through Congress

The panel discussion on the "Congressional Outlook for Funding for Indian Water Rights Settlements" started with Mike Connor of the Senate Energy Committee. He said that there is a lot of work left to be done in regards to convincing Congress of the importance of funding Indian water right settlements. He added that we need to work hard to educate Congress since it is an issue ripe for legislation. Connor shared four justifications for settling Indian water rights: (1) to avoid litigation costs; (2) to eliminate claims against the U.S.; (3) to avoid the displacement of existing water users; and (4) to settle water rights consistent with the U.S.'s trustee obligations to the tribe. There is \$63 million in the BIA 2002 budget for settlements.

Margaret Stewart of the Senate Budget Committee then shared parts of a federal budget forecast, which will determine the relative difficulty of obtaining more settlement funds. Due to the terrorist attacks, and the subsequent military engagement, the surplus in the budget is rapidly declining, and Stewart predicts that deficit spending will likely occur beginning next year. Stewart's opinion is that there is a good chance the Domenici amendment will succeed within the next year or two. If successful, it would allow the discretionary budget caps to be adjusted up to \$200 million, in order to facilitate funding of settlements. Later, when asked if she had noticed any opposition to S. 1186 on the Hill, she replied that she had not, and that the future looks good for the bill.

Patricia Zell, Majority Staff Director and Chief Counsel for the Senate Indian Affairs Committee spoke briefly, followed by Steve McHugh, also with the Committee. McHugh gave an overview of the process of getting a bill considered. He believes that the Senate is a much easier venue for bills than is the House. When asked about opposition to S. 1186, Zell answered in the negative, and added that there is a unique alliance between WSWC and NARF, as well as governors and business interests. She feels that such a relationship is vital and very respected by those in Congress. It is a unique and unprecedented approach that will be very persuasive to congressional members who may not know very much about S. 1186.

Besides emphasizing the importance of working from the bottom up in order to have a successful settlement, Mike Pearce, Counsel for the Arizona Department of Water Resources, spoke of the benefits of settlements in lieu of litigation. In sharing examples of the Navajo settlement and the Gila/Central Arizona Project settlement, he stressed two main reasons that a settlement is beneficial. First, it brings added value to the Indian community. Second, it brings finality to water issues, whereas litigation is often only a short-term cure. Pearce stressed that value and finality combine to create a partnership. He also suggested creating an in-state fund to facilitate settlements, rather than later pulling the money from taxpayers.

From a tribal point of view, Alec Garfield of the Tule River Tribe stressed the importance of a "needs assessment" in considering Indian water rights settlements. He said that the tribes have an obligation to do thorough research in regards to their settlements.

William S. Brack, the Vice President of Engineering at Phelps Dodge, then took a few minutes to remind attendees of how much water is needed to mine copper. Due to the huge appetite that the U.S. has for copper, which is widely used, Phelps Dodge and other mining companies need very large quantities of water. This demand, he reemphasized, is another strong reason for water right settlements. Settlements bring resolution and wet water to the parties, whereas litigation rarely resolves the problems, and often yields only paper water rights.

Julia Doermann, Federal Coordinator for the Oregon Governor's Natural Resources Office, helped all in attendance to understand the hardships brought about by the situation that arose in the Klamath Basin last summer. She urged all to be proactive with settlement negotiations in order to avoid such a catastrophe in other regions.

Summing it all up, Mike Jackson, now in private consulting, reviewed the important issues that had been dealt with during the symposium. In short, he concluded that the outlook for settlements depends on people who care enough to make it happen. Scott McElroy of Greene Meyer & McElroy then provided a formal wrap-up and gave special thanks to those who made the effort to contribute. He voiced satisfaction that the symposium had benefitted all who attended.

OTHER IMPORTANT ACTIVITIES AND EVENTS

In Memoriam

C. Laurence Linser passed away on June 17th, surrounded by family members, after being hospitalized for several weeks with a fungal infection in his lungs that did not respond to treatment. Since 1988, Larry has represented Arizona on the Council as an alternate member and we will all miss his smile and pleasant manner as well as his water management expertise. He served as Deputy Director of the Arizona Department of Water Resources, leaving in 1995 for a private consulting practice with Bookman-Edmonston Engineering and Navigant Consulting.¹⁷

¹⁷*Western States Water*, Issue #1414, June 22, 2001.

Council Staff and Membership Changes/News

Jim Alder resigned as WSWC Legal Counsel in order to accept a position with the law firm of Clyde, Snow, Sessions & Swenson in Salt Lake City. Jim joined the Council staff in 1997 as a law clerk after graduating from Brigham Young University. He was appointed legal counsel after passing the Utah Bar exam. Jim said, "I greatly appreciate the opportunity I've had to figuratively wet my feet in the field of water law with the Council. I have enjoyed working with some fantastic people during my tenure.... I am thankful for the chance the Council has provided me to learn and gain experience, and to establish contacts that will hopefully be maintained for years to come." We wish Jim the best in his new position and a successful future.¹⁸

Arizona

Rita Pearson Maguire resigned as Director of the Department of Water Resources in order to spend more time with her 12-year old daughter. "This is a time in her life that I do not want to miss."¹⁹ Rita served as a WSWC member for eight years and her knowledge and expertise will be missed. **Joseph C. Smith**, was appointed by Governor Jane Dee Hull as the new Director. He has been Deputy Director since 1994, and has 20 years experience in Arizona State Government. He has also served as Director of the Governor's Budget Office, Comptroller in the Department of Administration, and Assistant Director of the Arizona Department of Environmental Quality (DEQ). **Dr. Karen L. Smith**, the Department of Environmental Quality's Water Quality Division Director, was named as an alternate Council member. Governor Hull said, "She will not only ably represent Arizona's perspective, but her insight and experience will be of great value to the WSWC as it considers the myriad of complex water policy issues confronting the West."²⁰

California

Ed Anton retired from the State Water Resources Control Board, but continues to serve as an alternate member of the Council. He has continued working with the Board as a private consultant.

Kansas

Tom Stiles and **Karl W. Mueldener**, with the Kansas Department of Health and Environment (KDHE) were named as alternate members by Governor Bill Graves. Karl is Director of the KDHE Bureau of Water, and Tom is Chief of the Office of Watershed Planning. Governor Graves said, "The work of the Council is important to Kansas, and I want to ensure we stay engaged and informed."

¹⁸*Western States Water*, Issue #1409, May 18, 2001.

¹⁹*Western States Water*, Issue #1410, May 25, 2001.

²⁰*Western States Water*, Issue #1411, June 1, 2001.

Montana

Harley R. Harris joined the Helena law firm of Luxan & Murfitt, PLLP, as an associate, after serving Montana as an Assistant Attorney General since 1989. Harley represented the State of Montana as an alternate WSWC member since 1991. He was involved in litigating or negotiating a number of cases on complex issues of constitutional, environmental, natural resource, Indian and water law, and federal-court jurisdiction. We wish him the best.²¹ **Gary Ingman** accepted a position with Land & Water Consulting, Inc. in Helena. He is a senior biologist and watershed scientist in the company's new Helena office. His new job entails a variety of projects focusing on water quality monitoring, watershed assessment, restoration and planning. We wish them well and want to thank them for their hard work and contributions to the Council.²²

Nevada

Nevada Governor Kenny Guinn named **Allen Biaggi**, Administrator of the Division of Environmental Protection, as a WSWC member replacing **Pete Morros**, who retired from state service last year.²³ The Governor noted, "I believe Mr. Biaggi will be an asset to the Council because of his background and experience in the many water quality issues that face not only Nevada, but also the other Western States."²⁴ He also named as new alternate members **Hugh Ricci**, State Engineer, and **Jim Davenport**, Chief, Water Division, Colorado River Commission of Nevada, replacing **Richard Bunker**, the Commission's Chair.²⁵

North Dakota

Governor John Hoeven named **Dale Frink** as North Dakota's new State Engineer. He was the Assistant State Engineer and Director of the State Water Commission's Water Development Division. He replaced **Dave Sprynczynatyk**, who took over the Department of Transportation at the Governor's request.²⁶

²¹*Western States Water*, Issue #1429, October 5, 2001.

²²*Ibid.*

²³ *Western States Water*, Issue #1363, June 30, 2000.

²⁴*Western States Water*, Issue #1339, January 14, 2000, and Issue #1363, June 30, 2000.

²⁵*Western States Water*, Issue #1411, June 1, 2001.

²⁶*Western States Water*, Issue #1411, June 1, 2001.

Oregon

Mike Llewelyn, the Department of Environmental Quality's Water Quality Division Administrator, was named as a member by Governor John Kitzhaber, replacing **Langdon Marsh**, who resigned. Mike has served as an alternate member. The Governor wrote, "I look forward to Oregon's continued participation in the Council and support the Council's recent decision to become more involved in trying to better integrate water quality and water quantity policy-making in the West." Mike also served as the Chairman of the Council's Water Quality Committee.

Washington

Washington Governor Gary Locke appointed **Joe Stohr**, the Department of Ecology's new Program Manager for Water Resources, as a new member, replacing **Keith Phillips**, now a Special Assistant to the Director, **Tom Fitzsimmons**. Tom will continue to serve as a member, along with **Kathy Gerla**, an Assistant Attorney General. Kathy was named to replace **Deborah Mull**, who resigned to take a position as an administrative law judge with the state's Pollution Control Hearings Board. Keith will serve as an alternate Council member, and the Governor has named **Stephen Bernath**, with Ecology's Water Quality Program, to also serve as an alternate member.²⁷

Wyoming

Governor Jim Geringer made a number of new appointments to the Council. **Patrick T. Tyrrell**, the new Wyoming State Engineer, replaced **Gordon (Jeff) Fassett** as a member of the Council and the Executive Committee. **Tom Davidson**, Assistant Attorney General, and **Dennis Hemmer**, Director of the Wyoming Department of Environmental Quality, will also serve as Council members. The Governor Geringer named three additional alternate members: **Gary Beach**, Director of the Division of Water Quality; **Mike Besson**, of the Wyoming Water Development Commission; and **Sue Lowry**, of the State Engineer's Office.

Western States Water

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

²⁷*Western States Water*, Issue #1421, August 10, 2001, and Issue #1391, January 12, 2001.

Agriculture - Farm Bill

On October 17th, the House passed its version of a Farm Bill, authorizing continuing appropriations for U.S. agricultural programs (H.R. 2646). S. 1731 was introduced by Senator Tom Harkin (D-IA) on November 27, and it was quickly passed by the Senate Agriculture Committee, which he chaired. Senate Majority Leader Tom Daschle (D-SD) said he would “press for expedited action,” but strong opposition delayed action. A number of motions to close debate on S. 1731 and vote failed. The White House favored the House bill and criticized Harkin’s bill as expanding government subsidies and also committing “significant funds to a new working lands program [Conservation Security Program] that does not necessarily deliver measurable, effective environmental benefits.”²⁸

S. 1731 included a provision (Section 215) authored by Senator Harry Reid (D-NV), with the support of Daschle and Harkin, creating a new water conservation program that authorized the Secretary of Agriculture to acquire land and water under the Conservation Reserve Program (CRP) for the benefit of endangered, threatened or “sensitive” species, defined to include candidate species listed under the Endangered Species Act.²⁹ Even before it was introduced, it was rumored the WSWC endorsed the proposal, which it had not.

At the November meetings of the Council, in Wichita, Chairman Mike Brophy read a letter to be sent on his own behalf to Senator Tom Harkin (D-IA) regarding the Farm Bill and suggestions the Council had approved certain provisions. The letter stated that the Council “...has not been asked to review or take any action regarding the draft Water Conservation Additions.... From my perspective, western states are not opposed to initiatives...to develop and implement partnership arrangements with individual states, in accordance with the laws of those states, to address demonstrated water quantity or water quality requirements for species listed under the Endangered Species Act. However, I believe it is highly unlikely that the...Council would support the...Additions as drafted, which propose...the temporary transfer or permanent acquisition of water rights by the ...Department of Agriculture for lands enrolled in the Conservation Reserve Program.... [T]he goal...can be largely achieved under existing state laws. Therefore, I see no need for the Water Conservation Additions....”³⁰ The proposal raised considerable controversy among many western state water and farming interests. The WSWC’s Executive Committee debated the merits of the proposal, but could not reach any consensus and did not take a position on the bill.

Under the proposal, lands would be eligible for CRP enrollment, “...which will further the conservation of threatened and endangered species, or species which may become threatened or endangered if actions are not taken to conserve that species, and the habitat of such species.” It directed the Secretary to “...establish, and carry out the enrollment of eligible land...through the use

²⁸*Western States Water*, Issue #1438, December 7, 2001.

²⁹*Western States Water*, Issue #1439, Special Report, December 14, 2001.

³⁰*Western States Water*, Issue #1435, November 19, 2001.

of contracts in, a water conservation program to provide for the acquisition and temporary transfer of water or water rights, or permanent acquisition of water or water rights, from willing sellers that would otherwise be entitled to use the water in accordance with a State-approved water right or a contract with the Secretary, or by other lawful means (including willing sellers in the San Francisco Bay-Delta, the Truckee-Carson Basin, and the Walker River Basin).”

Up to 1.1 million acres might have been enrolled. “In enrolling eligible land in the program, the Secretary shall give priority to land with associated water or water rights that--(A) could be used to significantly advance the goals of Federal, State, Tribal and local fish, wildlife, and plant conservation plans, including--(i) plans that address multiple endangered species, sensitive species, or threatened species; or (ii) agreements entered into, or conservation plans submitted, under section 6 or 10(a)(2)(A) of the Endangered Species Act of 1973..., respectively; or (B) would benefit fish, wildlife, or plants of one or more refuges within the National Wildlife Refuge System.” The provision continued, “In enrolling eligible land in the program, for the purpose of transferring water or water rights associated with eligible land or providing dry year options on such water or water rights, the Secretary shall, in accordance with the water law of the State in which eligible land sought to be enrolled is located--(1)...enter into a contract with the landowner for the transfer of those rights that has a term of not less than 1, nor more than 5, years; or (2) provide for a dry year option contract or other similar agreement that effectuates the purposes of this section.” It defined a “water right” as “...any right or entitlement to water delivery that is--(A) exercised via contract, agreement, permit, license, or other arrangement; and (B) available for acquisition or transfer.”

Moreover, the Secretary was authorized to enroll up to 200,000 acres “...for the purpose of permanently acquiring water or water rights associated with the eligible land,” and “...enter into a contract or agreement for the acquisition of that water or those water rights with--(A) the landowner; and (B) to the extent that matching funds are provided for the acquisition of the water or water rights--(i) a State (including a political subdivision); (ii) a nonprofit organization; or (iii) an Indian tribe.” Further, “A contract or agreement under this section may provide for the transfer or sale of a portion of the total acre-feet of water associated with land enrolled in the program if--(1) the landowner agrees in the contract or agreement to adopt a change in practice that reduces the use of water for agricultural purposes; (2) the transfer or sale meets the requirements of the program; and (3) the contract or agreement and the purchase price for enrollment of land in the program reflect the fact that only a portion of the water or water rights associated with the eligible land are being transferred or sold.”

Under a contract, a landowner would agree to “transfer to the Secretary water or water rights associated with enrolled eligible land” and “take no action that would interfere with the quantity or quality of water transferred or acquired under the contract.” The Secretary would make payments for eligible land enrolled in the program and with regard to the use of water, “..may direct a landowner to use, or transfer or sell to an entity approved by the Secretary, water... to protect one or more endangered species, sensitive species, or threatened species.” Moreover, “At the request of a landowner, the Secretary shall submit any necessary State application, and complete any applicable State legal process, for the transfer or acquisition of water under a contract....”

In enrolling eligible land in the program, the Secretary was directed to consult with “...(1) the Secretary of the Interior; (2) the head of the lead water agency of the State in which the enrolled eligible land is located; and (3) any affected Indian tribes to ensure, to the maximum extent practicable, that all water and water rights transferred or acquired under this section...” in order to ensure waters “...are used to protect endangered species, sensitive species, and threatened species...”

The provision included a general savings clause which states: “Nothing in this chapter--(A) preempts any State water law; (B) affects any litigation concerning the entitlement to, or lack of entitlement to, water that is ongoing as of the date of enactment of this chapter; or (C) expands, changes, or otherwise affects the existence or scope of any water right of any individual.” It then adds, “In carrying out the program, the Secretary shall--(A) ensure, to the maximum extent practicable, that the program does not undermine the implementation of any law in effect as of the date of enactment of this chapter that concerns the transfer or acquisition of water or water rights on a permanent basis; and (B) implement the program in accordance with the purposes of such laws described in subparagraph (A) as are applicable.”

On December 5, the Senate began debate on S. 1731. On December 13, several western senators, led by Senator Pete Domenici (R-NM) offered an amendment on the Senate floor seeking to strip the proposed water conservation program language. Senator Domenici was joined by Republican Senators Wayne Allard (CO), Conrad Burns (MT), Ben Nighthorse Campbell (CO), Larry Craig (ID), Mike Crapo (ID), Mike Enzi (WY), Orrin Hatch (UT), Kay Bailey Hutchison (TX), Jon Kyl (AZ), Don Nickles (OK), Gordon Smith (OR) and Craig Thomas (WY). Senator Craig warned he expected debate would take some time as it “...is an issue that is anathema to western water law and the rights of States to determine the destiny of their own water.” In his opening remarks, Senator Domenici said, “The language contained in this substitute requires that the Secretary of Agriculture devote 1.1 million acres of the conservation reserve program to a new water conservation program.... It would say that the Secretary of Agriculture...would have the authority to acquire this acreage..., and the water rights that come with it, and then use the water rights for the first time in derogation of State water law. In other words, they could be used for Federal purposes, not bound by State law.” Senator Domenici continued, “The purpose of the old [CRP] program was to remove vulnerable land from production, not for the acquisition of water rights.... In essence, this is an attempt to pirate private water rights from individuals for purely Federal interests.”³¹

Senator Reid responded that these objections to the program were based on myths. “Some claim that the water conservation program will preempt State law and allow the Federal Government to run water law in the States. That is simply not true. Any application to enroll in the program would have to be approved by the State in which the farmer farms. For example, if a rancher in Nevada decided he or she wanted to be part of this program and the Department of Agriculture decided it was a good deal, they would have to go to Mike Turnipseed, Nevada’s water engineer, and if he said no deal, there would be no deal.... It does not preempt State water law.” The second myth? The water conservation program would create a huge new Federal program to permanently

³¹*Western States Water*, Issue #1439, December 14, 2001.

buy water rights. He pointed out there are 42M acres in the CRP program, and this little program is 1.1M acres. Moreover, the program focused on short-term contracts to lease water and farmers would retain full ownership of their water -- while providing a source of water for endangered species, for example, in drought years -- and supplementing a farmer's income in years in which they face water supply restrictions due to Endangered Species Act concerns. "This actually helps the farmers. Keep in mind, this program requires a willing seller, a willing buyer, and we protect property rights.... Why shouldn't a rancher or farmer have the right to do with his property what he wishes?"

Senator Burns questioned the result of such a program, though well-intentioned. "I would say this: Whenever the Federal Government enters the picture..., when you are going broke, and the fellow in town has the biggest checkbook, and it happens to be the Federal Government, ...[you] know the position you are in...and where that water is going to go."

The discussion continued until a compromise was reached that satisfied some, but not all. With the support of Senators Reid and Jeff Bingaman (D-NM), instead of striking the program, Senator Domenici and the others agreed to a modified amendment which reads: "Before the Secretary of Agriculture begins to implement the program created under this section in any State, the Secretary shall obtain written consent from the governor of the State. The Secretary shall not implement this program without obtaining this consent. In the event of the election or appointment of a new governor in a State, the Secretary shall once again seek written consent to allow for any new enrollment in the program created under this section in that State."

Later, Senator Jon Kyl (R-AZ) filed a further amendment to strengthen water rights protections that would have required the Secretary of Agriculture in enrolling lands in the Conservation Reserve Program (CRP) for the purpose of permanently acquiring water or water rights to "...comply with--(i) all interstate compacts, court decrees, and Federal or State laws (including regulations) that may affect water or water rights; and (ii) all procedural and substantive State water law."³² No action was taken, and the debate continued into the new year.

Border Water Issues

Texas irrigators protested Mexico's failure to comply with the 1944 treaty, under which it owes Texas some 1.4 million acre feet (af) of water. Under the 1944 treaty, Mexico is to release 350,000 af of water to Falcon and Amistad reservoirs, which supply Texas irrigators and Mexican water users in the Lower Rio Grande Valley.³³ Spencer said that the IBWC believes that there is sufficient water in Mexican reservoirs to address the deficit. Ongoing binational meetings are being held to move toward a solution, with Mexico having agreed to repay 600,000 af of water by July 2001, and the full deficit by October 2002. Mexico has released some 345,000 af.³⁴

³²*Western States Water*, Issue #1440, December 21, 2001.

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

³⁴*Western States Water*, Issue #1441, December 28, 2001.

Chihuahua Governor Patricio Martinez insists that the water debt will be paid, but says, "We don't have enough water in our reservoirs, and our position is the same, we cannot release or pay something that we don't have," according to *The Brownsville Herald*. The Mexican state's inability to deliver the water was confirmed by Horacio Almazan, president of the Junta Central de Aguas y Saneamiento in Chihuahua, the state's water and sewage commission. Almazan said "We cannot pay the water to the U.S. today or even next year." Downstream, local farmers from both Texas and Mexico together have formed an alliance protesting the manner in which the 1944 treaty is being enforced (or not enforced). "All the work that has gone into our regional plan is based on complete compliance with that treaty," Texas irrigator JoJo White says "Since Mexico looks like it's going to set a precedent of going into a treaty violation, now there's a big question mark. This plan may be worthless."³⁵

Clean Water Act

House Hearing

On February 28th, the House Infrastructure and Transportation Committee's Subcommittee on Water Resources and Environment held a hearing on several recent Clean Water Act (CWA) regulations adopted by the Clinton Administration. The hearing focused on the issues Congress should address to help states improve water quality. Representing the National Governors' Association (NGA), North Dakota Governor John Hoeven spoke about CWA reauthorization, watershed management, nonpoint source management, state revolving funds, total maximum daily loads (TMDLs), concentrated animal feeding operations (CAFOs), and other issues. Governor Hoeven stated that CWA reauthorization is among the important goals for the nation's governors, but they recognize such an "ambitious feat" is probably not possible in this Congress. However, the governors feel there is much that can still be accomplished. Regarding nonpoint source pollution (NPS), Governor Hoeven expressed a need for significant funding, time and education. He also expressed NGA's view that NPS should be handled on a watershed basis with implementation of voluntary or enforceable mechanisms best left to the individual states.³⁶

On the subject of TMDLs, Governor Hoeven urged Congress to adopt a CWA amendment providing states with at least fifteen years to comply with the mandates of the recent TMDL regulations. He also suggested that states should be granted the flexibility to establish their own priorities and milestones within that timeframe. The Governor expressed NGA's concern that the new TMDL regulations will change the traditional relationship between the states and the federal government, going beyond what was intended by Congress under the CWA. He stated that the most significant role the federal government can play is assisting states achieve water quality goals, adding that legislation may be necessary to give states the technical, scientific and financial resources to implement the TMDL program. The Governor also stressed the incompatibility of using a uniform national approach to attain state water quality standards, given the great diversity among

³⁵*The Herald*, December 14, 2001.

³⁶*Western States Water*, Issue #1398, March 2, 2001.

the states, saying, "There simply must be more than one acceptable method with which to improve water quality."

Governor Hoeven also expressed NGA's concern that draft CAFO regulations under consideration would impose large new burdens upon state agencies already facing permitting systems backlogs and possibly triple the current workload. He remarked that NGA is at odds with the cost analysis included in the regulation, stating that it seriously underestimates the costs that will be imposed on states to implement its requirements. He urged that "...the assumptions expressed be carefully reexamined, and that Congress conduct a hearing to determine the actual impact of the proposed changes to the CAFO requirements...."

Oregon Governor John Kitzhaber addressed his state's experience with the TMDL program, streamlining Section 404 permitting, and the importance of Section 401 certification. He also decried the "one-size-fits-all" approach, saying it is "...counterproductive to stubbornly force local partners to adhere to inappropriate processes and unrealistic timelines." He urged the federal government to be a "fully committed member" in local watershed processes and not resort to regulating from afar, exercising "rigidly inflexible oversight, or to speak in abstractions," as such "participation does not translate into the realities of life at the local level."

Jon Craig, Director of the Oklahoma Water Quality Division and a WSWC member, testified as President of the Association of State and Interstate Water Pollution Control Administrators. He emphasized the states must maintain the lead role in the Nation's clean water programs.

Confined/Concentrated Animal Feeding Operations

The Environmental Protection Agency (EPA) published a notice of proposed rulemaking to reduce water pollution from large Concentrated Animal Feeding Operations (CAFOs) in the *Federal Register* on January 12th, 2001. Comments were requested by May 2nd on some 28 issues.³⁷ Some of the issues included the use of a two-tier structure based on animal unit thresholds for defining CAFOs, removing the 25-year, 24-hour storm event exemption, requiring all CAFOs to apply for a National Pollutant Discharge Elimination System (NPDES) permit, defining a CAFO to include the production and land application areas, requiring certification for off-site recipients of CAFO-generated manure, tracking off-site transfers through recordkeeping, providing information for the recipients regarding proper management, restricting the land application of manure so as to avoid any pollutant discharges to U.S. waters and potentially prohibiting land application at certain times or using certain methods. On March 26, EPA Administrator Christie Whitman extended the public comment period on the complex and lengthy proposed rule through July 30. In March, EPA held eight public meetings across the country to provide additional information and encourage public comment on the proposal. Agriculture Secretary Ann Veneman told a 4-H Club group, "Ultimately, there will be some regulation that comes out with a balance that recognizes the important role that agriculture plays."³⁸

³⁷*Western States Water*, Issue #1402, April 2, 2001.

³⁸*Western States Water*, Issue #1403, April 9, 2001.

Herbicides

In *Headwaters, Inc. v. Talent Irrigation District*, the United States Court of Appeals for the 9th Circuit Court of Appeals, on March 12th, held that by applying the aquatic herbicide Magnacide H to irrigation canals without first obtaining a NPDES permit, the irrigation district (TID) had violated the Clean Water Act (CWA). The ruling designated irrigation canals as "waters of the United States." Overturning a district court decision, the 9th Circuit that even thought Magnacide H is subject to the labeling and application requirements of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), "The EPA-approved label under FIFRA did not eliminate TID's obligation to obtain a NPDES permit."³⁹

On April 20th, Bill McDonald, Acting Commissioner of the Bureau of Reclamation, wrote James Hanlon, Acting Deputy Assistant EPA Administrator for Water, asking for assistance in developing an immediate administrative solution. The letter states "The Court of Appeal's decision -- coming, as it did, just a few weeks before the start of the irrigation season -- has created significant problems for all Reclamation projects.... The canals involved in this litigation, to which the herbicide was applied by TID, are features of the Talent Division of the Bureau of Reclamation's Rogue River Project in Oregon. TID operates and maintains these federally-owned canals pursuant to a contract with the Bureau of Reclamation (Reclamation). The operation and maintenance of the federally-owned canals in Reclamation projects by our water user contractors is typical throughout the West. In addition, some project canals, or portions thereof, are still operated and maintained by Reclamation itself. There are literally thousands of miles of canals in Reclamation's projects."

The letter continues, "Both Reclamation and our irrigation districts will need to start their canal weed control activities as early as mid-May. These weed control activities are essential to the operation of our projects. Absent appropriate control of aquatic weeds, nearly all systems would experience some degree of operational difficulty and increased costs. In large projects which are highly automated, lack of weed control could even result in an inability to deliver project water supplies this summer because automated trash racks and screens, automated gates and check structures, and other automated equipment and facilities could become clogged with weeds and inoperable." The letter adds, "It is essentially impossible for our irrigation districts to apply for and obtain individual NPDES permits at this late date. Thus, the situation is critical for Reclamation and its water users. As we discussed when we spoke by telephone, Reclamation urges the Environmental Protection Agency to move rapidly to identify available administrative solutions to this problem for this summer. We will greatly appreciate any guidance and assistance which you can provide."

In an April 27th letter to EPA Administrator Christine Whitman, Rep. "Butch" Otter (R-ID) and other western representatives stated, "On behalf of the thousands of water users in our respective states that rely on the delivery of water--which is in especially low supply this year--through canals, laterals, and ditches, as well as the remainder of our citizens who rely on the responsible use of aquatic herbicides, pesticides, and other registered products, we request your immediate assistance. Water delivery organizations must be provided with adequate legal protection to assure that they will

³⁹*Western States Water*, Issue #1406, April 27, 2001.

not be in violation of the Clean Water Act when applying aquatic herbicides, pesticides and other registered products during the upcoming irrigation season.”

On May 31th, Sylvia Lowrance, Acting Assistant EPA Administrator for Enforcement and Compliance, sent regional administrators a memo on the Ninth Circuit Court’s March 12 decision that said EPA’s position was that “civil water enforcement priorities should not change and enforcement against any direct application of pesticides to waters of the United States in accordance with a Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) label, will be a low enforcement priority until EPA develops a concerted national approach on how to best regulate those activities.”⁴⁰ The memo continued, “The issue of how CWA requirements are met for the direct application of aquatic herbicides and other pesticides to water has important national implications for EPA, States, and the regulated community. For example, aquatic herbicides have long been considered to be essential tools for keeping irrigation canals free from aquatic vegetation which can impede flow by clogging irrigation channels and irrigation structures. EPA has not previously issued any national guidance of general applicability that would say that an NPDES permit would apply for these activities, nor have we established national policy specifying how the CWA might apply to the use of aquatic pesticides.... EPA is initiating a process to determine how best to implement the CWA and FIFRA.... However, it is unlikely to complete that action during the ongoing season for applying aquatic herbicides to irrigation canals.... In addition, the application season for public health pesticides used to control disease vectors, such as insecticides for mosquitos bearing infectious diseases, has begun. These important activities require an interim Agency response....”

The memo stated that through December 2001 civil administrative or judicial enforcement will remain a “low priority provided that both of the following conditions are met: (1) the registered pesticide product is applied directly to waters of the United States in a manner consistent with its labeling; and (2) there are no egregious circumstances, such as those resulting in serious actual harm or which may present imminent and substantial endangerment to public health or the environment.”

State Water Quality Standards

American Wildlands v. Browner

On August 9th, the 10th Circuit Court of Appeals upheld a district court’s ruling that state laws have control over nonpoint source pollution and that such are not controlled by the federal Clean Water Act (CWA). The district court ruled that EPA did not violate the CWA when it approved Montana’s 1995 changes to its water quality laws. The three judge court unanimously agreed, “We hold that the EPA’s approval of Montana’s water quality standards was not done arbitrarily or capriciously.... Furthermore, the EPA’s interpretation of the Clean Water Act implicit in its decision to approve the standards is permissible.”

Montana’s changed its laws regarding “non-degradation” and the amount of pollution that a waterway can hold without harm to wildlife or recreational opportunities. The acts created dozens of exemptions to state laws that regulate pollution from various industrial operations such as mining

⁴⁰*Western States Water*, Issue #1412, June 8, 2001.

and logging. One of the changes allowed state waterways to be reclassified as lower-quality, which could then be polluted to a greater extent before constituting a CWA violation. Another change relaxed state standards for the discharge of about 100 carcinogens into surface and ground waters.

Steve Mashuda represented the Earthjustice Legal Defense Fund and environmental groups in the lawsuit. He was disappointed with the decision. "EPA's approval of the loopholes at issue in this case was a significant missed opportunity to keep Montana's clean waters clean." In 1998, the environmental groups claimed that EPA failed to carry out its CWA duties by allowing the lowering of the state's water quality standards. In March 1999, the environmentalist groups changed the lawsuit to challenge EPA's approval of state water law changes.⁴¹

Total Maximum Daily Loads

On June 19th, the National Academy of Sciences released a report recommending changes to the TMDL program. One key finding of the NAS report was that many states lack sufficient data to develop TMDLs for all of their impaired waters.⁴² In July 2000, the Clinton administration issued a clean-up rule for about 21,000 of the nation's lakes, ponds, rivers and streams that did not meet water quality standards. The rule directed that state developed clean-up plans be drafted, and restoration efforts start within 8-13 years. The rule provided that states would have to establish TMDLs for each body of water found to contain excessive amounts of pollutants listed in §304(a)(2) of the Clean Water Act.⁴³ Conservative members of Congress had criticized the Clinton TMDL rules, and utilities, manufacturers, and farm groups had challenged it in court, claiming that the rule would cost them tens of billions of dollars annually.⁴⁴

On July 16th, EPA Administrator Christie Whitman proposed delaying by 18 months the effective date of the TMDL rules published on July 13, 2000. She stated, "We have an existing TMDL program and this review will not stop ongoing implementation of that program, development of water quality standards, issuance of permits to control discharges, or enforcement against violators. EPA and states will continue to cooperate to identify impaired waters and set protective standards for those waters." On August 9th, EPA published in the *Federal Register* formal notice of its decision to review and revise proposed rules for implementing the TMDL program.⁴⁵ The delay required the concurrence of the District of Columbia Circuit Court to stay action pending on related lawsuits. Whitman explained, "I am asking for this additional time to listen carefully to all parties with a stake in restoring America's waters--states, cities, small towns and rural communities, plus industry, the environmental community and farmers--to find a better way to finish the important job of cleaning our great rivers, lakes and streams.... [W]e need an effective national program that

⁴¹*Western States Water*, Issue #1422, August 17, 2001.

⁴²*Western States Water*, Issue #1424, August 31, 2001.

⁴³*Western States Water*, Issue #1418, July 20, 2001.

⁴⁴*Ibid.*

⁴⁵*Western States Water*, Issue #1421, August 10, 2001.

involves the active participation and support of all levels of government and local communities. Unfortunately, many have said the rule designed to implement the TMDL program falls short of achieving the goals.” EPA proposes reconsidering some of the choices made in the July 2000 rule, and will consider a number of recommendations for improving the program prepared by the National Academy of Sciences at the direction of the Congress.

The Western States Water Council favors rules allowing states to effectively implement the TMDL program and voiced concern that the rules lacked the necessary flexibility. For example, the TMDL rules had no “functional equivalency” provision so that existing state programs might continue if the rule would have the same end result as the TMDLs. The Council also opposed as unrealistic the fixed 10-year standard for attaining water quality standards in all waterbodies. Such a “one size fits all” approach did not reflect the reality that many waterbodies will not reach established standards within that time. Instead, the Council urged EPA to estimate the time period it will take individual waterbodies to reach water quality standards. Additionally, the Council feared that by allowing EPA to give itself power to cancel administratively-continued state NPDES permits, EPA would be usurping the authority to effectively implement TMDLs without regard to state law. The EPA’s final rules also included a Tier 3 classification for those bodies of water which see a decline in the level of water quality since the designation of the rule. The Council was of the opinion that this classification should be limited to only high quality waters on the 303(d) list, in order to assure higher scientific precision of a TMDL, bringing out a positive change in water quality. The Council wholeheartedly supported EPA’s decision to remove from the final rules provisions pertaining to the §303(d) public petition process, to remove the required pollution offsets for new and expanded discharges in listed waters, and to remove the provision requiring NPDES permitting for certain categories of agricultural and forestry activities.

In a potentially precedent setting policy decision, EPA declined to act on a request by the Montana Department of Environmental Quality (DEQ) to approve a “flow TMDL” for Big Creek. On July 27th, Bruce Zander, EPA Region VIII’s TMDL Coordinator responded in a letter that while EPA agreed with the findings, submitted in a December 2000 letter to EPA for review, in Montana’s flow management plan for Big Creek, “EPA is not taking formal action pursuant to Section 303(d)(2) of the Clean Water Act [CWA] to approve or disapprove this TMDL. It is EPA’s position that TMDLs are required by the Clean Water Act only for pollutants that are causing or contributing to the impairment of a water quality limited segment (WQLS). Section 303(d)(1) of the Act requires States to identify water quality limited segments, and to establish TMDLs for such waters for ‘those pollutants’ EPA identifies as suitable for such calculation. The Act in turn defines ‘pollutants’ to include various materials discharged into water. See § 509(6). We interpret the definition of ‘pollutant’ in the Act as excluding flow alterations, such as those causing the impairment of Big Creek, since flow alterations are not covered by the list of materials in this definition. Therefore, since TMDLs are required only for pollutants, and flow alteration is not a pollutant, no TMDL for low flow is required for Big Creek under the Act or EPA regulations.”⁴⁶

The letter continues, “We believe that the flow management plan for Big Creek that you have submitted is a reasonable approach to addressing flow in this waterway. However, the Act does not

⁴⁶*Western States Water*, Issue #1422, August 17, 2001 and Issue #1433, November 2, 2001.

require Montana to establish a TMDL in this instance because there is no pollutant causing or contributing to the impairment.... Moreover, EPA does not consider this TMDL necessary to comply with the orders issued by the U.S. District Court for the District of Montana in *Friends of the Wild Swan, et al. v. U.S. Environmental Protection Agency, et al.*, CV 97-35-M-DWM (June 21, 2000, as amended Sept. 21, 2000, D.Mont.). This submission is not a 'necessary TMDL,' since, as described above, the Act does not require States to establish TMDLs where there is no pollutant causing or contributing to a waterbody's impairment. Therefore, the Court's order does not require EPA or Montana to establish a TMDL for low flow for Big Creek. Again, we would like to acknowledge the good work on the Big Creek plan. Although we are not taking official action under section 303(d), we wish to concur with the elements of the plan and support the State in its implementation."⁴⁷

In August 2001, EPA released a draft report estimating costs for implementing the TMDL program at between \$900 million and \$4.3 billion annually. EPA Administrator Christie Whitman stated in an August 3rd press release, "[The] draft report gives us important new information to use in determining the most effective course in restoring America's waters. We will continue to work with all parties to find a better way to finish the important job of cleaning up our great rivers, lakes and streams." The EPA cost study estimates the costs to states of additional data gathering to support the TMDL program to be \$17M per year. Once states have collected good data, they will need to spend up to \$69M per year over the next 15 years to develop plans to clean up some 20,000 impaired waters currently on state lists. State costs to develop a cleanup plan for each of these 20,000 waters are projected to average about \$52,000 per plan. For the current fiscal year, EPA has \$210M to help states, tribes and interstate agencies with grants for TMDL related work, including monitoring. The cleanup costs would fall primarily on dischargers. Of note, EPA does not have sufficient information to estimate cleanup costs for waters impaired by mining or air deposition.⁴⁸

On October 18th, EPA published notice in the *Federal Register* that the revisions to EPA's TMDL program released on July 13, 2000 would not take effect until April 30th, 2003. The notice stated that EPA believes it is important to re-consider some of the choices made in the July 2000 rule in light of concerns expressed by many organizations, a number of studies, and recommendations in the National Research Council's June 19th report. Further, a delay in the effective date will allow EPA to solicit and carefully consider suggestions on how to structure the TMDL program to be effective and flexible and to ensure that it leads to workable solutions. Moreover, EPA believes that its decision voluntarily to reconsider the July 2000 rule may result in changes that will at least in part also resolve some of the issues raised in pending litigation in the D.C. Circuit Court of Appeals.⁴⁹ The rule states, "Instead of expending resources in lengthy litigation, EPA believes it can speed up the process of putting in place a more workable program, while building a foundation of trust among stakeholders in the basic process for restoring impaired waters. Once this foundation is soundly

⁴⁷For more information visit www.epa.gov/region/8/tmdls.html.

⁴⁸*Western States Water*, Issue #1424, August 31, 2001.

⁴⁹*Western States Water*, Issue #1431, October 19, 2001.

built, it is far more likely that diverse stakeholders will be able to agree on plans for restoring water quality and far more likely that these important plans will be implemented.” It adds, “Current court orders and consent decrees require EPA to establish (if the States do not) approximately 2000 TMDLs in the next 18 to 24 months. These requirements are in place independently of any separate requirements in the July 2000 rule. Accordingly, EPA does not believe that an 18-month delay in the...rule’s effective date will in any significant way slow the development of TMDLs.”

In the interim, EPA determined to continue to operate under the 1985 TMDL regulations, as amended in 1992, and States would continue to develop TMDLs to meet water quality standards intended to clean up the Nation’s waters. Some opposed to the delay expressed concern that TMDLs established between now and April 30, 2003, might not include implementation plans, as an essential required component. However, the July 2000 rule provided EPA with the flexibility to approve a TMDL without an implementation plan during a 9-month transition period, or one half of the 18-month delay, and “...EPA is also working in other ways to ensure that management measures reflecting load allocations in TMDLs are undertaken.” The notice states, “EPA is committed to structure a flexible, effective TMDL program that States, Territories and authorized Tribes can support and implement.”⁵⁰

In the Fall of 2001, EPA scheduled a series of five public listening sessions across the country on the TMDL program and related issues. The purpose was to improve understanding of the TMDL program, provide current program status information, get stakeholder perspectives on key issues, and identify and discuss ideas on how to address TMDL program issues. EPA plans to use information from the listening sessions as it considered regulatory changes expected to be proposed in 2002. The five sessions focused on: (1) Implementation of TMDLs Addressing Nonpoint Sources; (2) the Scope and Content of TMDLs; (3) EPA’s Role, the Pace/Schedule for Development of TMDLs, and NPDES Permitting Pre and Post TMDL; (4) Listing Impaired Waters; and (5) All TMDL Issues.⁵¹

EPA’s fourth public listening session was held in Oklahoma City on November 15-16, at the same time as the Council’s regular meetings. Over 160 people attended, including many WSWC Water Quality Committee members. Chuck Sutfin, Director of EPA’s Assessment and Watershed Protection Division, met earlier with Council members, at the WSWC’s invitation.⁵² He discussed key issues and EPA’s timetable for implementing the TMDL program. Mr. Sutfin focused on issues associated with listing impaired waters and “reasonable assurance” requirements. His presentation and subsequent dialogue with WSWC members and others mirrored EPA testimony.⁵³

⁵⁰Copies of the rule deferral are available online <http://www.epa.gov/owow/tmdl/defer>. See also www.epa.gov/owow/tmdl/examples.

⁵¹*Western States Water*, Issue #1430, October 12, 2001.

⁵²*Western States Water*, Issue #1435, November 18, 2001.

⁵³*Western States Water*, Issue #1436, November 23, 2001.

On November 14th, the day before EPA's Oklahoma listening session, G. Tracy Mehan, EPA's new Assistant Administrator for Water, testified before the House Transportation and Infrastructure Committee's Subcommittee on Water and Environment, chaired by Rep. John Duncan (R-TN) on the future of the TMDL program. Guiding the creation of the new rule, Mehan said, is the notion that water quality would be "better served" through EPA-supported state TMDL programs. Consistent with the Bush Administration's overall plan to shift federal program implementation and funding to state governments, this "recognizes the need for flexibility to accommodate various effective approaches that states may wish to employ," Mehan said. He told the subcommittee that allowing states and native tribes to implement water pollution trading could be the "sugar that makes the medicine of [the Total Maximum Daily Load program] go down," but allowing pollution trading is just one option EPA is considering. Some environmental groups oppose pollution trading. They argue that it would soften the 2000 TMDL rule by allowing some companies to pay to pollute instead of encouraging them to change harmful practices.

Mehan also told the subcommittee EPA is paying particular attention to how the agency might step in, if it believes a state's implementation plan is unacceptable, though he could not yet say what form such a "backstop" would take. He noted that the 2000 TMDL rule would require states to submit implementation plans for EPA's approval. This means EPA would have to adopt an implementation plan if a state TMDL was disapproved. However, he said, "The difficulty is that in many cases EPA does not have the breadth of authority outside the Clean Water Act that states may have to accomplish implementation." EPA is also reconsidering whether states should submit lists every two years (as currently required) or every five years, and whether states have to submit reports only on impaired waters or all water bodies. "If we can get it right, something like a TMDL program is essential to dealing with impaired water bodies," Mehan said. He made it clear that EPA would step in and set TMDLs for states that fail to do it on their own. "There will be legal requirements [on states] and if they fail the chickens may come home to roost at EPA," he said. But he added that states will have more control over their TMDL programs under the new rule than they would under the 2000 rule promulgated by the previous Administration.⁵⁴

Colorado River Basin

On January 16th in San Diego, Interior Secretary Bruce Babbitt, in his last public appearance, signed a landmark, legally binding Record of Decision (ROD) regarding the Colorado River Interim Surplus Guidelines.⁵⁵ Babbitt said, "I never thought we would get here. It seemed absolutely improbable, bordering on impossible. Signing this Record of Decision is a truly historic event in the history of the Colorado River. Today's action culminates four years of intense effort at modernizing the administration of the Colorado River. It provides a 'soft landing' for California by

⁵⁴Mr. Mehan's testimony is available online at www.house.gov/transportation.

⁵⁵A Final Environmental Impact Statement (FEIS) was published in the *Federal Register* on December 15, 2000 (65 FR 78511) and notice of the Record of Decision (ROD) on January 25, 2001 (66 FR 7772).

providing benchmarks which provide for staged reductions in its use of Colorado River water over a fifteen year period.”⁵⁶

The Colorado River supplies more than 30 million people and irrigates some 2 million acres of land in the seven basin states, as well as northwest Mexico. It is also important to several Indian tribes. The “Law of the River,” which determines usage among these groups, is a complex set of state and federal laws, interstate compacts, an international treaty, and various court decisions and decrees. Simply stated, Colorado River flows are evenly divided with the Upper Basin States of Colorado, New Mexico, Utah and Wyoming allocated 7.5 million acre-feet (Maf) of water per year, and the Lower Basin States of Arizona, California and Nevada another 7.5 Maf, with Mexico granted 1.5 Maf. In normal years, the State of California has a legal right to the use of 4.4 Maf, plus certain “surplus” amounts and any unused allocations of other states. California’s usage has been around 5.2 Maf on a regular basis, but growing water use in the other basin states and other events reducing the “surplus,” will force California to reduce its use to its 4.4 Maf legal entitlement.

The Secretary of Interior acts as the “watermaster” for the Colorado River. Negotiations led by Deputy Secretary David Hayes included the seven states, the tribes, and many other water users and stakeholders have sought to avoid any need to unexpectedly cut off California at its 4.4 Maf entitlement and severely disrupt its Colorado River water supply and related economy. The Interim Surplus Guidelines establish a mechanism for gradually reducing California’s dependence on so-called “surplus” waters. The Guidelines establish benchmarks that must be met by California, through conservation and water transfers, in return for assurances that needed water will continue to be delivered, while the state moves forward with its plan. Key elements of that plan include the lining of the All-American and Coachella Canals, and the transfer of conserved waters from the Imperial Irrigation District (IID) to the San Diego Water Authority.

Babbitt offered, “For San Diego, it means your growth future is assured if you use water wisely.” He added, “In order for California to comply with the agreement, the [IID to San Diego] water transfer has to go forward.” Maureen Stapleton, San Diego County Water Authority General Manager, said, “This is a historic event in which all seven river states have come together.” IID Board Member Lloyd Allen declared, “We know what we have to do to make it work, and we’ll make it work.” Phil Mutz, New Mexico’s representative to the Upper Colorado River Commission said, “We are confident that the consensus that has been reached will achieve the results.” Mike Madigan, formerly with San Diego’s water authority, observed, “The six other states sense a commitment in California they haven’t sensed before.... If we don’t move smartly along the path of solving things, we will have accomplished nothing and we will be back into litigation. This is a big deal. It’s important.”

Dennis Underwood, with the Metropolitan Water District of Southern California (MWD) and formerly Commissioner of the U.S. Bureau of Reclamation, said, “This will be the first time on the Colorado River System that any entity will limit its supply. We will irrigate the same acreage of

⁵⁶*Western States Water*, Issue #1393, January 26, 2001. The ROD and FEIS are available online at: www.lc.usbr.gov.

agriculture, but use less water. This agreement allows for a 15-year transition period. It guarantees [MWD] rate stability and supply stability.”⁵⁷ Similarly, Pat Mulroy, General Manager of the Southern Nevada Water Authority, called the ROD “a great mile-stone in settling our water issue.... It takes Southern Nevada out of the crisis mode...,” which it found itself in 1989, “when we realized we were going to run out of water.” It will allow Nevada to complete an agreement to store some 1.2 Maf of water in Arizona’s aquifers, while providing for the storage of 500,000 af more water in aquifers in Southern Nevada, thereby creating a 40-50 year water supply. It also protects Lake Mead from dropping dramatically, though it is expected to drop 8 feet over the 15-year agreement.⁵⁸

On May 23rd, Arizona Governor Jane Dee Hull signed Senate Joint Resolution 1001 ratifying an agreement with California and Nevada over the allocation of water in the Lower Colorado River Basin, as well as an agreement with the Metropolitan Water District of Southern California, which “enhances the security of Arizona’s water supplies” and “provides a way for MWD to serve its customers while implementing conservation and other measures that will enable California to meet its target...to reduce its consumption of Colorado River water to its legal allocation of 4.4 maf [million acre-feet] over the next 15 years.” The agreement is part of an accord involving the seven Colorado River basin states and the federal Interim Surplus Criteria Guidelines. Hull declared, “Arizonans a generation from now will enjoy the benefits of what we are accomplishing today. We have demonstrated that good neighbors can do great things when they are willing to do what is necessary to protect everyone’s interest.”⁵⁹

On July 9th, the House Resources Subcommittee on Water and Power held a field hearing in Salt Lake City, Utah on the seven basin states’ use of the Colorado River. Representatives from Utah, Colorado, California, Wyoming, New Mexico, Nevada, and Arizona addressed the subcommittee.⁶⁰ The overall message was that the seven states of the Colorado River Basin can manage well the waters of the Colorado, and any federal action must be in conjunction with state laws, interstate compacts, and the Law of the River. Individual representatives each strongly stated their conviction that any federal action must be made only after consultation with the seven states.⁶¹

According to the *Las Vegas Sun*, Bennett Raley, Assistant Secretary of the Interior for Water and Science, continues to express concern that California will not meet its commitment to reduce its Colorado River water consumption in accordance with the California 4.4 Plan. Addressing the Colorado River Water Users Association in Las Vegas, Raley said, “If California is not successful, the results could be grave for California.” He added, “With each passing day [Interior Secretary Gale Norton] and I grow more concerned about the ability of the entities of California to comply

⁵⁷*San Diego Union Tribune*, January 17, 2001.

⁵⁸*Las Vegas Review-Journal*, January 17, 2001.

⁵⁹*Western States Water*, Issue #1410, May 25, 2001.

⁶⁰*Western States Water*, Special Report, Issue #1420, August 3, 2001.

⁶¹*Western States Water*, Issue #1420, August 3, 2001.

with the commitments in the California 4.4 Plan.”⁶² Dennis Underwood, MWD Vice President for Colorado River Resources, is confident water conservation and transfer agreements will ensure California meets its goal of reducing its use to 4.4 Maf. As senior rights to Colorado River water are owned by irrigation districts in Southern California, any shortage of water would hurt MWD most, says Underwood. Raley fears battles over agricultural water use, and possibly a north-south water war in the state. Though Raley said that completing the Babbitt agreement is an important short-term step, the Interior Department and Bureau of Reclamation plan to work out a long-term solution also involving the fate of the Salton Sea, as well as the Colorado River Delta.

On November 7th, the House Resources Committee, Chaired by Rep. Jim Hansen (R-UT), reported H.R. 3208, the Western Water Security Enhancement Act, to authorize a comprehensive water management program for California. Rep. Ken Calvert (R-CA), Water Resources Subcommittee Chair, introduced the bill. As amended in Committee, Section 301(a) states, “The Secretary shall review programs that are administered by the Department of the Interior in furtherance of the goal of reducing California’s use of Colorado River water to its basic annual apportionment, in a manner consistent with amounts and deadlines established in the Interim Surplus Guidelines.” Further, the Secretary may “...utilize existing programs and authorities in furtherance of the goal of reducing California’s current use of Colorado River water.” Reportedly, the amendment was intended to highlight the fact that California has been getting more than its fair share of river water.⁶³

Dam Safety and Security

Security at federal dams across the nation have been increased in response to the terrorist attacks in New York on September 11th, 2001. Hoover Dam Manager Gary Bryant said, “When we heard about it we cut off all traffic across the dam and isolated the dam about 10 miles on each side.” Highway 93 across the dam is a major interstate route between Phoenix, Arizona and Las Vegas, Nevada. While later reopened, it remained closed to commercial traffic. Hoover Dam is considered critical infrastructure and its loss would be catastrophic, but Bryant observed, “If an airplane hit, it wouldn’t do a hell of a lot. It might leave a black mark.” All Bureau dams, powerplants and offices remained in operation, but nonessential services have been sharply curtailed. Visitor centers at Hoover, Glen Canyon and Grand Coulee dams have been closed until further notice for “the safety of the public.” Both the U.S. Army Corps of Engineers and Bureau of Reclamation also canceled tours and took other security measures. Reclamation Commissioner John Keys concluded, “We join all of America in reaching out to the victims and their families.”⁶⁴

⁶²*Las Vegas Sun*, December 13, 2001.

⁶³*Western States Water*, Issue #1441, December 28, 2001.

⁶⁴*Western States Water*, Issue #1426, September 14, 2001.

Drought

Washington State

Washington Governor Gary Locke declared a drought emergency on March 14th, saying, "...without a doubt, Washington is facing the most serious water shortages in at least a quarter-century. This could well be THE worst drought since record-keeping began in 1929.... Precipitation is at or near record lows all across Washington.... Snowpack is running at 50-60 percent of normal. Record low flows are being set daily in our rivers.... We are experiencing unprecedented low flows in the Columbia River - 56 percent of normal and dropping.... For now the biggest impact of the drought is on farmers.... Some irrigation districts in the Yakima Basin expect only 38 percent of the water they are normally entitled to, and it may dip to as low as 6 percent. More than a quarter of the value of the state's agriculture is produced in this basin alone.... Throughout the state, water for general domestic or business use may be in short supply during the summer months."⁶⁵

The Governor made his announcement standing in the dry bed of Alder Lake. He said, "We can clearly see where we stand today...how the drought impacts us all. This is a hydroelectric site -- no water -- no energy. No water -- no swimming. No water -- no fishing. And there are other sites in the state that look a lot like this -- Baker Lake...and Riffe Lake -- 130 feet below normal..., and those facilities are for drinking water. Washington state has 16,000 public water supply systems, and the vast majority of them (12,000) serve just a few households or businesses. Each system, and each part of the state, is unique and may experience the drought differently.... We are facing an extraordinary situation that demands the full attention and cooperation of all citizens. We will need neighbors to share with their neighbors. If a city or a farmer has water that they can do without, then please consider loaning or leasing it to a city or farmer who doesn't have enough. Working together, we can keep our fish swimming, our farmers in business, and our citizens from going thirsty."

The drought emergency declaration will allow the Department of Ecology to provide financial assistance, issue emergency water use permits, approve temporary water transfers, and step up efforts to prevent illegal water use. Given the lack of water, few emergency use permits will likely be granted, but extra staff have been added to process and act on temporary water right transfer requests within 15 days. Such transfers will be used to keep water in streams for fish, to provide enough water for communities, their businesses and residents, and try to keep farm crops from dying. The state's drought account currently holds \$5.1 million, which Governor Locke says will be spent to purchase or lease water rights, make irrigation systems more efficient, and help cities and towns keep water flowing.

The state Department of Fish and Wildlife is identifying where fish will be at greatest risk from the drought. The state is also working with the National Marine Fisheries Service to obtain federal assistance. Record returning salmon runs are expected this year. The state Department of Agriculture and state Conservation Commission will help match up farmers with water and those with needs, especially those with interruptible water rights that may be cut off this summer. The Department of Health is surveying local water utilities to determine needs and anticipate shortages.

⁶⁵*Western States Water*, Issue #1403, April 6, 2001.

The state Department of Natural Resources is advising residents on how to protect their property from forest fires. The state Office of Community Development is assessing its grant programs as a means of easing drought effects on businesses and communities. The General Administration Department will develop plans to reduce state agencies and Capitol campus water use.

Governor Locke has also called on the legislature to act quickly on House Bill 1832, introduced at his request to rewrite Washington's water law. He has said, "My proposed water legislation will help manage this year's drought, if we can get it passed fast enough. But my plan goes further than that. I am committed to updating our water laws over the next four years. Updating the laws will streamline our permitting process and stop penalizing those who don't use water -- the so-called 'use it or lose it' doctrine." He also addresses storage.

On April 4th, the Department of Ecology and Columbia Snake-River Irrigators Association, as well as the city of Pasco reached an agreement to allow more water to be used from the Columbia River (as a result of a lawsuit filed by the city and irrigators against the agency last October). Ecology Director Tom Fitzsimmons said, "We are pleased that the agreement helps break the logjam on processing water rights in the Columbia basin while also acknowledging the need to maintain healthy flows. We're devoting a lot of attention to managing the immediate water shortages caused by the drought, but we know it is just a temporary situation and the river will eventually be full again. We still need to pay attention to our water needs of the future and support the people of our state who are striving to build homes and businesses in rural areas."

Under the agreement, Ecology will process some twelve water use applications pending since 1991. They will contain conditions to protect minimum river flows, like all water rights issued for the Columbia since 1980. Pasco and the irrigators will support Ecology's request before the state legislature for needed staff, and participate in development of a management strategy for the Columbia and Snake Rivers, as proposed by Governor Locke. By September 30, Ecology will also develop a draft interim rule to govern the processing of applications to withdraw water from the rivers. In a related matter, in response to the drought and a public hearing recently in Wenatchee, Ecology will temporarily reduce the minimum flow requirements on the Columbia for six months. The flow is expected to drop below the minimum level this year for the first time. Under a 1980 rule, Ecology may in the public interest reduce the requirement by up to 25%. The decision affects about 300 water rights and totals less than one percent of the flow. Ecology Director Fitzsimmons stated, "There's a lot of debate about what this small amount of water means to the health of the Columbia, but there's no question at all that it means the difference between a break-even growing season versus bankruptcy for...farmers."

Columbia River

Drought conditions continued to stress the Columbia River system. In central Washington, August rainfall has only been about three percent of average and 75% for the water year. Recent rains won't measurably help improve streamflows, which are largely fed by ground water at this time of year. Record low flows are being set almost daily on different streams, according to the Washington Department of Ecology. In the Hanford Reach of the Columbia River, an estimated 1.6 million wild chinook salmon fry died last spring, stranded in the gravel by low-water conditions. That's about 7% of the total estimated hatch. Similarly, mortality rates were some 16 times greater

than in the previous two years downstream from Priest Rapids Dam. Rod Woodin, a Washington Department of Fish and Wildlife spokesman, notes, "Drought, together with fluctuations in water levels caused by dam operations, took a heavy toll on emerging mid-Columbia fall chinook salmon fry this year. How those losses will be reflected in adult returns three and four years from now remains to be seen. Actually, fluctuations in water levels from dam operations were much less than in previous years. The problem is that any variation during a low-water year dewateres a much greater area than when the river is at a normal level."⁶⁶

Rio Grande

In December, due primarily to the continuing drought, the Rio Grande was once again blocked from reaching the Gulf of Mexico by a sand bar. The International Boundary and Water Commission (IBWC) cut through a 400-foot sand bar five months ago, but according to IBWC spokeswoman, Sally Spencer, there are no immediate plans to dredge the river mouth again. "Perhaps if the flow were redirected to continue in the main channel in the river, there would be sufficient flows built up to go through the sandbar," she said. The river mouth reportedly went dry for several months in 1956, but storage available since the construction of Falcon and Amistad Dams in 1954 and 1969, respectively, have since helped maintain flows along the Lower Rio Grande. The IBWC operates these international reservoirs, which are currently at their lowest levels ever recorded for this time of year. On December 8th, the conservation pool at Amistad was only 30% of capacity and Falcon only 17%. Amistad is located 12 miles northwest of Del Rio, Texas. It covers 67,000 acres and is up to 200 feet (ft) deep. Falcon, downstream, is some 40 miles east of Laredo. It covers 78,300 acres, with a maximum depth of 110 ft.⁶⁷

Endangered Species Act

Species Listings and Delistings

On May 9th, the Senate Environment and Public Works Committee's Subcommittee on Fisheries, Wildlife and Water held a hearing on listings and delistings under the Endangered Species Act (ESA). Senator Mike Crapo (R-ID), Chairman, opened the hearing and said, "I am extremely concerned about the plight of Columbia River Basin salmon and steelhead stocks.... Extinction of species is not an acceptable outcome, but neither are policies that cause economic hardship or burden private landowners unfairly. The fact that we have recovered and delisted just nine U.S. species since the ESA was passed is not a testament to its success...and three of those species were recovered on the Pacific Island of Palau alone. When you take into account the hundreds of millions of dollars the U.S. spends each year in threatened and endangered species protections, something is clearly wrong.... Listing and delisting are two issues that need to be addressed.... The quantity and quality of science is an issue that comes up again and again...."⁶⁸

⁶⁶Department of Ecology News Release, August 21, 2001.

⁶⁷*Western States Water*, Issue #1441, December 28, 2001.

⁶⁸*Western States Water*, Issue #1408, May 11, 2001.

Senator Bob Graham (D-FL) said, "The Endangered Species Act was historic when it was passed by a nearly unanimous Congress over 25 years ago. The Act remains important in our efforts to balance human activities with the needs of imperiled wildlife.... I appreciate the fact that the U.S. Fish and Wildlife Service faces a severe listing and delisting backlog. An estimated \$80-\$120 million is needed to eliminate this backlog. However, I do not think that effectively cutting citizens out [of] the process by limiting the ability of the Fish and Wildlife Service to respond to court orders is the...appropriate way to address this problem."

Senator Max Baucus (D-MT) added, "I believe strongly in preserving this country's unique biodiversity and I believe strongly in the mission of the ESA. However, I have always been willing to explore ways to make the Act more effective..., and more sensitive to the legitimate concerns of states and private landowners. I've worked hard on ESA reform in past Congresses, working with my colleagues...to craft a bipartisan ESA re-authorization bill.... Our bill made significant improvements...that we felt made the Act a more effective tool in the identification and recovery of endangered or threatened species. It's a shame that the bill did not pass.... I believe it would have made a real difference, not only to overall species recovery efforts, but to the states and local communities that often find themselves at odds with the mandates of the ESA. The bill contained provisions that addressed some of the concerns that will be raised today about the listing process, such as independent peer review of listings and delisting decisions and...transparency in the listing process...." He continued, "I know that this hearing is not about ESA consultations..., but they are a good analogy to the problems the Service is facing.... The ESA was never, never supposed to trump good and necessary projects that can and should move forward.... When a city, country or the state wants to widen a road, install a culvert, rebuild a bridge, before you can show up with the flagger or the concrete mixer or the heavy equipment, the project is often effectively tabled before it's begun for lack of enough agency support to complete routine biological opinions and assessments.... I believe a lack [of] funding has severely compromised the effectiveness of the Service in carrying out its duties, resulting in project delays and frustration...."⁶⁹

Alsea Valley Alliance v. Evans

On September 1st, Judge Michael Hogan, U.S. District Court of Oregon, "...declared unlawful and set aside as arbitrary and capricious," the National Marine Fisheries Service (NMFS) decision to list the Oregon Coast coho salmon as a threatened evolutionary significant unit (ESU). He remanded the matter to NMFS for further consideration consistent with his opinion, and specifically "...directed the agency to consider the best available scientific information, including the most recent data, in any further listing decision." NMFS listed the Oregon Coast coho ESU as threatened on August 10, 1998 pursuant to a separate court order, but only listed all "naturally spawned" coho, excluding "hatchery spawned" fish. The plaintiffs central argument was that the ESA doesn't allow listing distinctions below the level of species, subspecies or a distinct population segment (DPS) of a species and that the NMFS distinction was unlawful. Judge Hogan agreed. The court found, "...NMFS may consider listing only an entire species, subspecies or distinct population segment.... To classify hatchery spawned coho as a DPS under NMFS's own standard, hatchery spawned coho would have to be 'substantially reproductively isolated from other nonspecific population units,' and

⁶⁹The hearing testimony is online at www.senate.gov/~epw.

'represent an important component in the evolutionary legacy of the species....' [O]nce released from the hatchery, it is undisputed that 'hatchery spawned' coho and 'naturally spawned' coho within the Oregon coast ESU share the same rivers, habitat and seasonal runs. It is undisputed that 'hatchery spawned' coho may account for as much as 87% of the naturally spawning coho in the Oregon coast ESU. In addition, hatchery spawned and natural coho are the same species and interbreed when mature. Finally, the NMFS considers progeny of hatchery fish that are born in the wild as 'naturally spawned' coho that deserve listing protection.... Thus, the NMFS listing decision creates the unusual circumstance of two genetically identical coho salmon swimming side-by-side in the same stream, but only one receives ESA protection while the other does not. The distinction is arbitrary."⁷⁰

Oregon Governor John Kitzhaber urged the federal government to appeal the decision, writing Commerce Secretary Donald Evans that it could have "devastating effects on fisheries and result in increased regulations for landowners on the Oregon Coast," should NMFS decide to re-list the entire species. He also expressed concern the ruling could lead to renewed efforts to rebuild salmon runs through greater use of hatcheries, to the detriment of "wild" fish, as well as recent efforts to improve, restore and protect watersheds, including fish habitat.⁷¹

Northwest Power Planning Council staff reported in a September 27th meeting that seven of twelve ESA-listed stocks of Columbia Basin salmon or steelhead could be at risk of losing federal protection under the same legal arguments. The impact may reach well beyond the Columbia River, as Brian Gorman, a NMFS spokesman, estimated 20 of 26 West Coast stocks could be affected. "This has vast legal, biological, social and political implications. This could be a regulatory nightmare."

On October 1st, the Columbia-Snake Irrigators Association, represented by Portland attorney James Buchal, filed a petition asking the National Marine Fisheries Service to remove ESA protections on the Snake River steelhead, Middle Columbia River steelhead, Upper Columbia River steelhead, Snake River spring/summer chinook, Snake River fall chinook, Upper Columbia River spring chinook and Snake River sockeye. The affected habitat covers much of eastern Oregon, eastern Washington and central Idaho. Mr. Gorman said, "We expected this but were surprised it was so fast." Environmental groups joined in urging NMFS to appeal Judge Hogan's decision.⁷² Mr. Buchal observed, "The listings were defective for many reasons," according to Buchal, "Now we have one of those reasons set forth in a document with the force of law." Buchal added, "With the largest salmon runs observed this year since dam counts began in 1938, the time is ripe for reconsidering application of the Endangered Species Act to Pacific salmon stocks. The federal government has far more pressing business than micromanagement of salmon recovery in the Pacific Northwest." Tom Mackay, President of the Columbia-Snake Irrigators Association, says, "You take

⁷⁰*Western States Water*, Issue #1426, September 14, 2001.

⁷¹*Western States Water*, Issue #1428, September 28, 2001.

⁷²*Western States Water*, Issue #1429, October 5, 2001.

a big sledgehammer away that is zeroed in on the Northwest and you then manage the resources for everyone's good." The Association suggests fish management be left to states and tribes.

However, Liz Hamilton, Executive Director of the Northwest Sportfishing Association suggests, "This is step one of many backward for salmon recovery. We're still hoping the federal government will do its job and file an appeal." In a September 28th editorial, the Seattle Times stated, "Years of expensive, hard-fought work to restore Northwest salmon habitat is in jeopardy if [the] federal court ruling on Oregon coastal coho salmon is not challenged.... If the Bush administration does not appeal the ruling to a higher court, then a legislative fix is needed to clarify the language that tripped up the agency. The ruling invites a dangerous retreat from habitat protection back to a simplistic, disastrous reliance on volume-oriented hatcheries.... [L]urking in the judge's ruling is an assumption that wholesale numbers of fish are all that matter; hatchery volume is enough... Salmon recovery and habitat restoration is expensive and politically vulnerable, especially when replacements can seemingly be mass produced...."

In response to the Times editorial, Barb Lindsay, Executive Director of United Property Owners, wrote, "This federal court ruling is long overdue and sets a much-needed legal precedent for counting all salmon in a particular river system before listing those fish stocks as headed for extinction. For many years now, federal fish managers have refused to count abundant hatchery fish in their population counts. For the past three years in Washington's Methow Valley, irrigators have been without water because the NMFS said flow must be cut off to save Carson stock salmon. Fifty miles away, however, NMFS ordered the same Carson stock hatchery salmon clubbed to death because these fish were commingling with 'wild' stock in another tributary. The irony is that these so-called 'wild' fish are, in fact, the offspring of hatchery stock!" She adds, "The truly endangered species here are citizens...whose livelihoods and property values are in jeopardy."

Russ Brooks, a Pacific Legal Foundation attorney, who brought the Alsea Valley suit said, "We expect all kinds of delisting petitions to be filed, but don't expect the fisheries service will act on them. It will take legal action." The Foundation plans to bring a lawsuit challenging the listings of Northern California/Southern Oregon coastal coho, which was in part the cause of the U.S. Bureau of Reclamation cutting of water deliveries to Klamath Project irrigators this summer. If the NMFS accepted the Columbia-Snake Irrigators Association's petition, it would have one year to decide whether one or more of the salmon runs should be delisted. "We'll do what the [ESA] says we have to do," according to Gorman.

NMFS announced it would not appeal Hogan's decision, and would review the listing of 23 protected groups of salmon and steelhead. However, Judge Hogan granted environmental groups intervenor status in order to allow them to appeal his decision to the Ninth Circuit Court of Appeals, which stayed his decision delisting coho salmon. The two sentence stay also stopped logging operations that affected the fish's habitat, and which had resumed after the delisting order.⁷³

Of note, overall some 417,000 salmon returned to the Columbia River basin this past spring, a far greater number than the 364,000 expected. Record salmon runs are also expected in the basin

⁷³*Western States Water*, Issue #1440, December 21, 2001.

this next spring, with an estimated 334,000 salmon passing Bonneville Dam. However, according to Guy Norman, with the Oregon Department of Fish and Wildlife, the number of salmon returning will probably drop considerably in 2003. He explained that due to lower water levels this year, fewer out-migrating salmon smolts were able to reach to the ocean, hence less will eventually return to spawn. This past year was the second driest year in the basin since 1929, and the effect of the drought will be seen in future numbers of returning salmon.

A Bonneville Power Administration (BPA) spokesman, Mike Hansen, added that the power crisis was a contributing factor to the lower out-migration, as dam operators stopped spilling water to help flush salmon to the sea, in order to generate more electricity. Hansen reported that 1998-99 winter precipitation in the basin and runoff was as high as 125 million acre-feet (Maf), but this past water year yielded only 54 Maf. Still, Hansen points out that though BPA suspended spill operations on the Snake River, the Army Corps of Engineers stepped up their collection and barging operations, moving 90 percent of out-migrating salmon around the four lower Snake River dams. Barge transported salmon account for roughly 60 percent of the out-migrating fish in the basin. According to Hansen, the barging saves the same fish that the conservation groups are trying to eliminate from the out-migration estimates, concluding, "...virtually all of those made it to the ocean."

Burt Bowler, a fisheries biologist with Idaho Rivers United, suggests that 2003 will be a telling year, offering real insights into salmon biology and survival rates. He maintains that it is still too early to tell whether lower runs in 2003 will have any effect on salmon recovery efforts. Regardless of the returns in 2003, Bowler said, "I don't think any of this is actually getting back to sustainable, long-term survival that would actually get to recovery. We're seeing some blips."

Regional Activities and Events

Klamath River Basin

On April 4th, United States District Judge Ann Aiken found the Bureau of Reclamation violated the Endangered Species Act by failing to consult the National Marine Fisheries Service on its Klamath Project operations and required a "concrete plan" to protect endangered salmon before water can be delivered to farmers, now facing a devastating drought. Water users in turn are seeking a separate injunction to ensure contract water is delivered to historically irrigated lands. Oregon Governor John Kitzhaber told a rally of 5,000 area residents, "I don't think it's a question of fish being more important than people. They're not. I don't intend to stand by and see this community or [its] children become extinct."⁷⁴ On April 6, Reclamation announced that no water would be available from Upper Klamath Lake to supply the Klamath Project, which since 1907 usually delivers some 500,000 acre-feet of water to approximately 1,400 farms covering some 210,000 acres. Ironically, the Tule Lake and Lower Klamath National Wildlife Refuges, which are dependent on project return flows, will also be dried up.

In an April 30th ruling, Judge Aiken denied a petition for injunctive relief by the Klamath Water Users Association and local farmers and irrigation districts stating "...the ESA explicitly

⁷⁴*Western States Water*, Issue #1404, April 13, 2001.

prohibits the relief they seek.”⁷⁵ In denying the farmers “desperate plea,” the judge said, “Plaintiffs allege that Reclamation breached its contracts with plaintiffs...by using Project water for purposes other than irrigation. However, as recognized by this court and the Ninth Circuit, plaintiffs’ contract rights to irrigation water are subservient to ESA and tribal trust requirements. (Patterson, 204 F.3d at 1214.) Therefore, plaintiffs cannot assert breach of contract based on Reclamation’s allocation of water to protect the suckers and salmon.” The judge added, “...Reclamation ‘has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the [Project] when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators.’ Patterson, 204 F.3d at 1213.” The Project was authorized in 1905, and, “In accordance with state water law and the Reclamation Act, the United States ‘appropriated all available water rights in the Klamath River and Lost River and their tributaries in Oregon and began constructing a series of water diversion projects.’ Klamath Water Users Association v. Patterson, 204 Fed 1206, 1209 (9th Cir. 2000).”

According to the Siskiyou County Farm Bureau, “The Klamath Project evolved into a complex system of irrigation canals, dams, diversions and drains, bringing life-giving water to crops grown in some of the richest soil in America. Water use rights under a bi-state compact set water use priorities with agriculture both first and second in line, then recreation and wildlife third. The tri-county Klamath Basin produces \$100 million in hay, grains, and vegetables. This, in turn, produces an additional \$250 million in economic activity in the various agriculturally-dependent communities throughout the region. Livestock herds, now being liquidated, are worth another \$100 million in replacement costs. Without farms, thousands of farmworkers will have no work. Without farmers to buy seed, supplies and equipment, the infrastructure of small businesses that support agriculture will collapse. Then, like dominoes, the restaurants, grocery stores and other small community businesses will lose their customer base. Property values will plummet, thousands of loans will default and county tax revenues will follow the economic spiral downward. How can it be the world has turned upside down...?”⁷⁶

Judge Aiken notes in her decision, “...the ESA requires an agency to avoid jeopardy to species, ‘whatever the cost.’ TVA v. Hill, 437 U.S. at 184.” She added, “Given the high priority the law places on species threatened with extinction, I cannot find that the balance of hardship tips sharply in plaintiffs’ favor.” The Judge concluded, “In essence, plaintiffs request that this court stand in the place of Reclamation as the operator of the Project and reallocate Project water in a manner that is inconsistent with governing law. Plaintiffs fail to show a likelihood of success on the merits of their claims, and, more importantly, plaintiffs fail to establish that they are entitled to the injunctive relief they seek. While the court sympathizes with plaintiffs and their plight, I am bound by oath to uphold the law. The law requires the protection of suckers and salmon as endangered and threatened species and as tribal trust resources, even if plaintiffs disagree with the manner in which the fish are protected or believe that they inequitably bear the burden of such protection. The scarcity of water in the Klamath River Basin is a situation likely to reoccur. It is also a situation which demands effort and resolve on the part of all parties to create solutions that provide water for the necessary

⁷⁵*Western States Water*, Issue #1407, May 4, 2001.

⁷⁶See www.snowcrest.net/siskfarm.

protection of fish, wildlife and tribal trust resources, as well as the agricultural needs of farmers and their communities. Continued litigation is not likely to assist in such a challenging endeavor. This court hopes and expects that the parties and other entities necessary to long-term solutions will continue to pursue alternatives to meet the needs of the Klamath River Basin.”

In a show of support for Klamath Basin farmers and ranchers, a huge bucket brigade and rally was held on May 7th in Klamath Falls, Oregon with 50 buckets -- one for each state -- passed from Veteran’s Memorial Park, down Main Street to Modoc Field, where the water was emptied into a dry irrigation ditch. The announcement stated, “Bucket brigades have been a symbol of unified community action against threatened disaster throughout the history of the American West. Americans who wish to stand shoulder to shoulder with the Klamath farmers and ranchers against this injustice are invited to bring a bucket and join the brigade.”

Anger and frustration over losses attributable to the U.S. Bureau of Reclamation’s decision to cut off irrigation water to farmers in the Klamath River Basin led to civil disobedience as headgates have been forcibly opened on June 29th to allow water to flow to parched lands. Someone entered a fenced and locked facility and opened the headgate releasing some 200 cubic feet per second (cfs) of water into the A canal. It was soon discovered, and the Bureau directed the Klamath Irrigation District (KID), which operates the project, to close the gate. When KID refused, two Reclamation employees accompanied by police closed the headgate. It was later found opened again, and Bureau employees returned to close and weld it shut.⁷⁷

On July 4th, in what the local paper termed the Klamath Tea Party, a group of some 100 farmers, ranchers and other local residents gathered at the gate and formed a human screen shielding the identity of others that used a chain saw and cutting torch to open the gate and break the welds, again letting water flow into the canal. The Klamath County Sheriff watched the demonstrators, but did not intervene, as no state or local laws were broken. There was only minor property damage. However, a Bureau spokesman, Jeff McCracken, announced U.S. marshals and the FBI have been asked to step in and protect the headgate. “We now have people who have entered...and done damage to federal property. We have no choice but to involve law enforcement...”

One of the bucket brigade organizers, Donnie Boyd, said, “I can understand why it happened because there’s a lot of frustration. I think this was more of a desperate way of saying we really need help.... The American government just moves so slow. It’s hard sitting here while your fields are drying up and blowing away.” Another Bucket Brigade organizer, Bob Gasser, added, “I’m not against it all, because our rights have been taken, as long as no one gets hurt and no property damage is done. They may be right. This may be the tack we have to take.... It’s a touchy situation. I just hope no one does anything stupid, even though we are breaking the law.” Dave Solem, KID Manger, observed, “I think people are taking actions they believe to be just, and I can’t blame them for that. It’s an action taken by individuals. They have done something they feel they need to do.... The water is private property that has been taken from them. We are not going to give up on...getting that water back into the system.”

⁷⁷*Western States Water*, Issue #1416, July 6, 2001.

On July 3rd, the Pacific Legal Foundation (PLF), on behalf of the KID and Tulelake Irrigation District, filed the first and only formal petition asking Interior Secretary Gale Norton and Commerce Secretary Don Evans to convene a meeting of the Endangered Species Committee or so-called "God Squad" to consider overruling the BOR decision that led to shutting off water to the Klamath Project. PLF Attorney David Haddock stated, "A fish first, people last line of thinking has caused a human tragedy in the Klamath Basin. This is a predicament of the government's making and government needs to fix it. A balanced approach to environmentalism is one that recognizes that human communities shouldn't be threatened with extinction." Attorney Ann Hayes added, "The most endangered species in Klamath now is its people, the farmers who have been producing food for America's dinner tables for decades. As PLF files this petition today, we encourage state and federal officials to do the same -- urge the God Squad to resolve this catastrophe."

On July 22nd, Klamath County Sheriff Tim Evinger formally asked federal officials to stop guarding the Upper Klamath Lake headgates, which had been forced open on four different occasions by local protestors, since July 14th. Evinger said, "I'm not going to be party to enforcing a federal law on federal property that is destructive to the entire community I represent." However, Lieutenant Jeff Wasserman, the commander of the U.S. Park Police detachment at the headgates, commented that whatever Evinger thought about the threat of local protestors breaking into the water supply, the decision is solely at the discretion of the Department of the Interior (DOI). In his own opinion, Wasserman concluded: "I would be very surprised, based on our mission, if we were told to leave."⁷⁸

After weeks of protests by local farmers and concerned citizens, demanding the federal government re-open the headgates of the Klamath Irrigation Project, some water was released by federal officials for the Klamath Project. On July 24th, Interior Secretary Gale Norton announced the release of 70,000 to 75,000 acre-feet of water from Upper Klamath. "The reason I am taking this action is because the Bureau of Reclamation has been taking measurements and has determined that Upper Klamath Lake is at a higher level than projected," Norton said. "Irrigators above the Klamath Irrigation Project have been able to conserve more water than projected, and there has been a little help from the rain gods," she explained. On July 25th, the headgates were opened. DOI spokesman Jeff McCracken expressed a feeling of relief when he commented on the decision to open the headgates: "This is what they've been asking for. This should bring some resolution for this year."

Many, including Oregon Governor, John Kitzhaber joined in the effort to try and reach a workable compromise between the demands of the Endangered Species Act and the local farmers. Farmers have mixed reactions. Some claim that the relief is too late, while others claim that the water can make a difference. Still many like Steve Kandra, Chairman of the board at the Klamath District, think that opening the headgates was merely a public relations ploy. "This is just a gesture to diffuse the situation, it doesn't fix the problem."

Protests were peaceful as the Bureau of Reclamation again shut off water releases from Upper Klamath Lake on August 23rd. It may take as long as ten days before the last of the 70,000-75,000 acre-feet of water released by order of Interior Secretary Gale Norton makes its way through the

⁷⁸*Western States Water*, Issue #1419, July 27, 2001.

system. Thousands came to Klamath Falls this week from several western states to support area farmers opposed to court ordered actions intended to protect endangered fish. The Klamath Falls News and Herald, in an editorial, supported calls for irrigators to have a part in the Endangered Species Act (ESA) Section 7 consultation process in the future. "At present, only federal agencies have a mandated place at the table. Input from irrigators has been on a more informal basis. Yet who has more to lose than irrigators who stake their livelihoods each year on the belief that the government will live up to its promises." The San Jose Mercury News added, "The federal government can buy out farmers or pay them to give up their water in drought years. But farmers, environmentalists and elected officials must work out ways of using and storing water that enable both wildlife and rural life to thrive."⁷⁹

Meanwhile, protests continue in Klamath Falls at the "A" canals about 100 people scaled a fence surrounding the headgates on August 29th, and faced federal agents situated literally on top of the headgates. They waived water rights and other documents purporting to prove Klamath Reclamation Project farmers control the irrigation system and operation of the dams. Klamath County Sheriff Tim Evinger continued to call for peace and patience. Barron Knoll, a farmer and outspoken activist who delivered the legal documents to Mike Meyers, head of the federal guards, said, "I did it to keep my hope alive, to keep this community's hope alive. I think we did that today." The legal research and opinion were prepared by the Coalition for Local Sovereignty, a Washington, D.C. interest group. Rick Rodgers, another farmer and spokesman who stood near the guards to discourage anyone from approaching too close, opined, "We've got a victory here. We got 120 feet closer and we got the sheriff on our side. I'd dearly love to go home, but I gave my word to the sheriff to help keep this peaceful." Knoll added, "We aren't going away. We need a decision for water now, this year and next year. We have to win it here.... If they cut off the water next year, there will be no hope left." Barbara Martin, with Farmers Against Regulatory Madness (FARM), declared, "If we don't educate ourselves, they will keep taking and taking and taking." Jeff McCracken, U.S. Bureau of Reclamation spokesman said they will review the farmers legal claims, but a 1906 deed proves federal ownership and ownership doesn't revert to the project beneficiaries even though they are required to pay back construction costs. Transfer of title would take an act of Congress.⁸⁰

Irrigators in the Klamath River Basin were expected to file suit in the U.S. Court of Claims on August 31st, seeking damages for the taking of water by the federal government for the protection of endangered fish species. Some 20 irrigation districts are represented by Marzulla & Marzulla, a law firm in Washington, D.C. and the same firm that won a similar suit representing the Tulare Lake Basin Water Storage District in California,⁸¹ involving water for the endangered and threatened winter-run chinook salmon and Sacramento-San Joaquin Delta smelt. The court has yet to fix monetary damages in that case, but firmly determined liability stating, "The federal government is

⁷⁹*Western States Water*, Issue #1423, August 24, 2001.

⁸⁰*Western States Water*, Issue #1424, August 31, 2001.

⁸¹*Western States Water*, Issue #1407, May 4, 2001.

certainly free to preserve the fish; it must simply pay for the water it takes to do so.”⁸² In the Klamath case, attorney Bob Harrison stated, “The monetary value of the water not released to the Klamath Basin this year is roughly estimated somewhere between \$300 million and \$1 billion.” He added, “We think there is a possibility this could go into a settlement hearing. Our sense is the federal government is seeking a venue to avoid dealing with these takings issues on an annual basis.”⁸³

In an August 27th article, the *Christian Science Monitor* suggests how the Administration handles the crisis will affect the President’s political support. “Mr. Bush risks incurring the wrath of one of his staunchest constituencies - farmers and ranchers - unless he can solve a looming water crisis [in the Klamath Basin].... The Bush administration is finding Western resource issues, like most things, more complicated now than when it was campaigning from outside the White House.... For now, Interior Secretary Norton has asked the National Academy of Sciences to review the biological opinions that were the basis for cutting off irrigation in the Klamath Basin. For farmers and their supporters, it’s a start....” The article continues, “How Bush handles the tense situation is being closely watched by loggers in Montana, miners in Nevada, and those who work the land all over the West - many of whom have seen their way of life dwindle in recent years as endangered species like the spotted owls and salmon become the focus of growing public environmentalism.”

Interior Secretary Gale Norton requested that the National Academy of Sciences (NAS) review the federal biological opinions that required the Bureau of Reclamation to withhold water from the Klamath project farmers. According to Interior spokeswoman Stephanie Hanna, “It’s not going to affect anything this year, obviously. The point of it is to make sure that in the future we are using the best available science to make decisions in allocating water.” Secretary Norton’s decision comes on the heels of a decision to release to farmers surplus water from Klamath Lake. Reaction to that decision has been mixed, with many Klamath farmers and others in the community being heartened by the action. “We were shut out of the process so badly, and things happened so fast when Clinton left office, this is a positive sign,” said Don Russell, President of the Klamath Water Users Association. However, conservationists claim that Norton has violated the biological opinion that she wants reviewed when she released the 75,000 acre-feet of water to farmers instead of wildlife. We welcome significant evaluation and always have, said Wendell Wood of the Oregon Natural Resources Council. “The concern that the irrigation community has expressed regarding this science in our mind isn’t because the science is bad, but because they don’t like the science.”⁸⁴

Irrigators in the Klamath River Basin have filed a lawsuit in the U.S. Court of Federal Claims seeking compensation for damages for the taking of their property when the U.S. Bureau of Reclamation cut off their water supplies from the Klamath Project this summer.⁸⁵ The plaintiffs include fourteen irrigation districts and several individual farmers and ranchers, represented by the

⁸²Ibid.

⁸³*Klamath Falls Herald and News*, August 24, 2001.

⁸⁴*Western States Water*, Issue #1420, August 3, 2001.

⁸⁵*Western States Water*, Issue #1431, October 19, 2001.

Washington, D.C. law firm of Marzulla & Marzulla, which won a similar case for the Tulare Lake Basin Water Storage District in California.⁸⁶ James Moore, one of the plaintiffs, said, "Without water, we no longer had viable, equitable property. They [took] away the certainty of our ability to farm, and we deserve full compensation." Some estimate compensation claims could reach \$1 billion. Moore added, "Our attorneys feel confident. They feel like we have a good, strong suit...." Mike Byrne, another plaintiff, stated, "This is a private-property takings, Fifth Amendment case." The irrigation districts are making a per acre assessment to raise money for legal fees, and the City of Klamath Falls is contributing \$100,000. A separate suit which unsuccessfully sought to stop the federal government from cutting off irrigators water this summer has been withdrawn.⁸⁷

Rio Grande Basin

A historic state-federal agreement was reached in Albuquerque, New Mexico on June 29th, to provide water for the endangered silvery minnow, while preserving farmers' water rights as well as the rights of municipal and other users. The agreement provides only a temporary solution, and a long-term strategy must still be worked out, but it was praised as a "historic breakthrough," by Senator Pete Domenici (R-NM). New Mexico State Attorney General Patricia Madrid hailed it as the opening a "new era of federal-state cooperation," and Interior Secretary Gale Norton called it a "model for similar Endangered Species Act conflicts across the country." Under the agreement, New Mexico will store 100,000 acre-feet of state-owned water for the fish in upstream reservoirs. This water is in addition to that which must be released under the Rio Grande Compact to meet obligations to Texas. The state's water will be sold to the federal government over a period of three years to help keep habitat for the silvery minnow wet, with \$4.1 million in expected payments to be used by the state to improve minnow habitat, implement a captive breeding program, and if necessary, rescue fish should the river go dry. Most of the surviving minnows are in a reach of the river below San Acacia Diversion Dam near Socorro, and above Elephant Butte Reservoir.⁸⁸

However, plaintiffs in a lawsuit challenging the Bureau of Reclamation's and Corps of Engineers' operations of the Rio Grande say the agreement is not enough. Letty Belin, an attorney for the plaintiffs -- Forest Guardians, Defenders of Wildlife and other environmental parties -- said, "While the agreement is a great first step, it's not going to stop the extinction of the minnow." On July 2nd, U.S. District Court Judge James A. Parker chose not to rule on motions to dismiss the suit, and indicated he might agree with plaintiffs' contention that the federal agencies have discretion to control water releases from storage reservoirs along the river for fish. Laird Lucas, another plaintiff attorney, said, "I think he threw that out very deliberately to shake everybody up."

Also on June 29th, given the agreement, the U.S. Fish and Wildlife Service issued a biological opinion that will allow continuing diversions from the Rio Grande. Moreover, an incidental "take" permit will provide water users with some legal protection and certainty. Andrew Smith, an attorney

⁸⁶*Western States Water*, Issue #1407, May 4, 2001.

⁸⁷*Klamath Falls Herald and News*, October 12, 2001.

⁸⁸*Western States Water*, Issue #1416, July 6, 2001.

with the U.S. Department of Justice suggested those actions may make the environmentalists lawsuit moot, as the federal agencies have complied with the requirements of the law. He said, "What we have now is a drastically changed situation." Gina Guy, Interior's Regional Solicitor, said that the agreement "represents a very hopeful note for the very difficult problems we've encountered throughout the West." Senator Domenici was more direct, stating, "Nationally, we're sending a signal today. The Secretary of Interior wants to work with states and recognizes our water law." Senator Jeff Bingaman (D-NM) added, "It's a win-win for all involved. It provides for protection of the species and at the same time provides for the continued uses of water that are traditional in our state. I hope this is a model the rest of the country will pay attention to."

The Middle Rio Grande Conservancy District, the largest water user in the area, is separately working on an agreement with the federal government to pass half the water that reaches Isleta down to the San Acacia Diversion Dam. District spokesperson Janet Blair says, "We're willing to allow the Bureau to use our facilities and some water to keep the Rio Grande from drying up." However, Bureau engineer Jaci Gould warned that the river is "not going to look like it did last year," when Reclamation purchased and released some 130,000 to 170,000 acre-feet of water to keep the river wet with water that isn't available this year. Steve Harris, with the environmental group Rio Grande Restoration observed, "It's obviously a matter of gravest concern. This could be the year the minnow goes extinct if we're not careful and lucky." Providentially, as talks proceeded towards the agreements, the Rio Grande rose as local thunderstorms rolled through the Albuquerque area.

Tulare Lake Basin

On April 30th, the United States Court of Federal Claims granted summary judgement in *Tulare Lake Basin Water Storage District v. U.S.* in favor of the plaintiffs. The California water users claimed that their contractually-conferred right to the use of water was taken from them when the federal government imposed water use restrictions under the ESA and sought Fifth Amendment compensation for their loss. The California case concerns the Delta smelt and winter-run chinook salmon, which are in jeopardy of extinction in the opinion of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. In stating the facts, Judge John Paul Wiese said, "The efforts by those agencies to protect the fish--specifically by restricting water out-flows in California's primary water distribution system--bring together, and arguably into conflict, the Endangered Species Act and California's century-old regime of private water rights. The intersection of those concerns, and the proper balance between them, lie at the heart of this litigation."⁸⁹

The opinion reads, "The development of California's water system has a long and detailed history well chronicled in case law.... That system, in brief, involves the transport of water from the water-rich areas in northern California to the more arid parts of the state. Various water projects or aqueduct systems have been built to facilitate that goal; two--the Central Valley Project (CVP) and the State Water Project (SWP)--are the focus of the present litigation.... [T]he two projects share a coordinated pumping system that requires, as a practical matter, that the systems be operated in concert.... By law, the water projects are required to be financially self-sustaining, with the costs of construction and maintenance to be paid entirely by those who ultimately receive the water. The

⁸⁹*Western States Water*, Issue #1407, May 4, 2001.

water contractors are thus obligated to pay to maintain the operation of the system regardless of the amount of water actually received. Because the amount of water available to water users in a particular year is largely a function of natural causes, however, the permits explicitly provide that the state will not be held liable for shortages due to drought or other causes beyond its control.”

However, the opinion concludes, “There is, in the end, no dispute that [the California Department of Water Resources] permits, and in turn plaintiffs’ contract rights, are subject to the doctrines of reasonable use and public trust.... Nor is there serious challenge to the premise that the [State Water Resources Control Board], under its reserved jurisdiction, could at any time modify the terms of those permits to reflect the changing need of the various water users. The crucial point, however, is that it had not.... Nor can we, as defendant urges, make that determination ourselves. It is the Board that must provide the necessary weighing of interest to determine the appropriate balance under California law between the cost and benefit of species preservation. The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so.” Damages have yet to be determined.⁹⁰

Energy

National Energy Policy/Plan

On May 17th, President Bush announced the release of his national energy policy and plan. “To protect the environment, to meet our growing energy needs, to improve our quality of life, America needs an energy plan that faces up to our energy challenges.... The plan addresses all three key aspects of the energy equation: demand, supply and the means to match them.... First it reduces demand by promoting innovation and technology to make us the world leader in efficiency and conservation.... Yet even as we grow more efficient, ...we will always require some additional energy to power our expanding economy. We learned...from the California experience...not even the most admirable conservation effort could keep up with the state’s demand for electricity.”⁹¹

The President continued, “So the second part of our energy plan will be to expand and diversify our nation’s energy supplies.... [It] expands and diversifies America’s supply of all sources of energy--oil and gas, clean coal, solar, wind, bio-mass, hydropower and other renewables, as well as safe and clean nuclear power... Diversity is important, not only for energy security, but also for national security.” The plan states, “Hydropower is the fourth-largest source of U.S. electricity generation, accounting for about 7 percent of total generation in 2000. In some regions of the country, such as the Northwest and New York, hydropower makes a much bigger contribution.... [H]ydropower generation has remained relatively flat in the United States for years. Hydropower has significant environmental benefits.... Given the potential impacts on fish and wildlife, however, it is important to efficiently and effectively integrate national interests in both natural resource preservation and environmental protection with energy needs.... Although most potential for hydropower has already been developed, there is some undeveloped hydropower capacity.... [M]uch of this... could be expanded without constructing a new dam. The most significant challenge

⁹⁰The full opinion is available at www.law.gwu.edu/fedcl/2001.htm.

⁹¹*Western States Water*, Issue #1409, May 18, 2001.

confronting hydropower is regulatory uncertainty regarding the federal licensing process. The process is long and burdensome, and decision-making authority is spread across a range of federal and state agencies charged with promoting different public policy goals.... The licensing process needs both administrative and legislative reforms.”

Federal Hydropower Licensing

On May 8th, The Federal Energy Regulatory Commission (FERC) sent to the Congress a comprehensive review of its policies, procedures, and regulations for licensing hydroelectric projects designed to reduce the cost and time of obtaining a license. The report was prepared pursuant to Section 603 of the Energy Act of 2000. In preparing the report, FERC solicited the views of federal and state agencies with responsibilities related to the regulation of hydropower projects, as well as the views of Indian tribes, licensees, non-governmental organizations, and interested individuals. The report focuses on relicensing of existing hydropower projects, which constitute by far the majority of FERC licensing proceedings. According to the report, “The median time from the filing of a license application to its conclusion for recent applications is 43 months. Many proceedings, however, take substantially longer. Many specific factors contribute to delays, but the underlying source of most delays is a statutory scheme that disperses decisionmaking among federal and state agencies acting independently of the Commission’s proceedings. The most common cause of long-delayed proceedings is untimely receipt of state water quality certification under the Clean Water Act. The same statutory scheme also ensures that the Commission has scant control over the costs of preparing a license application or of the costs of environmental mitigation and enhancement. These expenditures are frequently mandated in state water quality certification or mandatory federal agency conditions required pursuant to FPA Sections 4(e) and 18, and override the Commission’s balancing of all relevant factors affecting the public interest.” A copy of the report is online at www.ferc.gov/hydro/docs/section603.htm.⁹²

The report continues, “The Commission has made a determined effort historically to make the licensing process more efficient and effective, and to achieve outcomes satisfactory to all participants. The most successful reform effort has been the introduction of the Alternative Licensing Process (ALP), a cooperative process that combines pre- and post-application activities. The ALP and other reform efforts continue, but they cannot overcome the problems with the legislative scheme. The most effective way to reduce the cost and time of obtaining a hydropower license would be for Congress to make legislative changes necessary to restore the Commission’s position as the sole federal decisional authority for licensing conditions and processes. Alternatively, consideration should be given to requiring other federal agencies with mandatory conditioning authority to better support their conditions. Focusing state water quality certification by limiting certification to physical and chemical water quality parameters related to operation of the hydropower facility would be very helpful in reducing the time and cost of licensing.”

The staff report states, “Changes in Commission regulations and policies may also assist in reducing the time and cost of licensing, although they are not an adequate substitute for legislative reform. These include: requiring license applicants to report to the Commission during pre-filing

⁹²*Western States Water*, Issue #1408, Special Report, May 11, 2001.

consultation disputes with agencies concerning the need for studies and data, so that the Commission can determine whether to become involved in pre-filing consultation; fully including the public in pre-filing consultation, limiting the ability of agencies with conditioning authority to revise their conditions; issuing draft NEPA documents only when necessary, and increasing the standard term for new licenses to 50 years.”

On May 3rd, in response to a request from Rep. Joe Skeen (R-NM) and Rep. Ralph Regula (R-OH), the U.S. General Accounting Office (GAO) released a report entitled, “Licensing Hydropower Projects: Better Time and Cost Data Needed to Reach Informed Decisions About Process Reforms.” The report reads, “In recent years, some licensees and other participants in the licensing process have expressed concern that obtaining a license now takes too long and costs too much. Responding to these concerns, FERC established an alternative licensing process, and other federal agencies have introduced reforms intended to make the licensing process more efficient and less costly. However, these reforms did not quell the concerns. As a result, in November 2000, the Congress directed FERC to conduct a comprehensive review of the policies, procedures, and regulations relating to the licensing of nonfederal hydropower projects to determine how to reduce the time and costs associated with obtaining a license.”

The report explains, “Prior to the enactment of the statute requiring FERC to review its licensing process, you asked us to identify and assess significant issues related to the process. As agreed, this report discusses (1) why the licensing process now takes longer and costs more than it did when FERC issued most original licenses several decades ago; (2) whether participants in the licensing process agree on the need for, and type of, further reforms to the process to reduce time and costs; and (3) whether available time and cost data are sufficient to reach informed decisions on the effective-ness of recent reforms and the need for further reforms to the process.

The report states that hydropower accounts for about 10% of electricity production in the U.S. and is “an important part of the nation’s energy mix. It offers the benefits of a comparatively inexpensive, emission-free, renewable energy source, the quantity of which can be increased quickly in periods of peak demand.... However hydropower projects can also have adverse effects on ecosystems and...fish and wildlife. They can change the fundamental chemical, physical, and biological processes of river ecosystems by (1) fluctuating river levels and altering the timing of flows, (2) blocking the downstream flow of nutrients and sediments, (3) changing water temperatures and oxygen levels, (4) impeding fish from migrating up and down streams or killing them as they pass through turbines used to generate power, and (5) drying out sections of streams.

According to the GAO report, about half of all the hydropower generated is from federally-owned and operated projects, with nearly all the remainder generated at about 1,000 non-federally owned and operated projects, most of which were licensed by FERC decades ago for periods of up to 50 years. The licenses for 395 of these projects expired between January 1, 1993 and December 31, 2000. Many of these were small projects. Over the next 15 years, FERC expects another 238 projects to begin the relicensing process, but many of these are large projects which combined generate over half the nation’s non-federal hydropower.

The report concludes that the licensing process is more complex, lengthy and costly than it was 30-50 years ago, in part due to environmental and land management laws enacted during the 1960s

and 1970s, which require other participating federal and state agencies to address specific resource needs, including protecting endangered species, achieving clean water, and preserving wild and scenic rivers. Public values have changed and “reflect a growing concern about the environmental impact of hydropower projects. Environmental groups and others view the licensing [process] as a once-in-a-lifetime opportunity to have these values and concerns considered.” The report also finds that participants in the licensing process cannot agree on the need for, and type of, further reforms to reduce related time and costs. Some are satisfied with the current process, while others favor further reforms, but “cannot agree on what reforms are needed to shorten the process and make it less costly. Some believe that additional administrative reforms can improve the process and make it more efficient. Others, however, believe that new legislation will be required.” The report states, “[S]ome environmental groups believe that certain licensees deliberately prolong the licensing process to delay the sometimes substantial costs of complying with new license conditions. Conversely, some licensees believe that federal and state land and resource agencies prolong the process and increase the costs to obtain a new license by (1) requesting unnecessary studies; (2) not reviewing licensing applications in a timely manner; (3) analyzing or reanalyzing issues at different steps in the process without any clear sequence leading to their timely resolution; and (4) insisting on unreasonable, and sometimes conflicting, license conditions. Federal and state land and resource agencies, however, counter these claims, saying that licensees are unwilling to conduct studies or to provide additional information required for the agencies to fulfill their statutorily mandated missions and responsibilities. In addition, many licensees, federal and state agencies, and environmental groups believe that FERC has not provided necessary leadership and direction, especially during the pre-application consultation phase, when much of their process-related time and costs can be incurred.”

GAO also found cost data for most participants are not available, stating, “FERC cannot systematically separate its process-related licensing costs from other hydropower-program-related costs or link the costs to specific projects or steps in the licensing process. FERC also cannot identify other federal agencies’ actual costs to participate in the licensing process...” While FERC asks for such costs each year, “...it does not provide clear guidance...on what costs they should report.... Moreover, FERC does not request federal agencies to break down their costs by project or by step in the licensing process. As a result, it cannot link the hydropower-program-related costs...to either specific projects or to the various steps in the process. In addition, FERC does not request, and states generally do not report, their process-related licensing costs. Similarly, FERC does not request licensees to report their process-related licensing costs. Some licensees have, however, voluntarily reported these costs to FERC.... As of February 2001, FERC had compiled data on licensees’ process-related licensing costs for 83 -- or about 20 percent -- of the 395 licenses pending or issued.... However, because FERC did not provide licensees with guidance on what costs they should report, it has no assurance that the reported costs are consistent and comparable. Moreover, since the 83 projects did not represent a randomly selected sample, FERC cannot use these data to project the costs incurred by the universe of 395 projects.”

GAO also concluded that time data are incomplete, stating, “Because a project proceeds through sequential phases, stages, and steps in the licensing process, process-related time data are more readily available than process-related cost data, which vary by participant. However, the time data that FERC has collected are incomplete and limited almost entirely to the post-application analysis phase of the process.” FERC collected data for only one step in the pre-application

consultation phase of the licensing process, which according to FERC “generally requires three years or more to complete and constitutes, on average, more than 60 percent of the total time required to obtain a license.” However, FERC is not collecting time data for administrative and judicial reviews of its license decisions, although FERC often delays the implementation of contested license conditions until these reviews are completed. While FERC has begun gathering more data, available time and cost data will not be linked to project, process and outcome characteristics.

Without complete and accurate time and cost data and the ability to link time and costs to projects, processes, and outcomes, FERC cannot adequately assess public observations and suggestions on how the licensing process might be shortened or made less costly. Further, FERC does not have a schedule for developing a system to track process-related time and costs. GAO concluded, “We recommend that the Federal Energy Regulatory Commission inform the Congress of the extent that time and cost data limitations restrict its ability to reach informed decisions on whether further administrative reforms or legislative changes are needed to shorten the hydropower licensing process or make it less costly.” The GAO’s report is available online at www.gao.gov under the category of ENERGY.

On July 19th, the Senate Energy and Natural Resources Committee received testimony on proposals relating to the hydroelectric re-licensing procedures of the Federal Energy Regulatory Commission (FERC), including S. 71, the Hydroelectric Licensing Process Improvement Act of 2001. The Director of Hydro-Licensing and Water Rights at Portland General Electric Company, Julie Keil, testified, “The urgency surrounding this issue has not dissipated with the passage of time. In fact, with each passing year the stakes increase considerably. Today, as we look at the next 15 years, one-half of all non-federal hydroelectric capacity - nearly 29,000 MW of power (enough to serve 29 million homes) - must undergo the FERC re-licensing process. This includes 240 projects in 38 states, much of it in Western states where power supply is a major concern.” In a written statement, Mr. William Bettenberg, Deputy Director of the Department of Interior’s Office of Policy Analysis, listed the reasons for the average 4.5 year re-licensing process: (1) the average time from filing by the applicant to acceptance of the application by the Commission is about one year; (2) the average time from acceptance of the application by the Commission to the declaration by the Commission that the project is Ready for Environmental Analysis (REA) is about 11 months; (3) the average time to conduct the environmental analysis and issue the license is a little over 2.5 years, following issuance of the REA notice; and (4) even after the license is issued, there are often motions for rehearing with the Commission, and sometimes even challenges in court.⁹³

Columbia River Salmon

The Alaska Department of Fish and Game, with the support of Governor Tony Knowles, has criticized a proposed order prepared by staff for the Federal Energy Regulatory Commission (FERC) to suspend summer spill requirements to increase hydropower generation (Grant County Project No. 2114-091). A letter dated June 11th stated, “The Alaska Department of Fish and Game opposes your staff’s proposed order authorizing an increase in hydro generation at the expense of higher salmon mortality. Even under normal operation, passage success and interdam loss have been a concern

⁹³*Western States Water*, Issue #1420, August 3, 2001.

of Alaska, but your proposal would suspend summer spill entirely this year. The Department does not view the increased salmon mortalities...for the mid-Columbia River summer chinook stock, as de minimis. We are dismayed that your staff has come forward with a spill proposal that so devalues the sacrifices made by the fishing families of Alaska to protect those salmon.... A strong consensus has developed among the managers that additional harvest management restrictions are not going to help us rebuild salmon stocks, in the face of continued destruction and degradation of salmon habitat.... [We urge] you to carefully consider your potential actions and their long-term impacts on salmon, the people of Alaska, as well as those of the Pacific Northwest....”⁹⁴

High Plains/Ogallala Aquifer

Kansas has proposed the Congress consider enacting a High Plains Aquifer Conservation and Environmental Preservation Act to help individual water users, local units of government and states ensure the High Plains’ ground water resources are properly managed. The High Plains Aquifer consists primarily of the Ogallala and a few other distinct, but connected formations. It lies under some 33,500 square miles in 46 counties in Kansas, and extends through eight states from South Dakota to Texas. With limited surface water resources and relatively little precipitation, many areas in the High Plains rely on ground water. Southwestern Kansas gets 99% of its water from the High Plains aquifer, and 97% of that water is used for irrigation. An estimated 15 million acre-feet of water is withdrawn each year for irrigation. There are extensive areas in Kansas where the estimated useable life of the aquifer is now 25 years or less. The proposed legislation and federal agency actions would promote research, mapping and analysis, ground water conservation, cost sharing assistance, education and extension programs, federal financial incentives to “permanently stop irrigating specific tracts of land” for ground water protection and environmental preservation purposes, assistance to switch to dryland farming, and other activities in cooperation with states, and within state water law.⁹⁵

On October 11th, Senators Jeff Bingaman (D-NM), Pete Domenici (R-NM) and James Inhofe (R-OK) joined in introducing two bills designed to promote conservation of ground water resources in the High Plains states. The High Plains Aquifer Conservation, Monitoring and Coordination Act (S. 1537) would authorize the Secretary of Interior to conduct a hydrogeologic mapping, modeling and monitoring program and establish a High Plains Aquifer Coordination Council to facilitate federal, state and local conservation efforts. It also calls for an evaluation of the “effectiveness of Federal and State programs in addressing the present and anticipated groundwater resources issues relating to the High Plains Aquifer,” and recommendations directed to the Secretaries of Interior and Agriculture, and the respective Governors, “...regarding programs and policies and changes in Federal and State law to address the groundwater resources issues of the High Plains Aquifer.”⁹⁶

⁹⁴*Western States Water*, Issue #1414, June 22, 2001.

⁹⁵*Western States Water*, Issue #1399, March 9, 2001.

⁹⁶*Western States Water*, Issue #1434, November 9, 2001.

The Coordinating Council would be appointed by the Secretary of Interior, in consultation with the Secretary of Agriculture, with representation from the U.S. Geological Survey and the Bureau of Reclamation, the U.S. Department of Agriculture's Rural Development Administration and Natural Resources Conservation Service, the respective states' governors, two Indian tribes, and three others from each of the states selected from a list provided by each governor from "irrigation production agriculture," the "municipal and industrial water user community," and the "conservation community." Members would serve four-year terms, and the Council would report biennially on the status of the High Plains Aquifer. The bill also provides for educational assistance. It would authorize \$10 million a year through 2007, and lesser amounts thereafter.

H.R. 1538, the High Plains Groundwater Resource Conservation Act, would amend the 1985 Food Security Act to provide financial incentives and technical assistance to develop and implement comprehensive ground water conservation plans. States could operate approved programs in lieu of the Secretary of Agriculture and certify plans which "achieve significant per acre savings." The bill, under a 50%-50% match, would authorize \$75 million annually, increasing to \$125 million, from funds of the Commodity Credit Corporation. No one entity would receive more than \$50,000.

Indian Water Rights

Washington State Ground Water

The United States, on behalf of the Lummi Nation, filed a complaint in the U.S. District Court for the Western District of Washington in Seattle, requesting that the Court declare an implied reserved right for the Lummi Nation to ground water underlying the Lummi Peninsula. The complaint asks the Court to set a priority date for the reserved ground water right of time immemorial. Further, the plaintiffs assert that non-native development within the reservation has adversely affected the quantity and quality of ground water underlying the peninsula portion of the reservation. Many of the defendants in the case are water associations and individual ground water pumpers who own fee land within the boundaries of the reservation and use the peninsula's ground water resources for domestic and/or commercial purposes under permits issued by the Washington Department of Ecology.⁹⁷

The plaintiffs claim that non-native use is interfering with the ability of the Lummi Nation to exercise its treaty-protected rights to the ground water. They assert that the ground water -- the only source of fresh water on the peninsula -- "has experienced salt water intrusion as a result of excessive pumping." They also claim that the increasing non-native use of ground water has already forced them to discontinue the use of a community well and restrict the use of others. In addition to asking for a quantification of their rights to ground water, the suit asks the Court to enjoin the defendants from withdrawing ground water in conflict with the Nation's rights and to enjoin the state of Washington from asserting an ownership interest in and from regulating the waters underlying the Lummi Peninsula.

⁹⁷*Western States Water*, Issue #1394, February 2, 2001.

Ad Hoc Group on Indian Water Rights

On April 24th, the Ad Hoc Group on Indian Water Rights held a congressional briefing in the Senate Indian Affairs Committee Room. The Ad Hoc Group consists of the Native American Rights Fund (NARF), a tribal advocacy organization located in Boulder, Colorado, the Western Regional Council (WRC), an association of large business interests in the West, the Western Governors' Association (WGA), and the WSWC. Also of note, the State of New York, Office of Federal Affairs, has agreed to join as a member of the group in support of settlements, given the number and extent of land claims being pursued by Native Americans in the state.

Four senators attended and spoke in support of adequate funding for Indian land and water right settlements: Senators Pete Domenici (R-NM), Chairman, Budget Committee; Jon Kyl (R-AZ), Vice Chairman of the Energy and Natural Resources Committee's Water and Power Subcommittee; Ben Nighthorse Campbell (R-CO), Chairman of the Indian Affairs Committee; and Daniel Inouye (D-HI), Ranking Member, Indian Affairs. Over 70 people attended, mostly Congressional staff and federal agency staff.⁹⁸ Mike Brophy, WSWC Chairman, joined John Echohawk, NARF Executive Director, in conducting the briefing. Susan Cottingham, Executive Director of Montana's Reserved Rights Compact Commission, represented Governor Judy Martz and the Western Governors' Association. Executive Director Kit Kimball represented the Western Regional Council.

The briefing began with an historical perspective on settlements presented by Mike Jackson, former long-time congressional staff member to the Senate Indian Affairs Committee. Mr. Jackson was followed by Mike Connor of the Department of Interior, who catalogued current settlement negotiation and implementation efforts, with a focus on those settlements that could come before the 107th Congress. All four senators addressed those in attendance. Senator Domenici announced his intention to introduce legislation to facilitate funding for settlements in such a way as to avoid detriment to other Department of Interior programs. In a March 14th letter to the WGA, Senator Domenici stated, "I am writing to again voice my support for negotiated Indian land and water settlements.... I want to assure you that I have assumed funding for all the current land and water settlements in my draft budget for FY2002. Further, I support a cap adjustment for Indian land and water settlements. It is my intention to introduce legislation that would permit an adjustment to statutory discretionary spending limits for appropriations for previously authorized settlements, to the extent they are not assumed in the President's appropriation request. However, we must first determine the overall budget caps for the coming years before we include such an adjustment." Both Senator Campbell and Senator Inouye expressed their intention to cosponsor such legislation. Senator Kyl also pledged his efforts to promote funding for settlements.

Various Congressional committee staff and federal agency representatives also shared their perspectives. David Burnhardt, Counselor to Interior Secretary Norton, expressed the Department's intent to carry on work in support of negotiated settlements. He indicated that he contemplated the same level of effort as the previous Administration, in recent years, under the leadership of former

⁹⁸*Western States Water*, Issue #1406, April 27, 2001.

Deputy Secretary of Interior David Hayes. Margaret Stewart, of the Senate Budget Committee, shared her expectations as to the form of the legislation to be introduced by Senator Domenici. However, draft language had not been finalized. Norm Starler of the Office of Management and Budget (OMB), while making it clear that OMB had no position as yet with regard to the concept being advanced by Senator Domenici, explained OMB's institutional history of opposing special funding for a specific program, given the fact that every program's constituents believe their interests to be vital and deserving of special consideration. However, he also made it clear that OMB understands the special trust relationship between the United States and tribes. Several people in attendance were staff to members of the House. They called for a similar briefing on the House side, and one was held on September 10-11th. Other suggestions were made for next steps during a roundtable discussion that followed the presentations.⁹⁹

The Fiscal Integrity of Indian Settlements Protection Act

In a May 23th "Dear Colleague" letter, six western senators invited cosponsors to join them in introducing the Fiscal Integrity of Indian Settlements Protection Act of 2001. Senators Jeff Bingaman (D-NM), Ben Nighthorse Campbell (R-CO), Mike Crapo (R-ID), Pete Domenici (R-NM), Daniel Inouye (D-HI) and Jon Kyl (R-AZ) described the purpose of the bill as ensuring that "funds will be available to fulfill the federal government's responsibilities to negotiated Indian land and water settlements." They also addressed the fact that funding for Indian water right settlements now often comes at the expense of other Interior Department programs that are important to Indians and non-Indians.¹⁰⁰

The letter said, "Recently it has been brought to our attention that the current budgetary treatment...may be slowing the conclusion of negotiations.... Due to the limited resources available within statutory discretionary spending caps, the funding...must be taken from other vital Indian programs. Given these constraints, the Indian tribes and other parties to the...negotiations have questioned whether sufficient funds will be available for the federal government to meet the commitments it is making.... Once a settlement agreement has been negotiated, the administration submits to Congress legislation to ratify the agreement and provide authorizations for any federal funding and related actions.... Typically, the finalization of the settlement is contingent upon fulfillment of all its provisions, including appropriation of all authorized federal funding." The letter continued, "[T]he legislation that we will introduce would adjust the discretionary spending limits for an appropriation which funds federal commitments made in previously authorized Indian water or land settlements. This approach would continue the current practice of requiring Congress to first authorize and then appropriate funds for settlements. It would, however, facilitate the funding of settlements by adjusting the discretionary spending limits and the allocation to the Appropriations Committee, without taking scarce resources from other critical programs in the Bureau of Indian Affairs budget within the Department of Interior."

⁹⁹See the WGA website at www.westgov.org/wga/initiatives/iwr/index.htm.

¹⁰⁰*Western States Water*, Issue #1413, June 15, 2001.

The Ad Hoc Group on Indian Water Rights prepared a joint letter in support of such legislation that was signed on behalf of the Western Governors' Association, Western Regional Council, Native American Rights Fund and Western States Water Council.

The Fiscal Integrity of Indian Settlements Protection Act of 2001 was introduced on July 17th, by Senators Pete Domenici (R-NM), Daniel Inouye (D-HI), Ben Nighthorse Campbell (R-CO), Jeff Bingaman (D-NM), Max Baucus (D-MT), Mike Crapo (R-ID), Wayne Allard (R-CO), Tim Johnson (D-SD), and Jon Kyl (R-AZ). The bill (S. 1186) would provide for an annual adjustment to the federal budget cap of up to \$200 million. Appropriations covered by the cap adjustment would be made solely for the purpose of fulfilling the federal government's aggregate commitments in any fiscal year to the settlement of Indian water rights and land claims as authorized by legislation enacted by the Congress and signed into law by the President.¹⁰¹

Under the Budget Act, appropriations authorized to fulfill the federal government's trust responsibilities to individual tribes in settlement of their water rights or land claims are grouped together with other federal spending for Indian programs. Thus, any new appropriations to implement authorized settlement legislation effectively displace funding for other programs, under the current budget caps, thereby making Indian and other Interior programs bear the federal government's share of the cost of settlements. Advocates of the bill note that the number and size of pending settlements makes it imperative to ensure that the federal government's share of the cost of its own legal and trust liabilities to individual tribes is not paid at the expense of programs serving all tribes. Otherwise, a substantial disincentive to settlement of Indian water rights exists.

In a letter dated July 27th urging support for the proposed Senate legislation, the Ad Hoc Group on Indian Water Rights wrote: "We believe that the funding of land and water right settlements is an important obligation of the United States government. The obligation is analogous to, and no less serious than, the obligation of the United States to pay judgements which are rendered against it. We urge that steps be taken to change current budgetary policy to ensure that any land or water settlement, once authorized by the Congress and approved by the President, will be funded. If such a change is not made, these claims will likely be relegated to litigation, an outcome that should not be acceptable to the Administration, the Congress, the tribes or the states."

Fort Peck Compact

On August 10th, after over four years of negotiations, the Montana Water Court approved the Fort Peck Compact.¹⁰² Of the more than 6,200 affected water users, only three objected, an outcome that would have been impossible in court. Consensus was reached on issues that have been fought over for more than 100 years. The Compact successfully quantifies "tribal water rights," specifying the amounts to come from both surface and ground waters, and completes Montana's comprehensive water right adjudication. The Compact was ratified by the Montana Legislature and the Fort Peck Tribal Executive Board, and approved by the Governor and the United States Departments of Justice

¹⁰¹*Western States Water*, Issue #1421, August 10, 2001.

¹⁰²*Western States Water*, Issue #1425, September 7, 2001.

and the Interior. Though wasteful uses of water are prohibited, the compact gives the Assiniboine and Sioux Tribes the right to use water without regard to whether such use is “beneficial” under Montana state law. Even off-reservation diversions are permitted where such are needed to enable the tribes to obtain their agreed amount. The decision sends a message that “good faith negotiations can achieve solutions to difficult problems.”¹⁰³

The U.S. Supreme Court has only applied the Reserved Rights Doctrine to surface waters,¹⁰⁴ but the settlement also addresses ground water use by the Tribes. As early as 1968, the idea of separating surface water rights from ground water rights was criticized. “Whether the [necessary] waters were found on the surface of the land or under it should make no difference.”¹⁰⁵ Arizona has also addressed the use of ground waters as part of settlements of water rights held by Indian tribes on reservations.

The State of Montana and the Montana Water Court did not recognize a federal reserved water right to ground water on the Fort Peck Indian Reservation. The Court found that “[w]hether Indian reserved water rights include groundwater is another unsettled question of federal law.” Faye Bergan, Chief Legal Counsel for the Montana Reserved Water Rights Compact Commission, explains, “The Fort Peck Compact was negotiated between the State of Montana..., the Assiniboine and Sioux Tribes..., and the United States in 1985 as part of Montana’s ongoing statewide adjudication. The Compact recognizes a Tribal Water Right that is in satisfaction of all reserved water right claims of the Tribes.... The Fort Peck Compact does provide for the use of groundwater on the Reservation to satisfy the Tribal Water Right.... Through the process of negotiation, the State recognized use of groundwater in exchange for other limitations on surface water use and protections for state-based water rights.... Each of Montana’s seven Indian reservations is unique and the Fort Peck Compact clearly states that it is not precedent for future negotiations or Court decisions. The Montana Water Court’s decision confirmed the State’s ability to negotiate Indian reserved water right issues, including groundwater use, in the absence of controlling federal law.”¹⁰⁶

The Montana Water Court’s Final Order expressly addressed opposition to the extension of a so-called “Tribal Water Right” -- a term which should not be confused with any federal reserved water right. The court stated, “The Objectors contend that the extension of the Tribal Water Right to groundwater is either not supported by, or is contrary to, federal law.... Given the unsettled state of federal and state law with respect to the issues, the Water Court finds that extension of the doctrine to groundwater in Article III of the Compact is neither supported by, nor prohibited by, controlling federal law. Recognizing this fact, the parties reasonably chose to avoid the risk of litigation by negotiating this issue through the Compact process.”¹⁰⁷

¹⁰³Decision p. 40, cause No. WC-92-1.

¹⁰⁴See *Cappaert v. United States*, 426 US 128 (1976).

¹⁰⁵*Tweedy v. Texas Company*, 286 F.Supp. 383, 385 (D. Mont. 1968).

¹⁰⁶*Western States Water*, Issue #1426, September 14, 2001.

¹⁰⁷Cause No. WC-92-1, Memorandum Opinion, p. 23-24.

Gila River Adjudication

Practicable Irrigable Acreage

On November 26th, the Arizona Supreme Court issued another in a series of interlocutory appeals from the state's general stream adjudication. In an important decision, according to former Special Master John Thorson, the court vacated in part, and affirmed in part, a 1988 trial court ruling that Indian reserved rights would be quantified exclusively using the practicably irrigable acreage (PIA) standard in the Gila River adjudication. The court found the widely accepted PIA standard for measuring the amount of water reserved with the creation of an Indian reservation to be discriminatory and inequitable, because it does not weigh and consider the primary purpose of the reservation, which is to allow the Indians who live there to create an "Indian homeland." Reservations on their face were created as a "permanent home and abiding place" for the aboriginal people, and the primary purpose for also reserving water is to fill the needs of such a "homeland." The unanimous decision was authored by Chief Justice Tom Zlaket.¹⁰⁸

The Court started out with an analysis of the U.S. Supreme Court's Winters Doctrine. In its 1908 *Winters* decision¹⁰⁹, the Court held that when the Congress created Indian reservations, it also implied a reservation of enough water to accomplish the purpose for which the land was set aside. In the past, based on the assumption that the Indians wanted to live an agrarian lifestyle, the PIA standard became accepted as the measure of the amount of water that all Indians needed to make the reservations their permanent home. The PIA standard remains relatively simple to calculate, and the Court recognized that PIA was an effective measure for establishing a predictable quantity of water reserved for any given reservation, thus helping to simplify an already complex area of law.

However, the Court pointed out the discriminatory effect of the PIA standard in limiting an Indian reservation's purpose to agriculture, and completely disregarding the actual lifestyle of its inhabitants. The PIA standard does not allow a tribe to change and use its land and water in different ways as Indian society evolves. Instead it is static, unchangeable, and for many tribes it is entirely unusable due to geographic limitations. The unfortunate tribes that are confined to reservations where irrigation is not feasible cannot get any water under the PIA standard. This blatantly frustrates the "minimal need" of the federal reservation as outlined in the *Cappaert* decision.¹¹⁰ The PIA standard forces Indian tribes to "pretend to be farmers," subjecting them to the risk of establishing large agricultural projects, while the rest of the West is urbanizing and industrializing.

The court reasoned that since the purpose of a reservation is to create a homeland, the purpose must be liberally construed in favor of the Indians thereon.¹¹¹ "A permanent homeland requires

¹⁰⁸*Western States Water*, Issue #1438, December 7, 2001.

¹⁰⁹207 U.S. 564.

¹¹⁰426 U.S. 138, 141.

¹¹¹See *Colville Confederated Tribes v. Walton*, 647 F.2d 42,47 (9th Cir. 1991).

water for multiple uses, which may or may not include agriculture.” When determining the amount of water needed to fill the purpose of a “homeland” for the tribes, the court determined that a personalized, reservation-by-reservation analysis will be needed. Among other considerations, in determining the quantity of water needed to make a reservation a suitable “homeland,” a court should look at the tribe’s history, tribal culture, the reservation’s physical topography, the tribe’s economic base, past water use by the tribe, and the present and projected population of the tribe. A master land use plan for the reservation demonstrating actual water needs is to be considered.

Further, the court also indicated that the distinction between primary-secondary purposes for reservations recognized by the U.S. Supreme Court for national forest lands in *U.S. v. New Mexico*, does not apply to Indian reserved rights. However, the court concluded that quantification of a tribe’s water rights has to be based on the “minimal need,” but that must “satisfy both present and future needs of the reservation as a livable homeland.” Should a tribe seriously propose irrigating some tribal lands, PIA would be an appropriate standard for those lands, but the trial court must determine a proposed development is both achievable from a practical standpoint and economically sound. Though only binding in Arizona, the decision may well be influential elsewhere.¹¹²

FY2002 Appropriations

The House passed version of the Department of the Interior and Related Agencies Appropriations Act of 2002 (H.R. 2217) included \$60.95 million for miscellaneous payments to Indian tribes and individuals, the same as the budget request and an increase of \$23.5 million. Included was \$24.87 million for implementation of enacted Indian land and water claim settlements: \$625,000 for White Earth; \$250,000 for Hoopa-Yurok; \$24.73 million for the Ute Settlement; \$142,000 for Pyramid Lake; \$7.95 million for Rocky Boys; \$6.25 million for Michigan Great Lakes fishing; \$5 million for the Shivwits Band; \$2 million for Santo Domingo Pueblo; \$8 million for Colorado Ute; and \$6 million for Torres Martinez -- according to the Committee report.¹¹³

A House/Senate conference agreement confirmed the President’s request and House figures with \$60.1 million for “miscellaneous payments to Indian tribes and individuals and for necessary administrative expenses...of which \$24,870,000 shall be available for implementation of enacted Indian land and water claim settlements pursuant to Public Laws 101-618 and 102-575, and for implementation of other enacted water rights settlements; of which \$7,950,000 shall be available for future water supplies facilities under Public Law 106-163; of which \$21,875,000 shall be available pursuant to Public Laws 99-264, 100-580, 106,263, 106-425, 106-554, and 106-568....”¹¹⁴

P.L. 100-580 concerns the Hoopa Valley Tribe and the Yurok Indian Reservation lands in California. P.L. 101-618 addresses water right claims of the Fallon Paiute-Shoshone Indian Tribe

¹¹² *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, No. WC-90-0001-IR, is available at: <http://www.supreme.state.az.us/opin/filed2001.htm>.

¹¹³ *Western States Water*, Issue #1414, June 23, 2001.

¹¹⁴ *Western States Water*, Issue #1432, October 26, 2001.

in Nevada. P.L. 106-163 provides for the settlement of water right claims of the Chippewa Cree Tribe of the Rocky Boy's Reservation in Montana. P.L. 106-263 settles water rights claims of the Shivwits Band of the Paiute Indian Tribe in Utah. P.L. 106-425 settles Santo Domingo Pueblo land claims in New Mexico. P.L. 106-568 authorizes construction of the Wakpa Sica Reconciliation Place in Fort Pierre, South Dakota.

P.L. 102-575 is an omnibus authorization bill which subsumes the San Carlos Apache Tribe Water Rights Settlement Act of 1992, the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act and authorizes development of irrigation projects on the Standing Rock Indian Reservation, Ute Indian rights settlement provisions within the Central Utah Project Completion Act, construction of an interim water system for the White Clay and Wakpamni Districts of the Pine Ridge Indian Reservation, a study of incorporating portions of the Rosebud Sioux Reservation into the Mni Wiconi rural water systems project, and other actions.

Missouri River Basin/Corps of Engineers

The Corps of Engineers decided to issue an environmental impact statement on changes to its Missouri River project operations that control the river's flow, without listing a "preferred alternative."¹¹⁵ Instead, the Corps simply presented a list of management alternatives, and dropped a plan to recommend controversial changes in flows designed to benefit endangered species.¹¹⁶ The Corps planned to advocate adjusting river flows to mimic natural conditions, a plan favored by environmentalists and the U.S. Fish and Wildlife Service, who hoped that it would revive several endangered species on the river. The Corps hoped it could avoid potential Endangered Species Act litigation. However, critics of the Corps proposal argued that it would create flooding and harm the barge industry. The decision to drop its proposal also followed recent unanimous Senate action to adopt an amendment calling on the Corps to consider other alternatives to recover the species. According to its author, Senator Kit Bond (R-MO), the amendment would ensure that multiple uses of the river would be pursued. Majority Leader Tom Daschle (D-SD) commented that while he and Bond were in "vast disagreement" about how the problem should be solved, they agreed that the Corps should consider additional options.

On October 9th, the first in a series of workshops was held in Helena, Montana on the Corps of Engineers Revised Draft Environmental Impact Statement (RDEIS) for the Missouri River Master Water Control Manual Review and Update. Released on August 31st, the RDEIS does not identify a preferred alternative, as the Corps "...wants to leave a number of options open for discussion and debate, rather than focusing on the strengths and weaknesses of a single preferred alternative." The RDEIS presents an array of six alternatives, including the Current Water Control Plan, a modified conservation plan, and four alternatives that add various features of the U.S. Fish and Wildlife Service's reasonable and prudent alternative described in its 2000 Biological Opinion.¹¹⁷

¹¹⁵*Western States Water*, Issue #1420, August 3, 2001.

¹¹⁶*St. Louis Post/Dispatch*, August 2, 2001.

¹¹⁷*Western States Water*, Issue #1429, October 5, 2001.

According to Col. David Fastabend, Northwestern Division Engineer, "We have come to a very important point in the review and update process for the Missouri River Master Manual. We feel it is important to present more than one plan and receive comments from the people affected by the proposed changes. The RDEIS includes analyses of the alternatives that allow people to understand and compare the impacts of potential changes." Aside from the current operations plan, each of the other alternatives involve various water releases from Gavins Point Dam, near Yankton, South Dakota, including a spring rise and low summer releases. There are a number of features common to each to the new alternative plans, including drought conservation measures, increasing releases from Fort Peck Dam in Montana, unbalancing and rotating water levels at three upper basin reservoirs, and the use of an overall adaptive management strategy for dealing with change and scientific uncertainty. The RDEIS document also presents a comprehensive description of the economic, social and environmental impacts on fish and wildlife, flood control, navigation, hydropower, water supply, water quality, recreation and irrigation.

Snow Surveys and Water Supply Forecasting

On January 31st, WSWC Chairman Mike Brophy, Associate Director Tony Willardson and representatives of the Salt River Project (SRP) met with Senator Jon Kyl (R-AZ) in Washington, D.C. to seek sufficient funds for the snow survey system to appropriately maintain some 640 SNOTEL automated sites and additional manually measured snow courses operated by the Natural Resources Conservation Service (NRCS). An increase in funding is essential to ensure the continuing availability of critical information on western snowpacks used to project spring and summer streamflows and reservoir inflows. The SRP provides financial and other support, including transportation, for snow course measurements and SNOTEL sites in the Verde and Salt River watersheds. Senator Kyl was receptive and positive responses were also received during meetings with staff in other congressional offices, including Senators Max Baucus (D-MT), Conrad Burns (R-MT), Bob Bennett (R-UT), and Representatives Jim Kolbe (R-AZ) and Ed Pastor (D-AZ). The group also met with the NRCS Chief Pearlie Reed to seek more information and express their vital interests in this critical program.¹¹⁸ The group returned in March to visit other western congressional members and staff.

In February 23rd letters to Agriculture Secretary Ann Veneman and Mitchell Daniels, Director of the Office of Management and Budget, WSWC Chairman Mike Brophy asked the Administration to request \$11,719,000 in FY2002 for the Natural Resources Conservation Service's Snow Survey and Water Supply Forecasting Program. For FY2001, the Administration requested and Congress appropriated \$5,990,000 (\$2,315,000 less than estimated program operation and maintenance costs). The WSWC letter asked for another \$5,719,000 in FY2002 -- \$210,000 for inflation (at 3.5%), \$2,315,000 for current O&M and \$3,194,000 for deferred O&M. The letter asked that the Secretary also consider requesting \$6,958,000 for the first year of a five-year effort to upgrade and modernize the system by converting 249 manually measured snow courses to automated SNOTEL sites.¹¹⁹

¹¹⁸*Western States Water*, Issue #1394, February 2, 2001.

¹¹⁹*Western States Water*, Issue #1397, February 23, 2001.

The letter was sent to follow up on a previous letter approved by the Council in November 2000, urging the Administration to “request sufficient funding to adequately operate and maintain the current system of snow course and SNOTEL automated sites and reverse the erosion that threatens this vital information network.” The letter read in part, “In the West, water is life and much of it flows from mountain snows.... Many federal, state and local entities depend on water supply information gathered and disseminated through the USDA’s snow survey program, administered by the National Water and Climate Center (NWCC)...funded through the Natural Resources Conservation Service’s Conservation Operations Account. Over the past five years, level federal appropriations in the face of inflation and increasing program costs has left this system in serious circumstances. The NWCC has prepared a protocol for discontinuing 10-15% of the SNOTEL sites. Meanwhile, demands for the data continue to increase.... This vital information is used...to project spring and summer water supplies for agriculture, municipal and industrial uses, hydropower production, recreation, fish and wildlife management, endangered species needs, and other purposes. This data is also used to forecast flooding and drought. Without it, human life, property and environmental resources are at a considerably greater risk of loss.”

The FY2002 budget request for the U.S. Department of Agriculture (USDA) was some \$63.25 billion, down \$6.35 billion from the previous year, which was higher in part due to one-time emergency expenditures. Funding for the Natural Resources Conservation Service was also down overall, though ongoing appropriations were up from \$870 million to \$927 million. NRCS’s Conservation Operations account request was \$773.5 million, up from \$714 million. Of that amount, \$6,137,000 was earmarked for the Snow Survey and Water Supply Forecasting Program, up from \$5,990,000. The Council supported a minimum \$2,525,000 increase and a number of western members of the House and Senate agreed to support such an increase.¹²⁰

Senator Jon Kyl (R-AZ) was the first to sign a letter urging the Agriculture Appropriations Subcommittee leadership to approve \$8,515,000 in the NRCS’s Conservation Operations Account for the Snow Survey and Water Supply Forecasting Program. The \$2,525,000 increase would be used to cover cost increases due to inflation and for current operation and maintenance needs. Without such an increase, NRCS has estimated it may not be able to operate some of its automated SNOTEL sites.¹²¹ Joining Senator Jon Kyl (R-AZ), were Senators Wayne Allard (R-CO), Max Baucus (D-MT), Jeff Bingaman (D-NM), Maria Cantwell (D-WA), Mike Crapo (R-ID), Mike Enzi (R-WY), Orrin Hatch (R-UT), Harry Reid (D-NV), Gordon Smith (R-OR), Craig Thomas (R-WY), and Ron Wyden (D-OR). In addition to these twelve, other western Senators supported an increase in funding for the program, and eventually the Congress appropriated the \$8.5 million.¹²²

Of note, in response to the financial crisis facing Pacific Gas & Electric (PG&E), the California Department of Water Resources (DWR) picked up PG&E’s costs as a cooperator in USDA’s snow survey program. Separately, California funds and maintains its own system of snow sensors.

¹²⁰*Western States Water*, Issue #1404, April 13, 2001.

¹²¹*Western States Water*, Issue #1405, April 20, 2001.

¹²²*Western States Water*, Issue #1408, May 11, 2001.

Ironically, in a January letter to Thomas Hannigan, DWR Director, Bradley Powell, USDA's Regional Forester, asked the state to remove snow sensors in the Eldorado, Inyo, Klamath, Sierra and Stanislaus National Forests. The letter read, "We have a long history of working in partnership with the State of California to measure snowpack in the National Forests. Twenty years ago we prepared an Environmental Assessment upon the...request for temporary special use permits to place snow sensors and collect ten years of data at selected sites within designated Wilderness Areas. During the 1980s, temporary special use permits were issued by the individual National Forests. The first snow sensors were installed in the early 1980s and the last snow sensor was installed in 1989. On April 28, 1998, a letter was sent with one final consolidated temporary special use permit.... The permit expired on December 31, 1999. This completed our commitment for ten years of data collection at all snow sensor sites.... We have yet to receive a proposed plan for removal of the sensors and restoration of the sites as required in the permit. If these improvements are not removed by June 30, 2001, it will be necessary for the Forest Service to remove the sensors, restore the sites, and bill the Department as provided in the terms of your permit."¹²³

U.S. Geological Survey - Water Resources Programs

On February 28th, the President released a budget blueprint which contained general budget information.¹²⁴ In a March 2nd memo to senior USGS officials, Director Chip Groat, addressed the agency's FY2002 budget stating, "As a result of stories in several prominent newspapers, there has been much discussion about the status of the U.S. Geological Survey (USGS) budget for FY2002. The Wall Street Journal reported that we were being cut by 22 percent, a cause for great concern both within the bureau and outside among our cooperators, partners, customers, and supporters. The Secretary of the Interior and the Office of Management and Budget (OMB) have received more than 200 letters expressing concern about the budget cut described in the press. I am pleased to tell you that we have made progress in substantially reducing the amount of the proposed cut, but not so pleased to report that the cut currently in the draft budget proposal is still substantial."¹²⁵ Groat added that nothing in the proposed Administration budget was final until released by the President on April 3rd, and the proposed cut and programs to be cut were still being discussed with the Department of the Interior (DOI). "Of course nothing is really final until the Congress has acted on the proposed budget and comes to closure with the Administration," he said.

Groat continued, "This non-specific information describes a 4 percent cut for DOI. There is no specific tabular information about the proposed USGS budget, however there is language about us that is cause for serious concern. It indicates a view of our mission that is inconsistent with our history, current role, and vision put forth in the recent National Research Council report on the role and opportunities for the USGS." The blueprint states, "The budget also proposes to better target many U.S. Geological Survey (USGS) activities. The self-stated performance goal of USGS is 'to provide science for a changing world.' DOI is examining ways to focus USGS on providing sound

¹²³*Western States Water*, Issue #1497, February 23, 2001.

¹²⁴*Western States Water*, Issue #1398, March 2, 2001.

¹²⁵*Western States Water*, Issue #1399, March 9, 2001.

The U.S. Geological Survey released sixteen summary reports covering various river basins and aquifers under the NAWQA program. According to Timothy Miller, Program Chief, "Each assessment describes the occurrence and distribution of pesticides, nutrients, industrial and petroleum-based compounds, metals, and radon, as well as the condition of aquatic habitat and fish, insect, and algal communities. Contaminant sources, land and chemical use, and natural factors are related to water-quality conditions, aquatic life, and stream habitat. Results help to determine what these conditions may imply for the protection and safety of drinking water, for the health of aquatic ecosystems, and for resource management." Included were assessments covering Central Arizona, the Sacramento River, South-Central Texas, Puget Sound and the Upper Colorado River Basin.¹²⁸

In Arizona, the study found the water quality of forest and rangeland streams is primarily determined by natural factors, such as chemical weathering of rocks and soils. EPA goals for phosphorus were exceeded in 24% of samples, while nitrate levels were typically less than national background levels. Over 75% of samples exceeded drinking water guidelines for dissolved solids, but concentrations were diluted by rainfall and snowmelt runoff captured and later released by reservoirs. Lowland ephemeral streams transport only a fraction of the nutrients and dissolved solids, but these accumulate and can degrade ground water quality. Perennial urban streams are effluent dependent, and combine with return flows from agricultural irrigation. Samples exceeded phosphorus goals, dissolved oxygen levels were minimal for fish survival, and organochlorine compounds in streambed sediment and fish tissue exceeded guidelines for protection of aquatic health and fish-eating wildlife.

NAWQA studies to date in nearly 120 agricultural and 35 urban watersheds have led to the following general findings. In agricultural watersheds, nitrogen and phosphorus in surface water commonly exceed levels that contribute to excessive algae. Also, elevated nitrate levels are often found in shallow ground water under farmland. Pesticides are widespread, with at least one found in over 95% of stream samples. Pesticides commonly occur in mixtures. While concentrations are generally low and below drinking water standards, the long-term risk to human health and the environment is unclear. Herbicides -- most commonly atrazine and its byproducts, metolachlor, cyanazine and alachlor -- occur frequently in agricultural streams and ground water. Insecticides such as DDT, dieldrin and chlordane, which are organochlorine compounds, persist in agricultural streams and sediments even though their use was restricted or banned more than 20 years ago.

In urban watersheds, fecal coliform bacteria commonly exceed standards for water-contact sports. Phosphorus concentrations are generally as high as in agricultural streams, while insecticides such as diazinon, carbaryl, chlorpyrifos and malathion in mixtures occur more frequently and at higher levels. Nearly 80% of stream samples contained five or more pesticides. Some 36% of sediment samples exceeded guidelines for organochlorine pesticides. Herbicides -- most commonly atrazine, simazine and prometon -- applied to lawns, golf courses and road right-of-ways -- were detected in 99% of surface water samples and 50% of ground water samples. Volatile organic compounds used in plastics, cleaning solvents and gasoline occur widely in shallow urban ground water. The analysis covered some 60 compounds. The most frequently detected compounds were trichloroethene (TCE), tetrachloroethene (PCE), methylene chloride, the gasoline additive methyl

¹²⁸*Western States Water*, Issue #1412, June 8, 2001.

science to support the Department's land management agencies in their decision-making processes." Groat states, "While we should not and will not do anything to minimize our crucial role in supporting DOI bureaus, we have clearly not done a good job of informing the source of this language, OMB, about the substantial national role of the USGS and its programs. Until we have been successful at this, we have reason to be concerned about the financial health of any of our programs that do not fit the role described in the budget blueprint language. Likewise, any of our cooperators and supporters that have interests in programs outside of the blueprint description have reason for serious concern about their long-term fate and their status in the FY2002 budget request." With respect to USGS, the document stated, "This budget gives priority to those resources and programs that most directly address the science needs of Interior agencies and are related to core mission responsibilities...." There is \$813.4 million for the Surveys, Investigations and Research account, of which \$64.3 million "shall be available only for cooperation with States or municipalities for water resources investigations." This compares with \$862 million and \$62.9 million for FY2001.

Defenders of Wildlife criticized the President's requests for natural resource programs in general, prepared a budget summary that said that a \$44 million decrease in USGS Water Resources Investigations "...will eliminate the National Water Quality Assessment Program and the Toxic Substances Hydrology Research [Program]...on the behavior of toxic substances in surface and ground water..." The documents read, "The 2002 Budget proposes to make increased use of reimbursements or cost-sharing models for certain water quality-related programs to more appropriately reflect the value and benefits of these programs to external customers." Also, the expenditure of appropriated funds is limited to no more than "one-half the cost of...water resources data collection and investigations carried on in cooperation with States and municipalities." Also of note, USGS funds for biological research activities may not be used to "conduct new surveys on private property, unless specifically authorized in writing by the property owner."¹²⁶

National Water Quality Assessment

Senator Jeff Bingaman (D-NM) worked to restore some of the \$44 million cut. A May 11th article in *Science* magazine uses the words "gloomy" and "shocked" to describe the response of stakeholders to the 7.9% cut reported, much of which would fall on water quality programs. The article stated that the USGS Toxic Substances Hydrology Program would drop over 70% to \$4 million and the National Water Quality Assessment Program (NAWQA) faces a 30% cut to \$45 million. George Hallberg chaired the National Academy of Science's NAWQA review committee. He said, "It's the only program we have that really begins to assess the status and look at trends in the nation's water quality." The original scope of study included 60 sites, which was cut back to 42 sites, and the proposed cuts would only allow work at 24 sites to be funded. "You just can't keep reducing the size and call it a national program." Erik Olson with the Natural Resources Defense Council, added, "We're extremely concerned.... It would make it almost impossible for the federal government to have a meaningful understanding of water quality in the United States."¹²⁷

¹²⁶*Western States Water*, Issue #1404, April 13, 2001.

¹²⁷*Western States Water*, Issue #1409, May 18, 2001.

tert-butyl ether (MTBE) and the water treatment by-product trichloromethane. Elevated trace elements, above background levels, were detected for cadmium, lead, zinc and mercury. Levels of zinc and polycyclic aromatic hydrocarbons, related to fossil fuel combustion, are increasing. Toxic compounds were also found in fish tissue, often at higher levels than in the sediments.¹²⁹

U.S. Forest Service Bypass Flows/*Trout Unlimited v. USDA*

In a May 4th letter to U.S. Attorney General John Ashcroft, a number of western Senators urged the new Administration to reverse the United States' position regarding controversial bypass flows imposed by the U.S. Forest Service (USFS) as a condition of land use permit renewals across the West. Senators Wayne Allard (R-CO), Mike Crapo (R-ID), Pete Domenici (R-NM), Mike Enzi (R-WY) and Craig Thomas (R-WY) noted that the previous Bush administration had concluded, after a thorough analysis of statutory and case law, that USFS did not have the authority to impose bypass flows on existing water users. They pointed out that while the Clinton Administration adopted an opposing view, "In response, a 1997 Congressional Task Force found bypass flows illegal and recommended the Forest Service use other means to accomplish their goals consistent with state law." The Senators explain that this issue was about to be litigated in *Trout Unlimited v. USDA*, in the federal district court for Colorado. The Senators urged Ashcroft to reinstate the position that USFS has no authority to impose bypass flows as a condition for a special use permit. The states of Alaska, Arizona, Colorado, Idaho, Nevada, New Mexico and Wyoming have filed briefs in federal court to that effect. The Senators asked Ashcroft to ensure the U.S. takes this position in a May 15 response due in the pending lawsuit.¹³⁰ They conclude, "The best approach to protecting natural resources...is to work with the states. This is an historic opportunity to begin that work."¹³¹

Separately, on May 4th, Senator Larry Craig (R-ID), Chairman of the Energy and Natural Resources Committee's Subcommittee on Forests and Public Land Management, wrote Agriculture Secretary Ann Veneman saying, "I am disturbed by the continued neglect of western water law by the federal government. This action has serious impacts on water rights and water law in the West. The Forest Service has no authority to require this action and should not be involved in negotiating bypass flows.... Former Secretary Madigan concluded that the Forest Service did not have authority to impose bypass flows on existing water users.... The federal government does not have a federal water right regarding land use permits.... I encourage you to take this opportunity to protect our natural resources, including water, by working with the states, not restricting them with overly burdensome policy."

On May 22nd, the House Resources Subcommittee on Forests held a hearing on the U.S. Forest Service's use of "bypass flow" requirements in its permit actions. According to a staff summary briefing paper, the Clinton Administration, in a marked departure from previous federal policy

¹²⁹ For copies of the reports go online at <http://water.usgs.gov/nawqa> or call (703) 648-5715.

¹³⁰ Case No. 96-WY-2686-WD (D.Colo.).

¹³¹ *Western States Water*, Issue #1408, May 11, 2001.

embraced the use of USFS's administrative authority to condition the renewal of permits for existing water development facilities located on national forest lands and require flows bypass dams and other works in order to protect fish habitat.¹³² The staff summary states, "For 135 years, Congress has expressly and repeatedly deferred to the States in the appropriation, administration and adjudication of water resources.... Congress has in no uncertain terms ceded to the States' authority to manage the nation's water resources. It is within this context that we consider the Forest Service 'bypass flow' policy, a policy that gives the Forest Service supposed administrative authority to...requir[e] that a certain, and often times significant, share of a legally vested water right be left instream for the secondary purposes of the Forest. Bypass flows are imposed outside State water allocation processes without regard to prior rights, leaving even the most senior water users--with decades old water rights--susceptible to the specter of having their water, in effect, seized by the federal government.... [T]he policies of every previous Administration, including President Carter's..., held that federal instream flow rights must be acquired in priority under the procedural and substantive requirements of State water law."

Rep. Scott McInnis (R-CO), chaired the hearing. In an opening statement, he said, "I believe that the Forest Service's coercive practice of tying bypass flow restrictions to land use authorizations for existing water facilities represents the single largest threat to water users in Colorado and indeed throughout the West. In my mind, the policy looks an awful lot like federal blackmail. In practical terms, what the policy means is...if you're a municipality or a farmer or a rancher and you rely on a diversion or a ditch or a pipeline located within a National Forest for your drinking water, you are at risk.... This is a seismic shift in 135 years of federal water policy.... Congress and the Courts have made it exceedingly clear that when the federal government wants water, it has to get in line just like every other water user in America."

Senator Wayne Allard testified at the hearing. "Many westerners believe that Colorado and the states, not Washington, should establish state water policy. We know that Colorado already has an effective in-stream flow program in place to protect Colorado rivers from future development. We believe that if the Forest Service wants to increase flows in rivers that cross National Forests, it should work with Colorado's and other states' in-stream programs and/or purchase additional water rights consistent with western water law.... To understand the bypass flow controversy it's important to realize that much of Colorado's municipal and agricultural water is stored in high-mountain reservoirs. Much of this water is released and diverted on or across Forest Service property. While no one argues that the Forest Service has legitimate interests when considering new or future water projects, it is a different matter entirely to condition permit renewal on water forfeiture." He continued, "At the federal level, bypass flow arguments became so heated that in 1992 then Secretary of Agriculture Ed Madigan issued a departmental directive codifying historical Forest Service policy against imposing bypass flows. This directive was secretly repealed in the fall of 1993 without public or congressional input...[and] was not announced until nearly a year later by sheepish Forest Service personnel.... This issue is of great importance to the West, as bypass flow requirements are used to take water that is owned by cities and farmers without compensation,

¹³²*Western States Water*, Issue #1411, June 1, 2001.

notwithstanding the fact that the Task Force found that Congress has not delegated this authority to the Forest Service.”

Forest Service Deputy Chief, Randy Phillips, testified, “The bypass flow issue has raised considerable concerns among a number of water users in the West, particularly in this year of unusually low snow pack. As you know, the Forest Service is currently involved in litigation over the use of bypass flow.... I would like to share with the Committee the agency’s policy views.” He noted that at the request of members of Congress, USDA is reviewing the policy established by Secretary Madigan in an October 6, 1992 letter and will consider “...the benefits and costs of a change from current policy.... It is Forest Service policy and custom to work cooperatively with water facility permit holders to ensure that these authorizations appropriately consider environmental values while enabling permittees to operate and maintain their water facilities....” He added that the Forest Service’s 1980 water policy manual states, “The Forest Service in all matters related to water use and water rights, will endeavor to work cooperatively with the States. Such cooperation will recognize the State’s authority and responsibilities for allocation of waters within the State, and the need for the State to be informed as to uses and future needs of water on the National Forests.... Even though a beneficial use of water...is made by a permittee in connection with the use and occupancy of [USFS] lands, the Regional Forester retains the authority to make discretionary determinations of needed management actions in accordance with the rules and regulations for the use and occupancy of these lands.”

Kent Holsinger, a WSWC member and Assistant Director of the Colorado Department of Natural Resources, testified, “[T]he U.S. Forest Service must abandon the ill-founded, and we believe, illegal, practice of imposing bypass flows on water providers...[and] work within the bounds of state water laws and pursue any federal claims to water in state adjudications.... The Forest Service must attain the secondary purposes of the National Forests by obtaining and exercising water rights in accordance with state and federal laws. Bypass flow claims contravene one of the primary purposes for which the forest lands were reserved--to secure favorable water flows for water providers. Moreover, bypass flows simply don’t work. They fail to provide environmental protection and instead create an atmosphere of hostility, litigation and distrust.”

The USFS is aggressively defending its authority to impose bypass flow requirements as part of its permit process in the case, *Trout Unlimited v. USDA*, where the plaintiff is challenging a joint operation plan for the Poudre River headwaters that is designed to optimize aquatic habitat without causing a loss of water supply to affected water users. Opening and response briefs were filed in the U.S. District Court for Colorado.

Water Adjudication Fee Fairness Act

On February 14th, Congressman Mike Simpson (R-ID) introduced legislation (H.R. 705) to subject the United States to the imposition of fees and costs in proceedings relating to state water rights adjudications. The bill was referred to the House Committee on the Judiciary. Representative Simpson sponsored similar legislation in the last Congress. Senator Mike Crapo reintroduced legislation in the Senate (S. 447), which he first introduced last year as the “Water Adjudication Fee Fairness Act of 2000.” The WSWC Legal Committee worked closely with Senator Crapo and his staff in crafting the bill aimed at requiring federal agencies that file claims in state general water

rights adjudications to pay adjudication fees and costs as would any other user of water. In reference to this bill, Representative Simpson was quoted as saying: "It's only fair that the federal government pays fees when it files for water rights. Right now the federal government takes extreme liberty to file as many claims as it wants without any consequences... This bill would stop this practice."¹³³ The Western Governors' Association adopted a resolution urging Congress to pass such legislation.

Water Conservation/Bridging-the-Headgate Partnership

In a January 19th letter from retiring Commissioner Eluid Martinez, the Western States Water Council and the National Water Resources Association (NWRA) were invited to join the Bureau of Reclamation, NRCS, National Association of State Conservation Agencies, and National Association Conservation Districts in signing a "Bridging-the-Headgate" partnership "Declaration of Cooperation." WSWC Chairman Mike Brophy signed in a February 7th ceremony in Fort Worth, Texas. It commits each entity to work together for the sustainable and efficient use of western agricultural water supplies. The partners declare that they support proactive, voluntary, incentive-based and participatory approaches to water resource management and conservation. Each organization will encourage the formation of local working groups to facilitate networking among local irrigation districts and conservation districts, state water resource and conservation agencies, and local Reclamation and NRCS offices.¹³⁴

¹³³*Western States Water*, Issue #1396, February 16, 2001.

¹³⁴*Western States Water*, Issue #1394, February 2, 2001.

RESOLUTIONS AND POLICY 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 policy positions and resolutions, many of which address proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management, and protection of western water resources. The following were adopted by the Western States Water Council in 2001.

TOTAL MAXIMUM DAILY LOAD RULE REVISIONS

At its March 2001 meetings in Scottsdale, Arizona the Council updated and reiterated its position in a letter to EPA Administrator Christie Whitman regarding total maximum daily loads (TMDLs) for pollutants in waters under state water quality standards. In 2000, the Council submitted detailed comments on proposed revisions to EPA's rules.¹³⁵ The updated position again expressed the Council's strong feeling that any new rule needed a "functional equivalency provision," recognizing existing state processes that acceptably achieved the same desired results, though perhaps not fully fitting with EPA's new rules. The letter further pointed out other changes in the proposed revised rules the Council believed still needed to be made, while also highlighting those changes that had been made that adequately addressed Council concerns, including provisions for flexibility with regard to how TMDLs might be expressed.

¹³⁵WSWC 2000 Annual Report, pp. 87-101.



WESTERN STATES WATER COUNCIL

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Position No. 233

April 16, 2001

Christie Whitman, Administrator
US Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Whitman:

Enclosed is the position of the Western States Water Council regarding EPA's Final Revisions to the TMDL Rules. The Council is comprised of eighteen western states. Governors appoint representatives to the Council from their respective states. The Council transmitted its views relative to the draft rules to the Bush Transition Team and promised to provide the new Administration with its comments in response to the final rules. In identifying issues of continuing concern, the member states of the Council, as co-regulators under the Clean Water Act, offer to work with you to seek common ground in order to effectively discharge our respective responsibilities.

There are a number of provisions in the new regulation that improve the TMDL program. Therefore, we are not urging EPA to start over in developing TMDL rules. However, as the attached position paper reflects, there are significant issues which should be revisited. As you consider these issues, we again offer you our assistance. As states responsible for implementing the TMDL program rules, we believe we offer unique and valuable perspectives to improve the rules in order to more fully realize the benefits for which we all strive.

Sincerely,

A handwritten signature in cursive script that reads "Michael J. Brophy".

Michael J. Brophy, Chairman
Western States Water Council

Enclosure

cc: Senate Environment and Public Works Committee
House Transportation Committee
National Academy of Sciences

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
EPA's Final Revisions to the TMDL Rules
Scottsdale, Arizona
March 16, 2001**

1. The Council continues to feel strongly that a functional equivalency provision is needed within the new rules. Such a provision would allow states to demonstrate that a process, method or approach not fully recognized in the final regulations is acceptable if it achieves the same desired results envisioned by the rules. EPA must acknowledge that many states have already developed processes, methods and approaches to meet court, legislative or stakeholder demands for their existing TMDL programs. These existing processes and approaches should not be compromised or superceded by the new rules as long as states are able to demonstrate a successful water quality restoration program that contains a defined schedule, site-specific water quality goals, and monitoring to document outcomes. Such a provision would be consistent with EPA's stated desire to improve specificity and clarity in the TMDL program while accommodating flexibility on the part of states.
2. The Council supports a one-part 303(d) list of waters impaired due to specific pollutants or unknown causes, with optional listing of "threatened" waters. Waters impaired for other reasons such as "pollution", and which do not require TMDLs in the final rule, should be catalogued in state 305(b) reports, rather than in separate sections of the 303(d) list.
3. EPA's final rule adequately addresses the Council's concerns about retaining flexibility with regard to how TMDLs may be expressed. Specifically, the rule accommodates TMDLs expressed as "other appropriate measures" (or surrogates) in lieu of actual pollutant loads or reductions in load. The Council views this as a critical need which provides more flexibility to states, and which is frequently a more cost effective and practical approach to western nonpoint source TMDLs.
4. EPA's final rule extends the 303(d) listing cycle from two years to four years, beginning with the 2002 list. These changes address the Council's request for less frequent 303(d) reporting and a delayed implementation of the new requirements.
5. EPA's final TMDL rule fully addresses the Council's concerns regarding the need for flexibility in state TMDL prioritization approaches regarding threatened and endangered species. Under the new rules, states are requested to apply high priority designations to listed waters that provide habitat for endangered or threatened species, and to sources of drinking water. However, states may explain why such designations are not appropriate. The Council

endorses these final changes which provide a greater accommodation of state-specific circumstances and needs.

6. The Council recognizes the need for schedules and targets to complete TMDLs. However, given the uncertainties that accompany TMDL development, the Council continues to encourage maximum flexibility for approving modifications to interim specific schedules and pace.
7. EPA has delayed implementation of the final rule until approximately 15 months after signature. Further, the new requirements will not be applied to TMDLs submitted by states until July 1, 2002. These provisions of the final rule satisfactorily address the Council's request for a 12-month transition period between the old and new regulations.
8. EPA has not been responsive in their final rule to Council concerns pertaining to TMDL implementation requirements. Specifically, the Council expressed concern that TMDL implementation needed to be emphasized in state programs, but that established water quality management planning provisions of the Clean Water Act should be utilized rather than adding new mechanisms. Further, the Council feels that TMDL implementation plan elements should be provided in the form of guidance to states, not regulations. The proposed TMDL rules call for the concurrent submittal of implementation plans as part of the TMDL package. States believe that the specific implementation plans for a particular TMDL should not be subject to EPA approval. Instead, states should identify in the TMDL submittal the specific programmatic mechanisms that the state relies upon to provide reasonable assurance that the TMDL will be implemented.
9. The Council supports requirements contained in the final rule for public participation in all aspects of 303(d) listing, listing methodologies, TMDL schedules, and TMDLs. EPA was responsive to Council concerns pertaining to a proposed 303(d)-related public petition process and dropped this provision from the final rule.
10. EPA entirely removed proposed provisions of the rule requiring NPDES permitting or Section 401 certification for certain categories of agricultural and forestry activities. The Council strongly endorses these changes contained in the final rule, consistent with our position on the draft rules.
11. EPA eliminated a proposal requiring pollution offsets for new or expanded discharges to listed waters. The Council wholeheartedly supports this change, consistent with an earlier request to postpone the action. However, pollution offsets should be allowed when needed by the states.
12. The Council remains concerned about fiscal impacts of the final rule on state TMDL programs. Specifically, the final rule will require more state resources to be directed toward administrative and record keeping responsibilities. This will result in greater limitations in available resources for water quality restoration. The Council recognizes the increase provided in TMDL funds through additional 106 funding, but the GAP analysis shows that

states do not have the resources that will be necessary to develop and implement TMDLs. EPA and Congress need to fully acknowledge these increased program costs and be prepared to offset the fiscal impacts through additional appropriations.

13. EPA's final rule (130.26) defines any Tier 3 waterbody, (Outstanding Natural Resource Waters), as impaired if there has been any decline in the level of water quality since it was designated. It further requires that such waters be listed on the 303(d) list and that TMDLs be prepared. The Council is concerned about the practicality, usefulness and resource demands of completing TMDLs for such high quality waters that show even the slightest decline in water quality. The Council believes the criteria of "any decline" must be expanded and clarified to justify listing high quality waters on the 303(d) list and to make it more likely that the scientific precision of a TMDL could effect a positive change in water quality.
14. EPA's final rules require that implementation plans must assure the attainment of water quality standards in not more than 10 years unless the state can demonstrate with credible and scientific information that this is not reasonable. The Council is concerned that there are many waters which will not attain water quality standards within 10 years. EPA's rule creates a false expectation that nearly all impaired waters will be corrected within this time frame. The Council encourages EPA to maintain realistic expectations and to not make the demonstration process too cumbersome and time consuming for those waters that require more time to restore water quality. While some certainty regarding achievement of water quality standards is desirable, the Council proposes instead of the not more than 10 year requirement for all implementation plans that TMDLs enunciate, along with schedules of "activities" to implement, the estimate of the time period it will take to meet standards.
15. Under the final rule, EPA assumes the power to issue its own NPDES permit in listed waterbodies, and perhaps even in unlisted waterbodies, even while a valid permit exists and the State is drafting the renewal permit. The Council is concerned that by conferring upon itself the option to cancel administratively-continued state NPDES permits, the EPA will be assuming additional authority to implement TMDLs on its own and will subvert the State's ability to institute consensus-based implementation plans that equitably distribute the pollution reduction between mixed point and nonpoint source components.

WESTERN WATER POLICY REVIEW ADVISORY COMMISSION

In addressing a sunset position regarding the recommendations of the Western Water Policy Review Advisory Commission (WWPRAC),¹³⁶ the Council renewed and reiterated its opposition to one of the primary recommendations calling for “fundamental changes in institutional structure and government process....,” as wrongly “incorporating top-down approaches to water management by federal river basin commissions, which have been tried and failed in the past.” The Council also expressed serious concerns with other recommendations in the report which “... either directly conflict with existing state water law and policy, or fail to provide for adequate partnerships between the state and federal agencies on key policy issues.” While the Congress had taken no action on the 1997 WWPRAC recommendations, the Council chose to again express its deep reservations and adopted the following position in order to be prepared to address any future activity intended to implement these misguided recommendations.

¹³⁶WSWC 1998 Annual Report, pp. 42-48.

POSITION STATEMENT
of the
WESTERN STATES WATER COUNCIL
relative to the recommendations of the
WESTERN WATER POLICY REVIEW ADVISORY COMMISSION
Scottsdale, Arizona
March 16, 2001

Introduction

The Western States Water Council is an organization representing eighteen states. Members are appointed by their respective governors to address a broad range of water policy issues affecting the West. In this context, the Council responded to the recommendations of the Western Water Policy Review Advisory Commission (WWPRAC) in a letter dated November 14, 1997. The Commission had been charged by the Congress to prepare a report to the President on "federal activities in the nineteen western states which directly and indirectly affect the allocation and use of water resources...." The Council understood the difficulty of the task undertaken by the Commission and spent considerable time itself in reviewing draft reports and recommendations, as well as the Commission's final report. While commending the Commission for the time spent and commitment made by the Commission and its staff, the Council in its November 1997 letter expressed concerns with several of the Commission's recommendations. At the beginning of a new Congress and federal Administration, the Council wishes to reiterate the concerns expressed in its earlier letter in the form of this position statement.

Governance

The Council takes issue with the Commission's primary recommendations related to "fundamental changes in institutional structure and government process...." incorporating top-down approaches to water management by federal river basin commissions, which have been tried and failed in the past. Such an approach is the antithesis of the local bottom-up watershed approaches to identifying and solving water-related problems, which have gained favor and momentum westwide. The report's overall reliance on federal action and authority contrasts with existing interstate compacts and the growing recognition of the pivotal role states must play if we are to successfully deal with the complex challenges we face in water resources. In order to effectively carry out this role, flexibility and innovation at the state level is necessary. This emerging model for water governance moves away from federal mandates and institutional structures.

The final report states an intention to support such local initiatives. However, the suggested use of federal basinwide governance pilot projects ignores the success of many innovative state and local efforts undertaken without the need for federal direction or federal leadership, and threatens further successes by the imposition of the proposed governance structure.

Importantly, the final report fails to define the problem or problems that require a federal solution in the form of a federal river basin plan to be developed by a federal river basin commission. Local watershed councils or groups should be allowed to define and resolve problems without forced federal solutions as a condition of priority federal financial assistance and expedited regulatory action.

While enhanced federal policy and budget coordination, as well as expedited regulatory reviews and decisions, are commendable objectives, the prospect for their attainment is dim. The proposal for federally created and operated top-down river basin commissions is unworkable and unacceptable.

Conflicts with State Water Law and Institutions

The Council has serious concerns with other recommendations in the report which either directly conflict with existing state water law and policy, or fail to provide for adequate partnerships between the state and federal agencies on key policy issues. For example, while the report states an intention to “respect” state water law, the report also recommends changes in state management of ground water and allocation of conserved water which are contrary to current state laws.

Recommendations relative to the review of authority and operations of existing dams and hydroelectric facilities, would promote federal objectives without adequately addressing concomitant state interests. Other recommendations would condition distribution of federal funds based solely on federal policy considerations without adequate state and stakeholder input. Such undertakings will require effective partnerships between state and federal agencies, as well as affected stakeholders.

Summary

The federal government’s preemption of state authority is not the way to address the complex issues associated with western water management. The report, if implemented, would move us in the wrong direction, adversely affecting states’ abilities to efficiently address our water resource problems. The suggested federal role would create more problems than it would resolve. The recommendations regarding state authority are placed in the context of the report’s conclusions that would undermine the long-established congressional policy of deference to state water allocation law. The Western States Water Council strongly opposes this and similar recommendations in the report. More detailed comments on the report were provided by many of our member states.

The Council invites reference to a published report prepared by it for the Commission entitled, “Water in the West Today: A States’ Perspective.” This report was prepared by Council members and staff in response to a request from the Commission. The report relates to directives given to the Commission to: (1) review present and anticipated water resource problems affecting the nineteen western states; (2) review the problems of rural communities relating to water supply, potable water treatment, and wastewater treatment; (3) review the need and opportunities for additional storage or other arrangements to augment existing water supplies, including water conservation; (4) examine institutional arrangements to address problems of water allocation, water quality, planning, flood control, and other aspects of water development and use; and (5) review the respective roles of both the federal government and the states and examine federal-state relations regarding various aspects of water allocation and use.

The Council’s report (published by the Commission) is based on responses elicited through a written request for information from the Council’s member states, as well as several subsequent telephone conversations. Appendix I of the report contains the individual state responses, which exemplify both the commonality and diversity of challenges associated with the management of water resources in the West. Appendix II contains relevant policy positions of the Council, as well as the Western Governors’ Association, with which the Council is formally affiliated.

FEDERAL WATER AND CLIMATE DATA COLLECTION/ANALYSIS PROGRAMS

Facing the potential loss of critical data related to snowpack, streamflows and projected water supplies -- due to a lack of federal funding for the Snow Survey and Water Supply Forecasting Program, under the U.S. Department of Agriculture's Natural Resources Conservation Service, as well as proposed cuts to the U.S. Geological Survey's Water Resources Division, within the Department of the Interior -- the Council adopted the following position. It was widely distributed to western congressional delegations. In an unusual effort, WSWC officers, members and staff personally expressed their support for these programs to members of the Congress and the Administration in a successful effort to gain adequate funding. The position notes that "...without timely and accurate information, human life, health, welfare, property and environmental and natural resources are at considerably greater risk of loss." Further, with many western states suffering from drought, the position notes the importance of water and related climate data in projecting future water supplies.

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
FEDERAL WATER AND CLIMATE DATA COLLECTION AND ANALYSIS PROGRAMS
Scottsdale, Arizona
March 16, 2001**

WHEREAS, the Western States Water Council is a policy advisory body representing eighteen states, and has long been involved in western water conservation, development, protection and management issues, and our member states and political subdivisions have long been partners in cooperative federal water and climate data collection and analysis program; and

WHEREAS, in the West, water is a critical, vital resource (much of which originates from mountain snows) and sound decisionmaking demands accurate and timely data on precipitation, temperature, soil moisture, snow depth, snow water content, streamflow, and similar information; and

WHEREAS, the demands for water and related climate data continue to increase along with our population and this information is used by federal, state, tribal and local government agencies and private entities and individuals to forecast flooding and drought, and project future water supplies for agricultural and municipal and industrial uses, hydropower production, recreation, and environmental purposes, such as fish and wildlife management, including water for endangered species needs; and

WHEREAS, without timely and accurate information, human life, health, welfare, property and environmental and natural resources are at considerably greater risk of loss; and

WHEREAS, critical, vital information is gathered and disseminated through the Snow Survey and Water Supply Forecasting Program, administered by the National Water and Climate Center (NWCC) in Portland, Oregon and funded through USDA's Natural Resources Conservation Service (NRCS), while equally essential data on streamflows is gathered and disseminated through the U.S. Geological Survey's Cooperative Streamgaging Program and National Streamflow Information Program, which is funded through the Department of Interior; and

WHEREAS, over a number of years, federal appropriations have not kept up with increasing program costs and/or matching non-federal contributions, and this erosion in funding has led or will lead to the discontinuance, disrepair and obsolescence of a significant number of manual snow courses, automated SNOTEL (SNOWTElemetry) sites, and streamgages; and

WHEREAS, state-of-art technology has been developed to provide real or near real-time data with the potential to vastly improve the water-related information available to decisionmakers in natural resources and emergency management, and thus better protect the public safety, welfare and the environment; and

WHEREAS, there is a serious need for adequate and consistent federal funding to maintain, restore, modernize, and provide for targeted expansion of NWCC's SNOTEL System and Soil and Climate Analysis Network (SCAN), and USGS's Cooperative Streamgaging Program and National Streamflow Information Program, with a primary focus on coordinated data collection and dissemination.

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council urge the Administration and the Congress to give a high priority to the allocation and appropriation of sufficient funds for these critical, vital programs which benefit so many, yet have been or are being allowed to erode to the point that it threatens the quantity and quality of basic data provided to a myriad, growing and diffuse number of decisionmakers and stakeholders, with significantly adverse consequences.

EPA DRAFT PUBLIC PARTICIPATION POLICY

Having been made aware of a draft Environmental Protection Agency policy regarding public participation, the Council approved the following brief letter expressing support for the concepts presented, while pointing out many states “already have equivalent or equally effective policies in place,” and stating there was no need for additional federal requirements.



WESTERN STATES WATER COUNCIL

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

Web Page: www.westgov.org/wswc

Position 236

April 16, 2001

Patricia A. Bonner
U.S. Environmental Protection Agency
Office of Policy, Economics and Innovation (MC 1802)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Ms. Bonner:

The Western States Water Council has reviewed the published Draft Public Participation Policy. The Council is comprised of representatives appointed by the governors of eighteen western states. The Council agrees that the concepts outlined in the Draft Public Participation Policy are good policy for public participation. However, the policy should clearly recognize that states already have equivalent or equally effective policies in place, and the draft policy should not be used as a checklist to evaluate state programs and impose new public participation requirements on states beyond that required by existing law or regulation.

Sincerely,

A handwritten signature in cursive script that reads 'Michael J. Brophy'.

Michael J. Brophy, Chairman
Western States Water Council

CLEAN WATER STATE REVOLVING LOAN FUND

A number of WSWC members raised concerns regarding deliberations in the Congress over funding for Clean Water Act programs, specifically the Clean Water State Revolving Loan Fund, and a new federal grant program for combined sewer/storm drain overflow problems. Given the current backlog for money from the Fund for projects to address myriad point and nonpoint source pollution problems, the Council urged the Congress to provide separate funding for the new program, which was primarily designed to address the needs of "wet weather" states. The following letter was sent to key congressional members and western congressional delegations.



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Web Page: www.westgov.org/wswc

Position No. 237

July 16, 2001

The Honorable James T. Walsh, Chairman
House Appropriations Subcommittee
on VA, HUD, & Independent Agencies
H-143 Capitol Building
Washington D.C. 20515-6022

Dear Chairman Walsh:

On behalf of the Western States Water Council, representing 18 western states who are actively involved in managing both water quality and quantity, let me express our appreciation to you for your past support for state water quality management programs under the Clean Water Act.

As the Congress begins deliberations in earnest regarding Clean Water Act funding, we wish to draw your attention to the need to properly fund the Clean Water State Revolving Loan Fund (CWSRF). The CWSRF is an extremely efficient and effective mechanism to address both point and nonpoint source pollution problems. All of our Council states are actively engaged in administering these funds to insure their availability in perpetuity to address municipal wastewater and nonpoint source pollution control needs. Recent analyses suggest that \$3 billion annually is needed to capitalize the fund. Congress should appropriate at least \$1.35 billion for the CWSRF this year to maintain current funding levels in the face of such large demands for funding.

We are aware of the fact that Congress recently passed H.R. 4577 which, among other things, creates a new grant program to fund sewer overflow control grants. We believe the legislation intended to fund this new program only after the CWSRF was funded at \$1.35 billion. We do not question the need to address these wet weather problems in certain areas of the nation. It is the Council's position that the wet weather grant program should not be funded at the expense of maintaining CWSRF funding. We urge your support for maintaining current funding levels for the CWSRF and that additional funds be provided to fund the new wet weather grant program. Merely shifting funding from one under funded program to another is not the way to solve the nation's water quality problems.

We thank you for your attention to these important issues and would welcome the opportunity to clarify any of these points.

Sincerely,

A handwritten signature in cursive script that reads 'Michael J. Brophy'.

Michael J. Brophy, Chairman
Western States Water Council

cc: House Appropriations Subcommittee on VA, HUD, & Independent Agencies



WESTERN STATES WATER COUNCIL

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

Web Page: www.westgov.org/wswc

Position No. 237

July 16, 2001

The Honorable Alan B. Mollohan
Ranking Minority Member
House Appropriations Subcommittee
on VA, HUD, & Independent Agencies
H-143 Capitol Building
Washington D.C. 20515-6022

Dear Representative Mollohan:

On behalf of the Western States Water Council, representing 18 western states who are actively involved in managing both water quality and quantity, let me express our appreciation to you for your past support for state water quality management programs under the Clean Water Act.

As the Congress begins deliberations in earnest regarding Clean Water Act funding, we wish to draw your attention to the need to properly fund the Clean Water State Revolving Loan Fund (CWSRF). The CWSRF is an extremely efficient and effective mechanism to address both point and nonpoint source pollution problems. All of our Council states are actively engaged in administering these funds to insure their availability in perpetuity to address municipal wastewater and nonpoint source pollution control needs. Recent analyses suggest that \$3 billion annually is needed to capitalize the fund. Congress should appropriate at least \$1.35 billion for the CWSRF this year to maintain current funding levels in the face of such large demands for funding.

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We thank you for your attention to these important issues and would welcome the opportunity to clarify any of these points.

Sincerely,

A handwritten signature in cursive script that reads 'Michael J. Brophy'.

Michael J. Brophy, Chairman
Western States Water Council

cc: House Appropriations Subcommittee on VA, HUD, & Independent Agencies



WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/wswc

Position No. 237

July 16, 2001

The Honorable Barbara A. Mikulski, Chairman
Senate Appropriations Subcommittee
on VA, HUD, & Independent Agencies
709 Hart Senate Office Building
Washington D.C. 20510

Dear Chairman Mikulski:

On behalf of the Western States Water Council, representing 18 western states who are actively involved in managing both water quality and quantity, let me express our appreciation to you for your past support for state water quality management programs under the Clean Water Act.

As the Congress begins deliberations in earnest regarding Clean Water Act funding, we wish to draw your attention to the need to properly fund the Clean Water State Revolving Loan Fund (CWSRF). The CWSRF is an extremely efficient and effective mechanism to address both point and nonpoint source pollution problems. All of our Council states are actively engaged in administering these funds to insure their availability in perpetuity to address municipal wastewater and nonpoint source pollution control needs. Recent analyses suggest that \$3 billion annually is needed to capitalize the fund. Congress should appropriate at least \$1.35 billion for the CWSRF this year to maintain current funding levels in the face of such large demands for funding.

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We thank you for your attention to these important issues and would welcome the opportunity to clarify any of these points.

Sincerely,

A handwritten signature in cursive script that reads "Michael J. Brophy".

Michael J. Brophy, Chairman
Western States Water Council

cc: Senate Subcommittee on Veterans, Housing and Urban Development



WESTERN STATES WATER COUNCIL

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

Web Page: www.westgov.org/wswc

July 16, 2001

Position No. 237

The Honorable Christopher "Kit" Bond
Ranking Minority Member
Senate Appropriations Subcommittee
on VA, HUD, & Independent Agencies
274 Russell Senate Office Building
Washington D.C. 20510

Dear Senator Bond:

On behalf of the Western States Water Council, representing 18 western states who are actively involved in managing both water quality and quantity, let me express our appreciation to you for your past support for state water quality management programs under the Clean Water Act.

As the Congress begins deliberations in earnest regarding Clean Water Act funding, we wish to draw your attention to the need to properly fund the Clean Water State Revolving Loan Fund (CWSRF). The CWSRF is an extremely efficient and effective mechanism to address both point and nonpoint source pollution problems. All of our Council states are actively engaged in administering these funds to insure their availability in perpetuity to address municipal wastewater and nonpoint source pollution control needs. Recent analyses suggest that \$3 billion annually is needed to capitalize the fund. Congress should appropriate at least \$1.35 billion for the CWSRF this year to maintain current funding levels in the face of such large demands for funding.

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We thank you for your attention to these important issues and would welcome the opportunity to clarify any of these points.

Sincerely,

A handwritten signature in black ink that reads "Michael J. Brophy".

Michael J. Brophy, Chairman
Western States Water Council

cc: Senate Subcommittee on Veterans, Housing and Urban Development

STATE WATER LAW DEFERENCE, GENERAL ADJUDICATIONS AND FEES

The following position was adopted and sent to key members of the Congress and the Administration, urging the appropriation of funds to cover the costs states have incurred as a result of processing federal claims to water as part of general state stream adjudications. The resolution notes that the Congress "...has consistently recognized the primacy of state water law and...enacted the McCarran Amendment...to allow the joinder of the United States in state general stream adjudications, and Congress intended the United States to be subject to the same procedures as all other water right claimants joined in state general stream adjudications...." In a continuing dispute over federal agencies some times filing inflated claims, refusing to pay related filing fees, and claiming sovereign immunity, the Council urged the Congress to pass legislation requiring the agencies to participate in state administrative and judicial proceedings, pay applicable fees, and otherwise comply with all substantive and procedural laws related to state water rights adjudication and administration.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
URGING CONGRESS TO REAFFIRM ITS DEFERENCE TO STATE WATER LAW,
PROVIDE FOR THE WAIVER OF THE UNITED STATES' IMMUNITY TO
PARTICIPATION IN STATE ADMINISTRATIVE AND JUDICIAL PROCEEDINGS,
AND PROVIDE FOR PAYMENT OF FEES REQUIRED BY STATE LAW

WHEREAS, water is the lifeblood of each of the arid Western States, the allocation of which determines the future of each Western State's economic, environmental, social and cultural fortunes; and

WHEREAS, each Western State has developed comprehensive systems for the appropriation, use and distribution of water tailored to its unique physiographic, hydrologic and climatic conditions found within that state;

WHEREAS, the United States does not have a water management system that is equivalent to those of the Western States for the appropriation, use or distribution of water; and

WHEREAS, Congress has consistently recognized the primacy of state water law because of the need for comprehensive water management systems tailored to the unique needs and characteristics of the individual states; and

WHEREAS, Congress enacted the McCarran Amendment, 43 U.S.C. § 666, to allow the joinder of the United States in state general stream adjudications, and Congress intended the United States to be subject to the same procedures as all other water right claimants joined in state general stream adjudications; and

WHEREAS, many of the Western States are conducting general stream adjudications for the purpose of quantifying all water right claims in accordance with the McCarran Amendment; and

WHEREAS, the United States is often the largest claimant of water rights in these general stream adjudications, and the adjudication of federal water right claims requires a large commitment of time, effort and resources by the state courts and by state agencies; and

WHEREAS, the adjudication of water rights claims is absolutely essential for the orderly allocation of water in all the Western States where state law is based on the prior appropriation doctrine; and

WHEREAS, many of the Western States' general stream adjudication procedures require claimants to pay a fee to offset the states' expenses arising from state general stream adjudications; and

WHEREAS, citing to *United States v. Idaho* the United states claims immunity from the payment of adjudication filing fees required of all other claimants to offset the state's judicial and administrative expenses in conducting general stream adjudications; and

WHEREAS, for the United States to be immune from sharing in the expenses of these proceedings constitutes an unfunded federal mandate to the states; and

WHEREAS, the United States contends that it cannot be joined in state administrative or judicial proceedings with respect to water rights it has acquired under state law other than pursuant to the McCarran Amendment, 43 U.S.C. § 666; and

WHEREAS, it is inefficient and wasteful to require that a separate lawsuit be commenced for the sole purpose of regulating water rights acquired by the United States under state law; and

WHEREAS, the United States claims it is also immune from paying fees to states that are required of all other water users for the appropriation, use or distribution of water; and

WHEREAS, equity and fairness dictate that federal agencies who voluntarily seek to appropriate water pursuant to state law, or who acquire water rights based on state law, should be required to comply with state law, including the payment of fees, to the same extent as all other persons.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council supports passage of legislation that at a minimum provides for the following:

1. Requires the federal government to participate in all state administrative and judicial proceedings with respect to water rights it acquires to the same extent as all other persons.
2. Requires the federal government to pay filing fees (not Native American tribes) as well as comply with all other state substantive and procedural water right adjudication laws to the same extent as all other persons.

Position No. 208
Revised and readopted November 16, 2001
*(Originally adopted Nov. 17, 1995, and
readopted Nov. 20, 1998)*

3. Requires the federal government to pay applicable fees as well as comply with all other state substantive and procedural laws for the appropriation, use and distribution of water rights to the same extent as all other persons.
4. Provides for state administration of all water rights.

BE IT FURTHER RESOLVED that the Western States Water Council also urges Congress to appropriate moneys for payment of unpaid fees to states that have incurred expenses as a result of processing federal claims or federal objections to private claims in state general stream adjudications.

BE IT FURTHER RESOLVED that the Western States Water Council shall send a copy of this resolution to the congressional delegations representing the states and territories who are members of the Western States Water Council, to President George W. Bush, and to the President Pro-Tem of the United States Senate and the Speaker of the United States House of Representatives.

WESTERN STATES WATER COUNCIL

**REPORT OF INDEPENDENT ACCOUNTANTS
AND
FINANCIAL STATEMENTS**

June 30, 2001

HANSEN, BARNETT & MAXWELL
A Professional Corporation
CERTIFIED PUBLIC ACCOUNTANTS

WESTERN STATES WATER COUNCIL

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HANSEN, BARNETT & MAXWELL

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Salt Lake City, Utah 84111-2693

REPORT OF INDEPENDENT ACCOUNTANTS

To the Executive Committee
Western States Water Council
Midvale, Utah

We have audited the accompanying combined balance sheet of Western States Water Council as of June 30, 2001, 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 auditing standards generally accepted in the United States and the standards applicable to financial audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Western States Water Council as of June 30, 2001, and the results of its operations for the year then ended in conformity with accounting principles generally accepted in the United States.

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

In accordance with *Government Auditing Standards*, we have also issued a report dated August 22, 2001 on our consideration of Western States Water Council's internal control over financial reporting and on our tests of its compliance with certain provisions of laws and regulations. That report is an integral part of an audit performed in accordance with *Government Auditing Standards*, and should be read in conjunction with this report in considering the results of our audit.

HANSEN, BARNETT & MAXWELL

Salt Lake City, Utah
August 22, 2001

**WESTERN STATES WATER COUNCIL
COMBINED BALANCE SHEET
JUNE 30, 2001**

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, 2001</u>	<u>June 30, 2000</u>
Assets					
Cash	\$ 235,038	\$ —	\$ —	\$ 235,038	\$ 186,746
Prepaid expenditures	3,832	—	—	3,832	3,832
Deposits	1,501	—	—	1,501	1,501
General fixed assets (office equipment)	—	107,969	—	107,969	105,228
Other Debits					
Amount to be provided for payment of compensated absences	—	—	20,708	20,708	20,654
Total Assets	<u>\$ 240,371</u>	<u>\$ 107,969</u>	<u>\$ 20,708</u>	<u>\$ 369,048</u>	<u>\$ 317,961</u>

LIABILITIES AND FUND BALANCE

Liabilities					
Accounts payable	\$ 7,336	\$ —	\$ —	\$ 7,336	\$ 5,413
Obligations for compensated absences	—	—	20,708	20,708	20,654
Total Liabilities	<u>7,336</u>	<u>—</u>	<u>20,708</u>	<u>28,044</u>	<u>26,067</u>
Fund Balance					
Investment in general fixed assets	—	107,969	—	107,969	105,228
Designated fund balance - equipment replacement	6,547	—	—	6,547	2,404
Undesignated fund balance	<u>226,488</u>	<u>—</u>	<u>—</u>	<u>226,488</u>	<u>184,262</u>
Total Fund Balance	<u>233,035</u>	<u>107,969</u>	<u>—</u>	<u>341,004</u>	<u>291,894</u>
Total Liabilities And Fund Balance	<u>\$ 240,371</u>	<u>\$ 107,969</u>	<u>\$ 20,708</u>	<u>\$ 369,048</u>	<u>\$ 317,961</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, 2001**

	Budget	Actual	Variance Favorable (Unfavorable)	Actual 2000 (for Comparison Only)
	<u>2001</u>	<u>2001</u>	<u>2001</u>	<u>Only</u>
Revenues				
Member states' assessments	\$ 437,500	\$ 437,500	\$ —	\$ 412,500
Newsletter receipts	10,700	8,700	(2,000)	10,450
Symposium fees	11,026	13,200	2,174	23,467
Miscellaneous income	—	—	—	116
Interest income	<u>14,115</u>	<u>22,514</u>	<u>8,399</u>	<u>17,024</u>
Total Revenues	<u>473,341</u>	<u>481,914</u>	<u>8,573</u>	<u>463,557</u>
Expenditures				
Current				
Salaries	222,085	226,927	(4,842)	202,818
Travel	29,661	23,247	6,414	26,398
Payroll taxes and employee benefits	87,034	89,444	(2,410)	80,968
Printing and reproduction	13,559	11,807	1,752	12,525
Rent	23,548	23,571	(23)	22,500
Freight and postage	10,621	13,090	(2,469)	8,451
Telephone	4,494	3,780	714	4,040
Utilities	2,432	2,903	(471)	2,138
Maintenance contracts	4,673	5,661	(988)	7,347
Office supplies	5,722	2,042	3,680	6,703
Reports and publications	3,509	3,231	278	2,858
Meetings and arrangements	4,812	4,350	462	2,315
Accounting	3,318	3,300	18	3,234
Insurance	1,154	1,257	(103)	1,120
Contingencies	2,078	1,619	459	2,636
Miscellaneous expense	—	—	—	52
Pension management	4,512	4,198	314	2,482
Symposium expenses	11,026	12,440	(1,414)	13,950
Capital outlay	<u>4,272</u>	<u>2,678</u>	<u>1,594</u>	<u>29,272</u>
Total Expenditures	<u>438,510</u>	<u>435,545</u>	<u>2,965</u>	<u>431,807</u>
Excess of Revenues Over Expenditures	34,831	46,369	11,538	31,750
Fund Balance - Beginning of Year	<u>186,666</u>	<u>186,666</u>	<u>—</u>	<u>154,916</u>
Fund Balance - End of Year	<u>\$ 221,497</u>	<u>\$ 233,035</u>	<u>\$ 11,538</u>	<u>\$ 186,666</u>

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

**WESTERN STATES WATER COUNCIL
NOTES TO FINANCIAL STATEMENTS
JUNE 30, 2001**

NOTE 1— SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTE 2—CASH

The Council's major cash funds were held in the Utah Public Treasurer's Investment Fund during the years ended June 30, 2001 and 2000. 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, 2001 and 2000, was \$107,969 and \$172,107, 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. The fund is also held by the Utah Public Treasurer's Investment Fund and accrues interest at the same rate as the Investment Fund. The balance in the Equipment Replacement Fund at June 30, 2001 and 2000 was \$6,547 and \$2,404, respectively.

At year end, the carrying amount of the Council's bank deposits was \$17,927 and the bank balance was \$65,401. All of the bank balance was covered by federal depository insurance. Collateralization of deposits is not required by state statute.

NOTE 3—LEASE COMMITMENTS

The Council leases office space under an agreement classified as an operating lease. The lease expired March 1, 2001 and was renewed for three more years, expiring on February 28, 2003. Monthly payments are \$1,933. Future lease payments to be made during the year ended June 30, 2002 total \$23,196.

NOTE 4—RETIREMENT PLAN

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

The Council contributes to the Plan an amount equal to 17% of each plan member's gross wages less the total of all amounts to be reallocated during the taxable year by reason of recoveries attributable to contributions arising out of termination of employment of members of the Plan prior to full vesting. The total contribution for the years ended June 30, 2001 and 2000, were \$38,105 and \$34,479, respectively.

NOTE 5—COMPENSATED ABSENCES

Employees of the Western States Water Council are entitled to compensated absences in the form of paid vacation, paid sick leave, and paid administrative leave. According to policy, the vacation pay accrues at a rate of 8.5 hours per full month of service rendered for the first five years. The next five years accrues at the rate of 11 hours per month, the eleventh year through twenty years accrues at the rate of 13 hours per month, and beginning the twenty-first year accrues at the rate of 14 hours per month. The number of unused vacation days, up to 40, carries forward to the beginning of the next calendar year.

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

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

ACCOMPANYING INFORMATION

**WESTERN STATES WATER COUNCIL
SCHEDULE OF CHANGES IN GENERAL FIXED ASSETS
FOR THE YEAR ENDED JUNE 30, 2001**

	<u>2001</u>
Investment in General Fixed Assets - June 30, 2000	\$105,228
Office equipment additions	2,741
Office equipment retirements	<u>—</u>
Investment in General Fixed Assets - June 30, 2001	<u>\$107,969</u>

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

To the Executive Committee
Western States Water Council
Midvale, Utah

We have audited the financial statements of Western States Water Council as of and for the year ended June 30, 2001, and have issued our report thereon, dated August 22, 2001. We conducted our audit in accordance with generally accepted auditing standards and the standards applicable to financial audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States.

Compliance

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

Internal Control Over Financial Reporting

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

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

Salt Lake City, Utah
August 22, 2001

HANSEN, BARNETT & MAXWELL

RULES OF ORGANIZATION ¹³⁷

Article I - Name

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

Article II - Purpose

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

Article III - Principles

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

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

Article IV - Functions

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

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

¹³⁷The rules incorporate changes that were adopted in November 1997 at the Council's 125th meetings in Carlsbad, New Mexico.

Article V - Membership

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

(2) Member states may name alternate representatives.

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

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

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

Article VI - Ex-Officio Members

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

Article VII - Officers

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

Article VIII - Selection of Officers

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

Article IX - Executive Committee

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

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

Article X - Voting

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

Article XI - Policy Coordination and Deactivation

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

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

Article XII - Conduct of Meetings

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

Article XIII - Meetings

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

Article XIV - Limitations

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

Article XV - Amendment

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

COMMITTEE AND SUBCOMMITTEE MEMBERSHIP

EXECUTIVE COMMITTEE

Bob Loeffler - Alaska
Michael Brophy - Arizona
(Chair)
Joseph C. Smith - Arizona
(Alternate)*
Thomas Michael Hannigan - California
Hal Simpson - Colorado
Karl Dreher - Idaho
(Vice-Chair)
David J. Pope - Kansas
Jack Stults - Montana
Roger K. Patterson - Nebraska
Michael Linder - Nebraska
(Alternate)*
Roland Westergard - Nevada
Thomas C. Turney - New Mexico
Dale Frink - North Dakota
Francis Schwindt - North Dakota
(Alternate)*
Brian Griffin - Oklahoma
Duane A. Smith - Oklahoma
(Alternate)*
Paul Cleary - Oregon
Steve Pirner - South Dakota
William B. Madden - Texas
John Baker - Texas
(Alternate)*
D. Larry Anderson - Utah
Tom Fitzsimmons - Washington
Patrick T. Tyrrell - Wyoming

Management Subcommittee

Michael Brophy - Arizona
(Chair)
Karl Dreher - Idaho
(Vice-Chair)
Hal Simpson - Colorado
(Secretary/Treasurer)
Francis Schwindt - North Dakota
(Past Chair)
D. Craig Bell
(Executive Director)

WSWC Water Policy Seminar Subcommittee

David Pope - Kansas
(Chair)
Roland Westergard - Nevada
Francis Schwindt - North Dakota
Brian Griffin - Oklahoma
Dee C. Hansen - Utah

LEGAL COMMITTEE

Christopher Estes - Alaska
Michael Brophy - Arizona
Thomas Maddock - California
Roderick E. Walston - California
(Alternate)*
Harold D. (Hal) Simpson - Colorado
Karl Dreher - Idaho
Jamie Clover Adams - Kansas
Donald MacIntyre - Montana
Harley Harris - Montana
(Alternate)*
David A. Vogler - Nebraska
Roland Westergard - Nevada
Charles DuMars - New Mexico
Julie Krenz - North Dakota
Dean A. Couch - Oklahoma
Meg Reeves - Oregon
(Vice-Chair)
Sharyl Kammerzell - Oregon
(Alternate)*
John Guhin - South Dakota
J.E. (Buster) Brown - Texas
Fred N. Pfeiffer - Texas
(Alternate)*
Thorpe Waddingham - Utah
Norman K. Johnson - Utah
(Chair) (Alternate)*
Kathy Gerla - Washington
Tom Davidson - Wyoming

General Adjudication Fees Subcommittee

Karl Dreher - (Chair) - Idaho
Donald MacIntyre - Montana
Roland Westergard - Nevada
Chuck DuMars - New Mexico
Norman Johnson - Utah

Federal Reserved Water Rights Subcommittee

Michael Brophy - (Chair) - Arizona
Christopher Estes - Alaska
Susan Cottingham - Montana
Harley Harris - Montana
Charles DuMars - New Mexico
Norman Johnson - Utah

Legal Education Subcommittee

Mike Brophy - Arizona
Mike Pearce - Arizona
Rod Walston - California
Norman Johnson - Utah

Amicus Brief Subcommittee

Donald MacIntyre - Montana
Jim Davenport - Nevada
John Guhin - South Dakota
Norman Johnson - Utah
Tom Davidson - Wyoming

WATER RESOURCES COMMITTEE

Bob Loeffler - Alaska
Gary Prokosch - Alaska
(Alternate)*
Joseph C. Smith - Arizona
Tom Maddock - California
Jeanine Jones - California
(Alternate)*
Harold D. (Hal) Simpson - Colorado
Karl Dreher - Idaho
David J. Pope - Kansas
Jack Stults - Montana
(Vice-Chair)
Roger K. Patterson - Nebraska
David A. Vogler - Nebraska
(Alternate)*
Mike Turnipseed - Nevada
(Chair)
Hugh Ricci - Nevada
(Alternate)*
Dale Frink - North Dakota
Duane A. Smith - Oklahoma
Paul Cleary - Oregon
Garland Erbele - South Dakota
William B. Madden - Texas
David Montagne - Texas
(Alternate)*
Dee C. Hansen - Utah
D. Larry Anderson - Utah
Joe Stohr - Washington
Keith Phillips - Washington
(Alternate)*
Patrick Tyrrell - Wyoming

Border Water Issues Subcommittee

Joseph C. Smith - Arizona
Jeanine Jones - California
Karl Dreher - Idaho
Jack Stults - Montana
Tom Turney - New Mexico
Dave Frink - North Dakota
Carolyn Brittin - Texas
Keith Phillips - Washington
Tom Davidson - Wyoming

Drought/Flooding Issues Subcommittee

Joseph C. Smith - Arizona
Jeanine Jones - California
Jack Stults - Montana
Chuck DuMars - New Mexico
Tom Turney - New Mexico
Duane Smith - Oklahoma
John Baker - Texas
D. Larry Anderson - Utah

Endangered Species Act Subcommittee

James Davenport - (Chair) - Nevada
Karl Dreher - Idaho
Roland Westergard - Nevada
Charles DuMars - New Mexico
Dean Couch - Oklahoma
Paul Cleary - Oregon
Dee C. Hansen - Utah
Tom Davidson - Wyoming

USGS Stream Gaging/NRCS Snow Survey Programs Subcommittee

Mike Brophy - Arizona
Hal Simpson - Colorado
Karl Dreher - Idaho
David Pope - Kansas
Jack Stults - Montana
Mike Turnipseed - Nevada
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