

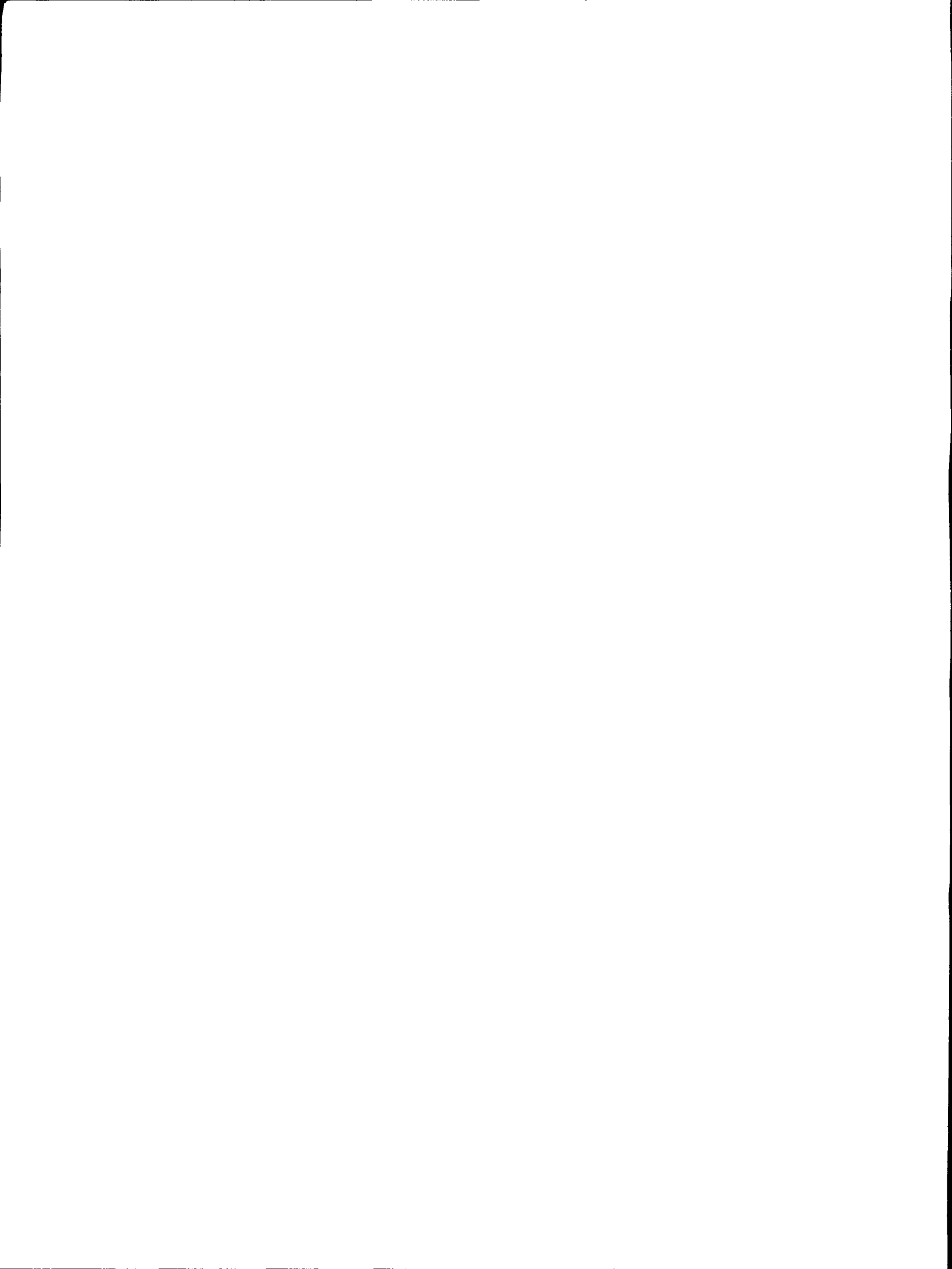
2002

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

Thirty-Seventh Annual Report



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# 2002 ANNUAL REPORT

## OF THE

### WESTERN STATES WATER COUNCIL

#### INTRODUCTION

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

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

Council membership and associate membership status is determined based on a request from the governor. Originally, Council membership consisted of eleven western states: **ARIZONA, CALIFORNIA, COLORADO, IDAHO, MONTANA, NEVADA, NEW MEXICO, OREGON, UTAH, WASHINGTON and WYOMING**. In 1978, **TEXAS** was admitted to membership, after many years of participation in Council activities in an "observer" status. **ALASKA** requested and received membership in 1984. **NORTH DAKOTA** and **SOUTH DAKOTA** both received membership in 1988 after a long association with the Council. In 1991, **HAWAII** requested and received membership. In 1999, **OKLAHOMA** requested and received membership. 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 2002, meetings were held in: Arlington, Virginia on March 11-13th; Bismarck, North Dakota on July 24-26th; and Wichita, Kansas on October 2-4th. 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 2002, the Council staff was comprised of: D. Craig Bell, Executive Director; Anthony G. (Tony) Willardson, Associate Director; Chad Shattuck, Legal Counsel; and a secretarial staff including Cheryl Redding, Lynn Bench, and Julie Groat.

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Joseph C. Smith - Arizona  
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Brian Griffin - Oklahoma  
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(Secretary/Treasurer)  
Michael Brophy - Arizona  
(Past Chair)  
D. Craig Bell  
(Executive Director)

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Dee C. Hansen - Utah

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\*For purposes of Committee rosters, the designation as "alternate" may not necessarily reflect the person's status regarding Council membership, but rather the person's function on the Committee.



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Jack Stults - Montana  
Tom Turney - New Mexico  
Dale Frink - North Dakota  
Carolyn Brittin - Texas  
Keith Phillips - Washington  
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Jack Stults - Montana  
Chuck DuMars - New Mexico  
Tom Turney - New Mexico  
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D. Larry Anderson - Utah

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David Pope - Kansas  
Jack Stults - Montana  
Mike Turnipseed - Nevada  
Duane A. Smith - Oklahoma  
Paul Cleary - Oregon  
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Barney Austin - Texas  
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Jim Davenport - Nevada  
Mike Turnipseed - Nevada

### **Water Information Management Systems Workshop**

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Hal Simpson - Colorado  
Hal Anderson - Idaho  
Tracy Taylor - Nevada  
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Paul Cleary - Oregon  
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### **Water Resources Program Funding Subcommittee**

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Dave Pope - Kansas  
Jack Stults - Montana  
Roger Patterson - Nebraska  
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Meg Reeves - Oregon  
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Ron Hammerschmidt - Kansas  
Karl Mueldener - Kansas  
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Don Shroyer - Arizona  
Greg Parsons - Colorado  
Jim Smitherman - Nevada  
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## **Safe Drinking Water Act Subcommittee**

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Dick Pedersen - Oregon  
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## COUNCIL MEMBERS

at Bismarck, North Dakota meeting on July 26, 2002



Front Row (seated left to right): Tom Maddock, Dale Frink, Jeanine Jones, Sue Lowry, Dave Pope, Duane Smith, Roger Patterson

Row 2: Don Ostler, Roland Westergard, Clyde Bohmfalk, Tom Stiles, Steve Pirner, Weir Labatt, Dave Glatt, Mike Brophy, Karl Dreher, Mike Turnipseed, Garland Erbele, Jack Stults, and Joseph Smith



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

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Anthony G. Willardson (Tony) .....	Associate Director
Chad Shattuck .....	Legal Counsel
Cheryl Redding .....	Office Manager
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# COUNCIL MEETINGS

**138th  
Western States Water Council  
Meetings  
March 11-13, 2002  
Arlington, Virginia**

The 138th meetings of the Western States Water Council were held in Arlington, Virginia in conjunction with the 2002 Washington Water Policy Roundtable that was cosponsored by the Association of Interstate Water Pollution Control Administrators (ASIWPCA) and the Interstate Council on Water Policy (ICWP). The full Council met on March 13. A number of sunseting positions were addressed. WSWC staff were directed to update and continue a position opposing the repeal of national plumbing efficiency standards, as a bill had been reintroduced, though no action was scheduled in the Congress. A letter to former Interior Secretary Bruce Babbitt regarding USGS funding was allowed to sunset, as a more comprehensive position in support of federal funding for water data collection had subsequently been adopted. Lastly, the Council continued its past position on reauthorization of the Clean Water Act, with the understanding that an updated position would be prepared and addressed at the next meetings in Bismarck, North Dakota on July 24-26. Committee and state reports were made. Herb Dishlip of Arizona moved and the Council approved a motion to prepare a resolution commemorating the 100th Anniversary of the Reclamation Act of 1902. Following the meeting, a number of members and staff visited several members of Congress and their staff, raising several water-related issues.

The Water Resources Committee met on March 11. Bureau of Reclamation Commissioner John Keys was a special guest. He began by addressing the drought and hydrologic realities in the Middle Rio Grande Basin, saying past water allocations "can't be sustained," adding that we've been in a period of above average flows following a period of dam building. Summer runoff projections are near historic lows in many basins, while more and more environmental demands have arisen, in addition to contracts to supply water for traditional project purposes. "We're struggling with what to do." He briefly mentioned several alternatives, covering water banking, purchases from willing sellers, better project maintenance, moving water between districts and even states, conversion of water to new uses, the possibility of new storage projects, and innovative ways to help fish, including off-stream refuge and salvage operations. He specifically addressed Klamath Basin issues, and other matters.

Lawrence (Larry) Clark, Deputy Chief for Science and Technology, Natural Resources Conservation Service (NRCS), was another special guest. He especially thanked the Council for its efforts in securing FY2002 funding for the Snow Survey and Water Supply Forecasting Program. "We were headed for disaster." As a result, western state funding allocations went up over 50%. They were able to address deferred maintenance problems, restocking their inventory of spare parts and replacing components at over 150 remote SNOW-TElemetry sites, including some near failure. A number of master stations were upgraded, and sixteen new stations were added: six in Alaska; five in California (monitoring the Eastern Sierras); four in Colorado; one in Utah; and one in Idaho. Much of the information is available on the internet, and the system is handling 800,000 requests for information and 40,000 downloads of data a week. He also reviewed the status of the Farm Bill, which would include some \$2B in new money for NRCS conservation programs.

Bob Hirsch, Associate Director for Water, U.S. Geological Survey (USGS), addressed the committee on a number of USGS activities, including a study mandated from the Congress for information on water availability and use. No general national overview has been done since the demise of the federal Water Resources Council, and the USGS is recommending a "modest" effort that would focus on existing demands and flow rates, particularly for low flow streams, but it would not project water use. It would cover overall ground water withdrawals. It would incorporate other studies by many entities. As required, a draft report was under review and would be delivered to the Congress in the next few weeks. He also noted a National Academy of Science (NAS) working group was being formed to prepare a report on water resources research. He encouraged the WSWC to nominate people.

The highlight of the Legal Committee meeting, on March 12, was a discussion on federal water claims. Rod Walston, a long-time WSWC member and now Deputy Solicitor, U.S. Department of Interior, covered Indian and other federal water right claims. He touched on the Klamath Basin controversy, the practicable irrigable acreage (PIA) standard, fishery treaty rights, U.S. Forest Service claims for instream flows, BOR contract and Endangered Species Act (ESA) responsibilities, tribal water marketing, reserved rights to ground water, property rights, takings and other issues. In response to a question, he opined that state water law needs to recognize and find ways to accommodate federal rights.

Tom Thompson, Deputy Chief, U.S. Forest Service, shared with the committee his view on the WGA Enlibra principles, which he views as a wise vision, an approach that is essential to successfully dealing with this nation's future water demands at the state, federal, and local levels. He believes more can be accomplished for the people and natural resources of the West where states, agencies, and private entities peaceably work together on water management.

Jack Haugrud, Chief, General Litigation Section of the Environment and Natural Resources Division of the Department of Justice (DOJ) reaffirmed that DOJ prefers negotiation to litigation in resolving water claims. He spoke of two types of uncertainty that slow water claim resolution. The first is legal uncertainty, which leaves parties guessing what will be the end result in litigation over a claim, and the second is scientific uncertainty, which is a problem that must be dealt with both in litigation as well as negotiation. He pointed out National Park Service successes with negotiating water needs for Zion National Park in Utah and Yellowstone National Park in Montana. With respect to criticism about the federal role in the Snake River Basin Adjudication, he said, "If we had to do it again, we would do it differently." He also mentioned USFS claims to "maintain conditions of favorable water flow," and Wild and Scenic River Act claims. Non-Indian claims occupy the time of ten full-time DOJ attorneys with others helping part-time.

State perspectives were shared by Meg Reeves (OR), Norm Gaume (NM), David Vogler (NE), and Jack Stults (MT). States have concerns with federal actions that contradict state water law, but there are also some encouraging success stories of cooperative approaches leading to the resolution of differences.

The Committee addressed the proposed Adjudication Fee Fairness Act and legislative strategy. Karl Dreher raised concern over frivolous federal water claims that cost western states money and investigation resources, only later to be dropped by the federal government. In the Snake River Basin Adjudication, the USFS filed over 3700 claims, while paying no filing fees, later dropping all but 71 claims, of which only seven were granted by the court. As an alternative solution to federal agencies paying filing fees like everyone else in an adjudication, New Mexico proposed asking the

Congress for a grant of \$150 million to cover the costs of adjudicating federal claims. Kris Polly, Director of Government Relations, National Water Resources Association (NWRA) encouraged Council members to work hard with their congressional delegations to get a federal fees fairness bill passed. The latest draft of a Report on Water Reuse and Groundwater Recharge in the Western United States was passed out to member states in attendance. Final comments and edits were welcomed until March 31. Thereafter, the final report would be made available to Council members and others.

The Water Quality Committee met March 13. Fred Leutner, EPA, and Fred Sayers, U.S. Fish and Wildlife Service, spoke about Clean Water Act and Endangered Species Act coordination, specifically state water quality standards and National Pollutant Discharge Elimination System (NPDES) permits. Consultation between the agencies is required, with the states encouraged to participate. The point is to address and try to resolve differences early in the process. Gary Beach raised concern over slowing decisionmaking by consulting on "almost anything." Concern was also raised over proposed regional memoranda of agreement (MOA) that could include more stringent requirements than the national MOA. Mr. Leutner stated that the MOA created no new EPA authority, or state requirements.

Nan Allen, Federal Energy Regulatory Commission, shared information on hydropower licensing and TMDLs. She provided an overview of the licensing process, goals, and agency involvement under an alternative hydropower licensing process compared to traditional licensing rules. A major unresolved issue remained as to how states could include TMDLs, some not yet developed and some subject to adaptive management conditions, in a 40-50 year federal license. Standard reopener clauses had seen limited use, and some states were including in Clean Water Act Section 401 certification conditions untested side agreements with license applicants.

Gary Beach (WY) reported on Western Water Quality Issues Subcommittee activities, including a March 6 conference call, related to ephemeral and effluent-dominated streams. The Congress mandated a study called the Arid West Water Quality Research Project and a report is expected in May ([www.co.pima.az.us/wwm/wqrp](http://www.co.pima.az.us/wwm/wqrp)). Tom Stiles (KS) reported that the TMDL Subcommittee plans to update the WSWC current position. EPA's new TMDL rule is expected by mid-June.



**139th Council Meetings**  
**July 24-26, 2002**  
**Bismarck, North Dakota**

The 139th meetings of the Western States Water Council were held on July 24-26, in Bismarck, North Dakota. The meetings featured a visit from Bennett Raley, Assistant Secretary of Interior for Water and Science. Mr. Raley spoke with the Legal Committee on the CALFED Bay-Delta program reauthorization, the Endangered Species Act (ESA), water management in the West, and the federal role in state water adjudications. Interior supports the CALFED concepts to balance and implement environmental restoration, water supply, and water development programs and projects. Regarding ESA, he said there are many basins in the West with the same problems as the Klamath, any of which could have had a similar result. He encouraged members to take a new look at ESA §6 regarding cooperative agreements with states, and invited all to submit to Interior proposed policy reforms to improve ESA implementation. On state general adjudications, Mr. Raley said that Interior wants to protect the integrity of state adjudications, as well as to enhance the timeliness of the process. Recognizing that "justice delayed is justice denied," he said that Interior has a responsibility to help and not hinder the adjudication process. Interior is willing to step back and look at its role as a client in state adjudications. He again encouraged members to suggest ways to improve federal participation.

The Council addressed and adopted a number of positions, including positions renewing opposition to repeal of the national plumbing efficiency standards and restating the Council's position on reauthorization of the Clean Water Act. A letter was approved expressing the Council's concerns with specific provisions of S. 1961, the Water Investment Act. While recognizing mixed reactions to various provisions in the bill by the states, the letter questioned the appropriateness of requiring states to set up expensive programs to provide communities with technical, financial and managerial assistance, as well as getting involved in local land use planning decisions. The letter also questioned the wisdom of a section directing the U.S. Geological Survey to undertake a national water resources assessment. The Council approved a letter in support of S. 2773, to create a program for hydrogeologic characterization, mapping, modeling and monitoring of the ground waters of the High Plains Aquifer, while suggesting changes.

Two letters were adopted through the unanimous consent procedures of the Council, which meant they were reviewed by the member state governors before being distributed. The first addressed the Environmental Protection Agency's (EPA) TMDL rulemaking process. The second raised certain concerns with proposed legislation to reauthorize the Clean Water Act as drafted by the Western Coalition of Arid States (WESTCAS).

Commemorative resolutions recognizing the Centennial Celebration of the Reclamation Act and 30th Anniversary of the Clean Water Act were also adopted. Resolutions of appreciation were adopted for former Chairman Francis (Fritz) Schwindt of North Dakota, and former members John Baker and Bill Madden, both of Texas. Also of note, **Karl Dreher** of Idaho was elected WSWC Chairman, with **Hal Simpson** of Colorado as Vice Chairman, and **Duane Smith** of Oklahoma as Secretary/Treasurer.

Further, during the full Council meeting, North Dakota State Engineer Dale Frink addressed members on a number of issues covering the 1997 Red River Flood that inundated Grand Forks, the Northwest Area Water Supply Project, attempts to manage the rising waters of Devils Lake, the

ongoing debate over updating the Corps of Engineers Missouri River Master Water Control Manual, and the serious drought conditions.

Many members got a first-hand look at North Dakota's water resources, while enjoying a Wednesday field trip. Along the way, various issues were discussed, including Missouri River bank stabilization and housing developments, the evolution of the Garrison Diversion Unit of the Pick-Sloan Program, and endangered species management and protection issues. Hosted by the North Dakota State Water Commission, members visited several historical sites along the Missouri River, including the Lewis and Clark Interpretive Center and nearby Fort Mandan, learning about life on the river in the late 19<sup>th</sup> century. At Sakakawea Reservoir, Jerry Shaack, Garrison Diversion Conservancy District, shared a brief history of the project, discussing present challenges with water quality and providing irrigation water for the Red River Valley. A tour of Garrison Dam and an adjacent fish hatchery followed. The group stopped under the shade of old growth cottonwoods at Cross Ranch State Park, and ended the day with dinner near the Custer House at Fort Abraham Lincoln.

The Water Quality Committee spent much of its time considering five action items, three letters, one position and one resolution, later adopted by the full Council. Chuck Sutfin, Director, Assessment and Watershed Protection Division, Office of Water, EPA, spoke with the Committee on the proposed Total Maximum Daily Load (TMDL) rule. He said the projected schedule was to have the rule out by November, with a final rule by Spring 2004. He encouraged Council members to take the initiative and express their opinion on the process of proposing a revised TMDL rule as soon as possible. He noted that EPA prefers to leave TMDL implementation as much as possible in the hands of the states. "The more we can get people to do things on their own, the better off we are." Dave Mabe, Idaho, followed with a summary of *Pronsolino v. Nastri*, in the 9th Circuit Court of Appeals, which held that the EPA has authority, in the absence of state action, to limit non-point sources of pollution as part of establishing a TMDL, even though there are no point source discharges to the stream. However, the court held that implementing and monitoring the TMDL limits are still state responsibilities. The American Farm Bureau had petitioned the 9th Circuit for a re-hearing. Tom Stiles, Kansas, then outlined the WSWC's TMDL Subcommittee's plans to submit comments on any new TMDL rule, urging member states' to express their individual concerns.

The Legal Committee, following Mr. Raley's remarks, was led in a discussion on improving state adjudications by Dick Bailey, Oregon Water Resources Department. Having worked as an adjudicator in the Klamath Basin, Mr. Bailey shared four suggestions for a smoother adjudication process. First is the importance of having a reliable and sufficient source of funding for the entire adjudication. Funding has been a major problem for some states. Second, he suggested that real progress is made when the policy people come to the negotiating table empowered to act. Third, though he feels that attorneys can slow the process, he suggested that a willingness to pursue litigation is a driving force toward settlements. Fourth, he encouraged states to use the courts as a tool to move towards a settlement.

Jim Davenport, Nevada, reviewed two recent cases on "takings," the 2001 *Palazzolo v. Rhode Island* case and the *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* case. He drew a distinction between the two, the first being an example of a permanent physical regulation, but not a "taking" since there remained significant value in the property, and the second as a temporary regulatory taking, which required no compensation due to its temporary nature. The meeting also included a summary of *Wisconsin v. EPA*, regarding EPA's grant of treatment-as-state

status to the Mole Lake Indians. The Supreme Court upheld the exercise of EPA's discretion in granting to the tribe authority to regulate water quality on the reservation.

The Water Resources Committee recommended three positions later adopted by the Council. Shaun McGrath, WGA staff, summarized efforts to enact national drought preparedness legislation and urged members to support the bill. Record drought conditions and heat were afflicting many areas of the West. Committee members briefly reported on workshops held in May in Omaha, Nebraska on ESA and water management issues, and in June in Salem, Oregon on state water information management systems. Maryanne Bach, the High Plains Regional Director and Bob Wolfe, both with the Bureau of Reclamation, addressed budget issues, specifically CALFED and funding for rural water supply and water reuse projects, as well as the status and nature of the Reclamation Fund.

Jim Peters, U.S. Geological Survey (USGS), noted the Congress had restored funding cuts made by the Administration to the USGS Water Resources Program and criticized the President's request for this popular program. With respect to a scoping study for a national water assessment, he noted a completed Interior document had yet to be released to the Office of Management and Budget (OMB) for clearance before going to the Congress. A National Academy of Sciences study of water resources research was also being organized and individuals recruited to help. Sue Lowry, Wyoming, reviewed the draft agenda for the following month's Water Conservation Roundtable in Boise. Greg Power, North Dakota Fish and Game Department, described issues related to aquatic nuisance species. Mike Turnipseed, Nevada, reported on litigation related to the water supply for the Yucca Mountain high-level nuclear waste repository, as well as issues related to conservation of Walker Lake on the east slope of the Sierras. Staff handed out a draft summary of state laws relating to water reuse and ground water recharge.

**140th Council Meetings  
October 2-3, 2003  
Wichita, Kansas**

The Western States Water Council's 140th meeting, the first hosted by the State of Kansas, was held in Wichita on October 2-4. Dave Pope, Chief Engineer of the Kansas Division of Water Resources, welcomed members and presented an overview of water resources management in the state. The Division, which is located in the Department of Agriculture, handles water rights permitting and regulation, and dam safety. The Kansas Water Office is a separate agency responsible for regulating weather modification, marketing water from conservation storage -- purchased under a water assurance program -- in U.S. Army Corps of Engineers' reservoirs, and water planning. The Kansas water planning process is a model that has been emulated across the nation. It involves local advisory committees in the development of local basin plans, which are the basis for the state plan. The Department of Health and the Environment is responsible for water quality programs.

Wichita lies in the Arkansas River Basin, a major interstate stream. Cheney Reservoir is a U.S. Bureau of Reclamation (BOR) project on the Ninnescah River, a tributary to the Arkansas. It was built primarily as a municipal water supply for the city, which operates the project. Kansas hosted a field tour of the Equus Beds ground water recharge project, which the Bureau also helped the city begin. Flood waters from the Arkansas are treated to remove any herbicides and pesticides and recharged through pits and passive wells at a number of sites. Dave also described issues along the Blue, Kansas, Missouri, Neosho, and Republican Rivers. Generally, these rivers run west to east. Precipitation ranges from 15-20 inches in the west to 40-45 inches in the east. There is an even greater difference in average annual runoff, which can vary by a multiple of 100, west to east. Water use also varies, with agriculture the predominant use in the West and greater municipal and industrial use in the East. Ground water is a major source of supply, and the state intensively manages some ground water areas in an attempt to reach a level of sustainable use. Much of western Kansas relies on water from the Ogallala Aquifer. The livestock industry is a major economic force in western Kansas, and huge cattle feedlots and hog farms produce odor and ground water contamination concerns.

Kansas adopted the Appropriation Doctrine as the basis for both its surface and ground water laws in 1945, which recognizes the interrelationship between alluvial water levels and stream flows. Many streams have been fully appropriated, and safe yield rules cover all the state's ground waters. Many ground water basins have been closed to further development or pumping has been restricted. Annual well water pumping reports are required, and some 15,000 wells have been metered. Areas with water supply problems are identified through the state's water planning process, and local stakeholders participate in finding solutions. Kansas is a party to four interstate compacts with Colorado, Nebraska and Oklahoma. Serious differences over the interpretation and administration of the Arkansas had been resolved through litigation and future compliance issues were being addressed. There were also active negotiations and there had been substantial progress on the Republican River, as part of a suit in the U.S. Supreme Court. The Missouri River is another important resource which Kansas shares with ten other states.

BOR Commissioner John Keys addressed the Council, beginning with a discussion of the "watershed case," *Minnow v. Keys*, brought by Forest Guardians to protect the Rio Grande and silvery minnow. Following many months of repeated consultation with the U.S. Fish and Wildlife Service (FWS) and discussions with stakeholders, a jeopardy biological opinion was released with

no reasonable and prudent alternatives.<sup>2</sup> Due to the drought, only 2% of average inflow was reaching Elephant Butte reservoir. While Reclamation bought 40,000 acre-feet of water with a FY2002 supplemental appropriation, it was not enough to maintain a desired 50 cubic foot per second flow through the middle Rio Grande, and FWS recommended letting the river go dry. Tens of thousands of minnows and eggs had been salvaged from the river, and FWS favored releasing water in the spring for returning fish to spawn. However, Judge James Parker ordered the immediate release of water stored upstream in federal reservoirs, even though that water is owned by Albuquerque, Santa Fe and the Middle Rio Grande Irrigation District. In fact, that water is part of an interstate and interbasin transfer bringing water to the Rio Grande in New Mexico from the Colorado River Basin in Colorado. Reclamation could only meet demands for releases from water it had purchased for a few days, and thereafter would be releasing water owned by others. The judge's decision was challenged by Reclamation and New Mexico, with Idaho and Colorado also filing amicus briefs in the 10th Circuit Court of Appeals.<sup>3</sup>

Commissioner Keys also addressed issues related to the Klamath River fish kill,<sup>4</sup> the California Plan for reducing its water use,<sup>5</sup> BOR's FY2003 budget, which he thought would likely be tied to future continuing resolutions limiting new spending,<sup>6</sup> and implementing security plans for 55 projects, which had cost \$30M to develop and would likely require a similar amount annually to implement. He noted the current shortfalls in state budgets, and offered to help states "free up" money for water right adjudications, such as in the Klamath Basin, which are critical to future water management. Reclamation had been able to provide \$250,000 to help the state of Oregon with other work under various authorities. Reclamation intends to continue working closely with the states, under state law, and Mr. Keys appointed Mark Limbaugh, Director of External Affairs, to specifically work with the Council. Concluding his remarks, he expressed his excitement over the "fantastic" BOR Centennial Celebration, which would continue with various events across the West.

Committee reports followed with recommendations for Council action. Of note, following the election of new Council officers in July,<sup>7</sup> new Committee leaders were appointed. Sue Lowry, Wyoming, was chosen to be the Water Resources Committee Chair, and Roger Patterson, Nebraska, the Vice Chair. Jim Davenport, Nevada, became the Legal Committee Chair, and Chuck DuMars, New Mexico, the Vice Chair. Tom Stiles, Kansas, was asked to serve as the new Water Quality Committee Chair, and Don Ostler, the Vice Chair.

Sue Lowry presented a letter prepared by the Endangered Species Subcommittee, chaired by Jim Davenport, and recommended by the Water Resources Committee highlighting state interests in protecting endangered species within state water law, and presenting seven recommendations for

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<sup>2</sup>*Western States Water*, Issue #1480, September 27, 2002.

<sup>3</sup>*Ibid.*

<sup>4</sup>*Ibid.*

<sup>5</sup>*Western States Water*, Issue #1478, September 13, 2002.

<sup>6</sup>*Ibid.*

<sup>7</sup>*Western States Water*, Issue #1471, July 29, 2002.

improving implementation of the Endangered Species Act (ESA). The letter also called on Interior Secretary Gale Norton to join a dialogue on the development of western water resources in concert with the conservation of endangered species. The Council approved the letter, as revised, but determined to send it to the Western Governors' Association (WGA) for review, before it was sent to Secretary Norton. Sue also noted the Committee listened to Harold Klaege, Kansas State Conservationist, discuss past and future programs under the Farm Bill, including incentives for conserving water. Jim Peters, Cooperative Program Administrator for the U.S. Geological Survey (USGS) was another guest. He addressed FY2003 funding for streamgaging, a National Research Council report on estimating water use, and a USGS report to the Congress on a potential future national assessment of water uses.

The Legal Committee recommended the Council approve a letter to DOI Assistant Secretary Bennett Raley with suggestions for expediting general state water right adjudications, and Jim summarized changes to the letter. It was unanimously approved, with one more change noting that "similar participation by the Department of Justice is essential." The Legal Committee also discussed the Rio Grande controversy, water issues surrounding siting of the Yucca Mountain high level nuclear waste repository, Clean Water Act Section 404 and wetlands protections following the SWANCC decision<sup>8</sup> eliminating the U.S. Army Corps of Engineers jurisdiction over "isolated waters," and legislation to overturn that decision.

The Council approved a revision to its position on reauthorization of the Clean Water Act, adding language related to nutrient management, which Tom Stiles presented on behalf of the Water Quality Committee. He also summarized Committee discussions with Chuck Sutfin, Director, Assessment and Watershed Protection Division, Environmental Protection Agency (EPA). Chuck covered EPA's new proposed Watershed/Total Maximum Daily Load (TMDL) Rule, Consolidated Assessment and Listing Methodology (CALM) Guidance, Farm Bill impacts on EPA programs, EPA's FY2003 and FY2004 budgets, and future spending under Section 319 of the Clean Water Act, which provides grants for state nonpoint source pollution program administration. With respect to the latter, Tom suggested the Council approve the preparation of a letter to the Office of Management and Budget (OMB) expressing support for Section 319 spending. A letter was prepared for the Executive Committee to approve, followed by a WGA review, and then was sent to OMB.

Of note, each of the Committees also approved their own 2003 work plans, with suggested priorities, which would be compiled into a Council work plan. The work plan is a flexible document that serves as a guide to focus Council resources on issues of common concern.

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<sup>8</sup>*Western States Water*, Issue #1391, January 12, 2001.

## OTHER MEETINGS

### Washington Roundtable

Commingled with the WSWC's Spring meetings in Arlington, Virginia were several special presentations and roundtable discussions as part of a biennial "Water Policy Roundtable" cosponsored by the WSWC, along with the Association of Interstate Water Pollution Control Administrators (ASIWPCA) and the Interstate Council on Water Policy (ICWP). On March 11, WSWC Water Quality Committee members joined ASIWPCA members for a State/EPA (Environmental Protection Agency) roundtable discussion of priority issues at a nearby hotel in Alexandria, Virginia. The informal discussion included opening remarks by Environmental Protection Agency (EPA) officials, followed by questions and answers on a variety of issues. The Roundtable highlight was a visit and brief remarks from EPA Administrator Christie Todd Whitman on March 12.

The WSWC's Water Resources Committee members joined ICWP members as Tom Stiles of Kansas, ICWP Chairman and a WSWC representative, described the results of a series of workshops on U.S. Geological Survey (USGS) streamgaging activities under its National Stream Information Program (NSIP) and Cooperative Water Program. Tom is also a member of the federal Advisory Committee on Water Information (ACWI), intended to review the results of the workshops and ICWP's subsequent findings. ICWP had published its findings regarding NSIP's goals and fixing intergovernmental responsibilities for the national streamgaging network. According to its report, NSIP's fully-federally funded gages should provide stage and discharge data for flood and drought monitoring at each National Weather Service or Natural Resources Conservation Service (NRCS) measurement forecasting location. Further, NSIP gages should monitor discharge for each major sub-basin at a Hydrologic Unit Code (HUC) 8 level for assessing flow status and trends. NSIP should also provide streamflow data for rivers governed by interstate compacts, treaties and Supreme Court decrees. Lastly, NSIP should focus on sentinel watersheds and benchmark stations to evaluate altered rainfall-runoff relationships induced by climate changes. Building on this basic NSIP network would be numerous other gages funded under the cost-shared Cooperative Water Program, including gages important for reservoir operations, National Flood Insurance Program support, and recreation. Lastly, the national network would include various single purpose gages that are or may be required under various permits, some of which serve no national or regional interest and should not be incorporated within either the NSIP or Coop Programs.

Robert Hirsch, USGS Deputy Director for Water, presented members and others with a packet of information describing streamgaging activities and programs in various western states, as well as the President's proposed FY2003 budget, which would eliminate the USGS toxic substances hydrology program, eliminate the State Water Resources Research Institute Program, and severely cut the National Water Quality Assessment Program, though not as much as proposed last year. NSIP would also be cut by \$2.1M, from the FY2002 appropriation. USGS has identified streamgages that would lose federal funding under the proposal, including some 70 gages in western states (<http://water.usgs.gov/nsip/nsipmaps/FY03loss.html>). The Cooperative Water Program funding request is up some \$21,000 over last year, but that is only a .03% increase, compared to inflation and other program cost increases of 3-4%. In response to suggestions that USGS focus on requesting more money for the Cooperative Program over NSIP, Mr. Hirsch offered that he would be happy to have more money in any of the programs. As in years past, the Congress was expected to restore much of the money cut in the President's budget through the appropriations process.

Given the Council's strong support for streamgaging, Chairman Mike Brophy suggested the Council could ask the Congress to restore the \$2M NSIP cut, and add another \$2M to the Coop Program.

Water infrastructure financing was the subject of other sessions. Diane Shea of the National Governors' Association (NGA) staff pointed out that projected demands "far out strip" existing resources, with estimates ranging from \$220B-\$330B. The governors recognized the serious nature of the funding gap, and supported the use of state revolving loan funds (SRFs) capitalized by federal appropriations as the primary mechanism for meeting future needs. She added the Clean Water SRF had already made some 10,000 loans, while the more recent Safe Drinking Water SRF had helped fund about 1,500 projects. Ms. Shea discussed pending federal infrastructure financing legislation, which included some good things, but also would establish new unfunded mandates and create new hardships for states. For example, the legislation would involve the states in certifying utilities as having appropriate asset management programs, rate structures and low income rate-payer protections. NGA opposed using the SRFs to coerce local actions, and supported further flexibility in program administration to allow states to use SRF monies for state priorities.

Jeff Mosher, with the Association of Metropolitan Water Agencies (AMWA), noted they agreed with many of the NGA's concerns, mentioning the asset management and rate structure requirements, as well as land use planning and consolidation requirements, and incentives for public-private partnerships. He added market forces were already driving many management changes. With respect to the funding gap, he calculated annual spending needs totaled around \$13B annually, and the Senate proposal of \$3B/year over five years won't meet demands. A House bill had yet to be introduced. In response to a question regarding consolidations, Mr. Mosher stated there are some 54,000 water systems, not counting an estimated 160,000 systems that may serve a gas station, for example. EPA drinking water requirements were continuing to create a huge burden on small water systems. Arsenic standards were but one recent example. One solution was to pool resources through consolidation of smaller systems or cooperative and collaborative approaches to sharing technical and financial resources. Small systems might share operators. Larger systems might lend technical support. In response to a question about land use requirements, he noted the legislation directs consultation with area transportation and other land use agencies in an effort to not encourage sprawl. Water security questions had taken on new meaning in response to potential terrorist attacks. AMWA was working with the federal Office of Homeland Security and the Federal Bureau of Investigations (FBI) on an information clearinghouse and protocol for alerting water systems to threats. The Congress appropriated \$80M for self-assessments in the FY2002 supplemental spending legislation, with \$16M earmarked for small to medium-sized systems. Work in this area was not new. In 1998, President Clinton by Executive Order established EPA as the lead federal agency, and a Critical Infrastructure Assurance Office in the Department of Commerce was set up a couple of years ago. However, it was difficult to determine what progress had and is being made as utilities are not likely to reveal information about system weakness, due to fear they might be exploited.

The following day, House and Senate congressional staff discussed the provisions of S. 1961, the Water Investment Act of 2002.<sup>9</sup>

Also on March 11, Jack Stults, Water Resources Administrator for the Montana Department of Natural Resources and Conservation, addressed the group on draft national drought policy

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<sup>9</sup>*Western States Water*, Issue #1450, March 1, 2002.



legislation advanced by the Western Governors' Association (WGA). Montana Governor Judy Martz is WGA's co-lead governor on drought. Jack reported the primary intent of the legislation is to better coordinate federal, state, tribal, local government and private drought preparedness and response activities. It would designate the U.S. Department of Agriculture as the lead federal agency, and create an 18-member national drought council with federal and non-federal co-chairs. He described the proposed membership. He described the responsibilities of the proposed council, noting it would be a policy and decisionmaking body, saying the word "advisory" is not used in the bill. He added that the proposed council office's would be located in Denver, a central location, out of the Washington, D.C. area, to provide greater autonomy and make it easier to partner with the states. He mentioned the need for consistency in national drought response, stating that there were myriad federal and other programs with different triggers and criteria for determining eligibility. The bill would also encourage and provide assistance for drought planning all the way down to the watershed level. Senator Domenici was expected to introduce the bill in the near future, and members were encouraged to contact their Senators about cosponsorship.

Over lunch on March 12, Shelly Randel, Legislative Assistant to Senator Domenici, also reviewed the provisions of the bill and called for support from the states. She noted that the Senator hoped to introduce it before the Senate adjourns for its Spring Recess on March 22, or after the Senate reconvenes on April 8.

Dr. Mack Gray, Deputy Under Secretary of the Department of Agriculture, began the afternoon discussions reporting on the status of the Farm Bill. He noted the House bill was similar to past bills, but authorized a lot more money, as did the Senate bill, though it focused more on conservation assistance programs than commodity support programs. Congressional staff had been meeting to work out differences in the two bills. Dr. Gray observed that the proposed conservation spending in both was more money than he every imagined possible in his long career. The Conservation Reserve Program (CRP) enhancements represent a "doggone good idea." It raised the total acreage limit to over 40M acres, compared to the previous 32M acre ceiling. He noted USDA expected to see more renewals than new signups, adding 80% of USDA's Conservation Operations budget was taken for CRP land retirements. There was more money for the Environmental Quality Improvement Program (EQUIP) and cost sharing for soil and water conservation projects. At \$175M-\$200M a year now, EQUIP spending was always oversubscribed. In one Texas county alone the previous year, there were 68 applications for assistance and money to fund only two projects. There was some \$1.2B in the bills. He mentioned the use of this money for best management practices to meet Total Maximum Daily Load (TMDL) requirements, as well as to help confined animal feeding operations (CAFOs) meet water quality requirements. Water conservation projects would also be eligible for funding. He also mentioned the Wildlife Habitat Improvement Program (WHIP). Given the strain likely to be put on USDA personnel in administering such expanded programs, they were considering the use of third parties to certify eligibility and compliance.

Among the differences in the bills was spending for farm land protection in rapidly urbanizing areas. The House would increase spending from \$17.5M now to \$50M, while the Senate would spend up to \$500M. The base amount the Congress had budgeted for the bill was \$73.5B, but there would have to be major compromises and decisions over spending between proposed commodity and conservation program increases. Further complicating matters was a revelation that the cost of the Senate bill was \$6B more than original estimates. The Senate bill had a Conservation Security Program, not in the House bill, that was designed to put money into areas not now getting commodity payments. With respect to Senator Harry Reid's (R-NV) amendment to allow seven states to include payments for water rights as part of the CRP retirements, there had been a lot of

contention. If it were to be approved, it would be only after more acrimonious debate, Dr. Gray observed.

Next, Christine Schabacker, representing the Assistant Secretary of Interior for Water and Science Bennett Raley, addressed a number of issues. She emphasized Secretary Gale Norton's 4Cs: communication, cooperation and collaboration in the name of conservation. First, she spoke about the USGS streamgaging program, one of Interior's oldest activities, which, with cooperator support, makes data freely available to a wide variety of users. The NSIP, described above, focuses federal funding on vital long-term gages that measure flows to meet five federal goals that involve borders, basin outflows, flooding, sentinel watersheds and water quality. She referred to NSIP workshops, adding that new streamgages in the upper Midwest were helping provide earlier flooding forecasts. With respect to the Bureau of Reclamation (BOR), Ms. Schabacker explained they were working hard to continue contract water deliveries in the face of drought and the requirements of environmental law, with aging infrastructure. BOR was committed to contingency planning and preparedness as an alternative to crisis management. In the Klamath Basin, BOR was considering the use of a water bank and related opportunities to augment flows for endangered species. The broad impact of the Endangered Species Act (ESA) was not foreseen when President Richard Nixon signed the bill in 1973. ESA was not a good long-term planning tool. ESA is more analogous to an overcrowded emergency room, than a long-term managed medical care system. Interior believed the people on the land are our greatest conservation resource, and was committed to build on the successes from the use of Habitat Conservation Plans (HCPs) and similar tools. Further, while BOR's authority to make project water deliveries for ESA purposes had been questioned, we could find ways to balance resource uses. She mentioned the Upper Colorado River Basin Species Recovery Plan, based on consensus and the acceptance of reasonably prudent alternatives and financial contributions, was making progress towards recovery goals. She noted Secretary Norton had signed an extension to that agreement, which was also serving as a pattern for similar efforts in the South Platte River Basin. In response to a question, she responded that the U.S. Fish and Wildlife Service's budget for its three core programs was about \$195M, and that the President's request included \$5M for a new proactive landowner species protection program, and \$10M for a stewardship program involving private individuals and organizations.

Lastly, EPA Administrator Christie Todd Whitman addressed the group at an evening reception. She described water as the greatest environmental challenge of the 21st Century. She referred to the enormous gap in spending to meet infrastructure needs, adding that while a lot had been done to clean up streams, there was a lot more to do. She referred to activities and events planned to commemorate the 30th anniversary of the signing of the Clean Water Act, and the need for education and cooperation in addressing water quality issues. With respect to the President's budget, she said the FY2003 request for the Clean Water and Safe Drinking Water SRFs was the largest ever at \$2.1B, in addition to EPA's \$1B water program budget. Further, there was \$20M for a new initiative to identify 20 priority watersheds for improvement. The Administrator noted the increased emphasis on water system security since 9/11, and stated EPA would spend \$90M for vulnerability assessments and training. EPA has established a Water Protection Task Force, which included the U.S. Army and National Center for Disease Control, to identify possible biological and chemical threats. More funds for water infrastructure were likely to be made available as part of the effort to ensure homeland security. She concluded her remarks highlighting the Bush Administration's strong record of stewardship and progress and the need to partner with local governments to protect water resources. In response to a question on the TMDL rule, she stated a draft would be out by late Spring, followed by an expedited review and final rule. The past rule of

July 2000 would not go forward. She added National Pollutant Discharge Elimination System policy guidance as it relates to pesticides should be out shortly.

## **Environmental Summit-Enlibra II**

The Western Governors' Association (WGA) and the White House Council on Environmental Quality (SEQ) cosponsored an Environmental Summit in Salt Lake City, Utah on April 24 - 26. Nearly 500 participants developed recommendations for policymakers on a diverse set of issues. The purpose of the Summit was to encourage the use of the Enlibra principles for environmental management. The principles call for greater stakeholder participation and collaboration in decisionmaking, focusing on outcomes rather than just programs, and recognizing the need for a variety of tools in addition to regulation to improve the environment.

Western Governors participating were WGA Chair Jane Dee Hull (AZ), Judy Martz (MT), John Kitzhaber (OR), WGA Vice Chair Mike Leavitt (UT), and Jim Geringer (WY). Governors Kitzhaber and Leavitt are WGA's co-leads for Enlibra. The governors were joined by key Administration officials and other dignitaries including: Secretary of Interior Gale Norton; Environmental Protection Agency Administrator Christie Whitman; SEQ. Chairman James L. Connaughton; and Fred Krupp, Executive Director, Environmental Defense. After hearing from the governors and Administration officials, attendees separated into breakout groups to address a broad variety of issues, including challenges associated with "Meeting Growing and Competing Demands for Water."

The goals for the water breakout session included providing "models for applying the Enlibra principles and Park City principles to overcome the inherent conflicts of insufficient water supplies." Michael Brophy, WSWC Chairman and Ben Grumbles, Deputy Assistant Administrator, Office of Water, U.S. EPA, served as co-moderators for the session. Karl Dreher, WSWC Vice Chairman and Director of the Idaho Department of Water Resources, discussed the experience and outcome in the Lemhi River Basin in providing additional instream flows for fish. Mr. Dreher pointed to the successful adaptation of state water law to facilitate the outcome. Dave Mastin, Deputy Minority Leader, Washington House of Representatives, related his perspectives from the Walla Walla Basin in Washington and Oregon where a number of stakeholders came together to improve fish habitat. Mr. Mastin emphasized the spirit of cooperation and early actions to improve habitat.

Following a period for questions and discussion, the group moved to consider a case study involving settlement of Indian water rights claims. John Echohawk, Executive Director, Native American Rights Fund, provided background on the evolution of efforts to foster settlement of these claims, rather than litigation. Jim Morsette, Water Resources Director, Chippewa Cree Tribe of Rocky Boys, Montana, related his experience with the settlement on his reservation. Pointing to David Hayes, who led the efforts on the part of the Administration to facilitate settlements, he noted that one person could make a considerable difference. Picking up on this point, Susan Cottingham, Montana Reserved Water Rights Compact Commission, shared her perspectives on the Rocky Boys settlement and urged the Administration to appoint someone in a permanent capacity to head Interior's Indian water rights office. Mike Jackson, Jackson & Associates (and former Deputy Staff Director, Senate Indian Affairs Committee), provided an overview of progress to date in achieving settlements and the obstacles that face such settlements as they come before Congress for approval. He voiced his support for the measure crafted by Senator Pete Domenici (R-NM) to deal with the significant obstacle of funding settlements. Finally David Hayes, Latham & Watkins (and former Deputy Secretary, Department of the Interior), offered some lessons learned from his experience.

He noted that all of the remaining proposed settlements would be difficult, but offered encouragement for continuing efforts.

The group moved next to the topic of planning for drought. Jack Stults, Administrator of the Montana Water Rights Division, discussed how his state had moved from drought response to include several initiatives to prepare for drought. Paul Cleary, Director of the Oregon Department of Water Resources, explained how the drought had significantly aggravated the problems in the Klamath River Basin. Better planning could have mitigated these impacts, he concluded.

Recommendations were summarized and presented to the governors. Mr. Dreher gave the report and related the chief recommendations to the Enlibra principles. In noting one of the principles calls for collaboration, not polarization, he reported the group's conclusion that successful environmental policy implementation is best accomplished through balanced, open and inclusive approaches at the ground level, where interested stakeholders work together to formulate critical issue statements and develop locally-based solutions to those issues. He noted that "...all of the case studies presented demonstrated the benefits of watershed approaches and the conflicts, some of which can be severe, that result when watershed approaches are not employed." The group recommended that the WGA encourage the expanded use of watershed-based approaches to improve the application of all of the Enlibra principles.

Specifically, the following were suggested:

- (1) Request federal funding from EPA's watershed program (and other programs), to support linking federal/state agencies with local constituencies in order to help promote watershed planning to gain the resulting benefits. The Governors could provide this link.
- (2) Request dedicated funding from federal sources, with some form of appropriate local match, to implement watershed improvements based on watershed plans and increase utilization of conservation districts.
- (3) Redirect some portion of existing federal funding for regulation and enforcement into watershed planning and implementation efforts.
- (4) Continue support for the Domenici amendment to fund Indian water right settlements, which have largely resulted from collaboration, and request that the Director of the Indian Water Rights Office in the Department of Interior be filled expeditiously.
- (5) As a measure of the success of the Enlibra principles, challenge tribes and federal and state governments to complete two Indian water right settlements per Congress.
- (6) Support the National Drought Preparedness Act, soon to be introduced, which furthers collaboration and cooperation among federal, state, and local entities in preparing for and responding to drought emergencies.

Mr. Dreher also related the group's recommendations related to the Enlibra principle of "science for facts." The group concluded that to improve the science and further reduce conflict and disagreement, collaboration needs to be extended to the development of the science.

- (1) Scientific investigations need to be framed with the involvement of all affected governmental entities and interested stakeholders to ensure the investigations address the right questions.
- (2) Scientific investigations need to be performed with the involvement of scientists representing all affected governmental entities and interested stakeholders, not just peer reviewed at the end, to build incremental buy-in and minimize disagreement over the facts.
- (3) Early implementation actions should be employed in advance of final scientific investigations, when and where needed and appropriate, and adaptive management should be used to further guide associated scientific investigations.

### **Endangered Species Act and Water Management in the Great Plains Workshop**

On May 6-8, the Nebraska Department of Natural Resources, Western Governors' Association and WSWC sponsored a workshop on the Endangered Species Act and Water Management in the Great Plains in Omaha. Six states were represented, together with the U.S. Fish & Wildlife Service (FWS), Bureau of Reclamation, Environmental Protection Agency (EPA) Corps of Engineers, Audubon Society, American Rivers and local ground water management, irrigation and public power districts. The group addressed the interrelated impacts of state water law and federal environmental statutes on the management of fish and wildlife and water. A consistent theme was the need to bring stakeholders to the table to find solutions to complex local and regional problems. The discussions focused on the continuing review of the Corps Master Manual for operation of the Missouri River system, the Platte River Endangered Species Partnership and the Rattlesnake Creek/Quivira Partnership.

The latter case involved a negotiated agreement for management of ground water development in central Kansas to ensure protection of the Quivira National Wildlife Refuge's senior state surface water rights. The refuge is a unique inland salt water marsh designated as an internationally important resting and feeding site for hundreds of migratory birds, including the whooping crane, Interior least tern, piping plover and bald eagle, among others. The wetland is fed by Rattle Snake Creek and the refuge has a 1957 state water right. However, thousands of upstream wells had been subsequently developed, affecting streamflows and threatening the water supply for the refuge. A similar situation to the north involved local water users and the State of Kansas in a bitter legal fight over water for the state-owned Cheyenne Bottoms wildlife area on Walnut Creek. No one was satisfied with the process.

In contrast the Quivira partners, which included the refuge management, local ground water management district and Kansas Division of Water Resources, began a seven-year task of gathering and analyzing data on aquifer characteristics and pumping impacts leading to a memorandum of agreement on a twelve-year plan to reduce agricultural water use. Adaptive management and patience were key to the process, and the threat of enforcement of a call on the creek kept people at the table. Alternative actions had been identified upfront, should the plan fail to achieve its objectives. Everyone with a stake was seeing to it that the plan worked. Of note it was the threat of enforcement of state water law, and not the Endangered Species Act (ESA), that provided the incentive.

On the Platte River, formal ESA consultation requirements related to myriad federal actions in the basin from federal licensing of hydropower projects to Clean Water Act permits for diversion works and U.S. Forest Service special use permits had the potential to impose onerous burdens on

habitat, sometimes hundreds of miles downriver. As a result, the governors of Colorado, Nebraska and Wyoming initiated discussions leading to the formation of the Platte River Endangered Species Partnership and an agreement with the U.S. Fish and Wildlife Service to develop a plan and process that would comprise a Reasonable and Prudent Alternative (RPA) to a jeopardy opinion on permitted development and ongoing project operations. The FWS long-term goal was to provide an additional 29,000 acres of habitat and increase average annual flows by 417,000 acre-feet of water focused on the Big Bend area, near Grand Island, in central Nebraska for some of those same species that use the Quivira refuge.

However, finding such a goal too ambitious for some of the partners to agree to, a phased incremental approach would be taken first trying to secure 130,000 to 150,000 acre-feet of water for endangered wildlife through a mix of water conservation and project reoperation opportunities in the three states. Each state was taking a little different approach to reaching the interim goals. Wyoming and the Bureau of Reclamation were looking to increase storage at Pathfinder Dam and use uncontracted water in Glendo Reservoir, both on the North Platte River, to increase flows. Colorado had planned to use ground water recharge opportunities to change the timing of discharges to the South Platte River to help meet target flows, while Nebraska planned to use water stored in Lake McConaughy behind Kingsley Dam on the North Platte, together with habitat acquisition (including some 2650 acres already purchased), to help meet the goals. Still, more water conservation and water supply actions will be needed to achieve FWS long-term goals. The states and federal government were also providing \$75M, but it could take twice that much for just the first increment of the plan. In addition to funding and water and land acquisition challenges, there were hurdles to be overcome with respect to the integrated management of surface and ground waters, concern over impacts on the local tax base, potential third party impacts, and other issues.

For more than a decade, since the drought of the late 1980s, the U.S. Army Corps of Engineers had been reviewing its Missouri River Master Water Control Manual that governs operations of system projects and reservoirs with a storage capacity of some 73.5M acre-feet (af) of water. The system provides for recreation, navigation and flood control, as well as water intakes for power plants and cities. Storage and releases also impact a number of endangered birds, already mentioned, and fish, particularly the sturgeon. The "flat lining" of the Missouri's hydrograph eliminated important spawning cues and backwater habitat, and changed a broad shallow river into a series of reservoir pools and deep, fast, sometimes dangerous channels. Economic and environmental values had also changed since construction of most of the reservoirs under the federal 1944 Flood Control Act. Recreation and power generation produced more revenue than navigation on the Missouri and was especially important to Montana, North Dakota and South Dakota with Fort Peck, Garrison and Oahe Reservoirs, among the largest in the country. Downstream navigation was still important and during the drought of the late 1980s, the Missouri River provided much of the flow of the Mississippi River. Water intakes were also threatened as water levels dropped, and agricultural lands on both sides of levees along the river remained more or less prone to flooding.

The Corps had struggled to balance these competing interests, and its responsibilities under ESA and its authorizing statutes. In February, the comment period closed on a revised draft environmental impact statement (RDEIS) for system operations. A preferred alternative was scheduled to be identified, followed by a record of decision by October 2002, with implementation of a new operations plan in March 2003. Whether the Corps could keep to that schedule remained to be seen. The Missouri Basin States Association had developed its own recommendations for the Corps, but could not reach a consensus. Missouri could not support the MBSA plan, and tribal members abstained. Drought management flows and water for ESA needs were two difficult issues.

members abstained. Drought management flows and water for ESA needs were two difficult issues. Some flow changes now appeared inevitable, with winners and losers, but the real dilemma according to MBSA Director Richard Opper was trying to “solve one piece of the puzzle at a time, before we understand how the pieces relate to each other.” Still, taking no action wasn’t acceptable. “You can’t forever argue the theoretical impacts.”

Maryanne Bach, Great Plains Regional Director for the Bureau of Reclamation, presented an overview of the Missouri River Basin, which faces many other issues and challenges in addition to endangered species. Some she mentioned were Indian water right and land settlements, and their implementation and funding, wild and scenic river segments, interstate and international concerns and disagreements, and the allocation of water and power resources. She reviewed some of these, including the changes over the years to the Garrison Diversion Project and other projects, with steadily decreasing authorizations for irrigated acreage and growing investments in rural potable water supplies.

John Ferrell, Featherworks LLC (and a former Corps historian) addressed those attending over lunch. He noted the Corps early mission was to rectify “Mother Nature’s mistakes” and end the wildly fluctuating flood/drought cycles that characterized the Missouri’s hydrograph. However, more recently the mission of the federal water project construction agencies had changed with public values and science, with environmental protection and sustainable development primary considerations. The meeting concluded with a caucus reviewing lessons learned from past experience. In Mr. Ferrell’s words, we have to “meet the needs of the present without compromising the future.”

### **Water Information Management Systems Workshop**

The Oregon Water Resources Department hosted WSWC’s annual Water Information Management Systems (WIMS) Workshop in Salem, Oregon on June 12-14. Representatives from nine states discussed information management needs, challenges, and innovations in water management systems. States shared technical presentations on data gathering and web-based information tools for the public. Attendees discussed geographic information systems, the U.S. Geological Survey’s National Streamgaging Information Program (NSIP), and cooperative state/federal streamgaging activities, Idaho’s Surface Energy Balance Algorithm for Land (SEBAL), Washington’s Well Log Imaging Project, and the National Resources Conservation Service’s Snow Survey and Water Supply Forecasting Program and Soil Climate Analysis Network (SCAN) program. Among participants, there was a general consensus that in order to help states improve their water management, there is a great need to have a common vision and strategy for using WIMS. Attendees also agreed that the benefits of using information technologies (IT) must be appreciated and supported by state leaders who make funding decisions which help or hinder the implementation of IT business plans.

### **Western Governors’ Association - Annual Meeting**

Western Governors wrapped up their Annual Meeting in Phoenix on June 25, by electing Governor Judy Martz of Montana as their new Chairman. Governor Martz intended to make forest health her top priority. The governors met briefly with President Bush, visiting northern Arizona to assess fire damages, and they discussed wildland fire management. The governors also adopted a number of policy resolutions on a variety of topics at the meeting. Four expiring resolutions related to water were revised and readopted, addressing: (1) Implementing the Total Maximum Daily Loads

Programs Under the Clean Water Act; (2) Future Management of Drought in the West; (3) The Safe Drinking Water Act; and (4) State Authority Regarding the Federal Hydropower Licensing Process.

The policy statement on the Total Maximum Daily Load (TMDL) Program urged EPA to work cooperatively with the states to develop and implement a program that “provides flexibility to accommodate state and local conditions, addresses funding needs in a realistic manner, recognizes a watershed-based approach to establishing TMDLs, and encourages incentive-based approaches, such as pollution trading programs and voluntary compliance before mandatory measures are taken.” The Western Governors’ Association (WGA) will “seek to pilot creative ideas, share experiences, compare strategies and identify opportunities to more efficiently and effectively establish and implement TMDL programs within the context of watershed planning.”

Regarding drought, “Western Governors believe that a comprehensive, integrated response to drought emergencies, including mitigation planning, is critical to the social, environmental and economic well-being of the West.... The Governors continue to believe that a national policy must be enacted which provides for a...coordinated...approach to future drought, and which focuses on...[four] critical elements.” These are: (1) monitoring, assessment and prediction; (2) mitigation and preparedness under a framework that assists in the assessment of vulnerabilities in order to reduce drought impacts; (3) enhanced response capabilities with strengthened intergovernmental partnerships to improve overall customer service; and (4) the use of a variety of communication tools to identify and use drought-related networks to facilitate the exchange and dissemination of information. The governors called for enactment of the National Drought Preparedness Act “...without delay in order to move the country away from the costly, ad-hoc, response-oriented approach to drought, and move us toward a proactive, preparedness approach....”

With respect to the Safe Drinking Water Act (SDWA), western governors believe “...the standards established thereunder for drinking water contaminants have been instrumental in ensuring safe drinking water supplies for our nation...[and] that it is essential for the federal government through EPA to provide technical and financial assistance to the states and water systems to meet the federal requirements. In particular, assistance is needed for small systems for new treatment technologies, and in some cases for operation and maintenance.” The governors also called for additional studies of arsenic’s health effects on U.S. populations at levels between 20 parts per billion (ppb) and 50 ppb. The governors also emphasized the importance of the Drinking Water State Revolving Loan Fund and supported efforts to increase state flexibility in spending funds for disadvantaged communities, such as the small systems that would be impacted by the new arsenic rule.

Lastly, the governors reiterated the critical importance of giving appropriate deference to state policies regarding hydropower development and project operations in federal decisions on siting and relicensing projects. The WGA resolution stated, “The states have an essential role in protecting their natural resources and environment, protecting [the] security of existing rights, and preserving options to provide for orderly water development in the future.... Congress should refrain from weakening or removing a vital tool for states to influence hydropower siting and operation within their borders and upon their waters. Section 401 of the CWA is operating as it was intended and should be retained without amendment.”



## **Water Conservation - Western State Roundtable**

A Western States Water Conservation Roundtable: "Managing Shortages in a Changing West," was held in Boise, Idaho on August 27-29. It was sponsored by the "Bridging-the-Headgate" Partnership, which included the U.S. Bureau of Reclamation (BOR), Western States Water Council, USDA's Natural Resources Conservation Service (NRCS), National Association of Conservation Districts, National Water Resources Association (NWRA), and the National Association of State Conservation Agencies. Several state and local Idaho agencies also cosponsored the meeting, and a related field trip that included a tour of nearby canal lining and automated irrigation water delivery systems, which had helped significantly improve water use efficiency. Over 100 federal, state and local water managers and experts attended from thirteen states and Washington, D.C.

Idaho Governor Dirk Kempthorne addressed the group and mentioned many of the water resources challenges facing the state, including urban growth, surface and ground water use conflicts, salmon recovery, hazardous waste cleanup, aquifer protection and management, and serious drought. Fifteen Idaho counties had been designated emergency disaster areas due to the drought and twelve canal companies had been shut down due to a lack of water, leaving some 280,000 acres dry. Magic Reservoir was dry. He recognized the Partnership for its work in promoting the sustainable and efficient use of western agricultural water supplies, relying on Enlibra principles and local leadership in a ground up, less prescriptive approach to finding the best and most effective solutions to economic and environmental problems. The governor noted the important role of water conservation, recognizing it is not a "cure all," but a tool box that includes water banking, dry year options, leasing and transfers, etc. He added states must retain their primary, pivotal role in western water management, with the support of federal partners. "Water is our lifeblood," and firm, reliable water supplies are essential to the future of the West.

Karl Dreher, Chairman of the Western States Water Council and Director of the Idaho Water Resources Department, introduced the governor and also welcomed those attending. His remarks focused on the importance of integrating conservation in overall water management, with the Snake River Plain as an example. Some one million less acre feet of water is diverted from the Snake River today than a hundred years ago, as two-thirds of the irrigation is by sprinklers. As less water is diverted, and more stays in the river, aquifer levels had declined and so have important downstream spring discharges that return to the river. Idaho has some of the nation's largest trout farms, which rely on these springs for clear clean water. The springs are also the source of supply for some of the most senior surface water rights in the state. As discharges declined, conflicts with junior ground water rights had arisen, creating serious water management questions and challenges.

Bureau of Reclamation Commissioner John Keys and the new NRCS Chief, Bruce Knight, also spoke briefly. Mr. Knight emphasized what he called "common sense conservation," and the commitment to soil and water conservation in the new Farm Bill. Commissioner Keys described the problems in the Klamath River Basin and Reclamation's efforts to work with state and local interests to find ways to avoid a repeat of the 2001 situation there or elsewhere.

Other WSWC members participating in the meeting included: Sue Lowry, Chair of the Water Conservation Subcommittee and a member of the Bridging-the-Headgate steering group; Paul Cleary, Director of the Oregon Department of Water Resources, speaking on the Klamath Basin and water banking and other efforts; Norm Semanko, Director of the Idaho Water Users Association, also representing NWRA; Jack Stults, Administrator of the Montana Water Rights Bureau, speaking on watershed group initiatives in the Blackfoot, Big Hole and Jefferson River Basins; Tom Davis,

Manager of the Carlsbad Irrigation District, addressing issues in the Pecos River Basin, where many river reaches had become dry. Joe Smith, Director of the Arizona Department of Water Resources, came with Tim Henley, Manager of the Arizona Water Banking Authority and Cindy Shimokusu, Director of the Tucson Active Management Area. Other member states were represented. Shaun McGrath, Western Governors' Association staff, addressed national drought legislation. Of note, former WSWC Chairman Bill McDonald, BOR's Pacific Northwest Regional Director, attended and introduced Commissioner Keys, and Martha Pagel, former Director of the Oregon Water Resources Department, addressed the Roundtable theme, "Managing Shortages in a Changing West."

## OTHER IMPORTANT ACTIVITIES AND EVENTS

### In Memoriam

**Debra Mull** passed away this year suddenly from a heart attack. A former WSWC member and Washington state administrative appeals judge, she was an expert on natural resource issues, especially water. Her humor and enthusiasm will be greatly missed.

### Council Staff and Membership Changes/News

#### Arizona

**Michael Pearce** left his position as counsel with the Arizona Department of Natural Resources to accept a job with the Phoenix law firm of Fennemore-Craig.

#### California

**Rod Walston**, long associated with the Council as a representative from California, resigned citing possible conflicts of interest with his new position as Deputy Solicitor for the Department of Interior.

#### Kansas

**Al Le Doux**, Director of the Kansas Water Office, has been named by Governor Bill Graves as an alternate member of the Council. The Kansas Water Office is responsible for the state water plan, and water marketing and water assurance programs, as well as weather modification.

#### Texas

**Thomas Weir Labatt III**, was appointed by Texas Governor Rick Perry, replacing William Madden as a WSWC member. He is the president of Labatt Management Co., LLC, which manages a portfolio of investments for a family limited partnership. He has also managed a 10,300 acre ranch in Edwards County Texas since 1967. He is currently a member of the Texas Water Development Board.

**Kathleen Hartnett White** was appointed by Texas Governor Rick Perry as a WSWC member replacing John Baker, who is now with the Brazos River Authority. She is a consultant/writer on environmental law, natural resources policy and ranching history. Ms. White and her husband own a 115-year old cattle ranching operation. She is a former member of the Texas Wildlife Association's Board and Texas Water Development Board (TWDB). She was appointed to the TWDB in 1999, and left in October 2001 to accept a full-time, six-year appointment to the Texas Natural Resources Conservation Commission (TNRCC).

## **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.

The following developments are included from the newsletter. It is not a comprehensive listing, but seeks to highlight major events occurring during the calendar year, as described in the newsletter.

### **Agriculture - Farm Bill**

A water rights controversy developed around Section 215 of the Farm Bill (S. 1731), which Senator Harry Reid (D-NV) added to establish a Water Conservation Program that defined "eligible land" to include "any land the enrollment in the program of 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 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...."<sup>10</sup>

Many argued that the proposed program as drafted failed to provide sufficient assurances that the Secretary must comply with both the substantive and procedural requirements of state water law pertaining to the administration and transfer of water rights. Senator Jon Kyl (R-AZ) submitted a further amendment<sup>11</sup> which would direct that the Secretary "...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."

In a February 1 letter to western senators approved by each of the WSWC member states, Chairman Michael Brophy on behalf of the WSWC addressed concerns over water rights language contained in the Section 215 Water Conservation Program stating, "Although there is not consensus among the eighteen western states...on supporting the [program] as proposed in the amendment, the western states agree that the amendment currently does not provide sufficient assurances that the USDA shall completely comply with both the substantive and procedural requirements of state water law pertaining to water right transfers and the subsequent administration of transferred water rights."

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<sup>10</sup>*Western States Water* Special Report, Issue #1439, December 14, 2001.

<sup>11</sup>(SA 2582) to SA 2471.

The letter continued, "Every western state requires state authorization for transfers involving a change in the place and purpose of use, as contemplated in the proposed Section 215 program. Such laws enable states to protect water right owners, other water users, and the public interest or welfare, including consideration relating to impacts on communities, conservation, and the environment. The proposed Section 215 process allows the Secretary to circumvent this vital state role by granting the Secretary discretion to acquire water rights outside state law and administration.... Such authority has the potential to render western states impotent to effectively direct their respective futures through their water use laws, policies and procedures."

The letter concluded, "Should this provision in the Farm Bill go forward, we would urge, at a minimum, that it be amended to require that any acquisition of a water right pursuant to the program and subsequent administration of such rights -- both temporary and permanent -- be wholly in compliance with the water laws and administration of the individual states in which the acquisition takes place."

On February 7, 2002, Senator Mike Crapo (R-ID) brought up on the Senate floor an amendment<sup>12</sup> that he submitted on December 13 of the previous year, to strike the water conservation program. He was joined by other western Republican senators from Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, Utah and Wyoming. The amendment was extensively debated, but there was no vote.

Senator Crapo said, "This amendment is essentially a debate over whether the Federal Government should make an unprecedented move into the management, allocation, and use of water nationwide through the farm bill.... The water provisions we are debating today are an effort to link, if you will, administration of the Endangered Species Act with this very successful CRP [Conservation Reserve Program], and to do so in a way that will intrude on State sovereignty over water and will create inappropriate pressures on our farmers, our agricultural producers, to give up their water rights and will not result in more effective benefits for the wildlife. In essence, ...in order to participate in that new CRP land, a farmer would have to agree to give up either temporarily or permanently his or her water rights to the Federal Government."

He continued, "The States already have programs and operations in place that enable them to address the questions of the need for water for species management. In fact, in my State of Idaho, we already are working very aggressively in salmon and steelhead recovery efforts to work with private property owners and water right holders to make certain we are able to get water to the species that need it without harming the agricultural community and the other interests of water users, and we are doing so very successfully." He referred to a December 11, 2001 letter from Governor Dirk Kempthorne, which stated, "In Idaho, the U. S. Bureau of Reclamation has been able to rent water from the State water supply bank from willing sellers pursuant to State law for almost a decade. More recently, the Bureau has rented water while in the Lemhi River, a tributary of the Salmon River, for the benefit of fish species. Again, this was done under the auspices of State law in cooperation with willing sellers. My point again is that State law already provides mechanisms for the objectives of this water language to be achieved. We do not need to insert the Federal Government into the control of water rights...."

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<sup>12</sup>SA 2533.

Senator Crapo went on to raise concern as to what would happen under the proposed conservation program when a lease expires and a farmer wants to again use his water rights. "What if a species has become dependent on that water? Does that become a taking? Does there need to be a NEPA analysis before the Federal Government can return the water rights to this farmer?" Senator Larry Craig (R-ID) read into the record the objections of the American Farm Bureau Federation.

Senator Harry Reid (D-NV), the original author of the program, subsequently offered a further amendment that would allow the states to hold related water rights, rather than the federal government. That language was circulated to several WSWC members. According to the Senator's staff, he wanted to make the program work for western states and to this end had developed the alternative proposal.

In response to Reid's new proposal, Senator Ben Nighthorse Campbell (R-CO) said, "I carefully reviewed the language letting the States hold water rights rather than the Secretary of Agriculture.... At first glance, this might sound reasonable, properly deferring to the primacy of State water courts in the West. However, the new language requires the Secretary of Agriculture to review and approve the interested State's program.... Whether intentional or not, the USDA review and approval requirement amounts to a sleight-of-hand Federal regulation of a precious State resource resulting in de facto Federal involvement."

On Wednesday, February 13, the Senate passed the Farm Bill by a 58-40 vote, after modifying the Water Conservation Program language the day before to limit its application to the states of California, Nevada, New Hampshire, New Mexico, Maine, Oregon and Washington. The new provisions survived a vote to strike the entire program 55-45.

With respect to water conservation, Senator Jeff Bingaman (D-NM) explained, "Section 215, as originally conceived, sought to provide direct Federal assistance to farmers by allowing the Federal Government to lease or acquire water rights on a willing seller basis to use as part of a plan to protect and recover certain species and certain habitat. That is a worthy goal, but as in all water-related issues...the devil is in the details. On close review, valid concerns were raised: No. 1 was whether the program would be conducted pursuant to all applicable State law; No. 2, what would be the implications of Federal ownership of Federal water rights; No. 3, what was the correct linkage between the Conservation Reserve Program and the Endangered Species Act.

[W]e agreed...before Christmas...to prohibit the application of the section 215 water conservation program in any State in which the Governor had not formally agreed to the program.... This change, however, ...was considered insufficient to address the needs of some States...that wanted to make use of the program but were still concerned about the issues...about Federal ownership of water, in particular. Fortunately, Senator Reid was agreeable to making changes in that language and we were able to adopt a much-improved version....

Senator Reid proposed a second-degree amendment to the farm bill...a substitute to the water conservation provision contained in section 215 of the underlying bill.... I have reviewed the amendment that Senator Reid offered and that the Senate adopted. I believe it is good law, it is good policy, and it is a substantial improvement over the original proposal.... The amendment that has now been adopted addresses many of the same conservation goals by utilizing two State-based water conservation programs. The first program, which is a water conservation reserve program, would fund States that submit proposals seeking to enroll land in a conservation reserve or to acquire water

rights to advance the goals of Federal, State, tribal, or local plans to conserve and protect fish and wildlife. The second of the two programs...is a water benefits program under which participating States can develop a plan where willing water users are offered assistance or compensation for several different water savings options, such as irrigation efficiency improvements, converting from water-intensive to less water-intensive crops, leasing or selling water rights -- again, not to the Federal Government, but to the State. Quite simply, the original concept has been converted into two programs that are State based and State controlled.

Under the new amendment, there is no possibility of the Federal Government buying or leasing water rights. That is prohibited. The remaining Federal role is to review the State proposal to ensure that they fulfill certain general purposes and to prioritize funding between competing proposals in order to get a State plan implemented. I think it is appropriate that the Federal Government try to provide some assistance to States and to the agricultural community to address these difficult needs that arise when the water needs of farmers compete with the needs of fish and wildlife. This is particularly true where the conflict is exacerbated by Federal laws, such as the Endangered Species Act.

In my view, it would be foolhardy for our State not to have that option.... There is no mandate that we participate. There is no mandate...that any farmer or water user participate.... There will have to be complete compliance with the substantive and procedural requirements of State water law. Finally, although the State may choose to use its program to help alleviate endangered species conflicts, this is not the sole basis or the application of the program. Other wildlife and habitat improvement programs are also allowable, and because any water acquisition will be done by the State, Federal actions are limited....”

House and Senate conferees were named and work began on working out differences between the House and Senate versions of the Farm Bill. Senator Reid’s proposed \$1 billion water conservation program did not make it out of the conference.

On May 2, the House passed the report of the Farm Bill conference committee, by a 280-141 vote, and the Senate soon followed. In deference to Senator Reid, a program was approved to get water to at-risk natural desert terminal lakes. “I’m satisfied,” said Reid. “The new Farm Bill...includes my legislation to provide an unprecedented \$270 million for voluntary measures to help Nevada’s farmers, ranchers, sportsmen and Tribes conserve water for Walker and Pyramid Lakes, restore wildlife habitat on public lands, and protect farm and ranch lands from urban sprawl....”

### **Border Water Issues**

Water shortages primarily due to the continuing drought in the Rio Grande basin and its major Mexican tributary, the Rio Conchos, raised social, economic and political issues that reached the highest levels with discussions between President George W. Bush and Mexican President Vicente Fox. By treaty, Mexico is to deliver 350,000 acre-feet (af) annually to two reservoirs on the Rio Grande, Amistad and Falcon. Given increasing demands and drought, Mexico had fallen behind in its obligations by some 1.5 million acre-feet.<sup>13</sup> This caused considerable economic hardship to downstream irrigators on both sides of the border, with American farmer calling for actions to ensure

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<sup>13</sup>*Western States Water*, Issue #1441, December 28, 2001.

Mexico met its obligations. On May 15, President Fox promised Mexico would repay its water debt, and proposed a water conservation plan and repayment schedule.

The Bush administration subsequently rejected Mexico's offer to pay back 32 billion gallons of its water debt over four months, presented June 9 in Washington, D.C. Mexico's payback proposal also included a request for \$100 million in loans to build a water system to aid water management in northern Mexico. The offer was a far cry from the U.S. officials' demand for the immediate transfer of 32 billion gallons of water and an additional 82 billion gallons to be delivered before September 26, with the remaining debt to be repaid over the next five years.

Under the 1944 treaty, an accounting of the water deliveries is done in 5-year increments, and it was Mexico's position that until the current period was over (this September), it had no obligation to repay any of its water debt. Due to the drought conditions that had plagued the region on both sides of the border, pressures were mounting for both President Bush and President Fox to reach a solution. The Mexican delegation returned home, promising to meet again soon to come up with an acceptable agreement.

On June 28, U.S. and Mexican officials signed a water deal. The deal was seen as a step towards resolving Mexico's water debt to the United States, but it made no specific provisions for any long-term repayment. The agreement stated that "the two governments would continue discussions through the International Boundary Water Commission (IBWC) regarding measures to be taken concerning the deficit in the allocation of water from the Mexican tributaries." The agreement provided that the U.S. would aid Mexico in covering irrigation infrastructure improvement costs.

Addressing the decade old water debt, Mexico released its right to 90,000 acre-feet of water from Amistad and Falcon Reservoirs. This water was allocated by the IBWC to Texas farmers in the Lower Rio Grande Valley, where it was expected to cover irrigation needs for the ensuing 4½ months. This appeared to be a substantial step towards a resolution of the debt, but there remained a clause in the agreement that provoked criticism. According to the agreement, if by October 26, "the new Mexican inflows have not replaced the volume of 90,000 acre-feet [in the international reservoirs], the Commission will make a compensating adjustment to Mexico's favor that is equal to the difference between 90,000 acre-feet and the quantity of Mexico's inflows." This condition has left Texas officials and farmers upset, many claiming that Mexico would never repay the growing water debt.

## **Clean Water Act**

### *General Accounting Office Report*

The General Accounting Office released a report entitled, "Water Quality: Inconsistent State Approaches Complicate Nation's Efforts to Identify Its Most Polluted Waters."<sup>14</sup> The report states, "Although the precise number is not known, the Environmental Protection Agency (EPA) believes that over 20,000 bodies of water throughout the country are too polluted to meet water quality standards. The approaches used to identify impaired waters vary considerably among states. This variation leads not only to inconsistencies in the listing of impaired waters but also to difficulties in

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<sup>14</sup>GAO-02-186, January 11, 2002.



identifying the total number of impaired waters nationwide and the total number of total maximum daily loads (TMDL) that states say will be needed to bring such waters up to standards.”

### Good Samaritan Bill

On March 21, Rep. Mark Udall (D-CO) introduced legislation to promote the cleanup of abandoned hardrock mines and improve water quality in waterways throughout the West. H.R. 4078, the Abandoned Hardrock Mines Reclamation Act of 2002 would remove some of the existing financial and liability obstacles that currently hinder mine cleanups. The Act would protect “Good Samaritans” in their efforts to cleanup abandoned hardrock mines, but it would not apply to coal mines or oil or natural gas wells.

Sections 101-103 would create a reclamation fee and a reclamation fund to provide the financial resources needed in cleanups. The fee would only apply to mines with annual gross revenues in excess of \$500,000 and the actual amount to be paid would be based on a sliding scale taking into account the net to gross proceeds, profits divided by revenues, essentially looking at size and profit margin together. Mining operations producing hardrock minerals after December 31, 2001 would be required to pay the fee to the Secretary of the Interior. The fees would go into a reclamation fund, which would be used to help pay for cleanups of abandoned hardrock mines. The best estimate thus far is that the bill’s fees would generate about \$40 million.

Next, the bill would create a new permit program and a permittee would be required to create a site remediation plan (with the ultimate goal of attaining Clean Water Act standards). The plan would be reviewed by both the EPA and the public. A permit, available to state, tribal, and federal governments, would require compliance with water quality laws, but it would provide some protection against liability for water quality violations. Permittees would be held liable for any water quality degradation resulting from their efforts. For example, an agency cleaning up a mine would be liable for their actions that adversely affect water quality at the site, but the agency would not be liable for preexisting water quality violations.

“Together, these two programs could help us begin to address a problem that has frustrated federal and state agencies throughout the country and make progress in cleaning up an unwelcome legacy of our mining industry,” Congressman Udall said.

### Herbicides in Irrigation Systems

On March 29, EPA issued a press release clarifying that it will use regulatory and enforcement authority under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) to prevent misuse of herbicides in irrigation systems. This statement is consistent with FIFRA, and the Clean Water Act, in which the Congress specifically states, “The Administrator shall not require a permit...for discharges composed entirely of return flows from irrigated agriculture.” EPA confirmed that the application of aquatic herbicides to ensure flow in irrigation canals does not require a Clean Water Act (CWA) permit, as long as the directions on the federally-approved label are followed.

EPA said it would continue to monitor herbicide and pesticide use to ensure that such is done according to the EPA-approved label requirements. The statement contradicted a 9th Circuit decision in *Headwaters v. Talent Irrigation District* in March 2001. In that case, the court found that a CWA National Pollutant Discharge Elimination System (NPDES) permit was required before pesticides could be used since the canals were waters of the United States. The EPA statement

explained that applying pesticides according to EPA-approved labels is governed by FIFRA, and not the NPDES permit program.<sup>15</sup>

### Nationwide Permits

On January 15, the U.S. Army Corps of Engineers (Corps) reissued nationwide permit (NWP) requirements for dredge and fill activities with minimal impacts on wetlands under section 404 of the Clean Water Act. The new requirements were to take effect starting on March 18.<sup>16</sup> The changes, according to the Corps, were made to show President Bush's commitment to a "no-net-loss" policy for wetlands preservation, reiterating the phrase coined by his father, the former president, over a decade ago. Changes in the nationwide permit process were first announced in August 2001.<sup>17</sup>

"Nationwide permits are general permits that authorize categories of activities which the Corps has determined will have minimal impacts on the aquatic environment, individually and cumulatively, when conducted in accordance with the permit conditions," a Corps representative explained. "However, the Corps will continue to require an individual permit for any project, whether covered by a general permit or not, which it determines would have more than minimal environmental impact." The NWP acreage threshold has been reduced from three acres to impacts covering up to one-half acre.

The Corps' 38 district offices would no longer have to enforce a strict one-to-one mitigation requirement on individual permit holders for any loss of wetlands, but rather could determine that some other form of wetlands mitigation such as an upland buffer of open water areas may suffice as environmentally appropriate. Further, the Corps would allow wetland trading as long as there is a break even point on a district level. The Corps says that this approach would provide for greater deference to watershed management principles, as Corps districts roughly parallel natural watersheds.

### **Colorado Basin**

Late in the year, Interior Secretary Gale Norton, addressing a meeting of the Colorado River Water Users Association in Las Vegas, compared the drama over the "California 4.4 Plan" to a high stakes poker game saying, "The stakes are high, and each party is studying their hand.... If this were a game, it would be time to lay our cards on the table and demonstrate that the Department of the Interior has not been bluffing. However, this is not a game, it is serious business. But I will lay our cards on the table.... While increasing water demand is causing change, what must not change is our commitment to honor compacts, decrees and agreements.... For the first time, a Secretary of Interior faces the need to enforce the limits confirmed by the U.S. Supreme Court in the historic *Arizona v. California* litigation."

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<sup>15</sup>*Western States Water*, Issues #1406, April 27, 2001, and Issue #1411, June 1, 2001.

<sup>16</sup>67 *Federal Register* 2020.

<sup>17</sup>*Western States Water*, Issue #1422, August 17, 2001.

She continued, "The issue is not whether but when California will live within its apportionment of 4.4 million acre-feet (Maf) of water.... In 2002, California will use approximately 5.2 [Maf] -- which means that California could be seen as using 75% of the water that the Basin produced.... Over the last decade, the Department and the seven basin states painstakingly negotiated an historic agreement on Colorado River water use.... This seven-state agreement gave California a choice for reducing its Colorado River overuse: California could take specific actions to reduce its...use to 4.4 [Maf] by the year 2015. In return, California would receive enhanced access to surplus water during a 15-year interim period. This is known as the 'soft landing' for California. Alternatively, if California didn't take required actions, it would immediately lose enhanced access to surplus water, beginning January 1, 2003.... California's choice will be determined by whether California water entities sign the Quantification Settlement Agreement (QSA) before January 1st."

She added, "At this time, it appears that California's Imperial Irrigation District has decided not to execute the QSA.... The QSA quantifies California agricultural water entitlements -- a matter that has been unresolved since 1931. Without a clear understanding of each entities' portion of California's agricultural entitlement, it will be very difficult to transfer water from California's agricultural users to its urban users. These transfers may be the only solution for California to live within its 4.4 [Maf] limit.... California's agricultural users have a priority right to 3.85 [Maf] of this apportionment, and the small remainder is all that is left for Southern California cities serving more than 17 million people."

Ms. Norton concluded: "As Secretary and River Master, I must enforce the Law of the River. This means I will hold California to the express covenant it made in 1929 to limit its use of the Colorado River to 4.4 [Maf]. No alternative is permitted under the Decree of the United States Supreme Court in *Arizona v. California*.... My hope is that the California entities can still sign the QSA before the December 31 deadline.... The era of limits is upon us.... We have entered an era of constraint on the Colorado River -- not only in water supply -- but also in the fiscal resources available to us. Efficient use of limited resources will have to be the watchword.... I want to congratulate all of you who have worked so hard to bring us so far in resolving issues of the Colorado River Basin. I urge you to bring the same energy and innovativeness to the pressing challenges that we still face."

## **Drought**

On January 1, reservoir storage in eleven western states was universally below average. Given the previous year's drought, storage was less than half of average in Nevada, and only a little better in Idaho, Oregon and Washington. Storage was well below average in Arizona, Utah and Wyoming, and below average in Colorado, Montana and New Mexico. It was slightly below average in California. Similarly, entering the new year, soil moisture profiles across the West were short to very short.

According to the U.S. Drought Monitor, while much of the Northwest appeared to be recovering from drought, particularly coastal areas, eastern Washington and Oregon were still dry, as was most of Utah, Colorado, Arizona, western New Mexico, and the High Plains. Moderate to severe drought conditions persisted across Nevada, eastern Oregon, Idaho and Oklahoma, with severe to extreme drought conditions in Montana, eastern Idaho, Wyoming and West Texas.

By Spring, with the exception of western Washington State, extreme to moderate drought conditions, as measured by the Palmer Drought Index, baked the West. On the West Coast

streamflow averaged were 60-80%, while in the interior West a majority was below 50% and many below 20%. Record lows appeared likely in many areas.

Senator Pete Domenici (R-NM) introduced the long-awaited National Drought Preparedness Act of 2002 on May 16, to establish a National Drought Council and improve national drought preparedness, mitigation and response efforts. The Western Governors' Association (WGA) helped draft and strongly supported S. 2528 and H.R. 4754, companion legislation introduced on the same day by Rep. Alcee Hastings (D-FL). In a February 24 letter to U.S. Department of Agriculture (USDA) Secretary Ann Veneman, WGA Co-Lead Governors for Drought, Judy Martz of Montana and Gary Johnson of New Mexico called passage of the bill "a priority for Western Governors."

WSWC members had a number of opportunities to review the proposed legislation prior to its introduction, and members were invited to contact their congressional representatives and encourage them to join as cosponsors of the bill. Among other things, the bill would create a Drought Assistance Fund to provide technical and direct financial assistance to states, tribes, local governments and other entities for the development and implementation of drought preparedness plans.

The bill would also encourage establishment of a National Drought Monitoring Network to collect and integrate key drought-related data, including streamflow, ground water levels, reservoir storage, soil moisture, snow pack, precipitation and temperature.

## **Endangered Species Act**

### *Critical Habitat*

On April 30, the U.S. District Court for the District of Columbia approved a settlement proposed by the National Marine Fisheries Service (NMFS), ending a lawsuit initiated by the National Association of Home Builders (NAHB) over the designation of critical habitat under the Endangered Species Act (ESA). Under the settlement agreement, NMFS agreed to remove critical habitat designations for salmon and steelhead populations while it worked on new designations that include more scientific backing and consider economic impacts.

The suit was brought in November 1999 by NAHB, and sixteen other groups, challenging the NMFS designation of critical habitat for West Coast salmon and steelhead populations in 150 watersheds, river segments, estuaries and bays throughout Washington, Oregon, Idaho, and California. The NAHB asserted that the designations made by the NMFS were "excessive, unduly vague, not justified as essential to conserve the listed species, and not based upon a required analysis of economic impact." The court agreed. District Court Judge Colleen Kollar-Kotelly said, in her approval of the settlement, "Clearly there is a problem with the current process underlying the critical habitat designation process," for endangered and threatened salmon under the ESA, since the costs of such protection were never taken into consideration.

### *Sound Science Act*

On June 18-19, the House Resources Committee held hearings on H.R. 4840, the Sound Science for Endangered Species Act Planning Act on 2002, which would ensure that "decisions with such far-reaching effects and consequences should be based on scientific information that can be defended before a committee of experts from the scientific community." H.R. 4840 would give

greater weight to field-tested and peer-reviewed data. It would also establish a peer review process for listings, delistings, development of recovery plans, and jeopardy opinions (if there is significant disagreement or significant economic impact). Further, it would revise the content and establish a higher threshold for listing petitions. A board of scientists would advise the Secretary on the validity of determinations. In addition, it provides for more interagency cooperation and the use of state information. On July 10, by a 22-18 vote, the House Resources Committee reported the bill.

### *Listing of California Golden Trout*

On June 21, U.S. District Judge Vaughn Walker in San Francisco ordered the U.S. Fish and Wildlife Service (FWS) to determine within 90 days whether the California golden trout should be added to the endangered species list. Trout Unlimited requested the listing in October 2000, but FWS never replied. After waiting eight months longer than the statutory time for a preliminary determination, Trout Unlimited sued the Service last November for failing to protect California's official state fish.

The Fish and Wildlife Service stopped adding species to the endangered list late in the Clinton Administration, citing a lack of funding and a backlog of cases. The district court ruled that federal law requires the agency to decide within 90 days whether or not protection might be needed, and to make a final decision on a listing a year later. Judge Walker said, "In setting a timetable for agency action, the Ninth Circuit has instructed courts to follow a standard of reasonableness.... Timeliness in the listing process is essential."<sup>18</sup> He continued, "If the court were to adopt the Secretary's recommendation [that no sanction is proper due to backlog and the lack of funding], the court would affectively be imposing no sanction on the failure to adhere to a deadline mandated by Congress. Courts cannot countenance a failure to comply with such deadlines, even if these deadlines are impracticable as a general matter due to current funding constraints. Rather, if these deadlines are entirely impracticable, Congress itself must act."

## **Energy**

### *Energy Bill - Federal Hydropower Licensing*

By a 88-11 vote, on April 25, the Senate passed an Energy Bill after weeks of debate. H.R. 4, which the House passed in August of 2001, was adopted by the Senate after striking everything after the enacting clause and substituting the language of S. 517 as amended.

An amendment by Senators Ben Nelson (D-NE) and Mike Crapo (R-ID), further modified by Senator Gordon Smith (R-OR), changed the hydropower title to substitute "fishery" with "fish resources" and to require federal resource agencies to adopt alternatives to mandatory conditions they impose -- as proposed by licensees -- unless the agency shows evidence that the proposed alternative will not result in greater protection of the resource at less cost. States, tribes and other stakeholders may also suggest alternatives, but greater weight is placed on a licensee's alternative proposal. To reject a licensee's alternative, a resource agency must document the effects on a number of other considerations, including energy resources, air quality, irrigation, recreation, flood control, navigation and drinking water supplies -- effects the Federal Energy Regulatory Commission (FERC)

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<sup>18</sup>*Conservation Council v. Hawaii v. Babbitt*, 24 F.Supp 2.d 1074, 1076 (D Haw 1998) which cited *Environmental Defense Ctr. v. Babbitt*, 73 F.3d 867, 872 (9th Cir. 1995).

is already required to consider. The amendment also extends from two to three years the FERC relicensing timeline.

The National Hydropower Association, representing the industry, praised the change stating, "It's a ray of hope for America's leading renewable energy resource.... While there are still many issues left unresolved, the Nelson/Smith/Craig amendment provides meaningful change in a process that is far too unwieldy and unpredictable.... Despite the additional burden imposed on license applicants under the Smith substitute," continued Linda Church Ciocci, "the preservation of an applicant's right to have its alternative condition reviewed, and the review to be documented, would be a significant improvement in the process."

On the other hand, American Rivers, representing environmental interests decried the change, under the guise of streamlining. According to Matt Sicchio, "This is a very real threat to the long-term health of our nation's rivers," which will "give utilities greater authority than states, Indian tribes, and the public in critical decisions over how public rivers are managed; undermine environmental standards that hydropower dams must meet; and invite more litigation at a time of increasing collaboration."

Language in the House bill is similar to the original Senate language. Other major differences in the two bills were referred to a House/Senate conference committee.

#### *Nuclear Waste Repository/Yucca Mountain*

On April 9, water to the Yucca Mountain nuclear waste site was cut off as the Department of Energy's (DOE) temporary permits to withdraw water under state law from five wells in Nye County, Nevada expired. In February 2002, State Engineer Hugh Ricci denied a request for an extension. The site's suitability has been studied for a repository for 77,000 tons of high-level radioactive waste. Nevada reasoned that the site study was complete, when in early January, Energy Secretary Spencer Abraham advocated President Bush approve the site, which he did on February 15. In anticipation of the state's decision and possible lengthy court proceedings, DOE built and filled a million-gallon tank east of the proposed repository, as well as several smaller tanks, storing roughly 400,000 gallons of water. "We have no need to draw water for operations right now and we're going to abide by the law," said Yucca Mountain spokesman Allen Benson.

On April 8, under authority granted in the Nuclear Waste Policy Act of 1982, Nevada Governor Kenny Guinn vetoed President Bush's approval of the site, but the Congress has the final say, with 90 days under the law to override Guinn's veto. "Our reading of the statute is that the project has been vetoed," said Nevada Deputy Attorney General Marta Adams. "It is legally dead unless it is revived by a new act of Congress." DOE spokesman Joe Davis says the Department will continue working on the Yucca Project.

On April 25, after two days of consideration, the House Energy and Commerce Committee voted 41-6 to override Nevada Governor Kenny Guinn's veto of the Yucca Mountain nuclear waste repository.

Meanwhile, the Department of Energy filed suit in federal court in an attempt to prevent Nevada from cutting off access to ground water at the site. In the complaint addressed to U.S. District Judge Roger Hunt, DOE argues, "Although Congress might ultimately decide that a repository should not be developed at Yucca Mountain, it might decide instead that the project

should go forward. Federal law requires the DOE to prepare for the contingency of a congressional decision to proceed with the Yucca Mountain project.<sup>19</sup> The federal government also argued that the Supremacy Clause overrides the requirements of state water law to obtain a permit for water to be used to supply the Yucca Mountain facility.<sup>20</sup>

The State Engineer had denied applications to permanently appropriate ground water for uses associated with the construction and operation of the facility, making factual findings that the applications were not in Nevada's best economic interest and that Nevada Revised Statutes 533.370(3) prohibited him from approving the applications with that finding.<sup>21</sup>

The federal government appealed, filing a "protective" notice of appeal in state district court and a complaint in federal district court. The federal government argued federal court was the proper venue in which to resolve its dispute, maintaining that the NWPA overrides state water law under the Supremacy Clause of the U.S. Constitution. The State of Nevada countered that the issue -- an appeal of an adverse water rights ruling -- was obviously one of state law which should be decided in state court. The district court agreed, sending the case to state court. In so ruling, the court first noted that the history of western water law is one aptly characterized by long-standing Congressional deference to state primacy and preeminence. Second, the court disavowed the federal government's Supremacy Clause argument.<sup>22</sup>

However, on appeal the Ninth Circuit reversed the district court and remanded the case for trial, finding that the case presented an important federal question regarding the relationship between federal and state law, specifically whether the NWPA preempts or overrides state water law.<sup>23</sup> Nevada believed the case presented a question of first impression with potentially far reaching implications. While the Supreme Court has amply explored federal reserved rights issues, it has not addressed the question of broad federal preemption of state water law based upon the Supremacy Clause. Further, while the federal reserved rights doctrine limited federal claims both in terms of the quantity of water and the purpose for which it is to be used, this broad new preemption argument could void state water laws. Nevada argued that should the federal government prevail, "It is difficult to envision a federal statute which could not be read to override state water law." Indeed, the need for water to effectuate the purposes of other federal laws is more direct under environmental statutes than in the case of NWPA.

The Senate, joining the House, voted to override Nevada Governor Kenny Guinn's Yucca Mountain veto by a 60-39 margin on July 9.

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<sup>19</sup>Las Vegas Sun, May 1, 2001.

<sup>20</sup>*Western States Water*, Issue #1456, April 12, 2002.

<sup>21</sup>See *U.S. v. Nevada*, 123 F. Supp. 1209 (D. NV 2000).

<sup>22</sup>*U.S. v. Nevada*, 123 F. Supp. 1209.

<sup>23</sup>*U.S. v. Nevada*, 268 F.3d 695 (9th Cir. 2001).

## **Federal Hydropower Licensing**

On June 25th, the WGA renewed a policy resolution regarding federal hydropower licensing and state authority. WSWC staff provided WGA staff with comments in preparation for the governors' action. The new policy statement directed WGA staff to work with the WSWC "...in opposing amendments to limit state and federal agency mandatory condition authority," as part of the federal licensing process, "...and to seek sponsorship of legislation restoring full state authority over state waters under the Federal Power Act." It also directed WGA staff to work with state, local and federal agencies and tribal governments, the Federal Energy Regulatory Commission (FERC), the hydro-power industry and environmental community to make the relicensing process more effective and efficient.

In preparing to release a Notice of Proposed Rulemaking (NPR), FERC sponsored a number of public forums to discuss new hydropower licensing procedures. Meetings in the West were held in Sacramento, California and Tacoma, Washington. Written comments were solicited. Thereafter, FERC held a stakeholders' meeting and NPR drafting session in Washington, D.C. on December 10th and 12th. WGA, WSWC and state and tribal staff participated in a number of conference calls in preparation for and then evaluating these meetings. Moreover, the State of California was working on an alternative proposal, for FERC's consideration, which integrated states' mandatory conditioning authorities under the Clean Water Act and other federal legislation more conscientiously into FERC's licensing process.

## **High Plains/Ogallala Aquifer**

The Council serves as a forum for a work group composed of eight member states with interests in the High Plains/Ogallala Aquifer. The work group met in conjunction with the regular WSWC meetings in Arlington, Virginia on March 11th. An aide to Senator Sam Brownback (R-KS) addressed pending legislation. Senator Brownback and Senator Pete Domenici (R-NM) joined Senator Jeff Bingaman (D-NM) in sponsoring S. 2773 in the 107th Congress to authorize the Secretary of the Interior to cooperate with the States in conducting a hydrogeologic characterization, mapping, modeling and monitoring program for the High Plains Aquifer. The group discussed this and other legislation, including the Farm Bill, as well as draft legislation promoted by the State of Kansas and Rep. Jerry Moran (R-KS). The draft legislation would address remaining concerns arising out of a report on the High Plains' needs by the Kansas Water Office. The work group also discussed sponsoring a future WSWC Workshop on Ground Water Management in the West.

On July 31st, the Senate Energy and Natural Resources Committee held a hearing on S. 2773, and the Council submitted a letter, dated July 26th, expressing interest in the legislation and support for further mapping, modeling and monitoring of the High Plains Aquifer. Accompanying the letter were suggested improvements to the bill. Of note, the bill specifically directed that the Secretary establish a review panel to evaluate and prioritize proposals for funding under the bill, and solicit suggestions for appointments to the panel from the Western States Water Council and other organizations. The letter concluded, "Provisions of other pending legislation are still being discussed by our High Plains caucus, including those related to education assistance, research, and voluntary incentive based programs. Any federal actions, to be effective, must recognize the primacy of state water law and provide incentives consistent with state policies and programs."



## **Klamath River Basin**

### *Biological Assessment*

On January 28, the U.S. Bureau of Reclamation (BOR) released a draft biological assessment (BA) under the Endangered Species Act (ESA) proposing to “continue operation of the features and facilities of the Klamath Project consistent with the historic operation of the Project from 1961 to 1997.” BOR Commissioner John Keys said, “This draft Biological Assessment and suggested options for conservation measures provide a solid foundation for the development of a long-term comprehensive plan for the Klamath Basin. It works towards meeting the needs of Klamath Basin Tribes, the farming community, the refuges, and the environment.... It recognizes that protecting endangered species must be accomplished while working cooperatively with local people to honor our long-standing commitments.”

In part, the BA reads, “Reclamation believes that the Project should not be held responsible for effects of all of the water development and land management activities throughout the Basin, both Federal and non-federal, on endangered suckers and threatened coho salmon.”

With regard to water rights, the BA states, “Federal law provides that Reclamation obtain water rights for its projects and administer its projects pursuant to state law relating to the control, appropriation, use or distribution of water used in irrigation, unless the state laws are inconsistent with express or clearly implied congressional directives. Reclamation has an obligation to deliver water to the Project water users in accordance with the Project water rights and contracts between Reclamation and the water users. Reclamation does not have authority to divert or store water for Project purposes when to do so would interfere with the exercise of senior water rights.”

With respect to its ESA obligations, BOR’s BA states, “Each federal agency has an obligation to insure that any discretionary action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify its critical habitat.... Section 7(a)(1) requires federal agencies to exercise their authorities to conserve species. It does not, however, expand the powers conferred on an agency by its enabling act, but directs agencies to use their existing authorities to conserve endangered species. Section 7(a)(1) alone does not, therefore, give Reclamation authority to undertake any particular action, regardless of its potential benefit for endangered species.”

Reclamation proposed a number of alternative actions intended to help meet its different legal obligations, including creation of a Klamath Project water bank.

### *National Academy of Science Report*

On February 5, the National Academy of Science (NAS) announced it had completed a scientific review of the evidence used by the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) in a “biological opinion” that called for higher water levels in Upper Klamath Lake and increased instream flows in the Klamath River to protect the endangered shortnose and Lost River suckers and threatened coho salmon. As a result, the Bureau of Reclamation cut off most federal water project deliveries to irrigators in the basin in 2001. According to a February 6 news release, the NAS interim report stated, “The available scientific evidence does not support current proposals to change water levels or river flows to promote the welfare of the fish currently at risk, although future research may justify doing so.” It concluded that

the interim report "...finds no clear connection between water levels in Upper Klamath Lake and conditions that are adverse to suckers.... Likewise, ...there is no scientific justification for increased minimum flows in the Klamath River to protect coho salmon.... The water needed to increase flows during dry years would have to come from reservoirs, but the temperature of reservoir water during the warmest months could equal or exceed those lethal to coho."

### Federal Working Group

On March 1, President George W. Bush established a cabinet-level group to address conflicts over water use in the Klamath Basin saying, "A prolonged drought and complex federal and state legal issues have made for difficult times in the Klamath River Basin. Today I am establishing the Klamath River Basin Federal Working Group to address concerns raised by farmers, ranchers, fishermen, Tribes, and others affected by these difficult conditions." The working group was to complete its work within 18 months and advise the President on further actions. Secretary Norton, observed, "The Klamath issues are complex, as the President has indicated, and our assignment is clear. We must bring about a satisfactory resolution that meets the needs of the farmers while upholding the government's trust responsibilities and our commitment to the needs of the environment."

### Partnerships

On April 2, James Connaughton, Chairman of the Council for Environmental Quality (CEQ) and a member of the federal Klamath Basin Federal Working Group,<sup>24</sup> announced that the Nature Conservancy (NC) and Bureau of Reclamation (BOR) had created a joint partnership to encourage long-term wetland restoration efforts and make additional water available for the benefit of fish and wildlife across the Klamath Basin. Historically, the Nature Conservancy diverted 13,000 acre-feet of water for wetland restoration work and continuing farming operations on its Williamson River Delta Preserve on Upper Klamath Lake. The Williamson River is the lake's largest tributary and the Preserve covers wetlands adjacent to the lake and lower reaches of the river. The Conservancy determined that the water would not be needed for the property, and proposed to not divert its water for the subsequent two years, increasing flows into Upper Klamath Lake. In return, Reclamation would increase its support for wetlands restoration on the preserve. Other partners involved in the restoration include the U.S. Fish & Wildlife Service, Natural Resources Conservation Service, PacifiCorp, Cell Tech, the Klamath tribes, and the National Fish and Wildlife Foundation.<sup>25</sup>

According to Connaughton, "The President has called for all parties to work together to reach a workable resolution to the competing demands for Klamath Basin water. The Nature Conservancy is showing leadership to all environmental and conservation groups through its offer to make water available for fish and farmers in the Basin." Russel Hoeflich, NC Vice President, explained, "This is an innovative proposal that could have short and long-term benefits for both people and the environment. In the short term, The Nature Conservancy is proposing to provide needed water to benefit fish and wildlife in the Klamath Basin. In the long-term, large-scale wetland restoration could improve water quality, increase habitat for endangered species and may increase water storage

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<sup>24</sup>*Western States Water*, Issue #1454, March 29, 2002.

<sup>25</sup>BOR press releases, April 2, 2002.

in Upper Klamath Lake.” BOR Commissioner John Keys said, “We are delighted that The Nature Conservancy has stepped forward with this proposal....”

On the same day, Connaughton also announced a partnership with the Klamath Basin Rangeland Trust to provide water for one year from lands no longer irrigated as part of an overall plan to improve water quality conditions in the upper basin through conservation and restoration efforts. The Trust is a locally-owned, rancher-managed, non-profit corporation created to acquire lands with ecological value and water rights. It promotes grazing, but does not divert waters historically used to irrigate its lands. Co-founder and rancher Kurt Thomas explained, “We are providing an opportunity for balance in the Upper Basin by simultaneously making water available for farmers and fish, protecting the grazing lands of cattle, and practicing conservation. Ours is an open process that allows for input and participation by stake-holders, including farmers, ranchers, tribes and concerned citizens.” Connaughton praised the effort saying, “The Rangeland Trust’s proposal is an example of the kind of creative action that will make a difference for the Klamath Basin.” Commissioner Keys added, “We are delighted with the proposal...[which] will provide cold, clean water that will benefit both water quality conditions and habitat for fisheries in the Klamath River Basin.”

### Takings Claim

On April 9, the U.S. Court of Claims in Washington, D.C. held its first hearing on Klamath Basin irrigators’ takings claim against the federal government for cutting off their water supply in 2001 to protect endangered and threatened species. Briefings in February outlined the facts and arguments in the case. The government disputed irrigators’ claims to the water, pointing out that the State of Oregon had yet to adjudicate Klamath Basin water rights. The irrigators countered that even if the state should grant project rights to the federal government, those rights would be held by the Bureau of Reclamation in trust for the irrigators, and cutting off their water would then be a breach of the government’s fiduciary duty.

### Moratorium Request

WaterWatch of Oregon and nineteen other conservation and commercial fishing organizations submitted a petition to the Oregon Water Resources Commission on May 28, asking the state to temporarily block the consideration of any new water rights claims in the Klamath Basin. After water to the basin’s farmers was turned off in the spring of 2001 to protect endangered fish, about 100 farmers were granted emergency permits for temporary wells to help them through the dry summer. The permits required the farmers to discontinue their use of the interim wells after the drought was over, but many of the well owners began seeking permanent permits.

The environmental groups filing the petition argued that the new claims would further stress the already sparse water supply in the basin. The petition asked the Commission to use its authority under Oregon statute<sup>26</sup> to withdraw from further appropriation all unappropriated surface and ground waters except those which are “found to not be in hydraulic connection with surface waters in the basin.” The petition asked the state to close the basin to further appropriation until: (1) Oregon has completed the adjudication of all water rights in the Klamath basin; (2) measurement and reporting devices have been installed on all major diversions; (3) the Oregon Water Resources Department has

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<sup>26</sup>ORS 536.410.

an effective program that ensures no illegal water use is occurring; (4) the scientific studies of the Klamath Basin's ground water resources have been concluded and they show that further ground water development is sustainable and can occur with no interference with surface waters; and (5) the Commission determines that water is available for further appropriation after the needs of fish, Native American tribes, existing water right holders, and downriver communities are met.

### **Missouri River Basin**

At a Senate hearing on July 10, David Fastabend, Army Corps of Engineers (Corps) Northwest Division Commander, denied allegations that politics were behind the Corps' decision to delay changes in the Missouri River dam operations. The Corps had been working on changes to the operation of six dams along the Missouri River for twelve years, but the debate had escalated since January, when the National Academy of Sciences supported the U.S. Fish and Wildlife Service's biological opinion recommending higher flows in spring, and lower flows in late summer. The biological opinion called for a change in flows to protect the endangered interior least tern, piping plover, and pallid sturgeon, which have suffered due to dam operations on the upper Missouri River.

A decision to change dam operations to mimic the natural flow would benefit North and South Dakota, leaving more water in reservoirs during the summer, consequently boosting the local recreation industry. Downriver states were concerned that proposed changes in flow would lead to more floods in spring, and also cripple the barge industry.

### **Rio Grande Basin**

New Mexico asked the U.S. 10th Circuit Court of Appeals to reverse a district court decision requiring the Bureau of Reclamation to release water from Heron Reservoir, a federal re-regulating and storage reservoir, for the benefit of the endangered silver minnow. Heron is part of the San Juan-Rio Chama Project and is located in Rio Arriba County in northern New Mexico. Water is diverted from the San Juan River in Colorado, before it reaches Navajo Reservoir in New Mexico. The San Juan is a tributary of the Colorado River, and under an interstate compact, New Mexico diverts part of its water to the Rio Chama, a tributary of the Rio Grande. Most of the water is owned by Albuquerque. According to Mayor Martin Chavez, San Juan-Chama water will supply about 70% of the city's future water needs. Nevertheless, Judge James Parker of the U.S. District Court for New Mexico ordered the Bureau to release enough water to maintain a 50 cubic feet per second flow in the San Acacia stretch of the Rio Grande near Socorro, 200 miles downstream of Huron Reservoir.

The State's Attorney General, Patricia Madrid, argued before the 10th Circuit that it was "intolerable that our farmers and the residents of the middle Rio Grande Valley should have the water they own and need for their survival put at risk." State Engineer Tom Turney said that releasing the water not only jeopardized the water supplies of Albuquerque, Santa Fe and Middle Rio Grande farmers, but also other endangered species in the San Juan and Chama rivers.

Kara Gillon, Defenders of Wildlife, explained, "The issue of the silvery minnow is much broader than the minnow itself. The silvery minnow is representative of the health of the entire Rio Grande."

Judge Parker concluded that due to Reclamation's obligations under the Endangered Species Act (ESA), it has the authority to release water from federal projects for the remainder of the year,

and as necessary, restrict and prorate the water contracts in the San Juan-Chama Project and the Middle Rio Grande Project during 2003 to cover the deficiency. The court also found the release of water from Heron Reservoir to meet flow requirements for the silvery minnow to be consistent with the intended purposes of the San Juan-Chama Project legislation.

Due to what the court deemed as an impending risk to the endangered fish, rather than remanding the issue back to FWS to consider other actions to protect the silvery minnow, the court mandated that Reclamation release sufficient water to maintain streamflows immediately. Judge Parker reasoned, "Given the Bureau of Reclamation's and the Department of the Interior's express policy not to release water from Heron in 2002 to benefit the silvery minnow without a court order, coupled with FWS's acquiescence in that policy, a remand to FWS is not warranted at this time because of the threat of imminent and irreversible harm to the survival and recovery of the silvery minnow."

### **Water Investment Act of 2002**

Senator Bob Graham (D-FL) introduced the Water Investment Act of 2002 (S. 1961) on February 15. Senator Jeffords, a cosponsor said, "This legislation seeks to provide additional resources to States, Tribes, and localities to meet water infrastructure needs. Simultaneously, it seeks to move the state of the art in water program management forward by increasing the flexibility offered to States in administering their water programs...and institutionalizing financial management capacity into our Nation's water systems."

He continued, "This legislation authorizes funding of over \$20 billion over 5 years nationwide for clean water and \$15 billion over 5 years nationwide for safe drinking water projects. There is significant new flexibility attached to these funds...which allow an extension of loan terms and more favorable loan terms (including principal forgiveness) for disadvantaged communities.... Recognizing the needs of larger communities with diverse income groups..., this bill includes a new opportunity for States to provide more favorable loan terms to communities that...may have pockets of disadvantaged individuals...in their service area. The bill makes the authority to transfer funds between the Safe Drinking Water Act and Clean Water Act State revolving funds permanent. There is financial accountability... [and] provisions...designed to help water utilities better manage their capital investments using asset management plans, rate structures that account for capital replacement costs, and other financial management techniques. We encourage utilities to seek innovative solutions by asking them to review options for consolidation, public-private partnerships, and low-impact technologies before proceeding with a project."

He said, "In addition, we authorize a demonstration program at \$10 million per year over 5 years to promote innovations in technology and alternative approaches to water quality management and water supply.... The use of nontraditional technologies is the focus in the Water Investment Act to ensure that nonpoint source pollution receives appropriate emphasis under the Clean Water Act...[and] will be a part of the equation when funding decisions are made at the State level.... It clarifies that planning, design, and associated preconstruction costs are eligible for funds.... This ensures that small communities who may not have the resources available to get a project to go on their own can receive assistance. Small communities will also benefit from a provision...that allows privately-owned wastewater facilities to access the Clean Water Act State Revolving Fund...to obtain much-needed financial assistance.... [O]ur legislation provides...technical assistance for small communities.... Water infrastructure is a major priority for the Environment and Public Works committee during this Congress. We plan to begin an aggressive schedule to move this legislation

through the Senate....” True to his words, the Committee held hearings on S. 1961 and related issues on February 26 and 28.

### **Water Policy Commission Establishment Act**

On May 22, the House Resources Committee’s Water and Power Subcommittee held a hearing on the 21st Century Water Policy Commission Establishment Act (H.R. 3561), sponsored by Rep. John Linder (R-GA). Rep. Linder testified, “H.R. 3561 is designed to bring our nation’s premier water experts and managers together to...share their ideas for the future.... As we work to plan and prepare for future demands placed on our fresh water resources, it will be critical that we share information, coordinate efforts, and reduce duplication and conflict.... I believe the first step toward meeting these goals is getting everyone together at the discussion table. I understand that we could spend years arguing over the appropriate size and shape of the table, even before we begin the debate of who deserves a seat at that table. But remember that the clock is ticking. The longer it takes us to begin to make preparations for the future, the less prepared we will be when crisis comes...and it is coming.”

While the WSWC took no position on the bill, Chairman Mike Brophy submitted written testimony based on past resolutions. He commended the bill’s sponsors for the laudable aim to help assure adequate water supplies for the future and better coordinate federal agency programs, while reminding the members of the WSWC’s position that the water governance recommendations of the Western Water Policy Review Advisory Commission, the last Congressionally authorized commission, were seriously flawed. He also noted virtually every western state needed additional water supplies to meet growing consumptive use demands, and recognized a need for rehabilitation of existing water infrastructure, while at the same time protecting instream water uses and values. He mentioned an array of state initiatives dealing with these challenges, stating that in a real sense, these state strategies collectively represent a “national water strategy,” noting however that a vital federal role remains. He mentioned the current drought and the need to improve drought planning and response, as defined in S. 2528,<sup>27</sup> as well as the need to carefully consider opportunities to “stretch” existing supplies. His statement urged the federal government to pay fees for its fair share of the cost of its claims in general state water right adjudications, and appropriately fund water-related data collection activities. He also briefly addressed many other water issues.

### **Water Quality Trading**

The Environmental Protection Agency (EPA) drafted a policy proposal on water quality trading programs for states and tribes, aimed at creating greater flexibility to develop market-based incentives to achieve and go beyond the goals of the Clean Water Act. The draft policy was circulated among key interest groups in late March.

In the draft policy statement, EPA noted that market-based programs have an advantage over government command-and-control approaches. They can be implemented at considerable savings and program goals achieved using economic incentives. According to David Batchelor, a senior policy advisor in the EPA Office of Water, the policy “provides for smart land use and

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<sup>27</sup>*Western States Water*, Issue #1461, May 17, 2002.

development.” Batchelor said that the draft trading policy is not intended to be a surrogate for regulatory requirements under the Clean Water Act, but a tool to help achieve those requirements.

On May 15, EPA published its proposed Water Quality Trading Policy. EPA Administrator Christie Whitman emphasized that the Water Quality Trading Policy keeps existing controls and safeguards in place, but offers greater flexibility and incentives to states, tribes and companies to comply with the Clean Water Act. “Trading provides incentives for voluntary reductions from all sources to improve and maintain the quality of the nation’s waters.” The proposed policy addressed trading to maintain water quality in unimpaired waters, trading in impaired waters before development of a total maximum daily load (TMDL) and trading to meet TMDLs. While the focus is on nutrients and sediment, the policy also discussed the potential for trading other pollutants under certain circumstances.”

### **Water Resources Funding Alternatives**

From time to time, the Council has received requests for information regarding state agency administrative structures and related water resources program funding. Some information has been compiled, but it is not complete. Moreover, some states continue to re-evaluate their ability to provide certain services in the face of declining budgets and significant funding cuts.

The Council has in the past prepared reports on state water resources program and project cost sharing and financing and analyzed state water use fees. The later results were compiled, evaluated and summarized in a brief report, *Western State Water Use Fees* that was presented to western governors. In 1999, information on the level or amount of certain fees was gathered from member states and is available as a reference and resource in evaluating future fee proposals. In 2002, many western states were facing severe budget cuts and estimates of overwhelming infrastructure financing needs. In response to the situation, a matrix of state water resource funding sources and mechanisms was prepared.

### **Water Reuse and Artificial Groundwater Recharge in the Western United States**

In November, the Council distributed a report on “Water Reuse and Artificial Groundwater Recharge in the Western United States,” prepared by Council staff. The report consisted of two parts: Part one of the report dealt with water reuse. It analyzed the extent of water reuse in western states, as well as the regulation of such activities. It contained a review of state programs and local projects, as well as an analysis of funding for reuse/recycling projects, project regulation and monitoring, and future water reuse concerns in the West.

Part two dealt specifically with artificial groundwater recharge. It was intended to give a brief overview of what western states are doing to recharge groundwater, describing state rules and regulations, examples of successful projects, and incentives which have helped different states promote successful recharge operations.

## **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 2002. A copy of the rules of organization is also included.





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](http://www.westgov.org/wswc)

Position No. 238

June 12, 2002

The Honorable Wayne Allard  
United States Senate  
525 Senate Dirksen Office Building  
Washington, DC 20510

Dear Senator Allard:

Last month, Senator Pete Domenici of New Mexico and Rep. Alcee Hastings of Florida respectively introduced S. 2528 and H.R. 4754, the National Drought Preparedness Act of 2002. The Western States Water Council strongly supports enactment of this important legislation this year and urges all western congressional members to join a growing bipartisan list of cosponsors. With extended drought conditions afflicting many parts of the West, federal legislation is needed to establish a national policy and promote coordination of proactive measures at all levels of government to plan, prepare and mitigate the serious impacts of drought in the United States. Western governors helped draft this legislation and have called on the Congress and the President to support its enactment.

The Western States Water Council is an organization representing eighteen states. Its members are appointed by their respective governors to address a broad range of water policy issues affecting the West. Much of the West is characterized by its aridity. Water is scarce. Its availability continues to circumscribe our economic and environmental well being and quality of life. Drought is a continuous threat. The Council has been actively involved in drought management and policy since 1976, when it served the governors as a regional coordinating body for drought relief efforts and a clearinghouse for information on drought conditions. Western states learned from that experience, and began developing drought response plans for the future. There is no doubt that timely, effective government action at the federal, state, local and tribal levels to prevent or mitigate drought impacts can significantly reduce the effects of drought and the need for relief expenditures. This legislation would help states develop and implement drought preparedness plans.

Governor Gary Johnson of New Mexico and Judy Martz of Montana, co-lead governors for drought issues for the Western Governors' Association have said, "It is high time for our nation to have a comprehensive national policy for drought." We join the western governors in urging the Congress and the Administration to enact this legislation.

Sincerely,

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

Michael J. Brophy, Chairman  
Western States Water Council



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Position No. 239

July 26, 2002

The Honorable Jeff Bingaman, Chairman  
Committee on Energy and Natural Resources  
United States Senate  
703 Hart Senate Office Building  
Washington, DC 20510

Dear Chairman Bingaman:

On behalf of the Western States Water Council, representing the governors of eighteen states, I am writing to express our interest in legislation dealing with the conservation and management of the High Plains Aquifer. As you know, the Council serves as a forum for western states to express their views on water resource issues. Several of our member states have determined to use the Council as a vehicle to address their interests in protecting the High Plains Aquifer and have formed a caucus that is meeting in conjunction with our regular Council meetings to discuss issues of mutual concern.

To date those discussions have revolved around the continuing need for conservation of High Plains ground water resources and the likely impact of incentive programs enacted as part of the Farm Bill. We have also addressed the need for further legislation and welcome the introduction of S. 2773. Good decisionmaking must be based on sound science and there is a clear need for more information on the extent and nature of the ground water resources of the High Plains aquifer. To this end, we support further mapping, modeling and monitoring and urge expedited action towards enactment of S. 2773 by the 107th Congress, with assurances of close cooperation with state geologists and water resource agencies. Attached are suggested changes to S. 2773 that we believe would further improve the bill.

Provisions of other pending legislation are still being discussed by our High Plains caucus, including those related to education assistance, research, and voluntary incentive based programs. Any federal actions, to be effective, must recognize the primacy of state water law and provide incentives consistent with state policies and programs. We look forward to working with the Congress to enact appropriate federal legislation, and working with the federal agencies to effectively implement legislative directives.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karl J. Dreher', written over the word 'Sincerely'.

Karl J. Dreher, Chairman  
Western States Water Council



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](http://www.westgov.org/wswc)

Position No. 240

July 31, 2002

The Honorable James M. Jeffords, Chairman  
Committee on Environment and Public Works  
United States Senate  
410 Dirksen Senate Office Building  
Washington, DC 20510-6175

Dear Chairman Jeffords:

On behalf of the Western States Water Council, consisting of representatives appointed by the governors of eighteen states, I am writing to express our concerns with S. 1961, the Water Investment Act of 2002, proposed legislation dealing with Clean Water State Revolving Funds and Drinking Water State Revolving Funds.

Serving as a forum for western states to express their views, the Council's reaction to many specific provisions of the bill is mixed. The bill contains provisions both supported and opposed by western states. States will be submitting individual comments on these issues. However, there is consensus among our members in opposition to provisions in the bill which: (1) require states to oversee and monitor local sewer and water facility rate structures; (2) require noncompliant municipalities to enter into lengthy administrative or judicial proceedings as a prerequisite to receiving loan funds; (3) require states to institute resource intensive programs to address the financial, managerial and technical capability of municipalities; (4) interject state loan managers into local land use planning issues; and (5) require the Department of the Interior, through the U.S. Geological Survey, to prepare an assessment of water resources which appears to be inconsistent with the historic role of the State Revolving Fund legislation.

We look forward to working with the Congress to enact effective water infrastructure legislation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karl J. Dreher', written over a circular stamp or seal.

Karl J. Dreher, Chairman  
Western States Water Council

**RESOLUTION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**commemorating the**  
**100TH ANNIVERSARY OF THE RECLAMATION ACT**  
**Bismarck, North Dakota**  
**July 26, 2002**

**WHEREAS**, in the West, water is indeed our “life blood” -- a vital and scarce resource the availability of which has and continues to circumscribe growth, development and our economic well being and environmental quality of life -- the wise conservation and management of which is critical to maintaining human life, health, welfare, property and environmental and natural resources; and

**WHEREAS**, recognizing the critical importance of water in the development of the West, the Congress passed the Reclamation Act on June 17, 1902 and provided monies “reserved, set aside, and appropriated as a special fund in the Treasury to be known as the ‘reclamation fund,’ to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semiarid land...” in seventeen western states, to be continually invested and reinvested; and

**WHEREAS**, the Secretary of the Interior was authorized and directed to “locate and construct” water resource projects to help people settle and prosper in this arid region, leading to the establishment of the Reclamation Service -- today’s U.S. Bureau of Reclamation; and

**WHEREAS**, then President Theodore Roosevelt stated, “The work of the Reclamation Service in developing the larger opportunities of the western half of our country for irrigation is more important than almost any other movement. The constant purpose of the Government in connection with the Reclamation Service has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent homemakers, to use and develop it for themselves and for their children and children’s children...;”<sup>28</sup> and

**WHEREAS**, the Bureau of Reclamation has built facilities that include 348 reservoirs with the capacity to store 245 million acre-feet of water, irrigating approximately 10 million acres of farmland that produce 60 percent of the nation’s vegetables and 25 percent of its fruits and nuts, as well as providing water to about 31 million people for municipal and industrial uses, while generating more than 42 billion kilowatt hours of energy each year from 58 hydroelectric power plants for some nine million people, and further providing flood control, recreation, and fish and wildlife benefits; and

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<sup>28</sup>State of the Union Address, 1907

**WHEREAS**, project sponsors have and continue to repay the cost of these facilities, which also produce power receipts that annually return about \$600 million to the United States Treasury, prevent some \$500 million in damages due to floods each year, and generate billions of dollars in economic returns from agricultural production; and

**WHEREAS**, the Reclamation Act states, "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State...relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws..." and

**WHEREAS**, western states and the Bureau of Reclamation have worked in collaboration to meet the water-related needs of the citizens of the West, and protect the interests of all Americans, recognizing changing public values and the need to put scarce water resources to beneficial use for the "ultimate greatest good of the greatest number;" and

**WHEREAS**, the water and power resources developed under and flood control provided by the Reclamation Act over the last century supported the development and continue to be critical to the maintenance of numerous and diverse rural communities across the West and the major metropolitan areas of Albuquerque, Amarillo, Boise, Denver, El Paso, Las Vegas, Los Angeles, Lubbock, Phoenix, Portland, Reno, Sacramento, Salt Lake City, Seattle, Tucson and numerous other smaller cities; and

**WHEREAS**, serious shortages and water allocation and management issues have arisen from time to time and continue to arise in every major river system in the West -- the Columbia, Colorado, Missouri, Rio Grande, Sacramento-San Joaquin -- as well as in numerous tributary and smaller river basins, including the Animas-La Plata, Arkansas, Canadian, Gila, Klamath, Pecos, Platte, Red, Republican, Rogue, Snake, Truckee, Umatilla, Walker and Yakima; and

**WHEREAS**, western States are committed to continuing to work cooperatively with the Department of Interior and Bureau of Reclamation to meet our present water needs in the West and those of future generations, within the framework of state water law, as envisioned by President Roosevelt and the Congress in 1902.

**NOW THEREFORE BE IT RESOLVED**, that the Western States Water Council formally recognize the 100th Anniversary of the enactment of the Reclamation Act of 1902 and congratulate the Department of Interior and the Bureau of Reclamation for their efforts over the last century in helping to meet the water needs of the people and the environment in the West.

**BE IT FURTHER RESOLVED**, that western states ask the Administration and the Congress to fully utilize the funds provided through the Reclamation Act and subsequent acts for their intended purpose in the continuing conservation, development and wise use of western resources to meet western water-related needs -- recognizing and continuing to defer to the primacy of western water laws in allocating water among uses -- and work with the States to meet the challenges of the next 100 years.

**RESOLUTION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**regarding**  
**THE "YEAR OF CLEAN WATER"**  
**Bismarck, North Dakota**  
**July 26, 2002**

**WHEREAS**, clean water is a natural resource of great value and importance to the quality of life in the western states as well as the entire nation; and

**WHEREAS**, there is strong public support in the West for protecting and enhancing the quality of our rivers, lakes, groundwater, wetlands, and marine waters;

**WHEREAS**, maintaining and improving water quality is essential to protect public health, to protect fisheries and wildlife, and to assure abundant opportunities for public recreation;

**WHEREAS**, it is the responsibility of both the federal government and individual states, to provide clean water as a legacy for future generations;

**WHEREAS**, substantial progress has been made in protecting and enhancing water quality since the passage of the 1972 Federal Water Pollution Control Act (Clean Water Act) due to concerted efforts by Federal, State, and local governments, the private sector, and the public;

**WHEREAS**, significant water pollution problems persist throughout the nation and significant challenges lie ahead in the effort to protect water resources from point and nonpoint sources of pollution;

**WHEREAS**, further development of water pollution control programs and advancement of water pollution control research, technology, and education are necessary and desirable; and

**WHEREAS**, October of 2002 marks the thirtieth anniversary of the enactment of the Federal Clean Water Act;

**NOW, THEREFORE BE IT RESOLVED**, that the Western States Water Council join in commemorating the calendar year 2002 as the "**Year of Clean Water**" and the month of October 2002 as "**Clean Water Month.**"

**POSITION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**Regarding**  
**WATER EFFICIENCY STANDARDS FOR PLUMBING PRODUCTS**  
**Bismarck, North Dakota**  
**July 26, 2002**  
*(revised and reaffirmed)*

**WHEREAS**, making efficient and beneficial use of scarce water resources has been, and continues to be, a fundamental objective of the Western States; and

**WHEREAS**, the importance of water use efficiency continues to grow as the finite water resources of the Western States support increasing levels of population and economic activity; and

**WHEREAS**, new technology that makes more efficient use of water in its various applications offers significant economic and environmental benefits to the Western States; and

**WHEREAS**, efficient plumbing products, including ultra-low flush toilets (ULFTs), became widely available in the early 1990's, and have undergone substantial product development and performance improvement since that time; and

**WHEREAS**, the American Water Works Association Research Foundation (AWWARF) has commissioned the most comprehensive end-use study of indoor water use ever undertaken in North America, recording indoor water usage in twelve cities, the majority located in the Western States; and

**WHEREAS**, the AWWARF studies have documented *per capita* indoor water use reductions averaging over 30% in single-family homes equipped with water-efficient plumbing fixtures, fittings, and appliances currently on the market, compared to homes without such products; and

**WHEREAS**, the States comprising the Western States Water Council have identified drinking water and wastewater infrastructure needs totaling more the \$60 billion over the next 20 years, as contained in *Needs Surveys* forwarded to Congress by the Environmental Protection Agency; and

**WHEREAS**, many of these capital costs can be postponed or reduced by reductions in the volume of flows that must be accommodated; and

**WHEREAS**, in recognition of the public and private benefits of efficient plumbing products, between 1990 and 1992 the States of Arizona, California, Nevada, Oregon, Texas, Utah, and Washington adopted statewide standards for new plumbing products, including a standard of 1.6 gallons per flush for toilets; and

**WHEREAS**, following action by these States and others, the Energy Policy Act of 1992 was enacted in October 1992 containing uniform national water efficiency standards for plumbing products, including a standard of 1.6 gpf for toilets, with the active support of many water and wastewater utilities in the Western States; and

**WHEREAS**, other Western States have subsequently incorporated comparable water efficiency standards into their plumbing codes; and

**WHEREAS**, uniform national efficiency standards simplify and reduce the States' burden of enforcement regarding sale and installation of ULFTs and other water-efficient plumbing products; and

**WHEREAS**, uniform national efficiency standards maintain a national market for plumbing products, allowing manufacturers to achieve full economies of scale and encouraging wider competition in all jurisdictions; and

**WHEREAS**, legislation has been introduced in the 107th Congress to repeal uniform national efficiency standards for plumbing products; and

**WHEREAS**, enactment of such legislation will not benefit the communities and consumers of the Western States; and

**WHEREAS**, enactment of such legislation will increase the burden of enforcement on Western States and communities seeking to maintain efficiency standards for plumbing products, and will reduce the reliability and predictability of water savings resulting from such standards; and

**WHEREAS**, enactment of such legislation may disadvantage Western States seeking to maintain water efficiency standards for plumbing products due to the diversion of a disproportionate share of federal financial assistance for water and wastewater infrastructure in future years to States choosing to make less efficient use of water by relaxing or repealing water efficiency standards for plumbing products.

**NOW THEREFORE BE IT RESOLVED**, that the Western States Water Council supports the retention of uniform national water efficiency standards for plumbing products.

Originally adopted April 9, 1999





WESTERN STATES WATER COUNCIL

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Web Page: [www.westgov.org/wswc](http://www.westgov.org/wswc)

Position No. 244

July 30, 2002

Ms. Christine T. Whitman, Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Mail Code 1101A, Ariel Rios Building  
Washington, DC 20460

Dear Administrator Whitman:

The Western States Water Council is writing to encourage the EPA, under your direction, to prepare for promulgation and comment, changes to the existing rules governing preparation of 303(d) and 305(b) listing and creation of TMDLs. We would appreciate the opportunity to evaluate revisions you may propose to the existing rules as compared to staying with the existing rules or the 2000 rules. Specifically, we support adaptive management for TMDL implementation and clarification that states are responsible for planning and implementation of TMDLs. We also support further clarification of the ability for states to use effluent trading to implement TMDLs and pre-TMDL voluntary efforts by stakeholders to avoid the creation of a TMDL. Another area that would greatly benefit from some attention is to standardize the reporting requirements for section 303(d) and section 305(b) so the reports are combined and submitted on a four-year schedule.

To accomplish this, we recognize that EPA will need to once again defer the effective date of the rule that was promulgated in 2000, and we are supportive of the Administrator taking necessary action to accomplish this. The Western States Water Council and its member states look forward to working with EPA to accomplish these goals and to commenting on the proposed rules. If you have any questions, please call Craig Bell at (801) 561-5300. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karl J. Dreher', is written over a circular stamp or seal.

Karl J. Dreher, Chairman  
Western States Water Council



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](http://www.westgov.org/wswc)

August 9, 2002

Position No. 245

Mr. Edward F. Curley  
WESTCAS  
Capital Development Division, Wastewater Management Department  
Public Works Building  
201 North Stone Ave., 8<sup>th</sup> Floor  
Tucson, Arizona 85701-1207

Dear Mr. Curley:

With this letter, we would like to provide an initial response to the draft legislation developed by WESTCAS entitled, "Proposed Clean Water Act Language for 2002 – Draft 02/27/02." Generally, the Western States Water Council supports many of the concepts in the bill. However, we believe that there are a number of important issues that would need to be resolved before we would be able to offer support for the bill.

Some specific concerns with the bill that we would like to raise to your attention include the following:

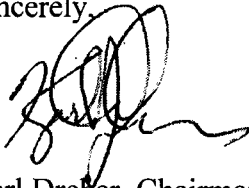
- The term "effluent-dependent stream" and its usage in the bill. We believe that there are important differences between "effluent-dependent" and "effluent-dominated" streams that need to be taken into account in determining appropriate water quality standards for such streams. The current definition and usage of this terminology in the bill need to be clarified.
- The mandate for EPA to develop new regional water quality criteria. Section 4 of the bill requires EPA to develop new arid west water quality criteria. We have concerns about directing EPA to develop such criteria for two reasons. First, it may be preferable to leave the ability to develop such criteria to individual states, rather than having EPA issue criteria that we would all have to live with. Second, and somewhat related, the Extant Criteria Evaluation Report from the Arid West Water Quality Research Project appears to conclude that the opportunities for broad regional modifications to EPA's existing criteria may be limited; rather, it appears that determining appropriate criteria tends to be a more site-specific issue.
- Section 4 reporting requirements. We are concerned that the requirement for EPA to prepare a biennial report "on the status of the development and adoption" of standards applicable to the arid West would indirectly add an unnecessary reporting burden on states, since EPA will require that states provide the information that would be used to create the report.
- Proposed new section 301(m)(5). We are uncertain as to the intent and operative effect of this proposed language. Is this intended to authorize effluent limitations that would differ from those resulting from applicable water quality standards?

- Arid West Water Quality Research Project authorization. While we support additional scientific research regarding arid west water quality issues, we believe that it would be useful to further clarify the scope and focus of the additional research that is contemplated.

If it appears that active consideration of the WESTCAS bill by Congress is likely, we believe further discussions between WESTCAS representatives and members from the WSWC Water Quality Committee would be useful in order to further explore these and any other issues that may arise. We believe that by attempting to work together in order to find consensus on these issues, our overall effort will be advanced.

If you have any questions, please call Craig Bell of the WSWC staff at 801-561-5300.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karl Dreher', written over a horizontal line.

Karl Dreher, Chairman  
Western States Water Council

**REVISED  
POSITION  
of the  
WESTERN STATES WATER COUNCIL  
regarding  
REAUTHORIZATION OF THE CLEAN WATER ACT<sup>29</sup>  
July 26, 2002**

**BACKGROUND**

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

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

**FEDERAL/STATE PARTNERSHIP**

To maintain an appropriate federal/state partnership, it is essential that state officials have a meaningful voice in EPA policy development, particularly in the early stages of such development before irreversible momentum precludes effective state participation and consideration of alternative methods of controlling water pollution.

**POLLUTION PREVENTION**

Pollution prevention has recently received a great deal of attention, but needs to be given more emphasis. The concept of pollution prevention cuts across all CWA programs by offering a means of avoiding complex and costly "command and control" approaches to water pollution control and clean up. Adequate funding should be provided to states for development of pollution

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<sup>29</sup>The Council originally adopted a position regarding reauthorization of the Clean Water Act in March 22, 1996 (Position No. 210). The position has since been revised and reaffirmed.

prevention programs, and incentives such as greater flexibility in using existing grants should be provided to states with strong pollution prevention programs.

## WATERSHED MANAGEMENT

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

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

9. Interstate and tribal coordination and cooperation should be supported to achieve the goals of the CWA. However, the states should have the initial lead in coordinating watershed management issues which cross state boundaries.

10. Watershed management should recognize, encourage and utilize pollution reduction trading and other innovative programs that achieve the goals of the CWA.

## RISK ASSESSMENT AND MANAGEMENT

Implementation of programs authorized by the Clean Water Act should be based on the magnitude of risk to human health, the environment, and the protection of designated uses. Benefits of regulation, including adequate consideration of the value of ecological resources, and other relevant factors that may not be readily quantifiable should outweigh the costs.

## FUNDING

1. Funding at the national level for the state revolving fund (SRF) should be at a level that is adequate to address the demands and requirements of the CWA, such as controls on non-point source pollution, stormwater, and toxics. Adequate funding should also be provided to meet the water quality needs of small communities and rural areas. A grant program or combination loan/grant program with loan terms greater than 20 years should be implemented through new funding and/or in a manner that does not deplete SRF assets.

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

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

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

5. The 4% limitation on SRF administrative costs should be based upon the authorized level rather than the appropriated capitalization grant amount, and provisions should be made for a minimum amount of federal assistance per state for administrative costs. Funds in the state water pollution control revolving fund should be available to cover costs of administering the fund in an amount not to exceed the greater of 6% of all grant awards to the fund, or 1/2 of 1% per year of the total amount of the valuation of the fund or \$600,000.

6. Alternatives to typical "command and control" programs can be promoted through creative funding incentives. The elimination of "cross-cutter" requirements for states with 90% of point sources meeting secondary treatment or for states with no or minimal National Pollution Discharge Elimination System (NPDES) permit backlogs are two examples.

7. SRF funding should be made available for the close-out of construction grant programs.

### NON-POINT SOURCE POLLUTION CONTROL

1. Maximum flexibility should be provided to states to effectively implement non-point source (NPS) pollution control programs. NPS funding should enable states to balance program elements and focus, as needed, on technology development and transfer, monitoring, assessment, demonstrations, local community technical assistance, and institutionalizing non-traditional water quality management programs. While incremental funds should be targeted to priority watershed having impaired waters, maximum flexibility should be provided to states in how they utilize these funds for watershed planning, monitoring and restoration projects.

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

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

4. EPA should not define national, mandatory management practices to control agricultural runoff and other forms of NPS pollution. It should be left to states to select an appropriate mix of voluntary and mandatory approaches to control such pollution, provided that the overall program is adequate to achieve compliance with water quality standards. A voluntary approach should be acceptable if the states have authority to enforce mandatory requirements where water quality standards violations occur. The irrigation return flow exemption from the NPDES should be retained.

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

### WATER QUALITY STANDARDS AND ASSESSMENT

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

2. The CWA should clearly acknowledge that municipal stormwater systems are to implement best management practices to the maximum extent practicable with the goal of meeting water quality standards. The CWA should not mandate specific effluent standards for stormwater discharges.

3. The various water quality assessment requirements should be integrated into a single, streamlined assessment under CWA Section 305(b). The assessment requirements should not be overly burdensome and the 305(b) assessment should be prepared every five years rather than every two years.

4. The states should review and revise water quality standards at least every five years. EPA should continue to be responsible for approving adopted state water quality standards to assure interstate compatibility and compliance. However, the application of water quality standards in support of state water quality protection goals must continue to be the prerogative of the states.

5. States must be allowed to establish water quality standards flexible enough to account for natural variations in water quality and background levels. EPA must recognize some unique western water conditions, such as arid lands and water rights.

6. When a state, in establishing a water quality standard, has considered the impacts of non-water quality factors -- such as legal and illegal harvest of fish, introduction of non-native aquatic species, and unscreened diversions -- on the maintenance of a balanced population of fish, shellfish, and wildlife, the Administrator shall also consider those factors in reviewing the state's standard.

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

8. EPA has determined that phosphorus and nitrogen are primary pollutants causing the impairment of many streams and lakes. EPA is requiring that states develop a strategy to address these pollutants. Any nutrient criteria developed by the western states must reflect site specific factors and unique approaches.



## EFFLUENT DOMINATED WATERS/WATER REUSE

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

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

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

4. WSWC should monitor the research conducted through the Congressionally authorized "Arid West Water Quality Research Project" regarding water quality criteria and standards for ephemeral and effluent dependent streams, and coordinate as appropriate with that effort.

## FEDERAL/WESTERN STATE ISSUES

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

2. CWA Sections 510(2) and 101(g) are clear expressions of Congressional intent regarding deference to the states' role to allocate quantities of water and establish water rights. This fundamental principle of deference, which is manifest in many other federal environmental statutes, should be reinforced in the context of the CWA reauthorization.

3. Virtually all western states have in place mechanisms to establish and maintain instream flows. Statutory requirements in the CWA for maintenance of such flows would affect water rights and impact water management in the West. States may choose to use in-stream flow as a mechanism to address flow-impaired streams, but no such requirements, either explicit or implicit, should be included in the CWA.

## WETLANDS

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

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

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

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

## GROUND WATER

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

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

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

## STORMWATER

Best management practices shall be developed through public participation and be designed to ensure that control of stormwater discharge is consistent with regulatory implementation of mandated receiving water standards. State regulatory agencies are encouraged to establish additional monitoring and performance criteria to assure meeting goals of watershed management programs. States should have the option to regulate stormwater using a permit issued under Section 402 or a state non-point source management program under Section 319 of the Act.

## ANTI-BACKSLIDING

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

## CLEAN LAKES

The Clean Lakes program has been a valuable program. The Congress should provide resources to improve the quality of the nation's lakes. Multi-year funding allocations should be provided to restore and improve the water quality of outstanding national resource waters.

## COMPLIANCE WITH STATE LAW UNDER CWA SECTION 401

States have primary jurisdiction over water quantity issues and should retain primary jurisdiction under the CWA over integration of water quantity and water quality considerations through the water quality certification process set forth under Section 401. State certification under Section 401 should be considered granted pursuant to federal law and should not be superseded by other federal law.

## TRANS-BORDER AREAS

The International Boundary and Water Commission, International Joint Commission, and EPA need adequate resources to deal with water quality issues in trans-border areas. Also, mechanisms should exist for better coordination and participation between the International Boundary and Water Commission, International Joint Commission, EPA, the states, other agencies, and our neighboring nations.

## WATER QUALITY CONTROLS ON TRIBAL LANDS

In order to prevent voids in regulation, state water quality standards should be effective on Indian lands until replacement standards have been adopted by tribal governments which are treated as states, or promulgated by EPA. Congress should provide direction that will aid in cooperative resolution of water quality issues. All efforts should be made to develop consistent tribal/state water quality standards at adjoining jurisdictional boundaries.

## CLEANUP OF ABANDONED AND INACTIVE MINES

States and local government agencies should be encouraged to address water quality problems caused by abandoned and inactive mines. To provide encouragement, the remediating party must be assured that its liability for cleanup at the site is limited to following its cleanup plan including any amendments thereto. The remediating party should not be liable for conditions existing prior to initiation of cleanup under its remediation plan.

## N.P.D.E.S. PERMITS

States should be allowed to issue NPDES permits for a ten-year period, based on their assessment of the need for permit life. Effluent limitations based on biomonitoring should recognize the variability of the testing procedures and the existence of species of concern in the receiving waters.

## TOTAL MAXIMUM DAILY LOADS (TMDL)

Development and implementation of Total Maximum Daily Loads (TMDLs) for impaired water bodies varies as to complexity, time to achievement and necessary resources. As the TMDL process represents watershed planning and management, the principles outlined by WSWC for Watershed Management should be adhered to in developing TMDLs. Maximum flexibility is desirable for the development and implementation of TMDLs to tailor strategic restoration actions on specific impaired water bodies and bring about their improvement in water quality. Where appropriate, successful performance of TMDLs could be measured by steps of relative improvement in water quality in the short run, rather than immediate compliance with water quality standards.

While the CWA has defined a clear responsibility for EPA in the development of TMDLs, it is equally clear that implementation of TMDLs is a State concern that directs the priority allocation of limited resources toward water quality restoration of State-specified water bodies. The variability and dynamic nature of the factors influencing water quality discourage the establishment of prescribed solutions, particularly at the federal perspective. Strategic planning for water quality restoration is a state responsibility and it is the responsibility of the states to see that local jurisdictions are provided the appropriate resources to implement those strategies. The states encourage the federal government to provide technical, financial and research assistance.

## FEDERAL FACILITY COMPLIANCE

All departments, agencies, and instrumentalities of the branches of the federal government and their respective properties, facilities and activities should be made subject to, and should comply with, all Federal, State, interstate, and local substantive and procedural requirements concerning the control and abatement of water pollution in the same manner as any other person is subject to the requirements. This should include any permit or reporting requirement, any provision for injunctive relief and such sanctions as are imposed by a Federal or State court to enforce the relief, and any requirement for the payment of reasonable fees.



WESTERN STATES WATER COUNCIL

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Web Page: [www.westgov.org/wswc](http://www.westgov.org/wswc)

Position No. 247

October 9, 2002

Mr. Bennett W. Raley  
Assistant Secretary for Water and Science  
U.S. Department of Interior  
1849 C Street NW, ms6640-MIB  
Washington, D.C. 20240

Dear Bennett:

On behalf of the Western States Water Council, I appreciate the time you took to participate in the Council's July 25 meeting in Bismarck, North Dakota. As a follow up to the discussions during that meeting, I am writing on behalf of the Council to communicate some suggestions on how the federal government might help expedite state general stream systems adjudications in the West. While the suggestions should not be viewed as a comprehensive listing, the steps we have identified, if implemented, would accelerate achievement of the mutually beneficial goal of quantifying the amounts, priorities, and other elements of water rights in river basins of the West. We hope to engage in further discussions with you regarding this important objective.

First, some background may be helpful for those with whom you may choose to share this letter. States in the West have developed comprehensive judicial and administrative proceedings (general stream adjudications) to quantify and document relative water rights within basins, including the rights to waters claimed by the United States under either state or federal law. These adjudications are typically complicated, expensive civil court and/or administrative actions that involve hundreds or even tens of thousands of claimants. Such adjudications give certainty to water rights, provide the basis for water right administration, reduce conflict over water allocation and water usage, and incidentally facilitate important market transactions for water rights in the West. Congress recognized the benefits of state general adjudication systems and by adoption of the McCarran Amendment (43 U.S.C. §666), required the federal government to submit to state court jurisdiction for the adjudication of its water right claims.

Although water right claims by federal agencies are often the largest and/or most complex claims in state general adjudications, the United States Supreme Court, in the case of *United States v. Idaho*, 508 U.S. 1 (1992), determined that the McCarran Amendment does not require the United States to pay filing fees, which pay for a portion of the costs associated with conducting adjudications. This holding means that the cost of adjudicating some of the most difficult claims in a state general adjudication has shifted entirely to private water users and state taxpayers. This drain on the resources of states and lack of federal government financial support significantly inhibit the ability of both state and federal agencies to protect private and public property interests. This is nowhere more evident than in the Klamath Basin where approximately 400 of the 700 claims being adjudicated are federal claims. The complexity of these federal claims, coupled with a series of

lawsuits filed in federal court by federal agencies, has significantly delayed the state adjudication. Further, because they are not subject to fees and costs like other water users in the adjudication, federal agencies have filed questionable claims that may have been otherwise tempered. In Idaho, for example, the Forest Service initially filed 3,700 last-minute claims in the Snake River Basin adjudication just prior to the initial court action on the adjudication fee issue. After the Forest Service used these last-minute claims to quantify the fiscal impact of paying fees and after the State of Idaho incurred considerable expense investigating these claims, the Forest Service withdrew all but 61 of the claims, and the state adjudication court has since dismissed all but 9 of the claims.

With this background, the western states have attempted to address this problem in the Congress. S.B. 447 and H.R. 705 would require all federal agencies filing water right claims in state adjudications to pay fees and costs to the same extent as a private party to the same proceeding. New Mexico proposed alternative legislation to provide federal funding support to each of the states pursuing general stream adjudications, based on a formula assessing the relative need for such support. These proposals have not advanced within Congress as yet, and so we would like to suggest some policy changes for this Administration's consideration as follows:

1. As a matter of policy, federal agencies should pay a fair share of the costs associated with adjudicating their claims in state adjudications. One alternative would be to establish a uniform federal fee structure, which we recognize may require that the money for such fees be diverted from some other federal programs. A federal representative should be designated to work with western state water administrators either to establish an equitable uniform fee structure for adjudicating federally held water rights or to devise some other means of providing for federal payment of a fair share of adjudication costs, and to help identify sources of federal funds for such fees. Importantly, the federal government has discretion to adopt such a policy as a matter of fairness, even though not presently required to do so by law. Payment of filing fees by federal agencies was in fact a common practice prior to the unfortunate U. S. Supreme Court ruling on the Forest Service claims in Idaho.
2. The federal government should not pursue separate actions in federal court that deal with the subject matter of a state court adjudication during the pendency of the adjudication, such as the Lower Rio Grande quiet title action filed in 1997 in federal district court in New Mexico and the 2001 Adair filings in federal district court in Oregon. Such actions divert substantial resources from state adjudications and are contrary to the intent of the McCarran Amendment.
3. Negotiations and mediation often occur with regard to federal claims within the context of ongoing adjudications. To be effective, there must be high-level federal involvement in such negotiations. Experience has shown that without the involvement of federal participants who have the authority to make decisions, achieving agreements can be illusory and delay mutually beneficial outcomes. Policy direction must be provided by the relevant federal agencies.
4. Federal agencies should be given policy direction to ensure that federal claims filed in state adjudications have a sound basis in fact and law. States continue to encounter claims by the Forest Service which are entirely inconsistent with the United States Supreme Court holding in *United States v. New Mexico*. We believe that direction to follow the holding of *United States v. New Mexico* would avoid questionable claims that can be very costly to evaluate, thus diverting limited state resources from completing general stream adjudications, and which are ultimately of no benefit to the United States.

5. Another way to ensure that claims have a sound basis in fact, and also to facilitate timely review of those claims is to require that the federal government provide whatever evidence it may have to substantiate its claims at the time of filing. Given the complexity and the contentiousness involving such claims, we believe states are justified in asking the federal government to take this step. Doing so will expedite the process in two ways: (1) it will minimize the filing of questionable claims in the first place; and (2) it will provide a basis for states to ascertain early-on the level of resources that states need to commit to the investigation of such claims.

Again, we appreciate your participation at our July 25 Council meeting. We believe similar participation from the Department of Justice is essential. As mentioned at the outset, we are anxious to engage in further discussions regarding these matters with you and/or your representatives and representatives from the Department of Justice. I appreciate the improvements you are attempting to implement, and I look forward to hearing from you regarding the above suggestions.

Best regards,



Karl J. Dreher  
Chairman  
Western States Water Council

cc: Thomas L. Sansonetti, Assistant Attorney General, Environment & Natural Resources Division, DOJ  
John W. Keys, III, Commissioner, Bureau of Reclamation, DOI





## WESTERN STATES WATER COUNCIL

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Position No. 248

October 24, 2002

Secretary Gale Norton  
Department of the Interior  
Interior Building  
1849 C Street, NW  
Washington, D.C. 20240

Dear Secretary Norton:

The Endangered Species Act in Section 2(c)(2) declares that it is "...the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." State and local agencies are an important component of "resolving water resource issues in concert with conservation of endangered species." Senate Report No. 97-418 states, "The policy statement contained in [the 1982] amendment [to the ESA] recognizes that most of the potential conflicts between species conservation and water resource development can be avoided through close cooperation between local, State and Federal authorities."

The Western States Water Council has served as a forum for implementing that policy by considering the impact of water use on endangered species, and the impact of the Endangered Species Act on water uses and water rights. We appreciate your efforts and those of this Administration to address these issues. The breadth and scope of the problem and related issues and conflicts over water use and endangered species continue to grow, as does the West.

We strongly support legislative changes suggested in the past by the Western Governors' Association, and consistent with the Governors' Enlibra Doctrine. However, until Congress reaches some consensus and acts to improve upon shortcomings in the law, administrative changes, particularly those involving state and local agencies, offer the best way to improve implementation of the Act for the benefit of both endangered and threatened species and people.

Over the past seven years, the Western States Water Council has held a number of symposia and workshops as forums for a discussion among various stakeholder of ways to improve water management to protect or benefit endangered species in the West. A number of recurring themes were evident and suggest opportunities for moving forward, on a case-by-case basis, to address issues arising in every major river basin in the West. We offer the following suggestions for the Administration's consideration.

1. Greater use should be made of authorities under ESA Section 5, which envisions federal appropriations for the acquisition and management of the lands and waters needed by endangered species, not the regulatory taking of private property rights. Any acquisition of water rights for endangered species should be on a willing seller/lessor basis, in full compliance with state laws, and the rights should be held by an appropriate public agency as determined by the state. States are using

a variety of tools to ensure water is available including water banks, temporary transfers, dry-year leasing, instream flow dedications, and other means consistent with state water law. Market-based mechanisms have been and can successfully be used to move water from one purpose to another, with appropriate consideration of third-party impacts consistent with state water law. The use of such opportunities should be promoted in a more structured manner. We invite you to participate in a dialogue leading to memoranda-of-agreement and/or cooperative agreements under Section 6 of the ESA with state agencies outlining the basic principles for securing water for endangered species purposes and providing funding assistance for appropriate state administrative expenses to ensure the secured water is delivered for its intended purpose.

2. Only the minimum amount of water reasonably needed for endangered species, as determined on a case-by-case basis using good data and sound science, should be acquired. The Secretary should require a review of the sufficiency of the science upon which major ESA decisions are based to ensure that they are justifiable. Without a transparent process, including peer-review and public comment, the data and science upon which biological opinions and other ESA-related decisions are based will continue to be suspect and subject to legal challenges. Moreover, appropriate alternative substitutes for water, where available, should be considered. Water is only one of many requirements for healthy and stable species populations, and may or may not be the limiting factor in some cases.

3. Development of recovery plans under ESA Section 4 and consultations conducted pursuant to ESA Section 7 should be open to all persons and interests affected by the subject action(s) or any subsequent implementation. Based on the successful case studies presented during the workshops we conducted, inclusive processes clearly result in higher degrees of success and reduced conflict. Affected parties are willing to contribute resources to recovery efforts if they have been involved in the recovery planning and consultation processes.

4. With respect to aquatic species, state and local agencies should be invited to participate in candidate conservation and safe harbor agreements and habitat conservation plans. Such mechanisms need to be consistent with any state conservation and local watershed plans or planning processes.

5. Recovery efforts should be prioritized, in consultation with the states and other affected interests, to focus limited resources where they are most effective. Before expanding critical habitat designations beyond the known range of species to all potentially suitable habitat, or taking similar actions, federal agencies should concentrate their efforts and resources on proven projects and programs for recoverable domestic species where they are known to exist.

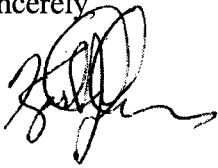
6. More money should be directed to species protection efforts to successfully implement these and other recommended improvements, including providing economic incentives for those with water rights and various types of water contracts. Without adequate federal funding, progress towards avoiding the listing of species and the delisting of species will continue to be slow and conflicts will increase. Priority should be given to opportunities to leverage federal appropriations with state spending and other non-federal contributions.

7. The ESA should be interpreted as not requiring consultation under Section 7 of the effect of federal agency actions on listed species outside the United States. Federal agencies are not authorized to take actions to protect species in foreign countries. The efforts of federal agencies to recover species in other countries are constrained by the actions and commitments of those countries. Furthermore, the resources of the United States should be reserved and dedicated to recovery efforts for listed species in the United States.

We applaud past administrative efforts to improve implementation of the Endangered Species Act and hope you will carefully consider the above suggestions. We welcome your experience and this Administration's commitment to finding workable solutions to conflicts between development and protection of our natural resources, particularly our water resources. We urge you to look to the states as indispensable partners in your endeavors. Without the support of state water managers and water right and contract holders, efforts to successfully meet the long-term water needs of endangered and threatened species will be difficult, if not impossible, to accomplish.

We ask for an open dialogue between state water managers and federal officials - together with local water users and managers, fish and wildlife managers, environmental interests, and other stakeholders - to establish a long-term process, based on Enlibra Principles, for successfully addressing water resource and endangered species issues. We look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karl J. Dreher', written over a circular stamp or seal.

Karl J. Dreher  
Chairman  
Western States Water Council

cc: Western Governors' Association  
Ann Klee, Counselor to the Secretary, DOI



WESTERN STATES WATER COUNCIL

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Web Page: [www.westgov.org/wswc](http://www.westgov.org/wswc)

November 27, 2002

Position No. 248(a)

Director Mitchell E. Daniels  
Office of Management and Budget  
Room 252 Eisenhower Executive Office Building  
Washington D.C. 20503

Dear Director Daniels:

The Western States Water Council understands that the Office of Management and Budget is undertaking program performance assessments to guide Executive Branch policy and budget decisions. One of the programs currently under scrutiny is the Section 319 Program of the U. S. Environmental Protection Agency, responsible for supporting demonstration projects for the abatement of non-point source pollution including agricultural, silvicultural, abandoned mine land, and urban non-point source programs. Additionally, many states tap 319 for core staff to conduct TMDLs. This use of 319 makes the program not just a "cost share," but also provides part of the necessary federal funding to meet the "gap" regarding state water quality agency staffing to manage the Clean Water Act. As part of the program effectiveness rating, the 319 Program was included in the testing process for OMB's Program Assessment Rating Tool (PART). Apparently, the performance rating for the 319 Program is marginal and its ability to reduce non-point source pollution is being questioned. This is inconsistent with the fact that the non-point source 319 Program has contributed significantly to water quality improvements, as documented in 305(b) reports from the states.

The Council supports your Office's efforts to establish performance metrics to evaluate the accomplishments of Federal investments. We understand how difficult this is because improvements under the non-point source 319 Program cannot be separated from point source improvements, unfunded non-point source improvements, and non-point source work done by other agencies. Nonetheless, the current evaluation of the 319 Program does not recognize the struggle by states to decrease impairments brought about by non-point source pollution. There is no question, that after three decades of attempting to reduce nutrient, sediment, and pathogen loads, different approaches and roles for Federal programs are needed to improve the success rate of environmental restoration. However, the perception that the 319 Program is merely a demonstration program for agriculturally-based Best Management Practices is highly inaccurate.

Based on the results of the initial performance evaluation, some may suggest dismissing the 319 Program as being duplicative of Farm Bill programs with insignificant benefits to the environment. However, the philosophy of water pollution control emerging from the experiences of administering 319 Program grant funds shows that non-point source pollution control is not merely a matter of funding agricultural Best Management Practices, the major thrust of the Farm Bill.

There is an ongoing need to support the social structure of watershed management, particularly at the local level, through watershed planning, stakeholder facilitation, interaction with landowners and agricultural producers, and exchange of technical information that motivates those individuals to participate in the Farm Bill programs. Further, 319 Program monitoring of water resources at the local scale assists targeting program assets to those activities most in need of abating pollutant loads, while critically evaluating the restorative impact of cumulative protection practices installed over the watershed. Such analyses of benefits to water quality are long term in nature and go well beyond the scope of a narrow program evaluation, such as PART.

There is no question that the 319 Program can and does enhance local involvement in traditional implementation projects, which will aid delivery of Farm Bill programs. However, the 319 Program also provides opportunities to address traditional non-point source pollution control needs that are not eligible for traditional Farm Bill funding. The following are among those areas:

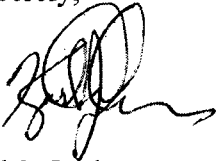
- \* Watershed coordination and planning to effectively target moneys, such as EQIP, to drainages that will result in investing in more significant pollution reduction.
- \* Watershed specialists and watershed councils to oversee and coordinate implementation of non-point source abatement activities on the local front, encouraging program participation by individuals, and surpassing density thresholds for the level of treatment necessary within a watershed to observe water quality improvement.
- \* Technology transfer and demonstration of new and emerging Best Management Practices addressing agricultural pollutants, including those associated with irrigation return flows.
- \* Support and implementation of Best Management Practices in urban centers to combat pollution arising from stormwater runoff.
- \* Support and implementation of Best Management Practices for construction activities, mining (such as Good Samaritan clean-up sites), and addressing modifications to hydrology and habitats.
- \* Monitoring of water quality emerging from watersheds to evaluate cumulative impacts of management activities in abating pollution.
- \* Monitoring within watersheds to target limited resources to subunits most likely to be contributing a majority of the pollutant loads seen in the watershed.
- \* Stream restoration and habitat improvement which restore the biological integrity of surface waters of the nation.
- \* State program administration and leveraging of multiple funding sources to administer and implement the Clean Water Act.
- \* Documenting connections between watershed and land use activities and impacts to the water resources of the watershed.

\* Educating individuals and communities on the importance of water quality, the significance of non-point source pollution in water quality problems, and the contribution to water quality improvement stemming from their individual actions.

The Council is concerned that OMB is currently reviewing EPA's new Watershed Rule, which will effectively move watershed management for water quality restoration into the future, while contemplating eliminating one of the key tools necessary to implement that rule. The western states support the efforts of EPA to develop a new Watershed Rule, but cannot put it in action if the 319 Program is reduced or eliminated. The three decades of progress made under the Clean Water Act demonstrate the impact of Federal, state, and local investment in controlling point sources. We are now in the era where similar commitments must be made for controlling non-point sources. Non-point source pollution is the largest remaining contributor to the impairment of the nation's waters. There is no duplication of effort between the 319 Program and the USDA programs. Both are essential cogs in the Federal strategy to improve water quality in the nation's waters. Further, significant reductions to the 319 Program would effectively eliminate program infrastructure to manage non-point sources of pollution on a watershed basis in many states.

We encourage you to continue to support the 319 Program and to assist EPA in enhancing the program to clearly accomplish the Federal objectives of the Clean Water Act and the Administration. We hope you will dedicate the necessary resources in the FY 2004 budget to empower the states to meet those goals.

Sincerely,



Karl J. Dreher  
Chairman  
Western States Water Council

cc: Christine T. Whitman, Administrator, Environmental Protection Agency  
Ann M. Veneman, Secretary, U.S. Department of Agriculture  
Members of the Senate Appropriations Committee  
Members of the House Appropriations Committee

## RULES OF ORGANIZATION<sup>30</sup>

### 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.

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<sup>30</sup>The rules incorporate changes that were adopted in November 1997 at the Council's 125th meetings in Carlsbad, New Mexico.

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

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

#### Article V - Membership

(1) The membership of the Council consists of not more than three representatives of each of the states of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, 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 sunseting. 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.