2003

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

Thirty-Eighth Annual Report

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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. **HAWAII** was a member from 1991-1999. 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 2003, meetings were held in: Lincoln, Nebraska on March 19-21st; Wellsville, Utah on July 31- August 1st; and Monterey, California on November 4-7th. 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, related to western water resources. Other information about the Council and Council members is also included.

The Council relies almost exclusively on state dues for funding the organization. The dues for FY2003 (ending June 30, 2003) were set at $25,000 per state. They have remained at this level for some years now. A copy of the audit performed for the fiscal year ending June 30, 2003 can be obtained from the Council office. The auditors noted "no matters involving the internal control over financial reporting and its operation that we consider to be a material witness," and "no instances of non-compliance that are required to be reported herein under *Government Auditing Standards*."

During 2003, 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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(Alternate)*
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Steve Pirner - South Dakota
Thomas Weir Labatt - Texas
D. Larry Anderson - Utah
Linda Hoffman- Washington
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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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Patrick Rice - Nebraska (Alternate)*
Mike Turnipseed - Nevada
Allen Biaggi - Nevada (Alternate)*
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Sherry Tippett - New Mexico (Alternate)*
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Miles Tolbert - Oklahoma
Steve Thompson - Oklahoma (Alternate)*
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Steve Pirner - South Dakota
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Total Maximum Daily Load (TMDL) Subcommittee

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Eileen Grevey Hillson - New Mexico
(Alternate)*
Charlie Gonzales - New Mexico
(Alternate)*
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(Alternate)*
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Keith Phillips - Washington
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(Chair) (Alternate)*

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Sherry Tippett - New Mexico
Dale Frink - North Dakota
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Sherry Tippett - New Mexico
Duane Smith - Oklahoma
D. Larry Anderson - Utah

USGS Streamgaging/NRCS Snow Survey Programs Subcommittee

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Mike Turnipseed - Nevada
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Barney Austin - Texas
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Mike Turnipseed - Nevada

Water Information Management Systems Works

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Hal Anderson - Idaho
Tracy Taylor - Nevada
Duane Smith - Oklahoma
Paul Cleary - Oregon
Nancy McCann - Wyoming

Water Resources Program Funding Subcommitt

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Hal Simpson - Colorado
Dave Pope - Kansas
Jack Stults - Montana
Roger Patterson - Nebraska
Duane Smith - Oklahoma

Water Transfers and the Public Interest

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Jeanine Jones - California
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Tom Stiles - Kansas
Jim Davenport - Nevada
Duane Smith - Oklahoma
Paul Cleary - Oregon
Weir Labatt - Texas
Pat Tyrrell - Wyoming

High Plains Work Group

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Jack Stults - Montana
Roger Patterson - Nebraska
Dean Couch - Oklahoma
Duane Smith - Oklahoma
Garland Erbele - South Dakota
Weir Labatt - Texas
Sue Lowry - Wyoming
Pat Tyrrell - Wyoming

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Jack Stults	- Montana
Roger K. Patterson	- Nebraska
Michael Linder (Alternate)*	- Nebraska
Roland Westergard	- Nevada
John D'Antonio	- New Mexico
Ron Curry (Alternate)*	- New Mexico
Dale Frink	- North Dakota
Miles Tolbert	- Oklahoma
Duane A. Smith (Alternate)*	- Oklahoma
Paul Cleary	- Oregon
Steve Pirner	- South Dakota
Thomas Weir Labatt	- Texas
D. Larry Anderson	- Utah
Linda Hoffman	- Washington
Patrick Tyrrell	- Wyoming

Water Quality Committee

Tom Chapple (Alternate)*	- Alaska
Karen Smith	- Arizona
Paul Frohardt	- Colorado
Steve Allred	- Idaho
Ron Hammerschmidt	- Kansas
Karl Mueldener (Alternate)	- Kansas
Tom Stiles **(Chair)** (Alternate)*	- Kansas
Jan Sensibaugh	- Montana
Michael Linder	- Nebraska
Patrick Rice (Alternate)*	- Nebraska
Mike Turnipseed	- Nevada
Allen Biaggi (Alternate)*	- Nevada
Ron Curry	- New Mexico
Fred Lujan (Alternate)*	- New Mexico
Sherry Tippett (Alternate)*	- New Mexico
David Glatt	- North Dakota
Miles Tolbert	- Oklahoma
Steve Thompson (Alternate)*	- Oklahoma
Mike Llewelyn	- Oregon
Steve Pirner	- South Dakota
Kathleen Hartnett White	- Texas
David Montagne (Alternate)*	- Texas
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Stephen Bernath (Alternate)*	- Washington
John Corra	- Wyoming
John Wagner (Alternate)*	- Wyoming

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David Vogler	- Nebraska
Jim Davenport **(Chair)** (Alternate)*	- Nevada
Roland Westergard	- Nevada
Chuck DuMars	- New Mexico
Maria O'Brien (Alternate)*	- New Mexico
John Utton (Alternate)*	- New Mexico
Julie Krenz	- North Dakota
Dean A. Couch	- Oklahoma
John Guhin	- South Dakota
J.E. (Buster) Brown	- Texas
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Norman K. Johnson	- Utah
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Jeanine Jones (Alternate)*	- California
Harold D. (Hal) Simpson	- Colorado
Norman Semanko	- Idaho
David L. Pope	- Kansas
Jack Stults	- Montana
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David A. Vogler (Alternate)*	- Nebraska
Mike Turnipseed	- Nevada
Hugh Ricci (Alternate)*	- Nevada
John D'Antonio	- New Mexico
Eileen Grevey Hillson (Alternate)*	- New Mexico
Charlie Gonzales (Alternate)*	- New Meixco
Dale Frink	- North Dakota
Duane A. Smith	- Oklahoma
Paul Cleary	- Oregon
Garland Erbele	- South Dakota
Thomas Weir Labatt	- Texas
David Montagne (Alternate)*	- Texas
Dee C. Hansen	- Utah
D. Larry Anderson (Alternate)*	- Utah
Joe Stohr	- Washington
Keith Phillips (Alternate)*	- Washington
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COUNCIL MEETINGS

141st Council Meetings
March 18-20, 2003
Lincoln, Nebraska

Nebraska hosted the 141st meetings of the Council in Lincoln on March 18-20, beginning with a field trip to the Platte River Whooping Crane Trust for a memorable evening in blinds along the river watching tens of thousands of sandhill cranes and geese gather to roost for the night. Governor Michael Johanns addressed the Council, noting that the arrival of the cranes was a sign that spring was here. The Governor commended the Council for providing an organizational framework for developing a cohesive unitary approach to western water policy and meeting western water demands. Without the Council, he said, "Each state would have to fend for itself to protect water supplies." He noted that Nebraska and much of the West faced a drought of historic proportions. Governor Johanns and New Mexico Governor Bill Richardson were serving as the Western Governors' Association's co-lead governors on drought, and together they were working toward a more proactive response that would include a new drought forecasting system, national monitoring network and national strategy for drought mitigation. "Drought is different than any other type of natural disaster. It can be upon us before we are prepared...."

Governor Johanns, an attorney, was raised on an Iowa dairy farm. He served as Mayor of Lincoln and as a county commissioner. He discussed farming and ranching needs, surface and ground water management, endangered species and instream flows, including the Platte River cooperative agreement, hydropower project relicensing, Indian water rights claims and water quality issues. He concluded, "Western states must retain control over their water." He added, "The Western States Water Council has been instrumental in ensuring western water resources are used for the varied good of all users. I appreciate your efforts to try to work together."

Roger Patterson, Director, Department of Natural Resources, followed the Governor with a powerpoint presentation on Nebraska's water resources and issues. He noted irrigation accounts for the use of 7.5 million acre-feet (Maf) of water annually (88% of the state's total water use), and some 6.2 Maf comes from ground water. The Ogallala Aquifer is a giant underground reservoir, with a saturated thickness of up to 1,000 feet in some places. It holds an estimated 2.1 billion acre-feet of water. However, water levels had declined significantly in some areas. Ground water quality, particularly nitrates, was also a concern. The livestock industry is also important to Nebraska, with a lot of open range. Roger explained his department's organization, and Nebraska's unique local natural resources districts, which have broad statutory authority for ground water and stormwater management, including ground water quality, soil and water conservation, and other activities.

The drought had made many water issues even more challenging along some of Nebraska's major rivers. Missouri River basin states had been frustrated by endless attempts to reach agreement on a new manual for the operation of federal dams by the U.S. Army Corps of Engineers. American Rivers filed suit to modify operations in line with the requirements of a U.S. Fish and Wildlife Service biological opinion under the Endangered Species Act (ESA), and Nebraska intervened. A cooperative agreement with Wyoming and Colorado over management of the Platte River and ESA protected species was also being implemented. A settlement with Kansas and Colorado over water use and the Republican River was before the U.S. Supreme Court for approval. Roger reported water allocations were going well under an interstate settlement following the *Nebraska v. Wyoming*

lawsuit on the North Platte. In 2002, the Nebraska legislature created a 45-member Water Policy Task Force to focus on surface and ground water interactions and management and address myriad issues including temporary and permanent water transfers, water leasing and banking, ground water depletions and the effects on surface streamflows, with draft legislation expected to be recommended for the 2004 session.

The Executive Committee acted to revise and renew two past policy positions -- one highlighting the need for a "true state-federal partnership" as part of any ground water quality strategy -- and a second reiterating support for negotiated Indian water right settlements. The Council approved these and a position emphasizing state primacy in water allocation under the Clean Water Act (CWA) water quality certification process under section 401. The latter was discussed by Jim Canaday, California Department of Water Resources, via a conference call regarding Federal Energy Regulatory Commission rulemaking and state concerns in the Water Resources Committee.

The Water Resources Committee was joined by a number of guests. Patrick Leonard, with the U.S. Fish and Wildlife Service, talked about current federal wildlife habitat acquisition award and conservation incentive programs. He offered that the Service was interested in pursuing opportunities for cooperative agreements, and looked forward to future discussions. The Committee discussed the 2002 Farm Bill's surface and ground water conservation incentives and rules. A letter by Karl Dreher, WSWC Chairman, stated, "Any rules must support existing state water programs and priorities, consistent with existing law, and provide the maximum flexibility possible to achieve state and federal goals."[2] William Rinne, U.S. Bureau of Reclamation, described a newly proposed $11 million Western Water Initiative for cooperative pilot projects and enhanced science and technology spending to help prevent future supply crises such as in the Klamath and Middle Rio Grande Basins.

Next, Don Wilhite described the work of the National Drought Mitigation Center in Lincoln and current drought conditions that set records in some parts of the West. Ironically, some WSWC members were unable to attend the meetings due to heavy snows that closed the Denver airport. He also discussed legislative efforts to enact a national drought policy. Bruce Newton, Director of the National Water and Climate Center, in Portland, reviewed current and future snow survey and water supply forecasting activities, inviting members to help sponsor a number of short-term forecasting project demonstrations. He also again thanked members for their critical support in ensuring adequate funding for this key federal program. Jim Peters, U.S. Geological Survey, covered FY2003 funding and future requests for the Cooperative Water Program and other water-related activities. Funding remained steady, but inflation eroded spending and some streamflow gages would likely be lost.

Tom Sansonetti, U.S. Assistant Attorney General, addressed the Legal Committee on the Department of Justice's (DOJ) roles and internal organization. He commented on the *Sumner Peck Ranch* settlement involving drainage for the San Luis Unit of the Central Valley Project. After four years of mediation, the parties struck a deal approved by the district court. He also reported that a Tenth Circuit Court of Appeals decision was expected soon on the Middle Rio Grande. Mr. Sansonetti encouraged the use of settlements, noting the successful efforts to use state law to meet federal water needs at Nellis Air Force base near Las Vegas, Zion National Park in Utah, and in

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[2]*Western States Water*, Issue #1503, March 7, 2003.

Idaho's Snake River Basin. While litigation is inherently adversarial, good government is not, and he described his "open-door policy" to discuss possible ways to resolve water conflicts. On state general stream adjudications, he referred to the Council's October 9, 2002 letter to Bennett Raley that suggested ways to expedite action. He dismissed any notion of the U.S. voluntarily paying fees for federal water right claims, unless so directed by the Congress. He concurred that the U.S. should not file separate water-related claims in federal court, though there could be occasional exceptions to this general rule. He also agreed that there ought to be high-level U.S. involvement early on in settlement negotiations, and that federal interests should be subject to the requirements of state law to the same extent as private claimants.

Another guest, Dave Osias, representing the Imperial Irrigation District (IID), reported that a San Diego district court granted IID an injunction on March 18, against the Department of Interior's recent reallocation of Colorado River water.[3] This lawsuit had the potential to escalate into a larger battle as other interested parties joined. Jeanine Jones said California would intervene if a Quantification Settlement Agreement (QSA) failed. Next, Jodi Fenner, Nebraska Assistant Attorney General, reviewed litigation challenging the Environmental Protection Agency's (EPA) arsenic drinking water standard as exceeding the Congress' Commerce Clause power. Due to naturally occurring arsenic, over 30 Nebraska water systems violated the new standard.

The Water Quality Committee next discussed the *Miccosukee v. South Florida Water Management District* case, which had been appealed to the U.S. Supreme Court from the Eleventh Circuit. The Committee concluded not to take a position on the certiorari request at this time, as the circuit court decision was not binding in western states. Chuck Sutfin, EPA, discussed various issues, including the Solid Waste Agency of Northern Cook County (SWANCC) Advanced Notice of Proposed Rule Making in regard to federal jurisdiction over wetlands.[4] Mr. Sansonetti suggested that states take advantage of the opportunity to comment by the April 16 deadline. Mr. Sutfin also spoke on EPA's new Confined Animal Feed Operations (CAFO) rule, EPA's Water Quality Trading Policy, the Total Maximum Daily Load (TMDL) watershed rule, and an Office of Management and Budget (OMB) evaluation of the Clean Water Act (CWA) section 319 program. Paul Frohardt summarized the work of the Effluent Dependant-Dominated Waters Work Group. By phone, Shaun McGrath, Western Governors' Association (WGA), noted Good Samaritan legislation was recently reintroduced into this Congress. In addition, Don Thober, Natural Resources Conservation Service (NRCS), previewed new rules for implementation of the 2002 Farm Bill and the Environmental Quality Incentives Program (EQIP).

142nd Council Meetings
July 31- August 1, 2003
Wellsville, Utah

The 142nd Meetings of the Western States Water Council were held at the Sherwood Hills Resort, near Wellsville and Logan, in northern Utah. The state hosted an all day tour of Bear Lake and the Bear River Basin, which covers parts of Idaho, Utah and Wyoming. The lake serves as a storage reservoir providing water for irrigating tens of thousands of acres downstream, but years of

[3] *Western States Water*, Issue #1504, March 14, 2003.

[4] *Western States Water*, Issue #1502, February 28, 2003.

drought had dropped lake levels to record lows, exposing miles of shoreline. While agriculture dominates the local economy, recreation is also an important factor. Hydropower is another beneficiary of the system, with a number of powerplants taking advantage of water releases for irrigation. Larry Anderson, Director of the Utah Division of Water Resources, hosted the tour and during the full Council meeting described Utah's water resources, highlighting the drought.

In the Weber River Basin, adjacent to the Bear River Basin, surface water deliveries were cut back to priorities dating to 1865. That basin was settled in 1850. Storage statewide declined from 3.5 million acre-feet (Maf) in 1999, to less than 2 Maf (excluding the major Colorado River reservoirs, which had also dropped dramatically). Governor Mike Leavitt established a statewide water conservation team and program to reduce municipal and industrial water use per capita by 25%. Utah's high water use figures were attributed to its unique geography, dry climate, large residential lots and outdoor water demands. Utah's low water rates are due to early development of local high quality supplies, which help keep transportation and treatment costs low, but this is also a disincentive to conservation. Water use was reduced from 321 gallons per capita per day (gcpd) in 1995, to 293 gpcd in 2002, with an ultimate goal of 241 gpcd. The goal appears achievable largely through more efficient outdoor residential use. Of note, state water development loans require that applicants have: (1) a water conservation/management plan; (2) a time-of-day ordinance; and (3) progressive water rates.

Mark Limbaugh, Deputy Commissioner, U.S. Bureau of Reclamation, also addressed the full Council. He emphasized the need to work together with states, within state law, as partners to solve western water problems. He noted that comments from public meetings on the Bureau's Water 2025 Initiative highlighted concerns over aging infrastructure and the need for more storage. They also hoped to collaborate on water conservation and delivery system reoperation opportunities, as well as research on technological improvements, particularly in desalinization of brackish waters. Only $11 million was appropriated for FY 2003 for the Bureau's initiative, but that represented new money. The House had approved another $11 million, and the Senate $7.5 million for this work, while the Senate voted for an overall increase of $67 million in Reclamation's FY2004 budget. Mr. Limbaugh observed, "We are confident Water 2025 is headed in the right direction."[5]

He also addressed issues related to increased security at Reclamation projects, rural water project legislation, and issues in the Klamath Basin, Middle Rio Grande, and southern California. With respect to the latter, he reported that the Part 417 review of the Imperial Irrigation District's water needs, as required by court order, under the Boulder Canyon Project Act, was completed to fulfill Interior's obligations as watermaster on the Colorado River. "This is something we will not be doing in other states."[6]

Next, Bob Hirsch, Associate Director for Water, U.S. Geological Survey (USGS), addressed members as "extremely important partners" in the collection of water availability and use data. He noted the move towards real-time stream gaging data allowed more people to see the value of the program. USGS continued to work to modernize and stabilize the National Streamflow Information Program (NSIP). Acoustic Doppler stream measurements and mobile data entry equipment were

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[5]*Western States Water*, Issue #1522, July 18, 2003.

[6]Western States Water, Issue #1521, July 11, 2003.

helping facilitate readings, with instant uploading of data to their computer network, eliminating the paper and pencil work of the past.

Each stream gage costs $8,000-$12,000 to operate and maintain. Federal costs increase by about 3.6% a year, due mostly to salary increases. While federal budget requests remained steady, state contributions had increased, but state budget problems threatened the loss of a number of cooperatively funded gages and important steamflow data in the future. USGS was particularly concerned about the loss of "long-record" gages. USGS was also working to provide real-time data from ground water wells as an aid to decisionmakers, particularly during drought. Mr. Hirsch noted that some of their data analysis pointed to a significant shift in peak runoff (10-15 days earlier in the season), perhaps due to climate changes. This is important as it would represent a substantial loss of snowpack water storage.

The Council adopted a resolution regarding the transfer of water under state law and the requirements of the Clean Water Act for a National Pollutant Discharge Elimination System (NPDES) permit. However, lacking complete consensus, the Council chose to refer it to the Western Governors' Association for review for 10 days, before it could be formally distributed. There was a lot of discussion over the need for states to be able to control both the quantity and quality of transferred waters. Separate from the resolution, the State of Idaho and others were working on an amicus brief urging the Supreme Court to overturn the 11th Circuit Court's *Miccosukee* decision requiring an NPDES permit for the pumping of urban floodwaters from one basin to another, degrading the receiving waters. The concern was that the transfer of any water not of identical quality might require a permit, with or without the addition of a pollutant, creating an obstacle to raw water supply transfers.

The Council also renewed two sunsetting positions. One urged the Congress to recognize and pass legislation to require the United States, when a party to a general state stream adjudication, to pay fees and costs imposed by the states related to non-tribal federal water claims "...to the same extent as private users." The other position reiterated the Council's support for a proactive, non-regulatory approach to promoting water conservation opportunities in the West through the U.S. Bureau of Reclamation's Field Services Program and the Bridging-the-Headgate Partnership involving the Bureau, U.S. Department of Agriculture and state and local conservation agencies, as well as the Council.

The Council adopted three resolutions of appreciation for outgoing members Tom Davidson of Wyoming, and Tom Davis and Wayne Cunningham, both of New Mexico. Lastly, the Council reelected for another one-year term: Karl Dreher of Idaho, Chair; Hal Simpson of Colorado, Vice Chair; and Duane Smith of Oklahoma as Secretary/Treasurer.

The Council's working committees met on Thursday. The Water Resources Committee meeting featured a presentation on current water supply conditions by Phil Pasteris, Forecasting Branch Chief with the National Water and Climate Center. Drought conditions across much of the West continued to deteriorate. Shaun McGrath, WGA staff, reported on the reintroduction of the National Drought Preparedness Act (S. 1454 and H.R. 2871). The governors had called for its enactment this year. The committee prepared a letter in support of the bill and forwarded it to the Council, which approved it for distribution. Other topics the committee briefly discussed included

Farm Bill water conservation rules, federal hydropower licensing rules, rural community water project needs, and state water agency efforts to cope with budget shortfalls.

The Legal Committee discussed a number of ongoing cases, including: *Nevada v. South Fork Band of the Te-Moak Tribe of Western Shoshone* regarding state regulation of headgates on a reservation for the delivery of water off the reservation; *Salish and Kootenai Tribes v. Stults* in Montana over permitting non-Indian water wells on a reservation; *South Dakota v. Army Corps of Engineers* and consolidated cases on Missouri River project operations; *Imperial Irrigation District v. U.S.* in California over water allocations and use; and *Rio Grande Silvery Minnow v. Keys* regarding the Bureau of Reclamation's responsibilities and discretion under the Endangered Species Act and Reclamation law. The latter included a discussion of legislative actions taken by members of the New Mexico delegation in Congress to protect existing water uses.

Chuck Sutfin, Director, EPA Assessment and Watershed Protection Division, reviewed recently issued guidance on TMDL listing and reporting requirements pursuant to sections 303(d) and 305(b) of the Clean Water Act. He described this as a state process, and EPA would accept state reports as written, unless there was a clear failure to administer state-created TMDLs. He also noted progress was being made on the Watershed Rule. Paul Frohardt of Colorado reported on efforts of the Effluent Dependent/Dominated Waters Work Group, which had drafted a discussion paper as a resource for state agencies dealing with various issues facing arid areas. Next, a panel of members including Don Ostler of Utah, Mark Pifher of Colorado, Dave Pope and Tom Stiles of Kansas, joined by Mike Boyle of Utah's Snyderville Basin Water Reclamation District, discussed case studies of water quality/quantity interrelationships.

Of note, as part of the meetings, WSWC Endangered Species Act subcommittee also met with U.S. Fish and Wildlife representatives to continue discussions on a proposed water use protocol.

143rd Council Meetings
November 4-7, 2003
Monterey, California

The Western States Water Council's 143rd meetings were held on November 5-7, in Monterey, California. The state hosted a very enjoyable and educational field trip that included the Marina City desalting plant, environmental restoration and education project at the Elkhorn Slough National Estuarine Reserve, a Castroville artichoke operation, and a regional tertiary wastewater treatment and reuse facility, the largest in California, that treats water for agricultural irrigation -- thereby reducing ground water pumping and seawater intrusion problems. The trip continued with a visit to San Clemente Dam. Years of siltation had reduced the water supply and power benefits, and seismic concerns led the state to order the lowering of the reservoir and/or removal of the dam, now a high hazard facility due not to its structural integrity, but to downstream residential development. Removal of the dam could benefit spawning steelhead trout, but as yet a technical solution that would avoid flushing tons of sediment downstream, to the detriment of the fish, had not been found. The trip ended at the Monterey Bay Aquarium.

At the Full Council meeting, representing the California Department of Water Resources, Jeanine Jones described the water resources of the Salinas River Basin and California's efforts to support and promote the use of desalting technology, where appropriate. The Central Coast was not

connected to the California State Water Project or other outside sources of water. Therefore, alternative supplies had to be developed to meet growing demands. Statewide, California operates over 40 desalting plants, producing about 170,000 acre-feet of water per year. Most use reverse osmosis technology to treat brackish ground water and wastewaters, though there are fifteen small plants, including the Marina facility, that treat seawater (producing up to 5,000 acre-feet/year). California is perhaps unique in that its infrastructure also includes agricultural drains and brine collection systems, with ocean outfalls, that facilitate brine disposal (a significant cost and obstacle to successful desalting activities). Pretreatment and energy costs related to project operations are also significant factors. The state provides some money for small projects treating brackish local ground waters and addressing sea water intrusion problems in coastal areas.

Also at the Full Council meeting, Keith Oleson and Brad Dobbins, from the U.S. General Accounting Office (GAO), briefed members on their recent report, "States' Views of how Federal Agencies Could Help Them Meet the Challenges of Expected Shortages."[7] While actual water use declined since 1980 by some measures, an 7% increase was expected by 2040, depending on future irrigation. In gathering information on future water supply challenges, GAO identified a number of trends: (1) a growing population and related water demands; (2) declining expenditures for construction and maintenance of surface water storage reservoirs; (3) depleted and declining ground water levels; (4) increasing demands for instream uses; and (5) uncertainty over the impacts of climate change on water resources.

Over the next ten years, 36 of the 47 states reporting expected shortages in normal years, and 46 of 47 states expected shortages during drought years. States wanted federal financial and technical assistance in meeting future needs, and greater input in federal project operations. States benefited from federal data collection activities, and supported greater spending to improve related programs. States also favored greater flexibility in the administration of federal environmental laws and policies. In California alone, there were 296 species listed under the Endangered Species Act. GAO concluded that while states have primary authority for water resources management, federal laws and policies often influence state actions. Further, federal agencies could do more to help states meet future challenges.

Mark Limbaugh, Deputy Commissioner, U.S. Bureau of Reclamation, also attended the meeting. He spoke to Interior's Water 2025 Initiative and related efforts, as well as other activities, and fielded questions. Some states were concerned with Interior's characterization of possible future "hot spots" facing future water conflicts, while others feared some needs may be overlooked if 2025 was used to prioritize Reclamation's future budget requests.

As there were no policy position statements or other action items for Council approval, committee reports were suspended, and the meeting concluded with state-by-state reports of various events and activities.

Of note, the Water Resources Committee meeting included an extended discussion of states' laws and policies related to water transfers and the public interest, as they relate to meeting future water supply needs. States' authorities for regulating and promoting water transfers vary, as does their ability to take into account the public interest and third-party impacts. While injury to other

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[7] *Western States Water*, Issue #1526, August 15, 2003.

water right holders is commonly prohibited, some states do not have the authority to consider the broader implications of many transfers. The Nevada State Engineer was reconsidering applications for water necessary to construct and operate the Yucca Mountain Nuclear Waste Repository, as his past denial -- based on an explicit state legislative directive prohibiting any state agency from taking any action to permit the federal facility -- had been overturned in federal court. However, the courts upheld the State Engineer's authority to broadly consider the public interest and the impact on Nevada's water resources, under its water laws. The definition of the public interest remains largely undefined. While Idaho also has authority to consider the public interest in permitting decisions, Colorado and Oregon do not (outside of an injury finding). The Council staff was asked to summarize state authorities for members' future use.

Others addressing the Committee included: Dick Moss, regarding a Family Farm Alliance water project survey; Tom Spofford and Bruce Newton, Natural Resources Conservation Service, on water supply and conservation; Steve Schoenig, on invasive species in California; and David Hardan, on ground water recharge.

The Water Quality Committee featured a presentation by Susan Burke, on Idaho's pollution trading program, with credits traded like a commodity between willing buyers and sellers, driven by market forces. Paul Frohardt of Colorado discussed water quality standards and issues surrounding effluent dependent or dominated waters. The various issues dealt with the concept of "existing use," and "net environmental benefit," which the states wanted EPA to further define. Tom Stiles, Committee Chair, in a letter to Geoffrey Grubbs, Director, EPA Office of Science and Technology, asked to engage the agency at the national level in discussions of the issues. The Committee also discussed the status of *South Florida Water Management District v. Miccosukee*. A brief urging the Supreme Court to reverse the Eleventh Circuit's decision had been drafted by Colorado and New Mexico, and was joined by Hawaii, Idaho, Nebraska, Nevada, North Dakota, South Dakota, Texas, Utah and Wyoming.[8] Similar briefs were filed by the U.S. Solicitor General and the National Water Resources Association. According to Stephen Bernath, the State of Washington was considering whether or not to sign on to a brief drafted by the state of New York, urging that the appellate court's decision be affirmed.

The Legal Committee discussed issues surrounding the Colorado River and the recently adopted Quantification Settlement Agreement (QSA). Jeanine Jones presented an overview of efforts to successfully deal with environmental concerns surrounding the shrinking Salton Sea. A diking project had been considered to reduce the size of the sea while preserving wildlife habitat. While there was still no definitive solution, funding for restoration efforts would come from the state purchasing water from the Imperial Irrigation District (IID) for sale to the Metropolitan Water District (MWD) at a markup. Jim Davenport of Nevada spoke about the Interim Surplus Guidelines for the Colorado River, and the QSA's positive impact on Nevada. David Osias, an attorney representing IID, highlighted some of the QSA's provisions. Most of the water needed to ultimately bring California's Colorado River consumption within its 4.4 million acre-foot apportionment would come from IID through water conservation and transfers. MWD General Counsel Jeff Kightlinger added that in the future, under the agreement, MWD would not challenge IID's irrigation practices as wasteful or unreasonable.

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[8] *Western States Water*, Issue #1531, September 19, 2003.

John Utton, of New Mexico, summarized the proceedings of the recent symposium on the Settlement of Indian Reserved Water Right Claims.[9] Maria O'Brien, also from New Mexico, updated the group on *Rio Grande Silvery Minnow v. Keys.* The Tenth Circuit was considering a *en banc* rehearing request and had taken the unusual step of requesting briefs on the matter.[10] Andrew Lloyd, with the Pacific Legal Foundation (PLF), gave a brief overview of the recent decision by the Ninth Circuit, and appeal efforts in *Okanogan County v. NMFS.* He also noted that PLF had sent a 60-day notice of intent to sue the National Oceanic and Atmosphere Administration's National Marine Fisheries Service (NOAA Fisheries) over the listing of three different evolutionary significant units (ESUs) of West Coast steelhead.[11]

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[9]*Western States Water*, Issue #1431, October 19, 2001.

[10]*Western States Water*, Issue #1530, September 12, 2003.

[11]*Western States Water*, Issue #1535, October 17, 2003.

OTHER MEETINGS

ABA Water Law Conference

Interior Secretary Gale Norton's speech highlighted the American Bar Association's (ABA) 21st Annual Water Law Conference in San Diego, on February 20-21, cosponsored by the WSWC. She reiterated that Interior will cooperate with states, localities and tribes on water management issues, saying that in so doing we must understand how water is allocated and that "we rely on states to administer water." After reciting the history of the reserved rights doctrine, and noting an exception for Indian water rights, she stated that federal interests could be protected under state law in the same way as other water users. The Secretary noted that 30 years ago things were different, but that now most states had instream flow laws and public interest standards that were conducive to federal interests. In this context, there was no reason for the federal government and the states to fight. "We will work in partnership with states to protect federal interests in water," she said. She also noted the importance of completing state general adjudications to settle water rights claims among users. Uncertainty must be resolved, she said. For Interior's part, she committed to abide by not only the letter, but the spirit of the McCarren Amendment (waiving the sovereign immunity of the federal government so it can be joined in state general stream adjudications). Specifically, she said, where Interior could identify that federal non-Indian reserved rights claims were a significant part of an existing adjudication, Interior intended to explore ways to resolve these claims expeditiously.

Jennifer Gimbel, Conference Co-Chair, provided the opening introductory remarks. She was followed by John Leshy, former Interior Solicitor and currently Professor of Law at Hastings College in San Francisco. He said he had initially bought into the "myth" that "water in the West was allocated and controlled through finely-tuned, tightly-run administrative systems." However, he learned of the "failures of state administration," citing the: (1) "enormous deviation between the actual practices of water users in the field and the information recorded in the office of the water administration officials;" (2) "lax administration of the beneficial use requirement;" and (3) the failure to successfully integrate ground and surface water management. These examples demonstrated the gulf between the "water management myth and water management reality." Moreover, these shortcomings, in his view, "played a significant, if largely obscure, role in almost every major western water controversy in recent years." Indeed, these disputes had been exacerbated in almost every case by "uncertainty about water measurement, management and administration." He shared his thoughts on why reform would be difficult, as powerful forces supported the status quo. Still, he concluded that the time was right to consider "promoting tighter and more active water administration by states."

Professor Leshy's solution was a "combination of carrot and stick" approach with new federal financial assistance for state water administration, noting that the withdrawal of federal dollars for water infrastructure, various federal environmental statutes and strained state budgets, have left states in a tight spot. He suggested a federal grant program aimed at "supplying federal dollars for improving state water management," but there would need to be strings "designed to advance a national interest in sound western water management." Grants would be earmarked solely for improvement in administration and management, not construction, attended by a requirement to measure all significant water uses and active policing of water systems, with a mandate that states address "in a meaningful way the hydrological connection between groundwater and surface water,"

and a requirement to create and implement "an effective system for setting and enforcing streamflows for environmental and biological purposes."

Next, a panel addressed the subject: "TMDLs: The Impacts of Water Quality on Water Quantity." Alexandra Dapolito Dunn, Association of Metropolitan Sewerage Agencies, stated that "without a doubt, the Total Maximum Daily Load (TMDL) program was the most powerful water quality tool in the Clean Water Act." After touching on how the program worked, she noted the complex issues associated with developing a temperature TMDL and what dischargers could do to meet it, citing potential inequities in requirements for point and nonpoint sources, the lack of solid water quality data, the interplay between the Clean Water Act (CWA) and the Endangered Species Act (ESA), and finally the water rights impacts. Regarding the latter, she concluded, "Whether TMDLs can trump water rights is a subject of extensive discussion, with no simple answers." Bruce Zander, EPA Region VIII in Denver, noted the CWA's distinction between the terms "pollutant" and "pollution." "Pollution" may include alterations to flow regimes or physical habitat. EPA had made it clear that only waters affected by "pollutants" were to be included in the TMDL program. He cited the history behind this conclusion, noting that it is not EPA's intention that waters impaired by non-pollutants should be forgotten, but rather should be included in other water quality management programs.

The next panel addressed, "Running the River by Litigation." Ann Klee, Counsel and Special Assistant to the Secretary of Interior, noted that ESA litigation was ongoing in virtually every basin in the West. She stated there must be a better way, suggesting the need to respect state water law and to engage partners to arrive at collaborative solutions. She discussed in particular Judge Parker's decision on the Middle Rio Grande.[12] As a consequence of the issues raised in that case, the 10th Circuit's review of the decision would be significant, especially since it involved the issue of whether the Bureau of Reclamation could use federal project water for ESA purposes, even when it was under contract for delivery to other water users. She saw litigation as a "zero sum game," whereas collaborative efforts could enhance everyone's interests. As an example, she cited efforts now underway among a broadly representative group regarding the silvery minnow and the Middle Rio Grande. The group had adopted respect for state water law and interstate compacts as a basic principle in working toward recovery.

Roger Patterson, Director of the Nebraska Department of Natural Resources, discussed the experience of the Missouri Basin states in attempting to reach consensus on a flow regime for the Missouri. The focus for some time has been a proposed revision of the Corps of Engineers' Master Manual for river operations. The basin states endeavored to reach an accord on recommendations to the Corps, but fell short. Lawsuits ensued. In the end, there was no decision by the Corps on the Master Manual and no unity among the states within the basin. Mr. Patterson noted that a recent lawsuit to enforce conditions consistent with a biological opinion of the Fish and Wildlife Service would likely bring everyone into the litigation, which could be a good thing. He concluded by saying we need to find ways to foster collaborative efforts where people can find how their interests can be compatible with others, but we "are a long way from that."

Mike Pearce, former counsel to the Arizona Department of Water Resources, and now in private practice, summarized his experience observing that states had now been forced to the

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[12] *Western States Water*, Issue #1479, September 20, 2002.

sidelines in matters that were significant. We have a system where courts are running the rivers by litigation, he said, referring to the history of litigation on the Missouri and the Colorado Rivers. He believed litigation to enforce various federal mandates would continue as a means to alter river regimes. Given that, and despite resource constraints, he encouraged states to get involved in these cases, including as a plaintiff.

This panel was followed by Secretary Norton's remarks at a luncheon. In the afternoon, four breakout sessions addressed: (1) "Multi-jurisdictional Practice: Promising or Problematic?" (2) "Municipal Storm Water Regulation: Controlling the Toxic Brew in California;" (3) "Private Water Rights or Public Resource? Overview of Current Takings Issues in Water Law;" and (4) "Survey of Indian Water Law: The Interplay Between Quality and Quantity."

With regard to water quality management in Indian country, Robert T. Anderson, Professor of Law at the University of Washington, raised the issue of whether there was a level of water quality to which tribes were entitled as part of their water right. Clearly, he thought, if non-Indian users polluted water to the extent it was not usable, then tribes would have a right of action. However, fishery uses represented a more difficult question, since it involved instream flows. He discussed litigation, which he felt stood for an implied servitude associated with Indian water right fishery purposes to protect habitat. Tribes may take the position that they have an environmental servitude associated with their water rights in order to protect water quality. Patti Goldman of Earth Justice in Seattle discussed the increasing utilization on the part of tribes of federal environmental laws to effectively provide input into federal decisionmaking that affects treaty rights, to convince federal decision makers to adapt federal actions to avoid harm to treaty resources, and to challenge federal decisions in court, when necessary. She discussed the specific case law supporting these options available to tribes, focusing on using the Clean Water Act to reduce non-point source pollution and to enforce water quality standards, and using the Endangered Species Act to maintain flows to support threatened or endangered species.

Rich McAllister of EPA's Region X Office of Regional Counsel discussed CWA implementation in Indian country, pursuant to Section 518, whereby tribes meeting established criteria may be treated as states (TAS status) and exercise the same authorities as states under most CWA programs. Mr. McAllister discussed the unique issues raised by the TAS process, and described how EPA was exploring ways to better implement this provision. With regard to water quality standards, in particular, he noted that EPA had not promulgated water quality standards that apply generally to Indian country, and the CWA did not clearly require that EPA do so. At the same time, states generally lacked authority to regulate in Indian country. Therefore, a gap exists in water quality standard coverage in many parts of Indian country under the CWA. He described the Section 518 criteria that tribes must meet to be eligible to administer water quality standard programs, and noted that only 50 tribes had applied for TAS status to administer water quality standards. EPA had approved TAS eligibility for 26 tribes, and seven of those approvals have been challenged. Controversy has arisen where EPA has approved tribal standards that were more stringent than state standards or EPA water quality criteria, and where EPA has approved a tribal program applying to non-Indian fee lands.

While recognizing that tribes have inherent sovereign authority to establish water quality standards outside the context of the Clean Water Act, EPA continued to evaluate whether or not to establish federal standards for Indian country waters where no standards have been approved. However, federal promulgation of such standards would not be without controversy. Another option

for EPA is to reconsider its approach, adopted in 1991, requiring a tribe to demonstrate inherent authority over non-members within its reservation. He noted that a number of commentators question why EPA had not interpreted the CWA's TAS provisions as a congressional delegation of authority, as it did with the Clean Air Act (CAA). Under the CAA, tribes are not required to demonstrate inherent authority for reservation sources. Finally, Mr. McAllister noted that Indian reservations often shared waterbodies with states, and there was always the potential need "to coordinate water quality work being done by a state with the needs of a tribe and its reservation." EPA was increasingly finding the need to coordinate CWA activities among affected states and tribes.

Tom Sansonetti, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, was a featured speaker. He described his Division's framework for dealing with water rights litigation. Of the ten sections within the division, two are devoted to water rights -- one for tribal rights and the other for natural resource agencies. Seven field officers do much of the work out of Denver and Sacramento. Justice Department attorneys work closely with their client agencies, and endeavor to work out any differences in positions among the various agencies. He then described various issues in litigation. Settlement discussions continue in many cases. He pointed specifically to successful negotiations leading to securing water for federal enclaves pursuant to state law. The keys to success include a sufficient quantity of water and federal enforceability of associated rights. He described the Zion National Park settlement in southern Utah as a successful example, consistent with both federal and applicable state law.

Mr. Sansonetti was followed by Christine Klein, Professor of Law at Michigan State University. She spoke to the emerging water law of the Great Lakes Basin. She noted that the Great Lakes States continue to be concerned about interest in large scale interbasin transfers from the Great Lakes to the Southwest. This was one incentive for these states to strengthen historically weak state water laws. Beyond this, she described lessons that could be learned from both the East and the West with regard to water management.

The next panel addressed the long-term implications of drought and water management. David Hayes, former Deputy Secretary of the Department of Interior, observed that the federal government now had much more influence with regard to water management in the West, and this influence intensified during times of drought. Given the status of the evolution of the law, he thought it unfruitful for people to say to the federal government, "You can't do that." In particular, he noted the implementation of the Endangered Species Act and the federal government's Indian trust responsibility. He, like other panelists during the conference, felt that the best solutions to conflicts are achieved when everyone gets to the table.

Joseph Dellapenna, Professor of Law at Villanova University, described three models of surface water allocation law. He examined both the riparian doctrine and the appropriation doctrine, with a discussion of his views as to the strengths and weaknesses of each. He noted in particular the failure of appropriative rights in the East. He concluded from this experience that it was "futile to import appropriative rights into the hydrologically more developed regions east of Kansas City." He also discussed so-called "regulated riparianism," which is a fundamental departure from common law riparian rights. He said the most important difference is that an administering agency decides before a use begins what is reasonable, "both in terms of general social policy and in terms of the effects of the proposed use on other permitted uses." Despite the additional costs associated with implementation of a regulated riparian system, Professor Dellapenna concluded that given the

increasing failure of traditional riparian rights to cope with the needs of modern societies, "and the only slightly better performance of appropriative rights," there seems to be little choice but to move to a regulated riparian system.

Colorado Supreme Court Justice Greg Hobbs discussed the history and evolution of the appropriation doctrine and emphasized its continuing utility in addressing drought. Referring to Colorado specifically, he noted that the paramount constraint on water management was the limited amount of snowfall and rainfall that occurs each year. The second constraint he described as legal, associated with Colorado's obligations under interstate water compacts and Supreme Court decrees. While drought can greatly alter what Colorado produces for in-state (and out-of-state) use, he underscored the certainty provided by the appropriation doctrine regarding to whom limited supplies would be delivered. He added that the security and dependability of water rights turn on the enforceability of their priority in times of short supply. He said that the "inability to ascertain and administer federal rights undercuts the enforcement of state-created water rights."

The last panel examined, "The Endangered Species Act, State Water Law, and 'Best Science.'" Jennifer Buckman, an attorney in private practice in Riverside, California, described the recent history relating to the east side of the Klamath Basin. She observed that biological opinions by the Fish and Wildlife Service insisted on higher lake levels for endangered suckers, while the evidence showed lower lake levels did not harm these fish. She concluded from her experience that some biologists have an agenda and use data to support their desired outcome.

Alletta Belin, an attorney working out of Santa Fe, New Mexico, observed that the ESA is really about preserving rivers, and negotiations don't necessarily lead to that result. She encouraged instead a reliance on federal tools. In her experience in New Mexico, litigation to enforce the use of such tools can provide a necessary impetus for parties to negotiate.

J.B. Ruhl, Professor of Law at Florida State University, said the battleground over the science for listing and delisting is shifting to the methodology. Several environmental advocates had spoken in favor of a precautionary principle in making determinations under the Act. The problem with this argument, according to Professor Ruhl, is that there is no such principle in the law. In other words, there was no affirmative duty to apply such a standard. He also observed that "best available science" was not much better than the general Administrative Procedures Act standard of "best professional judgment." He said that no court had explained why best available science meant more than this standard. As a result, agencies are going to be given pretty wide latitude. Nevertheless, agencies were being increasingly scrutinized. He cited the National Academy of Science findings related to the Klamath Basin as evidence of this trend. At the same time, he dismissed the notion that agencies worked on the basis of "junk science." Still, he concluded that peer review would find that many agency decisions implementing the ESA were flawed. Nevertheless, Professor Ruhl rejected an across-the-board mandate to require that all ESA decisions be subject to scientific peer review. Instead, he advocated that different methodologies be applied "to keep the ESA on an even keel." Professional judgment should remain the workhorse for most agency decisions under the ESA, but the "best available scientific evidence" standard clarifies what sound professional judgment entails in those situations. Further, the precautionary principle should be applied within the agency's discretion in cases where: (1) the evidence is inconclusive or even points against taking protective measures; (2) there is sufficient cause to believe that a decision not to take protective measures could be wrong; and (3) the consequences thereof could "place the species in an irreversible path toward extinction." Scientific peer review should be used to guard against cases of "arrogance or ambition

disguised as the precautionary principle." Any instance in which an agency uses the precautionary principle should be a candidate for scientific peer review, to determine "how out of line" the decision may be scientifically, given the best available scientific evidence.

Bureau of Reclamation - Water 2025 Kick Off

Interior Secretary Gale Norton challenged those in attendance at a June 6 meeting in Denver to kick off the Administration's Water 2025 Initiative to come together to solve the crises facing the West. She declared, "We made the desert bloom. We can't sit by and watch it turn to dust. That's not the way we see the future." She noted a number of hot spots where water scarcity has led to increasing conflicts, including the Colorado, Klamath and Rio Grande Basins. She said, "The Nation cannot afford repeated water crises in the West." With respect to the Klamath Basin, she added that "...at least some aspects of the crisis could have been averted with long-term planning." She continued, "We offer our expertise, our skills, and our information. But the hard work of preventing crises and conflict...will come from the people who must live with or learn to live without the water...."

The Secretary declared: "When water crises and conflict pit neighbor against neighbor, species against species, and business against recreation -- when they threaten your way of life -- we cannot afford to stand on the sidelines. The social, economic, and environmental consequences are just too severe. These crises impact commercial development, tourism, agriculture, municipal water supplies, and eventually damage the national economy.... For a long-lasting solution, we need everyone at the table, state and local governments, tribes, and stakeholders. We are looking to states and localities to take the lead. We can then help with technical expertise, with facilitation support, and with seed money." She added that water conservation, efficiency and markets are key tools. "Interior strongly supports the use of voluntary transfers to allow water to be shifted between competing water uses. These include agreements that allow agricultural producers the option to rent or lease their available water to cities and towns or other users in times of drought, and still have the ability to farm."

Secretary Norton stated: "Another tool is removing institutional barriers and increasing interagency cooperation. In some areas of the West, federal facilities have excess capacity at times that could be used to satisfy unmet demands elsewhere. This unused capacity is sometimes not available due to policy or legal constraints. In some cases, this additional capacity can be made available with changes in Interior policy; in others it would take legislative action." She concluded, "I look forward to working with all of you. We can make a difference in the future of the West."

Congressman Mark Udall (D-CO) began his remarks with a new revision of a well know refrain: "We're from the federal government, and we need your help." He added, "We work in Washington, D.C. but we live in the West." Calling for bipartisan cooperation, he quoted Sam Houston's observation during the Civil War. When asked about the future, he said, "I don't see North, and I don't see South. I see the Union."

In a videotaped message, Department of Agriculture Secretary Ann Veneman quoted Ben Franklin. "When the well is dry, we know the importance of water." She stressed Agriculture and Interior were "Partners in managing our country's natural resources," and that USDA shared Interior's vision of empowering people to make good decisions. She described the importance of irrigated agriculture, noting that while representing only 16% of the cropland, it accounts for 50%

of crop value and almost all of the country's fruits and vegetables. She added Farm Bill programs provided unique tools and flexibility to promote good stewardship and "help find solutions to water scarcity." She declared USDA was committed to the goals of Water 2025.

Following Secretary Veneman's video, USDA Under Secretary for Natural Resources, Mark Rey, spoke to the group. He reiterated the importance of irrigated agriculture to the Nation, and promised USDA would use its "portfolio of tools" to help address water problems in a "seamless federal effort." He specifically mentioned the Environmental Quality Incentives Program and ground water and surface water conservation program, Conservation Reserve Program enhancements, the Emergency Conservation Program, which provided funding in the Klamath Basin to plant cover crops, water and waste disposal loans, emergency rural water assistance, and data gathering and research activities -- including the work of the National Water and Climate Center under the Natural Resources Conservation Service (NRCS) and its snow survey and soil moisture monitoring networks. Lastly, Mr. Rey described joint USDA/DOI efforts such as the Bridging the Headgate work, a land stewardship memorandum of agreement, and a memorandum of understanding on interagency drought response teams that had recently been signed. In a play on the words of Mark Twain, he called for "more drink'n and less fight'n."

Bennett Raley, Assistant Secretary of Interior for Water and Science, introduced the morning panel of speakers, which included: New Mexico Attorney General Patricia Madrid; WSWC Chairman Karl Dreher; Greg Walcher, Executive Director of the Colorado Department of Natural Resources; Ron Gastelum, CEO and President of the Metropolitan Water District of Southern California (MWD); and Chips Barry, Manager, Denver Water. While applauding Interior for convening the meeting and seeking to open dialogue between western states and the federal government, Ms. Madrid stated, "With all due respect, the Department of Interior needs to get its own house in order." Regarding conflicts on the Rio Grande, she noted Will Rogers once said the Rio Grande was the "...only river he had ever seen that needed to be irrigated." In 2003, there was not enough water to meet demands of the environment and the people in the basin. She called the Rio Grande Project, which through efficiency improvements allows New Mexico to meet its obligations to deliver water to Texas, a "shining example of what can be achieved with federal/state cooperation." However, Endangered Species Act restrictions due to listing of the silvery minnow and critical habitat designations had left levees weakened in part due to prohibited channel maintenance, risking failures that could dewater the river, while New Mexico alone bore the burden of the water needs of the fish. Interior's actions had received mixed reviews in New Mexico. She concluded that Water 2025 is long over due. It remains to be seen whether or not internal conflicts within Interior can be resolved, and the initiative translated into cooperative action.

Chairman Dreher called Water 2025 a "laudable goal" and welcomed the change in direction for the Department of Interior, which fits well with the Western Governors' Association's Enlibra Principles. Also Director of the Idaho Department of Water Resources, he highlighted collaborative efforts in the Lemhi Basin to aid salmon, without sacrificing farmers. He also described how the Idaho Water Bank works. He noted the prior appropriation doctrine recognizes the reality of water shortages in the West. State water law encourages the beneficial use of water, but that doesn't mean that when there are shortages, watersheds have been "over allocated." Rather, periodic scarcity is a natural occurrence that must be recognized and managed. Idaho faced the difficult task, due to the current extended drought, of addressing a priority call against ground water users with junior rights by surface water users with senior rights to diminished spring flows. The Eastern Snake Plain Aquifer holds perhaps one billion acre-feet of water in storage, with some 10 million acre-feet per

year of recharge from irrigation and precipitation. However, the rate of recharge had dropped as irrigation methods have become more efficient and the recent drought has taken its toll. Discharges to the Snake River in the Thousand Springs area were declining, and facilities for trout production dependent on those springs were at risk. Conservation efforts, such as lining canals, would exacerbate these conflicts, because the water that could be salvaged had already been appropriated by junior users. He also noted Water 2025 called for using existing water projects to maximize benefits, and called for amendments to the federal Warren Act to facilitate more efficient use of our infrastructure. He also noted the WSWC's efforts to ensure adequate federal funding for the NRCS snow survey program and U.S. Geological Survey's streamgaging program.

Greg Walcher stated that Colorado had a great deal at stake in working with the federal government in providing water, and described success stories and new developing relationships. A recent Black Canyon of the Gunnison agreement demonstrated that "...you don't have to walk all over state water rights" to meet federal environmental needs. The Animas-La Plata Project was finally under construction, and though long delayed, would help meet the needs of Ute Indians in southeastern Colorado, while providing non-Indian users certainty. Colorado could also see the "light at the end of the tunnel," moving towards federal recovery goals for endangered Colorado fishes. With the development of California's 4.4 Plan, Colorado River waters would be better managed to meet interstate needs. The states were not "waiting around" for federal agencies to act on water issues. Colorado had a statewide water development program and was modernizing its water laws, redefining beneficial use, encouraging voluntary temporary water transfers to help mitigate drought, and authorizing interruptible water supply contracts to allow cities to get the water they need while protecting the future of Colorado's farming economy.

Colorado Governor Bill Owens addressed those assembled over lunch, declaring, "Water has always defined the future of Colorado and the West." While Colorado faces its worst drought in 350 years, there is a silver lining, as it has generated the political support necessary to make some tough decisions and "forced us to once again recognize the importance of water...." He specifically mentioned work towards an agreement on Colorado River water use in California, the Black Canyon water rights agreement, and construction of the Animas-La Plata Project. He added, "We can't change what nature has in store for Colorado, but we can change how we address those challenges." He announced he had signed a water bank bill and legislation providing for temporary water transfers during a declared drought, creating interruptible water supply contracts, and allowing water rights to be temporarily donated for use in protecting rivers and fisheries. He described Colorado's reservoirs as "jewels," asking people to imagine what Colorado would look like without the water stored and available for water supply, recreation and instream flows. He said that storage was still the best protection against drought, adding Colorado would have to build new storage facilities.

Among the other speakers were: Betsy Rieke, Bureau of Reclamation; Mike Applegate, Northern Colorado Water Conservation District; Dan Luecke, environmental and water resources consultant; Rod Lewis, Gila River Indian Community; John Sullivan, Salt River Project, representing the National Water Resources Association; Rita Maguire, Arizona Center for Public Policy; Jim Martin, Natural Resources Law Center; Bill Pauli, California Farm Bureau Federation; Melinda Kassen, Trout Unlimited; and Craig Smith, Family Farm Alliance.

Senator Ben Nighthorse Campbell (R-CO) was an unplanned guest. Asked to make a few remarks, he noted that he was a rancher himself and had been frustrated with the implementation of federal laws, such as the Endangered Species Act, that had been used unreasonably to obstruct water

development and use. He said, "There is a place for everybody and everything." Unfortunately, "In the West, we tend to want to fight it out in court. That time needs to come to an end. It is expensive, time consuming and doesn't do the West a lot of good." We must learn to conserve water, share and sometimes do without. He recommended the use of incentives to use less water, while suggesting research may lead to changes that we have not yet imagined.

John Keys, Commissioner, Bureau of Reclamation, summarized some of what he had heard, adding his thoughts as to where Reclamation would go from here. He suggested that drought was not the problem, but it made our water problems worse. Those problems won't go away, though the drought would. With respect to those problems, "Doing nothing is an option, but only if we are willing to live with the consequences. I'm not." He added: "The States don't want to be saved from these problems. They want help with solutions.... Today Water 2025 is just words and ideas, but tomorrow it's about actions and results.... We have the future at stake. The future of the western United States.... The debate over preventing conflict and crisis in the West has begun."

Settlement of Indian Reserved Water Rights Claims Symposium

On October 6-8, the Native American Rights Fund (NARF) and the Western States Water Council (WSWC) held an Eighth Symposium on the Settlement of Indian Reserved Water Rights Claims in Durango, Colorado. John Echohawk, NARF Executive Director, welcomed participants to the symposium, noting that over the 20 years he had been working towards the settlement of reserved Indian water right claims, much progress had been made. Mr. Echohawk said that the inaugural symposium was held in 1991 with the intention of bringing together water experts and those with the experience to discuss how to successfully execute further settlements. He noted that in regards to reserved Indian water rights, the parties involved must decide whether to engage in a "life or death struggle in court," or to settle. Mr. Echohawk emphasized that this was a very delicate issue, and each tribe must make the decision for itself. Pointing out that often tribes would resolve claims by a combination of litigation and settlement, he said that NARF respected the tribes' choice, but at the same time believed that settlements are usually the best way to resolve conflicts. Noting that only two Indian reserved water rights settlements had been completed prior to the commencement of the biennial settlement symposia, he praised the efforts of all those involved, pointing to one indicator of success -- 18 settlements had since been approved.

Karl Dreher, WSWC Chair, also welcomed participants and voiced the support of the Council for negotiated settlements. He said that in almost every case, settlement was a more sound policy for five reasons: first, settling water rights claims was less disruptive to existing uses than litigation, because many of the uses would be allowed to continue. Second, settlement usually led to actual "wet" water rather than just paper water. Third, settlement provided flexibility to find solutions in a variety of ways. Fourth, settlements promoted conservation and wise water management. Fifth, settlement promoted unity and a spirit of cooperation between tribes and states. Mr. Dreher said that settlements resulted in a win-win outcome; outcomes that were not available in the win or lose battle of litigation. Citing the Fort Hall settlement, he noted the importance of solidifying decree language as early as possible to avoid what could become a lengthy delay, or possibly the disruption of a settlement between the time of agreement and a decree consummating the settlement. He also had five suggestions for succeeding with settlement negotiations: First, tribal and non-tribal entities needed to set aside the issue of jurisdiction in order to focus on water use and practical solutions. Second, since there are often elements in a settlement requiring legal review, it was best to involve environmental interests early on in negotiations. Third, due to the possibility of change in sovereign

leadership for state, federal, and tribal parties, the intent of the provisions agreed to by the negotiating parties can better be recalled if memorialized in parallel with the agreement, or very soon thereafter. Fourth, meeting frequently was imperative in continuing to maintain positive relationships that lead to success. Fifth, the federal government, by virtue of its role as trustee for the tribes, could often undermine a practical solution agreed to between tribes and states. He hoped that the federal government would be a "flexible facilitator," rather than a "rigid frustrator."

As the keynote speaker, Selwyn Whiteskunk, Vice-Chairman of the Ute Mountain Ute Tribe, described the predicament in which many Indian tribes find themselves regarding water. For generations, tribes had water available on their reservations, but they have discovered that water has been significantly reduced, or in some cases was nonexistent. Mr. Whiteskunk provided an overview of the Animas-La Plata and Dolores projects, and how they provided needed water for various uses. He reemphasized that without the help of several interests, settlements would not be successful. While the treaties that created water rights on reservations remained the same, he pointed out that, although the tribes recognized no change in allocation, competing interests had led to diminished water resources for tribes seeking to use water guaranteed by treaty. Although the Colorado Ute water rights settlement was agreed to in 1986, and Congress ratified the agreement in 1988, Mr. Whiteskunk said that the Southern Ute Tribe was still waiting for water from the Animas-La Plata project. Complications with implementation had arisen due to the needs of endangered species. However, he indicated that the Ute Mountain Ute tribe had benefited greatly with the water from the Dolores project. He said that the tribes continuously lobbied to settle water rights claims, preferring to settle a claim rather than to risk everything in litigation. "We don't need to drag everyone to court," Mr. Whiteskunk concluded.

Negotiation of Indian Water Rights Claims: The Basics

Chris Kenney, Director, Native American Affairs Office, U.S. Bureau of Indian Affairs (BIA), indicated that the federal preference was to participate in settlement negotiations, because it is "the way to resolve Indian water right claims." He said that unlike litigation, negotiations provide the foundation for resolving future disagreements. From the federal perspective, without the full understanding of science and technical information, settlements would be impossible. Mr. Kenney indicated that there was a growing need for better funding for tribes to be able to hire technical personnel. He said that in 1988, close to $15 million was provided by the federal government for settling Indian reserved water rights claims, but that number had dropped to around $11 million in 2000. He also indicated that disagreements between the technical people involved could be a big hurdle in coming to an agreement. For this reason, the technical work should be done in conjunction with negotiations. Otherwise, in Mr. Kenney's opinion, the scientists, geologists, hydrologists, engineers, and other technical experts could go on and on in dispute, ultimately undermining a settlement. He cited the Tule River Tribe, which completed preparatory technical ground work early in the process, and cut negotiation time from an estimated four to five years, down to three.

Susan Cottingham, Director, Montana Reserved Water Rights Compact Commission, referred to the negotiations on the Flathead Indian Reservation, and agreed that technical complications could result in delay, or even in the demise of settlement negotiations. The Flathead negotiations had ground to a halt due to a reluctance to share tribal technical information on hydrology. In her opinion, the best possible outcome would include: (1) the hiring of good technical personnel; (2) working under strong policy guidance; (3) a joint effort between the parties to contribute to the technical work; (4) the assistance of extensive geographical information system (GIS) mapping; (5)

working with a knowledge of the probable outcome if the situation were litigated, thus enabling all sides to better measure what is at stake in the negotiation process; and (6) doing the technical work while recognizing the legal and political climate, so that the information can be used by technical, legal, and political officers without a communication breakdown. Ms. Cottingham stressed the importance of having the technical personnel able to communicate well with "normal people." Citing problems that had arisen on the Milk River, she said that it was important for the parties to provide themselves needed flexibility before the agreement was finalized. The settlement agreement should be dynamic, and flexible enough to serve the parties far into the future.

Joe Ely, Project Coordinator, Stetson Engineers, categorized three tribal components of settlements: the political, legal, and technical. The political component comprises tribal chairmen, committees, and possibly others involved in tribal government. Mr. Ely added that the political component is the owner of the process, while the legal and technical components were merely the tools used to accomplish the goal of the political component. The legal component, usually the tribal attorneys, faced the duty of ensuring that settlement terms and negotiations themselves were within the confines of the law. He indicated that another important job of the legal component was word-smithing legal documents in a way that would prevent future disputes or litigation over the settlement agreement. This job can be difficult since tribal attorneys also face the ethical responsibility of pushing for the highest water quantity possible for their clients. The technical component entails scientific questions. Such as: "How much water is needed by the tribe?" and "What is the quantity of the tribe's entitlement?" Mr. Ely said that the level of technical data required depends on the action being pursued. There is a "reconnaissance level," where water rights are simply being assessed to get an idea of the rights involved. It is vital that all parties to a negotiation are informed of the needs of the others involved. The next level, requiring further determination of a claim, he referred to as the "appraisal level." The highest level of technical data is required at the "litigation level," where the information gathered, and conclusions derived therefrom would undergo great scrutiny. He said that the litigation level of technical data is quite expensive and should be avoided unless the tribe is planning to litigate.

Bruce Sunchild, Vice-Chairman, Chippewa Cree Tribe, related the particular challenge in trying to help tribal elders understand the concept and need for water quantification. He also noted the challenge in maintaining continuity on the tribal committees. He provided an overview of the emotions and procedure involved in the Rocky Boys settlement in Montana. Early on, there was a lot of anger surrounding the idea of negotiating the quantity of water available to the tribe. Over time, the reluctance and anger gave way to discussion, and in 1997, the tribe reached an agreement with the state. Mr. Sunchild indicated that it is critical to identify and involve the decision makers with authority to act. He also pointed to the importance of being able to negotiate with the state of Montana at a state level. Some of the critical issues demanded decisions which had to be made without the opportunity to consult. But tribal leadership continuity, and the ability to trust and delegate, enabled the tribal representatives to make decisions. Having confidence in the technical data also made it easier to predict what the tribe's water needs would be for the next 50 to 100 years. He cited other entities that aided in the negotiation process, including the Bearpaw Resource Alliance, congressional committees, and the state governor. In Mr. Sunchild's view, the Rocky Boys settlement has had a positive effect on the tribe by creating numerous jobs for tribal members.

Gregg Houtz, Deputy Counsel, Legal Division, Arizona Department of Water Resources, shared an experience from Arizona to show how water rights settlements could bind larger groups. He noted that the claims to water in both the Little Colorado River and the Gila River drainages were

well in excess of twice the quantity of water available in the basin. Undoubtedly all water users in the two river drainages would be affected by a settlement. However, there was a positive attitude about resolving claims via settlement. In the settlement of the claims on the Salt River and Verde River, since the court mandated a settlement adjudication process, notice was published in several newspapers of general circulation. Notice was also sent out to more than 26,000 individual water right holders (derived from the lawsuit's claimant list). Mr. Houtz provided a few examples of Arizona laws that had been enacted to protect tribal interests to facilitate a settlement. A buffer zone was created near reservations limiting groundwater pumping. Legislation also closed the upper Gila River basin and the entire San Pedro River basin from further appropriation, providing a safe harbor clause for existing uses. Legislation also identified a 1982 groundwater pumping right for the Tohono O'Odham Nation. This right was not a reserved right, but a right to pump in priority under state law. He said that part of the reason the state had been willing to propose legislation for Indian water rights was because such rights work into the state's water regime much better than federally reserved rights. When asked how the tribes would be protected against legislation that would repeal such laws, Mr. Houtz explained the existing structural check kept the legislation tied by contract to the settlement, as well as a safe harbor provision for non-Indians. The risk of losing the safe harbor protection coupled with the strength of the contract helped to keep future legislatures from repealing these laws. He added that the recent Zuni settlement provided the tribe with a state water right, but unlike other private rights, the tribe could use it for instream uses.

Gerald Henrikson, Natural Resources Officer, Warm Springs Agency, Bureau of Indian Affairs (BIA), shared an insightful overview of the water issues negotiated on the Warm Springs reservation in Oregon. Over 23,000 water users were personally notified of the negotiations by utilizing a water rights holder list and the land owner list. Even though there were numerous parcels owned in fee within the reservation, the tribe administered the state water rights on the reservation.

Coordination of State/Tribal Water Quality Administration

Rich McAllister, Assistant Regional Counsel, Office of Regional Counsel, EPA Region 10, gave an overview of the requirements of the Clean Water Act (CWA) for tribes to receive treatment-as-state (TAS) status under §518. A 1987 amendment to the CWA provided that TAS status could be obtained by tribes in "Indian country," which under 18 U.S.C. 1151 was described as land within reservation boundaries, including allotments. The requirements to be eligible for TAS status were: (1) the tribe seeking TAS status must be a federally recognized tribe; (2) the tribe must have a governing body which carries out substantial governmental powers and duties; (3) the functions proposed to be carried out by the applicant tribe pertain to the management and protection of tribal water resources; and (4) the Indian tribe is reasonably capable of carrying out the proposed functions - which he indicated is the criteria most often challenged by states.[13] Mr. McAllister indicated that of the 50 applications for TAS status received in Region 10, only about one in four had been approved. He noted that it is very important to EPA to have its §518 approval upheld when sued. Due to the nature of water quality administration, Mr. McAllister related that border disputes were abundant, and typically stand in the way of §518 TAS status approval until dropped or settled between the state and tribe. He said that the EPA struggles to get states to recognize that EPA will work with tribes, and where there is no tribal water quality standard, EPA will promulgate a federal standard. He summarized by saying, "The United States is chicken about litigation," and it would

[13] *Albuquerque v. Browner*; *Western States Water*, Issue #1177, December 6, 1996.

really prefer to settle disputes where possible. Working on the Snake River TMDL (total maximum daily load) with 14 tribes, Mr. McAllister noted that Idaho had been very willing to work with EPA by dropping jurisdictional objections. He concluded that compromise was important, and that learning to maintain relationships is vital to settling claims. He noted that, in his view, EPA wanted to facilitate such a relationship between EPA, tribes and states, sometimes via formal agreements.

Derrith Watchman-Moore, Deputy Secretary, New Mexico Environment Department, informed participants that New Mexico had a commitment to continue to treat water quantity and water quality together, since the two could not really be separated. She noted that while tribes had many more hurdles to jump through in order to get TAS status than states do to regulate water quality, the state of New Mexico had been working to foster cooperation with tribes in water quality administration efforts. She also stated that in order to succeed, such cooperation often depends on people, not on the black and white of the law. The state sought to recognize similarities in water quality standards, enabling it to more easily coordinate water quality administration with the tribes. Ms. Watchman-Moore said that New Mexico wanted to continue to work with municipalities to help them to meet downstream water quality standards. In the meantime, she noted that New Mexico was urging EPA to issue revised NPDES permits to Albuquerque.

Bud Ullman, Director of the Water Adjudication Project for the Klamath Tribes, addressed the severe water quality problems currently plaguing Upper Klamath Lake. The biggest problems were with ammonia, acidity, dissolved oxygen, and phosphorus. He said that for portions of the year, the lake was lethal to fish. Further illustrating the point, local tribes used to harvest what they consider a sacred sucker fish by the thousands per year. Now, due to water quality degradation, the fish were scarce, and each tribe was limited to only two fish per year, for ceremonial purposes. Mr. Ullman related that legislation had put the Oregon Department of Agriculture (ODOA) in charge of agricultural water pollution, which was the main source of pollution to Upper Klamath Lake. To further the recovery process, 1995 legislation made the ODOA the exclusive agency for agricultural water quality administration. In 2003, legislation revised the method for setting load allocations for agricultural non-point sources. Mr. Ullman suggested that water quality needed to be better integrated into water rights settlements. This could be done by managing the state and federal timetable to fit into settlement timetables, improving scientific certainty, and using initiatives outside the CWA process to promote the integration of water quality safeguards.

The Administration's Settlement Policy and the Implementation of Settlements

While disclaiming any intent to discuss "policy," Tim Glidden, a contractor to the U.S. Department of Interior's Office of Indian Water Rights, provided an overview of the Administration's process associated with settlements. He said that generally a stream adjudication is what gets the parties moving, then the states and tribes typically create or appoint negotiation teams. The federal government first does a fact-finding inquiry to determine whether or not to create a negotiation team for the settlement process. Once it has been determined that a federal negotiation team is to be created, a team is organized, consisting of personnel from the Bureau of Reclamation (BOR), someone from the Interior Solicitor's Office, U.S. Fish and Wildlife Service (FWS), and representatives from other agencies, such as the Department of Justice (DOJ), the U.S. Forest Service (USFS), and the Department of Defense (DOD), as appropriate. The negotiation team speaks through a chairman to avoid creating any confusion as to the federal position, and the procedures the team uses have been outlined in the Federal Register. When asked about including environmental interests on the negotiation teams, Mr. Glidden said that it would be impossible to make progress

toward settlement if a variety of interest groups, including environmentalists, were made formal members. However, these interest groups have made their views known. He said that frequently a mediator was hired to work with the teams to see if some middle-ground can be found. Once negotiation is completed, an official agreement is needed. He opined that this can be very difficult at times because often each party wants the other to agree first. On the federal side, the Solicitor, the Secretary of the Interior, and the DOJ, and finally the Office of Management and Budget (OMB), have to review and approve the agreement before it is drafted into federal legislation. A federal implementation team sees to it that all parties to the agreement perform according to the terms of the settlement. Mr. Glidden noted that with 20 negotiation teams, and 17 or 18 implementation teams, a lot of personnel carry-over between the two. He indicated that the implementation can be very time consuming. He also made it clear that no water rights settlement establish a precedent for any other negotiation because each is unique. Mr. Glidden opined that the pressure on Interior's budget resulting from the ongoing *Cobell* case, where tribal trust beneficiaries have alleged the mishandling of trust funds by the Interior Department, could make it more difficult to find funding for future Indian water rights settlements.

Ron Carlson, Watermaster for Idaho's Water District No. 1, provided an overview of the hydrological system and the water works in his water district. Addressing issues from the Fort Hall settlement, he indicated that one of the biggest dilemmas was that most of the state's streams were already fully appropriated. There remained very little wiggle room for negotiations. In negotiating the Fort Hall settlement, tribal and non-Indian water user issues were resolved by the identification of reserved rights, provisions to store water under state water rights, and a subordination clause for times of scarcity. In implementing settlements, Mr. Carlson noted several issues that had to be resolved. There was significant concern over tribal administration of water, drought issues, and uncertainty created by a turnover in personnel. Further, many non-Indians believed that they had been injured by the settlement. Administration issues included: preserving relationships, the need for mechanisms for administration, and using a language that is easily understood by engineers, but also usable by the attorneys involved. Tribes faced difficulties in implementation as well. Many tribes had never managed water as non-Indians have for some time. Mr. Carlson said that success depends on trust, understanding, flexibility, competence, dependability, and most of all on people who can agree. "Indian agreements do not depend on governments to be successful...they depend on people."

Richard Narcia, Governor of the Gila River Indian Community, shared words of encouragement with the group. He has witnessed a lot of progress on settlement negotiations. After working for decades on the settlement of his tribe's claims, he referenced congressional hearings on the Arizona Water Settlement Act (S. 437, H.R. 885), the biggest settlement in history if approved, as a milestone for all involved. Governor Narcia agreed with Mr. Dreher's comment that the federal government can be a "rigid frustrator." He felt considerable frustration with the turnover in personnel at the federal level.

Rodney Lewis, General Counsel for the Gila River Indian Community, also addressed progress in the Arizona water settlement. He provided insight into how the Indian tribes handled the settlement negotiations. Tribes had worked to keep a nucleus of the negotiation team intact, seeking to obtain a total commitment from affected communities and tribal members to maintain focus on the ultimate goal. Noting that Arizona dealt with Indian reserved water rights claims on an ad hoc basis, he complemented Montana on its more structured approach to settling these claims. He said he had been asked several times, "Why not litigate to the end?" He said in response that the tribe

wanted wet water, and settlement appeared to be the fastest and surest way of obtaining such. Mr. Lewis predicted that with water provided by way of the settlement, the Gila River Indian Community would be the "breadbasket of central Arizona." Mr. Lewis said that having one federal attorney per tribe is a must, and that there could be a conflict of interest where one attorney represents several tribes. Likewise, he agreed with the comment that having an overlap of personnel on both the negotiation and implementation teams creates a conflict of interest, and that the teams should be composed of entirely separate groups of people.

Sterling Grogan, a biologist and planner for the Middle Rio Grande Conservancy District, shared three main points from his experience working on the 150 miles of the Middle Rio Grande River. First, he recommended that settlement negotiations use a multi-governmental, multi-organizational approach to dealing with endangered species. Second, he urged, "We need to get used to the fact that we live in the desert." Third, even without a formal adjudication on the Middle Rio Grande, the parties were able to provide water for each other's interests. He noted that success was seen only because the parties respected each other's jurisdiction.

Overview of the Colorado Ute Settlement

Carol D. Angel, Assistant Attorney General for Colorado, working in the Federal & Interstate Water Unit, provided attendees with a summary of the negotiations involved in the Colorado Ute settlement. She pointed out how costly and lengthy litigation could become by referencing the Wind River litigation out of Wyoming. Settlements have promoted good relationships between the Ute tribes and non-Indians. Colorado also has a well-developed water court, with tried and refined procedures, which aided the process. The tribes are familiar with the state water adjudication, and have great leadership to guide them through the settlement process. Initially, there were many unanswered questions about reserved Indian water rights. Ms. Angel said that Colorado was concerned that the reserved right could take most of the local water, but was also concerned about tribal administration procedures. It was also difficult to maintain a local solution to the local problem. Under the terms of the settlement, entered into in 1986, the Ute Mountain Ute tribe received 25,000 acre-feet (af) from the Dolores project, and 35,000 af from the Animas-La Plata project, subject to a shortage sharing provision. The Southern Ute tribe received 30,000 af from the Animas-La Plata project, with a provision allowing for future domestic and livestock wells. She indicated that the settlement agreement also contained a provision stating that disputes over water allocations or administration under the settlement would be resolved in Colorado's state water court, and not in federal court. Before, the water administration changed hands at the headgates just above the reservation. There was $40.5 million for the Ute Mountain Ute tribe, and $20 million for the Southern Ute tribe that had been appropriated for needed economic and infrastructure developments.

Scott McElroy, an Attorney for the Southern Ute Tribe, discussed the implementation of the Colorado Ute settlement. He related that the most difficult obstacles were dealing with opponents, such as environmentalists, who were not involved in the negotiations and had nothing to lose by thwarting the settlement's implementation. Settlement legislation passed in 1988. The endangered pike minnow caused problems with the Animas-La Plata project, but after seven years of research, creating a recovery plan for the fish, and changing the Navajo dam operations on the San Juan River, these problems had been dealt with. Complications also arose with obtaining EPA approval of the needed Environmental Impact Statement (EIS). Further, environmentalists lobbied to stop funding from passing in the House of Representatives in 1996. After two more years of negotiations, a 120,000 af project was approved, and is now under construction. Mr. McElroy reemphasized two

main suggestions for tribes in the process of settlement negotiation or implementation: first, be very conscious and thoughtful about what it is you would like to ultimately accomplish; and second, be patient.

Dan Israel, an Attorney for the Ute Mountain Ute Tribe, added his praise for the great leadership that helped to make the Colorado Ute settlement a reality. He provided the group with an overview of the facilities that the group would tour that afternoon. Addressing the group, Howard Richard Sr., Southern Ute Tribe Chairman, praised the efforts of all involved in settling Indian reserved water rights claims. He gave a brief history and demographic overview of the tribe and the reservation, and encouraged others to give negotiations a chance, commenting that it would save money in the long run.

Settlement Legislation: Getting Bills Through Congress

Josh Johnson, representing the House Resources Committee, commented via speaker phone on the progress of the Arizona Water Settlement bill, which was currently working its way through Congress. It was the largest settlement he could remember in the House of Representatives. He pledged Chairman Pombo's open-door policy to resolve concerns about the proposed legislation.

David Mullon, Majority Senior Counsel for the Senate Committee on Indian Affairs, also joined by phone and shared his thoughts on the benefits of settlements. He felt that settlements were the preferred approach, in that they provided more certainty for planners and managers, typically taking less time and money than litigation, and more effectively turning water rights into wet water. Funding is often the key component that enables tribes to fulfil the ultimate goal of bringing water to their communities. Mr. Mullon said that the greater the perceived liability of the United States to the tribe, and the more the settlement appeared to benefit all involved, the easier it was to obtain funding. Since funds were not unlimited, he expressed the mounting need to explore other possible sources. He said that the Arizona Water Settlement Act was a good one to look at as an example of creative ways of dealing with funding, in that it did not solely rely on appropriated funds. He added that as this legislation and others in the future rely on various sources for funding, they would be more likely to pass.

In attendance at the meeting, Patricia Zell, Democratic Staff Director and Chief Legal Counsel for the Senate Committee on Indian Affairs, voiced support and encouragement for settling Indian water right claims. She said that it was Washington's general perception that the interests of states, tribes, and non-Indians are at odds with each other, and inasmuch as settlements benefited all involved, Congress was usually inclined to help make necessary money available. Ms. Zell reviewed two factors that are essential to every settlement. First, there must be an appropriate balance in the way the parties to the agreement are benefitted. This provides unity. Second, every settlement agreement needs a "champion in Congress." Every settlement needs consistent and tireless efforts to gather support from Congress and the Administration. She said that with the perseverance of a Congressman in your corner, you would find ready allies in Congress. She also noted there was hope for an amendment to budget legislation that would help ensure funding for settlements. Ms. Zell pointed out a notable change in the President's budget priority, alluding to the conclusion that it would become even more difficult to obtain funding for settlements.

Chris Kenney, Director of the Native American Affairs Office in the U.S. Bureau of Reclamation, again addressed the attendees, providing an overview of what happened when

settlement legislation went to Washington, emphasizing that once the parties had come to an agreement, the ball had only just begun rolling. He noted that once a bill was brought to Congress, undoubtedly other issues and interests would surely arise. He said that it was OMB's responsibility to achieve consensus within the federal government. Mr. Kenney added that Congress had been faithful to settlements, in that if there was an agreement, Congress would fund it. He provided a word of advice, "Don't go to Washington with any remaining issues, but go prepared to educate Congress, and to get that champion in Congress."

Edward Wemytewa, Zuni Tribal Councilman, described a very modern Zuni Pueblo with a strong theocratic society. He shared the history of his tribe's efforts to protect the Zuni Heaven, a spiritual and sacred riparian area with many springs and vegetation. Mr. Wemytewa noted some hesitation on the part of non-Indian interests, but after years of negotiations, the settlement was finalized by an agreement in 2002, and then by legislation in June of 2003.

Mike Connor, Senate Energy and Natural Resources Committee, said that there had been a recent loss of momentum in reaching settlements. Commenting on past legislative efforts to guarantee funding, he responded that there had not been enough settlements recently to emphasize the need for funding legislation. He added that budget deficits would likely cause many congressional representatives that deal with these settlements to once again support such funding legislation. Mr. Connor said that the overall reduction of $3 million in the combined budgets of BIA and BOR from 2003 to 2004 was influenced by the lack of settlements in the pipeline. He opined that settlement parties could expect increased scrutiny due to budget deficits, and perhaps closer scrutiny regarding the contributions of non-Indian interests.

Bill Hume, Director of Policy and Strategic Planning in the New Mexico Governor's Office, concluded from what he had heard at the symposium that a settlement could not be pursued without an accompanying lawsuit. He also raised the question of determining the priority dates for Pueblo water rights, which were established by Spanish and Mexican law, but later recognized by the United States. Mr. Hume assured the group that New Mexico Governor Richardson's administration was ready and willing to work on settlements.

Steven Malloch, Executive Director of the Western Water Alliance, pointed out that all water allocation questions are political, because it is too important to be left in the hands of attorneys and hydrologists. He recognized several daunting issues for settlements; namely, negotiations, the demands of growing populations, the Endangered Species Act, clean reliable water sources, CWA issues, non-point source pollution, restoring degraded waters and waterways, and adjudicating state water rights. From an environmentalist's perspective, Mr. Malloch says that there were three options regarding Indian reserved water rights settlements: (1) to leave them alone; (2) lobby the parties involved to get their views recognized; or (3) to litigate using the environmentalists' "holy trinity" of the ESA, CWA, and NEPA (the National Environmental Protection Act). He urged parties to be ready to educate congressional staff, noting that it was hard to underestimate congressional staff's lack of knowledge regarding many of the issues they deal with. He cited the importance of using stories, using the adage, "a compelling story is worth a whole lot more than a dry recitation of the facts."

Mike Brophy, an attorney at Ryley, Carlock & Applewhite, and former WSWC Chairman, provided a wrap-up summary of the symposium. As one who had long been associated with both litigation and the settlement of Indian water rights claims, he stressed the importance of persistence

and a strong will, together with a lot of patience in this process. He praised the efforts of the WSWC and NARF, as well as others dedicated to bringing about more success in settling these claims. He highlighted the points made by the symposium speakers. He also noted that the invocations given by tribal participants to begin each day indicated the seriousness of settling Indian reserved water rights claims. He underscored the importance of addressing water quality concerns along with the quantity concerns in settlement negotiations, and concluded that the job of funding these settlements would inevitably grow more difficult.

Ground Water Management Conference

On December 3-4, the Western States Water Council, in cooperation with the Texas Water Development Board (TWDB) and Texas Commission on Environmental Quality (TCEQ), sponsored a conference on Ground Water Management in the West in Amarillo, Texas. Over 70 people attended and participated, including local businessman T. Boone Pickens, who discussed his proposal to market ground water from Roberts County, Texas to the Dallas area. Nine senior state officials from Colorado, Idaho, Kansas, Nebraska, Nevada, New Mexico, Oklahoma, Texas, and Utah addressed ground water management problems, priorities and programs. Karl Dreher, Director of the Idaho Department of Water Resources and WSWC Chairman, welcomed those attending, as did Wales H. Madden, Jr., a TWDB member.

Colorado

Colorado Chief Deputy State Engineer, Ken Knox, addressed those attending. He noted that a Colorado judge once said, describing ground water, that the "...laws of its existence and progress are...secret, uncontrollable...." To the extent practical, Colorado seeks to manage ground waters and surface waters conjunctively. Colorado has four different definitions for ground water: (1) tributary; (2) non-tributary, that is, Ogallala bedrock ground water; (3) not non-tributary; and (4) designated ground water. Conflicts between senior surface water users and junior ground water pumpers have arisen in the Arkansas, Rio Grande and South Platte River basins. Some surface water rights with priority dates from the 1880s had been shut off over the last two years due to drought, while wells with priority dates from the 1960s and 1970s continued to pump. In the San Luis Valley, the local economy depends on some 3,000 wells. Shutting down those wells would have an unknown impact.

Since the 1950s, the state had measured static winter water levels in some 650 wells. Many were measured with the assistance of the U.S. Geological Survey. The state was developing one $750,000 well that would penetrate all four of the major aquifers in the Denver basin in order to better understand the hydrogeology. Such information is critical to a comprehensive decision support system that describes surface and ground water interactions. Models had been developed for a number of basins, including the Republican River, shared with Nebraska and Kansas. Kansas had brought a compact administration suit. In wealthy and rapidly growing Douglas County, south of Denver, water levels were dropping 3-4 feet/year. Special water districts had been formed to drill new well fields, at a cost of up to $500,000/well. Ground water recharge programs were growing, as an alternate to surface reservoirs. There is no evaporation, and often environmental compliance is easier and treatment costs are much less. Coloradans are increasingly recognizing the value of ground water.

In Colorado, well interference cases are handled as tort claims in the State's water courts. The State Engineer doesn't really get involved. Similarly, the State Engineer isn't involved with conflicts between water wells and septic systems.

Idaho

Karl Dreher suggested ground water in the West is "undermanaged." He described the hydrology of Idaho's Snake Plain Aquifer, which holds some 250 million acre-feet (Maf) of water. About 8 Maf moves through the system each year, but a number of back-to-back years of serious drought had raised serious management issues as springflows, river reaches, and well levels dropped. Ironically, increasing surface water irrigation efficiencies had actually decreased the incidental ground water recharge to the aquifer, to the detriment of senior surface water rights to flows in the Thousand Springs area. Abundant surface waters and traditionally lavish irrigation practices, raising water tables to the root zone of crops, had contributed to dramatic increases in water levels in the fractured basalt aquifer. However, similarly dramatic declines had followed years of more efficient surface water use and increasing ground water pumping. Urban development in some areas had also reduced recharge. Idaho relies on ground water for 95% of its municipal use, and much of its irrigated agriculture. Aquaculture is a significant enterprise in the Thousand Springs area, and users with senior surface water rights were questioning use by wells with junior rights. In order to better understand and manage its surface and ground water resources the State of Idaho is spending a lot of money on building hydrologic models to facilitate decisionmaking.

Kansas

In Kansas, the Doctrine of Prior Appropriation has been applied to ground water use since 1945. Dave Pope, Chief Engineer, Kansas Division of Water Resources, Department of Agriculture, described major aquifers and points of diversion, i.e., large capacity irrigation wells. There is one priority system for both surface and ground water rights, which have all been quantified. While water use is regulated by the state, ground water management districts (GMDs) have been formed that may recommend rules for the state to implement. Any new permits for water use are subject to criteria to protect safe yield, closing many areas. It has been 25 years since permits were issued in some areas.

In Kansas, GMDs are important government units, created by local initiative, which cover 90% of the state. They have some taxing authority. Over 80% of ground water use is for irrigation. Eight "intensive ground water use control areas" have been created, primarily due to concerns related to depleted streamflows or pollution. Water transfers are important, as much of the state is closed to new uses. There are limits to protect historic water users, including conditions to prevent an increase in consumptive use. Kansas requires reporting of ground water use, and there are criminal penalties for non-compliance. New and replacement wells are required to install flow meters. With GMDs assistance, there is an active enforcement program. Civil penalties may be assessed, and orders issued to stop pumping.

Many of the problems Kansas was trying to deal with were caused by past practices and uses. In southwest Kansas, some 40-50% of the Ogallala Aquifer had been depleted, though the rate of decline had slowed immensely, from 3-5 feet/year to half a foot/year. In order to sustain the area's

long-term economic viability, Kansas was offering state incentives, coupled with federal farm conservation programs, to encourage farmers to revert to dryland production.

Nebraska

Next, Ann Bleed, Deputy Director of the Nebraska Department of Water Resources, reported that they have a lot of ground water, and up until now there has been little stress on the resource. Most of their irrigation is from ground water. Surface water is regulated under the Doctrine of Prior Appropriation, but ground water law is different. In Nebraska, they use the Correlative Rights System, which authorizes the use of water on overlying lands and requires the sharing of the resource when there are shortages. Ground water use is not regulated by the state. Rather, there are 23 natural resource districts (NRDs) in Nebraska with locally elected boards and broad management authorities, which cover ground water use. There are some aquifers which cross NRD boundaries, raising some potential problems. The NRDs have authority to manage ground water and under certain circumstances surface water with the cooperation of the state. Concerns over the impact of ground water use on surface streamflows is growing. Ann said, "Kansas helped wake us up...complaining about depletion of the Republican River." A suit over compact administration had been settled. Nebraska must control pumping that interferes with meeting its compact obligations.

Similarly, Nebraska faced a need to control ground water pumping to comply with a cooperative agreement with Colorado and Wyoming over management of the Platte River to protect endangered species. The states must mitigate any depletions to the river after 1997, which in Nebraska means the impact of wells. She noted, "As challenging as the laws and framework are, the biggest challenge has been technical.... Measuring and monitoring takes time, effort and money." Complex computer models were needed to facilitate decisionmaking. "If people understand the need for rules and regulations, and the scientific basis for them, they will go along." However, models are only as good as their input, and data wasn't cheap. It had been easier to get money from the legislature because of the Republican River lawsuit.

Nevada

Hugh Ricci, Nevada's State Engineer, described the structure and operations of his office. Nevada conjunctively manages ground water and surface water, and many rights are commingled, using different resources, including effluent. About 100 water right applications were filed with the State Engineer's office each month, and 80% were change applications. Each was reviewed to ensure water was available, that the proposed use or change would not interfere with other existing rights, and that it was not detrimental to the public interest. In 2001, the legislature also created a protectable interest in domestic wells, which don't require a water right, though it wasn't clear what that meant. Often wells are used as a source of water to supplement surface water rights.

There are 232 individual ground water basins in Nevada, and 119 had been designated or partially designated for special management. Many are valley-fill ground water reservoirs, managed to match the perennial yield. Since the early 1950s, the U.S. Geological Survey and State had been working together to estimate perennial yield, which totals some 1.7 million acre-feet, but in some basins is only 200 acre-feet/year. Well permits had been issued since 1905, and the popular thinking was that not every water right granted would be fully used. Under the Carey Land Act, only 2-3% of the homesteads were expected to succeed, but 50% did. Some basins were overdrafted before data

on perennial yield was available. Some basins may appear to be over appropriated on paper, but often ground water rights supplement surface water diversions, and aquifers are only overdrafted during drought. Also, an estimated 30% of withdrawals for irrigation are expected to return as recharge. For example, in the Carson Valley, rights to 100,000 acre-feet/year of ground water had been issued, but the perennial yield is only 45,000 acre-feet. However, 60,000 acre-feet are supplemental rights pumped only when Carson River flows are low. Actual pumping was less than 29,000 acre-feet during dry years, and less than 20,000 acre-feet in wet years.

In the Las Vegas Valley, temporary ground water use permits were issued in anticipation of the development of Colorado River water supplies. The average annual perennial yield is some 25,000 acre-feet, and the annual overdraft has ranged from 15,000 to 52,000 acre-feet. Some 5,000 acre-feet of water is pumped for domestic wells, and a total of 6,000 acre-feet of all withdrawals is recoverable. The perennial yield does not include the 300,000 acre-feet of consumptive use of Colorado River water allocated to Nevada and brought in each year. Any return flows are credited to the state. Of note, to further augment Las Vegas' water supplies, the Southern Nevada Water Authority had filed 146 applications to appropriate 180,000 acre-feet of ground water from 27 basins. Four applications for over 130,000 acre-feet had been granted. Some 3,000 protests were filed against 114 of the applications.

There are significant amounts of unappropriated ground water available in eastern Nevada's carbonate aquifers, under some 50,000 square miles (half of Nevada). Unfortunately, basic hydrogeologic information and data is scare. Allowing development of these resources without such data raises concerns, and Nevada had committed $6 million to match federal money for studies. In one area with data from only one long-term well, 16,000 acre-feet of water had been appropriated, and 50,000 acre-feet had been requested. In many areas, water right applications were being held in abeyance, while more information was gathered on stressing the aquifer with rights already issued.

Mine dewatering is of special concern in Nevada. In 2000, some 279,000 acre-feet of water was pumped to dewater mines. Nevada law requires that the water be reinjected or otherwise beneficially used.

Nevada has a number of ground water management tools, including the designation of ground water basins for special regulation, forfeiture and abandonment laws, metering and reporting requirements, term-limited permits, conjunctive use, recharge and banking of ground water, etc.

New Mexico

Paul Saavedra, representing New Mexico State Engineer John D'Antonio, noted that while ground water administration and enforcement actions had increased, problems remain. Total water use in New Mexico is around 4.5 million acre-feet/year about equally divided between surface and ground water. Both resources are managed under the Prior Appropriation Doctrine. Surface water use has been permitted since 1907, with prior uses grandfathered. Ground water was first regulated in 1931, in the Mimbres Basin, followed 30 days later with the declaration of the Roswell Basin. In 1956, the New Mexico Supreme Court recognized the conjunctive management of all the state's water resources.

New Mexico allows ground water mining and there are eight basins with no rivers that are being mined. In eastern New Mexico, the Ogallala Aquifer was being mined at five times the estimated recharge rate. Ground water use is managed using a 40-year plan. Ground water resources are inventoried by counties and blocks of water are allocated and apportioned by allowable uses. The State Engineer takes a very conservative approach. The state realizes it is mining water, and is evaluating and re-evaluating available management tools. Critical management areas have been established, and excessive draw down rates trigger action. For example, if water levels in New Mexico's portion of the Ogallala Aquifer decline by more than 2.5 feet/year, the State will not issue new water use permits.

Mr. Saavedra displayed a chart of the ground water application system, with 29 processes. If a water right application was not protested, it took on average a year to go through the notice, publication, and hearing processes. It is very difficult to get a right. It took on average 2.5 years if an application was protested, and 90% were protested. Impairment of other rights is a major consideration, as are the conservation of water and the public welfare. The public welfare is not well defined, and one of the issues with conservation is, if you conserve water, someone else will use it.

New Mexico was trying to expedite water transfer applications, and was considering the use of water banks, including water banking authority for acequias.

At the time, applications for use by domestic wells were automatically approved and were allowed three acre-feet of water. In the last legislative session, there were five bills proposed to regulate wells, and they all failed. The State Engineer would probably try again to have domestic wells regulated like all other water rights. The office processes 7,000 domestic well applications a year.

In response to the drought, the State Engineer was receiving a number of applications for supplemental wells, which had been denied. New Mexico was also struggling to keep water in the Rio Grande to protect the silvery minnow, an endangered species, under the threat of federal action. While not popular, they were also actively pursuing interbasin transfers and use of water for the maximum economic development of the state. Meanwhile, they were in the midst of developing a state water plan, mandated by the governor. They were proposing the conjunctive management of water resources in eight areas with rights administered according to priority by area water masters.

Oklahoma

Duane Smith, Director of the Oklahoma Water Resources Board, explained that ground water is private property in his state, while surface water is a public resource. Ground water is defined as any water outside the cutbanks of a stream and below the surface of the ground. Oklahoma law doesn't recognize any interconnection between surface and ground water resources. Oklahoma doesn't have local ground water management districts. The state does define reasonable use as two acre-feet per acre annually, and can require metering of wells, but only if a majority of the water users agree, which hasn't happened. In Texas County, irrigation uses a billion gallons of water each day -- as much as New York City. The aquifer had declined 100 feet in some areas. Duane observed that farm economics was what really regulated ground water use, adding, "We have to put in place incentives to reduce water use." Farmers are fiercely independent. They don't like government, and they don't like regulation. "Farmers need to buy in, and not be regulated in." He also saw greater concern over pollution of ground water resources from hog farms and other livestock operations.

Moreover, pressure to allow interstate ground water transfers and sales, now under a legislative moratorium, would continue to grow. Oklahoma waters are closer to the growing Dallas metropolitan area than many in Texas, and Dallas had to get more water from somewhere. Oklahoma City faced the same opposition to transfers from rural areas of the state. He also observed, "Infrastructure isn't built by conserving water, but by selling water." Studies of conjunctive use of ground water and surface water and their interconnected nature were ongoing. "We have the same problems as other states."

Texas

Weir Labatt, a WSWC and Texas Water Development Board (TWDB) member, explained Texas' Rule of Capture which is a combination of English common law and Texas case law. Whoever owns the land or surface estate, has an unlimited right to pump water under their land. In 1949, the Texas Legislature granted local ground water management districts limited powers to regulate pumping. In 1997, Senate Bill 1 provided additional authority for local districts. There are 90 different ground water management districts in Texas, covering 90% of the State's ground water. However, many lack any real power to control pumping, and few have the resources necessary to adequately manage ground water use. No state agency regulates ground water use.

As ground water development and export proposals -- mostly from rural to urban areas -- had arisen, so had concern over the lack of any state ground water management policy or the means to regulate and control its use. This came to a head with the elected leadership of the Texas General Land Office proposing to sell or lease water under state lands. Environmental concerns about critical habitat for endangered species, protected under federal law, had also led to greater pressure to change state law. Even ardent property rights protectionists and land owners saw the potential economic loss they could face due to the unregulated use of ground water under the law of the commons. Weir observed, "We've got this sort of convoluted mess right now!"

Utah

According to Lee Sim, Assistant Utah State Engineer, the state faced a host of ground water-related problems. There are relatively few useable or developable aquifers, but problems had arisen due to falling water levels, decreases in artesian pressure and contamination.

In the Salt Lake Valley, ground water quality was a great concern. Generally, water quality was better east of the Jordan River, and poorer on the westside. Similarly, water quality declined as you approached the Great Salt Lake. The Kennecott Copper mine and tailings ponds were also the source of contamination and a plume of pollution in the southwest corner of the valley has been the subject of a state natural resources damage suit. The plume could become a larger problem as housing development in the area was growing rapidly, and ground water mining could lead to further migration of poor quality ground water. With respect to water quantity, pumping was approaching the estimated sustainable yield of 165,000 acre-feet/year, while 3-4 times that amount had been appropriated, but not developed. Of note, the U.S. Geological Survey had to abandon one of its global positioning system (GPS) sites as the valley floor at that location fluctuates up and down some six inches with ground water use and recharge. There is a ground water management plan for the Salt Lake Valley, with designated regions and estimated safe yield. Rules limit transfers of ground water rights between these regions, and even within a region, rights can't be transferred from

the upper aquifer to a lower, higher quality aquifer. Water use could be, but has never been, regulated by priority date.

In southern Utah, west of Cedar City in the Great Basin, some 25,000 acres are irrigated from ground water in the Beryl-Enterprise area. Continuous water level declines of about two feet/year had been observed since the 1940s, with a jump in irrigation after World War II. The current drought had brought declines of 4-6 feet/year, and raised concerns. Aquifer levels had dropped over 100 feet in some areas. Some 80,000 acre-feet/year is pumped, with only about 33,000 acre-feet of recharge annually. The basin is over appropriated, Similarly, the Milford area further north saw a spike in irrigation development after WWII. It was closed to new irrigation in the 1960s, but water levels continued to decline and irrigated acreage needed to be reduced by one-third. To reduce use, the state was first using aerial photography to identify any lands illegally irrigated without a water right. Of some 15,000 irrigated acres, about 1,000 had been determined to be illegal and all but 200 of those acres had been eliminated. This had been a six-year project. It was labor intensive and time consuming. Moreover, despite such efforts, there had been no apparent impact on declining water levels. All the local streams are ephemeral, and there are no other surface water sources from which to import and recharge water. There may be no other alternative but to regulate the basin according to priority date. Ground water rights in the basin had never been administered by priority, and some farmer's may not know what their priority dates are or may have multiple priority dates for their lands.

Regulating ground water use by priority will be difficult legally and politically. There is limited statutory direction and no case law regarding ground water regulation. Section 73-5-1(5) refers to an "adequate" supply, but the term is undefined. Does that equate to safe yield? Can the State Engineer decide what is adequate? Under current law, there is no exemption for domestic users. Even after new irrigation development was curtailed in the 1960s, several hundred domestic wells were approved. If water use was administered by priority date, many domestic wells could be shut down, with little decrease in declining water levels. At the request of the State Engineer, an interim legislative committee was considering the problem.

The issue won't go away, and important decisions have to be made over the next five years. The alternatives under consideration are: (1) do nothing; (2) immediately regulate use by priority date to the full extent necessary; (3) implement priority regulation in five year phases; (4) implement priority regulation by attrition; and (5) limit existing rights to the life of the user. Some of these alternatives may require compensation for the water users, as arguably the State should never have granted some of the rights. Buying and retiring some water rights may work for these small rural areas, but could set a precedent -- in the Salt Lake Valley water rights are much more valuable. Just talking about the problem had caused local bankers to worry about loans and priority dates and well owners to worry about their operations.

Other featured speakers included Texas State Senator Robert Duncan and TCEQ Chair Kathleen Hartnett White, also a WSWC member.

The conference also featured panel presentations on: (1) ground management districts and special management authorities; (2) science, technology, economics and agriculture; (3) ground water marketing, transfers and banking; (4) mapping, measuring and modeling ground water; and

(5) conjunctive use. There were also individual presentations on the Ogallala water conservation initiative and the Ogallala Institute.

Several powerpoint presentations from the meeting were posted on the Council's website.

OTHER IMPORTANT ACTIVITIES AND EVENTS

Council Staff and Membership Changes/News

Arizona

Michael Brophy, tendered his resignation as a WSWC member to Governor Jane Dee Hull. Governor Hull subsequently appointed **L. William Staudenmaier** as an alternate WSWC member. **Herb Guenther** was named as Director of the Arizona Department of Water Resources and added to Council membership by virtue of that appointment.

Colorado

Paul Frohardt, Administrator of the Water Quality Control Commission was appointed by Colorado Governor Bill Owens as a member of the Council replacing Dave Holm. Governor Owens also selected **Mark Pifher**, Director of the Water Quality Control Division, as an alternate WSWC member. **Frank McNulty**, who replaced Kent Holsinger as Assistant Director of the Colorado Department of Natural Resources, was added to Council membership.

Kansas

Adrian Polansky was appointed secretary of the Kansas Department of Agriculture by Governor Kathleen Sebelius in February 2003, and added to Council membership by virtue of that appointment.

New Mexico

Governor Richardson designated several representatives from his state; namely: **John D. Antonio**, New Mexico State Engineer; **Ron Curry**, Secretary of the New Mexico Environment Department; **Bill Hume**, Policy and Planning Director, Office of the Governor; **Charlie Gonzales**, Mayor of Questa, a small community north of Taos; **Eileen Grevey Hillson**, Owner, AguaVida Resources; **Fred Lujan**, Consultant of Indian Affairs of the Isleta Pueblo; **Maria O'Brien**, Attorney with Modrall Sperling Roehl Harris'& Sist, P.A.; **Sherry Tippett**, Grant County Attorney, Silver City; and **John Utton**, Attorney with Sheehan, Sheehan and Stelzner.

Oklahoma

Governor Brad Henry named **Miles Tolbert** as Secretary of Environment, replacing Brian Griffin, a member of the Council.

Oregon

Meg Reeves resigned from the Oregon Department of Water Resources to take a position as Director, Policy and Legal Services, Oregon State University. **Phil Ward** was appointed to head the Oregon Water Resources Department and was added by virtue of that appointment.

Utah

Thorpe Waddingham, a prominent private attorney and the last charter WSWC member, resigned. He had served 38 years since the Council's organization in 1965. Health problems had prevented his active participation for a number of years.

Washington

Tom Fitzsimmons was named as Chief of Governor Gary Locke's office in October 2003. **Linda Hoffman** was named as Acting Director and was therefore added to WSWC membership.

Wyoming

John Corra was appointed by Wyoming Governor Dave Freudenthal as a WSWC member replacing Dennis Hemmer.

Jennifer A. Golden was appointed by Wyoming Governor Dave Freudenthal as a WSWC member replacing Tom Davidson, who resigned as Deputy Attorney General to pursue other opportunities in water and natural resources law.

John Wagner was named as Administrator of the Wyoming Department of Environmental Quality, and thus listed as a member of the Council by virtue of that appointment.

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. It is intended as an aid to help achieve better federal, state, and local decisionmaking and problemsolving, improve intergovernmental relations, promote western states' rights and interests, and point out policy trade-offs. Further, it covers Council 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 is a summary of significant activities and events in 2003 primarily taken from the newsletter. However, it does not represent an exclusive listing of all Council activities or other important events. Rather, it seeks to highlight specific topics.

Clean Water Act

Litigation marked much of the activity in 2003 related to Clean Water Act (CWA) policies and CWA implementation. Further, the Congress developed proposed remedies to CWA challenges, but failed to enact any of the legislation. Significant administrative actions were also taken by the Environmental Protection Agency (EPA).

Clean Water Infrastructure Financing Act

On January 15, the Clean Water Infrastructure Financing Act (S. 170) was introduced by Senator George Voinovich (R-OH). It would amend the CWA to authorize the appropriation of $3 billion annually for state water pollution control revolving funds (SRFs) and other purposes for FY2003-FY2007. Activities eligible for Section 603 assistance would include any that have "as a principle benefit, the improvement or protection of the water quality of navigable waters to a municipality, intermunicipal, interstate, or State agency, or other person," including the construction of publicly owned treatment works (POTWs), lake protection programs under Section 314, nonpoint source management under Section 319, estuary conservation under Section 320, and restoration of riparian areas (including the acquisition of property rights), measures to improve the "efficient of public water use," plans to prevent water pollution, and land acquisitions for POTW mitigation.

S. 170 would also provide that "fees charged by a State to recipients of the assistance may be deposited in the fund and may be used only to pay the cost of administering this title." Annual fund administrative expenses could total $400,000 per year or 1/2% per year of the current valuation of the fund, whichever is greater, plus the state fees collected. Assistance could be provided for any project on a state priority list, under Section 216, without regard to ranking. It would provide "loan guarantees for -- (A) similar revolving funds established by municipalities or intermunicipal agencies; and (B) developing and implementing innovative technologies." Privately owned works "principally treating municipal waste water or domestic sewage" would also be eligible for guarantees.

The Environmental Protection Agency (EPA) would be directed to help states create simplified procedures to enable small water systems, defined as those that serve 20,000 residents or less, obtain assistance. The bill also would allow up to 2% of the funds to be used to provide "small systems with technical and planning assistance, financial management, user fee analysis, budgeting, capital improvement planning, facility operation and maintenance, repair schedules, and other activities...." It also would provide for extended repayment periods for "financially distressed communities," defined as any community that meets affordability criteria that are established by the state and developed with public review and comment, of up to the lesser of 40 years or the expected life of the project. EPA would publish information to help states establish affordability criteria. States could also provide distressed communities with additional financial assistance (including forgiveness of principal) provided the total amount of loan subsidies did not exceed 30% of the "amount of the capitalization grant received by the State for that fiscal year."

Good Samaritan Bill

On January 29, Rep. Mark Udall (D-CO) re-introduced legislation (H.R. 504) to help cleanup abandoned and inactive hardrock mines and improve water quality saying, "Abandoned hardrock mines are a menace to the environment and public health and safety. As population growth continues near the old abandoned mines, these problems are likely to increase. We simply must begin to address this issue - not only to improve the environment, but also to ensure that our water supplies are safe and usable." H.R. 504 would create a mine reclamation fee and reclamation fund. Existing hardrock mineral producers with over $500,000 in gross annual revenues would pay a fee on a sliding-scale to help fund cleanup of abandoned hardrock mines. Up to $2 million a year would help states inventory mines for cleanup. "This program could help us begin to address a problem that has frustrated federal and state agencies through the country and make progress in cleaning up an unwelcome legacy of our mining history," said Udall.

Under so-called "Good Samaritan" provisions, H.R. 504 would create a new EPA permit program, with public review. EPA would approve cleanup plans. Once issued a permit, the holders and cooperating parties would be shielded from some, but not all, CWA liability, so long as they complied with the plan. The cleanup fund would help ease the financial burden, and operators would also be able to sell minerals extracted, with royalty fees on federal lands possibly offset. Rep. Udall said voluntary efforts to cleanup the Pennsylvania mine near Keystone, Colorado were abandoned when a judge ruled that good Samaritans could be held liable for creating a point-source discharge. "In this case, the valiant and laudable efforts of volunteers were frustrated by the very laws that are designed to stem this type of pollution," said Udall. Each minute, the mine releases 30-200 gallons of orange-tinted, highly acidic water into Peru Creek. Last year, a similar bill was introduced, but saw no further action. A similar bill was introduced in the Senate.

SWANCC Hearing

Congress also reviewed the implementation of the so-called SWANCC decision (*Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*). On June 10, the Senate Environment and Public Works Committee held a hearing on federal jurisdiction under the Clean Water Act (CWA). Senator Russell Feingold (D-WI), testified that the U.S. Supreme Court in the SWANCC case overstepped the intent of Congress by invalidating the "migratory bird rule," which had been used to regulate wetlands. The court had held that the Corps of Engineers lacked authority under

CWA section 404 to regulate the dredging and filling of isolated intrastate ponds and wetlands, notwithstanding a Corps finding that the water in question was used as habitat for migratory birds, Senator Feingold introduced the Clean Water Authority Restoration Act of 2003 (S. 473), to override the 2001 decision, on February 27.

Before the Committee, Senator Feingold said, "The confusion over the interpretation of the SWANCC decision is growing, but not, I believe, because of the holding of [the] SWANCC case itself, but because of the manner in which federal agencies are implementing the decision." On January 10, the EPA and Army Corps of Engineers had announced an Advance Notice of Proposed Rule Making (ANPRM), in the *Federal Register*, raising questions about jurisdiction under the Clean Water Act. "The Rule Making announces the Administration's intention to consider even broader changes to Clean Water Act coverage for our waters. Specifically, the agencies are questioning whether there is any basis for asserting Clean Water Act jurisdiction over additional waters, like intermittent streams." Citing guidance provided to EPA and Corps officials, Senator Feingold accused the agencies of illegally attempting to use administrative actions to eliminate a category of waters from CWA jurisdiction.[14]

Commenting on the ANPRM, Idaho Governor Dirk Kempthorne testified that according to SWANCC, all intrastate non-navigable water bodies created as a result of man's activities should be excluded from CWA jurisdiction. However, in providing comment on the definition of "isolated waters," he urged the EPA to adopt a liberal interpretation of SWANCC. "All naturally occurring isolated wetlands, streams, wet meadows and riparian areas should continue to receive protection and should be accommodated in the definition," he urged. He noted, "If federal agencies eliminate or narrow jurisdiction over certain water bodies or wetlands, Idaho may be unable to step in and control water quality issues relating to all of these bodies or wetlands without an additional grant of authority from the Idaho Legislature."[15] In contrast, other groups opposed a liberal interpretation of SWANCC.

The American Farm Bureau supported a strict interpretation of SWANCC and opposed S. 473. "The type of land-use restriction placed on farmers and ranchers by such an expansive regulatory interpretation of the CWA is far beyond what Congress intended, at best creating uncertainties about permissible conduct and at worst exposing farmers and ranchers pursuing routine farming activities to substantial penalties."[16]

Later, in a December 16 press release, the Environmental Protection Agency and the Army Corps of Engineers decided not to issue a new rule on federal regulatory jurisdiction under the Clean Water Act as had been proposed in an internal draft regulation derived from its ANPRM. Rather than subjecting the agency to the legal challenges associated with a new rule, "It's our belief that the best approach is to continue reviewing and learning from the data." The two agencies' press release stated: "After soliciting public comment to determine if further regulatory clarification was needed, the EPA and the Corps have decided to preserve the federal government's authority to protect our

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[14] *Western States Water*, Issue #1518, June 20, 2003.

[15] Ibid.

[16] Ibid.

wetlands. The agencies will continue to monitor implementation of this important program to ensure its effectiveness."[17]

"The Bush Administration saw the writing on the wall and decided that weakening the Clean Water Act could not withstand public scrutiny," said Daniel Rosenberg, an attorney for the Natural Resources Defense Council. Rosenberg commended the agencies for "abandoning their misguided plan to limit the scope of protection...for our nation's streams, wetlands and other waters." Chandler Morse, a policy analyst for the National Association of Home Builders, said that without a new rule, confusing and contradictory interpretations of the wetlands regulations would be likely to continue. "I don't think we're going to see any fundamental solutions to the problems we're facing," Mr. Morse said. "And the problems that we're facing, the issues that we'd like to see addressed, are the inconsistency and the unpredictability in the permitting process."[18]

Pollutant Trading Policy

Besides considering a new rule regarding CWA jurisdiction in light of the SWANCC decision, EPA undertook other initiatives. On January 13, the EPA announced a new policy that was designed to cut industrial, municipal, and agricultural discharges of pollutants into the nation's waterways. It used a market-based approach, encouraging polluters to reduce their discharges, and allowing them to then sell credits to other polluters. "The Water Quality Trading Policy I am announcing today recognizes that within a watershed, the most effective and economical way to reduce pollution is to provide incentives to encourage action by those who can achieve reduction easily and cost effectively," said EPA Administrator Christine Whitman. "Our new Water Quality Trading Policy will result in cleaner water, at less cost, and in less time. It provides the flexibility needed to meet local challenges while demanding accountability to ensure that water quality does improve."[19]

The policy would allow trading in various sediments, such as selenium, and nutrients like phosphorus and nitrogen. While recognizing the potential benefit of trading in other pollutants, EPA said more studies were needed before widening the range of pollutants to be traded. The policy did not support the trading of any bioaccumulative toxins, or any trading that would have a toxic effect. "We know now that the biggest challenge remaining to us is non-point source pollution," Whitman said. "This trading program is one of the best ways to get at it." According to EPA, the common elements of a credible trading program include clear legal authority and mechanisms necessary for trading, clearly defined units of trade, a standardized protocol for quantifying credits, reasonable limitations on the creation and duration of credits, mechanisms to enforce compliance with trading rules, public participation in developing the program, and a mechanism for periodic program evaluation.

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[17]*Western States Water*, Issue #1544, December 29, 2003.

[18]Ibid.

[19]*Western States Water*, Issue #1496, January 17, 2003.

"The policy provides a road map for how states can enact trading programs while meeting their Clean Water Act requirements," said David Bachelor, EPA senior policy advisor on trading. "It spells out how they can do it and make it straight with the law."[20]

However, Nancy Stoner, Natural Resources Defense Council, called the policy illegal. "This new policy violates the Clean Water Act, which protects all of our waterways from pollution -- not just some. Under this scheme, the water quality in some of our lakes, streams and rivers will be traded away for the benefit of other waterways. The EPA is trading good quality water for bad.... Under this policy our waterways are for sale. Only corporate polluters will benefit." She added, "The cumulative effect of these policies is very damaging. It's really Christmas all over again for corporate polluters."[21]

Farmers could profit under the policy by reducing their contribution to water pollution and selling the credits. "We are optimistic that this plan will encourage water quality protection actions and projects on America's farms, so that our farmers can further their efforts to be good stewards of the land," said Don Parrish, American Farm Bureau Federation.[22]

CAFO Rules

On February 12, EPA also published final rules in the Federal Register for the control of wastes from confined animal feeding operations (CAFO) under the Clean Water Act. A number of petitions were subsequently filed challenging the rules in appellate courts in the Second Circuit, Fourth Circuit, Eighth Circuit, Ninth Circuit, Eleventh Circuit, and the District of Columbia Circuit.

The American Farm Bureau Federation, the National Chicken Council (NCC), the National Pork Producers Council, and the National Turkey Federation all filed separate petitions for review, claiming the rules were too restrictive and unnecessary. In a press release, the NCC voiced its frustration over the proposed CAFO rules: "The vast majority of companies in the industry are implementing a voluntary approach to nutrient management at the farm level that will better control the contribution of phosphorus and nitrogen nutrients made to the soil by the use of poultry litter as fertilizer. Under our voluntary program, farmers work with the companies to prepare and utilize appropriate nutrient management plans. A voluntary, cooperative approach is the best way to achieve real progress on this issue.... EPA's determination to cut this process short and substitute federal control of environmental performance on farms is a huge step in the wrong direction."[23]

On the other hand, on March 7, the Sierra Club, the Natural Resource Defense Council (NRDC), and the Waterkeeper Alliance filed petitions claiming that the new rules violated the Clean Water Act by giving feedlots far too much leeway for creating their own management plans. "Polluters can't be trusted to write their own permits," said NRDC attorney Melanie Sheperdson.

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[20]Ibid.

[21]Eric Pianin, *Washington Post*, January 14, 2003.

[22]Damon Franz, *Greenwire*, January 13, 2003.

[23]*Western States Water*, Issue #1504, March 14, 2003.

"It's like asking high school kids to write their own tests. They'll make it too easy to comply, and they won't protect public health."[24]

TMDL Rule

On March 13, the U.S. Environmental Protection Agency (EPA) announced the withdrawal of its 2000 Total Maximum Daily Load (TMDL) rule. After receiving over 34,000 comments (and being sued by several parties), EPA decided that the rule was unworkable since it did not have sufficient support from states and local communities. More than 90 percent of the comments supported EPA's proposed withdrawal. These comments came from various stakeholders, including state agencies, professional associations, agricultural and forestry groups, business and industry, trade associations, academia and private citizens.

This meant that the 1985 TMDL rule with its 1992 amendments would be the rule in place. EPA reported that in 2001 and 2002 combined, more than 5,000 TMDLs were approved or established under the current TMDL rule. The number of TMDLs approved or established annually had increased from 500 in 1999 to nearly 3,000 in 2002. EPA indicated that it "has been working steadily to identify options to improve the TMDL program, including addressing problems reported by the National Academy of Sciences. The agency had conducted several public meetings and was reviewing its ongoing implementation of the existing program with a view toward continuous improvement and regulatory changes in light of stakeholder input and the NAS recommendations."[25]

EPA also published guidelines, effective October 23, that described the process and criteria to be used to award nonpoint source (NPS) grants under CWA Section 319 for FY2004. "The guidelines continue EPA's policy of focusing a significant portion of Section 319 funds ($100 million annually) to address watersheds where nonpoint source pollution has resulted in impairment of water quality. The remaining funds were to be used by States to assist in their implementation of their broad array of programs and authorities to address all of the water quality threats and impairments caused by nonpoint source pollution."[26]

The notice replaced previous guidance, and noted the progress states had made in upgrading their nonpoint source management programs, stating: "...since 1996, States have enhanced their technical tools and capabilities, strengthened and increased their partnerships, nurtured a vast network of community-based action on a water-shed basis, and, in many cases, developed stronger financial bases and legal support for their upgraded programs. As a result, the Nation is experiencing increasingly positive results in terms of both on-the-ground action and actual water quality improvements." Federal funding for Section 319 increased from $105 million in 1998 to $238 million in 2003.

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[24]Sierra Club press release, March 10, 2003.

[25]*Western States Water*, Issue #1506, March 28, 2003.

[26]2003 *Federal Register*, Vol. 68, pp. 60653-60674.

The new guidelines were intended to clarify, consolidate and shorten previously issued guidance. "The concepts presented in these guidelines...represent the current state of the art in fashioning watershed-based solutions to prevent and remedy water quality problems. These guidelines have benefitted significantly from a multi-year, evolving process working with States.... EPA looks forward to continuing to work with the States and our other partners to implement an effective and successful nonpoint source program that makes rapid progress towards our goals of eliminating our remaining water quality problems and preventing new threats from creating future impairments."

Water Quality Standards for Indian County

EPA prepared a draft Advanced Notice of Proposed Rulemaking (ANPRM) on Water Quality Standards for Indian Country. The draft rule would apply "core" federal water quality standards to any waters in Indian Country, with "tailored" standards for waters of individual tribes or groups of tribes developed for implementation on specific waters, with EPA consulting with the tribe prior to any promulgation. Indian Country would include all territory within an Indian reservation (including land owned in fee simple by non-Indians), "dependent Indian communities," and Indian allotments held in trust by the federal government (18 U.S.C. 1151).[27]

The draft indicated that the ANPRM would likely deal with other questions such as: To which waters of Indian country should the "core" federal standards apply? Should the core standards apply to allotments outside reservations, currently under state jurisdiction? If EPA proposes core standards, should EPA propose "cultural and traditional" uses explicitly within the designated uses? Are there any specific provisions for which EPA Regional Administrators should have discretionary duties? Would a standardized template for tailored federal standards be useful? Should tailored federal standards be limited to specific pollutants and water bodies? Should EPA plan for subsequent rules to enhance core federal standards for individual tribes?

The draft notice recognized EPA's preference that tribes develop and adopt their own federally-approved water quality standards where possible (under Clean Water Act Section 518), but to date, only 23 Indian tribes had successfully done so.

Miccosukee v. South Florida Water Management District

Significant litigation involving CWA jurisdiction also occurred during 2003. On May 30, pursuant to the Supreme Court's request, U.S. Solicitor General Theodore Olson submitted a brief as amicus curiae urging the Court not to review the Eleventh Circuit decision in *Miccosukee v. South Florida Water Management District* (280 F.3d 1364). In 2002, the Eleventh Circuit Court of Appeals upheld a decision that the pumping of already polluted water into a more pristine water body constitutes an addition of pollutants to navigable waters from a point source, thus triggering the Clean Water Act requirement for a National Pollutant Discharge Elimination System (NPDES) permit. On January 13, before deciding on whether or not to grant certiorari to review *Miccosukee*, the Supreme Court called on the Solicitor General to provide the government's views on the issues raised in the case. The brief stated, "The United States urges the Court to deny the petition for a writ

[27] *Western States Water*, Issue #1541, November 28, 2003.

of certiorari because that fact-specific decision does not give rise to a conflict among the courts of appeals or otherwise present a question warranting this court's review."[28]

On February 2, fifteen western senators had signed a letter to Solicitor Olson urging him to support Supreme Court review of the case, as the decision could adversely affect western states. The Senators' letter stated, "The Circuits are now equally divided. While the First, Second and now Eleventh Circuits have held that such basin transfers are point sources that require permits, the Fourth, Sixth and D.C. Circuits have interpreted the Act as requiring the introduction of a pollutant from a point source before such a permit is mandated." The letter added, "In finding that such water conveyance activities trigger a need for a permit, Miccosukee implicates every trans-basin and intra-basin diversion, thereby threatening our ability to use our limited water resources to meet both traditional consumptive uses, as well as environmental demands."[29]

On April 10, the Ninth Circuit, citing the Eleventh Circuit, decided *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, ruling that the discharge of water extracted in coal bed methane drilling was a discharge of pollutants since the discharge water was saltier than the receiving river.

The U.S. Supreme Court granted certiorari in *Miccosukee*. Peter Nichols, an attorney for Trout, Witwer & Freeman, suggested that the case "...gives us the opportunity...to make the case to the Supreme Court that the trans-basin conveyance of water without adding anything doesn't require a permit under the Clean Water Act. At the same time, it's going to be a real challenge to make sure the Court understands all the implications...and does not sidestep the issue and decide Miccosukee on its facts in a manner that leaves the West out to dry...."[30] On September 10, Solicitor General Olson submitted an amicus brief on the merits urging the Court to reverse the Eleventh Circuit Court decision. The Solicitor argued that any distinction between conveying water back to its source or to another separate and distinct water body for purposes of NPDES permitting is "unsound." Rather, in the Miccosukee case, "...the pumping station merely transports navigable waters from one location to another. Any pollutants in the C-11 canal are already in 'the waters of the United States' when those waters enter the...pumping station for discharge into the...water conservation area. The pumping station accordingly does not introduce any pollutants into the waters of the United States from the outside World. The same result follows whether the C-11 canal and the water conservation area are viewed as a single body or separate bodies of navigable water. In either case, the...pumping station transports 'waters of the United States' that already contain pollutants from one location to another; it does not add pollutants to 'the waters of the United States.'"[31]

The Solicitor also urged the Court to reject the Eleventh Circuit's conclusion that a "cause-in-fact" of pollution is the same as a point source for NPDES permitting purposes, noting that

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[28]*Western States Water*, Issue #1517, June 13, 2003.

[29]*Western States Water*, Issue #1502, February 28, 2003.

[30]*Western States Water*, Issue #1510, April 25, 2003.

[31]*Western States Water*, Issue #1531, September 19, 2003.

under the Clean Water Act, a point source must in some way be the means by which pollution is added to "waters of the United States," not just the means by which polluted water is relocated.

Colorado and New Mexico drafted an amicus brief asking the high court to reverse the Eleventh Circuit's decision, which was joined by Hawaii, Idaho, Nebraska, Nevada, North Dakota, South Dakota, Texas, Utah and Wyoming. This brief argued that the Eleventh Circuit decision was not only contrary to the plain language of the Clean Water Act, but that Congress expressly intended that the Act not interfere with state water law, or with state water allocation decisions. It illustrated the far reaching negative effect the decision could have on water resources in the West and nationwide. The brief noted many western projects involve water transfers.

Federal Jurisdiction over Wetlands

Two decisions on federal jurisdiction over wetlands under the Clean Water Act (CWA) were also appealed to the U.S. Supreme Court. Petitions for certiorari were filed over the Fourth Circuit Court of Appeals ruling, in June, in *U.S. v. Deaton* that federal jurisdiction over wetlands includes an indirect man-made hydrologic connection to navigable waters of the United States; and its September ruling, in *Treacy v. Newdunn Associates*, similarly affirming federal jurisdiction over waters connected only by man-made means. Both decisions liberally interpreted the U.S. Supreme Court's 2001 ruling in *Solid Waste Agency of Northern Cook County v. United States* (SWANCC), rejecting federal CWA jurisdiction over isolated intrastate wetlands.

In a November 10 petition for certiorari, the Deatons, as landowners, claimed that the Fourth Circuit ignored the "significant nexus" principle illustrated in SWANCC, misapplied the commerce clause power over navigation, and failed to identify a clear statement of congressional intent to impose CWA jurisdiction over lands as far attenuated from navigable waters as their land.

An October petition in *Treacy v. Newdunn Associates* cited conflicting circuit court decisions regarding federal jurisdiction over wetlands, and sought guidance in the absence of a consistent national policy. Both petitions cited the Fifth Circuit's 2001 decision in *Rice v. Harken*, which held that federal jurisdiction over waters of the United States could not include "intermittent streams that only infrequently contain running water" and are "not sufficiently linked" to navigable waters. Rice added that it "would be an unwarranted expansion of [federal jurisdiction] to conclude that a discharge onto dry land, some of which eventually reaches groundwater and some of the latter of which still later may reach navigable waters, all by gradual, natural seepage, is the equivalent of a 'discharge' 'into or upon the navigable waters.'" Deaton and Newdunn extended federal jurisdiction over wetlands on the basis that eventually water would escape the properties in question and ultimately find its way to a navigable waterway through man-made means.[32]

Drought/Water Supply

The multi-year drought conditions continued in 2003 over most of the West. The Natural Resources Conservation Service (NRCS) reported a meager January 1 snowpack and forecasts for spring and summer streamflows were below average for nearly every western state. California and western New Mexico were exceptions, with near average streamflows expected. Snowpacks were

[32] *Western States Water*, Issue #1544, Special Report, December 19, 2003.

below average (70-89%) throughout the Pacific Northwest, northern Rockies, Intermountain West and Southwest, with several basins in Alaska, northern Arizona, northern Idaho, western Montana, Nevada, western Oregon, Utah, and central Wyoming reporting well below average snowpacks (50-69%). Snowpacks were above average for California, southwest Oregon and northeastern New Mexico (110-150%). Since October 1, 2002, the beginning of the new water year, seasonal precipitation reflected a similar pattern.

As of January 1, reservoir storage in eleven states was below average, and only half of average or less in Arizona, Colorado, Nevada, New Mexico, Oregon, Utah and Wyoming. In 2002, runoff was extremely low for many Southwestern and Rocky Mountain basins, and 2003 streamflow forecasts for most of the West were below to well below average (50-89%). Northwestern California streams and the Lake Tahoe area stream-flows were forecast to be above average (110-129%), and the Zuni/Bluewater basin streamflows in New Mexico were forecast at near to slightly above average (90- 109%).

Due to March storms, by April 1, the spring and summer water supply outlook improved for much of the Southwest, the Columbia Basin, and the Colorado, Wyoming and Montana Rockies. However, because of a dry fall and winter, streamflow forecasts for most basins remained between 50%-89% of average. March storms missed much of the Intermountain West, including Utah and Nevada, as well as southeastern Oregon. With record low streamflows in 2002 in many areas, and 2003's snowpack resting on very dry soils, it was feared that much of the snowmelt could be soaked up before reaching rivers and streams. Much of central Utah, Nevada, southeastern Idaho and eastern Oregon were said to expect less than 50% of average runoff. Elsewhere in the Rocky Mountains and the Southwest forecasts had improved to 50%-89% of average. However, in the Four Corners area, streamflows were forecasted at 110%-129% of average. Near to slightly below average streamflows were expected in Alaska.

Reservoir storage improved to near average, on April 1, in California, Idaho, Montana and Washington. However, storage was roughly half of average in Colorado, Nevada, New Mexico, Utah and Wyoming, and only slightly better in Arizona and Oregon. In many areas, there was little or no carryover storage. Snowpacks were almost all below average westwide, and in some areas below 8,000 feet had already melted.

On May 1, the National Water and Climate Center reported that water supply forecasts remained significantly below average, though projected spring and summer streamflows improved in the Rockies of Colorado, Wyoming, Montana and in the Columbia Basin due to a very wet and cool April. However, much of the West faced well below average streamflows, due to the dry fall and winter, and last year's record low or near record low streamflows. Rocky Mountain snowpacks remained below average in central and northern Nevada and many parts of Utah, but improved in Colorado, Wyoming, Montana and Idaho. Of note, in Utah, early April high temperatures and sustained winds led to the sublimation of 4-6 inches of snow water equivalent, with dry soils absorbing 1-2 inches more. Reservoir levels remained below average in nine states. Only Washington reported above average storage. Many states and communities had already implemented water use restrictions by May 1.

Drought Relief and Response

On February 13, the House and Senate passed appropriation's legislation providing $3.1 billion for drought relief by taking the money from the new Conservation Security Program (CSP) in the 2002 Farm Bill that Senator Tom Harkin (D-IA) crafted. The drought aid would allow farmers that lost 35% or more of their crops to claim up to 95% of the cost, with some $350 million specifically set aside for livestock producers in counties qualifying for disaster relief. On February 20, Agriculture Secretary Veneman announced that a disaster assistance working group had been created to ensure timely and efficient implementation of program benefits contained in the $3.1 billion disaster assistance package passed by the Congress. "We want to make sure that the disaster aid implementation is a farmer friendly process and our team at USDA is going to work to ensure that the program benefits reach producers as quickly as possible," said Veneman. "This working group will examine ways to expedite the process and cut red tape if possible to get program benefits in the hands of farmers and ranchers."[33]

On May 9, Secretary Veneman declared 17 states would receive $53 million to help farmers and ranchers implement water conservation practices to mitigate the long-term impacts of drought. The money would be made available through the National Resources Conservation Service (NRCS) under the Environmental Quality Incentives Program (EQIP) and Ground and Surface Water Conservation provisions in the 2002 Farm Bill. State conservationists would provide cost sharing assistance and incentive payments to undertake eligible activities that would include irrigation efficiency improvements, switching to less water intensive crops and/or converting to dryland farming. USDA's financial and technical resources were focused on key western watersheds where the drought and chronic water supply problems had hit the hardest. The Klamath River Basin in Oregon and California, and High Plains Aquifer region were specifically mentioned.[34]

National Drought Preparedness Act

On July 24, 2003, Senators Pete Domenici (R-NM) and Max Baucus (D-MT), together with Representative Alcee L. Hastings (D-FL) and Representative Denny Rehberg (R-MT), held a press conference to unveil the National Drought Preparedness Act. As the bill's leading sponsors in the Senate and the House, they circulated a "Dear Colleague" letter stating that: "Despite the enormous economic and social impacts that droughts regularly cause, the U.S. lacks a national policy that coordinates and integrates our preparation and response to droughts.... Our bill moves the country away from the costly, ad-hoc, and response-oriented approach to drought, and toward a more proactive approach focused on preparation and planning." The bill was designed to improve delivery of federal drought programs and to provide new tools for drought preparedness planning as well as to improve forecasting and monitoring.[35]

The Western Governors' Association sent a letter to Congress endorsing the bill. The letter, dated July 24, commended the bill's sponsors, concluding that "this badly needed legislation will

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[33] *Western States Water*, Issue #1501, February 21, 2003.

[34] *Western States Water*, Issue #1513, May 16, 2003.

[35] *Western States Water*, Issue #1523, July 25, 2003.

enable improved coordination across government and a proactive approach to drought management. We support this bill and urge its passage." The letter applauded the Administration's initiatives during the past year to improve its approach to drought, including the Water 2025 initiative. However, the governors' letter noted "that these actions alone will not create the federal drought policy that is needed. Congress must act to force broad cooperation among all federal agencies with drought program responsibilities, and to ensure that this cooperation and integration extends nationally to all levels of government. Additionally, new authorizations are needed to encourage drought preparedness planning, improved drought monitoring and forecasting, and shift federal investment away from response programs to proactive drought mitigation."

The legislation would establish a "National Drought Council" under the direction of the Secretary of Agriculture. The Council would build on existing programs and provide a coordinating and integrating function for federal drought programs while making recommendations to improve existing federal drought programs. Among other things, the Council was to develop a comprehensive national drought policy action plan that outlined and integrated the roles and responsibilities of the federal agencies for drought, consistent with state laws and other applicable federal laws. The bill would also enable the Drought Council to assist states, local governments, tribes, and other entities, including watershed groups, in the development and implementation of drought preparedness plans. Guidance to this end would be prepared by the Council. The bill itself contained key elements that would be included in drought preparedness plans. The Drought Council would also facilitate the development of a national integrated drought information system in order to improve the characterization of current drought conditions and the forecasting of future droughts. Two million dollars for each of the fiscal years 2003-2010 would be authorized to carry out the Act. The Drought Council itself would terminate eight years after date of enactment.

A similar bill was introduced in the 107th Congress. The WSWC supported its passage, stating in a June 12, 2002 letter that "...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."

GAO Report on Fresh Water Supply

In the midst of the continuing multi-year drought, on July 9, the General Accounting Office (GAO) released a report entitled, "Freshwater Supply: States' Views of How Federal Agencies Could Help Them Meet the Challenges of Expected Shortages." GAO noted, "The widespread drought conditions of 2002 focused attention on a critical national challenge: ensuring a sufficient freshwater supply to sustain quality of life and economic growth. States have primary responsibility for managing the allocation and use of water resources, but multiple federal agencies also play a role...."

GAO was asked to determine the current conditions and future trends for U.S. water availability and use, the likelihood of shortages and their potential consequences, and states' views on how federal activities could better support state water management efforts to meet future demands. GAO conducted a web-based survey of water managers in 50 states, and received responses from 47 (not California, Michigan and New Mexico).

GAO found that national water availability and use had not been comprehensively assessed in 25 years, but trends indicated that demands on the Nation's water supplies were growing along with the population. Surface water storage opportunities were limited, and ground water reserves were being depleted. Demands for instreamflows for fisheries and other environmental purposes were also putting pressure on freshwater supplies. Climate change was also creating uncertainty.

GAO reported, "State water managers expect freshwater shortages in the near future, and the consequences may be severe. Even under normal conditions..., 36 states anticipate shortages in localities, regions, or statewide in the next 10 years. Drought conditions will exacerbate shortage impacts.... [E]conomic impacts to sectors such as agriculture can be in the billions of dollars. Water shortages also harm the environment...."

State water managers ranked federal actions that could best help states meet their water resource needs. They preferred: (1) financial assistance to increase storage and distribution capacity; (2) water data from more locations; (3) more flexibility in complying with or administering federal environmental laws; (4) better coordinated federal participation in water-management agreements; and (5) more consultation with states on federal or tribal use of water rights.

While not making recommendations, the GAO report urged federal officials to review the results and consider opportunities to better support state water management efforts. GAO officials reviewed their findings at the WSWC meeting in Monterey, California on November 6, during the Water Resources Committee meeting.

Water 2025 Initiative

Chronic water shortages were cited as a key reason for an Administration proposal to concentrate existing federal financial and technical resources in key western watersheds. The President's FY2004 budget included an $11 million Western Water Initiative, which Interior Secretary Norton called an initial investment in "Water 2025: Preventing Crises and Conflict in the West." In announcing the initiative on May 2, Norton said, "Crisis management is not an effective solution for addressing long-term systematic water supply problems." She specifically referred to the Klamath Basin and Middle Rio Grande. "Water 2025 recognizes that states, tribes, and local governments should have a leading role in meeting these challenges. The Department of Interior should focus its attention and resources on areas where scarce federal dollars can provide the greatest benefits to the West and the Nation."[36]

Secretary Norton continued: "In some areas, existing water supplies are -- or will be -- inadequate, even under normal climatic conditions. The continuing drought magnifies the problems, which include over-allocated watersheds and aging water supply infrastructure. Water 2025 is designed to provide a framework to focus on future challenges and stretch or increase water supplies to meet environmental and economic demands through a balanced, practical approach to water management."

She identified the areas where the potential for conflict was high, due to inadequate supplies for existing demands; namely, California's San Joaquin Valley, Lake Tahoe, the Reno/Sparks area

[36]*Western States Water*, Issue #1512, May 9, 2003.

in Nevada, Las Vegas and the Lower Colorado River to the border with Mexico, the Lower Rio Grande and Texas Gulf Coast, Albuquerque and Santa Fe in northern New Mexico, as well as the Middle Rio Grande above Elephant Butte Reservoir, Denver and Colorado's Front Range, Salt Lake City and Utah's Wasatch Front, and much of Arizona, including Tucson, Phoenix, Flagstaff and communities along the Mogollon Rim, as well as the Navajo and Hopi Reservations.

Secretary Norton was the keynote speaker at a subsequent kick off to the Administration's Water 2025 initiative at a meeting in Denver on June 6, described earlier in this report (under OTHER MEETINGS). Following that meeting, the Bureau of Reclamation held a series of regional consulting meetings. Commissioner Keys opened a July 16 meeting in Salt Lake City declaring, "I don't come here with a bag of money to solve everybody's water problems. I don't come here with all the solutions to the problems. I do come here to tell you that we are all facing problems.... Water supplies are inadequate to meet demands..., even in normal years." He described drought conditions across the West, but added, "When the drought is over, we're still short of water." He explained that Water 2025 is an effort to try to focus sustained attention on our problems and leverage resources. He added that the federal government can't solve our water problems by itself -- nor can the states, local governments, tribes, etc. "Doing nothing is not an option."[37]

21st Century Water Commission Act

On May 7, the House Committee on Transportation and Infrastructure, chaired by Rep. Don Young (R-AK), held a hearing on H.R. 135 to create a 21st Century National Water Commission. Rep. John Duncan (R-TN), Chairman of the Water Resources and Environment Subcommittee observed, "This bill begins the hard work of tackling one of the most important, and difficult, environmental and economic issues facing our nation -- water supply." He added, "I respect the primary role that states play in addressing water supply issues, but the federal government can provide expertise and technical assistance." Rep. John Linder (R-GA) introduced the bill and testified, "The future of our nation's water supply is a serious and critical issue. Many states across the Nation are currently facing a water crisis, or have in the last few years. Once thought to be a problem only in the arid West, severe droughts last summer have caused water shortages up and down the East Coast. States once accustomed to an unlimited access to water are now experiencing problems the West has had for decades. The United States and its resources have changed dramatically over the past three decades. We simply cannot afford to maintain the status quo with something as critical as our Nation's fresh water supply."[38]

Endangered Species Act

Conflicts between endangered species protection and water resource management, and efforts to resolve them, continued throughout the year. In response to a WSWC letter to Interior Secretary Gale Norton calling for protecting endangered species within state water law, the Council received a letter from Gary Frazer, U.S. Fish and Wildlife Service, Assistant Director for Endangered Species. The Council's letter presented seven recommendations for improving ESA implementation. It also

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[37] *Western States Water*, Issue #1522, July 18, 2003.

[38] *Western States Water*, Issue #1512, May 9, 2003.

called on the Secretary to join a dialogue on the development of western water resources in concert with the conservation of endangered species.

Mr. Frazer noted that the Service had appointed Michael Thabault to work primarily on water issues in the Endangered Species Program's Consultation and Habitat Conservation Planning Branch. "The Service would be pleased to make him available to coordinate with your group to begin discussions to formulate memoranda of agreements under section 6 of the ESA that outline the basic principles for securing water for endangered species purposes and providing funding assistance for appropriate State administrative expenses to ensure that any water secured is delivered for its intended purpose."

The Council's letter suggested that a species' minimum water needs should be determined on a case-by-case basis, with sufficient sound science and an opportunity for peer review. Mr. Frazer responded that the ESA requires the use of the "best available scientific and commercial information," and making scientifically sound decisions was one of his highest priorities. However, he stated that any "sufficiency-review process...could significantly delay the preparation of biological opinions." Rather, he suggested that the action agencies involve all interested parties in the consultation process so that biological opinions included any "relevant information they have."

With respect to Section 7 consultations being open to all affected persons and interests, Mr. Frazer noted that decision lies with the action agency. However, again, "The Service strongly encourages other agencies to involve all interested parties in the consultation process." He indicated an intent to fully involve all interested parties in developing recovery and habitat conservation plans, and safe harbor and candidate conservation agreements, but "participants have the final decision as to who will be involved in such planning efforts."

Regarding the suggestion that Section 7 consultation not be required for extraterritorial species, he explained, "All Federal actions that take place within the United States or on the high seas that may affect listed species must be evaluated for compliance with the duty to avoid jeopardizing the continued existence of listed species or destruction or adverse modification of critical habitat."

Mr. Frazer agreed that recovery efforts should be prioritized to focus resources where they are most effective, and "that States and other affected interests should be considered in establishing priorities, and we will work to improve communications with our partners and stakeholders during recovery planning and implementation." He did not address the Council's suggestion that critical habitat designations be limited at first to the "known range of species," or that "federal agencies should concentrate their efforts and resources on proven projects and programs for recoverable domestic species where they are known to exist." With respect to the petition for more funding and economic incentives, Mr. Frazer mentioned Section 6 Cooperative Endangered Species Conservation Fund grants, the State Wildlife Grants Program, and two new programs, FY 2002 Private Stewardship Grants and the Landowner Incentive Program. These provide financial assistance to states and private parties working to conserve "federally listed and other at-risk species."

The letter was a prelude to discussions between Council members and Mr. Frazer and Mr. Thabault that resulted in a draft "protocol" and accompanying "preamble" designed to foster cooperation in protection of species and stable water management.

In the meantime, litigation proceeded challenging various decisions by the federal implementing agencies. On January 9, U.S. District Court Judge Helen Frye ruled that the U.S. Army Corps of Engineers (Corps) had met its obligations under the Clean Water Act (CWA) for the operation of its Columbia and Snake Rivers dams, even though they affect water temperature, which can harm salmon and steelhead trout protected under the Endangered Species Act (ESA). The Nez Perce Tribe of Idaho, environmentalists, and fishing groups had sued the Corps, alleging its dam operations illegally contributed to rising water temperatures along the lower Snake River, in violation of the Clean Water Act and the State of Washington's antidegradation standard.

Other litigation involving the ESA arose elsewhere in the Northwest. On September 24, the Pacific Legal Foundation (PLF), representing various clients in Washington, Oregon, and California, sent a 60-day notice of its intent to sue the National Oceanic and Atmospheric Administration (NOAA Fisheries) and the Secretary of Commerce for the alleged illegal listing of West Coast steelhead trout on the endangered species list. According to the notice, the steelhead listings were illegal based on the same logic used in a 2001 federal district court decision striking down the distinction between wild-bred and hatchery-bred fish because they belonged to the same "evolutionary significant unit [ESU]."

In September 2001, in *Alsea Valley Alliance v. Evans*, U.S. District Judge Michael Hogan had rejected the listing of the Oregon coastal coho salmon as "arbitrary and capricious," for treating wild-bred fish differently than hatchery-bred fish, which he found were both part of the ESU. He ruled the distinction between the two was unlawful. "The NMFS [National Marine Fishereis Service] may consider listing only an entire species, subspecies, or a distinct population segment."

The PLF notice said that the ESA "does not permit the Secretary to make listing distinctions below that of species, subspecies, or a distinct population segment of a species." Citing *Alsea Valley*, the notice stated that NOAA "must include or exclude all members of the distinct population segment or ESU as opposed to only some members in order to comply with the ESA." It continued: "However, in each of the ESU listings, NOAA defined the ESU to include some, but not all hatchery fish in the populations but took the additional illegal step of eliminating from the listings the hatchery members of the populations.... Moreover, NOAA excluded rainbow trout from the ESUs despite the fact they are the same species that swim side-by-side in the same rivers and interbreed with the listed steelhead."

On November 16, the Idaho Water Users Association (IWUA), the Coalition for Idaho Water (CIW), and several irrigation interests in Idaho filed a 60-day notice alleging the Secretary of Interior, the Bureau of Reclamation (BOR), the Secretary of Commerce, and NOAA Fisheries had violated the ESA and the Administrative Procedures Act (APA) regarding the operation of BOR projects in the Upper Snake River Basin. The notice pointed out that for over 12 years, water users in Idaho provided flow augmentation water in a sum exceeding 4 million acre-feet to aid listed salmon and steelhead trout migration in the lower Snake River and Columbia River Basins. Norm Semanko, Executive Director of the IWUA, and CIW President, stated: "Despite this considerable sacrifice of Idaho water, the environmental community now wants more -- a lot more. However, flow augmentation is a failed experiment and there is simply no basis for requiring ever-increasing amounts of water from Idaho -- water that could be used for increased and competing demands within our own state -- especially in the middle of an historic, prolonged drought."

The notice demanded that the BOR and NOAA Fisheries: (1) recognize that the Upper Snake River Basin Project operations are separate and distinct from operations in the Lower Snake and Columbia Rivers; (2) review the status of listed salmon and steelhead trout, including hatchery-bred fish, as required under the ESA; (3) acknowledge that consultation on the operation of the Upper Snake River Project is unnecessary and unlawful under the ESA; (4) acknowledge that federal agencies have no authority to acquire or use water from the Upper Snake River Basin for flow augmentation; (5) address the claim that federal agencies have violated the ESA by failing to use "best available science" to address the needs of listed species in the Columbia River Basin; and (6) address the claim that federal agencies have improperly relied on flow augmentation, and failed to complete a recovery plan for salmon.

"We did not make the decision to fight over Idaho water in the federal courts - the environmentalists did," Semanko said. "Now that we have been forced onto that path, we must fight and we must fight aggressively." In August, environmentalists had threatened litigation unless the operation of ten dams and reservoirs on the upper Snake were reevaluated to avoid harming salmonids. In October, 118 members of the House of Representatives asked President Bush to consider "all scientifically credible options" to acquire additional water for flow augmentation to ensure self sustaining harvestable populations of wild salmon in the Snake River.

Rio Grande

On June 12, the U.S. Tenth Circuit Court of Appeals affirmed 2-1 a district court decision which held that the U.S. Bureau of Reclamation (BOR) "...retains sufficient discretion over its river management and operations in the middle Rio Grande...to require BOR to consult...under Section 7(a)(2) of the ESA." The district court had granted preliminary injunctive relief, and ordered BOR to reduce contract deliveries from the San Juan-Chama Project and/or the Middle Rio Grande Project and/or restrict diversions consistent with an order dated April 19, 2002. Justices Seymour and Porfilio concurred, with Justice Kelly dissenting. "As the majority and dissent agree, this case turns on whether the government retains discretion under the contracts with the water users to apply the provisions of the...ESA."

The majority concluded, "Scientific literature likens the silvery minnow to a canary in a coal mine, ...its population has steadily declined and now rests on the brink of extinction.... [T]he silvery minnow provides a measure of the vitality of the Rio Grande ecosystem, a community that can thrive only when all of its myriad components -- living and non-living -- are in balance. All of the parties have admirably participated in sustaining the vitality of that system. In that process, BOR's discretion in operating these federal projects will more properly effect its consultation responsibilities with FWS [the U.S. Fish and Wildlife Service] and its water management role. To that end, we conclude the district court properly held BOR has discretion to reduce deliveries of water under its contracts to comply with the ESA. We therefore AFFIRM."

Judge Kelly's 14-page dissent rebutted this and other majority holdings, point-by-point, concluding: "This case has enormous significance.... [It] is in considerable tension with Supreme Court authority...recognizing that the federal government generally must respect state [law and] water rights and lacks any inherent...right in water originating in or flowing through federal property.... Under the court's reasoning, the ESA, like Frankenstein, despite the good intentions of its creators, has become a monster."

With respect to the question of compensation for water not delivered under the repayment contract, the district court held: "The Federal Government must compensate those, if any, whose contractual rights to water are reduced in order to meet the aforementioned [2002] flow requirements." The 10th Circuit opined, "Although that portion of the court's order is now moot, the issue of compensation will likely resurface with reallocations that may eventuate from BOR's exercise of discretion. Clearly, that issue is not ripe for our review, and any further discussion here is unwarranted."

In a June 13 letter to the Albuquerque Journal, Bureau of Reclamation Commissioner (BOR) John W. Keys III wrote: "The 10th Circuit Court of Appeals decided on June 12 to uphold an earlier court decision directing the Bureau of Reclamation to give priority to water deliveries for the silvery minnow at the expense of farms and cities. This Opinion is a major setback to the collaborative process that we have worked so hard to develop. For example, the U.S. Fish and Wildlife Service and the Bureau of Reclamation worked hard this year to develop a 10-year Biological Opinion that would help the silvery minnow not only survive, but recover -- while still allowing local citizens the water they need to sustain their lives and livelihoods."

On August 11, the State of New Mexico, represented by Attorney General Patricia Madrid, filed a petition for a rehearing en banc stating, "The decision in the Silvery Minnow case...is of critical concern to New Mexico as well as numerous states in the West. This decision took the unprecedented step of ordering that water imported from the Colorado River Basin into the Rio Grande Basin for use by the people of Albuquerque and others can be used for a Rio Grande endangered species. In addition, the court found that the [ESA] provides authority for the federal government to, in effect, breach long-standing contracts with water users that we have relied upon. We believe the court has gone beyond what the [ESA] requires or allows. The minnow decision sends cracks through the foundation of our State water laws and creates a climate of uncertainty for our users.... The federal government cannot take our water without compensating those whose lives and livelihoods depend upon it. The 10th Circuit should not exempt the federal government from following the State of New Mexico's water law." Idaho, Colorado, Kansas, Nebraska, Nevada, Utah, and Wyoming joined in an amicus brief in support of a rehearing. Governor Bill Richardson said the State would take all necessary action to keep control of New Mexico's water resources in state hands, while encouraging cooperation to manage the Rio Grande to meet all interests' needs.

On September 6, the House Resources Committee, chaired by Rep. Richard Pombo (R-CA), held a field hearing in Belen, New Mexico on the impact of the silvery minnow and the 10th Circuit Court of Appeals decision. With respect to the Endangered Species Act, Chairman Pombo said, "One of the unintended consequences of this law is that it puts the needs of species over the critical needs of human beings. New Mexico is not alone in its current predicament. In fact, this situation is yet another scary reminder of the Klamath Basin catastrophe.... If we don't come together to repair this law, we will see more and more of these problems in communities throughout the country."

Rep. Heather Wilson (R-NM) included a rider in the FY2004 Energy and Water Appropriations Bill (H.R. 2754) to prohibit the expenditure of any federal funds to provide water from the U.S. Bureau of Reclamation's San Juan-Chama Project, which imports water into the Rio Grande Basin, for the fish. Similar language was included in the Senate version reported by the Senate Energy and Natural Resources Committee, chaired by Senator Pete Domenici (R-NM). Governor Bill Richardson supported these legislative actions as "...consistent with our efforts to resolve the dispute involving the endangered silvery minnow and the future of Albuquerque's water supply." The

language adopted specifically directing that funds may not be used by the Commissioner of the Bureau of Reclamation at his "...discretion, if any, to reduce or reallocate water to be delivered pursuant to San Juan-Chama Project contracts, including execution of said contracts facilitated by the Middle Rio Grande Project, to meet the requirements of the Endangered Species Act (ESA), unless such water is acquired or otherwise made available from a willing seller or lessor and the use is in compliance with the laws of the State of New Mexico, including but not limited to, permitting requirements."

Section 205(b) of H.R. 2754 also codified certain reasonable and prudent alternatives and incidental take limits set by the U. S. Fish & Wildlife Service in a biological opinion (dated March 17, 2003), which when combined with other specified actions were determined by the Congress to "fully meet all [ESA] requirements...for the conservation of the Rio Grande Silvery Minnow..and the Southwestern Willow Flycatcher...on the Middle Rio Grande in New Mexico."

Section 206 directed the Secretary of Interior to expedite ongoing work of an ESA Collaborative Program Workgroup by establishing a seven-member executive committee with Reclamation and Service representatives and five at large members representing signatories of an existing memorandum of understanding that included other federal agencies, state agencies, municipalities, universities/environmental groups and business/industry interests. The bill also required that this committee prepare a detailed spending plan before any related FY2004 appropriations could be obligated or expended.

Legislative Reforms

In addition to litigation on various fronts, Congress was otherwise being urged to look at potential reforms to the ESA. Proponents and critics of the legislation marked the Act's 30th anniversary with diverse comments. Since the law was last reauthorized in 1992, implementation had continued under annual appropriations legislation. Idaho Governor Dirk Kempthorne, a former U.S. Senator, had then proposed sweeping ESA amendments. He remarked, "It is interesting that something that received such praise and brought so many people together in 1973 is now so divisive. The reservoir of good will that once existed has been drained. The effects of implementing the ESA have registered an 8.0 on the Richter scale of environmental legislation.... The laissez-faire conservation philosophies of previous generations were toppled and replaced with an aggressive, command-and-control philosophy.... Many Americans have been left to meet bitter conflict, lost property rights, and costly, seemingly endless litigation."

Craig Mason, Assistant Secretary of Interior for Fish, Wildlife and Parks, testified in April -- at a hearing before the Senate Environment and Public Works Committee on the designation of critical habitat for listed species -- that the present system is "broken." While committed to the recovery of endangered and threatened species and improving the ESA's "efficiency and effectiveness," the program is in "chaos" due to limited resources and a lack of discretion to "focus on those species in greatest need of conservation." He observed, "In short, litigation over critical habitat has hijacked our priorities...[with] limited resources and staff time...spent responding to an avalanche of lawsuits, and court orders.... We believe that this time could be better spent focusing on those actions that benefit species through improving the consultation process, the development and implementation of recovery plans, and voluntary partnerships with States and private landowners."

At an "ESA at Thirty" conference at the University of California, Santa Barbara, referring to the conflict over water use in the Rio Grande Basin, Roger Kennedy, former director of the National Park Service, suggested, "...the problem, in the short term, is one of misuse of water in a dry climate.... The [ESA] is doing its job. It is forcing us to look at what we are doing, to set limits to wasteful uses, and to make up our minds as to how a limited water supply should be allocated." The ESA is a scapegoat for those "looking to assign blame."[39] Michael Bean, Environmental Defense Fund, stated, "We need to make species more secure. We need a program that is more effective and less burdensome. We need less bureaucracy and more resources. We need more candor and less rancor if we are ever going to forge a common understanding." William Snape, Defenders of Wildlife, pointed out that 85% of Americans support the ESA. Mr. Mason opined, "I don't foresee any major legislative changes...."[40]

Farm Bill/Water Conservation

Conservation received increased support under the Farm Bill during 2003. Agriculture Secretary Ann Veneman, speaking before the National Cattlemen's Association on January 30, announced that the Administration would request a record $4.9 billion for conservation and related environmental stewardship spending (up $582 million over FY2003). This included $2 billion for the Conservation Reserve Program (CRP), $850 million for the Environmental Quality Incentives Program (EQIP) $250 million for wetlands reserves, $112 million for farmland protection, $85 million for grassland reserves, $51 million for ground and surface water conservation (up $6 million), $42 million for wildlife habitat incentives, $19 million for the new Conservation Security Program, and $8 million for water conservation and water quality "enhancements" in the Klamath River Basin. The Secretary said, "This record-level request illustrates the priority the President places on conserving natural resources by providing land-owners the tools they need...."[41]

She also announced the release of new proposed rules for the EQIP program to implement changes authorized by the 2002 Farm Bill. The new rules delegated EQIP administration to the Natural Resources Conservation Service (NRCS). Of note, under National Priorities, the rule listed first: "Reduction of nonpoint source pollutants; such as nutrients, sediment, or pesticides and excess salinity; in impaired watersheds consistent with [Total Maximum Daily Loads] TMDLs where available, as well as the reduction of groundwater contamination, and the conservation of ground and surface water resources." Among other things, as mandated by statute, the rule would allocate 60% of EQIP funds for improving livestock related practices, including assistance for waste storage facilities under a comprehensive nutrient management plan.

The Farm Bill added Ground and Surface Water Conservation EQIP cost-share and incentive payments and loans for actions that result in "net water savings." Activities could include irrigation system efficiency improvements, the production of less water-intensive crops, or conversion to dryland farming, water storage improvements such as water banking or ground water recharge, and activities to mitigate the effects of drought. In addition, a total of $50 million were targeted for water

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[39]*The Chronicle Review*, Vol. 49, Issue 34, p. B16.

[40]*Santa Barbara News-Press*, November 15, 2003.

[41]*Western States Water*, Issue #1498, January 31, 2003.

conservation activities in the Klamath River Basin in California and Oregon that NRCS intended to administer through EQIP. Activities to reduce water use and water quality improvement activities in the basin would be eligible.

Indian Water Right Settlements/Litigation

Arizona Water Settlement Act

On March 25, Senator Jon Kyl (R-AZ) introduced the Arizona Water Settlements Act (S. 437), also referred to as the Central Arizona Project Settlement Act of 2003. The bill would make adjustments to the Central Arizona Project (CAP) and authorize the Gila River Indian Community Water Rights Settlement. It set forth permissible uses of CAP water for domestic, municipal, industrial, fish and wildlife, and other purposes. It would establish requirements for the reallocation of CAP non-Indian agricultural and uncontracted municipal and industrial priority water. It would require the Secretary of the Interior and the State of Arizona to develop a program to ensure Arizona Indian tribes would receive their share of agricultural water in times of shortage. Further, the proposed legislation set forth water delivery requirements and construction obligations with respect to the San Xavier Indian Reservation, the San Carlos Apache Tribe, and the Schuk Toak District, and also would settle the claims of the Tohono O'odham Nation.

Senator Kyl introduced similar legislation in the last Congress. He then said, "[T]his bill could ultimately be nearly as important to Arizona's future as was the [CAP] authorization...itself. Since Arizona began receiving CAP water from the Colorado River, litigation has divided water users over how the CAP water should be allocated and exactly how much Arizona was required to repay the Federal Government. This bill will, among other things, codify the settlement reached between the United States and the Central Arizona Water Conservation District over the State's repayment obligation for costs incurred by the United States in constructing the Central Arizona Project. It will also resolve, once and for all, the allocation of all remaining CAP water. This final allocation will provide stability necessary for State water authorities to plan for Arizona's future water needs. In addition, approximately 200,000 acre-feet of CAP water will be made available to settle various Indian water claims in the State. The bill would also authorize the use of the Lower Colorado River Basin Development Fund, which is funded solely from revenues paid by Arizona entities, to construct irrigation works necessary for tribes with congressionally approved water settlements to use CAP water."[42]

The bill would define reallocated Gila Community water rights and revise water delivery requirements. It also would provide for a program to repair and remediate damage related to subsidence due to ground water pumping on the reservation. Further, it would establish a trust fund for the Community. In addition, the bill would require the Secretary to reduce the demand for irrigation water in the upper Gila River Valley, by "acquiring...decreed water rights and extinguishing or severing and transferring those rights..." for the benefit of the Community. This could also be accomplished by entering into fallowing agreements. An identical bill (H.R. 885) was introduced by Rep J.D. Hayworth (R-AZ).

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[42] *Western States Water*, Issue #1485, November 1, 2002.

Zuni Indian Tribe Settlement Agreement

On March 13, the Senate unanimously passed the Zuni Indian Tribe Water Rights Settlement Act (S. 222), also introduced by Senator Kyl, to provide the resources to acquire water from willing sellers for the tribe in Arizona in the Little Colorado River Basin. It also grandfathered existing water uses and waived claims against many future water uses. A companion bill (H.R.495), introduced by Rep. Rick Renzi (R-AZ) subsequently passed the House. A total of $26.5 million -- with over 70% coming from the federal government -- was authorized to implement the agreement. For its part, the tribe agreed to waive future claims to water rights and agreed not to object to current water uses by non-Indians.

Pecos River Settlement

On March 25, New Mexico Attorney General Patricia Madrid announced a settlement of a Pecos River water rights dispute involving the United States, New Mexico, Texas, the Carlsbad Irrigation District (CID), the Pecos Valley Artesian Conservancy District, and the Fort Sumner Irrigation District. The controversy ended up in the courts in 1956. Attorney General Madrid said, "We all recognize that water is the life blood of our state. In the West, water has always been precious. New Mexico has many competing demands for our limited amount of water. The competing interests, cities, farmers and endangered species, frequently find themselves at odds. It is my firm belief that if we work together we can find a solution. It is a pleasure to see that an agreement has been worked out on the lower Pecos River. I commend the State Engineer's Office and the Interstate Stream Commission and their staffs for their tireless efforts to negotiate this settlement. I would like to commend the 2002 Legislature for passing legislation and providing an appropriation to allow for the purchase and retirement of water rights, the cornerstone of the settlement. While this settlement does not complete the entire adjudication, it brings certainty and security to the water users on the Southern Pecos."[43]

Shivwits Water Rights Settlement

Interior Secretary Norton announced in November that all of the parties had taken certain actions required to allow the Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act of 2000 (P.L. 106-263) to take full effect. Secretary Norton said, "I congratulate the Shivwits Band, the Washington County Water Conservancy District, the city of St. George, and the state of Utah for coming together to resolve these often contentious issues through a creative, negotiated settlement for the benefit of all the parties, rather than relying upon costly litigation, which often takes decades and results in few winners and many losers." She added, "The Settlement is an example of the collaborative approaches announced in Interior's Water 2025 initiative."[44] The Shivwits would receive 4,000 acre-feet/year of water rights, to come from the St. George Water Reuse Project and the Santa Clara Project, a pressurized irrigation pipeline that would conserve water lost through seepage and evaporation from area canals. The Congress fully appropriated $24 million as authorized, the Utah State Engineer took action necessary to implement the agreement,

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[43]Ibid

[44]*Western States Water*, Issue #1544, December 19, 2003.

and a Utah district court entered a final decree in the Virgin River adjudication confirming the band's water rights.

Nevada v. Te-Moak Tribe

Notwithstanding the progress in settlements, there remained a number of outstanding lawsuits and disputes involving Indian water claims. On July 29, the Ninth Circuit Court of Appeals, in *Nevada v. South Fork Band of the Te- Moak Tribe of Western Shoshone*, affirmed that Nevada maintains jurisdiction over the administration of state water rights. The decision was significant to western states since both state and federal courts claimed jurisdiction over an action arising out of the administration of water rights on an Indian reservation within the state. For 50 years, the tribe cooperated with the state engineer and water commissioners, allowing them access on to and through the reservation to a private ranch on which diversion works serving the tribe's and other landowners' water rights were located. Also, for some 20 years, the United States or the tribe itself paid fees assessed to all water right holders for administration on the Humboldt River. However, in March 1998, the tribe adopted two resolutions stating that the tribe would not pay assessment fees and would not allow water commissioners to enter the reservation. In 1999, tribal officers arrested state officials who had crossed the Te-Moak Reservation in order to regulate the flow of the Humboldt River as decreed by the state district court. After failing to persuade the tribe to rescind its resolutions, Nevada began contempt proceedings in state court, charging the tribe with violating the Humboldt Decree. The United States was joined as a defendant, and asked that the case be removed to federal court. Both the state and federal courts claimed jurisdiction and enjoined the other from conducting further proceedings.

The matter reached the Ninth Circuit Court, which ruled in favor of the state, "...remanding the case to state court, but on the grounds that the [federal] court lacked jurisdiction, not as a matter of abstention." The United States argued that the McCarran Amendment repealed the doctrine of prior exclusive jurisdiction, which states that when a court of competent jurisdiction has obtained possession, custody, or control of particular property, that possession may not be disturbed by any other court. The United States also argued that the action was brought in personam (regarding the person), rather than in rem (regarding the property). The circuit court rejected both arguments and said, "We...reject any suggestion that the McCarran Amendment repealed the doctrine of prior exclusive jurisdiction and hold, instead, that the Amendment affirmed that longstanding jurisdictional limitation." The court also said that the doctrine of prior exclusive jurisdiction "...is no mere discretionary abstention rule. Rather it is a mandatory jurisdictional limitation."[45]

River Basins and Interstate Aquifers

Colorado River Basin - California Quantification Settlement Agreement

In September, after lengthy negotiations and much controversy, the final pieces of the puzzle fell into place for quantifying southern California water agencies' rights to Colorado River water. The Department of Interior required implementation of a Quantification Settlement Agreement (QSA) whereby California would reduce its use of Colorado River water prior to reinstating California's access to "special surplus water under the Colorado River Interim Surplus Guidelines

[45] *Western States Water*, Issue #1525, August 8, 2003.

[ISG]...." California Governor Gray Davis had promoted a new QSA proposal, announcing on March 12, "This is a major breakthrough in addressing California's long-term water needs."[46]

Colorado River Basin States agreed to a transitional period of fifteen years, given implementation of California's 4.4 Plan, to reduce its over-use of the river. The QSA was the basis for this plan. According to the outline of the agreement, "The QSA assures California up to 75 years of stability in its Colorado River water supplies, and provides for a lasting peace among Colorado River users, not only in California, but also among the seven states that share the Colorado River." Further, "The QSA commits the state to a restoration path for the environmentally sensitive Salton Sea, as well as provides full mitigation for these water supply programs.... The QSA allows renewed access to surplus water, when available, under the federal Interim Surplus Guidelines. For 2004, urban Southern California would be entitled to receive 200,000 acre-feet of surplus water."[47]

On September 23, the Metropolitan Water District (MWD) of Southern California's board of directors, in a special meeting, approved the Quantification Settlement Agreement, followed by the Coachella Valley Water District (CVWD) on the 24th, and the San Diego County Water Authority (SDCWA) on the 25th. The Imperial Irrigation District (IID) followed after a stipulation of dismissal was approved by a federal court ending litigation with the United States over IID's water use. The stipulation "irrevocably" terminated the U.S. Department of Interior's 2003 Part 417 beneficial use review and approved IID's 2003 water order, consistent with the QSA.

The 75-year QSA is comprised of some 50 documents, contracts and environmental reports. It cleared the way for the transfer of water from agricultural to urban users and was the basis for implementing California's 4.4 Plan and bringing the state into compliance with the inter-state Colorado River Compact. MWD Vice Chairman John Foley observed, "To reach this point has been a long and difficult road, representing years of negotiations and false starts. However, through the...water transfers and local and regional projects envisioned under the QSA, we are providing added reliability and certainty to secure the economic and environmental well-being of California." MWD Chief Executive Officer Ron Gastelum added, "Ultimately, the final package reflects a number of important policy principles that have been important to Metropolitan from the outset..., particularly the need for each party to pay its own costs of implementing its components of the QSA, especially potential environmental costs."[48]

Under the QSA, MWD would purchase up to 1.6 million acre-feet (Maf) of water that IID proposes to conserve and sell to the state, over and above the 200,000 af IID would transfer annually to San Diego and another 100,000 af to be transferred from IID to CVWD. MWD would pay $250/af to the state for any additional water IID conserves and the net proceeds -- estimated at up to $300 million -- would help pay for environmental impacts to the Colorado River system, including the Salton Sea. MWD would also contribute $20/af of special surplus water made available, to also fund the Salton Sea restoration.

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[46]*Western States Water*, Issue #1531, May 16, 2003.

[47]*Western States Water*, Issue #1529, September 5, 2003.

[48]*Western States Water*, Issue #1532, September 26, 2003.

CVWD General Manager Steve Robbins exclaimed, "Adoption of the QSA is a win-win-win-win-win situation. Everyone benefits. Each of the four participating agencies benefit. The state benefits. The federal government benefits. The other basin states that use Colorado River water benefit. And the Salton Sea benefits."[49]

The California State Legislature passed and Governor Gray Davis signed three bills to enable parts of the proposed QSA. SB 277 would establish a Salton Sea Restoration Fund, administered by the Department of Fish and Game, and authorize the Department of Water Resources to buy and sell water made available under the QSA. It also provided for a study of the economic impacts of fallowing land in the Imperial Valley. SB 317 would authorize the "take" of species protected under state law that result from the implementation of the QSA. It also committed the state to a study relating to restoration of the Salton Sea ecosystem and protection of related wildlife. The state would also pursue a memorandum of agreement with the U.S. Department of Interior seeking federal help in restoring the Salton Sea, and review the composition of a related advisory committee. It also imposed an ecosystem restoration fee, with certain exceptions, on any water transferred by IID.

On October 16, Interior Secretary Gale Norton and representatives of four California water agencies signed the historic Colorado River water agreement. According to a press release from her office, the Secretary described the agreement as "...a landmark pact that begins a new era of cooperation on the river by fulfilling a promise California made more than 70 years ago." At the signing ceremony, she said, "This Agreement marks a historic turning point for California and the Colorado River Basin States. The economy and well-being of a large part of the growing West rely on critical agreements, such as this one, that allocate Colorado River water, provide assurances of long-term supplies, and clear the way for market-based transfers and other tools that are essential to meet the growing water needs of the region." As part of the agreement, the Secretary reinstated the Interim Surplus Guidelines, which she said, "...will allow Nevada, which lost access to extra water from the Colorado River along with California, to again have access to this water and return to the long-term path it has developed to meet the needs of its growing population."[50]

According to Pat Mulroy, General Manager of the Southern Nevada Water Authority, "This was the linchpin. The drought is still a huge issue. The amount of water we thought we'd get has been reduced because of the drought." Rita Maguire, who as head of the Arizona Department of Water Resources, worked for years on this matter, said, "Reaching this agreement will allow water managers within the basin to deal with other complex issues, the three biggest being Indian water claims, growth and environmental demands on water."[51]

On December 11, standing in for Secretary Norton at the annual meeting of the Colorado River Water Users Association in Las Vegas, Nevada, Interior Assistant Secretary for Water and Science, Bennett Raley, read from a prepared speech: "What a difference a year can make.... With the execution of the Colorado River Water Delivery Agreement...., we achieved a great victory for the people of the Colorado River basin. This victory was the result of the patience, perseverance,

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[49]Ibid

[50]*Western States Water*, Issue #1535, October 17, 2003.

[51]*The Arizona Republic*, October 16, 2003.

and relentless efforts of the seven states and the four California water management agencies. As a result of your success, we see a brighter future on the river -- a future with greater certainty and cooperation than exists in any river basin in the West. Together, we have added a page to the river's storied history." However, he added, "The current drought on the Colorado may emerge as the next major challenge for the Basin. Because of the ample storage in the Colorado Basin -- and completion of the [Agreement] -- the Lower Basin will be able to enjoy access to surplus water in 2004. The Interim Surplus Guidelines provide the Lower Basin with access to surplus water -- but access to this extra water is tied to the evaluation of Lake Mead. This mammoth reservoir has steadily fallen nearly 60 feet -- roughly 6 stories -- in the last three years.... "Today, Lake Mead stands at its lowest level since 1968. Should the current drought conditions continue -- and should Lake Mead fall another fourteen feet -- access to surplus water in the Lower Basin could be eliminated as early as January 1, 2005...." Raley concluded, "Given the population growth in the Southwest, this reduction will especially impact municipal users in Southern California and here in Nevada."[52]

Klamath River Basin

In light of the circumstances of the previous two years, the U.S. Bureau of Reclamation established a 2003 Klamath Basin Pilot Water Bank to determine the feasibility of such action in meeting a 2002 biological opinion's requirement to protect threatened salmon and endangered suckers. It consisted of two components that provided payments for those willing to "forebear surface water use by crop idling," and/or "substitute ground water for surface water." Applicants could choose either, but not both, for a "particular field unit." Only complete farm field units of at least 20 acres were eligible, and other criteria applied. Regarding 2001, Commissioner John Keys said, "[T]here was a reallocation of water from the irrigators in the government project to the endangered species, a sucker in the lake and salmon in the river below.... [T]here are ways to work with the system to benefit the endangered species and at the same time make water available. What we are doing is trying to go in and create a water bank so that water will be left in the system to benefit the endangered species and at the same time make our deliveries of water."[53]

In response to the Bureau of Reclamation's offer to pay farmers in the Klamath River basin to fallow land, 341 applications were received to idle over 24,000 acres -- more than twice the 12,000 acre enrollment goal for the Klamath Basin Water Bank. Reclamation hoped to make 33,000 acre-feet of water available to help endangered and threatened fish, and offered $187.50 per acre to farmers willing to fallow land during the year. With water supplies uncertain, due to the drought, many chose to take the offer. Reclamation reviewed the applications and consulted with irrigation districts to maximize the water savings and minimize disruption of irrigation system operations. The Bureau also offered $75 per acre to those willing to use ground water in lieu of surface water this year, and hoped to make another 25,000 acre-feet of water available.[54]

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[52]*Western States Water*, Issue #1544, December 19, 2003.

[53]*Western States Water*, Issue #1503, March 7, 2003.

[54]*Western States Water*, Issue #1504, March 14, 2003.

On May 19, California Resources Agency Secretary Mary Nichols wrote Interior Secretary Norton, stating, "In light of the loss of over 30,000 salmon last year on the Klamath River, I strongly urge the U.S. Bureau of Reclamation (USBR) to revisit their approach to operations of the Klamath River Project. Unfortunately, the 2003 [plan] does not reflect any change to the 10-year plan and flow schedules put in place last year. While we commend your effort to balance competing environmental and economic interests, California strongly feels that the current flow schedule is inadequate to protect the Klamath River's Coho and Chinook salmon and steelhead trout.... [W]e again request you to direct the USBR to reinitiate consultation with NOAA Fisheries to minimize further loss and lead to recovery of the Klamath River's native fish. In addition, we request that you direct the USBR to also work closely with the [California Department of Fish and Game] and tribal interests to develop a revised 2003 Operations Plan."[55]

A subsequent report by the National Research Council (NRC) concluded: "Instead of focusing primarily on how water levels and flows affect endangered and threatened fish in Oregon's Upper Klamath Lake and the Klamath River -- federal agencies charged with protecting the fish should pay greater attention to other causes of harm." The committee that wrote the report for the NRC identified a strong need for other kinds of initiatives to protect the fish, such as removal of migration obstacles, improvement of habitat, and reduction of summer water temperatures in tributaries.

The NRC reiterated an earlier finding that there was no evidence of a causal connection between water levels in Upper Klamath Lake and the welfare of endangered suckers. Similarly, the committee found that the effect of higher minimum flows in the Klamath River on coho salmon was unlikely to lead to their recovery, although higher flows may benefit other species that are not endangered or threatened. The committee's report covered an array of problems, such as excessive growth of algae and depleted oxygen levels in Upper Klamath Lake, dams that block spawning migrations, competition from hatchery fish, excessive sediment in streams, loss of streambank vegetation, and high water temperatures in the summer. The committee estimated that the research, scientific modeling, and remediation outlined in its report would cost about $25 million to $35 million over the next five years, excluding the costs of any major projects, such as dam removal.

A final report was issued on November 18 by the Fish and Wildlife Service (FWS), which found the direct cause of death in the September 2002 fish kill was an outbreak of two freshwater pathogens, "Ich and columnaris." The two pathogens are commonly found in the Klamath River and other aquatic systems, so FWS concluded that additional factors combined to stress the fish and render them more susceptible to the pathogens. The report said those factors included: the large size of the fall run of chinook salmon returning to the Klamath River from the Pacific Ocean; the high densities of fish in the lower river (enabling the pathogen outbreaks to spread quickly); the relatively low flow in the lower Klamath River; and hot weather, which raised water temperatures above that optimal for salmon. The FWS said the fish kill was the largest loss of pre-spawning adult salmon ever recorded in the Klamath River, and one of the largest on the West Coast.

FWS Director Steve Williams said, "As both (NRC and FWS) reports make clear, the river's troubles are due to a multitude of factors, and improving the river will require a watershed effort by Federal and State agencies, the Tribes, and other stakeholders." Environmentalists, however, insisted that the primary factor was the low flow in the Klamath River. "Hot water, blockages to fish

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[55]*Western States Water*, Issue #1515, May 30, 2003.

passage, crowded and high density, which allows parasites to spread, is only a factor in low flows," Glen Spain of the Pacific Coast Federation of Fishermen's Associations said. "There was simply too little water in the river in a drought year."[56]

Missouri River Basin

On June 4, the Eighth Circuit Court of Appeals overturned four lower court decisions in North and South Dakota that enjoined the U.S. Army Corps of Engineers (Corps) from drawing down reservoirs in the two states. At the same time, the appellate court upheld a decision by a district court in Nebraska requiring the Corps to adhere to its "Master Manual." According to the court, the Flood Control Act of 1944 required the Corps to develop the Missouri River Main Stem Reservoir System Regulation Manual, commonly referred to as the Master Manual and the Master Manual gives navigation and power purposes a higher priority than other uses, including recreation, fish and wildlife, and other project purposes. Though the Master Manual had been revised over the years by the Corps, since 1979, controversy accompanied management issues on the Missouri River as drought conditions forced the Corps to make priority decisions. The upstream states believe the Corps favors downstream barge traffic over upstream fishing and recreation for political reasons.

In 2002, district courts granted injunctions forcing the Corps to maintain certain water levels in Lakes Oahe, Francis Case, Sakakawea, and Fort Peck in Montana, North Dakota and South Dakota. Though the injunctions were only temporary, the Eighth Circuit stayed them during the appeal. Since the district court injunctions coming out of North and South Dakota were capable of repetition, they were reviewed along with the decision out of the Nebraska district court. The Eighth Circuit held that since placing higher priority on navigation needs downstream did not constitute an "arbitrary or capricious" decision by the Corps, the injunctions were unwarranted. Although the Corps argued that it has discretion as to when to follow the provisions of the Master Manual, the appellate court rejected that idea, citing language in the manual demonstrating the intent thereof to mandate certain actions.

On July 12, the D.C. Circuit Court ordered the Corps to reduce flows between Yankton, South Dakota and St. Louis, Missouri in order to meet the needs of endangered species. Further, D.C. Circuit Judge Gladys Kessler threatened sanctions of up to $500,000 per day. Meanwhile, the Eighth Circuit was still considering issues relevant to the Corps operation of the Missouri River. Faced with conflicting orders, the Corps did not comply, and Judge Kessler found the Corps in contempt on July 22, stating that sanctions would begin July 25.

The case was referred to Judge Magnuson of the Minnesota District Court in a consolidation of the several separate lawsuits by the Judicial Panel on Multidistrict Litigation. Judge Magnuson issued a stay of Kessler's contempt order. A petition by conservationists to lift the two-week stay was denied on August 4. However, the Corps indicated that it would reduce reservoir releases and related flows pursuant to the D.C. Circuit Court's order. Judge Magnuson then ruled that the Corps of Engineers must operate the Missouri River under low summer flow conditions and reduce reservoir releases in order to protect the threatened and endangered pallid sturgeon, interior least tern and piping plover. To comply with the order, the Corps must reduce releases from Gavins Point Dam from just over 26,000 cubic feet per second (cfs) currently to 21,000 cfs through August 15.

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[56]*Western States Water*, Issue #1540, November 21, 2003.

After August 15, the agency could begin raising flows again, and could resume full navigation service on September 1.

On December 18, the U.S. Fish and Wildlife Service (FWS) issued an amended biological opinion regarding the Corps of Engineers' proposed operation of Missouri River mainstem dams that included specific biological targets to protect threatened and endangered species, "...while respecting the needs of those who depend on the river for water, navigation, power and recreation." The amended opinion retained the vast majority of the conservation measures from the 2000 opinion, but for the first time incorporated a performance-based approach that gave the Corps greater management flexibility. The new opinion proposed an aggressive watershed approach, habitat creation and restoration, test rises along the river and an adaptive management and monitoring program -- building on recommendations by the National Academy of Science in a 2000 review.

FWS Director Steve Williams said, "The amended biological opinion outlines a clear plan of action the Corps must take to comply with the Endangered Species Act. For the next two years, the Corps has the opportunity to implement alternative measures that are expected to achieve biological benefits for the [piping plover, pallid sturgeon and least tern]. If the Corps fails to adequately plan for sturgeon spawning flows and the creation of sufficient habitat for all three species, the opinion provides for a specific flow regime for the river that would become effective in 2006."[57]

Ogallala/High Plains Aquifer

On January 23, Senators Jeff Bingaman (D-NM), Pete Domenici (R-NM) and Sam Brownback (R-KS) introduced the High Plains Aquifer Hydrogeologic Characterization, Mapping, Modeling and Monitoring Act (S. 212). A hearing on the bill was held Thursday, March 6, in the Senate Energy and Natural Resources Committee's Water and Power Subcommittee. Senator Brownback and William Alley, Chief of the U.S. Geological Survey's (USGS) Office of Groundwater, testified. The WSWC submitted written testimony in a letter for the record. S. 212 is similar to S. 2773, introduced in the last Congress, but with a number of changes. In July 2002, the WSWC took a position on S. 2773. A number of the Council's recommended changes had been made in S. 212, but some emphasizing state water management agencies' roles were not. Still, the Council supported expedited action on S. 212.

S. 212 authorized the USGS, working in cooperation with participating state geological surveys and water management agencies, to undertake a regional, state-by-state and county-by-county mapping program of the hydrogeological configuration of the High Plains Aquifer through the year 2011. Moreover, it provided for "... analyses of the current and past rates at which groundwater is being withdrawn and recharged, the net rate of decrease or increase in...storage, the factors controlling the rate of horizontal and vertical migration of water..., and the current and past rate of change of saturated thickness...."

S. 212 divided the program into federal and state components. The federal component would include: "(A) coordinating Federal, State and local data, maps and models into an integrated physical characterization of the High Plains Aquifer; (B) supporting State and local activities with scientific and technical specialists; and (C) undertaking activities and providing technical capabilities not

[57]*Western States Water*, Issue #1545, December 26, 2003.

available at the State and local levels." The federal component would be developed in consultation with a Federal Review Panel with three USGS representatives and four non-federal representatives (two each from lists of nominees submitted by the Western States Water Council and Association of American State Geologists).

States could elect whether or not to participate in the state component of the program to "assist in addressing issues relating to groundwater depletion and resource assessment...," with the governor or governor's designee appointing a "state panel representing a broad range of users...and persons knowledgeable regarding hydrogeologic data and information," which would establish state program priorities. These state panels would also advise USGS regarding the development of regional databases and ground water flow models. Federal money would be awarded to states to implement their programs, with 20% of the funds earmarked for state geological surveys (divided equally among the eight High Plains states) and the remainder awarded on a competitive basis to state or local agencies or other entities in the High Plains states, with proposals screened first by the state panels and subjected to peer review, followed by final prioritization and recommendations to the Secretary from the Federal Review Panel.

Of note, awards under the competitive portion of the state program would require at least a 50% non-federal match, which could include the "value of in-kind contributions of property and services." None of the federal funds made available under the state component could be used by USGS to "pay indirect, servicing or program management charges." Nor could award recipients use more than 18% of the money for such purposes.

S. 212 was a much more narrow legislative initiative than earlier proposals that also included education assistance, research and voluntary incentive based programs -- all designed to reduce the use of waters from the High Plains Aquifer. Earlier legislative proposals also would have established a High Plains Aquifer Coordination Council to -- among other things -- provide recommendations regarding programs and policies and changes in federal and state law to address ground water resources issues.

On October 30, the House Resources Committee's Water and Power Subcommittee held a hearing on S. 212. Chairman Karl Dreher wrote the Subcommittee, in support of a program "...building towards an integrated hydrogeologic characterization of the aquifer -- in close cooperation with the High Plains States."[58]

Dr. Lee Allison, Kansas State Geologist, testified in support of S. 212 saying, "New studies would either build on important, but often small and intermittent efforts underway in the states, or would fill gaps and needs that are not being addressed at all." He emphasized, "Nothing in this bill changes the ways the aquifer is managed. Nothing in this bill duplicates current efforts. This bill provides resources requested by state and local water agencies and establishes the High Plains aquifer as a priority area of study..... We are adamant about the primacy of the states in managing and controlling our water. The Review Panel...is set up to assure state control of state activities...."[59]

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[58]*Western States Water*, Issue #1537, October 31, 2003.

[59]Ibid

Bob Hirsch, Associate Director for Water at the U.S. Geological Survey (USGS), stated the Administration's belief that the goals of the bill could be achieved under existing federal programs -- and expressed concern that the cost of the legislation is uncertain. He noted the long history of USGS ground water monitoring and assessment activities in the eight High Plains states, and noted that the scope of the activities proposed was well within the expertise of USGS.

The American Farm Bureau testified against S. 212 as it believed its "...provisions move the management of groundwater toward federal jurisdiction" through the review panel and oversight of mapping, modeling and monitoring -- while the money could be best spent directly by the states for ongoing water conservation programs."[60] They also opposed any reporting requirement.

Rio Grande Basin

Various interstate and international issues involving the Rio Grande Basin were raised during 2003. By treaty, even during extraordinary drought, Mexico is to deliver an annual average of 350,000 acre-feet (af) of water from the Rio Conchos and other tributaries to the Rio Grande, but had failed to do so. Drought had stressed water systems on both sides of the border. Since 1992, Mexico had accumulated a water debt totaling 1.3 million acre-feet (Maf), to the detriment of U.S. water users along the lower Rio Grande.

In January, Mexico agreed to transfer to U.S. ownership from Falcon and Amistad Reservoir nearly 130,000 af, and over 55,000 af was transferred to U.S. control on March 29. However, none of that water had come from the Rio Conchos in Mexico, where high reservoir storage upset U.S. farmers, which viewed it as a continuing treaty violation. Jo Jo White, General Manager of the Mercedes Irrigation District, said, "Yes, we are pleased to receive the water, but not by this method. Mexico was supposed to physically release water from its internal water system. Once again, Chihuahua is being protected.... It is the principle of the thing. The [U.S.] government is setting a bad precedent in allowing Mexico to flout its own agreement. It gives them even more incentive to hold on to that water at all costs." With the transfer, Mexico had delivered just over 266,000 af since October 2002.[61]

According to the International Boundary and Water Commission (IBWC), which gages and accounts for flows along the border, Mexico also ordered the release of over 300,000 acre-feet (af) of storage water from Falcon Reservoir for Mexican farmers downstream in the state of Tamaulipas that had been without irrigation water for the past two years.

Without rain or releases from the Rio Conchos, water levels at Falcon would continue to drop. Reservoir levels had fallen four feet in April to 264 feet above sea level, and were expected to drop by about seven feet in May, with Mexico drawing 11,600 af per day. White added, "Mexico is releasing water that could have been ours...diverting [it] to another district in Mexico that we were

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[60]Ibid

[61]*Western States Water*, Issue #1510, April 25, 2003.

told was going to get water from another source.... [We] thought we had a glimmer of hope.... [T]hey're just not going to meet their obligation."[62]

On July 3, the IBWC met in El Paso, Texas to approve a stipulation that would lead to Mexico delivering some 107,014 acre-feet of water annually salvaged through water conservation measures to be implemented by three irrigation districts in the Rio Conchos basin in Mexico, financed with some $40 million from the North American Development Bank's Water Conservation Investment Fund. A total of 321,043 acre-feet of water would be saved, according to estimates, with one-third to be conveyed to the Rio Grande for use by the United States. According to IBWC spokeswoman, Sally Spener, "What this does is enhance Mexico's ability to deliver the water that is required under treaty." Texas Agriculture Secretary Susan Combs received the news, saying she was "cautiously optimistic," while expressing concern over the lack of any plan for future repayments of Mexico's water debt. Mexico claimed that it has been unable to deliver the required 350,000 acre-feet annually from Rio Grande tributaries, primarily the Rio Conchos, due to drought. It now owed the United States some 1.4 Maf.[63]

On August 14, in the keynote address at the Bureau of Reclamation's 2025 Water Conference in Austin, Texas Governor Rick Perry renewed his call for Mexico to live up to the terms of a 1944 water treaty. "If diplomacy will not yield a fair result for our farmers, then maybe withholding regular releases to Mexico will," Governor Perry said. "I'm not interested in causing a fight. I'm interested in resolving a problem and doing so with the means at our disposal." The U.S. by treaty must provide 60,000 af/year from the upper Rio Grande, and 1.5 Maf from the Colorado River at the California/Arizona border with Mexico. "If the United States can meet its water treaty obligations, delivering to Mexico what is required, then we should expect nothing less of Mexico," he added. "For years we have sought resolution to the water dispute between Texas and Mexico, and for years diplomacy has yielded little." The Governor suggested that the U.S. government should explore whether water releases from the U.S. to Mexico should continue.[64]

Issues also arose within the United States along the Rio Grande. In response to an interstate dispute between Texas and New Mexico, on April 23, Governor Bill Richardson announced a "win-win compromise" had been reached over a water relinquishment agreement. New Mexico would release 122,500 acre-feet of its water from Elephant Butte Reservoir to downstream users, in exchange for the right to store an equivalent amount in upstream reservoirs for the City of Santa Fe and others. Under the law of the Rio Grande, upstream storage would otherwise be prohibited, given the 30-year low water levels in Elephant Butte, which is also New Mexico's largest recreation boating destination. "The balance of New Mexico's credit water will remain in the reservoir until next year."[65] New Mexico's Elephant Butte Irrigation District (EBID) would get 57% on the total relinquishment, drawing some water in May, and more in August and September. The El Paso area and Mexico would also benefit from the releases.

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[62]Ibid

[63]*Western States Water*, Issue #1521, July 11, 2003.

[64]*Western States Water*, Issue #1527, August 22, 2003.

[65]*Western States Water*, Issue #1511, May 2, 2003.

Still, not everyone was happy with the agreement. Elephant Butte was expected to fall some 26 feet by early September, with its surface area dropping from 11,000 acres to about 6,280 acres. Truth or Consequences City Commission Nadyne Garner, which depends on revenue from recreationists from both New Mexico and Texas, said, "It will be devastating to our businesses and banks." Governor Richardson said Elephant Butte would still be a "premier water recreation playground. By any of the possible scenarios, it will remain the biggest and the best. The lake will have enough water for recreation through the summer season, barring a dry rainy season in late summer.... By August and September, if we're lucky, the rains through the central part of the state will have begun to recharge the lake.... We will do the best we can for everyone as we cope with whatever nature deals us in the summer and in the years ahead.... This problem is not new -- but we are bringing new tools to bear in dealing with it.... The drought has been draining away our water for several years."[66]

Litigation and legislation addressing implementation of the Endangered Species Act along the Middle Rio Grande has been described earlier in this report.

[66]Ibid

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 2003.

Position No. 249
(See also Nos. 215 and 230)
adopted March 14, 1997
revised and reaffirmed March 14, 2000

POSITION
of the
WESTERN STATES WATER COUNCIL
on
PROTECTING GROUND WATER QUALITY
Lincoln, Nebraska
March 21, 2003
(revised and reaffirmed)

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

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

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

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

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

NOW THEREFORE BE IT RESOLVED that any federal ground water quality strategy must reflect a true state-federal partnership, and provide adequate funding consistent with current federal statutory authorities.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
INDIAN WATER RIGHTS SETTLEMENTS
Lincoln, Nebraska
March 21, 2003

WHEREAS, the Western States Water Council, an organization of eighteen western states, and adjunct to the Western Governors' Association has consistently supported negotiated settlement of Indian water rights disputes; and

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

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

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

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

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

WHEREAS, the settlement of Native American water claims, and land claims, is one of the most important aspects of the United States' trust obligation to Native Americans and is of vital importance to the country as a whole; and

WHEREAS, current budgetary policy makes it difficult for the Administration, the states and the tribes to negotiate settlements knowing that the settlements may not be funded because funding must be offset by a corresponding reduction in some other tribe or essential Interior Department program.

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

BE IT FURTHER RESOLVED, that the Western States Water Council commends the Administration for recognizing that settlement of the land and water claims of Native Americans is an obligation of the United States government and for adopting the policy that these claims should be settled

BE IT FURTHER RESOLVED, that steps be taken to change current budgetary policy to ensure that any land or water settlement, once authorized by the Congress and approved by the President, will be funded without a corresponding offset to some other tribe or essential Interior Department program.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
urging the
CONGRESS AND ADMINISTRATION
TO CONTINUE TO RECOGNIZE STATE PRIMACY REGARDING
WATER RIGHTS AND WATER QUALITY CERTIFICATION
in the
FEDERAL LICENSING OF HYDROELECTRIC PROJECTS
Lincoln, Nebraska
March 21, 2003

WHEREAS, water is the lifeblood of each of the arid Western States and its allocation affects the future of each Western State's economic and environmental well-being, as well as social and cultural strength; and

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

WHEREAS, western states support the appropriate development of our regional hydropower resources as an important part of a balanced national energy policy; and

WHEREAS, hydropower development can have a profound impact on water flow regimes and other beneficial water uses; and

WHEREAS, Congress has consistently recognized the primacy of state law in the allocation and administration of water rights for all uses because of the need for a comprehensive system of governance; and

WHEREAS, Congress has also delegated its authority under the Federal Clean Water Act to the states for the protection and conservation of water quality, consistent with state water quality standards and state water rights law and administration; and

WHEREAS, Section 401 of the Federal Clean Water Act empowers states to certify that any federally authorized, permitted or licensed projects or other activities are consistent with applicable state water quality standards; and

WHEREAS, any federally licensed activity that may result in any discharge into navigable waters must be preceded by a Section 401 certification that ensures compliance with all provisions of state law; and

WHEREAS, states have primary jurisdiction over the integration of water quantity and water quality issues; and

WHEREAS, the Federal Energy Regulatory Commission (FERC) has undertaken a rulemaking process that is designed to integrate and streamline Section 401 certification requirements and other federal environmental reviews within its hydropower licensing authority under the Federal Power Act; and

WHEREAS, the FERC rulemaking recognizes the states' mandatory conditioning authority under Section 401; and

WHEREAS, the FERC rulemaking should clarify that the dispute resolution process is binding only for purposes of deciding what studies FERC will require an applicant to conduct, and does not affect the independent authority of state agencies with water quality certification authority to require applicants to provide needed information; and

WHEREAS, the FERC rulemaking should make the study dispute resolution process available to all state and tribal agencies that need studies to be conducted to meet their responsibilities for making recommendations under Sections 10(a) and 10(j) of the Federal Power Act; and

WHEREAS, the FERC rulemaking should provide for preparation of a single environmental document that can be used by all agencies that require preparation and circulation of environmental documentation before those agencies can issue a decision, including water quality certification; and

WHEREAS, the FERC rulemaking should not require the filing of a request for water quality certification until the licensing process has progressed to where the environmental documentation and public participation requirements for water quality certification can be completed.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council supports the promulgation of rules that integrate and streamline existing state and federal hydropower licensing requirements, while recognizing the states' mandatory conditioning authority under Clean Water Act Section 401 and Congress longstanding deference to the states with regard to the allocation of water for all uses, including hydropower.

BE IT FURTHER RESOLVED that these rules provide for a dispute resolution process that is available to all state and tribal agencies that need studies to be conducted to meet their responsibilities for making recommendations under Sections 10(a) and 10(j) of the Federal Power Act, that is binding only for purposes of determining what studies FERC will require the applicant to conduct, but is not binding on states exercising their independent authority over water quality certification.

BE IT FURTHER RESOLVED that filing for states' water quality certification should not be required until the licensing process has progressed to where the environmental documentation and public participation requirements for water quality certification can be completed.

BE IT FURTHER RESOLVED that the Western States Water Council opposes any administrative or legislative effort to weaken or eliminate states' mandatory conditioning authority under Section 401, and supports efforts to fully recognize the states' authority to allocate and regulate water uses for all purposes, including hydropower.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
WATER TRANSFERS
and
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
DISCHARGE PERMITS
Wellsville, Utah
August 1, 2003

WHEREAS, certain courts have ruled that the movement of water containing pollutants from one distinct body of navigable water to another can constitute a point source discharge subject to National Pollutant Discharge Elimination System (NPDES) permitting under the Clean Water Act; and

WHEREAS, in June 2003, the United States Supreme Court granted certiorari to review *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002); and

WHEREAS, there are numerous interstate, interbasin and intrabasin water transfers westwide that are essential to the social, economic and environmental well-being of the region; and

WHEREAS requiring NPDES permits for water right holders to transfer water to a location of need, in the exercise of their water rights, though no pollutant is added to the water and the transfer is not for waste disposal purposes, would inappropriately encumber necessary water transfers and the enjoyment of private property rights; and

WHEREAS the federal government has long recognized the right to use water as determined under the laws of the various states; and

WHEREAS Sections 101(g) and 510 of the Clean Water Act clearly leave water decisions to the states; and

WHEREAS Congress did not intend to regulate the mere movement of water from one basin or sub-basin to another in the legitimate exercise of water rights as point source discharges of pollutants.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council declares that the transport of water through ditches, canals, tunnels, pipelines and other constructed water conveyances in order to supply municipal, agricultural, industrial and other beneficial uses, as opposed to waste disposal purposes, in compliance with state law, should not trigger federal NPDES permit requirements, simply because the transported water contains pollutants.

Position No. 253
(See also No. 219 and 231)
adopted November 14, 1997
revised and reaffirmed October 20, 2000

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
FEDERAL NON-TRIBAL FEES IN GENERAL ADJUDICATIONS
Wellsville, Utah
August 1, 2003
(reaffirmed)

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

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

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

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

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

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

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

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

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

Position No. 254
(See also No. 232)
adopted October 20, 2000

POSITION STATEMENT
of the
WESTERN STATES WATER COUNCIL
in support of
RECLAMATION'S WATER CONSERVATION FIELD SERVICES PROGRAM
AND "BRIDGING-THE-HEADGATE" PARTNERSHIPS
Wellsville, Utah
August 1, 2003
(reaffirmed)

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

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

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

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

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

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

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

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

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

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

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

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

WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/wswc

Position No. 255

August 6, 2003

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

Dear Senator Allard:

On behalf of the Western States Water Council, I am writing to declare our support for passage of the National Drought Preparedness Act of 2003, introduced on July 24th by Senator Pete Domenici of New Mexico and Rep. Alcee Hastings of Florida respectively as S.1454 and H.R.2871. The Council strongly supports enactment of this important legislation and urges all western congressional members to join as cosponsors. With extended drought conditions afflicting many parts of the West, federal legislation is needed to promote coordination of proactive measures at all levels of government to plan, prepare and mitigate the serious impacts of drought. 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.

On July 24th, Governor Judy Martz of Montana, as Chair of the Western Governors' Association, joined by Governor Bill Richardson of New Mexico and Mike Johanns of Nebraska as co-lead governors for drought, wrote "It is high time for our nation to have a comprehensive national policy for drought.... We call on the Congress and the President to enact this bill this year." We join the western governors in urging the Congress and the Administration to enact and implement this legislation as soon as possible.

Sincerely,

Karl Dreher, Chairman
Western States Water Council

RULES OF ORGANIZATION

Article I - Name

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

Article II - Purpose

The purpose of the Western States Water Council shall be to accomplish effective cooperation among western states in 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.

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

(3) Express policy positions regarding proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management, and protection of water resources in Western States.

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

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

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 exluded 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

sunsetting. 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.