



Western Water, State Primacy, and Cooperative Federalism

Policy Summary

Western states are characterized by their arid conditions and limited water resources. Western States have longstanding and complex legal systems for allocating these limited supplies, including prior appropriations water rights that provide the foundational certainty for continued growth and prosperity. Some uses benefit the public good, while other uses are recognized, protected, and regulated as property rights. The future economic and environmental health of the West depends on the availability of adequate quantities of water of suitable quality for myriad uses. States, tribes, and local entities implement various components of water laws, agreements, and management processes. Additionally, interstate compacts, court decrees, international treaties, and negotiated water rights settlements impose obligations that often require nuanced water management to ensure compliance.

These stark western water realities necessitate a specific model of deference and collaboration between state and federal governments. For more than a century, the federal government has a longstanding practice of deference to western water laws, through Congressional statutes, court decisions, and executive orders. Because conditions vary significantly across the West, state-led management allows for more rational and orderly allocation and protection of water resources than unilateral, one-size-fits-all mandates from the federal government. States are in the best position to protect water resources according to their unique local economic and environmental conditions.

Principles of Cooperative Federalism for Western Water:

- 1. State Primacy and Exclusive Authority:** Western States are responsible for protecting water quality and managing the allocation and use of all water within their borders, including surface water, groundwater, and all natural flows regardless of federal infrastructure.
- 2. Federal Deference and Non-Interference:** Nothing in any act of Congress should be construed as interfering with state water laws. New federal legislation, rules, or policies should never preempt, erode, or interfere with state laws relating to water management, appropriation, protection, use, or distribution.
- 3. Substantive Consultation and Partnership:** Federal agencies must engage in meaningful and timely consultation with state officials early in the development of rules or policies that have federalism implications for western water.
- 4. States are Co-Regulators and Partners, Not Stakeholders:** Western state laws require knowledgeable and experienced coordination of water quality and water quantity decisions.

The Western States Water Council (WSWC) is a government entity representing western state water agencies with members appointed by their respective governors. The WSWC's mission is to ensure that the West has an adequate, secure, and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future.

5. **Federal Uses of Water:** All federal uses of water, including temporary uses, require either a state-based water right or a quantified federal reserved water right. Statutory restrictions on obtaining general state permits for federal projects should not apply to the withdrawal and use of western water resources.
 6. **Collaborative Problem Solving:** Federal needs should be addressed through existing legal frameworks, including general stream adjudications, interstate compacts, court decrees, and negotiated agreements. Additionally, ongoing state-federal communication, such as that supported through WestFAST, creates relationships conducive to collaboration.
5. Federal agencies should work collaboratively with states to create flexible regulations that do not interfere with state water management.
 6. Federal agencies should establish and implement appropriate procedures and processes for substantively consulting with states, elected governors, and their appointed representatives (such as WSWC) on the implications of their proposals.

Core Message

Federal deference to state water laws is based on sound principles. Any federal strategy affecting western water quality, quantity, allocation, or management must respect state primacy, reflect a true state-federal partnership, and provide adequate funding consistent with current federal statutory authorities and regulatory mandates.

What WSWC Is Asking For

1. Congress is encouraged to pass legislation requiring federal entities to comply with both substantive and procedural state laws regarding the use of water in Western States.
2. Congress should appropriate sufficient funding to allow federal agencies to effectively identify, quantify, and substantiate their water rights claims.
3. Policy direction should be given to ensure all federal claims for water rights filed in state court have a sound basis in both fact and law.
4. Federal agencies should pay their fair share of fees and costs associated with adjudicating their claims in state court.

Closing Statement

The federal government has at times introduced federal legislation or proposed regulatory actions that are inconsistent with sound principles of cooperative federalism. Federal agencies have, at times, dismissed these principles by diverting water resources without permits, issuing unilateral mandates, and engaging in rulemaking processes and procedures without collaborating with relevant state water agencies. WSWC supports efforts to improve communication and collaboration at all levels of government.

Nothing in this position is intended to alter or affect the authority of western states over the allocation and administration of waters within their borders, the implementation of delegated or primacy programs under federal law, or the interpretation or application of any interstate compact, court decree, international treaty, tribal settlement agreement, or state water law.

Supporting Documentation

Why This Matters

Western States depend on the orderly allocation, administration, and protection of limited water resources for a myriad of domestic, municipal, industrial, and environmental purposes. Many hydrologic basins and aquifers are fully appropriated, and may be closed to new water rights. Under prior appropriations law, “first in time, first in right” generally means that during years of drought, senior water rights may be fulfilled first, and junior water rights may not receive water at all, or may only be partially fulfilled. Additionally, in some basins or aquifers that have been overappropriated, states have established special rules, regulations, and oversight to carefully manage the water resources that remain. States are in the best position to identify, evaluate, and prioritize their needs, and to plan and implement strategies to meet those needs. New federal laws, policies, regulatory initiatives and directives have the potential to threaten the authority of states to effectively govern the development, protection, conservation, and management of water within their borders. They disrupt the appropriate balance of responsibilities within the cooperative federalism framework.

Federal Deference to Western State Water Law

The Desert Land Act (1877): Recognized by the Supreme Court as the primary act that severed water from public lands, giving states primary authority over surface water and exclusive authority over groundwater appropriations and administration.

Reclamation Act (1902): Section 8 requires the Bureau of Reclamation to proceed in conformity with state laws relating to the control, appropriation, use, or distribution of water.

Federal Power Act (1935): Section 10 affirms that federal licensing for hydropower must respect state water law and established water rights.

Flood Control Act (1944): Explicitly recognizes the rights of states to determine watershed development and protects their rights to natural flows.

The McCarran Amendment (1952): 43 U.S.C. §666 requires federal agencies to submit to state court jurisdiction for the adjudication of water rights, acknowledging that state systems are the proper venue for documenting these complex rights. It waives sovereign immunity, ensuring federal agencies follow state procedural law.

Water Supply Act (1958): Section 301 recognizes the primary responsibilities of states in developing water supplies, encouraging federal cooperation with this development in the construction and operation of federal water infrastructure.

Clean Water Act (1972): Sections 101(b) and 101(g) recognize state authority to protect water quality and allocate water quantities.

Executive Order 13132 (1999): Requires federal agencies to “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications...”

Why Collaboration Matters

Water must be recognized as a critical public policy priority given the importance of the resource to our public health, economy, food security, environment, and western way of life. State primacy is fundamental to a sustainable water future. Water security is in the collective public interest. Agencies should prioritize educating leadership and staff on western water rights and state law to prevent actions that hinder or infringe on state authority.

Unquantified federal water rights claims, particularly reserved water rights claims, can lead to contentious, time-consuming, and counterproductive litigation, often resulting in outcomes that do not adequately provide for federal needs or recognize other community needs and interests. Working cooperatively with their federal partners, states have shown that they have the ability and authority to address federal needs regarding surface water and groundwater within existing legal frameworks, including but not limited to permits, memoranda of understanding, water rights settlements or compacts, stipulations, and other methods. High-level federal participants with the authority to make binding decisions must be involved in negotiations and mediations to avoid illusory agreements and delays.

Opportunities exist for greater collaboration and cooperation. One example is the preservation of threatened and endangered species through transparent, flexible, voluntary, and effective regulatory protections and restrictions, without unmitigated or uncompensated takings of water rights, or interfering with state management of water resources.

The Western States Federal Agency Support Team (WestFAST) is comprised of 16 federal agencies with water-related responsibilities in the West. It was created pursuant to a recommendation of the Western Governors’ Association and the WSWC to foster cooperation and collaboration between the federal agencies, the states, and the state agencies in addressing water resource needs. Ongoing communication between WestFAST and WSWC builds strong state-federal relationships that enables opportunities for collaboration.

Why Treating States as Co-Regulators Matters

States are co-regulators with implementation authority and experience with the Clean Water Act and a myriad of state laws that require the coordination of water quality and water quantity decisions. The CWA was built on principles of cooperative federalism, envisioning state and federal partners working together with shared responsibilities. Section 101(b) explicitly preserves the primary responsibility of states to address pollution within their borders, and section 101(g) acknowledges the critical importance of balancing water quality protection in a way that does not interfere with state authority to allocate water. States are best positioned to protect and manage the water within their borders because of their on-the-ground knowledge of the unique aspects of their hydrology and legal frameworks. Additionally, many states have their own statutory and constitutional authorities to protect water beyond the limits of the CWA. The federal government should acknowledge states as valued partners with the experience to help inform any legislative or regulatory changes to accomplish mutual objectives. Rather than

attempt to dictate water policy, the federal government should engage states early in meaningful consultation, seek to understand state priorities, and contribute its fair share of funding to support implementation of state water planning and management, thus avoiding, or at least minimizing, the need for federal regulatory mandates. The federal government should explicitly recognize and support ongoing state, tribal, and local watershed management efforts through appropriate technical and financial assistance. Strong state-federal relationships will result in more effective implementation of programs that protect human health and the environment according to the needs of each state.

Regulatory Etiquette

Agencies must follow Executive Order 13132 by establishing accountable processes and implementing appropriate procedures for meaningful and substantive consultation with states.

Agencies should build on existing principles of cooperative federalism with a system of etiquette that (a) avoids the publication of public notices over federal holidays and extends comment periods when states identify a need for more time to provide meaningful feedback; (b) promotes dialogue with state agencies rather than listening sessions; (c) provides sufficient notice and context for nationwide briefings to enable state agencies to prepare to meaningfully engage in the conversation; (d) identifies opportunities where in-person engagement is needed with states, beyond virtual communication; and (e) includes field visits to western states and tribes to better understand regional and local issues, the various relationships among states and tribes, and how federal rulemaking can address or impact those issues.

Regulatory Scope: Groundwater

The conditions affecting groundwater supplies, demands, and impairments vary considerably across the West and within individual states. State laws and regulations are specific to the individual hydrologic conditions of their aquifers. States recognize the importance of effective and comprehensive groundwater management and are in the best position to protect groundwater quality and to allow for the orderly and rational allocation and administration of the resource.

Congress has created and the U.S. Supreme Court has recognized federal reserved rights to surface water, but no federal statute has addressed any federal property or other rights related to groundwater. The WSWC opposes any efforts to establish a federal ownership interest in groundwater not otherwise recognized or allowed under state law. The regulatory reach of federal statutes and regulations were never intended to infringe upon state or private ownership of, protection of, or control over groundwater, including but not limited to: the Clean Water Act, Endangered Species Act, Multiple-Use Sustained-Yield Act, National Environmental Policy Act, Organic Administration Act (USFS), Reclamation Act of 1902, Safe Drinking Water Act, Wild and Scenic Rivers Act, Wilderness Act, Migratory Bird Treaty Act (MBTA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Federal agencies should work cooperatively within state legal frameworks to address federal groundwater needs rather than exerting ownership interests or control.

Regulatory Scope: Natural Flows

The Flood Control Act of 1944 specifically declared the policy of Congress to recognize the interests and rights of the Missouri River Basin States in determining the development of the watersheds within their borders and likewise their interests and rights in water use and control, and to preserve and protect to the fullest extent established and potential uses of the rivers' natural flows, those flows being the natural flows that would pass through the states in the absence of the U.S. Army Corps of Engineers' (Corps) dams. Additionally, various western states have the authority and duty to manage permitting of stored water to supplement natural flows. Federal agencies in the western states, such as the Bureau of Reclamation, generally recognize western water laws and natural flows through reservoir operations, with releases from storage or water service contracts that supplement natural flows. The WSWC urges the Corps to recognize and proceed in conformity with state laws related to the development, use, control, appropriation, storage, and distribution of the states' surface waters, including natural flows. Any policy of the Corps to require storage contracts to access natural flows within a reservoir boundary would be a violation of the states' rights to develop, use, control, and distribute surface water.

Federal Compliance

Western states used general stream adjudications to determine and document relative water rights within basins, including rights to use water claimed by the United States under state or federal law. These adjudications provide the basis for water rights administration and reduce conflict over allocated uses. The McCarran Amendment (43 USC 666) requires the federal government to submit to state court jurisdiction in such adjudications. These proceedings typically involve hundreds or even tens of thousands of claimants, and federal water rights claims are typically the largest, most complex, and costly to resolve. States use filing fees to reimburse the expenses associated with adjudications, and when federal agencies decline to pay filing fees and other costs, especially when filing numerous claims, the costs are shifted to private water users and state taxpayers, draining state resources and significantly inhibiting the ability of both state and federal agencies to conduct adjudications in a timely manner. Prior to a U.S. Supreme Court decision in *U.S. v. Idaho*, 508 U.S. 1 (1992), federal payment of filing fees was a common practice. Requiring federal agencies to pay filing and other fees and costs to follow the same procedures as other water right claimants would help ensure their claims are legitimate, in conformity with state law, and made in good faith. Congress should appropriate sufficient funding for federal agencies to adequately and effectively identify, quantify, and prepare evidence to substantiate their water rights claims, ensuring they have a sound basis in fact.

Statutory restrictions on state permits, such as CERCLA (Sec. 121(e)(1)), should not apply to the withdrawal of limited water resources.

Alternate: WSWC Urges Congress and the Administration to:

1. Respect state primacy over the allocation, use, protection, and administration of water within state borders.

Western states are responsible for protecting water quality and managing the allocation and use of water within their borders, including surface water, groundwater, and natural flows, regardless of federal infrastructure.

2. Preserve federal deference to state water law and reject federal interference.

Nothing in any act of Congress should be construed to interfere with state water law. Federal legislation, regulations, guidance, and policies should not preempt, erode, or interfere with state laws governing water management, appropriation, protection, use, or distribution.

3. Require meaningful, timely, and substantive consultation with western states.

Federal agencies should engage governors, state water agencies, and their appointed representatives early in the development of legislation, regulations, guidance, and other federal actions that have federalism implications for western water.

4. Recognize western states as co-regulators and sovereign partners, not ordinary stakeholders.

Federal agencies should work with states as governmental partners in matters involving water quality, water quantity, allocation, infrastructure, and management, recognizing that western states have the legal authority and practical experience needed to coordinate these decisions.

5. Require federal uses of water to obtain valid water rights.

All federal uses of water, including temporary uses, require either a state-based water right or a quantified federal reserved water right. Federal agencies should not withdraw or use western water outside those established legal frameworks, and statutory restrictions on obtaining general state permits for federal projects should not apply to the withdrawal and use of western water resources.

6. Address federal water needs through existing legal frameworks and collaborative problem solving.

Federal water needs should be addressed through general stream adjudications, interstate compacts, court decrees, negotiated settlements, memoranda of understanding, and other existing legal frameworks rather than through unilateral federal action or one-size-fits-all mandates. Ongoing communication between states and federal agencies, including through efforts such as WestFAST, should be strengthened to support practical solutions.