WESTERN STATES WATER COUNCIL
www.westernstateswater.org
Policy Position #2026-04

Western Water, State Authority, and Cooperative Federalism

Policy Summary

Western states are characterized by their arid conditions and limited water resources. Western States have longstanding and comprehensive legal systems for allocating these limited supplies, including by applying the doctrine of prior appropriation to provide the foundational certainty for continued growth and prosperity. Water rights are used to benefit the public good while also being recognized, protected, and regulated as a type of property right. The future economic and environmental health of the West depends on the availability of adequate water quantities of suitable quality for myriad uses. States, tribes, local entities, and federal agencies 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 states and the federal government. With very limited exceptions, the federal government has recognized and followed western water laws for more than a century, 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 regulate water supplies according to their unique local economic and environmental conditions.

WSWC Urges Congress and the Administration to:

1. **Respect state authority over water allocation, use, distribution, and administration within state borders.** Western states are responsible for managing water allocation and use within their borders, including surface water, groundwater, and stored water, 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 displace state water law. Federal legislation, regulations, guidance, and policies should not preempt, erode, or interfere with state laws governing the management, appropriation, protection, use, or distribution of water.
3. **Require meaningful, timely, and substantive consultation with western states.** Federal agencies should engage governors, state water agencies, and their appointed

*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.*

representatives early in the development of legislation, regulations, guidance, or other federal actions that have federalism implications for western water.

4. **Require federal water uses to obtain water rights.** All federal water uses, including temporary uses, require a state-based water right, a federal reserved water right, other state authorization for use, or agreement. Federal agencies should not use western water outside those established legal frameworks. Federal waivers on obtaining state permits for federal projects should not apply to the use of western water resources. Continuous communication between states and federal agencies, including through efforts such as WestFAST, should be strengthened to support practical solutions.

Core Message

Federal deference to state water laws is based on sound principles for managing limited resources. Any federal strategy affecting western water allocation or management must respect the historic recognition of primary state authority, reflect a true state-federal partnership, and provide adequate funding for federal deference and compliance 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, including water use in Western States.

2. Congress is encouraged to 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 courts have a sound basis in fact and law.

4. Federal agencies should be required to pay their fair share of fees and costs associated with adjudicating their claims in state court.

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, governors, and their appointed representatives (such as WSWC) on the implications of their proposals.

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 water allocation and administration 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.

Related position: *See WSWC Policy Position #2026-05, State Primacy and Cooperative Federalism for Western State Water Quality Programs, addressing cooperative federalism in water quality and Clean Water Act implementation.*

Supporting Documentation

Why This Matters

Western states have distinct legal systems providing for the orderly allocation, administration, use, and protection of surface water and groundwater for domestic, municipal, agricultural, industrial, and environmental purposes. Many hydrologic basins and aquifers are fully appropriated and may be closed to new water diversions. Under prior appropriation laws, “first in time, first in right” generally means that during years of drought, senior water rights are fulfilled first, and junior water rights may not receive water or may only be partially fulfilled.

Additionally, in some basins or aquifers that have been over-appropriated, states have special rules, regulations, or 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 that threaten the states’ authority to effectively govern water development, protection, conservation, and management within their borders disrupt the appropriate balance of responsibilities within the cooperative federalism framework.

Why Collaboration Matters

While 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, respecting state authority 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.

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…”

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 permits and approvals, 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 addressing water resource needs. Ongoing communication between WestFAST and WSWC builds strong state-federal relationships that enables collaboration opportunities.

Regulatory Etiquette

Agencies must follow Executive Order 13132—Federalism by establishing accountable processes and implementing appropriate procedures for meaningful and substantive consultation with states. This should include implementing 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 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: 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. It also declared a policy 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 Corps policy 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 use 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 among the largest, most complex, and costly to resolve. Some states use filing fees to reimburse the expenses associated with adjudications. 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 the 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 federal water rights claims, ensuring they have a sound basis in fact.

Additionally, states have experienced conflicts associated with the failure of federal agencies to comply with state water permitting requirements. Federal waivers on state permits or state legal requirements, particularly those that are vague or undefined, should not apply to the withdrawal of water resources, particularly where those resources are limited.

Adopted by the Western States Water Council on October 22, 2026, in Las Cruces, New Mexico, without opposition; Arizona abstained.