1999

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

Thirty-Fourth 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. In 1991, **HAWAII** requested and received membership. In 1999, **OKLAHOMA** requested and received membership. Council membership is automatically open to all member states of the Western Governors' Association (which also includes the **State of Nebraska**). 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. In 1999, there were two important changes in associate membership. **MONTANA** regained full membership, while **HAWAII** was excluded from membership pending payment of its dues. **ALASKA** continued to participate as an associate member.

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 1999, meetings were held in: Yakima Washington on April 8-9; Jackson, Wyoming on August 19-20; and Austin, Texas on November 4-5. Guest speakers are scheduled according to the relevant subjects to be considered at each meeting. The Council meetings are open to the public. Information regarding future meeting locations and agenda items can be obtained by contacting the Council's office. Included herein are reports on each of the Council meetings, positions and resolutions adopted by the Council, and a discussion of other important activities and events.

During 1999, the Council staff was comprised of: D. Craig Bell, Executive Director; Anthony G. (Tony) Willardson, Associate Director; James P. Alder, Legal Counsel; and a secretarial staff including Cheryl Redding, Lynn Bench, and Julie Stam.

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

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MEMBER STATES and MEMBERSHIP+

ARIZONA

*Governor Jane Dee Hull; 9-97
**Rita Pearson; 6-91
Michael Brophy; 6-91
C. Laurence Linser (Alt.); 6-88

CALIFORNIA

*Governor Pete Wilson; 1-91 to 12-98
†Thomas Michael Hannigan; 1-99
David G. Kelley; 1-83 to 7-83
reappointed 3-84
Thomas S. Maddock; 5-94
Roderick E. Walston (Alt.) 1-86
Edward C. Anton (Alt.); 2-91
James M. Stubchaer (Alt.); 6-93
Jeanine Jones (Alt); 2-97

COLORADO

*Governor Roy Romer; 1-87 to 12-98
†Peter Evans; 8-98
J. David Holm; 1-90
Harold D. Simpson; 3-92
Wendy C. Weiss (Alt.); 4-87
Jim Lochhead (Alt.); 8-92
Jennifer Gimbel (Alt.); 7-97

*Ex-Officio Member
**Executive Committee Member
†Council members denoted by this symbol are listed on this membership list by virtue of their office, pending receipt of a letter of appointment by their Governor.

IDAHO

*Governor Phil Batt; 1-95
**Karl Dreher; 7-95
Wallace N. Cory; 3-95
Sherl Chapman; 10-95
Wayne T. Haas (Alt.); 10-83 to 5-99
J.D. Williams (Alt.); 5-91

MONTANA

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

NEVADA

*Governor Robert J. Miller; 1-89
**Roland D. Westergard; 5-68
Peter G. Morros; 3-91
R. Michael Turnipseed (Alt.); 8-96
Joseph E. Dini, Jr. (Alt.); 7-83
Richard Bunker (Alt.); 10-97

OKLAHOMA

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

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

NEW MEXICO

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

NORTH DAKOTA

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

OKLAHOMA

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

OREGON

*Governor John Kitzhaber; 1-95
**Martha O. Pagel; 6-92
Geoffrey M. Huntington; 1-99
Langdon Marsh; 1-99
Meg Reeves (Alt.); 1-99
Mike Llewelyn (Alt.); 1-99
Steve Sanders; 7-90 to 4-99

SOUTH DAKOTA

*Governor William J. Janklow; 1-95
**Nettie Myers; 5-95
John Hatch; 6-88
Steve Pirner; 6-88
John Guhin (Alt.); 6-88

TEXAS

*Governor George W. Bush; 1-95
**William B. Madden; 8-97
J. E. (Buster) Brown; 8-97
John Baker, Jr.; 8-97
Fred N. Pfeiffer (Alt.); 10-83
J. David Montagne (Alt.); 9-92

UTAH

*Governor Michael O. Leavitt; 1-85
**D. Larry Anderson; 3-85
Thorpe A. Waddingham; 6-65
Dee C. Hansen; 3-85
Dallin Jensen (Alt.); 7-71
Don A. Ostler (Alt.); 10-87
Norman K. Johnson (Alt.); 10-97

WASHINGTON

*Governor Gary Locke; 1/97
**Tom Fitzsimmons; 4-98
Keith Phillips; 4-98
Tom McDonald; 11-91

WYOMING

*Governor Jim Geringer; 1-95
**Gordon W. Fassett; 3-87
Myron Goodson; 6-65 to 3-83;
reappointed 10-86 to 4-99
William L. Garland (Alt); 10-90 to 11-96
Tom Davidson; 10-96
Dennis Hemmer (Alt.); 10-96

ASSOCIATE MEMBER STATE

ALASKA

*Governor Tony Knowles; 12-94
†Bob Loeffler; 10-98
†Christopher Estes; 11-96
†Michael A. Conway; 3-98
†Gary Prokosch; 5-99

Select Photo

COUNCIL MEMBERS

at Jackson, Wyoming meeting on August 20, 1999

Front Row: Francis Schwindt, Roland Westergard, Mike Brophy, Jeanine Jones, Don Ostler, Ed Anton, Tom Maddock, Norm Johnson, Martha Pagel, Sherl Chapman, Fred Pfeiffer

Back Row: Steve Hirschey, Gary Ingman, Hal Simpson, John Hatch, James Davenport, Pete Morros, Larry Linser, Dee Hansen, Bill Madden, Larry Anderson, Karl Dreher, Rich Moy (obo Jack Stults), and John Baker

Halftone

STAFF

D. Craig Bell	Executive Director
Anthony G. Willardson (Tony)	Associate Director
James P. Alder (Jim)	Legal Counsel
Cheryl Redding	Office Manager
Lynn Bench	Bookkeeper
Julie Stam	Receptionist/Secretary

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

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COUNCIL MEETINGS

129th
Western States Water Council
Meetings
April 8-9, 1999
Yakima, Washington

The Western States Water Council's 129th meetings were held in Yakima, Washington at Cavanaughs Gateway Hotel. A Wednesday afternoon field trip began with presentations on local water issues. The U.S. Department of Agriculture's (USDA) Water and Waste Disposal Programs and Water 2000 Initiative were described. Administered by the USDA's Rural Utilities Service, the goal is to provide clean, safe and affordable drinking water to all rural homes by the year 2000. James Trull, with the Roza-Sunnyside Board of Joint Control used slides and water samples to provide a view of water quality issues in the Yakima River Basin. Under the federal Clean Water Act, the Washington Department of Ecology is developing Total Maximum Daily Loading (TMDL) goals for all water bodies not meeting water quality standards. In the Yakima Basin, agricultural runoff, carrying sediment, herbicides and pesticides, is the major problem. Turbidity goals (measured by NTUs) have been set at 2000 NTU for 1999, 1000 NTU in 2000, 500 NTU in 2001, 100 NTU in 2002, and 25 NTU by the end of 2002 for all points of discharge to the Lower Yakima River. The local irrigation districts and land-owners are taking broad, proactive steps towards meeting the state's goal. A visit to a farmer's hops fields that are irrigated by a drip system illustrated this effort.

The Endangered Species Act (ESA) is also an important catalyst for changing water management practices to protect listed anadromous fish species, salmon and steelhead. While improving water quality benefits the fish, major federal, state and local investments have also been made to install fish ladders and screen irrigation diversions to facilitate fish passage and reduce mortality among both smolts and adult fish. Members toured a large rolling screen diversion facility operated by the U.S. Bureau of Reclamation as part of the Yakima Basin Enhancement Project.

The tour concluded with a visit to a local vineyard, irrigated with a drip system.

The Water Resources Committee met first on Thursday and took up a proposal for a joint effort with the Western Governors' Association (WGA) to address concerns with ESA amendments with respect to water rights. Rich Bechtel, WGA staff, outlined potential tasks in preparation for continuing administrative reforms and future legislation, which appears unlikely to pass until after the next Presidential elections.[2] Mr. Bechtel also discussed WGA efforts to improve the federal hydropower relicensing process, while protecting states' rights. Members discussed work on a summary of state water use and administrative fees, and future meetings on ground water and information management.

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[2]*Western States Water*, Issue #1297, March 26, 1999.

Marvin Fretwell, with the U.S. Geologic Survey (USGS), discussed the President's 2000 budget and the cooperative stream gaging program. Thereafter, the Committee directed that letters raising concern over the funding levels and USGS's priorities be drafted and sent, with the Council's approval, to the Administration and the Congress. The Committee also recommended the Council adopt a position, with an accompanying letter, in opposition to the proposed repeal of national plumbing efficiency standards, which many manufacturers and states rely on as an important conservation measure.

The Water Quality Committee further discussed rural water needs, with Jack Gleason, USDA's Washington State Program Director, David Travers, EPA's Ground Water and Drinking Water Office (via a telephone hookup) and John Hatch, a Council member from South Dakota. Next, the Environmental Protection Agency's (EPA) Advance Notice of Proposed Rulemaking Regarding Flow Criteria was addressed by Tim Hamlin, EPA Region X and Mark Pifher, an attorney and private consultant. Concerns regarding conflicts with state water rights were raised. Mr. Pifher and Shaun McGrath, WGA staff, also discussed continuing efforts to reauthorize and amend the Clean Water Act (CWA). Then the Committee approved for the Council's consideration a change to its current CWA position to address CWA compliance by all federal facilities "in the same manner as any other person...."

A number of other water quality issues were raised. Dan Robinson, in Yakima's EPA Office, addressed the Concentrated Animal Feeding Operations Strategy, which proposes various levels of regulation, depending on the number of animal units. He explained proposed requirements for waste management plans. Next, an upcoming Workshop on Watershed Management Strategies was outlined by Don Ostler, a member from Utah. Lastly, member states briefly reported on TMDL development and implementation activities, and Shaun McGrath previewed a related upcoming WGA workshop. Remarks and a slide presentation by Chris Coffin, Washington DOE's TMDL Coordinator in the Yakima Basin were postponed until Friday's full Council meeting.

The Executive Committee met and reviewed the Council's budget, dues projections, annual report, WGA work plan items, plans for next year's Water Policy Seminar, in Washington D.C. (in cooperation with the Interstate Council on Water Policy and Association of State and Interstate Water Pollution Control Administrators), and other future Council meetings.

The Legal Committee began with Martha Pagel, a member from Oregon, discussing proposed legislation for the federal payment of general adjudication fees. Last year, Rep. Bob Schaffer (R-CO) sponsored a bill, which has yet to be reintroduced. His legislative aides were unable to participate in the meetings. Federal water claims were a related topic, with Alan Reichman, Washington's Assistant Attorney General and WSWC Executive Director Craig Bell discussing joint WSWC and Conference of Western Attorneys General efforts. Indian water rights claims and settlements were also considered with Council Vice-Chair Mike Brophy leading the discussion and members updating activities westwide. The WSWC and Native American Rights Fund are again sponsoring a related fall symposium.

Mike Turnipseed, a member and the Nevada State Engineer, summarized conflicts with the Shoshone Tribe denying him entry to their reservation (which was created through the federal purchase of a number of private ranches, with accompanying water rights) in order to monitor water use and to administer those rights under the Humboldt River Decree. The state is opposed to the United States removal of a related case to federal court, arguing the original state court maintains jurisdiction over implementation of the decree. Next, Tim Erkel, U.S. Army Corps of Engineers, reviewed the Corps' back-and-forth policy on regulation of excavation activities in wetlands, and the decision not to appeal a federal appeals court decision striking down the Corps' related regulatory authority (which is now again limited to dredge and fill activities). Member states next reported on various legal activities and cases.

Tom Fitzsimmons, Director of the Washington Department of Ecology, was unable to attend due to conflicting meetings with the state legislature. Scott Smith, with the Washington Department of Fish and Wildlife, summarized for members the state's aquatic nuisance species (ANS) management plan. Washington is the only western state with a federally approved plan. Mr. Smith emphasized the risk ANS pose to native and endangered species, and especially efforts to restore Northwest salmon and steelhead runs. The Council also listened as Bill McDonald, Bureau of Reclamation, updated administrative and legislative activities related to the transfer of federal water projects to non-federal ownership and policies to guide the use of federal facilities for the transfer or wheeling of non-federal waters. Progress on both issues continues slowly.

The Council's working committees reported, and the Council adopted, as amended three policy statements. The first position opposes the repeal of national plumbing efficiency standards. The second urges the Administration and the Congress to fully fund state/ USGS cooperative stream gaging activities at current levels, even at the expense of other USGS work. The third calls for amending the Clean Water Act to require compliance with its mandates by all federal facilities. A resolution of appreciation was adopted for outgoing member Steve Sanders.

130th Council Meetings
August 19-20, 1999
Jackson, Wyoming

The 130th meetings of the Council were held on August 19-20, in Jackson, Wyoming at the Snow King Resort. The Council, under a unanimous consent rule, considered and adopted two positions that were not included in the notice of the meeting and must first be cleared through western governors' offices before they will be distributed. The first asks that where Native American land and water claims have been negotiated and settlements enacted into law, the President and the Congress recognize such settlements are mandatory obligations of the federal government and change current budgetary policy, which treats funding for such settlements as discretionary spending. The practical effect, under past budget agreements, has been that no settlement can be funded without a corresponding reduction in some other component of the budget. As settlement funding has been included in the Interior Department's budget, that means a corresponding cut at the expense of some other Interior program (or Tribe).

The position states, "It is virtually impossible for the Administration, the States or the Tribes to negotiate settlements knowing that they will not be funded.... We believe that the funding of land and water settlements should be a mandatory obligation... analogous to, and no less serious than, the obligation of the United States to pay judgements against it. We urge that steps be taken to change current budgetary policy to ensure that any land or water settlement, once authorized by the Congress and approved by the President, will be funded. If such a change is not made, all of these claims will be relegated to litigation, an outcome which ought not to be acceptable...."

The second position asks that the Administration and the Congress support narrowly tailored legislation to "establish that the United States (not Native American tribes), when a party to a general adjudication, shall be subject to fees and costs imposed by the state[s] to conduct the proceedings to the same extent as private users and other non-tribal entities." Under current federal law, any water right claims of the United States must be raised in any state general stream adjudication. The states officially quantify and record all water right claims, and both private and public water right holders benefit from the protection afforded by determining their relative priorities and the amount of unappropriated water, if any, that may remain available to satisfy other important environmental and economic uses. However, federal courts have determined that while the United States must be joined in such adjudications in state courts, the federal government need not pay state fees imposed on applicants for processing claims, even though federal water right claims are often the largest and most complicated. As a result, the financial burden of funding these often lengthy, complicated and expensive proceedings falls unfairly on other water users. Moreover, the lack of federal financial support delays the completion of these adjudications.

Pursuant to procedures adopted by the WSWC as an affiliate of the Western Governors' Association (WGA), if no western governor raises an objection, following a ten-day review, these provisional positions will be distributed to the Administration and Congress.

The regular committee meetings began on Thursday. The Water Resources Committee listened as Rich Bechtel and Shaun McGrath briefed members on water-related issues before the Western Governors' Association (WGA), including Endangered Species Act amendments and administrative reforms, federal hydro-power licensing issues, drought and non-native nuisance species. Dr. Robert Hirsch, U.S. Geological Survey, Associate Director for Water Resources, explained USGS' budget request and changes intended to reduce outside cooperators' costs, including western states, by funding federal overhead with federal appropriations. However, this has also led to an equally proportionate decrease in general USGS program funding, including the cooperative streamgaging network, which the WSWC has strongly supported. At present, while non-federal cost sharing is increasing the number of USGS gaging stations is declining, including many long-term gages, raising serious concerns over the loss of valuable streamflow and other data. Next on the agenda, Jack Barnett, Engineer-Manager, Bear River Commission, described the Bear River Basin shared by Idaho, Utah and Wyoming. Interestingly, the headwaters rise in Utah's Uinta Mountains and meander through all three states before emptying into the Great Salt Lake, making each of the states, at some point, both an upstream and a downstream state. Jack focused on recent efforts to address water quality concerns cooperatively within the context of the Bear River Compact. The committee also discussed a number of other items.

The Water Quality Committee began with a brief discussion of Council participation in an upcoming WGA workshop on the recently released Environmental Protection Agency total maximum daily load (TMDL) rule and water quality/quantity interrelationships to be held in Park City, Utah on September 22-23 at the Yarrow Hotel. EPA officials will describe the proposed rule, and on day two, participants will address the integration of water quantity and quality issues, particularly within the context of state watershed strategies. Next, Bill Chase, City of Phoenix, described proposed legislation drafted by the Western Coalition of Arid States (WESTCAS) to amend the Clean Water Act (CWA) to address problems specific to the West. He asked for support from the Council. The Council has refined its own position on CWA amendments, which in general parallels and compliments the WESTCAS bill. Without formally endorsing the WESTCAS bill, which may be introduced in the future, WSWC members were encouraged to point out to their congressmen similarities between the interests of the two organizations.

Next, Jim Alder, WSWC staff, briefed members on the activities of the Safe Drinking Water Futures Forum, which is highlighting source water protection and water supply issues. Thereafter, an extended roundtable discussion of confined animal feeding operations (CAFO) issues involved Hiram Boone, U.S. Department of Agriculture and Charles Sutfin, EPA, and state representatives. Many states have already addressed CAFO water quality threats, and there was some criticism of the federal agencies' management strategies and considerable skepticism they would commit the federal resources needed to assist the states in meeting new federal CAFO mandates.

The Executive Committee reviewed the WSWC budget, membership, WGA work plan items and joint meetings, future Council meetings, sunsetting external resolutions, and next spring's Water Policy Seminar in Washington, D.C. Of note, the State of Montana has renewed its status as a full member of the Council.

The Legal Committee discussed the status of the Water Adjudication Fee Fairness Act of 1999, the State Water Sovereignty Protection Act, and other legislation regarding or affecting the exercise of state water rights. The negotiation and funding of Native American water right settlements was also addressed, along with the agenda for the next WSWC/Native American Rights Fund (NARF) symposium on settlements to be held on September 8-10, in Missoula, Montana at the Holiday Inn Parkside. With unanimous consent, the Committee also considered and recommended the two positions adopted by the Council regarding adjudication fees and Native American water right settlements. Next, Bobbie Frank, Executive Director of the Wyoming Association of Conservation Districts and Marc Stimpert, an attorney representing the Association, described a lawsuit filed on behalf of the Association seeking to stop implementation of the Administration's Clean Water Action Plan, which was adopted without significant public review.[3] The suit alleges various substantive and procedural violations of the federal Administrative Procedures Act, National Environmental Protection Act (NEPA), and other federal laws. The Association has received considerable out-side support for the lawsuit.

Thereafter, Deborah Mull, Washington State Assistant Attorney General, spoke about the states' use of its Section 401 water quality certification authority to block a request to expand and

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[3] *Western States Water*, Issue #1310, June 25, 1999.

modify the use of a water right for a long studied, but uneconomic hydropower project, the Sullivan Creek Project, which would dewater a section of the stream.[4] Rather than encouraging expansion of federal hydropower licensing authority, she described their position in the litigation as strictly advocating the rights of states to manage their own waters. Lastly, Tom Davidson, Wyoming Deputy Attorney General, described continuing litigation involving the Bighorn River Basin adjudication and Native American rights, related 1868 Walton rights, and *Wyoming v. Nebraska.*

Wyoming Governor Jim Geringer addressed the full Council, highlighting the WGA's "Enlibra" message and outlining the challenges of meeting the state's water and other needs, given federal environmental mandates, such as the CWA and ESA.[5] Mike Besson, Water Development Commission, and Jeff Fassett, State Engineer, discussed various water issues in Wyoming. They were followed by Eluid Martinez, Commissioner, U.S. Bureau of Reclamation. He spoke about Reclamation's mission, its relationships with the states, water and project facilities transfers, the Warren Act, the Pecos River adjudication, Rio Grande system, and water conservation.

Notably, Francis (Fritz) Schwindt, North Dakota Environmental Health Section Chief, was re-elected as the WSWC Chair, Michael Brophy, an Arizona attorney, as Vice-Chair, and Martha Pagel, Oregon Water Resources Department Director, as Secretary-Treasurer.

131st Council Meetings
November 4-5, 1999
Austin, Texas

The fall meetings of the Western States Water Council were held in Austin, Texas on November 3-5, at the Radisson Hotel. The Lower Colorado River Authority hosted a field trip and trail ride at the McKinney Roughs, a 1900-acre natural area along the river which the Authority owns and operates for educational and recreational purposes. An evening reception was held in the Texas State Capitol. Senator J.E. "Buster" Brown, Chairman of the Texas Natural Resources Committee, and a WSWC member, welcomed members to Texas. Texas faces many water-related challenges. Senator Brown explained how the late Lieutenant Governor Bob Bullock had asked him to introduce a water resources management bill despite the many obstacles it would face. The Texas State Legislature passed Senate Bill 1, after a single session, on June 2, 1997. Bullock called it "a blueprint for a comprehensive plan to protect the resource most vital to future generations of Texans."[6]

At the Council meeting, Craig Pedersen, Executive Administrator of the Texas Water Development Board described the creation of sixteen regional water planning groups under authority

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[4] *Western States Water*, Issue #1306, May 28, 1999.

[5] *Western States Water*, Issue #1262, July 23, 1998.

[6] *Western States Water*, Issue #1204, June 13, 1997.

of SB 1. These local groups are comprised of a broad spectrum of private citizens and representatives of county governments, river authorities, water districts, environmentalists, industry, agriculture, and many others. They are to prepare local water plans to be submitted to the Board for review, approval and incorporation into a state water plan. In addition to local population projects and estimates of water demands and supplies, the planning groups are to identify the need for additional water data (particularly with respect to ground water), identify unique stream segments, potential future reservoir sites, and address other local issues. Future concerns include funding and implementing the plans, coordination of water quantity and water quality management, aging infrastructure, and urban water use. Mr. Pedersen also addressed Edwards Aquifer issues.

John Baker, Commissioner, Texas Natural Resource Conservation Commission, and a WSWC member, briefly talked about the challenge of developing total maximum daily load (TMDL) standards for 303(d) listed waters. His staff made an informative presentation on managing nutrient loads in the Lake Waco basin, including municipal wastewater treatment outflows and nonpoint source pollution from dairy operations. These are priorities for reducing controllable discharges. There is an unusual amount of water quality data available over a 35-year period that has been used to model the likely effect of the combined use of different best management practices. However, in some parts of the basin, streams are ephemeral and/or effluent dominated. Even given aggressive protection actions, water quality goals set for orthophosphate (30 ppb) are not likely to be achieved.

Jim Gilmore, representing the Regulatory Branch of the Southwestern Division of the U.S. Army Corps of Engineers, was a special guest at the Council meeting. He addressed recent developments in the Clean Water Act Section 404 Program, explaining new administrative appeal procedures for the review of permit and other Corps decisions. The intent is to provide applicants with a fair and expedited 90-day review of actions, such as denial of a 404 permit, beginning with reconsideration at the district level, before moving to review at the division level. The appeals process is also available regarding the basic assertion of Corps jurisdiction. A number of questions were raised regarding lawsuits, reopening permits third party standing or lack thereof, Corps jurisdictional issues, and also special local operating procedures for endangered species (SLOPES).

In response to its working committee reports and recommendations, the Council remanded for further consideration and revision a twelve-page letter to EPA on proposed changes to water quality planning and management regulations (TMDL rules). The revised comments will be circulated again for comment, then submitted to the Executive Committee for approval, before submission to EPA in January 2000. No other external policy matters were before the Council. The Council did act to approve an amendment to its by-laws providing that any state delinquent in paying dues for a period of three years will be excluded from Council membership unless and until the current year's dues are paid.

The Executive Committee was pleased to approve Oklahoma's request for membership, made in a recent letter from Governor Frank Keating.[7] The Committee recognized and welcomed Duane A. Smith, Executive Director of the Oklahoma Water Resources Board, as a new member. Mr. Smith pointed out that Oklahoma shares many common concerns with respect to water with other

[7]*Western States Water*, Issue #1328, October 29, 1999.

western states, and specifically noted Oklahoma's favorable impression of the Council from participation in the Indian Water Rights Symposia and other WSWC sponsored workshops. The Committee also reviewed the WSWC budget, auditor's report, by-laws, 2000 work plan, future Council meetings and other matters, including water-related work plan items of the Western Governors' Association (WGA) and suggested topics and speakers for a joint Water Policy Seminar to be held in Washington, D.C. on March 13-15, 2000 at the Crystal City Marriott, together with the Interstate Council on Water Policy (ICWP) and the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA).

The Water Resources Committee listened as John Baker and Shaun McGrath, WGA, discussed the work of the National Drought Policy Commission. A brief draft report has been released, and members were asked to provide staff with comments by November 17. Rich Bechtel, WGA, discussed the Endangered Species Act and asked for WSWC member volunteers for a WGA work group that will meet in Denver on November 22-23. He also described state efforts to collaborate on Section 401 water quality certification conditions. Next, David Thorkildsen, with the Texas Water Development Board's Resources Information Office and WSWC's represent-ative on the federal Advisory Committee on Water Information spoke on recent activities, particularly related to the U.S. Geological Survey's stream gaging program. Another special guest, Kimberly Simms Ianelli, a former natural resource advisor to Governor Bush, and now the Executive Director and Secretary of the Texas Water Foundation (TWF), described the organization's origins and educational purpose. Senator Brown is the TWF President and Chairman of the Board. Wayne Elmore, Team Leader, National Riparian Service Team, educated members on the impressive results of a cooperative stream restoration program. Lastly, the Committee approved a work plan that includes items on conjunctive water use, endangered species, water conservation, water information management, federal hydropower licensing, water resources program funding and fees, control of aquatic nuisance species, drought, floods, and international border water issues.

The Water Quality Committee briefly reviewed the proposed letter to EPA commenting on TMDL rules, before deciding to ask a subcommittee to reconsider and redraft the letter for Executive Committee approval. Shaun McGrath summarized the status of the Good Samaritan Abandoned or Inactive Mine Waste Remediation Act (S. 1787), which has been introduced by Senator Max Baucus (D-MT). Jim Alder, WSWC staff, described the Combined Sewer Overflow Control and Partnership Act (S. 914), introduced by Senator Bob Smith (R-NH), and the Clean Water Infrastructure Financing Act (S. 1699), introduced by Senator George Voinovich (R-OH). Jim then summarized the results of the Bosma Dairy court decision.[8] A U.S. district court judge held that runoff from the over application of manure from the confined feeding operation on fields constituted a discharge in violation of its National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act (CWA). The judge also ruled that irrigation canals and drains were "waters of the United States." The committee approved a work plan that covers Clean Water Act reauthorization and administration, the Safe Drinking Water Act, interrelationships between water quality and water quantity, wetlands, and tribal water quality issues.

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[8] *Western States Water*, Issue #1316, August 6, 1999.

The Legal Committee meeting included a report on the Indian Water Rights Symposium[9] and upcoming American Bar Association Water Law Conference. Different members also reported on the following cases: *Nevada v. South Fork Band of the Te-Moak*; *Klamath Water Users Association v. Patterson*; and *Potlatch Corporation v. United States*. A draft bill, the Water Adjudication Fee Fairness Act, was discussed, as was a draft report of a working group on the Endangered Species Act and Indian Water Rights. Tim Vollman, from the Albuquerque Office of the Solicitor, Department of Interior, and Tom Pitts, a Loveland, Colorado consultant, reviewed the draft report. The committee also approved its 2000 work plan, covering general adjudication fees and federal reserved water rights, Indian water rights, federal non-Indian water right claims, transfers of water in the West, and a symposium on Water Quality Protection and Western State Water Law.

Various states also gave brief reports throughout the meetings on different issues.

The next meetings of the Council will be held in conjunction with the biennial Water Policy Seminar in Washington, D.C. on March 13-14, 2000, at the Crystal City Marriott.

[9] *Western States Water*, Issue #1322, September 17, 1999.

OTHER IMPORTANT ACTIVITIES AND EVENTS

In Memoriam

Myron Wilton Goodson passed away on April 20, at the age of 83 following an extended private battle with leukemia. His obituary read, "His family, water and the land meant the most to him." Born west of Dubois, Wyoming in 1916, he made his home near Sundance, on the Longview Ranch at the foot of Bear Lodge Mountain. In 1963, Wyoming Governor Cliff Hansen hired him as Chief of Water Development for the Department of Natural Resources, later called the Department of Economic Planning and Development. He was soon appointed as a charter member of the Western States Water Council. He served as a life-long member of the Water Resources Committee, and its Chairman during a critical drought period from 1976-1977. He retired in 1983, but continued to represent Wyoming on the Council, attending meetings with Marjorie. We will miss both of them, and our heart-felt sympathies go out to the Goodson family.

Daries "Chuck" Lile passed away on February 8, in Durango, Colorado after a two-year battle with cancer. He retired in July 1998 after 31 years of state service. He started work in 1967 in the Colorado State Engineer's Office and retired as Director of the Colorado Water Conservation Board, a position he held for six years. He was instrumental in negotiating the Southern Ute/Ute Mountain Ute Water Rights Settlement Agreement. In 1992, he was named to the Western States Water Council, and served as chair of the Water Resources Committee. We will miss his smile and laugh, his cowboy hat and boots, as much as his skills as a leader, communicator and negotiator. Our condolences go out to his family.

Council Membership Changes/News

In a letter dated October 19, **Oklahoma Governor Frank Keating** respectfully requested membership in the Western States Water Council. The Governor noted, "Oklahoma's philosophy with regard to water management is closely allied with that of the Council, not to mention the majority of the states that make up your esteemed organization.... For many years, water resource professionals from Oklahoma have attended numerous [WSWC] workshops and symposia.... I feel strongly that Oklahoma's membership...would benefit both organizations immensely."

The Governor named three members, and three alternate members, to represent the state: **Brian C. Griffin**, Secretary of Environment; **Duane A. Smith**, Executive Director, Oklahoma Water Resources Board; and **Mark S. Coleman**, Executive Director, Oklahoma Department of Environmental Quality; and as alternates, **J.D. Strong**, Director of Environmental Affairs, Office of the Secretary of Environment; **Dean Couch**, General Counsel, Oklahoma Water Resources Board; and **Jon Craig**, Water Quality Division Director, Oklahoma Department of Environmental Quality.

Steve Allred was named by Idaho Governor Dirk Kempthorne as the new head of the Idaho Department of Environmental Quality and a WSWC member. Steve served as Director of the Idaho Department of Water Resources from 1967-81, and a WSWC member from 1973-83. He worked for 17 years for Morrison-Knudsen Corporation, serving as President of its Environmental and Government Services Group, and recently he was a partner in Corporate Finance Associates, a large Northwest commercial real estate sales, leasing and management organization. The Governor said, "Steve has a unique understanding of the environmental issues facing our state. He will be very progressive in maintaining the strong balance we must have between a good environment and a good economy."

Joe Dini, Speaker of the Nevada Assembly, and a long-time WSWC member, has been named as an alternate, at his request, by Governor Kenny Guinn, due to demands on his time and a reduced level of activity. He was replaced by **Michael Turnipseed**, the Nevada State Engineer, and previously an alternate member.

Peter Evans was appointed as the new Director of the Colorado Water Conservation Board and a WSWC member by Governor Bill Owens, succeeding Chuck Lile. He had served as Deputy Director since 1993. He began his career with the Department of Natural Resources as a reclamation specialist, then received his law degree and spent five years in private practice before returning to the Department in 1990 as a legal and policy adviser to the Executive Director, specializing in water issues. The Governor said, "The continued health of Colorado's economic future and our quality of life depends largely on how well we manage our water resources. This makes the CWCB director one of the most important positions in state government.... We have complete confidence in Peter."

Wayne Haas retired as Administrator of the Idaho Department of Water Resources and as an alternate Council member. He was appointed to represent Idaho in October 1983, and served as a member of the Water Resources Committee. We will miss Wayne's expertise and hard work.

Thomas Michael Hannigan was named as Director of the California Department of Water Resources by Governor Gray Davis, and appointed as a Council member. Mr. Hannigan, a real estate broker for Colliers International, is from Suisun. He served in the State Assembly for eighteen years. He has also served as a Solano County Supervisor and mayor of the City of Fairfield.

Fred N. Pfeiffer retired as General Manager of the San Antonio River Authority (SARA) in Texas, where he served for 36 years. Under Fred's leadership, a number of projects have been completed, including a 30-foot tunnel to carry stormwater under the City of San Antonio. A long-time WSWC member, he was appointed by former Governor Mark White in 1983. Fred continues to represent Texas on the Council.

Western States Water

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

Water Law Workshop

The American Bar Association (ABA) held its 17th Annual Water Law Conference at the Sheraton San Diego Hotel and Marina in California on February 25-26. The conference drew over 250 lawyers, government officials and individuals representing different water user groups from municipal and industrial interests to agriculture and the environment. The Western States Water Council is a cosponsor. Participants were treated to lively discussions on several interesting topics, including: the federal government's role in water rights reallocation; conflicts with state law in operating federal reclamation projects; making Indian water settlements work; current litigation regarding ground water; and the impacts of total maximum daily load (TMDL) requirements under the Clean Water Act (CWA) on the exercise of water rights and on point and non-point source discharges. The conference was co-chaired by Kathleen Marion Carr, U.S. Department of the Interior, Office of the Field Solicitor, in Boise, Idaho, and Chair of the ABA Water Resources Committee, together with Tim DeYoung, with Modrall, Sperling, Roehl, Harris & Sisk, in Albuquerque, New Mexico. Both provided welcoming remarks.

Thursday's first panel discussion, "The Federal Government's Role in Water Rights Reallocation--Command & Control vs. Market Facilitator," was moderated by John Lawrence, Minority Staff Director, U.S. House of Representatives Resources Committee. The panel consisted of Hal Candee, Natural Resources Defense Council, Tom Birmingham, representing the Westlands Water District, and Peter Sly, East Bay Municipal Groundwater District.

Mr. Burningham said that the federal government should be a facilitator of water markets, and should not attempt to exercise command and control authority over projects. He stated that the Bureau of Reclamation (BOR) is using water for Central Valley Project Improvement Act (CVPIA) purposes other than the purposes that are stated in their permits, adding if the BOR wishes to use water differently, according to Mr. Burningham, it should apply to change its water use with the California State Water Resources Control Board, just as any other appropriator. He feels that the CVPIA has effectively given control of water in the Central Valley Project to "low-level biologists" from the U.S. Fish and Wildlife Service. After a short review of the history of the CVPIA, Hal Candee argued that it constitutes a "clear congressional directive" that overrides state law. He also argued that the CVPIA amended every BOR law previous to it and that water delivery contracts entered into subsequent to enactment of the CVPIA must recognize and be bound by these amendments. He stressed that the government has taken a very long time to implement the CVPIA's provisions. Most of the deadlines have been missed. Peter Sly referred to a document written by Professor Brian Gray, which suggested that fish and wildlife agencies be made proprietary water rights holders in the Bay-Delta system. He also spoke of the possibility of establishing what he called an CVP "environmental baseline account."

The next panel discussion dealt with state water law and conflicts in operating federal reclamation projects. Barbara Geigle, the U.S. Department of the Interior's Assistant Solicitor for Water and Power, moderated the panel. The panelists included: Maria Iisuka, U.S. Department of Justice; David Creekman, Nevada Assistant Attorney General; and Steven L. Hernandez, of Hernandez & Hubert, Las Cruces, New Mexico. After explaining that the laws governing BOR projects and state processes vary greatly, Ms. Geigle stated that explosive growth is leading to measures to move water and is leading to conflicts with environmental statutes. David Creekman, whose experience has been working with Nevada's Newlands Project, spoke of what he termed "constitutional federalism." He argued that there is no "clear congressional directive" for changing the operation of the Newlands Project. For the last 4-5 years, cases arising from this project have been bogged down in "minutia," with many of the conflicts involving jurisdictional and procedural questions. Steven Hernandez spoke of the dispute between New Mexico irrigation districts and the BOR which has resulted in BOR's quiet title action in federal court. Mr. Hernandez argued that the BOR's interest in the project water rights ended once the construction repayment obligation was fulfilled. While federal mediation continues, the state court adjudication has not stayed the title issue. Maria Iisuka spoke on the Yakima Basin in Washington, has been "federalized." When asked if the Endangered Species Act (ESA) provides authority for federal reallocation of water, Ms. Iisuka and Ms. Geigle agreed that they don't see how federal agencies can avoid it.

Thursday's luncheon speaker was Marc Reisner, author of "Cadillac Desert." Mr. Reisner, stated that his opinions have evolved since "Cadillac Desert" was published, and he briefly reviewed the history of water development in the West. He then addressed what he feels will be necessary to accommodate future water needs, especially aquatic life needs. Mr. Reisner expressed his belief that the deconstruction of some infrastructure will be necessary. Reallocation alone is not the answer, and politically would be bad choice. More spawning grounds are needed, which will require the removal of some marginally productive dams. He urged the more efficient use of water supplies through the removal of marketing restraints and the enhancement of water storage through the use of underground storage and conjunctive use programs. Finally, Mr. Reisner expressed his view that possible solutions may be thwarted by "consensus," which he claimed is the new incarnation of political correctness, and which is being defined today as "virtual unanimous support."

Thursday's afternoon agenda included breakout sessions on a number of topics. Participants could choose between discussions on making Indian water settlements work, issues in developing municipal water supplies, legal ethics in the water rights practice, and a technical presentation on remote sensing and surveys.

Friday morning's first panel discussion focused on current litigation regarding ground water, and was moderated by Molly Cagle, of Vinson & Elkins, in Austin, Texas. Speakers included: Rita Pearson, Director of the Arizona Department of Water Resources; Anne Schneider, of Ellison & Schneider, in Sacramento, California; and Steve Kosub, of Soules & Wallace, in San Antonio, Texas. Ms. Schneider began the discussion by presenting a history of very difficult California ground water issues. She believes, "It all comes down to money as the main issue. Who is going to pay for the importation of Colorado River water to replenish groundwater?" Steve Kosub described the Texas situation, stating that Texas follows the rule of the biggest pump. The creation of the Edwards Aquifer Authority, with its locally elected board of directors, has led to "the rule of the most votes," in the fight for control of ground water. Because it has been three years since the Fifth Circuit overturned federal assertion of control over the Edwards Aquifer, and no rules or regulations have yet been established, he believes the case will most likely return to federal court. Rita Pearson described tribal attempts to create federal reserved rights to ground water in Arizona. A reserved right to ground water would conflict directly with Arizona water law. Arizona regulates ground water under the reasonable use doctrine and no landowner has a property right to it.

In the concluding session of the conference, panelists focused on TMDLs and their impact on water rights and on point and non-point source discharges. Lori Potter, of Kelly, Haglund, Garnsey & Kahn, in Denver, Colorado, was the moderator. The panelists were: Nina Bell, Northwest Environmental Advocates, and William Myers, of Holland & Hart, in Boise, Idaho. After addressing TMDLs and non-point source pollution, Mr. Myers concluded his remarks by expressing his belief that the Clean Water Act and TMDLs will take a back seat during the 106th Congress. He predicted that the ESA will see more activity during the session. Nina Bell expressed her view that TMDLs can and must address flow issues. If they don't, she stated, she doesn't believe they will stand up in court. Ms. Bell also stated that EPA will make implementation plans a part of new TMDL regulations. She also predicted more litigation on antidegradation issues, ESA-related issues, and specific TMDLs.

Water Information Management Systems Workshop

The Colorado Division of Water Resources and Colorado Water Conservation Board hosted the 1999 WSWC Water Information Management Systems (WIMS) Workshop on June 7-9, in Denver. Some 55 people attended and participated, including state water resource information managers from fourteen states and U.S. Environmental Protection Agency and Bureau of Reclamation officials. Together they joined in presentations and discussions covering a wide array of uses of information technology -- geographic information systems, data management, imaging and modeling -- to improve water resources planning and management and water rights administration. The meeting began with brief state reports and a roundtable discussion of state water information management systems. States shared problems and approaches to finding solutions. Different state and federal activities were highlighted

In Colorado, a multiyear effort to gather, develop and analyze water resources information to improve decisionmaking has been driven by the need to comply with interstate compact requirements and related litigation in major river basins. The Colorado River and Rio Grande decision support systems are a result of these efforts, as are new tools for monitoring ground water wells. Water users and users of water resources information -- consultants and realtors -- are also demanding greater access to more and more data. Public mandates for expedited water use permitting decisions are also a catylst for change. In Colorado, each year, some 10,000 applications for well permits are processed. Permit decisions are to be made within 45 days. In Arizona, the state legislature has required that a decision on well permits be made within ten working days. Today, information technology is transforming how state water resource agencies do business -- replacing old paper files, streamlining permitting processes, and helping to more efficiently and effectively manage the burden of administering (identifying, defining, ordering by priority, and protecting) hundreds of thousands of water rights.

Conjunctive Water Use and Management Workshop

The Oregon Department of Water Resources hosted a WSWC Workshop on Conjunctive Water Use and Management in the West in Portland on July 12-14. The focus of the meeting was on the maximum beneficial use of western water resources, but also the growing practical administrative problem of protecting senior surface water rights. In the West, pioneers began developing surface waters in the late 1800s, and significant ground water development followed much later in the mid-1900s with rural electrification, electric pumps and other technological advances. As a result, the most senior water rights are usually held by surface water users. Water demands in many areas continue to grow and more and more surface and ground water systems are stressed or over appropriated. For the first time, in many areas, senior surface water users are calling for their water at the expense of junior ground water pumpers.

The changing nature of uses also has a significant impact on system hydrology. For example, in Idaho, the past development and spread of flood irrigation practices in the Upper Snake River Basin caused water levels in the mostly basalt aquifer to rise some 60 feet. The water eventually returns to the river many miles downstream in the Thousand Springs reach. There surface water users appropriated the flows. Today, upstream surface water users have improved their efficiency through conversion to sprinkler irrigation systems that save money, labor and water. As a result, about 800,000 acre-feet of water that was once diverted from the river is now left in the stream. There is a proportionate loss of water that once enhanced recharge to the aquifer, leading to falling ground water levels and spring flows. Senior surface water users dependent on spring flows are calling for the state to curtail ground water uses with junior water rights, while regulators struggle to shape an effective and equitable solution to the problem. The state can't require upstream users to continue past inefficient flood irrigation practices to maintain ground water levels and spring flows, and curtailing junior ground water uses by priority may have little long-term impact at a significant economic cost. The higher flows in the Snake River also raise other water management issues as more and more water is dedicated to protect and restore endangered and threatened salmon and steelhead runs. As western states strive to integrate management of their surface and ground waters and administer related water rights, more and more difficult conjunctive use issues arise.

Martha Pagel, Director of the Oregon Department of Water Resources (ODWR), welcomed representatives from eleven states that participated in the workshop. She outlined Oregon's growing problems and concerns and challenged those attending to develop recommendations for both technical and policy changes. Later, Fred Lissner, ODWR, addressed ground water and surface water management issues in Oregon in more detail. Others addressing conjunctive use issues in their respective states included: Karl Dreher, Director, Idaho DWR; Hal Simpson, Colorado State Engineer; Jim Holway, Arizona DWR; and Mark Jordan, Texas Natural Resources Conservation Commission. Each brought a unique perspective to the issues.

The management of water uses and administration of water rights varies from state to state. Most states apply the Doctrine of Prior Appropriation to both surface and ground water, but there are important exceptions. In Texas, overlying landowners exercise a right of absolute ownership over any water drawn from under their land, which is also referred to as the Rule of Capture. Local and regional ground water districts manage resource allocation, not the state. In Arizona, the 1980 Ground Water Act led to acceptance of a safe yield goal within designated Active Management Areas (AMAs) and the careful measurement of and accounting for all water uses, plus conservation and augmentation. However, outside these areas, there is little authority for the state to control water use. California's law has evolved around a mix of reasonable use requirements and a correlative rights theory for both surface and ground water. Regional and local boards, and not the state, are primarily responsible for ground water management.

Much of the workshop involved facilitated discussions of a wide range of issues involving defining ground water, geologic and hydrologic science, ground water and surface water administration and interference issues, and long-term management issues, such as safe yield goals, conservation measures and cumulative impacts. Further, the effects of drought and climate variations were also discussed, along with a movement towards identifying and encouraging the use of preferred water sources and requiring the development of alternative water supply plans. So-called artificial, enhanced and managed state ground water recharge programs were highlighted, including Arizona's Water Banking Authority. A number of growing interstate and international conjunctive use issues were also raised.

Participants identified a number of key elements for any successful conjunctive use program: (1) authority/jurisdiction over all water resources and water rights, which have been categorized to include surface water, ground water, effluent and other types of water; (2) ability to prevent injury and threats to senior surface water users and uses, given often over-appropriated sources and the potential for significant interference; (3) flexible authority and regulatory mechanisms to mitigate conflicts and address related short and long-term issues; (4) clear and simple regulations; (5) access to good science, good data and technical tools; (6) state financial and technical assistance; (7) adequate staffing, funding and other resources; (8) public education and involvement in decisionmaking; and (9) political support.

Indian Reserved Water Rights Settlement Symposium

The Western States Water Council and the Native American Rights Fund co-sponsored their sixth Symposium on the Settlement of Indian Reserved Water Rights Claims on September 8-10, in Missoula, Montana. The symposium drew approximately 225 participants representing tribes, states, federal agencies and private interests. Participants enjoyed an outstanding selection of speakers, as well as the hospitality of the Confederated Salish and Kootenai Tribes at a dinner and social activity. The focus of this year's meeting was on the completion of settlements currently in progress and congressional approval of settlements recently completed. Montana Governor Marc Racicot welcomed participants and emphasized the importance of water to the State of Montana. He noted the fact that Montana is home to seven tribal reservations, all of which deserve the respect due sovereign governments. Governor Racicot also touched on his State's settlement negotiation process, and shared his optimism that the recent Crow Tribe and Rocky Boys settlements will motivate Congress to refocus its energy towards approving and funding completed reserved rights settlements.

The opening session addressed the basics of the settlement negotiation process, gathering background information and the role of technicians. Carla Homstad, Historical Research Associates, spoke on the investigation process and noted some of the avenues available to determine historical tribal water use and the intent of treaty drafters in creating a reservation. She also emphasized the importance of being aware of probable bias in historical records, providing a clean, succinct, and useable document to the client, and warned that historians must avoid becoming advocates. Barbara Cosens, Legal Counsel, Montana Reserved Water Rights Compact Commission (MRWRCC), described the very complex nature of the Milk River Basin. Settlement negotiators were able to plot information on a Geographic Information System (GIS) and discovered that small changes in water management led to large changes in the amount of water available to settle the tribe's claims. Next, Jeanne Whiteing, Whiteing and Thompson, addressed the issue of conflicts of interest among technical experts, suggesting disclosure of potential conflicts among technicians and engineers at the outset of settlement discussions.

A second session concentrated on identifying parties and issues and how negotiations bind larger groups. Richard Aldrich, Field Solicitor for the Department of the Interior, limited his remarks to the context of his experience with the State of Montana. Mr. Aldrich stated that the MRWRCC has engaged in a very aggressive public participation program to determine the relevant issues and parties. This has been vital to their success in completing settlements. He emphasized the importance of binding tribal allotees in settlement negotiations and detailed the approval process before Congress, state legislatures, and tribal governments that a settlement document must complete. The Honorable Michael Nelson, Presiding Judge of the Arizona Apache County Superior Court, spoke on representation needs of the various interests involved in the Little Colorado Adjudication. Judge Nelson suggested that the federal interests are not always well represented and emphasized the great need for federal negotiating teams to be able to make final decisions or to discuss options rather than just saying "No" to settlement proposals. He also urged states and tribes to come to the table with clear positions, illustrating the current conflicting claims arising between Arizona state agencies. Professor Francis McGovern, Mediator of the Nez Perce Water Rights Case in Idaho, suggested that the role of the mediator might be that of a strategist, using any number of mediation models to reach a solution. He suggested use of the "backward induction" or "dynamic programming" model where participants decide first where they want to be, and then figure out how to get there. Art Alden, Water Rights Director for the Crow Tribe of Montana, detailed the tribe's involvement in a recently completed settlement.

The symposium's keynote address was delivered by David Hayes, Acting Deputy Secretary of the Interior. He stated that the activities of the symposium sponsors are having a material effect on the settlement process and emphasized the fact that success in this arena can only happen through consensus building. Mr. Hayes detailed Interior activities briefly summarizing a multitude of settlement negotiations, and concluded that the reason that most of these cases have lasted 10-20 years is that it is "very tough stuff." He emphasized that these matters can't and will not be resolved without leadership and courage from all sides, noting that while it only takes a few positive influences to make an enormous difference, it also takes only one lawyer or one political leader who refuses to look at the big picture to effectively kill a settlement. Mr. Hayes urged States to take political risks and see the value in settlement of tribal claims, pointing to the "enlightened leadership" found in the States of Oregon and Montana. He explained that federal agency resources are stretched extremely thin, and stated that federal agencies are on a very short leash with Congress. Describing Congress as "blissfully unaware of what we're about," Mr. Hayes confirmed the loss of institutional memory of the earlier settlement "heyday." He emphasized the dire need to re-educate Congress in regards to settlements, particularly western delegations, as Congress today is "ignorant of the benefits" of reserved rights settlements.

Following Acting Secretary Hayes, Susan Cottingham, MRWRCC Program Manager, described her organization and the status of several Montana settlements, emphasizing the need for funding and implementation. She also addressed the need for States to educate their neighbors on their efforts, in order to avoid potential conflicts in implementing settlements. Rodney Lewis, General Counsel to the Gila River Indian Community, expressed concern over an unpublished opinion from Sandra Day O'Connor of the U.S. Supreme Court that concluded if Tribes aren't going to be able to put claimed water to actual use, they should not be awarded a right. WSWC Vice Chair Mike Brophy, of the law firm of Ryley, Carlock & Applewhite, described the re-invigoration of the Ad Hoc Group on Indian Water Rights and its efforts to re-educate Congress as to the importance of reserved rights settlements. He also discussed the recent movement to make the funding of settlements mandatory instead of discretionary. There may be an opportunity to pass such legislation in the current Congress. Mike Connor, Deputy Director of Interior's Water Rights Office, reiterated the need to achieve settlements through negotiation rather than litigation, using the Wind River case and the Yakima Nation/Aquavella case as examples of the proposition that successful litigation does not necessarily equal a victory. Next, Scott McElroy, of the law firm of Greene, Meyer & McElroy, of the Colorado Ute settlement shared tribal concerns that opponents to implementation are not parties to the settlement. The opponents consist mostly of environmental groups that have no incentive to come to the table, but effectively hold a veto power over construction of the Animas-La Plata project, which may be the result of pushing the settlement through Congress without first having all the interested groups in agreement.

The next session began with presentations on financing and cost sharing for settlements. Pam Williams, Chief Counsel of the Secretary of the Interior's Water Office, stated that although cost sharing is required by 1990 Criteria and Procedures for settlements, defining the actual contributions is very difficult, with the decision as to who is contributing the water being a particularly sticky issue. Ms. Williams detailed some of the federal funding accounts available to help finance the settlement process. Funding the implementation of settlements is becoming very difficult, as they are typically funded from appropriations for the Bureau of Indian Affairs' budget, which is devastating for that agency. Funding has become a zero-sum-game, where money is taken from other agency activities to fund settlements, thus the great interest in new money and requiring mandatory settlement funding. Faye Bergan, MRWRCC Legal Counsel, next addressed cost sharing in Montana settlements. While Montana has a very large land area, it also has the lowest income in the Nation. As a result, not much money is available for State cost sharing. This has forced the State to be creative in finding settlement solutions, even combining issues in the settlement to which the State is not a party in order to achieve agreement. Stanley Pollock, Special Counsel with the Navajo Nation's Department of Justice, also spoke of dovetailing other issues with water settlements. Arizona is attempting this in the Little Colorado Adjudication, although it is not yet working. Reflecting on the lack of settlement funding in an age of budget surplus, he also expressed hope and support for mandatory funding of reserved rights settlements. Roger Fragua, Manager of American Indian Affairs, Enron Corporation, concluded explaining that Tribes offer corporate America many advantages with their regulatory structure, location and natural resources, and they should explore partnerships to help develop use of their resources and gain knowledge of the markets.

The focus of the next session was the development of tribal water rights. Rita Pearson, Director of the Arizona Department of Water Resources, noted the scarcity of water resources and the continued rapid growth Arizona expects to experience in the near future. The West is currently experiencing a paradigm shift, from the historical "grab-as-much-water-as-you-can" train of thought, to a recognition of the shared nature of the resource in the face of growing competition. Ms. Pearson described and encouraged the use of the Arizona Water Bank to address common needs for a stable, secure water supply, and prevent harm to that supply. Susan Williams, of the law firm Williams, Janov & Cooney, explained that Tribes don't necessarily share the view that rapid growth and development is good, but declared that controlled, managed growth doesn't mean that water isn't needed. She also stated that settlements need to take into account past discrimination against Tribes in the development of their entitlements to water. Ms. Williams urged Tribes to obtain judicial consent decrees for settlements, so that judicial review may be obtained if a dispute arises in the future. Christopher Kenney, from the Bureau of Reclamation's Office of Native American Affairs, estimated that $900M is needed to address the current needs of reservations, without even addressing economic development needs. Mr. Kenney stressed that quantification of water rights does not equal water development and that only about half of all settlements address the need for infrastructure. Tribes need a water development plan to assist in the negotiation and implementation process for settlements. Bruce Farling, Executive Director of Montana Trout Unlimited, concluded asserting that great economic benefit is derived by simply leaving water in streams. Mr. Farling emphasized the need to protect natural flow regimes to preserve riparian environments and fish populations.

Symposium participants toured the Flathead Reservation, which included a stop at Kerr Dam on Flathead Lake. Some of the problems confronting tribal fisheries management were described. Later, attendees were treated to a salmon and buffalo dinner at the Kicking Horse Job Corps Center, followed by a drum circle demonstration, accompanied by native dancers, and tribal flute music.

The final presentations concentrated on settlement legislation and getting bills through Congress. Michael Jackson, Minority Staff, Senate Committee on Indian Affairs, stated that he is very hopeful that the Rocky Boys settlement will be passed in the near future. He feels, though, that the outlook for other settlements is bleak as long as the zero-sum-game continues. Mr. Jackson also agreed that funding settlements "should be as that for court judgments against the U.S.," with a separate account established to automatically fund settlements once they are approved. He advocated an "old-fashioned lobbying campaign," urging participants to communicate their interest to members of Congress, agency officials, and the executive branch. A conference call with Bob Faber, Staff

Director of the House Subcommittee on Water and Power, and Steve Lanich, Minority Legislative Staff for the House Resources Committee, followed. Mr. Faber emphasized that settlements should improve a Tribe's standard of living, but should not adversely affect present water users, while maintaining fiscal responsibility. Realistic expectations will help settlement prospects. Mr. Lanich asserted that settlements that have worked have all the parties' support. He claimed that the Animas-La Plata project was delivered to Congress as a "take-it-or-leave-it" deal without agreement from all parties, and we continue to see the fallout. When presented with the proposal for mandatory funding of settlements, Mr. Faber agreed with its merit. Steve McHugh, Majority Counsel with the Senate Committee on Indian Affairs, claimed that the prospects of securing funding for settlements is "not real good" because of what he termed "macro-budget politics." Many believe this to be a good time to reduce the size of the government, despite the current budget surplus. Despite this trend, he encouraged the mandatory funding proposal.

Tim Snider, President of the Phelps Dodge Mining Company, summarized his company's involvement in settlement negotiations and participation in the Western Regional Council, which is part of the Ad Hoc Group. He expressed his view that the need for certainty in water rights demands employment of a collaborative process, as it allows for a better end-product. Martha Pagel, Director of the Oregon Water Resources Department, spoke first as a representative of Oregon Governor Kitzhaber and the Western Governors' Association in support of the mandatory settlement funding proposal. She then addressed the recent Oregon experience with the Warm Springs Tribe. She stated that the "best way to deal with Congress is not to go to Congress." She explained how Oregon and the Warm Springs Tribe were able to construct a settlement that did not require Congressional approval, thereby simplifying the process immensely. Laura Ziemer, Director of Montana Trout Unlimited's Wester Water Project, illustrated the different outcomes of "front-end" versus "back-end" environmental interest involvement in the settlement process using the Crow Tribe settlement and the Animas-La Plata problem as examples. Bruce Sunchild, Vice Chair of the Chippewa Cree Tribe, spoke of the need to continue educating Congress as to the importance of settlements and encouraged tribal representatives to secure tribal resolutions in support of the settlement funding proposal and get them out to the appropriate officials.

The Symposium wrap-up/summary was done by Professor Charles DuMars, of the University of New Mexico and Law and Resource Planning Associates. Professor DuMars reiterated the points made in the remarks of Susan Williams and Rita Pearson. He restated the fears of Tribes that if a reserved right isn't quantified, it will "go away," and also their concern with the pace of development and growth. He characterized State concerns as the "fear of loss of the existing right," which he said must be overcome. The common need that will drive settlements is the need for certainty and security. Professor DuMars suggested that we need to refocus the debate surrounding settlements and acquire a better understanding of the hydrological facts, rather than debating "practicably irrigable acreage" specifics. He also expressed the need for U.S. government agencies to come to the bargaining table with authority to make binding decisions, as they are both the biggest claimant and biggest objector in most adjudications. Timidity won't get the job done, and a stand must be taken in some situations. He emphasized the vital need for leadership in unpopular situations. Because one negative voice can undermine the whole process, the Professor urged participants to do their homework, getting everyone on board, getting to know their opposition, educating each other about your respective positions, and educating their Congressmen about all that is going on. And finally, while he felt some settlements could be achieved without it, Professor DuMars noticed the overwhelming support for mandatory funding of reserved water rights settlements.

Water Management Symposium - Total Maximum Daily Loads/Watersheds

On September 22-23, the Western Governors' Association (WGA) and the Western States Water Council (WSWC) sponsored the third in a series of seven workshops on Total Maximum Daily Load (TMDL)/Western Watersheds in Park City, Utah. Scheduled so as to coincide with the Environmental Protection Agency's (EPA) release of its proposed TMDL rules, the workshop was intended to assist interested parties in preparing comments on the proposed rules and provide EPA with an opportunity to answer questions about the rules, as well as focus on water quantity/water quality issues, particularly within the context of state watershed/TMDL strategies. Dianne Nielson of Utah, Jim Souby of WGA, and Craig Bell of WSWC, welcomed participants. Next, Don Brady, EPA explained that the proposed rules are really a proposal to change three rules. The proposal would clarify the process of listing waters and establishing TMDLs. Also, under the National Pollutant Discharge Elimination System (NPDES), it would provide a means to improve water quality pending establishment of a TMDL and provide an additional means for obtaining a "reasonable assurance" that TMDLs will be implemented. Finally, the proposed rules would amend the Water Quality Standards (WQS) program, also seeking to improve water quality, pending the completion of a TMDL.

In seeking to create a more comprehensive scheme, Mr. Brady explained that the proposed rules would require TMDLs to include an implementation plan that would address both point and nonpoint sources of pollution. State 303(d) lists would be required to contain all water bodies impaired or threatened by pollutants or pollution, although TMDLs would only be required for waterbodies impaired by pollutants. Mr. Brady explained that the definition of a "threatened" water is a waterbody that would likely be included on the 303(d) list within five years, and he felt that states have the ability to predict this. He also explained that states will be required to establish a listing methodology that will include factors used to evaluate data and methods for determining impairment, and to help the public understand how states make a listing determination. Mr. Brady also stated that although low flow may constitute "pollution" and that waterbodies may be listed as "flow impaired," TMDLs will not be required for "flow impairment." However, if a TMDL is prepared for a "pollutant," it will also have to address how the level of pollution relates to flow. This would require greater reduction of pollutants due to low flows.

States would be required to prioritize their 303(d) lists, completing TMDLs for those waters falling in the "high priority" category, which would include drinking water sources waters where Maximum Contamination Levels are exceeded or where waters are listed that affect threatened or endangered species. Under the proposed rules, waters would remain on the list until WQS are attained, new data or information indicate the waterbody has attained WQS, or new data or information indicate that the water is no longer threatened.

The proposed rules would set forth the minimum required elements of a TMDL as including: the waterbody name and location; the existing pollutant load; the deviation of the load from the amount needed to attain WQS; pollutant sources, by category or individual; the wasteload allocation for point sources; the load allocation for nonpoint sources; a margin of safety; an allowance for seasonal variation; an allowance for reasonably foreseeable growth; and an implementation plan. Mr. Brady explained that the implementation plan must provide: implementation actions; the timeline for implementation; reasonable assurances; the legal and regulatory controls; the time needed to attain WQS; a monitoring plan; milestones to measure progress; and revisioning procedures. He also explained "reasonable assurances" must demonstrate that enforceable NPDES permits will be issued expeditiously to implement waste load allocations for point sources. For nonpoint sources, they must demonstrate by specific procedures and mechanisms that load allocations for the waterbody will be implemented.

Kim Kramer, EPA, explained that the two primary objectives of the proposed rules are to achieve "reasonable further progress" towards improving water quality in impaired waterbodies prior to creation of a TMDL, and to provide "reasonable assurance" that TMDLs, once established, will be implemented. She explained that "reasonable further progress" allows for offsetting pollutant loads through market-based pollution trading by large new point source dischargers or existing dischargers undergoing significant expansion. Ms. Kramer also explained that the proposed rules would allow EPA to re-issue expired state-issued NPDES permits, which would constitute an extension of authority to the EPA. This would apply to expired permits authorizing discharges to impaired waterbodies where water quality is inconsistent with WQS in the absence of a TMDL or where inconsistent with an established TMDL. She also explained that authority would be extended to EPA to designate an animal feeding operation as a significant contributor of pollution and subject to the NPDES permit system, but only where EPA establishes a TMDL or finds that a state-established TMDL is insufficient.

Two panels were convened to discuss the effect of the proposed rules on state listing requirements and its effect on TMDL development and implementation. Don Ostler, Director of the Utah Division of Water Quality, started things off, listing processes he felt would be affected by the proposed rules. Ron Micheli, Director of the Wyoming Department of Agriculture, described the impacts he believed would be felt by the agriculture community. Kim Graber, Legal Counsel to the National Wildlife Federation, believes that although the response of environmental groups to the proposed rules has been varied, they are a significant improvement over the current process, stating that it is clearly time to focus on nonpoint sources of pollution. John Roanhorse, of the Intertribal Council of Arizona, and formerly a Federal Advisory Committee Act (FACA) TMDL Committee member, noted the importance of conflict resolution to tribes and expressed concern with data methodologies, as tribes' data is largely incomplete.

In the next session, Tom Stiles, Chief of Planning with the Kansas Department of Health and Environment, who explained his state's decision to follow the recommendations of the FACA TMDL Committee in preparing 103 TMDLs which were approved by EPA last June. He stated that it is the states' prerogative to decide how implementation will be achieved and that micro-management by EPA will not produce the desired results. Buddy Morgan, Manager of

Montgomery Alabama Water Works, expressed his belief that water quality will not improve through number crunching and continued "ratcheting down on point source dischargers." Nina Bell, Northwest Environmental Advocates, believes that TMDLs will be the centerpiece that ties all other water quality programs together, with nonpoint source loading being the biggest problem. Her biggest disappointment with the proposed rules is that they do not allow for flow restrictions. Joe Miller, of the American Farm Bureau Federation, was disappointed that agriculture continues to receive most of the blame and indicated that these new regulations would only continue to promote the trend towards large corporate farms.

Gary Beach, Administrator of the Wyoming Water Quality Division, and Mike Llewelyn, Administrator of the Oregon Water Quality Division, summarized the first day's discussions. Mr. Beach felt that workshop participants were concerned with whether the proposed rules would actually strengthen the TMDL program. He also expressed concern over the burden being placed on nonpoint sources, stating that "these proposals have not come to terms with how we address nonpoint source pollution." He also expressed concern for the timeline proposed by the rules, characterizing it as "unrealistic." Mr. Llewelyn indicated that states should have flexibility in establishing TMDLs. He disputed the idea that Congress envisioned TMDLs as the centerpiece of water quality controls, and wondered if the pollutant/pollution issue isn't a surreptitious way to get EPA into water quantity regulation.

The next day, Martha Pagel, Director of the Oregon Water Resources Department, focused remarks on state watershed strategies and opportunities for water quality/quantity integration. She stated that water rights are facing many different questions today. "It's no longer just a question of priority." People have come forward with different ways of managing the resource for long-term sustainability, and doing business in new ways that get away from the strict division between state agencies responsible for water quality and quantity. She urged government agencies working under rules established in the last century to be willing to take the risk of changing. She cautioned, however, that there must be respect for existing rights. Gary Beach added that he is encouraged by his participation in a number of interstate commissions that are dealing with quality issues although set up to address quantity. Although he agreed that states "must find a new way of doing business," he reiterated that this is a state issue, and not one for federal agencies to decide.

A series of case studies meant to provide examples of efforts to integrate water quality and quantity considerations within a watershed were considered. The first case study focused on the East Canyon Drainage Basin, of which Park City, Utah is a part. Bob Morgan, Utah State Engineer, described the hydrology of the area and the existing relationships between the interested parties. Stating that communication between state departments and divisions is critical, he described a memorandum of understanding to that effect between the Utah Division of Water Quality and Department of Natural Resources. Jay Pitkin, Deputy Director of the Utah Division of Water Quality, described the current water quality situation in the East Canyon Basin, adding that the basin is water-short. He also described watershed stakeholder group efforts to evaluate impairment and methods for improvement. Rex Ausburn, General Manager of the Snyderville Basin Sewer Improvement District, questioned whether the State Engineer deals solely with water quantity issues and whether the Division of Water Quality deals solely with quality issues. He wholeheartedly endorses the watershed approach and supports flexibility for state authority over EPA control.

The next case study focused on the Upper Clark Fork Basin in Montana. Gary Ingman, Bureau Chief of Monitoring and Data Management for Montana, provided a description of the Upper Clark Fork Basin, including the water uses and quality impacts. Gerald Mueller, Facilitator for the Upper Clark Fork Watershed Group, described the group's origin, processes and continuing responsibilities. These included the creation of a management plan that was adopted with an almost unanimous vote and later enacted into law. He described the process as difficult. Stakeholders could barely stand to be at the same table initially, but over the years built new working relationships based on respect and trust. Holly Franz, attorney with Gaugh, Shanahan, Johnson & Waterman, spoke about some of the tools used to address quantity/quality problems in the basin, including leasing provisions, wastewater reuse, drought planning, flow augmentation, return flow studies, ongoing groundwater studies, phosphate detergent bans, and a voluntary nutrient reduction program. Gerald Mueller then summarized some of the lessons learned through this process. He stated that while some issues require a top-down approach, such as the heavy metals problem being addressed through the Superfund program, nonpoint source issues must be addressed by voluntary, bottom-up approaches. Patience in building relationships and trust are necessary. Incentives to take voluntary actions, including funding, are critical, especially for farmers and ranchers, as they can't increase their prices to cover the additional costs involved.

The final case study was the Klamath River Basin of Oregon. Jim Bryant, Bureau of Reclamation, provided participants with a brief history of the Klamath Basin and its complex development. Steve Kirk, Oregon Department of Environmental Quality, described the Klamath River TMDL as "the most difficult TMDL Oregon has ever attempted," with four state-line crossings. He indicated the state's commitment to working with citizen advisory groups and to the TMDL paradigm as stated by EPA. Bud Ullman, attorney for the Klamath Tribe, expressed the tribe's belief that they will be able to reduce the size of their reserved rights claim in the Klamath Basin Adjudication if water quality is sufficient. He also expressed the tribe's approval of Oregon's attempt to address water quality concerns in the alternative dispute resolution process accompanying the adjudication. Tracey Liskey, Klamath area rancher and TMDL committee member, urged citizens to be involved in the process and influence outcomes. He also expressed his concern that reoperation of the Klamath system will leave area agriculture short of water.

A roundtable discussion addressed issues raised during both days of the workshop. Participants addressed concerns that an implication exists that the Appropriation Doctrine has somehow failed us by promoting water quality impairment. This implication was disputed by Karl Dreher, Director of the Idaho Water Resources Department, who insisted that the right to the use of water has never included the right to return polluted water to a stream. He believes that if water use results in pollution, the remedy has to be paid for by the polluter. He argued that with the cost of water being "unbelievably cheap," the cost of restoring water quality should be passed on to users. He referred to an earlier statement that the homeowners in the Park City area pay less for their water than they paid for the front doors of their homes. Mr. Dreher also contended that a right held for water quality purposes is a beneficial use under the Appropriation Doctrine.

Many participants expressed concern with the timeframe suggested by the proposed TMDL rules. They insisted that it was unrealistic, and could not possibly allow states to do all that would be required under the new rules. Many participants were also concerned with the length of the comment period provided for such a far-reaching and extensive proposal. Don Brady of EPA did announce that the decision had been made to extend the comment period by 60 days, until December 22. Another major concern was the lack of adequate resources with which to complete the work contemplated by the proposed TMDL rules, on both the state and federal agency sides.

Participants suggested that WGA and WSWC put together a collection of all funding assistance programs available. It was also suggested that a future TMDL workshop look at institutional barriers that limit participation in incentive programs. Participants felt that more work should be done to bring the Clean Water Act (CWA) up to date in a statutory fashion and urged WGA and WSWC to do more in support of CWA reauthorization. Participants also expressed a need to create incentives for agency personnel and water users to engage in risk taking in making the Prior Appropriation Doctrine address water quality issues. Finally, attendees urged both WGA and WSWC to make comments on the timeframes, funding issues and state flexibility concerns regarding the proposed TMDL rules. Both Craig Bell, WSWC, and Shaun McGrath, WGA, thanked participants for their attendance and reassured them that their comments would be taken seriously.

Western Governors' Association

Annual Meeting

The Western Governors' Association's (WGA) annual meeting was held on June 13-15, at the Jackson Lake Lodge in Wyoming. The meeting brought together the leaders of thirteen states and four Canadian provinces, including: Governors Tony Knowles - Alaska; Bill Owens - Colorado; Ben Cayetano - Hawaii; Dirk Kempthorne - Idaho; Marc Racicot - Montana; Mike Johanns - Nebraska; Kenny Guinn - Nevada; Gary Johnson - New Mexico; Ed Schafer - North Dakota; John Kitzhaber - Oregon; Bill Janklow - South Dakota; Mike Leavitt - Utah; and Jim Geringer - Wyoming; as well as Premier Ralph Klein - Alberta; Glen Clark - British Columbia, Gary A. Filmon - Manitoba; and Roy Romanow - Saskatchewan. Four plenary sessions focused on Endangered Species Management, Western Air Service, Information Technologies for Governance, and the Future of Western Energy.

Governor Jim Geringer, WGA Chairman, hosted the meeting, which opened discussing endangered species management. Jim Weaver and Jack Turnell, New Mexico and Wyoming ranchers, described proactive, voluntary efforts to conserve species. Afterwards, Jason Shogren, a University of Wyoming economist, reviewed the findings of a report on voluntary incentive systems to protect endangered species on private property. Governor Geringer said, "As Western governors, we have been working with congressional members to reauthorize the Endangered Species Act in a consensus, broad-based manner. We will persist in that effort.... However, we won't just wait for Congress to Act. We will also work with the Administration to develop tools that will assist states and landowners in their proactive efforts to conserve species so they will not end up on the endangered list." The governors support a greater state role in species management and recovery, more funding, helping rare species before they are listed, a better process for de-listing species, and greater certainty, incentives and landowner partnerships. The governors urged the Congress to enact ESA reform legislation similar to that crafted by Governor Kempthorne, while in the U.S. Senate. Kempthorne expressed his strong belief in states' rights, saying "there is no limit to what we can accomplish." A more effective and workable ESA is the WGA's number one legislative priority.

Governors Geringer and Schafer led the discussion on the role of information technology in improving government efficiency. One of the issues presented was the critical need for affordable high speed, broad band telecommunications infrastructure for rural economic development. Jim Foreman, a Wyoming rancher, showed a short slide presentation on his use of imaging and remote sensing for range management. Next, Bill Richardson, Secretary of the U.S. Department of Energy, joined the governors to discuss the future of western energy production, including coal, oil and gas, geothermal energy, hydropower, wind and solar energy resources. Economic, environmental and technological challenges were addressed, together with how western governors can best work with public and private partners to address these complex issues and realize optimal economic benefits without sacrificing our environment.

During a business session, the governors approved a new work plan and budget, and adopted a number of new, revised and sunsetting position statements. With respect to water resources management, they adopted a new resolution on "Interstate Coordination of State Watershed Plans to Implement the Total Maximum Daily Loads Programs Under The Clean Water Act." It urges the U.S. Environmental Protection Agency to work cooperatively with the states and address funding needs realistically. They amended their 1998 resolutions on "Principles for Environmental Management in the West," or "Enlibra" doctrine, and on "State Authority Regarding the Federal Hydropower Licensing Process." The latter reads in part, "The critical importance of water resources to the well being of the people of the western states underscores the necessity that federal decisions on siting and relicensing of hydropower projects give appropriate deference to state policies and decisions regarding development and operation of such projects. The states have an essential role in protecting their natural resources and environment, protecting security of existing rights, and preserving options to provide for orderly water development in the future." Lastly, the governors readopted sunsetting resolutions on "Future Drought Management in the West" and "Implementation of the National Environmental Policy Act."

The governors elected Governor Cayetano as their new chair and Governor Dirk Kempthorne as their new vice-chair. Governor Cayetano chose as his theme for the next year, "Growth on the Cutting Edge - New State Economic Strategies for the Next Century." He said, "The governors can play a key role in bringing leaders from business, labor and politics together to promote a shift from comparative to competitive advantage." For more information, visit www.westgov.org.

Abandoned Mines Remediation

Good Samaritan Legislation

On October 26, Senator Max Baucus (D-MT), joined by Senators Tom Daschle (D-SD) and Ben Nighthorse Campbell (R-CO), introduced S. 1787, the "Good Samaritan Abandoned or Inactive Mine Waste Remediation Act." The bill is aimed at removing current disincentives under the Clean Water Act for voluntary, cooperative efforts focused on improving water quality degraded by abandoned or inactive mines. In a letter to Senator Baucus, signed by Governors Marc Racicot of Montana, Bill Owens of Colorado, and Michael O. Leavitt of Utah, the Western Governors' Association commended him for introducing the bill to resolve this problem. The letter states, "Inactive or abandoned mines are responsible for threats and impairments to water quality throughout the western United States.... Often a responsible party for these mines is not identifiable or not economically viable enough to be compelled to clean up the site. Many stream miles are impacted by drainage and runoff from such mines, creating significant adverse water quality impacts in several western states." The letter continues, "Recognizing the potential for economic, environmental and social benefits to downstream users...western states, municipalities, federal agencies, volunteer citizen groups and private parties have come together across the West to try to clean up some of these sites. However, due to questions of liability, many of these Good Samaritan efforts have been stymied."

The letter explains, "EPA policy and some case law have viewed inactive or abandoned mine drainage and runoff as problems that must be address under...the National Pollutant Discharge Elimination System (NPDES) permit program. This, however, has become an overwhelming disincentive for any voluntary cleanup efforts because of the liability that can be inherited for any discharges...remaining after cleanup, even though the volunteering remediating party had no previous responsibility or liability for the site, and has reduced the water quality impacts from the site by completing a cleanup project." S. 1781 would "effectively and fairly eliminate such disincentives," which are a stumbling block to cleaning up sites and achieving water quality goals. A related WGA press release stated that the proposed legislation would "...amend the Act to protect Good Samaritans from such liability when their projects are approved by the Environmental Protection Agency." The Western States Water Council adopted, as part of its current policy position on the reauthorization of the Clean Water Act (Position No. 220), a statement in support of the cleanup of abandoned and inactive mines which asserts that in order to provide encouragement, "...the remediating party must be assured that its liability for the cleanup at the site is limited to following its cleanup plan including any amendments thereto. The remediating party should not be liable for conditions existing prior to initiation of cleanup under its remediation plan."[10]

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[10] *Western States Water*, Issue # 1328, October 29, 1999.

Animal Agriculture Reform Act

In response to WSWC concerns regarding the Animal Agriculture Reform Act (S. 1323),[11] which Senator Tom Harkin (D-IA) introduced in the last Congress, Senator Kent Conrad (D-ND) wrote Council Chairman, Francis Schwindt, also of North Dakota, stating that he agreed that Senator Harkin's bill would "greatly increase [the U.S. Department of Agriculture's] USDA's workload at a time when the Department is struggling to handle its current obligations." He also agreed that the "time frame outlined in the bill may well be overly aggressive given the amount of information that producers must understand in order to comply." Senator Conrad indicated that many of the Council's concerns with S. 1323 were addressed during a Senate Agriculture Committee hearing held on April 2, 1998. He recognized USDA's enthusiasm for "increasing technical support and research activities relating to animal waste management," but also concerns that the Natural Resources Conservation Service is not very well suited for the enforcement responsibilities anticipated in Senator Harkin's bill. Senator Conrad suggested, given the Clinton Administration's "significant" efforts to address the issue in the Clean Water Action Plan, that "Congressional action may not be necessary." [12]

Animal Feeding Operations

Unified National Strategy

On March 9, the Environmental Protection Agency (EPA) and Department of Agriculture (USDA) released their final Unified National Strategy for Animal Feeding Operations (AFOs). The Administration's Clean Water Action Plan identified AFOs as one of the most serious remaining sources of water pollution. The new strategy "discusses the relationships between AFOs and environmental and public health, establishes national performance expectations for all AFO owners and operators, and presents a series of actions that USDA and EPA will take to minimize public health impacts and improve water quality, while complementing the long-term sustainability of livestock production." Over the past several decades, economic forces, technological changes and industry adaptations have promoted expansion of confined production units, geographic separation of animal production and feed production operations, and concentration of large quantities of manure and wastewater on farms and in some watersheds. According to EPA, AFOs "can pose a number of risks to water quality and public health, mainly because of the amount of animal manure and wastewater they generate," and states have reported that "agriculture is the most widespread source of pollution in the nation's surveyed rivers."

The strategy proposes all animal feeding operations develop and implement comprehensive nutrient management plans that address manure handling and storage, application of manure to the land, record keeping, feed management, land management, and other manure utilization operations. EPA estimates that approximately 300,000 AFOs will need to develop or revise management plans. It is estimated that 95% of AFOs will be encouraged to voluntarily implement plans. The remaining

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[11] *WSWC Annual Report 1998*, pp. 59-61.

[12] *Western States Water*, # 1286, January 8, 1999.

large livestock operations (those with 1,000 animal units or more) are classified as Concentrated Animal Feeding Operations (CAFOs). They will be required to develop plans as part of permits required under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES). Permits would also be required in watersheds where CAFOs contribute to waterbody impairment and nonattainment of a designated use or "unacceptable conditions" pose significant water pollution risks. Seven key issues are identified as critical to the strategy's success: (1) building capacity for management plan development and implementation; (2) the availability of qualified specialists to help with plans; (3) accelerating voluntary, incentive-based programs; (4) performance measures to gauge success; (5) USDA and EPA collaboration to establish data sharing, coordinated research, technical innovation activities, compliance assistance, and a single center for information; (6) improving the existing regulatory program; and (7) industry involvement and leadership.

In a related matter, on July 30, in eastern Washington, U.S. District Court Judge Ed Shea published findings of facts and conclusions of law in *Community Association for Restoration of the Environment v. Henry Bosma Dairy, et al.*, which stated that as a CAFO the dairy was liable for discharges into the "waters of the United States" in violation of its NPDES permit. A pre-trial ruling bifurcated the issues of the dairy's liability and the penalties phase, in which the dairy faced fines possibly exceeding $350,000.[13] Relying on *U.S. v. Saint Bernard Parish*, *U.S. v. Ashland Oil and Transport Company*, and *Leslie Salt Company v. U.S.*, Judge Shea concluded that "Congress intended to create a very broad grant of jurisdiction in the Clean Water Act, extending to any aquatic features within the reach of the commerce clause power." He ruled that irrigation ditches and drains constitute "waters of the United States" under the Clean Water Act, and are therefore subject to strict pollution controls. Judge Shea found the dairy to be in violation of its NPDES permit due, at least in part, to an "over application of manure or animal wastewater [to the dairy's crop-producing fields] ...which causes a discharge to the waters of the United States." Although run-off is normally considered to be a non-point source discharge, which is not subject to NPDES regulation, Judge Shea held that "it is only where the over application of the manure or wastewater to...fields by the CAFO owner or operator or its agents is the cause of the discharge that there is a violation of the [Dairy Waste Management Plan] NPDES permit and the CWA." Agricultural organizations fear Shea's ruling may potentially limit irrigation canal operations by forcing districts to keep the water in their canals clean--not just water that spills back into a river. Judge Shea also held that Bosma's dairy remains liable even though improvements at the dairy alone won't make the Yakima River pristine. The judge said penalties awarded against Bosma will deter further pollution. He indicated that he hoped other polluters will learn of the fines and will modify their behavior.

Animas-La Plata Project

The Bureau of Reclamation announced its intent to prepare a draft supplemental environmental impact statement (DSEIS) on the Administration's so-called Animas-La Plata (ALP) ultralite proposal, that was released on August 11, 1998. The key components of the new plan involve the further down-sizing of the proposed dam and reservoir, limiting storage to municipal and industrial water uses, and adding a non-structural element. The off-stream storage reservoir would hold about

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[13] *Western States Water*, Issue #1316, August 6, 1999

90,000 acre-feet of water, with a minimal amount of "dead" storage, and would be fed by an inlet conduit and pumping plant (with a capacity of about 240 cubic feet per second). It would be located at the Ridges Basin site. The total depletion from the Animas River and San Juan River Basin would be no more than the 57,100 acre-feet (af) per year allowable under a Fish and Wildlife Service biological opinion to protect endangered fish. Other currently authorized project features would be deauthorized. Consumptive use for municipal and industrial purposes would be allocated as follows: Southern Ute Tribe 19,980 af; Ute Mountain Ute Tribe 19,980 af; Navajo Nation 2,340 af; ALP Water Conservancy District 2,600 af; San Juan Water Commission 10,400 af; and the remainder lost to evaporation. Under this allocation, the tribes are still about 13,000 af short of their total depletion rights recognized in the Colorado Ute Water Rights Settlement. Therefore, the Administration would establish a $40M water acquisition fund to purchase water rights from willing sellers, or allow the tribes to use the money for on-farm development, water delivery infrastructure or other economic development. It's initial proposal allowed just 50% of the money to be redirected.[14]

The Alternative proposals to be considered in the DSEIS are: (1) the Administration's proposal with an added recreation component, raising reservoir conservation storage by about 30,000 af to 120,000 af; (2) the ALP Lite Reconciliation Plan, developed as part of a public process supported by former Colorado Governor Roy Romer and Lieutenant Governor Gail Schoettler with a 260,000 af reservoir with some irrigation; (3) the Animas River Citizens' Coalition proposal to meet settlement water needs through the purchase of irrigated lands and water rights near the reservations; (4) a variation of the Administration's proposal that would supply non-Indian water needs from sources other than Ridges Basin Reservoir; (5) the Citizens Progressive Alliance proposal to allow the tribes to lease their settlement rights and leave their water in the stream, with the economic value of such flows calculated to include hydropower production, water quality and other benefits; and (6) the no action alternative. Scoping meetings were held in Durango, Colorado on February 2, in Farmington, New Mexico on February 3, and in Denver on February 4.

Border Water Issues

Mexico

The International Boundary and Water Commission (IBWC), Western Governors' Association (WGA), U.S. Bureau of Reclamation and Mexico's National Water Commission (CNA) sponsored a drought workshop in El Paso, Texas on October 12-13. The meeting was an extension of a series of drought workshops held throughout the United States. Its purpose was to improve communication, share information and explore problemsolving approaches to issues related to drought and water management in general. Opening remarks were presented by U.S. and Mexican Commissioners, John Bernal and Arturo Herrera, as well as Eluid Martinez, Commissioner of the Bureau of Reclamation, and John Baker, a WSWC member and member of the Texas Natural Resources Conservation Commission. Mr. Martinez called for an open-minded dialogue among the participants regarding the technical and political preparations needed to address future water

[14] *Western States Water*, Issue #1288, January 22, 1999.

management challenges in both countries. He said the El Paso-Juarez region was unique, divided into two countries and three different states, and might serve as a model for future problemsolving. Separate panels focused on the Rio Grande/Rio Bravo and the Colorado River Systems in both countries. Speakers addressed participants in both languages with the help of translation devices.[15]

A panel on the Colorado River, moderated by WSWC Associate Director Tony Willardson, included Bill Bennett, California Department of Water Resources (DWR), Darrel Jordan, Arizona DWR, and Federico Perez, CNA. They spoke on current drought conditions, water resources planning and drought management practices, and case studies of successful programs, as well as barriers to success. The Rio Grande panel included Carolyn Brittin, Texas Water Development Board, Don Lopez, New Mexico State Engineer's Office, and a number of CNA officials and officials from the Mexican Technological Institute on Water.

The majority of the discussion revolved around the Rio Grande watershed and regional water needs. Mr. Bernal summarized the history of the IBWC, its current activities, the 1906 Convention dividing the waters of the Rio Grande and the Treaty of 1944 (allocating the waters of the Colorado River between the two countries). He provided the context for understanding major issues in the Rio Grande, noting the basin is home to over 10 million people, many drawn to the region to work in the hundreds of factories and farms. Agriculture accounts for 80% of surface water use. Commissioner Bernal noted the need for water education, water supplies secure from drought and pollution, the involvement of all stakeholders in planning and implementing plans to address the area's water problems, and a willingness to negotiate agreements between neighbors. Growing demands along the border and years of drought have raised tensions.

Commissioner Herrera also called for proactive measures designed to prevent emergencies, and also emphasized the need to educate both the public and politicians regarding water supply problems. He noted that the needs of the upper Rio Bravo (Rio Grande) are different than on the lower river reaches. He also raised issues related to ground water use and management along the border. He discussed efforts to modernize and expand Mexico's data gathering network, identify critical areas involving both surface and ground waters, and water quality as well as water quantities. He raised some concerns with respect to water quality on the Colorado River and ecological issues regarding the river's delta. He noted that existing institutions, organizations and programs have the potential to promote a "meeting of the minds" between our two countries, but that resolving conflicts requires a "global perspective."

WSWC member Charles DuMars of New Mexico was a featured keynote luncheon speaker. His remarks focused on three steps towards a greater understanding and ability to address border water issues, including drought. First, he called for development of better data and a water atlas covering the border. Second, he suggested water storage and system distribution efficiencies might be improved. Lastly, he called for an end to what he referred to as the problem of "blank maps." In preparing his address, he was surprised that he could not find any maps of the entire Rio Grande basin. Each country's mapping efforts end at the border, and so it seems does our understanding of

[15] *Western States Water*, Issue #1326, October 15, 1999.

each others' water-related challenges. We need a broader vision transcending political boundaries. Others' suggestions involved development of a regional transboundary drought planning program, with appropriate definitions of drought and related triggers for action, finding funding for bi-national efforts, public education and trust building.

Canada

In February 1998, the Governments of the United States and Canada asked the International Joint Commission (IJC) to address the issue of water use along their common border. The reference was a result of an ill-defined proposal to export water by tanker from Lake Superior, as well as other potential water uses affecting the Great Lakes and other areas of the United States and Canada. In part, the letter read, "The Governments are concerned that individual projects of apparently minor effect will set a precedent of bulk removal of water from the Great Lakes basin, opening the Great Lakes and other water bodies to subsequent water removal initiatives, with unpredictable consequences.... Boundary water resources continue to be the subject of ever-increasing demands in the light of expanding populations.... The Governments are concerned that current management principles and conservation measures may be inadequate to insure the future sustainable use of our shared waters."[16] The governments asked the IJC to review and report on the following matters: (1) existing and potential consumptive uses of water; (2) diversions of water in and out of the transboundary basins, including withdrawals of water for export; (3) the cumulative effects of existing and potential diversions, and removals of water, including removals in bulk for export; and (4) the current laws and policies as may affect the sustainability of the water resources in boundary and transboundary basins. First priority was to be given to an examination of the Great Lakes Basin, with interim recommendations for the protection of the waters of the Great Lakes to be made within six months, and a final report by February 2000. The Governments also directed the IJC to address any additional work that might be required to assess and "better understand the implications of consumption, diversions and removal of water, including removals for export from other boundary waters, waters of transboundary basins, and groundwater of shared aquifers."

In an interim report dated August 1999, the IJC recommended a temporary moratorium be placed on permits for any new bulk sales or removals of surface or ground water from the Great Lakes, with some exceptions. The IJC further recommended a binational effort to improve monitoring of water uses, as well as examine "their individual and cumulative impacts on the integrity of the Great Lakes Basin ecosystem." The recommendations also addressed ground water uses and related research, enhanced water conservation and demand management strategies, and the use of existing institutions.

The IJC also began preparing a potential study plan for the rest of the border. In response to a request for information and assistance in this effort, WSWC Assistant Director Tony Willardson was named to the IJC study team. IJC commissioners and staff met with western state water officials from Idaho, Montana, and Washington in Spokane, on November 18. Officials from Alaska and

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[16] *Western States Water*, Issue #1333, December 3, 1999.

North Dakota participated by phone. IJC Commissioner Thomas Baldini, the U.S. Section Chair, explained the reference and reviewed the interim report. A draft scope of work for the rest of the border was presented and each state briefly described available data on potential demands, diversions, ground water use and legal and institutional topics. The states' comments have been used to revise the potential scope of work, which will be considered by the full IJC and then both governments as part of the IJC's February 2000 report.

In a related matter, a group of U.S. congressmen representing Great Lakes States and Florida, led by Bart Stupak (D-MI), introduced a bill on July 22, to prohibit the export of bulk fresh water from the Great Lakes or other fresh water sources. H.R. 2595 stated, "No bulk fresh water may be exported from the United States...," i.e., "fresh water extracted from a lake, river, stream, spring, well, aquifer, glacier, or other natural source of fresh water, or ground water, in amounts intended for transportation by tanker or similar form of mass transportation, without further processing." Drinking water in containers intended for personal use is excluded from the definition. The moratorium could only be lifted, following completion of a final report by the International Joint Commission, by specific federal legislation or regulation of exports. The bill was referred to the House Committee on International Relations, but no further action was taken.[17]

Clean Water Act

After the release of the President's FY2000 budget request in February 1999, serious questions were raised over EPA's proposed spending cuts for Clean Water Act (CWA) state revolving loan funds. Rep. "Bud" Schuster (R-PA), Chairman of the House Transportation and Infrastructure Committee responded, "With $139 billion in unmet needs for clean water infrastructure nation-wide, we should be increasing, not decreasing our investment in clean water." Rep. Sherwood Boehlert (R-NY), Chair of the Water Resources and Environment Subcommittee, called cuts for state revolving loan funds (SRFs) "unconscionable." On February 23, Rep. Boehlert's Subcommittee held a hearing at which three governors presented their views on the Clean Water Act (CWA), as well as the views of the National Governors' and Western Governors' Associations. In addition to agreeing more money needs to be spent on clean water programs, Governors Jim Geringer (R-WY), George Pataki (R-NY), and Parris Glendening (D-MD) addressed many other issues.

Governor Geringer highlighted parts of the Park City Principles and Enlibra Doctrine, as they relate to clean water issues. He emphasized voluntary, collaborative, cooperative and flexible measures, as opposed to "a prescriptive, top-down, command-and-control type of approach.... We do not argue about the objective of clean water at all. But we do take issue with EPA's continual focus on demanding that the states follow their process, their pathways with little attention given to the result." Governor Geringer specifically mentioned total maximum daily load (TMDL) issues, the Clean Water Action Plan, and Section 319 funding.[18] As Governor of Wyoming, he questioned EPA's position that 319 funds should be used to "implement state duties only under an EPA Plan,"

[17] *Western States Water*, Issue #1322, September 17, 1999.

[18] *Western States Water*, Issue #1293, February 26, 1999.

as well as the unilateral adoption of the federal Clean Water Action Plan, both implemented without specific legislative authority. He used as opposing examples Wyoming's successful voluntary efforts to clean up Muddy Creek, and EPA's rigid requirement for unified watershed assessments.

As the WGA Chair, Governor Geringer focused on three priority CWA issues: (1) "Good Samaritan" cleanups of inactive or abandoned mines; (2) state Section 401 certification authority; and (3) arid lands issues. He called for protection for third party remediating agencies that step up to clean up runoff from abandoned mine sites for which they have no liability or responsibility, in order to further encourage remediation of sites that adversely impact many miles of western streams. He expressed WGA's interest in the federal relicensing of more than 100 hydroelectric projects in the West between now and 2010, and opposed industry efforts to exempt such facilities from state certification requirements and conditions under Section 401. He also highlighted arid land issues, noting the need for flexible criteria and standards in the West, with its "countless ephemeral streams, effluent-dependent streams, and man-made water conveyance systems [that] flow only in response to sporadic precipitation, snowmelt, runoff, wastewater discharges, or the conveyance of water or reclaimed water intended for specific purposes."

Governor Geringer specifically reaffirmed a series of nine WSWC recommendations on pollution prevention programs, watershed management, state revolving funds (including minimum federal funding of $2.4B annually for at least five years), water quality standards, the use of reclaimed waters or effluent, the Section 404 program, expressions of policy in Sections 510(2) and 101(g), total maximum daily load (TMDL) development, and Section 319 funding. He concluded, "Our purpose is to promote changes that create a safer, healthier environment in a more cost-effective manner.... The Act is not in need of major repair. The arid nature of Western states presents unique concerns.... The Clean Water Act should continue to ensure that the states make the crucial decisions on water quantity and quality actions.... Our states have considerable expertise in integrating water quality criteria with our longstanding authority to allocate water resources."

In November 1998, the WSWC adopted a position and sent a letter to EPA Administrator Carol Browner supporting a new revised allotment formula for state and interstate monies appropriated under Section 106 of the Clean Water Act.[19] In part, the letter stated that the proposed formula revisions recognized changing population growth patterns and dynamic water quality problems, as well as current impairment data, workload issues and non-point source pollution problems. All western states benefited from the proposed revisions and the letter urged Ms. Browner to implement the new formula "with all due haste."[20]

In a May 6, 1999 response, Michael Cook, EPA's Director of the Office of Wastewater Management, stated that concerns over the revised allotment formula raised during the public comment period led EPA to convene an expanded Section 106 Formula Work Group. To ensure equal representation for States from all ten EPA Regions, officials from Iowa, New York, Utah and Washington were added. The Group reached an agreement that was presented to Charles Fox, EPA

[19] 63 *Federal Register* 59870

[20] *Western States Water*, Issue #1304, May 14, 1999.

Assistant Administrator for Water, and which would be used for determining state allotments for FY2000 and beyond. The revised formula will be used with the following modifications. The 21 states and territories that received no increase in their FY1998-99 allotments will be guaranteed their same allotment in FY2000, plus an inflation allowance, while the remaining 35 entities will receive the same amount in FY2000 as in FY1999, less an amount necessary to fund the inflation increases for the other 21 entities. These FY2000 allotments will become new funding floors for each state.

In the future, should additional funds be made available under Section 106, the funding floors will be adjusted upward based on the Consumer Price Index, with any remaining funds distributed under the revised formula. All states will participate equally should there be any decrease in future Section 106 funding. As a result of these changes, other earlier "modulating procedures" limiting funding decreases to 5% annually and 20% overall were eliminated. A 10% cap placed on a state's share of any single formula component was retained. As modified, the expanded Work Group agreed to the revised formula and its six components and their supporting data sources. Mr. Cook's letter included a summary response to public comments on the revisions.

Endangered Species Act

On January 15, the Departments of the Interior and Commerce and EPA published a draft Memorandum of Agreement (MOA) in the Federal Register regarding procedures to enhance coordination under the Clean Water Act (CWA) and the Endangered Species Act (ESA). The draft MOA addressed how EPA, the Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) intend to exercise their respective statutory and regulatory authorities. Under the MOA, interagency coordination teams would be established at the regional and field office level to foster early and recurring collaboration on various CWA and ESA activities. These teams would meet regularly to identify priority areas of concern and estimate workload requirements. Further, an elevation procedure would be used to resolve concerns that may arise between the federal agencies and help avoid delays and speed the completion of consultations under ESA Section 7.[21]

The MOA states that EPA will propose amending its water quality standards regulations[22] to require that they are not likely to jeopardize the continued existence of ESA-listed species or destroy or adversely modify designated habitat. It would also require that mixing zones or other variances granted by states or tribes would not likely result in the jeopardy of listed species, with the adoption of site-specific criteria where necessary to avoid the likelihood of jeopardy. In addition, it called for EPA and the Services to conduct a national consultation on EPA's recommended aquatic life criteria published under CWA Section 304(a), within 18 months of executing the MOA. Thereafter, separate individual consultations would not be required of EPA when approving state or tribal aquatic life criteria that are identical to or more stringent than those recommended, except where new species are listed that may be affected.[23]

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[21] *Western States Water*, Issue #1289, January 29, 1999.

[22] 40 CFR 131

[23] 64 *Federal Register* 2742

The scope of the upcoming triennial review of water quality standards, to be undertaken by states and tribes, was also to be discussed, with EPA and the Services providing input into the standards development process. Where available information supports a determination that existing standards are not adequate to avoid causing jeopardy to a listed species, EPA will work with the state or tribe to revise the standards. The MOA also provides a framework under which EPA and the Services would coordinate action with regard to permits issued by states or tribes under CWA Section 402, the National Pollutant Discharge Elimination System (NPDES). EPA may object to the permit, if it determines that the permit is likely to adversely affect listed species and the permit is subject to objection as being outside the guidelines and requirements of Section 402(d). If their concerns cannot be resolved, EPA will use the full extent of its CWA authority to object to the permit, which may include its veto authority. The CWA gives states and tribes primary responsibility for administration of the water quality standards and NPDES permitting programs, with EPA playing a carefully delineated oversight role. The MOA does not augment EPA's existing oversight authorities under CWA Section 303(c) or Section 402, but seeks to ensure that the needs of listed species are taken into account. The notice claimed that the draft MOA will not override traditional state or tribal authority or fundamentally alter relationships between the states, tribes and EPA.

On March 31, environmental and commercial fishing groups filed suit claiming that the operation of four federal dams and reservoirs on the Lower Snake River violated provisions of the Clean Water Act (CWA) by creating river conditions lethal to already endangered and threatened salmon and steelhead runs. *National Wildlife Federation v. U.S. Army Corps of Engineers* was filed in the Federal District Court in Portland, Oregon. The plaintiffs included the Earthjustice Legal Defense Fund and the Pacific Environmental Advocacy Center, on behalf of the National Wildlife Federation, Idaho Wildlife Federation, Washington Wildlife Federation, Pacific Coast Federation of Fishermen's Associations, American Rivers, the Institute for Fisheries Resources, Idaho Rivers United, and the Sierra Club. They assert that the slack water reservoirs created by the dams allow summer water temperatures to reach levels lethal to salmon, and that the uncontrolled release of water over the dams' spillways in the spring leads to high levels of nitrogen gas in the water.

The plaintiffs point out that the CWA requires the Army Corps of Engineers, which operates the dams, to comply with water quality standards set by the State of Washington. They also claim that data gathered by the State of Washington and EPA show that conditions created by the dams violate state standards, and the complaint asks the court to order the Corps to resolve the problems. While not asking for the removal of the dams, the plaintiffs do point out that removing the dams' earthen portions may be the best way to resolve the temperature and dissolved gas problems. Earthjustice Legal Defense Fund attorney Kristen Boyles stated, "There may be several different solutions to the water quality problems with these dams. But unless and until federal dam operators acknowledge that there is a problem that they are responsible for, we will never arrive at a solution."

In 1978, the National Wildlife Federation (NWF) brought suit against then EPA Administrator Ann Gorsuch citing similar environmental impacts, temperature changes and supersaturated nitrogen levels, in arguing that dams were point sources of pollution that required a NPDES permit. While the federal District Court for the District of Columbia found in favor of NWF, that decision was subsequently overturned on appeal. The appellate court found that dams were not point sources, adding nothing to a waterway, and the Congress didn't envision CWA regulation of dams.

Total Daily Maximum Load Rules

In August, EPA published in the Federal Register, "Proposed Revisions to the Water Quality Planning and Management Regulation," in order to "address issues of fundamental importance to cleaning up our Nation's polluted waters. Listing impaired and threatened waters and establishing [Total Daily Maximum Loads] TMDLs are fundamental tools for identifying remaining sources of water pollution and achieving water quality goals." Under Section 303(d), states, territories, and authorized tribes (collectively referred to as "states") are required to develop lists of impaired waters. These are waters that do not meet water quality standards, even after point sources of pollution have installed the minimum required levels of pollution control technology. States must establish priority rankings for waters on the lists and develop TMDLs for listed waters. A TMDL specifies the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards, then allocates pollutant loadings among point and nonpoint pollutant sources. EPA must approve or disapprove state lists and TMDLs. If a state submission is inadequate, EPA must establish the list or the TMDL.

In 1996, EPA's Office of Water felt that there was a need to evaluate EPA's and the states' implementation of their Section 303(d) responsibilities. EPA convened a committee under the Federal Advisory Committee Act (FACA) to undertake such an evaluation and make recommendations for improvements, including recommended changes to the TMDL regulations and guidance. The TMDL FACA committee was comprised of 20 individuals with diverse backgrounds, including agriculture, forestry, environmental advocacy, industry, and State, local, and Tribal governments. On July 28, 1998, the committee submitted a final report containing more than 100 consensus recommendations, a number of which would require regulatory changes. These recommendations helped guide the development of the proposed revisions to the TMDL, NPDES and water quality standards regulations.

Initially, EPA had provided a period of sixty days for interested parties to submit their comments on the proposed rules. After discussions with a number of interested groups, including the Council, EPA extended the comment period by an additional sixty days, until December 22, 1999. Finally, in response to congressional pressure, the agency again lengthened this comment period by another thirty days, with final comments due on January 20, 2000.

As reported earlier herein, the Council cosponsored a September symposium on TMDLs and State Watershed Strategies in Park City, Utah. Further, Don Brady, EPA, addressed the WSWC's Water Quality Committee at its August meeting in Jackson Hole, Wyoming. A TMDL subcommittee was organized to formulate the Council's official comments. Through a series of conference calls and meetings, the Subcommittee fashioned the comments which were eventually finalized and submitted to EPA in early January, 2000.

Clean Water Action Plan

Unified Federal Policy for a Watershed Approach

On June 14, as called for by President Clinton's Clean Water Action Plan (CWAP), the Departments of Agriculture (USDA) and Interior (DOI) released a working draft of a proposed

Unified Federal Policy for a Watershed Approach to Federal Land and Resource Management (UFP) as a starting point for discussion and consultation with States, tribes and others. Official publication of the proposal in the Federal Register, along with a 90-day public comment period, was anticipated later. The CWAP directed USDA and DOI to develop a unified federal policy to "provide a framework for a watershed approach to management of federal lands and resources." The UFP aims to coordinate efforts to assess watersheds under federal management, protect and restore priority watersheds, and "work with States and tribes in efforts to protect and improve water quality." Eighteen specific commitments are proposed in four general areas, along with an implementation schedule, with federal land managers working together in watersheds. These four areas include: consistent watershed assessments; improving watershed management; consistency and compliance with water quality requirements; and enhancing collaboration with States, tribes and others.[24]

In the area of watershed assessment, the proposed federal agency commitments include: (1) using a science-based approach to watershed assessment; (2) developing and implementing common procedures for delineating, assessing, and classifying watersheds; and (3) conducting watershed assessments for federally managed watersheds. Under improving watershed management, federal land management agencies propose to: (a) select specific watersheds as priorities for management and restoration; (b) identify certain watersheds on federal lands for special protection; (c) incorporate watershed management goals into plans and programs; (d) improve watershed conditions through restoration and adaptive management; and (e) assist States and tribes in developing science-based Total Maximum Daily Loads (TMDLs). To improve consistency and compliance, the agencies propose to: (1) review agency policies to incorporate watershed management principles and meet requirements for preventing and controlling water pollution; (2) review agency processes for use of natural resources; and (3) develop common understanding of integration of best management practices, TMDLs, and water quality standards. In order to improve collaboration, the federal land management agencies propose to: (a) enhance collaboration among the federal agencies; (b) improve cooperation with States, tribes and communities; (c) expand opportunities for public participation; (d) expand opportunities for dialogue with private-sector landholders; (e) coordinate monitoring; and (f) share training, information and resources. The federal land management agencies are interested in the following questions: How can they coordinate and better mesh their policy proposals with state and tribal water quality and watershed programs? What will be the potential impacts of their policy proposals on state and tribal water quality and watershed programs? Would any of these policy proposals seriously hinder state or tribal water quality protection and watershed management efforts?

Unified Watershed Assessments

On June 22, the Wyoming Association of Conservation Districts, joined by 37 plaintiffs, filed a lawsuit in the U.S. District Court for Colorado challenging the legality of the adoption of the Clinton Administration's Clean Water Action Plan (CWAP). It alleges that the promulgation and implementation of the CWAP violates the U.S. Constitution's Fifth Amendment, the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), the Administrative Procedures Act (APA), the Intergovernmental Cooperation Act (ICA), the Regulatory Flexibility Act, the Unfunded Mandates Act, the Federal Land Policy and Management Act, the National Forest Management Act,

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[24] *Western States Water*, Issue #1310, June 25, 1999.

the Multiple Use Sustained Yield Act, and related Executive Orders. Among the many violations of law alleged by the complaint is that the CWAP was not subjected to the APA's rulemaking requirements, NEPA's public comment requirements, nor the ICA's state and local government cooperation requirements. The Association (WACD) complained that CWAP sought to expand EPA's jurisdiction under the CWA by mandating development of Unified Watershed Assessments (UWAs), covering the health of every watershed within each state. The complaint alleges that the UWA rule was never released in draft form for public review or comment. EPA did allow a seven day review of the draft by state and federal agencies, but the complaint notes that the State of Wyoming did not even "receive its draft of the UWA and request for comments until after the close of the seven day comment period." Wyoming refused to prepare the required UWAs "because of the extremely short time frame given to the State to complete this project." EPA subsequently withheld Wyoming's CWA Section 319 funding allocation for non-point source management programs --some $900,000 -- "primarily used by conservation district members of the Plaintiff WACD for on-the-ground stream restoration projects."[25]

The complaint also alleges that the CWAP redefines non-point source pollution as "polluted runoff," and claims that polluted runoff includes "a number of activities that may be regulated as point sources under the [CWA]." The WACD complains that EPA has given itself authority to "establish wasteload/load allocations (TMDLs) for all non-point source pollution within an entire watershed," and has also expanded its authority on federal lands by mandating that all public lands be managed according to a "Unified Federal Policy" for watershed management.[26] Further, by mandating the development of a "national strategy" to control confined animal feeding operations (CAFOs), the complaint alleges that the CWAP expands federal authority over private lands as well. Moreover, "It is EPA's position that in impaired category watersheds... EPA can combine individual [animal feeding operations] throughout an entire watershed into a CAFO. Once these units are designated as a CAFO, the EPA can require a permit for each individual operation." For more information, contact Karen Budd-Falen or Marc R. Stimpert, attorneys for the plaintiffs, Budd-Falen Law Offices, Cheyenne, Wyoming, (307) 632-5105.

Colorado River Basin

Under the 1922 Colorado River Compact, California was apportioned the use of 4.4 million acre-feet (Maf) of water a year. California's water use has at times reached 5.2 Maf, when water surplus to the other basin states' needs has been available. However, growing demands in the other basin states and the recognition of water banking opportunities are drying up this "surplus" water. The threat of an extended drought and hydrologic shortages with potentially catastrophic losses in the basin, including California, have led to negotiations over ways to allow states to set aside current and future surpluses, within the legal limits of the "Law of the River." The other basin states have expressed a willingness to accept a flexible definition of water "surpluses," and allow California 15 years to take the necessary steps to implement a plan to reduce its Colorado River water use. A number of significant events occurred during the year.

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[25] *Western States Water*, Issue #1312, July 9, 1999.

[26] *Western States Water*, Issue #1310, June 25, 1999.

State and local officials debated a so-called "California 4.4 Plan," which was the subject of a state legislative hearing on March 17.[27] While California state policy encourages agricultural water districts to conserve, market and transfer water to municipal use, the Colorado River is regulated by federal law. Colorado River water use is governed by a complicated queue of rights, priorities and entitlements. For example, the Metropolitan Water District of Southern California (MWD) holds rights junior to the Imperial Irrigation District (IID) and other irrigation districts, but MWD may still exercise a claim to unused agricultural entitlement water. IID and San Diego negotiated an agreement to transfer conserved water to the city, but it would require MWD's cooperation or at least forbearance in not claiming a right to the use of conserved waters, thereby allowing this water to be transferred to San Diego. MWD owns and operates the 1.2 Maf Colorado River Aqueduct, serving municipal needs in much of the Los Angeles Basin and San Diego. MWD must keep the aqueduct full to supply its members, but that may require the support of the irrigation districts and San Diego on issues related to river operations and federal surplus guidelines, a conjunctive use program in the Coachella Valley, and other actions. In 1998, some 3 Maf of Colorado River water flowed unused to Mexico, but Colorado River water available to MWD and other California interests in dry years is limited.

At the March hearing, U.S. Interior Secretary Bruce Babbitt warned Californians that he would soon begin the process of promulgating new criteria for the operation of Colorado River facilities, the declaration of "surpluses," and the apportionment of its waters. He added that the rules would be "less favorable to California unless a [IID/San Diego] transfer plan is approved," as well as other actions to reduce California's use to its 4.4 Maf entitlement. In part, California's plan calls for the transfer of 200,000 acre-feet of water from IID to the San Diego County Water Authority, with another 20,000 acre-feet of water salvaged by lining the All-American Canal.

On May 18, the U.S. Bureau of Reclamation announced in the *Federal Register* its intent to address the need for development and implementation of specific criteria "that will guide the Secretary's annual decision regarding the quantity of Colorado River water available for delivery to the Lower Basin States."[28] The demand for water in the Lower Basin has exceeded its 7.5 Maf apportionment and promulgating surplus criteria would "provide more predictability to States and water users." Reclamation also held a series of public scoping meetings concerning: (1) the need for the development of surplus criteria; (2) the format for the criteria (either by revising the Long-Range Operating Criteria set forth in Article III or by developing interim criteria); and (3) the specific issues/alternatives to be analyzed in the National Environment Policy Act (NEPA) process.

Other important events included an agreement between IID, MWD and the Coachella Valley Water District, which quantified their respective Colorado River water entitlements after years of uncertainty, thus helping facilitate the transfer of water between IID and the San Diego County Water Authority.[29] Also, a final rule, published in the *Federal Register* on November 1, authorized

[27]*Western States Water*, Issue #1298, April 2, 1999.

[28]*Western States Water*, Issue #1309, June 18, 1999.

[29]*Western States Water*, Issue #1316, August 6, 1999.

interstate agreements for the storage of Colorado River water off-stream for future use, facilitating the use of Arizona's water bank by Nevada and California. On December 7, Interior published notice of its intent to prepare an environmental impact statement (EIS) on development of interim criteria to determine whether or not surplus conditions exist.[30]

At the Colorado River Water Users Association's annual meeting in Las Vegas, Nevada on December 17, Interior Secretary Bruce Babbitt praised stakeholders for their cooperation in negotiations designed to resolve a number of Colorado River water management issues. Babbitt called on the other Colorado River Basin States to support a "fair accommodation between providing California a reasonable opportunity to effect a transition to their entitlement and the concerns of the other states for a high degree of security based on maintaining adequate water supplies in storage." He said, "In partnership with the States, Tribes and others, we have taken on many long-standing Colorado River issues over the past five years. Some questioned whether we could ever make any progress on these issues...but we have demonstrated that accomplishment is possible if we work together to achieve consensual solutions."[31]

Drought

National Drought Policy Commission

On January 12, Agriculture Secretary Dan Glickman announced the establishment of a new National Drought Policy Commission to provide advice and recommendations on the creation of an integrated, coordinated Federal policy designed to prepare for and respond to drought emergencies, in accordance with the National Drought Policy Act, which President Clinton signed on July 16, 1998 (P.L. 105-199). The Commission was directed to study and review existing federal, state, local and tribal laws and programs relating to drought. The Secretary of Agriculture chairs the 16-member Commission. Other members include the Secretaries of Army, Commerce, and Interior, the Director of the Federal Emergency Management Agency, and the Administrator of the Small Business Administration (or their designees). The President was to appoint two governors nominated by the National Governors' Association - one east and one west of the Mississippi, one person nominated by the National Association of Counties, and another nominated by the U.S. Conference of Mayors. On July 1, Secretary Glickman announced the appointment of six at-large members to represent groups acutely affected by drought emergencies -- rural and urban water associations, the agricultural production community, fishing and environmental interests, and Native Americans. They were: Ane Deister, California; A. Leon Smuthers, Kentucky; Brian Schweitzer, Montana; Ernesto Rodriguez, New Mexico; Robert L. Miller, Oklahoma; and Robert C. "Bob" Brown, Texas.

During 1999, hearings were held in July and September in Washington, D.C. and El Paso, Texas in October, and Los Angeles in December. At the meeting in Washington, D.C. on September 22, Secretary Glickman stated, "I am deeply concerned about the ability of smaller, less well-capitalized producers to stay in business during times when we're facing both depressed farm prices

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[30]64 *Federal Register* 68373

[31]*Western States Water*, Issue #1336, December 23, 1999.

and a disastrous drought. We will continue our work with Congress to address the needs of farmers who face serious financial damage or ruin through no fault of their own. We must give farmers and ranchers the tools they need to cope with the increasing volatility in world agricultural markets." He also noted the NDPC would work with a White House Drought Task Force established by President Clinton to coordinate the federal response to the current drought in all or parts of 33 states.

WSWC staff attended the public hearing in El Paso, Texas on October 13. Three commissioners were present: Ane Deister, Metropolitan Water District of Southern California; Robert C. Brown, Farm Credit Bank of Texas; and Ernesto Rodriguez, Director of the New Mexico Department of Public Safety, Office of Emergency Management. A few dozen people attended and a number testified. Don Lopez, New Mexico State Engineer's Office, noted recent drought related damages in the state, future projections of precipitation, and recent state drought planning and preparedness activities. Carlos Rincon testified on behalf of the Environmental Defense Fund on the need to recognize and protect instream flows and the ecosystem of the Rio Grande. Two irrigation district managers from the lower Rio Grande Valley and an attorney representing parallel interests testified regarding the impact of the drought on farm production. In particular, they highlighted the potential devastating effect of continuing shortages. They attributed their problems in large part to Mexico's failure in recent years to deliver an average of 350,000 acre-feet of water per year (over a five-year period) from its tributaries to the Rio Grande, as required by the 1944 Treaty. A number of reservoirs on tributaries have subsequently been built in Mexico, but the drought and growing water uses in Mexico have led to shortages. Falcon and Amistad Reservoirs on the Rio Grande, which supply U.S. farmers along the lower Rio Grande stand at only a fraction of their capacity. Between 1992-97, Mexico fell behind in its deliveries by over one million acre-feet, which it is supposed to repay over the next five years. However, since then, it has failed to deliver another 420,000 acre-feet and its ability to make good its water supply commitments over the next three years appear doubtful. Last year alone, Texas A&M estimated the economic loss related to the underdelivery of 350,000 acre-feet of water to the U.S. to be $77M and 4500 jobs.

The Commission completed and circulated a draft report presenting a set of principles and recommendations, and calling on the federal government to commit the resources necessary to carry out the recommendations. The draft read, "The United States has the means to lessen the impacts of drought. Many of the key elements for doing so are already in place. The Commission firmly believes, however, that we can and must do better...in the future than we have in the past." The draft added, "The objective is to bring about greater public understanding of drought and...public involvement in drought preparation and mitigation efforts."

The draft report highlighted the following concepts: (1) a well-informed and involved public; (2) self-reliance and self-determination; (3) consideration of all affected entities and related issues, including legal, economic, geographic, climate, religious, and cultural differences and environmental concerns; (4) lessons from past drought experiences; (5) comprehensive, long-term strategic planning emphasizing preparedness and mitigation; and (6) a federal role focused on appropriate coordination, technical assistance, education, and incentives, while at all times respecting the rights and sovereignty of states, local governments, and tribes. The draft report stated, "...these principles, constitute guidelines for framing appropriate federal action...."

The draft report made six recommendations for federal action: (1) provide training and technical assistance -- efficiently and effectively -- in support of non-federal drought-related programs; (2) emphasize drought preparedness and mitigation measures that incorporate comprehensive, long-term strategies; (3) incorporate incentive-based approaches, flexibility, and timeliness into federal drought emergency response measures; (4) provide adequate, sustained funding for drought-related research; (5) provide adequate, sustained funding for effective analysis, interpretation, and dissemination of drought-related data; and (6) the President should appoint a drought "czar," though no agency or department was recommended.

Water Supply Outlook

On April 1, the USDA's Natural Resources Conservation Service reported snowpacks and streamflow forecasts below (70%-90%) to much below (<70%) average in the Southwest, while conditions in the Northwest were above (90%-110%) to well above (>130%) average -- generally along a line from southern California to eastern Montana. Washington, Oregon, northern California and Idaho had above to well above average snowpacks and projected spring and summer streamflows. In Montana and Wyoming, conditions were average to above average in western Montana and northwestern Wyoming (around Yellowstone), but below average on the eastern plains. In California, snowpack conditions and streamflow forecasts changed dramatically from the northern to southern Sierras, ranging from well above average to well below average. Utah and Colorado were below to well below average, from north to south, and snowpacks in Arizona and New Mexico were well below average, as were projected streamflows. In the Southwest, reservoir storage was generally good. Storage was above average and within 70%-80% of the full useable reservoir pools in California, Colorado, Nevada, New Mexico, Oregon and Utah. In the Northwest, storage was generally a little below average in Idaho, Montana and Washington. Surface storage was also below average in Arizona, but significant amounts of surface water have been stored underground in recent years as part of the state's water banking program. Other areas that were dry included Texas, Oklahoma, Nebraska and South Dakota. Texas Governor George Bush declared an emergency in 167 of 254 counties in March, with below average spring precipitation forecast. South Dakota had been relatively dry since December 1998.[32]

On May 1, water supplies varied greatly across the West, with record snows in the Northwest, but much drier conditions in the Southwest. Snowpacks across Oregon, Washington, northern Idaho and into Canada were over 130% of average. Similar snowpack levels could be found in northern California, eastern Nevada, Wyoming's Wind River Range, Utah's Uintah Mountains, and parts of Colorado. Much of Idaho, Wyoming and northern Utah were above average. Snowpacks in the Upper Rio Grande in New Mexico and Arizona's Salt River system were less than 70% of average, and were below average over much of the Upper Colorado River system, southern Utah and California's southern Sierra Range. May 1 summer streamflow forecasts were well above average in Washington, much of Oregon and parts of northcentral Wyoming. Above average flows were forecast in Idaho, Montana, northwest Wyoming, northern California, and the rest of Oregon. Well below average flows were expected for Utah's Great Basin, with well below to below average flows

[32] *Western States Water*, Issue #1300, April 16, 1999.

in New Mexico and southwest Colorado. Reservoir levels remained good, but were lower in Arizona, Idaho, Montana and Washington.[33]

Endangered Species Act

The Western Governors' Association continued to list Endangered Species Act (ESA) reform as its number one priority, due to its effects on the use of western lands, waters and other resources. No new comprehensive reform bill with bipartisan support emerged in 1999, but a number of bills to amend the Endangered Species Act (ESA) were introduced.[34] Targeted legislative reforms addressing specific improvements in administration of the Act appeared to hold the most promise, though many doubt any changes are likely in the near future.

Federal Reform Legislation

On February 3, Rep. Mike Crapo (R-ID) introduced three targeted bills to address specific issues. H.R. 494, the Endangered Species Fair Regulatory Process Reform Act, would require specific documentation in the listing process of available data, published scientific sources, appraisals and methodologies, and the extent to which information has been field-tested and peer-reviewed. It also would require that the Secretary of Interior provide for an independent scientific peer review of any regulation to list or delist a species, and that "referees" conduct the review considering all relevant information and make a recommendation to the Secretary within 150 days. The Secretary would select three independent referees from lists provided by the National Academy of Sciences. The bill also set certain criteria for scientific studies to support listings and delistings. The bill specifically stated, "The Secretary may not determine that a species is an endangered species or threatened species unless the determination is supported by data obtained by observation of the species in the field." The Secretary also would be required to "accept and acknowledge receipt of data regarding the status of a species, that is collected by the owner of land through observation of the species...." A formal rulemaking would be required for listing and the process would include a field hearing. Certain other actions, including approval of a new or revised recovery plan, would also be required to be supported by "substantial evidence." The Secretary would also be required to publish an economic impact analysis with any listing or designation of critical habitat. Other reforms in the bill would prohibit the Secretary from releasing "any experimental population on or affecting privately owned property except by a rulemaking." Further, it required the Secretary to act expeditiously, within 90 days, on any request for an incidental take permit. If the permit is denied, specific reasons would be provided in writing, along with suggested measures that if included in an amended application would result in approval. Limits would also be placed on federal fees charged for processing a permit.

H.R. 495, entitled the Endangered Species Land Management Reform Act, addressed the takings issue and would have established a right to compensation for diminishing private property values. It prohibited an agency from taking "an action...affecting privately owned property that

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[33] *Western States Water*, Issue #1309, June 18, 1999.

[34] *Western States Water*, Issue #1297, March 26, 1999.

results in the diminishment of the value of any portion of that property by an amount equal to or greater than 50 percent of the value of that portion unless compensation is offered...," or at the option of the property owner, an agency "...shall buy that portion of the property by paying the fair market value...based on the value of the property before the diminution and without regard to the presence on the property of a species listed...." If the parties could not reach an agreement on compensation, the bill outlined a choice of remedies, including alternative dispute resolution and civil action. Federal funding would be provided through the establishment of a separate Treasury account, the Species Conservation Trust Fund, for "acquiring real property, waters, or interests therein." Lastly, the bill would limit mitigation requirements imposed by the Secretary so as to be proportionate to the permitted activity with respect to acreage and expenditures.

H.R. 496, the Endangered Species Criminal and Civil Penalties Liability Reform Act, would require specific intent for prosecution of takings. It redefined "take" so as to "knowingly and intentionally perform any act with the knowledge that the act would constitute harassing, harming...an individual member of a species that was present at the time and location of the act...." Moreover, it required the Secretary to provide notice of a violation and an opportunity to correct or mitigate any violation. The bill specifically codified the "no surprises" policy and "safe harbor agreements." Any person that entered into and complied with a conservation plan "may not, without their consent, be required to undertake any additional mitigation measures...[that] require payment of money, or compliance with use, development, or management restrictions on any land, waters, or water-related rights...." The bill would establish baseline requirements, under safe harbor agreements, for non-federal actions that benefit listed species by "creating, restoring, or improving habitat or by maintaining currently unoccupied habitat," and permit takings above this limit "on lands or waters that are subject to the agreement if the taking is incidental to, and not the purpose of, carrying out of an otherwise lawful activity." The Secretary would establish standards and guidelines for the development and approval of safe harbor agreements. Further, the bill authorized federal financial assistance of up to $10,000 for individual private landowners in carrying out actions not otherwise required under an agreement.

On March 3, Rep. George Miller (D-CA) reintroduced legislation entitled the Endangered Species Recovery Act with strong support from the environmental community and 66 cosponsors. The bill was designed to "reaffirm and strengthen this Nation's commitment to protect wildlife," as well as "ensure the recovery of our Nation's declining biological diversity," and "provide assurances to local governments, communities and individuals in their planning and economic development efforts." It addressed critical habitat, "survival habitat," listings, recovery planning, cooperative agreements, interagency cooperation, conservation plans and agreements, and natural resource damage liability. It would also have authorized different tax incentives -- estate tax deferrals, additional deductions, and tax credits -- for certain property subject to conservation agreements and the costs of compliance.

On March 11, Rep. Richard Pombo (R-CA) again introduced legislation to exempt those actions necessary to address "imminent threats to public health or safety or catastrophic natural events" from ESA consultation and conferencing requirements in reconstructing, repairing and maintaining federal or non-federal flood control levees. Mr. Pombo introduced a similar bill in the previous Congress, following devastating flooding in California, and the House held hearings on the issue. His new bill, H.R. 1101, was strongly criticized by environmental groups.

On April 14, the House Resources Committee held a hearing on Chairman Don Young's (R-AK) Landowners Equal Treatment Act (H.R. 1142), which he introduced on March 17, along with Rep. Billy Tauzin (R-LA), Rep. Richard Pombo (R-CA) and more than 20 other cosponsors. The purpose of the bill was to insure that private property owners are compensated when their land must be used as habitat for endangered and threatened species. Mr. Young noted, "The Supreme Court has said that the right to be compensated for the taking of private property for a public use is a fundamental constitutional right on the same level as the right to free speech and free exercise of religion. There are some in our country who no longer revere or respect the rights of private property owners. Their view is that using land for wildlife habitat is more important than protecting the right to own and control the use of private property."[35]

Mr. Young continued, "Certainly, landowners can file suit for compensation under the Constitution, but...these lawsuits are so expensive, time consuming and difficult, that ordinary citizens lose their land or their right to compensation because they cannot afford these lawsuits. [T]he Clinton administration has consistently opposed any and all efforts to protect private property rights. However, the Clinton administration has vigorously sought compensation for impacts on government lands when other public agencies must make use of them." Referring to a $26M payment to be made from local airport charges to compensate for impacts from aircraft overflights on the Minnesota Valley National Wildlife Refuge, Mr. Young added that his bill would insure that private property owners are compensated on the same basis. "It only deals with the requirement of the Endangered Species Act that habitat of species be protected, even when that habitat is someone's private property. It would require the same sequencing as is currently applied to public lands -- first avoid using private property for public use, if that is not possible, then minimize the impacts and if that is not possible mitigate through compensation."

Fish and Wildlife Service Director Jamie Rappaport Clark testified in strong opposition to the bill on behalf of the Administration. "This legislation will seriously and needlessly undermine endangered species conservation under the guise of protecting private property rights. The Secretary of the Interior will recommend a veto of H.R. 1142 if it is presented to the President." After referencing a letter to the Committee from the Department of Justice regarding "takings," she focused her testimony on the "great lengths" to which this Administration has gone to "minimize the impacts of the Endangered Species Act (ESA) on landowners," and how H.R. 1142 would compromise those efforts. She stated, "We have streamlined the consultation and permitting components of the Federal Endangered Species Program. We are proud that our efforts have produced better species conservation and recovery, while promoting cooperation rather than confrontation." She specifically mentioned, "Key landowner reforms...for Habitat Conservation Plans, the use of new tools like 'No Surprises' assurances and 'Safe Harbor' agreements, and greater use of Candidate Conservation Agreements and special rules under section 4(d) of the ESA." She noted these reforms are designed to increase regulatory certainty, and that adequate funding for their implementation had been requested in the President's FY2000 budget. She said, "We believe that with the full implementation of our reforms and provision of adequate appropriations, the ESA will protect the biological resources of the Nation without imposing undue burdens on individual

[35] *Western States Water*, Issue #1330, April 16, 1999.

citizens.... Unfortunately, H.R. 1142 does not contribute to these objectives. It instead undercuts the entire Act."

On October 27, Rep. Young, with 31 cosponsors, introduced the Common Sense Protections for Endangered Species Act (H.R. 3160). The bill attempted to improve the way in which species are listed as endangered or threatened, allow federal agencies to carry out their missions while protecting endangered species, require fair treatment of landowners, and emphasize recovery and delisting of endangered and threatened species. It would require the Secretary of the Interior to solicit and consider listing information from the public and local governments. It would also allow states to protect distinct species populations in their states where the species or subspecies is otherwise abundant. H.R. 3160 would change the listing process by requiring petitions to list species to include substantial scientific data to support their claims. Upon the receipt of a petition to list a species, notice would be required to the public and each affected state, seeking comments on the petition. Peer review for listings, delistings, designation of critical habitat, biological opinions, and mitigation criteria would be required, and states would have an opportunity to participate therein. The Secretary would also be required to hold public meetings, solicit information and publish notices identifying needed data before publishing a proposed listing rule. Citizens impacted by suits challenging the failure to list a species would be allowed to intervene in such suits. The bill would also require the government to identify the economic impacts expected from a listing, although it does not require that the listing decision be based on economic considerations.

H.R. 3160 attempts to reduce conflicts and economic dislocation by placing deadlines on agencies to make species-related decisions and ensuring that such decisions are based on science and the actual presence of an endangered or threatened species. It purports to insure that agencies will fulfill their missions and provide a faster and surer method of resolving conflicts between themselves. It also attempts to limit the use of injunctions where the consultation process is proceeding in good faith. Once conservation agreements to protect species are reached, the bill would make them binding on all parties. Rep. Young's legislation would also attempt to ensure fair treatment of landowners, requiring reasonable deadlines for making permit decisions, streamlining and simplifying the permitting process, and preventing abusive and excessive demands on landowners as a condition of getting an ESA permit from the federal government. The bill would authorize safe harbor agreements to encourage landowners to use their land for wildlife. It would also provide a statute of limitations for lawsuits to challenge permits for private landowners and limit the use of citizen suits against private landowners as well. The legislation also provides that emergency actions to protect public health and safety are not a violation of the law. Further, H.R. 3160 would make recovery planning an inclusive process by ensuring priorities for development of recovery plans and requiring a commitment to recovery through a separate program to recover and delist species. The legislation also would ensure that recovery results in the delisting of the endangered or threatened species. Recovery plans are required to have a biological recovery goal that when met would trigger delisting.

Habitat Conservation Plans

In March, the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) jointly published a Draft Addendum to their final Handbook for Habitat Conservation Planning (HCP) and Incidental Take Permitting Process. The so-called "5-point policy guidance" was intended to promote efficiency and nationwide consistency within and between the Services and improve the HCP program by providing additional clarifying guidance.[36] According to the notice, in just a few years, the HCP program has been transformed from a relatively little-used approach to one of the ESA's most important and innovative conservation programs. The Services issued only fourteen incidental take permits in the first ten years of the program, but has since issued over 243 incidental take permits, and about 200 HCPs are currently under development. The 5-point policy is derived in part from current practices. The new guidance is designed to: (1) establish overall biological goals for species covered by HCPs; (2) clarify and expand the use of adaptive management strategies; (3) design and implement mandatory monitoring programs; (4) provide criteria to be used by the Services in determining the duration of incidental take permits; and (5) expand the use of public participation.

On July 20, the Senate Environment and Public Works Committee's Subcommittee on Fisheries, Wildlife and Drinking Water held the first of two hearings on Habitat Conservation Plans in Washington, D.C. Chairman Mike Crapo (R-ID) opened the hearing by referring to HCPs as a win-win proposition for landowners, but stated that improvements were needed, including changes to the cost, science, and time they take to develop, and the process used to develop them. In response to testimony from witnesses, Senator Crapo expressed interest in the idea of establishing a national database for HCP developers. He also asked several questions regarding adaptive management. As part of his opening statement, Senator Crapo maintained that no changes should be made in the "no surprises" component of HCP plans. After years of criticism from environmental groups, the U.S. Fish and Wildlife Service recently modified the Administration's controversial "no surprises" policy. Under the change, if a voluntary species protection program "is jeopardizing the existence of a species, it can be revoked," according to an environmental spokesperson. However, a Fish and Wildlife Service spokesperson characterized the change as slight, so that only where the species is on the brink of extinction, would FWS step in to save the species.[37]

The "no surprises" policy, outlined in a 1994 Department of Interior memorandum, provides protection for landowners participating in HCPs and other voluntary species protection programs. The policy was finalized as a formal rule in February 1998, but then became the target of a lawsuit. Under the policy, landowners who voluntarily agree to set aside land for endangered species can obtain assurances that the government will not seek additional or unanticipated concessions so long as the plan is in effect, even if a species' needs change over time. There was a caveat written into the policy providing that if "unforeseen circumstances" should arise exacerbating species' needs or requiring new protection and mitigation efforts, Interior could step in. The burden to establish such a need rested with the government. The modification to the no surprises policy was included in final rules concerning safe harbor and candidate conservation agreements, issued June 17 in the *Federal Register*. The rules became effective July 19.

The second hearings on HCPs was held October 19, with states, businesses and the environmental community testifying as to the pros and cons of the HCP process. Anecdotal

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[36] *Western States Water*, Issue #1301, April 24, 1999.

[37] *Western States Water*, Issue #1314, July 23, 1999.

experiences and opposing views on the effectiveness of HCPs were heard. The need for more federal funding and avoiding a "one-size-fits-all" approach were issues supported by all parties. The length of time it is taking to negotiate HCPs was also heavily criticized by witnesses, as plans are taking two to six years to complete, although the law required the process to take no more than 10 months.[38]

Salmon

In March, the National Marine Fisheries Service added nine stocks of salmon and steelhead to the list of threatened and endangered species, for the first time covering habitat in major metropolitan areas of Oregon and Washington. NMFS stated, "The ...listings are the result of such factors as land-use and water-development projects that degrade watershed and stream conditions critical to salmon survival, habitat loss, over-harvesting, dam construction and operation, and certain hatchery practices." Department of Commerce Secretary William Daley said, "Our goal here is to restore salmon, but we know that we cannot accomplish that alone. As we have all said repeatedly, extinction is not an option! We want to work together with state and local officials to preserve, for future generations, healthy salmon stocks along with clean and productive rivers and streams. Assistant Secretary Terry Garcia added, "Healthy salmon resources are essential to the economic health and prosperity of the region. One of our greatest challenges is to restore the great salmon runs of the Pacific Northwest to sustainable levels."[39] The listed populations include: chinook salmon in Puget Sound, the Lower Columbia River, Upper Columbia, and Upper Willamette River; Columbia River chum salmon and the Hood Canal summer run chum; steelhead in the Upper Willamette and Middle Columbia; and the Ozette Lake sockeye salmon. They were all listed as threatened, except the Upper Columbia spring-run chinook, which is endangered. NMFS promised to work with state and local groups to develop tailor-made regulations and conservation initiatives. Future determinations were expected on the listing of four remaining chinook salmon units: the Snake River fall run; the southern Oregon and California coastal chinook; and the California Central Valley fall and spring runs.

On November 16, federal working paper on salmon recovery in the Pacific Northwest was released by a group of nine federal agencies, known as the "Federal Caucus." According to William Stelle, NMFS Regional Administrator, "This paper was written with two major goals in mind: to lay out the basic options for salmon recovery and to stimulate a constructive debate among the governments and the people of the region on those options." Stelle adds, "Our job is to get the science right and to help foster a serious regional debate on the choices that must be made if we are going to restore salmon runs in the Columbia Basin.... We indeed have some very tough choices ahead, but I'm absolutely convinced that the goal of saving salmon is bigger than any differences that may exist in the region."[40] NMFS is working closely with other federal agencies participating in the creation of a recovery plan which covers the operation of the Columbia River system of dams and related federal land management issues. The federal agencies include the Bonneville Power Administration, Army Corps of Engineers, Environmental Protection Agency, U.S. Fish and Wildlife

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[38] *Western States Water*, Issue #1327, October 22, 1999.

[39] *Western States Water*, Issue #1300, April 16, 1999.

[40] *Western States Water*, Issue #1331, November 19, 1999.

Service, U.S. Forest Service, Bureau of Land Management, Bureau of Reclamation, and the Bureau of Indian Affairs.

The 16-page "Four-H" working paper summarizes the impact on the salmon of habitat degradation, harvest activities, hatchery production and hydropower operations. Under each "H," three recovery options are listed: Habitat - Make modest habitat improvements with more federal funding and coordination. Increase state, tribal and local efforts, and increase federal funding tied to water-quality compliance efforts. Increase federal regulation on non-federal land, "if state and local governments are unable to ensure adequate habitat restoration programs." Harvest - Implement the Pacific Salmon Treaty, and hold to 1999 harvest levels with modest increases if fish numbers increase, or hold in-river harvest rates to 1999 levels until recovery goals are reached, or reduce the harvest to "crisis levels" for 10 years. Hatcheries - Continue current efforts mixing actions to produce fish for harvest and boosting wild fish numbers. Continue producing fish for harvest and increase production of wild stocks. Substantially decrease production of fish for harvest and increase the production of wild fish stocks. Hydropower - Continue making improvements to the present system. Substantially increase the investment in physical improvements to the system. Breach the Snake River dams that block salmon passage.

Dam removal is supported by environmental groups and vigorously opposed by regional energy, industry and agricultural interests. The Corps is preparing a draft environmental impact statement which includes the option of bypassing the four lower Snake River dams. Other studies have concluded that dam breaching alone may not be enough to restore salmon runs and under certain circumstances might have a negligible effect. Mr. Stelle notes that it would take congressional action to decommission and remove or bypass the dams. He adds, "The major question is whether this region has the fortitude to rebuild habitat productivity.... [Is] the region willing to make commitments necessary to recover these stocks without removing the dams?" The paper includes a cost/benefit analysis and risk assessment of recovery efforts. It concludes that efforts undertaken to improve juvenile survival, such as improving habitat of natal rivers and the Columbia River estuary, would be much more cost effective than bypassing the dams and implementing tighter harvest restrictions.

On the other hand, David Bayles, with the Pacific Rivers Council in Portland noted, "Healthy salmon need healthy rivers, and salmon didn't evolve in rivers chopped up by dams." Chris Zimmer, with Save Our Wild Salmon in Seattle, criticized the working paper for just "...giving us options and things to talk about," rather than a recovery prescription. He challenged industry interests to "say what they are going to give up if they are not going to remove the dams." Recognizing other alternatives for recovery could be "onerous," Bruce Lovelin, with the Columbia River Alliance (of aluminum smelters, barge operators, and hydropower producers) said, "The good news is...they don't have to do breaching. But it doesn't mean we are off the hook.... Frankly, this could mean a regional civil war." Darryll Olsen, a consultant for irrigators says, "The dam-removal debate is over. The technical data just doesn't support it.... Everyone's been infatuated with the charismatic gesture of dam removal. But the real issue isn't dams. It's water." U.S. Senator Slade Gorton (R-WA) observed, "It sounds like the Administration has decided it has lost the battle over whether or not it should take down dams on the Snake and Columbia Rivers." However, he added, "The battle over dam removal is far from over."

Stelle suggests other less controversial options in the paper include changes in harvest restrictions, hatchery practices and hydropower production. These options may be more practical to implement as they involve mainly federal agencies' actions. More difficult alternatives involve improving habitat, because federal agencies only have a direct say in activities taking place on federal lands and in waters of the United States. With respect to the latter, he notes that restoring salmon runs is closely linked to water quality, and actions taken on the state level to improve water quality will be a key component to recovery. The current efforts of the three Northwest states to better comply with the provisions of the Clean Water Act (CWA) will be one of the main forces in improving fish habitat on non-federal lands. He indicated that NMFS is working closely with EPA on water quality issues, including programs where private landowners and others can develop plans to improve water quality and satisfy their obligations under both the CWA and the ESA. Again, the paper notes one option is to increase the federal regulatory role under the CWA and ESA if the states do not make sufficient habitat improvements.

The working paper outlines the current "conceptual" salmon recovery plan, according to Stelle. A full "Four-H" draft document will be published for public comment. It will include an explanation of the scientific analysis used to arrive at values for the various options. Public meetings will be held in January 2000. Thereafter, the federal agencies will try to narrow the list of options, combine options into integrated alternatives, and then build a comprehensive recovery program. Detailed recovery plans will be developed later for individual stocks of listed fish, utilizing options and integrated alternatives developed by the agencies.

Federal Hydropower Licensing

On February 23, at a hearing on the Clean Water Act before the House Transportation and Infrastructure Committee's Water Resources and Environment Subcommittee, Wyoming Governor Jim Geringer, Chairman of the Western Governors' Association (WGA), testified with respect to Section 401 and state certification of hydropower development. He said, "While the governors have long supported hydropower development, subject to a strong state role..., they believe industry's argument that it is unfairly subjected to dual federal-state regulation to be inherently invalid. We live in a federal system in which a host of proposed projects, including mining and other activities, even on federal lands, must comply with both state and federal law as a precondition for operation. Exemption of hydropower facilities would be to the detriment of all other water users who may be required to pay for the water quality mitigation that should rightfully have been provided by the hydropower facility."[41] He noted federal and state agencies are participating in a dialogue designed to find administrative ways to make the relicensing process more effective.

Western Region Hydro Relicensing Summit

On May 25-26, EPRI, an electric industry research organization, the National Hydropower Association (NHA), the Hydropower Reform Coalition (HRC), and the Western Governors' Association (WGA) joined together to sponsor a Western Region Hydro Relicensing Summit in

[41] *Western States Water*, Issue #1293, February 26, 1999.

Portland, Oregon.[42] The meeting included stakeholders, state and federal regulators, non-government organizations and utilities in a discussion of federal hydropower relicensing and related issues. The meeting began with a panel that included: Mark Robinson, Federal Energy Regulatory Commission (FERC); Kris Lee, U.S. Forest Service; and Andrew Fahlund and Julie Keil, industry representatives. They addressed past experiences with the "Class of 1993" project relicensings and efforts to simplify and streamline the process. The general consensus is that the process costs too much and takes too long -- three and a half years on average. FERC has promulgated an alternative relicensing process that allows stakeholders a greater role in designing procedures, and to date in 1999, 30% of the applications to relicense a project have used this alternative process. However, in response to a Senate hearing last year, efforts to further improve the process have been expanding.

A panel of state representatives addressed past, present and future relicensing issues, and included: Lynne Kennedy, Oregon Department of Environmental Quality; Jim Canaday, California State Water Resources Control Board; Carol Jolly, Washington State Governor's Office; and Christopher Estes, Alaska Department of Fish and Game. The discussion raised many points. Government has the responsibility for balancing conflicting interests involving economic development and environmental protection. The process should be clear and simple. It should be easily understood. However, some of the issues are very complex. Among some of the difficult issues, in addition to streamlining decisionmaking, are interim relicensing conditions, treatment of orphan projects (abandoned by the responsible parties and the license surrendered), funding state agency participation in the process, designing studies, unifying consistent agency conditions, addressing cumulative impacts, and post-licensing uncertainties.

Though not explicitly articulated or emphasized at the meeting, an underlying theme was the issue of state and federal agencies' mandatory conditioning authority and the problem of balancing conflicting interests. While some view mandatory conditions as an impediment to balancing competing interests, others expressed their belief that the Congress provided for specific mandates regarding fish passage, land management, water rights and water quality certification as a means of establishing a floor or minimum standard for all projects over and above which FERC has authority for balancing the remaining interests. However, almost everyone seemed to believe process improvements were possible to avoid or minimize problems arising from conflicting agency conditions and certifications. Briefly, participants agreed that there is no "cook book" approach appropriate for all projects, and that the best way was usually to involve broad stakeholder participation early in the relicensing process and encourage collaborative decisionmaking. Suggested recommendations for process improvements were developed with the help of a facilitator through a series of smaller group brainstorming and stakeholder discussions or caucuses.

Oregon Dam Removal Agreement

Oregon Governor John Kitzhaber and officials of the National Marine Fisheries Service (NMFS) joined other officials from the City of Portland, Portland General Electric (PGE) and others also met in Portland on May 26, to announce a win-win agreement to meet Portland's water and power needs, while aiding threatened salmon and steelhead trout. Under the plan, which requires

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[42] *Western States Water*, Issue #1307, June 4, 1999.

FERC approval, there are a complex series of tradeoffs. PGE will remove two aging dams, the Little Sandy Dam on the Little Sandy River and Marmot Dam on the Sandy River. Little Sandy Dam was built in 1906, and six years later Marmot Dam was built to divert more water through a canal, flume and tunnel system to PGE's Roslyn Lake powerhouse on the Little Sandy River. PGE owns and operates eight hydropower facilities and four thermal powerplants in the region, with a total generating capacity of some 4,000 megawatts. PGE will lose 22 megawatts of generating capacity, but it will avoid potentially costly renovations as part of the federal hydropower relicensing process.[43]

As part of the plan, PGE will also enter into a long-term agreement to purchase power from Bull Run dam, owned and operated by the City on the Bull Run River, which joins the Little Sandy before flowing into the Sandy River. For its part, the City will have NMFS permission to increase its diversions from Bull Run reservoir for its municipal drinking water system. At times, each summer, operation of the City's system already dries up the river. However, removing both dams will open up 22 stream miles of new habitat for anadromous fish. Liz Hamilton, Director of the Northwest Sportfishing Industry Association in Portland, declared, "I think this is a win-win-win for everyone. I know of nothing else in the region that comes close to this level of commitment." According to Portland City Commissioner Erik Sten, "This will allow us to get a lot more done [for salmon and steelhead] for a lot less money." NMFS spokesman, Brian Gorman, added, "We're always pleased when dams that are impediments to salmon are opened up." Earlier this year, an 8-foot irrigation diversion dam in Medford, Oregon was removed, but these dams are much larger.

Washington State Water Rights

In the State of Washington, an appeal of a decision by the Washington Pollution Control Hearings Board addressed the relationship between state water rights and state water quality protection requirements as they relate to federally licensed hydropower projects. The Public Utility District No. 1 of Pend Oreille County (District) filed an application with FERC in November 1994 to amend a hydroelectric license to redevelop the Sullivan Creek Hydroelectric Project. The original project was built and operated from 1910-1956 by the Portland and Lehigh Portland Cement Companies, which operated facilities in the town of Metaline Falls. Sullivan Lake dam and reservoir stored water for release to generate power. Water was diverted from Mill Pond into a wooden flume and canal system, to a forebay, through a penstock to the powerhouse, and back to Sullivan Creek over a distance of about three miles.[44]

In 1956, the District purchased the project and in 1958 and 1959, the Federal Power Commission issued a license for the reestablishment of hydroelectric power generation from the project. The District holds disputed water rights to the use of 550 cubic feet per second (cfs) on Sullivan Creek, Harvey Creek and Sullivan Lake. These include a state right to store, divert and use water for hydroelectric power generation. The original right to the use of 110 cfs has a 1907 priority date. In 1964, the point of diversion was changed from Mill Pond to the confluence of Sullivan and

[43] *Western States Water*, Issue #1307, June 4, 1999.

[44] *Western States Water*, Issue #1306, May 28, 1999.

Outlet Creeks. A 1980 permit for the use of up to 550 cfs supplements the 1907 right, subject to a minimum instream flow of 10 cfs.

While undertaking various feasibility studies and submitting necessary applications over the years to redevelop the project, it has not been operated by the District. In 1993, the District filed two applications to change the point of diversion for two of its water rights, and in 1996 filed an application for water quality certification under Section 401 of the Federal Clean Water Act (FCWA), all with the Washington State Department of Ecology. In 1997, Ecology issued the 401 certification, adding minimum instream flow requirements over and above those imposed under the 1980 water right permit. The year round requirements range from 75 cfs to 200 cfs. In 1998, Ecology denied the District's applications to change the point of the diversion on the basis that the 1907 right had been abandoned, the project supporting the right had been abandoned, and that approval would be detrimental to the public interest. With respect to the 1980 permit, Ecology added that a change application could not be granted until the water rights had been developed and put to beneficial use. The District appealed to the Pollution Control Hearings Board.

In two summary judgement motions, the District asserted that the Clean Water Act Section 101(g) and state water law prevent Ecology's attempt to supersede and abrogate the District's senior water rights by imposing instream flow requirements under Section 401. Next, the District also challenged denial of the change applications arguing Ecology improperly: (1) applied a public interest test; (2) concluded the District had abandoned its water rights; (3) concluded that inchoate water rights are not subject to change; and (4) delayed processing of the applications after erroneously claiming that the State Environmental Policy Act (SEPA) applied. Ecology responded that the District's assertions were not supported by the law or the facts. Ecology argued: (1) a water right does not grant a right to pollute; (2) the District must still comply with applicable laws; (3) the acquisition of a water right does not excuse compliance with other validly enacted laws; and (4) the water rights held by the District had always been conditioned on the public's right to maintain the quality of the water. Some of Ecology's arguments follow.

Section 101(g) reads: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired.... [N]othing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Ecology argues, "This broad language has been interpreted by the courts as being a general policy statement which does not nullify other provisions within the Act.... It is ironic that Section 101(g) reserves power to the state - it does not take it away. Contrary to the assertions made by the District, Section 101(g)... does not support a conclusion that Ecology's 401 certification is improper." Quoting the U. S. Supreme Court's *Elkhorn II* decision, "Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.... The [401] certification merely determines the nature of the use to which that proprietary right may be put under the Clean Water Act if and when it is obtained from the state." Ecology notes, "The condition only requires a certain flow be bypassed before the District exercises its rights."

Ecology's response added, "In *California v. FERC*, the Supreme Court held that the Federal Energy Regulatory Commission (FERC) was authorized to condition a project even if the conditions were contrary to minimum flow conditions issued by the state in allocating the water right to the applicant. The Supreme Court reached this conclusion even though the [Federal Power Act] FPA contained the following provisions: 'Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.' This provision is very similar to Section 101(g) of the FCWA. The Washington Supreme Court [and U.S. Supreme Court] has held that the FPA does not preempt the FCWA. As such, FERC is obligated to include [state] Section 401 conditions as conditions when issuing a license.... [I]t is illogical to assume that the authority granted to the states under the FCWA would provide less authority to condition a project that might have some effect on existing water rights than the authority given to FERC under the FPA.... Ecology does have the authority to place appropriate water quality conditions on a project ...even if those conditions may to some degree impact the exercise of vested water rights.... The Section 401 conditions do not operate to take away the District's proprietary interest[s]."

The Board's decision upheld most of Ecology's actions. The decision reads in part: "The question of whether water quantity is an element of water quality regulation was resolved by the Supreme Court in *Jefferson County v. Ecology* (Elkhorn).... The Court held that the state may impose conditions on certifications insofar as necessary to enforce a designated use.... The quantity of water use may therefore constitute pollution and be regulated as an 'other limitation' under Section 401.... It is equally settled law that Section 101(g) does not shield a water right holder from compliance with water quality standards.... This applies to situations such as Elkhorn where the state water right applications were being considered contemporaneously with a FERC application as well as the present case where the water rights are vested prior to the federal application.... The authority of Ecology to issue a water quality certification is not in any way limited by the fact that it may be unable to render a vested water right junior to an in-stream flow requirement."

On cross motions for summary judgement, the Board upheld Ecology's authority to condition a water quality certification, to deny the change application for the undeveloped water right permits, to make tentative determinations of water right validity in evaluating an application for change, to consider the public interest, and on the issue of compliance with the State Environmental Policy Act. Summary judgement was denied as to the issue of abandonment (including an issue of failing to pay annual hydroelectric power fees in a timely manner). Distinguishing Washington law from California law, the Board denied Ecology's claim to regulate water quality to protect the public trust.

Of note in a memorandum in support of Ecology's motion for summary judgement, the Washington Attorney General's office writes: "In Washington, a water right can be acquired through the riparian doctrine, the prior appropriation doctrine, or through acquisition of a permit/certification under the 1917 Water Code. Regardless of how a water right is acquired, the acquisition of a water right does not equate with ownership of the water; rather it is a 'usufructuary right' to use the waters of the state, subject to conditions imposed through the police powers of the state. The waters of the state belong to the public...and are not subject to private ownership.... The vesting of a water right does not limit the state's authority to exercise its police power to regulate and control the waters of the state even if this exercise...results in additional conditions for the use of a vested water right.... Neither the federal Clean Water Act nor Washington's...laws excuse compliance...because a water right has been obtained."

State Water Quality Certification

Also in 1999, the Federal Energy Regulatory Commission, in ruling on a motion for reconsideration, ordered the Central Vermont Public Service Corporation (Central Vermont) to obtain water quality certification from the State of Vermont under § 401 of the Clean Water Act (CWA) for continued operation and maintenance of its existing 1.85 megawatt Carver Falls Project, located on the Poultney River in Washington County, New York, and Rutland County, Vermont. The project dam spans the river with the powerhouse/tailrace in New York and one of the dam's spillways in Vermont. Although Central Vermont had obtained certification from New York in April of 1995, the Vermont Agency of Natural Resources (VANR) asserted that Central Vermont must also obtain certification from it, because the project would result in a discharge into Vermont waters from the dam spillway located on the Vermont side of the river. Central Vermont opposed VANR's contention, primarily on the grounds that the state's request was contrary to Commission precedent. The Commission disagreed, stating that it had "never before been directly presented with the issue posed here," because although some of the cases cited to by Central Vermont involved a project on a border river with a powerhouse in one state and a spillway in another, "none of them discusses whether there are two discharges, much less whether both required [§ 401] certification."

It has been reported that Central Vermont, in making its argument before the Commission, cited the decision of the Ninth Circuit in *Oregon Natural Desert Association v. Dombeck* (*Oregon*), filed July 22, 1998. Central Vermont reportedly argued that dams are not point sources of pollution, and under the holding of *Oregon*, § 401 certification cannot be required of nonpoint sources of pollution. In *Oregon*, the Ninth Circuit overturned the decision of the Federal District Court of Oregon, which had held that the Forest Service was required to obtain § 401 water quality certification from the State of Oregon before it could issue permits allowing grazing that would potentially cause nonpoint source pollution on federal lands. The district court's decision had relied exclusively on CWA § 502, which provides: "(12) The term "discharge of a pollutant" [means] any addition of any pollutant to navigable waters from any point source... (16) The term "discharge" when used without qualification includes a discharge of a pollutant.... The district court reasoned that because the unqualified term discharge is defined as including, but not limited to, point source releases, it must include releases from nonpoint sources as well."

Examining the purposes of the entire Act and recognizing the distinction between discharges and runoff, the Ninth Circuit found that it regulated only discharges coming from a point source. "The discharge of pollutants from nonpoint sources - for example, the runoff of pesticides from farmlands - was not directly prohibited.... [W]hen examined as a whole, [the CWA] cannot support the conclusion that § [401] applies to nonpoint sources.... [C]ertification under § [401] is not required
for grazing permits or other federal licenses that may cause pollution solely from nonpoint sources."[45]

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[45] *Western States Water*, Issue #1291, February 12, 1999.

Federal Water Project Transfers

The House Resources Committee's Water and Power Subcommittee held an oversight hearing on the transfer of title to Bureau of Reclamation facilities to local irrigation districts on February 2. Commissioner Eluid Martinez testified at the hearing. Reclamation holds title to more than 600 projects. It has transferred operation and maintenance responsibilities for about 400 projects to local entities, and in 1995 initiated a process to transfer title as well, focusing on small single-purpose projects, as a means of reducing federal expenditures and shifting ownership responsibility. However, the task has proven to be more arduous than anticipated. While some 65 local entities have expressed an interest in taking title to projects from which they benefit and may already operate and maintain, no title transfers had been completed.

The transfer of title to federal assets requires the approval of the Congress, which has authorized the conveyance of: certain facilities of the Minidoka Project to the Burley Irrigation District in Idaho (P.L. 105-351), the Canadian River Project to a municipal conservation and reclamation district in Texas (P.L. 105-316), the Rio Grande Project to the Elephant Butte Irrigation District in New Mexico and El Paso County Water Improvement District in Texas (P.L. 102-575, Title XXXIII), and the Vermejo Project in New Mexico to the local conservancy district. Transfer authorization is also expected soon for certain facilities that are part of the Carlsbad Project in New Mexico, the Clear Creek Unit of California's Central Valley Project, Colorado's Pine River Project, and the Wellton-Mohawk irrigation and drainage system in Arizona. Subcommittee Chair Rep. John Doolittle (R-CA) is particularly interested in the proposed Sly Park Project transfer to the El Dorado Irrigation District near Sacramento, California.

Mr. Martinez said, "the actual transfer of title" to the Minidoka and Canadian River Project facilities should be complete in "the not-too-distant future." However, he added that the "simple projects that we hoped would be easy to transfer have not turned out to be so simple and have taken longer than expected." Among the many considerations are setting the price for the project, fixing responsibility for dam safety, determining the application of federal laws such as the National Environmental Policy Act and Endangered Species Act, and other concerns over future non-federal project operations, such as flood control operations. With respect to the inclusion of all stakeholders in a "consistent, fair and open process," Mr. Martinez testified, "It has been our experience that shortcuts take significantly more time than the thorough route.... [T]hose who are left out will derail the proposal at the eleventh hour and ultimately it will take even longer."

Bruce Driver also testified, representing several environmental groups, including American Rivers, the National Audubon Society and the National Wildlife Federation, and he laid out principles to ensure the title transfer process enhances environmental values.

The Congress acted on a number of federal water project transfer bills. On March 25, the Carlsbad Irrigation Project Acquired Land Transfer Act (S. 291), introduced by Senator Pete Domenici (R-NM), passed the Senate by unanimous consent and was sent to the House (which considered but did not pass a companion bill in 1999). S. 356, the Wellton-Mohawk Transfer Act, was enacted on June 7, and on June 20 was signed into law by President Clinton (P.L. 106-221). Introduced by Senator Jon Kyl (R-AZ), it authorized the Secretary of Interior to convey certain works, facilites and lands in the Gila Project to the local irrigation district. On November 1, the

House passed H.R. 862, the Clear Creek Distribution System Conveyance Act, by Rep. Wally Herger (R-CA), and sent the bill to the Senate, where is was referred to the Energy and Natural Resources Committee. S. 291 would transfer all interests in the irrigation/drainage system. Rep. John Doolittle (R-CA) introduced H.R. 1019, to convey the Sly Park Unit of the Central Valley Project to the El Dorado Irrigation District, including Sly Park dam and reservoir, the Camp Creek diversion dam and tunnel, and other conduits and canals. The House was passed the bill on November 19, and sent it to the Senate (which did not act on the bill in 1999).

Indian Water Rights

On December 23, President Bill Clinton responded to a November letter from WSWC Chairman Francis Schwindt regarding funding for Native American land and water rights settlements and acknowledged the importance of the issue to "our citizens in the West." The President promised that "...Office of Management and Budget Director Jack Lew will respond to your concerns directly."[46]

Ad Hoc Group

Earlier this year, on February 23, the Ad Hoc Group on Indian Water Rights, held a congressional workshop on Indian water right settlements. The group was formed as a result of an initiative undertaken by the Western Regional Council (WRC). The WRC is a group of large corporations that are involved in natural resources development in the West. The Ad Hoc Group was formed in 1981 in response to concerns about the uncertainties and complications associated with largely unquantified Indian water right claims. The consensus among Ad Hoc Group members is that the federal government and others should support the negotiated settlement of Indian water rights claims. The group provides a forum to discuss ways in which the process for concluding, approving and implementing settlements can be improved.[47] Given these objectives, the WRC prepared proposed legislation that was first presented to the late Morris Udall, then Chairman of the House Interior Committee. Mr. Udall responded that before he would proceed, they would need to talk with the tribes. The tribes opposed the legislation, but these initial discussions evolved to address what would constitute an acceptable approach to settlements. The Western Governors' Association (WGA), Western States Water Council (WSWC), and the Native American Rights Fund (NARF) later joined the WRC as members of the Ad Hoc Group. From its efforts, a process evolved at the federal level to facilitate negotiated settlements that contributed to the approval by the Congress of fourteen water rights settlements.

Between 1988-1991, the Ad Hoc Group sponsored four congressional workshops as a means to further enhance and improve the settlement process. Key congressional committee staff representatives and Administration officials were invited to these workshops. However, in 1992, the process essentially broke down. Several factors contributed to this, including a perceived lack

[46]*Western States Water*, Issue #1339, January 14, 2000.

[47]*Western States Water*, Issue #1295, March 19, 1999.

of commitment by key federal agencies, including the Department of Interior. About a year and a half ago, the Interior Department again sent a clear signal that it supported negotiated settlements and it established a Federal Tribal Funding Task Force, which has since been meeting periodically. Oregon Governor John Kitzhaber agreed to serve as the WGA's lead governor on this subject, and the congressional workshop was planned in order to continue the momentum within the Department of Interior and also address questions by members and leaders in the new Congress.

The workshop began with remarks by Mike Brophy, the WSWC's Vice-Chair, on behalf of the Western Regional Council. Mr. Brophy introduced Governor Kitzhaber, who reiterated western governors' support for negotiated settlements as a more desirable approach than extended and expensive litigation. He specifically spoke about the need for the federal government to fulfill its trust responsibilities and be involved in the negotiations as an indispensable party in order for any settlement to be successful. He specifically noted that the nature of the federal government's trust responsibilities requires a significant federal contribution toward funding the implementation of settlements, which he also described as an opportunity for the federal government to fulfill its trust responsibilities to tribes without otherwise imposing unreasonable constraints on existing non-Indian water uses also developed in reliance on federal commitments. Bruce Sunchild, of the Chippewa Cree Tribe and Co-Chair of the Tribal Water Funding Task Force, spoke next. He also underscored the importance of the federal trust responsibility and shared his experience regarding the Rocky Boy's Settlement in Montana, which has been concluded among the parties. The Administration supports the settlement, and legislation to approve it was pending before the Congress.

Interior Secretary Bruce Babbitt addressed his involvement in the creation of the Ad Hoc Group as the Governor of Arizona. At that time, he recommended the WGA become a member. He also reiterated the current Administration's support for negotiated settlements, and agreed with Governor Kitzhaber about the need for the federal government to commit the time and resources to make these settlements work. However, he noted the days when the federal government would simply write a check for the balance to make up any difference needed to achieve a successful settlement are gone. He underscored the need for states and others to likewise contribute time and resources.

Following this initial panel of speakers, Craig Bell, WSWC Executive Director, provided a history of the efforts of the Ad Hoc Group and also an overview of the Indian water right settlements that have been approved by the Congress.

A subsequent panel, moderated by Don Leonard of the Western Regional Council, discussed funding. The panel participants included: John Echohawk, Executive Director of the Native American Rights Fund; Rita Pearson, Director of the Arizona Department of Water Resources; Dave Hayes, Counsel to the Secretary, Department of the Interior; Steven McHugh, Majority Staff, and Michael Jackson, Minority Staff, Senate Indian Affairs Committee; and Rick Mertens, with the Office of Management and Budget. Various perspectives on the difficult issue of funding were raised, but an underlying theme arising out of the discussion was that the country no longer faces a budget crisis such as inhibited federal contributions to such settlements in the past. While funding will still be difficult, current circumstances present a window of opportunity.

Arizona Senator John Kyl (R), a member of the Senate Appropriations Committee, spoke to the group over lunch. He underscored his continuing interest in settlements and the importance of the congressional role in their review. He noted his personal concerns relative to off-reservation marketing of water and any potential adverse ramifications to state water law. Representative J.D. Hayworth (R), also of Arizona, next addressed the group, adding his interest in supporting settlements and working with the Ad Hoc Group to explore ways to facilitate more settlements. He emphasized the importance of involving the appropriate congressional delegations in negotiations.

After lunch, a panel addressed ways to better facilitate and implement negotiated settlements. Mike Brophy facilitated the discussion, much of which focused on the question of how to quantify the federal trust responsibility. Different perspectives were shared on the practicably irrigable acreage (PIA) standard and the Justice Department's long held view that the federal government's contributions to such settlements should be measured by and limited to the estimated cost of litigation in representing tribal claims. Another important issue involved the use of past settlements as a precedent for future settlements. While supporters of virtually every settlement have emphasized that it should not be considered as a precedent, some participants echoed Senator Kyl's remarks that any settlement, as a practical matter, would invariably be viewed as a precedent for subsequent settlements.

The group next turned to considering follow-up steps. In the short term, proceedings from the workshop were to be prepared and distributed by WGA staff. Given the fairly brief window of opportunity for completing any legislative work prior to the election year, the group recommended that visits may be made to key members of Congress and staff to reiterate support for negotiated settlements and to address any issues or concerns. It was also recommended that the WSWC and NARF continue to hold their Indian Water Right Settlement Symposia to provide opportunities for the key parties to gather and share their perspectives on progress to date and work for the future. A symposium was held on September 8-10, in Missoula, Montana, as described previously herein.

On May 10, the Ad Hoc Group on Indian Water Rights held a briefing for western House staff members to communicate its support for negotiated Indian water rights settlements.[48] Don Leonard, WRC Executive Director, and Shaun McGrath, WGA staff, welcomed and introduced those participating. John Echohawk, NARF Director, provided a background on Indian reserved water rights and Craig Bell, WSWC Executive Director, described the history of the Ad Hoc Group and the evolution of a process for facilitating negotiated settlements. Mike Brophy, WSWC Vice-Chair and the lead representative for the WRC on this matter, explained why settlements are important and outlined the critical role of the federal government. The Ad Hoc Group believes that the federal government should encourage and facilitate settlements by assisting in the negotiations and by providing appropriate funding. Mr. Brophy shared a list of eighteen federal negotiation teams that are currently working on Indian water rights settlements around the West. He focused on the necessary role of Congress in approving settlements that involve limitations on Indian water rights, among other things. The briefing and a planned Senate briefing in July highlight a basic Ad Hoc Group assumption that in order for negotiations to be successful, the federal government must

[48] *Western States Water*, Issue #1304, May 14, 1999.

participate. However, Ad Hoc Group members acknowledge that this is increasingly difficult and innovative mechanisms must be explored.

San Carlos Apache Water Rights Settlement

In a public ceremony held on March 30, in Phoenix, Arizona, Interior Secretary Bruce Babbitt signed the San Carlos Apache Tribe Water Rights Settlement, just hours before another deadline for a settlement of the San Carlos Apache Tribe water right claims was about to expire.[49] Those joining in supporting the settlement agreement include the Tribe, the Salt River Project, the City of Tempe, and the Roosevelt Water Conservation District. However, a majority of the parties involved in settlement negotiations chose not to sign, including the State of Arizona, the Central Arizona Water Conservation District and the communities of Globe, Safford, Glendale, Mesa, Chandler, Gilbert and Scottsdale. In 1992, the Congress approved broad parameters for a settlement and authorized $50M in federal economic development funds for the tribe once an agreement was signed and accepted by a state court as part of the Gila River Adjudication, under procedures and criteria adopted by the Arizona Supreme Court in 1991. The Tribe's 1.9 million-acre reservation straddles the Salt and Gila Rivers east of Globe. Several extensions of time have been granted in order to complete the negotiations and details of the settlement, but a new deadline to file an agreement with the state court had arrived and Babbitt chose to sign a settlement agreement with only a few of the parties, possibly hoping that pending disagreements could be worked out and other parties would eventually join and sign, or that the court would accept the settlement without more signatures.

Rita Pearson, Director of the Arizona Department of Water Resources, said that the state would not sign the document until it was complete. She noted the lack of an agreement with neighboring communities. The tribe has not yet settled its differences with the communities of Globe and Safford, which border the reservation. The tribe wants Globe to abandon a wellfield and assist in the construction of a pipeline from Roosevelt Lake -- which would purportedly increase local water bills 300%. The tribe wants Safford to reduce the amount of water it diverts from Bonita Creek, but to do so would create a serious situation for the community. Scottsdale, on the other hand, did not join in signing the settlement because it lacks agreement on a separate 100-year lease of the tribe's allotted Central Arizona Project (CAP) water. Until these differences are resolved, Pearson will not recommend the state sign the settlement. The settlement agreement, if and when accepted, would provide the impoverished tribe with rights to approximately 68,000 acre-feet/year of water -- enough to serve 300,000 people a year. The water could be used by the tribe for any beneficial purpose, but the water could not be sold, leased, or transferred off reservation (with the exception of the tribe's original allocation of 12,700 acre-feet of CAP water).

Babbitt, a former Arizona governor, praised the settlement for setting the stage for other agreements. "We can now move forward and quickly to settle the remaining water-rights disputes." The giant Gila River General Stream Adjudication involves nearly 65,000 water rights claims in central and southern Arizona. Babbitt hopes a bill will be introduced in Congress by the end of 1999 to resolve other Gila River claims first filed in 1974. Velasquez Sneezy, the Tribe's Vice Chair said, "I believe this settlement...is going to motivate our younger people...to plan for the future.

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[49] *Western States Water*, Issue #1302, April 30, 1999.

The Settlement was subsequently approved by Judge Susan Bolton as part of the Gila River Adjudication, shortly before federal settlement authority would have expired.[50] Eighteen objections to the proposed settlement were filed by a July 1 deadline, including objections by the cities of Globe and Glendale, and the Central Arizona Water Conservation District (CAWCD). Special Master John E. Thorson heard arguments on motions for summary judgement in August, and determined in September that the proposed settlement could not be finalized without the approval of certain parties, including Globe and the CAWCD. Governor Jane Hull stepped in to mediate differences between Globe and the Tribe. An agreement was reached in late October. Under the agreement, the city will be allowed to continue a limited amount of pumping from their wellfield straddling the western border of the San Carlos reservation. The Special Master filed his final report on November 9, with the City of Glendale and the CAWCD as the only remaining objectors.

In December, Judge Bolton overruled the Special Master, finding that the consent of CAWCD and Glendale were not necessary before the settlement could be approved. She determined that neither party was required to do anything as a result of the agreement or the 1992 settlement act. In 1992, Congress approved broad parameters for a settlement and authorized $50M in federal economic development funds for the Tribe once an agreement was signed and accepted by a state court as part of the Gila River Adjudication, under procedures and criteria that were adopted by the Arizona Supreme Court in 1991. Several extensions of time were granted in order to complete negotiations and details of the settlement. The approved settlement provides the Tribe with 7,300 acre-feet of water per year (af/y) from the Black and the Salt Rivers, plus 60,665 af/y of Central Arizona Project water, surface water in on-reservation tributaries, ground water beneath the reservation, and all effluent developed on the reservation. The San Carlos settlement is the fourth to be approved as part of Arizona's adjudications. Negotiations are continuing with the Gila River Indian Community and the Hopi, Navajo, San Juan Southern Paiute, and Zunis.

Crow Indian Water Rights Settlement

Montana Governor Marc Racicot called a special session of the state legislature in June to address a tentative settlement of water rights and coal tax issues with the Crow Indian tribe. Legislators ratified the settlement of tribal water rights claims in some of the major streams in southeastern Montana, including the Bighorn and Little Bighorn Rivers and Pryor Creek.[51] The agreement would resolve a 21-year-old court battle over millions of dollars in coal taxes the state allegedly illegally collected on Crow-owned coal, by providing a $15M payment from the state to the tribe over a 15-year period. This payment would also serve as the state's financial contribution towards implementation of the water rights compact. The state would agree to protect production of Crow coal from any taxes implemented by the state in the future. The water rights compact basically awards the right to all the water in the major drainages on the reservation to the tribe. However, all existing uses--including the water rights of non-Indians who farm and ranch on the reservation--would be protected under terms of the agreement. The tribe would also receive rights to about 300,000 acre/feet of water in Bighorn Lake.

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[50] *Western States Water*, Issue 1339, January 14, 2000.

[51] *Western States Water*, Issue #1307, June 4, 1999.

While support for the compact had been voiced by members of the Crow Agency and tribal elders, it still faced opposition from within the Tribe, as well as from the federal negotiating team. The chairman of the federal team, Bill Benjamin, surprised officials gathered at the Crow Agency on May 25, by stating that while state and tribal negotiators should be praised for their efforts, the federal government could not support the agreement in its current form, as the federal team has both substantive and technical concerns. Federal officials are worried that the accelerated pace of the negotiations did not allow enough time to fully consider all of the issues. Benjamin noted the federal government's belief that the state's proposed $15M contribution toward implementation of the compact is too low, in light of the federal government's expected contribution, and the benefits that the state and non-Indians in the Bighorn and Yellowstone basins can expect.

Chippewa Cree Tribe/Rocky Boy's Reservation Water Rights Settlement

On November 18, Congress approved the first Indian water rights settlement since 1992. The Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act of 1999 (S. 438) was introduced by Senator Conrad Burns (R-MT) in February.[52] A similar settlement bill had previously been introduced by Senator Max Baucus (D-MT) in 1998.[53] The Act approves and ratifies a 1997 Water Rights Compact entered into by the Chippewa Cree Tribe of the Rocky Boy's Reservation and the State of Montana, as modified by the Congress. The Act directs the Secretary of Interior to execute and implement the Compact, which requires the United States, the Tribe, or Montana to petition the Montana Water Court to enter and approve the proposed decree. The Act also directs the Secretary to administer and enforce the tribal water right pending approval of a tribal water code. Further, the Act directs the Secretary, through the Bureau of Reclamation, to perform a feasibility study of water and related resources in northcentral Montana and evaluate domestic, municipal, rural, industrial, and incidental drought relief alternatives for the Reservation. The Bureau of Reclamation is also to conduct a regional feasibility study to evaluate water and other resources limitations and determine how they may best be managed to serve the needs of Montana's citizens. In addition, Reclamation is to plan, design, and construct specified water projects on the Reservation. Moreover, the Act requires the Secretary to allocate a specified amount of stored water to the Tribe, without cost, and explicitly grants the Tribe the right to use the water for any use either on or off the Reservation. The Act sets up a trust fund to implement the settlement and defines Montana's contribution. On December 9, President Clinton signed S. 438 into law.

Endangered Species Act

On December 9, the Colorado Water Conservation Board (CWCB) sponsored a meeting in Denver with the federal Working Group on the Endangered Species Act (ESA) and Indian Water Rights. The meeting was put together by CWCB Director Peter Evans as an informal opportunity for participants to ask questions and get answers regarding the Working Group's objectives and opinions, from two of its members, Tim Vollman of the Southwest Regional Solicitor's Office in Albuquerque and Margot Zallen with the Rocky Mountain Regional Solicitor's Office in Denver.

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[52] *Western States Water*, Issue #1331, November 19, 1999.

[53] *Western States Water*, Issue #1247, April 10, 1998.

A draft Working Group report had been released for comment, and was scheduled to go the printer in mid-January 2000. The Working Group was not sure when the report would be submitted or what the Secretary of Interior would do with the final report. They believe it is clear that internal dialogue will continue.

Both Mr. Vollman and Ms. Zallen expect that the Secretary will address the Working Group's recommendations and may look to the Working Group for suggestions as to how to implement their recommendations. They believe that further public dialogue will be necessary and agreed that agency rulemaking may be necessary as well in order to implement the report's recommendations. Those recommendations would direct federal agencies: (1) to take into account how their actions may effect the exercise of Indian water rights; (2) require that requests for ESA Section 7 consultations include an evaluation of the potential effects on Indian water rights; (3) include Indian water rights as part of the environmental baseline; and (4) otherwise take into account that the future exercise of unadjudicated Indian water rights may lead to shortages and require reinitiation of consultations or other ESA actions with respect to finding reasonable and prudent alternatives, identifying critical habitat, etc.

Mr. Vollman indicated that many of the comments received so far have complained that the problem and the purpose for the report are not clearly stated. Mr. Vollman did recognize a need to better state the underlying assumptions in the report and better clarify some points. Some comments suggested a need to assess the impact of *TVA v. Hill* on the Working Group's recommendations. Some meeting participants expressed concern that tribal water rights are singled out in the report for special consideration with regard to ESA Section 7 consultations and Indian water resource development, while ignoring the effects on other senior water rights in general. Participants also expressed concern that the report's recommendations create a powerful disincentive for tribes to participate in the reserved rights settlement negotiation process, especially where an agreement to subordinate tribal rights would be necessary to reach an agreement with non-Indian users. According to one participant, this would appear to be in direct conflict with other recent Interior efforts focused on promoting negotiated settlements. Another suggested that one of the report's recommendations would result in an adjudication of the water source at issue under the ESA.[54]

Safe Drinking Water Act

On March 3, the Senate Environment and Public Works Committee's Subcommittee on Fisheries, Wildlife, and Drinking Water, Chaired by Senator Michael Crapo (R-ID), held oversight hearings on the implementation of the Safe Drinking Water Act (SDWA) Amendments of 1996, which the WSWC closely followed. Testifying were: EPA Assistant Administrator for Water, Chuck Fox; Norine Noonan, EPA Office of Research and Development; Gerry C. Biberstine, Colorado Department of Public Health and Environment (for the Association of State Drinking Water Administrators); Merril Bingham, Director of Public Works, Provo City, Utah (for the American Water Works Association); Gurnie Gunter, Director of the Kansas City Water Services Department (for the Association of Metropolitan Water Agencies); Steve Levy, Executive Director of the Atlantic State Rural Water Association (for the National Rural Water Association); and

[54] *Western States Water*, Issue #1334, December 10, 1999.

Andrew Chapman, President & CEO, Elizabethtown Water Company, on behalf of the National Association of Water Companies.[55] They complimented EPA and various stakeholder groups for their cooperation in implementing the requirements of the Act, but expressed concern over a number of drinking water-related topics such as disinfection byproducts, appropriations for state revolving loan funds, the need for funding for research and better science, microbial pathogens, and consumer right-to-know issues. Witnesses strongly urged the Subcommittee and the Congress to provide the necessary funding to meet water system construction and research needs and to enable utilities and others to continue to meet SDWA deadlines on schedule.

[55] *Western States Water*, Issue #1297, March 26, 1999.

POSITIONS AND RESOLUTIONS

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 1999.

UNIFORM NATIONAL PLUMBING EFFICIENCY STANDARDS

On April 9, the Western States Water Council adopted the following position. On April 21, it was was sent with the following cover letter to Rep. Thomas Bliley (R-VA), Chairman of the House Commerce Committee, as well as western congressmen. On July 27, at the invitation of the Committee's Subcommittee on Energy and Power, WSWC Associate Director Tony Willardson testified on behalf of the Council in opposition to the repeal of national plumbing efficiency standards for certain fixtures (proposed by Rep. Joe Knollenburg (R-MI), the sponsor of H.R. 623). His testimony outlined the current WSWC position and highlighted state experiences, which include significant water savings and reduced demands for related infrastructure. Moreover, states would face an unwanted regulatory burden if the national standards on manufacturers were repealed. National standards were enacted as part of the Energy Policy and Conservation Act in 1992. Among other things, the act set specific water use standards for the manufacture of water closets, urinals, showerheads and faucets. The 1.6 gpf (gallons per flush) standard set for toilets and functional problems with some early model designs as led to considerable public derision. Showerheads are limited to the use of 2.5 gallons per minute (gpm). Several members participated in the hearing.

Mr. Knollenburg stated, "...by imposing new overreaching mandates on plumbing products manufactured in the United States...the American people...have been saddled with toilets and showers that in many cases do not work properly." Rep. Joe Barton (R-TX) cosponsored H.R. 623 and he noted that the purpose of the hearing was to see if there was enough support to move the bill forward. Many westerners are among the bill's 82 cosponsors. On the other hand, Rep. Michael Bilirakis (R-FL), one of the sponsors of the 1992 limitations, strongly opposed H.R. 623 and repeal of the plumbing efficiency standards, stating they were added as an amendment with overwhelming approval on a 328-79 vote. He added that water conservation was an important way of life in Florida and water use limits on plumbing fixtures served to significantly reduce indoor water use and limit the need for new water and wastewater infrastructure. Also, Rep. John Dingell (D-MI), the ranking minority member on the Committee, spoke briefly in opposition to H.R. 623.

A panel in support of the bill testified about many complaints from consumers about low-flush toilets that just don't work, adding the problem is growing as the federal standards are applied to fixtures installed as part of new construction or remodeling projects. They declared that the law has created a black market for old toilets, and that consumers should have a right to choose for themselves. Further, nationwide conservation standards were not needed to avert the exaggerated threat of a looming national water crisis. "The reality is that water is cheap and plentiful for the majority of Americans." A panel opposing the bill testified for several conservation, environmental and other interest groups. Plumbing manufacturers and distributors testified that current models work well and the national standards have created uniformity and contributed to cost savings for consumers due to economies of scale. Moreover, repeal of the standards would again lead to a troublesome plethora of state and local regulations and codes. The panel also testified of substantial water savings nationwide, citing examples in Los Angels, New York, San Diego and Tampa. They also focused on the environmental benefits of reducing indoor water use, even in water-rich areas. A number of favorable conservation and consumer satisfaction studies were referenced.

WESTERN STATES WATER COUNCIL

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April 21, 1999 Position No. 224

The Honorable Tom Bliley, Chair
House Commerce Committee
U.S. House of Representatives
2409 Rayburn House Office Building
Washington, DC 20515-4607

Dear Chairman Bliley:

On behalf of the Western States Water Council, which represents the governors of sixteen states, I am writing to express our opposition to the repeal of the uniform national plumbing efficiency standards in the Energy Policy Act of 1992, as envisioned in H.R. 623. A resolution adopted by the Council to this effect is enclosed. The Council has always advocated and promoted the wise use of western water resources in general, and specifically appropriate water conservation measures. Making efficient and beneficial use of scarce water resources has been, and continues to be, a fundamental objective of western states' water policies. Water agencies that have carried out retrofit programs to install higher efficiency fixtures have demonstrated substantial water savings from these programs.

While many western states have enacted their own plumbing efficiency standards and codes, others now rely on the established federal standards, which if repealed, would leave a regulatory gap that could lead to substantial confusion and difficulties in enforcing current state standards for installation of water efficient fixtures. Moreover, repeal might be perceived as sending the wrong signal that urban water conservation is not as important now as a few years ago. With urban growth in the West and the difficulty in developing new water supplies to meet the needs of an expanding population, continuing water use efficiency will always be an important water conservation and management tool.

The national standards provide uniform requirements that simplify and reduce the state burden of enforcement regarding the sale and installation of water efficient plumbing fixtures. The federal statute provides a minimum standards, but if necessary and appropriate, states may still choose to exercise their authority to adopt more stringent requirements. We would appreciate your support in maintaining the existing national standards.

Sincerely,

Francis "Fritz" Schwindt, Chair
Western States Water Council

cc: Western Congressional Delegation

Position No. 224

POSITION
of the
WESTERN STATES WATER COUNCIL
Regarding
WATER EFFICIENCY STANDARDS FOR PLUMBING PRODUCTS
Yakima, Washington
April 9, 1999

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREAS, legislation has been introduced in the 106th Congress to repeal uniform national efficiency standards for plumbing products; and

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

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

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

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

USGS COOPERATIVE STREAM GAGING PROGRAM

The U.S. Geological Survey's (USGS) Federal-State Cooperative Program involves a partnership with other federal, state, and local agencies that provides information that is critical for many of the Nation's water-resources management and planning activities. Non-federal cooperators include state, county, and municipal agencies, as well as interstate compact organizations, conservation districts, water-supply districts, sanitary districts, drainage districts, flood-control districts, and similar organizations. A fundamental characteristic of the program has been that these state and local agencies provide at least one-half the cost (with money or in-kind services) while the USGS does most of the data gathering, quality control and archiving. The result is a consistent computerized data base, which along with the results of analytical studies, are made available to cooperating agencies and to the public through published reports and the internet. The USGS Federal-State Cooperative Program provides for the systematic study of water quantity, quality, and use on a national basis.

Most work is directed toward potential and emerging long-term problems, such as water supply, waste disposal, ground water quality, effects of agricultural chemicals, floods, droughts, and environmental protection. Standardized methods allow study results to be transferable to similar problems in other areas and contribute to issues that have interstate, regional, or international significance. Data collected by USGS and the results of its studies are accepted by parties on both sides of disputes and furnish the basis required for interstate and international compacts, Federal law and court decrees, congressionally mandated studies, regional and national water-resources assessments, and planning activities. This comprehensive program of hydrologic data collection and investigations provides information necessary for the wise development and use of the Nation's water resources.

Typically about half of the funds support the collection of hydrologic data, while the remaining half support hydrologic investigations and research. In 1994, according to USGS, the Federal-State Cooperative Program served as the sole source of funding for the operation of more than 4,200 continuous streamflow stations and partially funded an additional 650 continuous streamflow stations. These stations constitute about 67 percent of the continuous streamflow stations operated by the USGS. The program also provided funds for the collection of ground-water levels at approximately 27,300 wells and the collection of water-quality data at about 1,900 surface-water stations and 4,800 ground-water well and spring stations. Since the early 1970s, there has been an increase in the number of investigations that have emphasized water-quality issues, such as aquifer contamination, river quality, storm-runoff quality, and the effects of acid rain, mining, and agricultural chemicals and practices on the hydrologic system.

In recent years, increasing federal costs and changing USGS priorities have caused friction with western state agencies focused on water supply and streamflows. Several hundred streamgages have been lost, raising considerable concern regarding the viability and integrity of the system in some areas. Western states increasingly bear a greater portion of program costs, and question federal budget priorities, as expressed in the following letters.

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April 21, 1999

Position No. 225

Mr. Bruce Babbitt, Secretary
Department of the Interior
Interior Building
1849 C Street, NW
Washington, DC 20240

Dear Secretary Babbitt:

As your Department prepares the President's budget request for fiscal year 2001, the Western States Water Council urges you to put a priority on funding the USGS's state-federal cooperative stream gaging program. This basic data collection program is key to many of our western water management actions and continues to suffer from the erosion of funding for the federal share. The funding proposed in the President's FY2000 budget request, for example, would result in a loss of about 450 existing stream gaging stations.

The cooperative stream gaging program provides fundamental information used by state, federal, and local water managers for flood control, water supply, water quality, and environmental resources assessment purposes. The states and the federal government have maintained a partnership in funding this program for many years. Loss of federal funding for the program results in a doubled impact, as state matching funds are correspondingly curtailed. We believe that maintenance and improvement of the existing stream gaging network is the single most important element of USGS's program.

To this end, we ask that you prioritize the funding proposed for USGS such that we can maintain our present number of gaging stations. This basic data collection program is more important to us than are other USGS programs such as the hydrology of toxic substances, research and development, and data interpretation activities -- programs which the proposed FY2000 budget would reduce less than the cooperative program is being cut.

We support the findings of USGS's recent report to Congress on the status of the cooperative program -- the findings that emphasize the critical need for additional stream gages to support functions such as flood forecasting and water quality monitoring. As we are increasingly being asked to use adaptive management approaches in addressing western water problems, the needs for basic data collection likewise increase. We thus request that you maximize the allocation of USGS funding to the cooperative stream gaging program.

We would be happy to work with your representatives to help target needed levels of federal funding for the cooperative program. Please contact us if we can provide supporting information on this subject.

Sincerely,

Francis "Fritz" Schwindt, Chair
Western States Water Council

cc: Office of Management and Budget

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April 22, 1999

The Honorable Ralph Regula, Chair
Subcommittee on Interior and Related Agencies
House Committee on Appropriations
U.S. House of Representatives
Longworth House Office Building
Washington, DC 20515-6023

Dear Representative Regula:

The Western States Water Council is writing to request your support for placing a high priority on funding for the U.S. Geological Survey's cooperative stream gaging program in the Interior appropriations bill for FY2000. The cooperative stream gaging program is the result of a longstanding state/federal partnership in natural resources management. Our member states have worked closely with USGS over the years to establish and to maintain stream gage networks that provide vital water supply and flood warning information, as well as water quality and environmental data. We are very concerned over proposed unilateral federal cuts in basic data collection and the cooperative program, which is primarily funded by states and local agencies.

The federal matching funds proposed in the President's FY2000 budget are insufficient to maintain the existing cooperative stream gaging program. Ironically, a recent report to the Congress on the cooperative stream gaging program cites the critical need for additional gages, requiring greater not less funding. The costs of operating and maintaining the existing network are increasing, while federal budget support for basic data collection continues to decline. As a result, there has been a significant reduction in the number of gages being supported by the cooperative program. Further, reductions in the network will jeopardize the success of our water supply, flood warning, water quality and environmental data collection programs, which benefit millions of citizens throughout the Nation. As a matching program, federal funding cuts have a disproportionate impact on overall program funding, more than doubling the dollar reductions. The present budget restructuring results in further funding cuts and the loss of an additional 450 gages.

The Council thus encourages the Congress to support the full funding needed to maintain at current levels the cooperative stream gaging program for FY2000, even at the expense of other USGS programs. We believe that the collection and maintenance of the existing basic water data collection network is the most important element of USGS's water resources program. While cooperative USGS data collection activities are reduced, significant increases are provided in the Administration's budget for other activities such as science support, facilities, and a new category of "integrated science." This shift of USGS's resources away from supporting the basic cooperative data collection program partnerships with the states reverses current trends towards downsizing the federal bureaucracy and empowering the states. The highest priority should be placed on maintaining and strengthening the USGS current cooperative stream gaging partnership with the states.

We strongly urge you to restore and rebalance appropriations for critical cooperative state/federal data collection activities. Please contact us if we can provide any supporting information on the program.

Sincerely,

Francis "Fritz" Schwindt, Chair
Western States Water Council

cc: Charles Groat, Director, U.S. Geological Survey
Jim Souby, Executive Director, Western Governors' Association
Western Governors' Association Staff Council
Western States Water Council Members
Office of Management and Budget

REAUTHORIZATION OF THE CLEAN WATER ACT

The Western States Water Council has had a long-standing interest in many Clean Water Act (CWA) issues. The Committee worked to influence the national debate when the Act was reauthorized in 1987, and has since monitored it's implementation in matters of interest to western states. While the Act was again due for reauthorization in 1992, the debate over changes through 1998 has failed to achieve a consensus.

The Council has continued to be involved in reauthorization discussions with federal officials and other states and organizations. Working together with Western Governors' Association representatives, the Council has engaged in extensive discussions on legislative proposals addressing western concerns. These included strengthening the expression of deference to state water management authority in section 510, clarifying the scope of state authority under section 401, seeking to foster cooperation between states and tribes under section 518, the inclusion of arid states provisions for ephemeral and intermittent streams, and new abandoned mine and "Good Samaritan" provisions. Additional issues have also been raised by Council members, including the impacts of introduced aquatic species on water quality management requirements, antidegradation provisions, and lists of "Water Quality Limited Segments" of impaired and threatened waters required under section 303. The Council also has an interest in watershed and nonpoint source pollution control provisions and funding issues.

A key factor of interest to the Council is preserving states' control over water rights in their states. Section 101(g) provides that Congress did not intend to supersede, abrogate or otherwise impair a state's authority to allocate quantities of water within its jurisdiction. A parallel provision under section 510 states that, except as expressly provided, nothing in the CWA shall preclude or deny the right of any state to adopt or enforce water quality standards or laws, or to impair the states' rights or jurisdiction over the states' waters. Some court cases, however, have weakened application of these provisions and concerns have arisen that the CWA, through water quality controls, could curtail states' jurisdiction over the allocation of their waters.

In 1999, the Council amended its earlier position on the reauthorization of the CWA, adopting an additional provision supporting the passage of legislation requiring federal facilities to be subject to all of the CWA's substantive and procedural requirements, including injunctive relief and court-imposed sanctions.

REVISED
POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
REAUTHORIZATION OF THE CLEAN WATER ACT[56]
April 9, 1999

FEDERAL FACILITY COMPLIANCE

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

[56]The Council originally adopted a position regarding reauthorization of the Clean Water Act on March 22, 1996 (Position No. 210). That position was revised and reaffirmed and readopted on August 20, 1998 (Position No. 220). This additional provision further revised that position.

STATE WATER RIGHTS ADJUDICATIONS FEES

In its continued efforts to seek the introduction and passage of legislation to require the federal government to pay fees for their proportional costs in state general water right adjudications, the Council sent a letter to Senator Orrin Hatch (R-UT), Chairman of the Senate Judiciary Committee, urging his support for draft legislation.

The federal government has historically deferred to state authority to manage water within state boundaries. Consonant with that deference, the McCarran Act was enacted to provide state courts with authority to join federal agencies in general adjudications of water rights commenced by the states. In the general adjudications now underway in many western states, federal agencies are among the largest claimants. Yet the McCarran Amendment preserves the immunity of federal agencies with regard to the payment of fees and costs associated with state general adjudications. Pursuant to this immunity, federal agencies have also claimed an exemption from paying fees required of all other water users for the appropriation, use or distribution of water, which exemption the Supreme Court recognized in 1992.

In 1995, the Legal Committee first proposed and the Council first adopted a position resolving that the federal government should be required to pay filing fees and comply with other state requirements associated with the general adjudication of water rights. In addition, it urged the Congress to appropriate funds to reimburse states for expenses incurred in connection with the adjudication of water rights for federal parties. That position was readopted on November 20, 1998. It is the basis for the following proposed legislation and letter.

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Position No. 226

September 8, 1999

The Honorable Orrin G. Hatch, Chair
Committee on the Judiciary
United States Senate
131 Senate Russell Office Building
Washington, DC 20510-4402

Dear Senator Hatch:

The Western States Water Council, an organization of representatives appointed by the governors of sixteen western states, urges you to support introduction and passage of the enclosed legislative remedy.

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

Federal agencies are among the primary beneficiaries of adjudication proceedings by having the states officially quantify and record their water rights. However, the courts have determined that under existing law (the McCarran Amendment), the United States need not pay fees for processing federal claims even though federal claims are typically the most complicated and largest of claims in state adjudications.

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 other water users and often delays completion of the adjudications by diminishing the resources necessary to complete them. Delays in completing adjudications result in the inability to protect private and public property interests or determine how much unappropriated water may remain to satisfy important environmental and economic development priorities.

The Western States Water Council, therefore, asks you to support the enclosed, narrowly tailored legislation to establish that the United States (not Native American tribes), 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 and other non-tribal entities.

Sincerely,

Francis Schwindt
Chair, Western States Water Council

Enclosure

cc: Senate and House Judiciary Committees
Senate and House Committees on Appropriations
Western Congressional Delegation

Position No. 226

[DISCUSSION DRAFT]

A BILL

To subject the United States to imposition of fees and costs in proceedings relating to State water rights adjudications.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Water Adjudication Fee Fairness Act of 1999".

SEC. 2. FINDINGS.

The Congress finds the following:

Position No. 226

(1) Generally, water allocation in the western United States is based upon the doctrine of prior appropriation, under which water users' rights are quantified under State law. Appropriative rights carry designated priority dates that establish the relative right of priority to use water from a source. Most States in the West have developed judicial and administrative proceedings, often called general adjudications, to quantify and document these relative rights, including the rights to water claimed by the United States Government.

(2) State general adjudications are typically complicated, expensive civil court and administrative actions that can involve hundreds or even thousands of claimants. Such adjudications give certainty to water rights, provide direction for water administration, and reduce conflict over water allocation and water usage. Those claiming and establishing rights to water are the primary beneficiaries of State general adjudication proceedings.

(3) The Congress has recognized the benefits of the State general adjudications and, by adoption of section 208 of the Department of Justice Appropriation Act, 1953 (43 U.S.C. 666; popularly known as the

"McCarran Amendment"), required the United States to submit to State court jurisdiction and to file claims in State general adjudication proceedings.

(4) Water rights claims by Federal agencies are often the largest and most complex claims in State general adjudications. However, the United States Supreme Court, in the case United States v. Idaho, 508 U.S. 1 (1992), determined that the McCarran Amendment does not require the United States to pay administrative fees and costs or judicial fees and costs in State general adjudication proceedings.

(5) Since Federal agency water rights claims are among the most difficult to adjudicate, and since the United States is not required to pay fees and costs paid by non-Federal claimant, the burden of funding adjudication proceedings unfairly shifts to private water users and State taxpayers. The requirement that States process Federal Government water rights claims without reimbursement constitutes an unfunded mandate on States.

(6) The lack of Federal Government funding to support State water rights adjudications in relation to the complexity of the claims involved has produced

significant delays in completion of State general adjudications. These delays inhibit the ability of both the States and Federal agencies to protect private and public property interests. Also, failure to complete the final adjudication of claims to water restricts the ability of resource managers to determine how much unappropriated water is available to satisfy environmental and economic development demands.

SEC. 3. LIABILITY OF UNITED STATES FOR FEES AND COSTS IN WATER USE RIGHTS PROCEEDINGS.

(a) IN GENERAL.----In any State administrative or judicial proceeding for the adjudication or administration of rights to the use of water in which the United states is a party, the United States shall be subject to the imposition of fees and costs to the same extent as a private party to the proceeding.

(b) APPLICATION.----Subsection (a) shall apply to proceedings pending on or initiated after the date of enactment of this Act, including with respect to fees and costs imposed in such a proceeding before the date of the enactment of this Act.

© REPORT TO CONGRESS.----The head of any Federal agency that files or has pending any water rights claim shall prepare and submit to the Congress, within

90 days after the end of each fiscal year, a report that identifies--

(1) each claim filed by the agency that has not yet been decreed;

(2) all fees and costs imposed on the United States for each claim identified under paragraph (1);

(3) any portion of such fees and costs that has not been paid; and

(4) the source of funds used to pay such fees and costs.

(d) FEES AND COSTS DEFINED.----In this section, the term "fees and costs" means any administrative fee, administrative cost, claim fee, judicial fee, or judicial cost imposed by a State on a party claiming a right to the use of water in a State proceeding referred to in subsection (a).

FUNDING FOR INDIAN WATER RIGHTS SETTLEMENTS

Working with the Native American Rights Fund, the Western Regional Council and the Western Governors' Association, as part of an Ad Hoc Group on Indian Reserved Rights Settlement, to promote the negotiated settlement of Indian Reserved Rights Claims to water and to expedite the settlement process, the Council proposed that changes be made in the way that funds are appropriated for implementing Indian water right settlements. At present, settlements are funded as part of the Department of Interior's regular appropriations within the federal budget as a discretionary spending item. Often, funding for the settlement of Indian reserved rights claims has been drawn from other areas of Interior's budget, usually the Bureau of Indian Affairs (BIA), with other BIA programs sustaining a corresponding decline in funding.

The Ad Hoc Group proposes that the Congress and Administration make changes to current budgetary policy to make the funding of negotiated settlements mandatory, rather than discretionary. As stated below, "We believe that the funding of land and water settlements should be a mandatory obligation of the United States government. The obligation is analogous to, and no less serious than, the obligation of the United States to pay judgments which are rendered against it." Such a change would help ensure that any land or water settlement, once authorized by the Congress and approved by the President, would be funded. Otherwise, even when negotiations between states, local entities, tribes and federal agencies lead to a final agreement, funding of that agreement is still subject to further Congressional action to provide the necessary appropriations. The adoption of the Ad Hoc Group's proposal would create a separate fund from which settlement funding would be automatically drawn, much like the scenario in which a judgment is entered against the United States in a court of law.

The Council adopted the following suggested draft legislative language in support of this proposition, and sent letters to members of Congress, agency officials, and the President, urging the creation of a separate settlement fund to meet these important federal obligations.

WESTERN STATES WATER COUNCIL

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Web Page: www.westgov.org/wswc

September 8, 1999

The Honorable William J. Clinton
President of the United States
White House
Washington, DC 20500

Dear Mr. President:

The Western States Water Council, an organization of sixteen western states, and adjunct to the Western Governors' Association, has for years actively supported the negotiated settlement of the water claims of Native Americans. The Council believes that 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. The Council adopted a policy advocating the settlement of water claims in 1986 and has maintained this policy consistently since that date.

We commend your 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. The Interior Department has devoted enormous effort towards effecting this policy, particularly in the last three years. However, unless current budgetary processes as applied to land and water settlements are changed, the Administration's settlement policy will become a nullity.

Under current budgetary policy, funding of land and water settlements is considered to be discretionary, with the result that no settlement can be funded without a corresponding reduction in some other discretionary component of the Interior Department's budget. The practical effect of this budgetary policy is to preclude the funding of land or water settlements. It is virtually impossible for the Administration, the States or the Tribes to negotiate settlements knowing that they will not be funded because funding can only occur only at the expense of some other Tribe or essential Interior Department program.

We believe that the funding of land and water settlements should be a mandatory obligation of the United States government. The obligation is analogous to, and no less serious than, the obligation of the United States to pay judgments which are rendered against it. We urge that steps be taken to change current budgetary policy to ensure that any land or water settlement, once authorized by the Congress and approved by the President, will be funded. If such a change is not made, all of these claims will be relegated to litigation, an outcome which ought not to be acceptable to the Administration, the Congress, the Tribes or the States.

Sincerely,

Francis Schwindt
Western States Water Council, Chair

WESTERN STATES WATER COUNCIL

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

Web Page: www.westgov.org/wswc

September 8, 1999

The Honorable Trent Lott
Majority Leader
United States Senate
487 Senate Russell Office Building
Washington, DC 20510-2403

Dear Senator Lott:

The Western States Water Council, an organization of sixteen western states, and adjunct to the Western Governors' Association, has for years actively supported the negotiated settlement of the water claims of Native Americans. The Council believes that 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. The Council adopted a policy advocating the settlement of water claims in 1986 and has maintained this policy consistently since that date.

We commend 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. The Interior Department has devoted enormous effort towards effecting this policy, particularly in the last three years. However, unless current budgetary processes as applied to land and water settlements are changed, the Administration's settlement policy will become a nullity.

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We believe that the funding of land and water settlements should be a mandatory obligation of the United States government. The obligation is analogous to, and no less serious than, the obligation of the United States to pay judgments which are rendered against it. We urge that steps be taken to change current budgetary policy to ensure that any land or water settlement, once authorized by the Congress and approved by the President, will be funded. If such a change is not made, all of these claims will be relegated to litigation, an outcome which ought not to be acceptable to the Administration, the Congress, the Tribes or the States.

We enclose herewith draft legislative language which, if enacted, would make mandatory the funding of any land or water settlement authorized by Congress and approved by the President. We acknowledge that there may also be other approaches to achieving the desired result and look forward to exploring these approaches as we move forward in resolving this vital issue.

Sincerely,

Francis Schwindt
Western States Water Council, Chair

DRAFT LANGUAGE TO AMEND AN INTERIOR APPROPRIATIONS ACT OR A SUPPLEMENTAL APPROPRIATIONS ACT TO "FENCE OFF" INDIAN LAND AND WATER CLAIMS SETTLEMENT FUNDS IN THE INTERIOR DEPARTMENT'S BUDGET AND MAKE SUCH FUNDING MANDATORY RATHER THAN DISCRETIONARY:

"Such sums as may be necessary, not to exceed $250,000,000 in any fiscal year, shall hereafter be available for payment of amounts authorized in Indian land and water claims settlement Acts, subject to the same protections and limitations as funds appropriated in satisfaction of a judgment of the Indian Claims Commission or the United States Claims Court in favor of any Indian tribe, band, group, pueblo, or Indian community."

WESTERN STATES WATER COUNCIL

REPORT OF INDEPENDENT ACCOUNTANTS

AND

FINANCIAL STATEMENTS

June 30, 1999

HANSEN, BARNETT & MAXWELL
A Professional Corporation
CERTIFIED PUBLIC ACCOUNTANTS

WESTERN STATES WATER COUNCIL

TABLE OF CONTENTS

HANSEN, BARNETT & MAXWELL
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Salt Lake City, Utah 84111-2693

REPORT OF INDEPENDENT ACCOUNTANTS

To the Executive Committee
Western States Water Council

We have audited the accompanying combined balance sheet of Western States Water Council as of June 30, 1999, and the related general fund statement of revenues and expenditures and changes in fund balance - budget and actual for the year then ended. These financial statements are the responsibility of the Council's management. Our responsibility is to express an opinion on these financial statements based on our audit.

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

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Western States Water Council as of June 30, 1999, and the results of its operations for the year then ended in conformity with generally accepted accounting principles.

The year 2000 supplementary information in Note 6 is not a required part of the basic financial statements but is supplementary information required by the Governmental Accounting Standards Board. We have applied certain limited procedures, which consisted principally of inquiries of management regarding the methods of measurement and presentation of the supplementary information. However, we did not audit the information and do not express an opinion on it. In addition, we do not provide assurance that the Council is or will become year 2000 compliant, that the Council's year 2000 remediation efforts will be successful in whole or in part, or that parties with which the Council does business are or will become year 2000 compliant.

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

In accordance with Government Auditing Standards, we have also issued a report dated August 6, 1999 on our consideration of Western States Water Council's internal control over financial reporting and on our tests of its compliance with certain provisions of laws and regulations.

Hansen, Barnett & Maxwell

HANSEN, BARNETT & MAXWELL

Salt Lake City, Utah
August 6, 1999

WESTERN STATES WATER COUNCIL
COMBINED BALANCE SHEET
JUNE 30, 1999

ASSETS

	General Fund	Account Groups: General Fixed Assets	Account Groups: General Long-Term Debt	Totals (Memorandum Only): June 30, 1999	Totals (Memorandum Only): June 30, 1998
Assets					
Cash	$ 145,477	$ —	$ —	$ 145,477	$ 132,485
Account receivable	12,927	—	—	12,927	12,927
Prepaid expenditures	3,832	—	—	3,832	3,832
Deposits	1,501	—	—	1,501	1,501
General fixed assets (office equipment)	—	96,180	—	96,180	97,006
Other Debits					
Amount to be provided for payment of compensated absences	—	—	16,504	16,504	17,268
Total Assets	$ 163,737	$ 96,180	$ 16,504	$ 276,421	$ 265,019

LIABILITIES AND FUND BALANCE

	General Fund	General Fixed Assets	General Long-Term Debt	June 30, 1999	June 30, 1998
Liabilities					
Accounts payable	$ 8,821	$ —	$ —	$ 8,821	$ 2,507
Obligations for compensated absences	—	—	16,504	16,504	17,268
Total Liabilities	8,821	—	—	25,325	19,775
Fund Balance					
Investment in general fixed assets	—	96,180	—	96,180	97,006
Designated fund balance - equipment replacement	29,846	—	—	29,846	30,986
Undesignated fund balance	125,070	—	—	125,070	117,252
Total Fund Balance	154,916	96,180	—	251,096	245,244
Total Liabilities And Fund Balance	$ 163,737	$ 96,180	$ 16,504	$ 276,421	$ 265,019

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

WESTERN STATES WATER COUNCIL
GENERAL FUND
STATEMENT OF REVENUES AND EXPENDITURES AND CHANGES IN FUND BALANCE - BUDGET AND ACTUAL
FOR THE YEAR ENDED JUNE 30, 1999

	Budget 1999	Actual 1999	Variance Favorable (Unfavorable) 1999	Actual 1998 (For Comparison Only)
Revenues				
Member states' assessments	$ 350,000	$ 350,000	$ —	$ 337,000
Bureau of Reclamations contract	12,900	—	(12,900)	5,797
Newsletter receipts	11,350	11,205	(145)	11,350
Symposium fees	11,500	9,505	(1,995)	25,292
Miscellaneous income	15,000	13,030	(1,970)	34
Interest income	11,200	13,647	2,447	13,289
Total Revenues	411,950	397,387	(14,563)	392,762
Expenditures				
Current				
Salaries	195,921	197,423	(1,502)	189,569
Travel	18,496	19,502	(1,006)	23,169
Payroll taxes and employee benefits	79,556	78,555	1,001	62,177
Printing and reproduction	13,573	16,032	(2,459)	12,540
Rent	22,297	21,753	544	21,310
Freight and postage	12,818	11,944	874	11,323
Telephone	3,755	4,335	(580)	3,565
Utilities	2,568	2,567	1	2,413
Maintenance contracts	6,998	5,641	1,357	5,190
Office supplies	3,155	2,589	566	5,740
Reports and publications	512	2,932	(2,420)	2,301
Meetings and arrangements	2,730	3,792	(1,062)	1,796
Accounting	3,063	3,100	(37)	2,874
Insurance	1,201	1,209	(8)	1,140
Contingencies	2,102	2,057	45	1,970
Miscellaneous expense	—	23	(23)	11
Pension management	1,600	2,122	(522)	1,018
Symposium expenses	2,542	7,746	(5,204)	11,784
Capital outlay	9,528	7,387	2,141	3,048
Total Expenditures	382,415	390,709	(8,294)	362,938
Excess of Expenditures Over Revenues	29,535	6,678	(22,857)	29,824
Fund Balance - Beginning of Year	148,238	148,238	—	118,414
Fund Balance - End of Year	$ 177,773	$ 154,916	$ (22,857)	$ 148,238

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

WESTERN STATES WATER COUNCIL
NOTES TO FINANCIAL STATEMENTS
JUNE 30, 1999

NOTE 1--SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTE 2--CASH

The Council's major cash funds were held in the Utah Public Treasurer's Investment Fund during the years ended June 30, 1999 and 1998. Deposits and withdrawals may be made at any time and interest payments are added to the investment balance monthly. The balance in the Investment Fund at June 30, 1999 and 1998, was $101,151 and $89,241, respectively.

During the fiscal year ended June 30, 1991, the Council established an office equipment replacement fund. This fund will be used to purchase new equipment as it is needed. Deposits into this fund are made monthly in the amount of $544. The fund is also held by the Utah Public Treasurer's Investment Fund and accrues interest at the same rate as the Investment Fund. The balance in the Equipment Replacement Fund at June 30, 1999 and 1998 was $29,846 and $30,986, respectively.

At year end, the carrying amount of the Council's bank deposits was $14,400 and the bank balance was $40,118. All of the bank balance was covered by federal depository insurance. Collateralization of deposits is not required by state statute.

NOTE 3--LEASE COMMITMENTS

The Council leases office space under an agreement classified as an operating lease. The lease expires March 1, 2000. Monthly payments are $1,767. Future lease payments to be made during the year ended June 30, 2000 total $14,136.

NOTE 4--RETIREMENT PLAN

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

The Council contributes to the Plan an amount equal to 17% of each plan member's gross wages less the total of all amounts to be reallocated during the taxable year by reason of recoveries attributable to contributions arising out of termination of employment of members of the Plan prior to full vesting. The total contribution for the years ended June 30, 1999 and 1998, were $33,586 and $25,576, respectively.

NOTE 5--COMPENSATED ABSENCES

Employees of the Western States Water Council are entitled to compensated absences in the form of paid vacation and paid sick leave. According to policy, the vacation pay accrues at a rate of 8.5 hours per full month of service rendered for the first 5 years. The next 5 years accrues at the rate of 11 hours per month and for years thereafter the rate is 13 hours per month. The number of unused vacation days, up to 40, carries forward to the beginning of the next calendar year.

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

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

NOTE 6--YEAR 2000 ISSUES

As of June 30, 1999, the Council has not contracted with any vendors for assistance in addressing year 2000 issues relating to its computer systems and other electronic equipment.

The Council has identified the Financial Reporting system as mission critical (that is, critical to conducting operations) and has subjected that system to the following stages of work to address year 2000 issues:

- Awareness Stage – Establishing a budget and project plan for dealing with the year 2000 issue.

- Assessment Stage – Identifying the systems and components for which year 2000 compliance work is needed.

- Remediation Stage – Making changes to systems and equipment.

- Validation/Testing Stage – Validating and testing the changes that were made during the remediation stage.

The Council has completed work through the remediation stage on the Financial Reporting system.

Because of the unprecedented nature of the year 2000 issue, its effects and the success of related remediation efforts will not be fully determinable until the year 2000 and thereafter. Management cannot assure that the Council is or will be year 2000 ready, that the Council's remediation efforts will be successful in whole or part, or that parties with whom the Council does business will be year 2000 ready.

ACCOMPANYING INFORMATION

WESTERN STATES WATER COUNCIL
SCHEDULE OF CHANGES IN GENERAL FIXED ASSETS
FOR THE YEAR ENDED JUNE 30, 1999

	1999
Investment in General Fixed Assets - June 30, 1998	$ 97,006
Office equipment additions	7,387
Office equipment retirements	(8,213)
Investment in General Fixed Assets - June 30, 1999	$ 96,180

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Salt Lake City, Utah 84111-2693

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

To the Executive Committee
Western States Water Council

We have audited the financial statements of Western States Water Council as of and for the year ended June 30, 1999, and have issued our report thereon, dated August 6, 1999. We conducted our audit in accordance with generally accepted auditing standards and the standards applicable to financial audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States.

Compliance

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

Internal Control Over Financial Reporting

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

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

Hansen, Barnett & Maxwell

HANSEN, BARNETT & MAXWELL

Salt Lake City, Utah
August 6, 1999

RULES OF ORGANIZATION[57]

Article I - Name

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

Article II - Purpose

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

Article III - Principles

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

(1) All water-related needs of the states of origin, including but not limited to irrigation, municipal and industrial water, flood control, power, navigation, recreation, water quality control, and fish and wildlife preservation and enhancement shall be considered in formulating the plan.

(2) The rights of states to water derived from the interbasin transfers shall be subordinate to needs within the states of origin.

(3) The cost of water development to the states of origin shall not be greater, but may be less, than would have been the case had there never been an export from those states under any such plan.

Article IV - Functions

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

(1) Undertake continuing review of all large-scale interstate and interbasin plans and projects for development, control or utilization of water resources in the Western States, and submit recommendations to the Governors regarding the compatibility of such projects and plans with an orderly and optimum development of water resources in the Western States.

(2) Investigate and review water related matters of interest to the Western States.

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

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

---

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

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

(2) Member states may name alternate representatives.

(3) Any state may withdraw from membership upon written notice by its Governor. Further in the event any state becomes delinquent in paying dues as set forth in Article V (5) for a period of three years, the state will be 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.

COMMITTEE AND SUBCOMMITTEE MEMBERSHIP

EXECUTIVE COMMITTEE

Bob Loeffler - Alaska (Associate)
Rita Pearson - Arizona
C. Laurence Linser - Arizona (Alternate)
Thomas Michael Hannigan - California
Peter Evans - Colorado
Karl Dreher - Idaho
Jack Stults - Montana
Roland Westergard - Nevada
Thomas C. Turney - New Mexico
Dave Sprynczynatyk - North Dakota
Francis Schwindt - North Dakota **(Chair)** (Alternate)
Martha Pagel - Oregon
Nettie Myers - South Dakota
William B. Madden - Texas
John Baker (Alternate) - Texas
D. Larry Anderson - Utah
Tom Fitzsimmons - Washington
Gordon W. Fassett - Wyoming

Management Subcommittee

Francis Schwindt - North Dakota **(Chair)**
Michael Brophy - Arizona **(Vice-Chair)**
Martha Pagel - Oregon (Secretary/Treasurer)
Gordon W. Fassett - Wyoming (Past Chair)
D. Craig Bell (Executive Director)

WSWC Water Policy Seminar Subcommittee

Roland Westergard - **(Chair)** - Nevada
Francis Schwindt - North Dakota
Dee C. Hansen - Utah
Gordon W. Fassett - Wyoming

Steering Group/National Water Policy Subcommittee

Dave Sprynczynatyk - **(Chair)** - North Dakota
J. David Holm - Colorado
Peter Morros - Nevada
D. Larry Anderson - Utah
Gordon W. Fassett - Wyoming

LEGAL COMMITTEE

Christopher Estes - Alaska (Associate)
Michael Brophy - Arizona
Roderick E. Walston - California
(Alternate)
Thomas Maddock - California
(Alternate)
Peter Evans - Colorado
Karl Dreher - Idaho
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