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An Agricultural Law Research Article

Keep Your Money: Let the West Pay for its Own Water Projects

by

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I. THE CHANGING FEDERAL ROLE IN WESTERN WATER

The federal mission in western water has become increasingly difficult to characterize. At one time, the roles were easy to define: federal agencies were prominent builders and managers of water storage, hydropower, and flood control facilities. As dam sites were built out the construction role lessened. Federal management of water facilities was augmented by a new role in which federal authorities regulated water pollution and became involved in water management decisions through the Endangered Species Act (ESA). Federal involvement in resolving tribal water claims also became more visible.

As the command and control programs grew, and the subsidies represented by construction diminished, the federal presence in western water understandably became more controversial. Opponents to federal environmental controls found a receptive audience in the Republican controlled Congress. Federal environmental regulation of nonpoint source pollution, for example, essentially has been crippled. Key members of Congress are hoping to eviscerate the control that the ESA exerts over western development. At the same time, the "crisis" in western water is relentlessly raised, as drought moves across the west, and as the incipient battles over water rights are brought to the fore. The allocation of the Colorado River in a dry year, for example, has enough substance and controversy to fill reams of newspapers.

The federal presence in water in the western U.S. is markedly different from its presence in the eastern U.S. To paint in broad strokes, the federal role in pollution control is roughly equivalent across the nation. The Corps of Engineers is a powerful force across the nation as well, exercising physical control of rivers, coastal beaches and ports, and hydropower facilities. In contrast, the Bureau of Reclamation is a uniquely western institution, created to reclaim the arid west for farming and development through the

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construction of water storage facilities. The Department of Interior and the Forest Service are primarily western land managers, and tribal water issues are primarily found in the West.

The question posed here is what role the federal government should play in responding to the western water crisis, in light of the changes in the social and political landscape that have occurred in the last decade. The gargantuan federal deficit may serve as a brake on the expansion of federal water development. With declining federal budgets, federal control over facilities could be turned over to private entities. Tribal water settlements will be scrutinized, and perhaps stripped to leaner packages with benefits limited to tribes, rather than serving as the vehicle for regional water benefits. The future direction of federal environmental constraints is an open question at this time. Radical reform (i.e., the repeal or effective dismantling of the ESA and other federal environmental laws) seems to have support from only a minority of legislators, despite the stridency of the attacks upon these laws. Measures that exempt specific projects from federal laws, however, do seem more commonplace.¹ Finally, while drought is an accustomed part of western life, global warming will bring about permanent changes in precipitation patterns, with the greatest effect on those who make a living from the land.

These shifts in the landscape open the door to a new generation of policy choices. If we were to reorient federal roles around sustainability, we would make different investments and mandate different roles for federal agencies. One of the most important policy innovations, however, would be to adopt a policy of restraint, or diminished federal funding, for water resources developments. In short, my thesis is that solutions to water needs that are funded locally are more likely to be sustainable than those produced through national appropriations.

My thinking is affected by the work I did on a Presidential commission that recommended sustainability be the cornerstone of western water policy. Its work is briefly described below.

II. A DECADE OF CHANGE

I served as the chair of an advisory commission that was established by Congressional legislation to consider the role of the federal government in

1. Following the decision in *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003), the Energy and Water Development Appropriations Act of 2004, Pub. L. No 108-137 § 208(a), 117 Stat. 1827 (Dec. 1, 2003) was enacted, effectively barring the Secretary of the Interior from using funds from the fiscal year to "restrict, reduce or reallocate any water stored in Heron Reservoir or delivered pursuant to San Juan-Chama Project contracts . . . to meet the requirements of the Endangered Species Act."

western water.² The report's findings might be characterized as fresh, since so few of them have been adopted, but the political environment of the nation has undergone immense change since that time, and the respective positions of the political parties on these issues have become somewhat blurred.

The Commission's work was initiated in legislation that was signed into law in 1992, the brainchild of Senator Mark Hatfield. Senator Hatfield was a moderate Oregonian Republican, well known in the natural resources field, and well known for his concern for the Columbia River basin. In the legislation and my conversation with him, he said our primary charge was to rationalize the multiplicity of federal agencies and legislation that governed water management, with the Columbia River as the Senator's "Exhibit A."

The Commission responded with a recommendation that federal agencies engage in watershed and basin management, thereby coordinating all governmental entities with responsibilities in a basin. The rationale for the proposal was the belief that basin management would initiate more co-equal relations among federal, state, and other stakeholders in a basin. This recommendation proposed a practical step in improving coordination and responsiveness by federal agencies, but was not the dramatic overhaul of federal roles that Senator Hatfield sought. Much of the Commission's attention was consumed with an unresolved disagreement over whether basin level management should lead to a "softening" of federal environmental regulation.

In retrospect, the recommendations of the Commission occurred within parameters that reflected critical assumptions about the national government, assumptions that no longer hold. First, the single party control of the Executive and Legislative branches has led to unprecedented attacks on bedrock environmental laws. Thus, the assumption that federal environmental laws, and in particular the ESA, would be the backdrop against which water management would occur is now a debatable proposition. Second, the federal government has aggressively opened up oil and gas on western lands, in the process reversing any stereotype of federal authorities as more protective of the western environment than are state governments. Third, the federal ability to bestow largesse on the West has become dubious, because of the ballooning federal deficit, the war in Iraq, hurricane relief, and other demands on federal funding. Fourth, it is far clearer now that the West, and in particular western agriculture, will be negatively affected by the changing climate. Thus the largest consumer of water, and the most powerful influence on federal water policies, is destined to shrink

2. The Report of the Commission was entitled, *Water in the West* (1998). I discussed the report in *The Western Water Policy Review Advisory Commission: Another Look at Western Water*, 37 Nat. Resources J. 909 (1997).

in importance. Fifth, the demographic shift in the West and western agriculture has made water transfers less politically charged than they were a short decade ago. Finally, agricultural subsidies are under national and international scrutiny because of the globalization of trade in agriculture. Agriculture consumes a high percentage of western water withdrawals, so shifts in the subsidies available to western farmers have implications for water usage by this sector.

If one were to reconsider western water policy in light of these changed circumstances, a very different conversation would occur than the one that resulted in the Commission report. I will focus on one changed circumstance: that of the federal government as the deep pockets of water resources.

III. CONTEMPORARY CONGRESSIONAL DEMANDS FOR WATER POLICY

One of the constant features of political life is the need by politicians to promise solutions for the crises faced by their constituents. President Carter's advice to "put on a sweater" in response to energy prices is the sound byte that characterized his presidency. Acceptance of the reality of difficult situations might be good spiritual advice, but it is not good political advice.

How would Congress fix the water crisis? One indication is seen in pending federal legislation that implicitly assumes that the problem is the need for additional supplies and that federal assistance should address this need. The findings recite that "a thorough assessment of technological and economic advances that can be employed to increase water supplies or otherwise meet water needs in every region of the country is important and long overdue."³ Testimony before the House committee stressed the need for federal assistance for these causes.⁴

As we stand on the cusp of another era of federal funding for water projects, we should consider the alternatives to this supply model. Primary among them is having the beneficiaries pay for the projects themselves. Water is a good that individuals can purchase through water charges or payments to irrigation districts. Larger projects can be paid for with long-term borrowing based on water revenues. State or regional governments can choose to contribute to these costs with general obligation bonds or other revenues.

Generations of economists have argued in favor of pricing water at its true cost, pointing out that this will lead to appropriate conservation of wa-

3. Twenty-First Century Water Commission Act of 2005, H.R. 135, 109th Cong. §2 (April 12, 2005).

4. See 151 Cong. Rec. H1859 (daily ed. April 12, 2005).

ter and adequate supply.⁵ While this advice largely has been ignored in Washington, D.C., it is the advice that the World Bank freely dispenses worldwide, where central governments lack the ability to subsidize water projects.

But what can really be so dangerous about free money from Washington, D.C.? The policy conundrum is that providing subsidies for additional water supplies induces behavior that is very different from that which results from requiring jurisdictions to self-finance. As populations grow in arid regions, the margin of safety for adequate water supplies becomes thinner. At a large scale, one can point to water used in agriculture as a source of future supplies. But, in specific regions of the West, there may not be sources of water to transfer. Further, western water is subject to cycles of drought, and some have argued that global warming will usher in an era of permanent drought. In short, subsidies lead people to use water as though it were freely available, to move to areas where there isn't sufficient water, and to plan for future growth, lulled into a false confidence that water supplies are sustainable.

The politics of pork are that the costs of uneconomical water projects are born by the taxpayers of the country as a whole, but the benefits are limited to a discrete interest group or region.⁶ Environmental groups may oppose specific projects because of their effect on rivers and ecosystems, and at least one NGO (Taxpayers for Common Sense) acts as a watchdog for the public fisc, but in general there is no political benefit from opposing unnecessary spending. Indeed, if "bringing home the bacon" is a mark of a good member, it would be highly counter-productive to attack others' projects.

Public investment in public goods is a legitimate function of government. The distinction between a subsidy and an investment in a public good is defined by a leading text: "These [public goods] are the economic activities . . . that cannot appropriately be left to private enterprise Private provision of these public goods will not occur because the benefits of the goods are dispersed so widely across the population that no single firm or consumer has an incentive to provide them."⁷ Water projects have benefits to specific individuals and firms, which can be assessed for their costs. There are public goods that the federal government should provide; it should fund research into water related subjects, perform water monitoring, address public health concerns and areas of poverty, and fund environmental restoration projects, as just a few examples.

5. See National Research Council, *Envisioning the Agenda for Water Resources Research in the Twenty-First Century*, 36-38 (2001); Kenneth D. Frederick, *Marketing Water: The Obstacles and the Impetus*, 132 *Resources for the Future* 7 (Summer 1998).

6. See generally Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Revised ed., Harvard University Press, 1971); *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* (Basic Books, 2000).

7. Paul A. Samuelson and William D. Nordhaus, *Economics*, 42 (12th ed., McGraw-Hill, 1985).

As I write, business as usual in the Congress is under new scrutiny, as the corruption of money and power brings down powerful officials, and practices such as “earmarks” are subject to attack in the news media.⁸ The interesting thing about this moment is that both parties seem to be committed to federal spending on a scale that boggles political observers. When Hurricane Katrina hit, and relief expenditures were necessary, not merely expedient, the public began to look at where America’s wealth had gone. The wisdom of building a bridge in Alaska (dubbed “The Bridge to Nowhere”) was the focus of pundits across the country. It could fairly be called a no brainer to denounce earmarks that are provided in exchange for a relationship with a lobbyist. But the larger question is when federal funding is better than leaving projects to local funding, and this question does not seem to have a role in the national conversation over corruption and pork barrel spending.

We need a positive vision for the West and to invest in ways that help us reach that vision. Bemoaning the flow of federal funds to private beneficiaries is satisfying, but it isn’t likely to be a winning political position. It would be more pragmatic for westerners to identify projects that benefit the public, and to lobby with vigor for these. The West is in need of investments in public goods that have lasting benefits for its citizens. (The focus of this comment is on environmental investments, although it is beyond peradventure that there are critical needs for federal investments in many other areas).

For example, the Congress could embark on a large-scale program to protect the West’s wetlands and riparian lands. These areas play a critical role in western ecosystems, yet are protected poorly, if at all, under existing laws. The Congress could authorize investment in purchase of permanent conservation easements in these lands, preventing land uses that are adverse to their ecological value. A related issue is the lack of water committed to instream purposes in western rivers. Western water law encouraged the full utilization of western rivers long before the value of leaving waters in stream was recognized. The public benefits from ecological integrity, habitat for birds, fishes, and other species, recreation, and tourism, when rivers have flows in them. The Congress could assist western states by purchasing flows for instream purposes, and addressing other requirements of restoration of these critical ecosystems.

Global warming soon will force a reexamination of the U.S.’s profligate releases of carbon dioxide. In the West, with its legacy of oil, gas, and coal reserves, the transition will affect our economy. Our challenge is to reduce our emissions of carbon dioxide, and to rebuild our economy around new types of energy. Fortunately, the means of making these changes are not beyond our abilities, but public investments will be required. We will need

8. See Ken Silverstein, *The Great American Pork Barrel*, 311 Harper’s 31-38 (July 2005).

to ensure that new construction of buildings utilizes designs that minimize energy demand, that our cities are reoriented around public transportation, and that alternative energy sources replace the coal and natural gas plants that now dot the west. There are many appropriate opportunities for federal investments in bringing about this revolution.

The announcement that money has been procured from Washington for one worthy cause or another is always treated as an occasion for congratulations. This is especially so when the money concerns some water need. It is counterintuitive to reflect that these funds might better be spent elsewhere, but that is what western constituents will need to convey to our Congressional delegations, as we seek to manage our water resources with wisdom.