A Western Governor Looks at Water Policy

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I am honored to be invited to participate in this symposium on western water resources. The Federal Reserve Bank of Kansas City is to be congratulated for its initiative and sensitivity in organizing and sponsoring this symposium, for no issue excites western sensibilities more than the topic of water. Without water, the arid lands of our region will never realize their promise nor their potential, and the capacity they have to produce food, fiber, or fossil fuel resources will remain forever beyond our grasp.

The western character has been shaped by the relentless struggle to put water to land. This is especially true in Utah. The Mormon pioneers who arrived in Salt Lake Valley in the summer of 1847 quickly built canals and dams to harvest what remained of the run-off from the mountain streams in order to grow a crop before winter. They were unconsciously reenacting a ritual that was five thousand years old and first employed by the Sumerians in the Middle East, where civilization as we know it came into being with the practice of irrigation. As W. H. McNeil notes in his classic study, *The* Rise of *the* ***West,*** "man's first civilized communities differed fundamentally from the Neolithic Village Communities, for the simple reason that the water engineericg vital to survival required organized community effort." The parallel between the Sumerians and the Mormons is striking and instructive because both knew that the future in an arid region belonged not to the hunter, the trapper, the nomadic herdsman, or the seeker of precious metals, but to those who had the ingenuity and the discipline to make

the desert bloom by putting water to beneficial use.

I was raised in a small community in one of the drier parts of a state that is the second most arid in the nation. Every rain storm in Parowan, Utah, was an event almost as big as the Fourth of July. You learned to reckon time by the intervals between rains. January 3, 1977, is memorable to me, not so much because it was the day I was inaugurated as the twelfth governor of Utah, but because it snowed that day. It was the first moisture we had received in three months and it was the last we were to see for another three months. The drought the west endured during the winter of 1976–1977 cost the region an estimated $15 billion. It may have been a harbinger of things to come.

The Water Resources Council has found that water shortages already exist in 21 of the 116 subregions of the country. These subregions lie in the central plains and the U.S. southwest. By the year 2,000, 39 of these subregions are likely to suffer severe water shortages, including areas of the northern plains, the Rockies, and California. This means that at the beginning of the twenty-first century, most of the nation west of the Mississippi will be in the grip of severe water shortages. This does not assume a prolonged drought, but only the extrapolation of the trend of overutilization of present supply combined with the underdevelopment of potential reserves. We can expect that periodic droughts, like oil embargos, will exacerbate a deteriorating situation. That is why a national water policy, like a national energy policy, is required if we are to complete what has been called the "American century" with anything resembling the optimism and confidence we had as a nation when we began it.

The Carter Administration's initiative to develop a national water policy got off to a very bad start, not only from a policy but also from a procedural perspective. The announcement of the infamous "hit list" was in the morning papers the day that western governors convened in Denver to discuss the deepening western drought with Interior Secretary Andrus, who had been in office less than a month. He, like the rest of us, read about it in the newspapers. That act did incalculable harm to the new administration insofar as its relations with the West was concerned. It was the cause of the skepticism that persists today

over the true intentions of the administration in water policy.

In this regard, the decision of the president to sign the Public Works Bill even though it contained an appropriation to complete the Tellico Dam will go a long way toward dispelling this feeling. I salute the president for his decision. I know how much he disliked signing the bill with the Tellico Dam included among the water projects, but it was the prudent course to take. His objection to the dam was not based upon the threat to the snail darter, but because it was, in his opinion, a bad water project. Needless to say I am happy that the president signed the bill, and I hope that it is a prelude to a new relationship with the West in our continuing effort to shape a national water policy.

If the states are to be full partners in this process (and I have always maintained that there is an important distinction between a national water policy and a federal water policy) then the states must be in a position to seize the initiative and shape the outcome. My experience as chairman of the National Governors' Association Subcommittee on Water Management has convinced me that the key to an effective water resource policy for the states is in the institutions we build to manage the use of this resource.

The NGA Water Subcommittee is a coalition that merges the technical expertise of interstate water organizations, such as the Association of State and Interstate Water Pollution Control Administrators and the Interstate Conference on Water Problems. Together with regional organizations (such as the Great Lakes Commission and the Western States Water Council), we have been able to participate in and influence the national debate on water policy. It is an effective marriage of the political resources of the nation's governors and the technical skills of water quality and water quantity professionals. We have been able to protect state interests in the congressional debate on the Federal Water Pollution Control Act amendments of 1977 and the Safe Drinking Water reauthorization legislation that same year. More recently we have been involved in the fight to hold waste water construction funding in the FY 1980 Budget, and we look to be involved in the upcoming effort to secure adequate funding for controls over non-point-source pollution in rural areas.

To develop knowledgeable positions on issues requires that the governors have technical resources at their disposal. It is the responsibility of governors to insure that the strategies and objectives of these organizations are consistent with state goals and strategies. This can only be done by linking them up in a coalition that elected state officials can guide and direct. It is my hope that in addition to national organizations, each area will develop strong regional organizations with a water quantity and water quality resource capacity. Not unexpectedly, this capability exists in a mature form only in the West, where the Western States Water Council provides a dependable and influential voice for western water interests. I am convinced that strong regional positions on water are essential in order to sharpen the issues and better define the interests at risk. It was through such a process that the basic outline for the agreement that became the National Governors' Association (NGA) policy position on water emerged. This policy was adopted by the NGA without a dissenting vote early in 1978 and has become the basis for our discussion and negotiations with the federal government. The central premise of that position as stated in the preamble is that "the States have the primary authority and responsibility for water management."

I have no doubt that the NGA effort materially influenced the tone and direction of the president's water message that was sent to Congress on June 6, 1978. The president emphasized that he envisioned comprehensive changes in water policy requiring development of "a new, creative partnership" between the federal government and the states. The president further stated that his proposals were designed "to enhance the role of the states, where the primary responsibilities for water policy must lie. . . . States must be the focal point for water resource management."

These were reassuring words to those of us in the West for whom the idea of state sovereignty in water use and management is rooted in the development of our water laws. But preemption is seldom blatant and often appears in subtle guises as in the implementation of the recommendations on water conservation.

The options that the administration wants to pursue in the name of conservation not only could preempt the states in their

traditional role in conserving water but would also emasculate the state's prerogatives in allocating water resources. Conservation has long been recognized as essential in the arid West. The basic legal concept of the western states that prevents waste in water use is that beneficial use determines the scope of the water right. Beneficial use is measured by the reasonableness of the purpose of water use. It requires reasonableness not only with respect to the amount of water but also in the efficiency of the facilities diverting and transporting the water. The measure of reasonableness is often quantified by specifying the duty of water or the amount beneficially needed for particular uses. Thus, mechanisms are available under present state laws to identify wasteful practices and to prevent them. New federal mechanisms in the form of federally enforceable conservation requirements are unnecessary and would preempt traditional state prerogatives.

I remain confident, however, that the man charged by the president for management of the federal effort in developing a national water policy will listen to any appeal on potential preemptions of state prerogatives that occur in the implementation of the policy. That man is Interior Secretary Cecil Andrus who enjoys the trust, confidence, and affection of his former colleagues in the nation's statehouses.

A more clear and present threat to the states' water rights comes not from the water policy review but from the proposal to create an Emergency Mobilization Board with broad powers to supersede state laws when it is determined that they pose an impediment to the completion of priority energy projects. I find it amusing that the federal government deems this radical legislation necessary in order to break the alleged log jam of state bureaucratic barriers to energy development. Except for the notorious and oft-cited SOHIO pipeline in California, there are precious few examples of state recalcitrance in energy development.

My fears are that the fast-track legislation that is presently being considered could, under the pretense of an overriding national interest, trample state procedural and substantive laws underfoot. I have joined with my colleagues in opposing both House and Senate versions of this legislation. I find it particularly

ironic that the sponsor of the House preemption bill is Representative John Dingell who was the sponsor of the National Environmental Policy Act that established the environmental safeguards that he now seeks to supersede. There is no doubt in my mind that the momentum behind the fast-track legislation poses a far greater threat to state water laws than any aspect of the water policy review. It disregards experience and it disdains custom, both of which are the hallmarks of western water law. The emergence of this body of law is unique to the West and dramatically illustrates the primary role of the state in the management of its water resources.

Western water law has developed through the accretion of custom and experience and reflects the realities of life in an arid region. Water rights can be acquired only by beneficial use of water, and they can be lost by nonuse. Under the western appropriation doctrine, the first to make beneficial use of water is protected to the extent of his use. The appropriation doctrine enables the state through definition of "beneficial use" to prevent waste and mismanagement of its waters, and therefore, in contrast to the riparian doctrine, vests the state with broad control over its waters.

State water laws evolved during the nineteenth century, when federal policy stressed disposition of the public domain to encourage homesteading and settlement. By a series of acts in 1866, 1870, and 1877, Congress approved the western appropriation policy and declared that rights to water on public land could be obtained under the laws of the states and territories. Even government patentees had to acquire water rights in accordance with state law.

Congress also passed the 1902 Reclamation Act to encourage development of the West. As with the earlier acts, western congressmen secured provisions that reserved to the states broad control over water resources. Section 8 of the 1902 Act provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.

The 1902 Reclamation law thus established a true partnership between nation and state: the federal government would build and operate reclamation projects; the states would control the acquisition, distribution, and use of water.

While state laws may not override congressional objectives expressed in the federal reclamation laws, where state laws and federal laws do not conflict, state law is applicable. Congress, in the reclamation laws and the earlier public land disposal acts, clearly evinced a policy of deferring to state law on the acquisition, control and distribution of water.

As you can see, water projects and water rights run in tandem in the western mind, and President Carter took them both on, first with his assault on western water projects and then with his subsequent announcement of a national water policy review, which was seen as an attempt to preempt state water rights. As I indicated to you earlier, the states succeeded in modifying and limiting the intent and scope of the water policy review and when finally announced by the president, the policy listed four basic objectives:

1. to improve planning and efficient management of federal water programs,
2. to establish a new national emphasis on water conservation,
3. to enhance federallstate cooperation in water policy and planning, and
4. to increase attention to environmental quality.

I would like to elaborate on the objective of federal-state cooperation because it is in keeping with the thrust of my remarks to you today. Two aspects of this objective have provoked the most controversy and presented the clearest delineation of state-federal divergence: cost sharing on federal water projects and federal reserved rights.

First, as to cost sharing, legislation has been introduced at the request of the administration proposing to establish shared financing of federal water projects built by the Army Corps of Engineers, the Bureau of Reclamation, the Soil Conservation Service, and the Tennessee Valley Authority by requiring states to contribute in advance and in cash a variable percent of the

project cost depending on whether the products of the project are "vendible" or "nonvendible."

The National Governors' Association policy supports the concept of cost-sharing, but it is not specific on what the percent of cost share should be or whether it should be retroactively applied. The NGA policy position on cost-sharing urges that it be consistently and uniformly applied to structural and nonstructural alternatives as well as among federal agencies. It also recommends that when a state cannot provide its front-end share there should be a provision for recoverable loans.

The administration's cost-sharing legislation is intended to winnow out the so-called bad water projects. There is a provision in the bill for voluntary cost-sharing of projects that have been authorized by Congress but for which no money has yet been appropriated. Under the terms of the administration's bill, this **$38** billion backlog of projects would be subject to additional cost sharing. Suffice it to say there has been little enthusiasm for the administration's proposal either from the Congress or the states.

A more intriguing approach to cost sharing is the legislation that has been introduced by Senator Peter Domenici of New Mexico and cosponsored by Senator Patrick Moynihan of New York, entitled the National Water Resources Policy and Development Act of 1979. As Senator Domenici said, upon introduction of his legislation, the goals of a federal water policy should be "to increase state responsibility to move projects ahead to earlier completion and to establish an effective system of project priorities." I believe his bill goes a long way toward achieving the NGA objective that has been set forth in our policy statement. It establishes a block grant approach to water resource development based upon land area and population. It would require a 25 percent state match that could be paid back through the life of the project, but it would guarantee certainty of funding within the block grant category. There is another category of projects of "national significance" that would be exempted from cost sharing entirely. These would be projects with multi-state impacts and benefits of the sort originally contemplated by the Reclamation Act of 1902.

This two-tiered approach to water project funding achieves

two important objectives. First, it allows a state more discretion in the management of its water resources by allowing it to establish project priorities, and second, it broadens the base of support for water project appropriations. This second point is crucial because those of us wh'o are interested in water resource development should fully appreciate the significance of the failure of Congress to override President Carter's veto last fall of the public works bill which contained water projects that had been on his original hit list. As a result there have emerged new realities in water politics that require a new consensus, and if the price of that consensus should include doing something about the water resource needs of other regions of the country, then so be it. But whether it be the Central Utah Project or the Third City Water Tunnel in New York City, we must be about the business of building them before spiraling costs and interminable delays bring water resource development in this country to a complete stand-still.

Despite the conceptual audacity of Domenici-Moynihan, there is some resistance to it, particularly in the West. Western reticence centers on the 25 percent up-front cost share and concern over replacing a tried-and-true system for water project funding with something new and untried. As a western governor I understand these concerns, but I am apprehensive that the old system will not complete the reclamation agenda of the West so that we can develop our vast natural resource reserves in a timely fashion. There will be another attempt to reach an accommodation among the states represented on the NGA water subcommittee when they meet in Salt Lake next week.

An even more difficult question presents itself in the federal reserved water rights issue as it relates to both the reserved water rights of Indians and the reserved water rights attaching to federal lands. Indian reserved water rights were specifically exempted from the jurisdiction and schedule of the national water policy review and have been developed separately by the assistant secretary of interior for Indian affairs. The federal reserved rights portion of the national water policy was issued in an opinion delivered by the solicitor of the Department of the Interior to a special meeting between western governors and Secretary Andrus in Salt Lake City in May of this year.

While the states are still scrutinizing that document in order to be able to respond definitively to it, it appears that the solicitor's opinion devises a new theory upon which to base a claim for a nonreserved federal water right. As a brief prepared by the Western States Water Council states in response:

> The reasons for development of this new theory by the Solicitor can also be surmised. The Supreme Court in the New Mexico case denied the government's claims to reserved rights for instream uses on forest lands for aesthetic, recreation, wildlife-preservation, and stock-watering privileges. Besides being a vital source of timber, national forest system lands are considered the most important watershed areas under any agency of the United States. In the eleven western states, more than half of the stream flow comes from national forests.
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> Having lost the effort to claim such instream rights through the reservation doctrine, it is not difficult to conceive that federal agencies will try again in light of the Solicitor's opinion to claim that such instream non-consumptive uses have been "appropriated" by the federal government for congressionally authorized purposes and therefore should be upheld without reference to state substantive law. Such claims could be anticipated not only from the Forest Service, but also from the National Park Service, the Fish and Wildlife Service and the Bureau of Land Management as well.

The New Mexico case that is referred to was a significant decision handed down by the Supreme Court last year that limited the application of the federal reservation doctrine. In tandem with *California* v. *U.S.*, decided the same day, it portends a dramatic shift in the court's attitude in favor of greater state discretion in water management. If this judicial trend continues it will easily surpass in importance and long-run significance the administration's water policy review. It has emboldened state water lawyers, which explains their immediate and militant reaction to the solicitor's opinion.

As long as the solicitor's opinion does not harden into an official position of the Department of the Interior on this issue, there is still an opportunity for an accommodation, but clearly the concept of a nonreserved federal water right is unacceptable to the states.

Similar sentiments exist among the states on the issue of Indian reserved water rights. Although this issue is not addressed within the context of the administration's water policy review, I want to consider it in concluding my remarks to you. In an article that appeared this summer in the Yale Law Journal analyzing the implications of the Indian reserved water rights issue, the author argues that the definition of Indian rights should be achieved through adjudication rather than legislation, and that adjudication through the courts is preferable to adjudication by federal agencies. While I cannot agree with his preference for federal courts over state courts in the resolution of these rights, the rationale the author develops in justifying adjudication over legislation reveals a process that I want to expand upon: Any definition of the Indian reserved right must be judged by its workability; legislative standards would lack the benefits of decentralized decision making. Given the diversity of Indian reservations and the variety of their claims, fine-tuning and flexibility is essential in defining the scope of Indian reserved rights.

The alternative to legislative definition of Indian reserved water rights is development of standards through case-by-case consideration of reservations. Such consideration requires close scrutiny of the legal instruments and circumstances surrounding the creation of the reservation as well as thorough evaluation of the tribe's economic possibilities at the time. Because the definition of Indian reserved rights is currently undeveloped, a court or agency adjudicating these rights has great flexibility to ensure that the result is equitable under the circumstances of each case. Decentralized decision makers would be permitted to learn by experience. This familiar process of common law evolution would develop outer boundaries for Indian reserved rights that could be tested in a variety of contexts and adversary proceedings and could then be applied to particular situations. Reliance on adjudication thus involves significantly less potential than the legislative approach for unwanted rigidities in defining the extent of Indian reserved water rights.

Notions like "decentralized decision makers" and "common law evolution" that describe a process rather than an outcome remind me of the way Justice Curtis solved a problem before

the U.S. Supreme Court involving the Commerce Clause over 120 years ago. He devised a uniformity-diversity test in *Cooley* v. *Board of Wardens* as a standard for determining when laws should be applied uniformly and therefore enacted at the federal level, and when laws should recognize local diversity and therefore be enacted at the local level. It was a singularly creative act in constitutional law and one that expresses clearly the reason the federal system was devised. This is the genius of the federal system; and as in the case of the free enterprise system, we forget how simple and how well it can work. What is needed in the search for a national water policy is a good measure of both.