

Quadrennial Energy Review Public Meeting: Water-Energy Nexus

Statement of

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I. INTRODUCTION

The Western States Water Council submits the following statement describing its efforts and policy recommendations regarding the water-energy nexus. The Council is a non-partisan government entity created by the western governors, which is affiliated with the Western Governors' Association (WGA) and advises the governors of eighteen western states on water policy matters. The Council's members are appointed by their respective Governors and include state natural resource directors, state engineers, water quality directors, assistant attorneys general, and others. This statement is based on Council Positions #335, #336, #339, #342, #344, #345, #351, and #358, which are attached.

II. WATER MANAGEMENT AND USE IN THE WEST

Congress has consistently recognized that states have primary authority and responsibility for the appropriation, allocation, development, conservation and protection of the surface water and groundwater resources within their borders. As such, states are primarily responsible for the development, management, and protection of their water resources, and are in the best position to identify, evaluate and prioritize their needs. This responsibility also includes the allocation of water for energy-related activities, including the determination of whether or not there is any unappropriated water available for use.

Currently, about 70% of the freshwater that is withdrawn in the West is used for irrigation, followed by energy and industrial use (12%), and public supply (11%). Irrigation also accounts for about 95% of water consumption in the West, compared to 3% for municipal needs, and less than 1% for thermoelectric energy generation.¹

At the same time, the West is the nation's "energy breadbasket" and is home to both renewable and non-renewable resources that provide the majority of the nation's energy. The extraction and development of these energy resources is expected to increase in coming years, as noted by U.S. Energy Information Administration (EIA) projections that show a 56% increase in total U.S. natural gas production by 2040,² much of which will take place in the West.

¹ U.S. GEOLOGICAL SURVEY, ESTIMATED WATER USE IN THE UNITED STATES IN 2005 (Oct. 27, 2009), <http://pubs.usgs.gov/circ/1344/>.

² ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY OUTLOOK 2014 WITH PROJECTIONS TO 2040, MARKET TRENDS: ELECTRICITY DEMAND, MT-23 (2014), [http://www.eia.gov/forecasts/aeo/pdf/0383\(2014\).pdf](http://www.eia.gov/forecasts/aeo/pdf/0383(2014).pdf).

Furthermore, the EIA estimates that national electricity demand could grow by as much as 41% from 2012 to 2040, increasing demands for new generating capacity.³ Almost all of these activities will require water to some extent, with many uses requiring significant amounts of water, including cooling water for proposed traditional and renewable power plants, which are expected to be a major driver of new water demand in the coming decades.

The projected growth in energy-related activities will likely mean that the amount of water withdrawn and consumed for energy purposes will rise, raising a number of questions about the interaction between energy and water. These include how access to water will impact energy development in the West, as well as the states' ability to supply water of adequate quality in quantities needed to sustain current and future energy uses. Moreover, much of the West is arid and many watersheds are already fully appropriated, which means that those seeking water for new energy uses will need to purchase existing water rights.

These growing energy demands for water also coincide with significant drought, growing populations, environmental needs, and a number of other needs that are expected to place further demands on the West's already limited water resources. Taken together, such demands make a secure and sustainable future increasingly uncertain given aging and often inadequate water infrastructure, limited knowledge regarding available supplies and existing and future needs and issues, as well as competing and sometimes undefined or ill-defined water rights.

State primacy will be fundamental to addressing these challenges and ensuring a sustainable water future for energy and other uses. As such, the federal government should streamline regulatory burdens and support implementation of state water plans and state water management. Effectively addressing these challenges will also require a collaborative, cooperative effort among states and stakeholders that transcends political and geographic boundaries, with federal agencies, states, tribes, and local communities working together to resolve water issues, including issues associated with energy demands.

III. STATE-FEDERAL COLLABORATION

Over the years, the Council has engaged in a number of activities to support greater state-federal collaboration regarding federal water-related activities in the West, including activities affecting the water-energy nexus.

Since 2008, the Council has worked with the Western Federal Agency Support Team (WestFAST) to help coordinate federal efforts regarding water resources. WestFAST was created at the request of the Western Governors and includes 12 federal agencies with water resource interests and management responsibilities in the West, including the Department of Energy (DOE). A federal liaison is also stationed in the Council's offices to help coordinate collaboration and communication between the Council and WestFAST's member agencies. To date, WestFAST has helped carry out a number of efforts to advance federal interagency collaboration with the Council on various priorities, many of which are related to the water-energy nexus, including drought, water information, data collection, and data management.

³ *Id.* at MT-16.

In 2013, the Council also adopted position #355, which urges Congress and the Administration to recognize the primary role of states in allocating water for energy and the value of Department of Energy (DOE)-hosted energy water programs and research conducted at the National Laboratories that is undertaken in collaboration with state water resources agencies. As noted in the position:

[T]he expertise and research of the National Laboratories can supplement and enhance the ability of state, local, and tribal water managers to understand and develop adaptation strategies [and such] water-related research...should be guided by state needs as expressed in state planning documents and...planning processes.

Of further note, Council position #351 recognizes that clean, efficient, and inexpensive hydropower is a vital part of the energy resources needed to meet our present and future energy demands. To this end, it calls for federal legislative and administrative actions to authorize and implement reasonable hydropower projects that enhance the nation's electric generation capacity and promote economic development, through streamlined permitting processes, while appropriately protecting environmental resources. The position further supports the development and implementation of appropriate energy and water conservation programs at all levels to minimize demands placed on natural resources and ecosystems.

IV. THE IMPORTANCE OF DATA IN STATE WATER MANAGEMENT

States must have timely and accurate data to effectively manage their water resources and to plan for future water demands. In particular, these water management and planning efforts require data on precipitation, temperature, soil moisture, snow depth, snow water content, streamflow, groundwater, and similar information. With respect to energy, states need this basic data to project future water supplies for future energy uses, to estimate streamflows for hydropower production, and facilitate the management and administration of water rights needed for energy extraction, power plant cooling, and other energy-related activities.

A number of federal programs provide much needed information that states rely on to plan effectively for energy-related water needs and demands. These include:

- The U.S. Geological Survey's (USGS) Cooperative Streamgaging Program and National Stream Flow Information Program, which are funded through the Department of the Interior;
- Landsat thermal data acquired through the National Aeronautics and Space Administration and USGS;
- USGS groundwater measurement and monitoring efforts;
- The Snow Survey and Water Supply Forecasting Program, administered by the National Water and Climate Center (NWCC) in Portland, Oregon, and funded through the U.S. Department of Agriculture's Natural Resources Conservation Service;

- NWCC’s Soil and Climate Analysis Network; and
- The National Oceanic and Atmospheric Administration’s National Weather Service and Climate Programs Office.

Together, these programs provide vital data that state natural resource managers need to forecast floods and droughts and facilitate water management and the administration of water rights, decrees, and interstate compacts – all of which affect the availability of water for energy purposes. However, over the years, the lack of capital investments in many of these programs has led to the discontinuance, disrepair, or obsolescence of vital equipment needed to maintain existing water resources related data gathering activities. As a result, there is a serious need for adequate and consistent federal funding to maintain, restore, modernize, and upgrade federal water and climate programs not only to avoid the loss or further erosion of critical information and data, but also to address new emerging needs, including energy, with a primary focus on coordinated data collection and dissemination.

In short, the old adage “you can’t manage what you can’t measure” is especially applicable to water management. Failing to provide adequate resources for these critical and vital data programs will hinder the ability of states to plan effectively for the growing demands associated with energy and other uses. Therefore, the Council has long urged the Administration and Congress to give a high priority to the allocation and appropriation of sufficient funds for these programs, which benefit so many, yet have been or are being allowed to erode to a point that threatens the quality of the basic data provided.

In addition, as discussed below, the Council has undertaken a number of efforts to help improve the availability of water data to support a wide range of activities that can support efforts to address the water-energy nexus.

A. Energy and Water in the Western and Texas Interconnections

Over the last few years, the Council has worked to coordinate dialogue between the western states and Sandia National Laboratory as the laboratory carried out its “Energy and Water in the Western and Texas Interconnections” project, which developed a series of maps that are intended to support a range of regional planning and policy analysis efforts, with initial applications to focus on electricity transmission planning in the West.⁴ The maps provide information on surface water, groundwater, and “non-fresh water” availability, and focus on data regarding electric power generation and water use, as well as water availability, cost, and use. The resulting water availability “metrics” also show substantial variability, both in terms of water supply sources estimated to be available and their cost, from one watershed to the next. The maps can be accessed online and can be used as a high-level screening tool for review of least cost energy transmission paths.⁵

In preparing the maps, Sandia evaluated five categories of water sources, ranging from more traditional supplies, such as unappropriated surface water, appropriated surface water and

⁴ For more on the project, see: http://energy.sandia.gov/?page_id=1741.

⁵ The mapped water metrics can be accessed at: <https://snlwm.maps.arcgis.com/home/>.

groundwater, to alternative supplies, such as municipal wastewater reuse and brackish groundwater. Sandia obtained the data to support the study from state water plans and other materials shared by state water agencies (when available) and developed estimates for remaining watersheds using a variety of data sources.

The information was then aggregated for 1,208 watersheds on a consistent and comparable scale (an 8-digit Hydrologic Unit Code (HUC) level) for the conterminous U.S. The research team also mapped the estimated cost to develop the water sources and the projected growth in consumptive water demand to 2030 for each watershed. The Council helped facilitate western state review of both the methodologies used and the figures generated during an extensive iterative review process.

B. The Council's Water Data Exchange (WaDE)

The Council's work with Sandia highlighted the lack of, and difficulty of accessing state data needed to carry out comprehensive, regional analyses of water availability. To address this gap and improve access to state water data, the Council initiated an effort in 2011 in coordination with the WGA, DOE's National Laboratories, and WestFAST to develop a web-based water data exchange (WaDE) that will allow for real-time access to western state water allocation, supply, and demand data in a common format. WaDE will also allow users to access state water use data by category, including at a minimum, agricultural, municipal, and industrial/energy uses.

WaDE will employ an innovative, distributed data framework that will allow states to control and maintain datasets locally, thereby ensuring that the data available on WaDE are the latest and best available. This framework will also make the data available through a central data portal and mapping application that will allow users to view data for specific states, regions, and watersheds, depending upon the data format used by the state in question. Further, users will be able to incorporate the state data provided through WaDE into other models or products.

The WaDE project is currently on track to complete an initial pilot project containing water data from five states by the summer of 2015. The lessons learned from this pilot project will then be used to include data from the remaining western states within the WaDE framework. When completed, WaDE will position states to answer important questions about water resources in the West on a regional scale by increasing the availability of water quantity-related information. It will also directly support national water security efforts by serving as a basis for studies similar to Sandia's and federal programs such as USGS' Water Census, and support better decision-making by those agencies that are pursuing integrated water resource management, including efforts related to energy development. Finally, WaDE serves as a model for others interested in developing and sharing specific datasets using a distributed approach.

V. **PROVIDING CERTAINTY FOR WATER RIGHTS ADMINISTRATION**

The outstanding water rights claims of Native American tribes and certain federal agencies have the potential to displace state-based water rights and create a significant amount of uncertainty. This hinders the states' ability to plan effectively for the water demands associated with energy and other uses.

A. The Importance of Indian Water Rights Settlements

Under the prior appropriation doctrine, which governs water allocation in most western states, the first parties to physically divert and put water to a “beneficial use” have priority over subsequent water users. This means that senior water right holders with earlier priority dates (the date the water was first put to beneficial use) can seek curtailment of uses with junior priority dates in times of shortage. However, most non-Indian water development in the West occurred after the federal government finalized treaties and executive orders to establish reservations for tribes, and after Congress severed land and water rights in the West and directed that water rights be obtained under state law. In addition, most tribal treaties and executive orders creating Indian reservations did not specify the tribes’ water rights.

The U.S. Supreme Court addressed the resulting conflict in *Winters v. United States*,⁶ finding that tribal treaties and executive orders impliedly reserved water rights necessary to meet the purpose(s) of a tribe’s reservation. These reserved rights differ from state-issued water rights because they: (1) arise independently of beneficial use; (2) are not limited by beneficial use; (3) are measured by present and future supplies needed to fulfill the reservation’s purpose(s) instead of past uses; and (4) have priority dates that correspond to the date the tribe’s reservation was established.

Resolving *Winters* rights claims is critical for western states because tribal rights typically have priority dates that are senior to non-Indian uses, and therefore have the potential to displace established state-issued rights. This is especially problematic where tribal rights pertain to river systems that are fully appropriated by non-Indian users. The unquantified nature of many tribal rights creates great uncertainty with regard to existing state-based uses and can impede local, state, and regional economic development, including energy development. As a result, quantifying tribal water right claims is essential for western states to address increasing water demands related to energy and other demands and to allocate water supplies that continually change and are often scarce due to drought, reduced snowpacks, and other factors.

At the same time, tribes often lack the resources to develop their water rights, a situation that contributes to a lack of reliable water supplies and related infrastructure throughout Indian Country that sometimes prevents tribes from protecting the health, welfare, and safety of their communities.⁷ The absence of adequate and reliable potable water supplies also contributes to unemployment, poverty, and mortality rates on reservations that are much higher than those in non-Indian communities.⁸

Moreover, the federal government and federal taxpayers have an interest in resolving tribal water rights claims. Specifically, the federal government holds Indian water rights in trust

⁶ 207 U.S. 564 (1908).

⁷ *Testimony of John Echohawk on behalf of the Native American Rights Fund: Oversight Hearing on Indian Water Rights Settlements Before the Subcomm. on Water and Power of the H. Comm. on Natural Resources*, 110th Cong. 7-8 (2008) (statement of John Echohawk, Executive Director, NARF) [hereinafter Echohawk Testimony].

⁸ *In Support of S. 789, the Tule River Tribe Water Development Act: Hearing to Receive Testimony on S. 637, S. 789, S. 1080, and S. 1453 Before the Subcomm. on Water and Power of the S. Comm. on Energy and Natural Resources*, 111th Cong. 7 (2009) (statement of Ryan Garfield, Chairman, Tule River Tribe); Echohawk Testimony, *supra* note 7, at 7.

for the benefit of the tribes and is joined as a party in all water rights adjudications involving tribes. These trust responsibilities also include a fiduciary duty to protect tribal water rights. In many cases, the federal government has not protected tribal water rights, which means that tribes often have significant breach of trust claims against the federal government. This federal trust responsibility also means that Congress and the President must approve each settlement.

Settlements are the preferred manner of resolving tribal water rights claims because they are often less costly and time-consuming than litigation and allow states and tribes to craft mutually acceptable solutions that are not available through litigation. In particular, tribes will typically waive their breach of trust claims against the federal government as well as a portion of their claimed water rights in consideration for federal funding to build needed drinking water infrastructure, water supply projects, and tribal fishery restoration projects. These projects generally enable tribal and non-tribal water users to use existing water supplies more efficiently and advantageously and do not displace existing non-tribal water users. Without federal funding to build these projects, settlements are simply not possible in many cases.

If settlements are not authorized and funded, tribes may have no choice but to litigate their water claims. This is problematic for states because it could provide tribes with senior water rights that could displace many established state-issued water rights that are essential to meet non-Indian energy, industrial, residential, and municipal needs in the West. In addition, postponing the implementation of Indian water rights settlements will be more expensive for the federal government in the long-run because increasing water demands, decreasing water supplies, and other factors will increase the costs of resolving these claims.

To address this issue, the Council, the WGA, and Native American Rights Fund (NARF) have worked together for over 30 years as part of an Ad Hoc Group on Indian Water Rights to support the negotiated resolution of Indian water rights claims, meeting regularly with Congressional and Administration officials to educate them about the importance of resolving tribal water rights. The Council and NARF also hold biennial symposia that bring together state, tribal, and federal experts from around the West to share the lessons learned from successful settlements and discuss ways to improve the settlements process.

To date, these efforts have helped contribute to the approval of 27 settlements. However, the water rights of many more tribes remain unquantified, creating a significant amount of uncertainty that perpetuates hardships to tribes and prolongs conflicts between reserved water rights and state-created water rights. This, in turn, could potentially disrupt established economies and hinder effective state and regional water planning and development for energy and other activities that require reliable and secure water rights.

For these reasons, the Council has long urged the Administration to support Indian water rights settlements with a strong fiscal commitment for meaningful federal contributions that recognizes the trust obligations of the federal government. The Council also urges that any settlement, once authorized by Congress and approved by the President, should receive adequate funding so that it may be implemented in a timely manner.

B. The Need to Resolve Other Federal Water Claims

The U.S. Supreme Court held in *Arizona v. California*⁹ that the doctrine of reserved rights is not limited to Indian reservations and may apply in some instances to other federally reserved public lands, such as national forests, national recreation areas, and national wildlife refuges. Like Indian reserved water rights claims, these non-tribal reserved claims have the potential to disrupt existing state water rights, including water rights needed for energy purposes. Additionally, some DOE facilities may also require water rights for their operations.

These claims are often the largest and/or most complex claims for states to resolve. However, the U.S. Supreme Court held in *United States v. Idaho*¹⁰ that federal agencies are not required to pay state filing fees in general stream adjudications, which state use to resolve federal water rights claims. These fees pay for a portion of the costs associated with conducting adjudications, and the Court's ruling has shifted the burden of paying for state general stream adjudications to private water users and state taxpayers, draining state resources and limiting the ability of states to adjudicate the water rights of private parties and federal entities. As such, the Council has long supported the passage of federal legislation requiring the federal government to pay state filing fees in state general stream adjudications.

VI. STATE-FEDERAL PARTNERSHIPS

The Council recognizes that federal agencies with water resource interests and management responsibilities have rich potential to either support state efforts or impinge on state authority, including state management of water needed for energy purposes. Accordingly it is critical that state and federal agencies maintain positive, cooperative working relationships, particularly in the implementation of federal laws that are premised on strong state-federal partnership, such as the Clean Water Act (CWA) and the Endangered Species Act. Such cooperation is only possible when states are regarded as full and equal partners of the federal government in the development and execution of programs for which both have responsibility.

When developing policies, guidance, and regulations for these laws, federal agencies should be mindful of the costs and impacts that such efforts may have on the states, who often expend their own resources implementing certain federal programs. This is particularly true for the CWA because Congress intended for the states and the Environmental Protection Agency (EPA) to implement the CWA in partnership, delegating authority to the states to administer the law as co-regulators. As such, regulations regarding the CWA and other similar federal laws have the potential to significantly impact states.

In some cases, federal regulations accurately account for state needs and impacts. This is true for EPA's current water transfers rule, which clarifies that certain types of water conveyances are not subject to CWA permitting.¹¹ This clarification is essential for the social and economic health of the arid West because western states rely on thousands of transfers to move water from where it is located to where it is needed for energy, domestic, agricultural, and

⁹ 373 U.S. 546 (1963).

¹⁰ 508 U.S. 1 (1992).

¹¹ 40 CFR Part 122.

other needs. Requiring CWA permits for these transfers would be prohibitively expensive, technically impractical, and could compel the curtailment of certain transfers, including transfers needed to supply water for energy purposes, with little water quality benefits. Notably, EPA's rule has been the subject of recent litigation and the Council appreciates the agency's longstanding efforts to defend the rule.

However, many federal regulations that have the potential to impact states and their implementation of federal environmental laws have been developed without adequate state consultation or consideration of state perspectives. Such has been the case with the EPA's and the U.S. Army Corps of Engineers' proposed rule regarding CWA jurisdiction.¹² Although the agencies conducted some outreach with the Council and other state organizations, the agencies did not seek substantive consultation with the individual states until the publication of the proposed rule for public comment. As a result, the Council has expressed concern that the substantial differences in hydrology, geography, and the legal frameworks of the West will require additional, significant consultation with each of the western states to determine how the draft rule will affect them and be implemented, in order to avoid misrepresentations and unintended consequences.

Ultimately, there is a need for the federal government to develop reasonable environmental regulations that accurately account for state needs and perspectives. This requires true consultation with states, which should take place as early as possible and before the publication of a proposed regulation for public comment, when irreversible momentum often precludes effective consideration of state perspectives.

VII. CONCLUSION

States have the primary and exclusive authority over the management and appropriation of water for energy-related activities, which requires timely, accurate, and reliable data. Further efforts are also needed to help quantify tribal and non-tribal federal water rights to provide additional certainty for state water management and planning efforts. Fortunately, there is much that the states and federal government can do to support state water efforts, including but not limited to research by the National Laboratories to address state needs, the negotiated resolution of tribal water rights claims, and continued and increased support for critical data programs.

¹² Definition of "Waters of the United States" Under the Clean Water Act, Vol 79 Fed. Reg. No. 76, 22,188 (April 21, 2014) (to be codified at 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

RESOLUTION
on the
FEDERAL GOVERNMENT'S ROLE IN EXPEDITING
STATE GENERAL STREAM ADJUDICATIONS
Idaho Falls, Idaho
October 7, 2011

WHEREAS, the Western States Water Council, representing eighteen western states, most of which are actively engaged in general stream system adjudications, wish to hereby communicate their recommendations on how the federal government might help expedite such adjudications in the West; and

WHEREAS, states in the West have developed comprehensive judicial and administrative proceedings (general stream adjudications) to quantify and document relative water rights within basins, including rights to waters claimed by the United States under either state or federal law; and

WHEREAS, these adjudications are typically complicated, expensive civil court and/or administrative actions that involve hundreds or even tens of thousands of claimants, but such adjudications give certainty to water rights, provide the basis for water right administration, reduce conflict over water allocation and water usage, and incidentally facilitate important market transactions for water rights in the West; and

WHEREAS, Congress recognized the benefits of state general adjudication systems and, by adoption of the McCarran Amendment (43 U.S.C. §666), required the federal government to submit to state court jurisdiction for the adjudication of its water right claims; and

WHEREAS, although water right claims by federal agencies are often the largest and/or most complex claims in state general adjudications, the United States Supreme Court, in the case of *United States v. Idaho*, 508 U.S. 1 (1992), determined that the McCarran Amendment does not require the United States to pay filing fees, which pay for a portion of the costs associated with conducting adjudications; and

WHEREAS, this holding means that the cost of adjudicating some of the most difficult claims in a state general adjudication has shifted entirely to private water users and state taxpayers, representing a drain on the resources of States which significantly inhibits the ability of both state and federal agencies to protect private and public property interests; and

WHEREAS, requiring federal agencies to pay filing and other fees and follow the same procedures as all other water right claimants helps to ensure their claims are legitimate and made in good faith;

NOW THEREFORE BE IT RESOLVED that the Western States Water Council recommends policy changes at the federal level as follows:

1. As a matter of policy, federal agencies should pay a fair share of the costs associated with adjudicating their claims in state adjudications. The federal government has discretion to adopt such a policy as a matter of fairness, even though not presently required to do so by law. Payment of filing fees by federal agencies was in fact a common practice prior to the unfortunate U. S. Supreme Court ruling on the Forest Service claims in Idaho.
2. General stream adjudications pursuant to the McCarran Amendment should be brought in state and not in federal court. Actions brought in federal court divert substantial resources from state adjudications and are contrary to the intent of the McCarran Amendment.
3. There must be high-level federal involvement in negotiations and mediation that often occur with regard to federal claims within the context of ongoing adjudications in order to be effective. Experience has shown that without the involvement of federal participants who have the authority to make decisions, achieving agreements can be illusory and delay mutually beneficial outcomes. Policy direction must be provided by the relevant federal agencies.
4. Federal agencies should be given policy direction to ensure that federal claims filed in state adjudications have a sound basis in fact and law. States continue to encounter questionable claims that can be very costly to evaluate, thus diverting limited state resources from completing general stream adjudications, and which are ultimately of no benefit to the United States.
5. Requiring the federal government to provide whatever evidence it may have to substantiate its claims at the time of filing is a way to ensure that claims have a sound basis in fact, and also to facilitate timely review of those claims. . Given the complexity and the contentiousness involving such claims, States are justified in asking the federal government to take this step. Doing so will expedite the process in two ways: (1) it will minimize the filing of questionable claims in the first place; and (2) it will provide a basis for states to ascertain early-on the level of resources that states need to commit to the investigation of such claims.

*(See also Positions #247, #272(a-b), and #308)
Originally adopted October 9, 2002
Reaffirmed October 21, 2005 and October 17, 2008*

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
INDIAN WATER RIGHTS SETTLEMENTS
Idaho Falls, Idaho
October 7, 2011

WHEREAS, the Western States Water Council, an organization of eighteen western states and adjunct to the Western Governors' Association, has consistently supported negotiated settlement of Indian water rights disputes; and

WHEREAS, the public interest and sound public policy require the resolution of Indian water rights claims in a manner that is least disruptive to existing uses of water; and

WHEREAS, negotiated quantification of Indian water rights claims is a highly desirable process which can achieve quantifications fairly, efficiently, and with the least cost; and

WHEREAS, the advantages of negotiated settlements include: (i) the ability to be flexible and to tailor solutions to the unique circumstances of each situation; (ii) the ability to promote conservation and sound water management practices; and (iii) the ability to establish the basis for cooperative partnerships between Indian and non-Indian communities; and

WHEREAS, the successful resolution of certain claims may require "physical solutions," such as development of federal water projects and improved water delivery and application techniques; and

WHEREAS, the United States has developed many major water projects that compete for use of waters claimed by Indians and non-Indians, and has a responsibility to both to assist in resolving such conflicts; and

WHEREAS, 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 and not just individual tribes or States; and

WHEREAS, the obligation to fund resulting settlements is analogous to, and no less serious than the obligation of the United States to pay judgments rendered against it; and

WHEREAS, Indian water rights settlements involve a waiver of both tribal water right claims and tribal breach of trust claims that otherwise could result in court-ordered judgments against the United States and increase costs for federal taxpayers; and

WHEREAS, current budgetary pressures and legislative policies make it difficult for the Administration, the states and the tribes to negotiate settlements knowing that they may not be funded because either they are considered earmarks or because funding must be offset by a corresponding reduction in some other expenditure, such as another tribal or essential Interior Department program;

NOW, THEREFORE, BE IT RESOLVED, that the Western States Water Council reiterates its support for the policy of encouraging negotiated settlements of Indian water rights disputes as the best solution to a critical problem that affects almost all of the Western States; and

BE IT FURTHER RESOLVED, that the Western States Water Council urges the Administration to support its stated policy in favor of Indian land and water settlements with a strong fiscal commitment for meaningful federal contributions to these settlements that recognizes the trust obligations of the United States government; and

BE IT FURTHER RESOLVED, that Congress should expand opportunities to provide funding for the Bureau of Reclamation to undertake project construction related to settlements from revenues accruing to the Reclamation Fund, recognizing the existence of other legitimate needs that may be financed by these reserves; and

BE IT FURTHER RESOLVED, that Indian water rights settlements are not and should not be defined as Congressional earmarks; and

BE IT FURTHER RESOLVED, that steps be taken to ensure that any water settlement, once authorized by the Congress and approved by the President, will be funded without a corresponding offset, including cuts to some other tribal or essential Interior Department program.

*(See also Nos. 250, 275, and 310)
Originally adopted March 21, 2003
Revised and reaffirmed Mar 29, 2006 and October 17, 2008*

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
SUPPORTING FEDERAL RESEARCH ON
CLIMATE ADAPTATION

Washington, D.C.
March 15, 2012

WHEREAS, climate variability and change have serious potential consequences for water resources planning and management, water rights administration, flood management, water supply availability, and water quality management; and

WHEREAS, much of the West's water infrastructure was designed and constructed prior to our current understanding of climate variability and change, often from short hydrologic records from the first half of the 20th century;

WHEREAS, impacts of climate variability and change can include increased frequency and intensity of severe weather (droughts and floods), reduction of mountain snowpacks, changes in timing and amount of snowmelt runoff, and changes in plant and crop evapotranspiration resulting in changed water demand patterns; and

WHEREAS, climate variability and change are additional stressors on western water resources, which are already challenged by population growth, competition for scarce resources, increasingly stringent environmental regulations, and other factors; and

WHEREAS, water resources management and planning at all levels of government and sound future decision-making depend on our ability to understand, monitor, predict, and adapt to climate variability and change; and

WHEREAS, the 2006 Western Governors' Association (WGA) report on *Water Needs and Strategies for a Sustainable Future* and the follow-up 2008 WGA *Next Steps* report identify addressing climate change impacts as a priority for moving forward, and make specific recommendations for actions that the federal government and the states should take to support adaptation, including detailing research and planning needs; and

WHEREAS, the Council approved Position No. 285 in 2007, calling for the Administration and Congress to give a high priority for funding federal programs that provide for the application of basic research on climate variability and change to real-world water management; and

WHEREAS, the Council co-sponsored workshops in 2007, 2008, and 2011 to gather input on climate adaptation and research needs; and

WHEREAS, the U.S. Geological Survey (USGS) released its Circular 1331, *Climate Change and Water Resources Management: A Federal Perspective*, in February 2009,

identifying knowledge gaps, research needs, opportunities to improve planning capabilities, and other activities that would assist in climate change adaptation including those that could impact water quality and thus, available water supply; and

WHEREAS, applied research needs and improvements to water resources planning capabilities identified in the WGA and federal reports and in the Council's workshops include subjects such as evaluation of modifications to reservoir flood control rule curves, evaluation of the adequacy of existing federal hydroclimate monitoring networks, improvements to extreme precipitation observing networks and forecasting capabilities, development and improvement of applications for remote sensing data (satellite imagery), preparation of reconstructed paleoclimate datasets for drought analyses, and development of new guidelines for estimation of flood flow frequencies; and

WHEREAS, many of the applied research needs and improvements to water resources management capabilities and hydroclimate data collections programs identified in the WGA and federal reports and in the Council's workshops are not presently incorporated into federal agency budgets;

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council supports federal applied research and hydroclimate data collection programs that would assist water agencies at all levels of government in adapting to climate variability and change.

(See also No. 316, revised and reaffirmed July 17, 2009)

(See also No. 278, revised and reaffirmed July 21, 2006)

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding
WATER TRANSFERS
and
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
DISCHARGE PERMITS
Seattle, Washington
June 8, 2012
(revised and reaffirmed)

WHEREAS, on August 1, 2003 the Western States Water Council adopted a resolution regarding water transfers and National Pollutant Discharge Elimination System (NPDES) discharge permits; and

WHEREAS, on July 21, 2006, the Western States Water Council adopted a resolution that generally supported the U.S. Environmental Protection Agency's (EPA) proposed amendment to its Clean Water Act regulations as published on the June 7, 2006 Federal Register (Vol. 71, No. 109), which exempted water transfers from the NPDES permitting program.

WHEREAS, in those resolutions the Western States Water Council declared its position that the transport of water through constructed conveyances to supply beneficial uses should not trigger federal NPDES permit requirements, simply because the transported water contains different chemical concentrations and physical constituents; and

WHEREAS, in those resolutions the Western States Water Council also expressed support for the ability of each Western State to use available authorities to place appropriate conditions on water transfers to protect water quality; and

WHEREAS, on June 13, 2008, the EPA published in the Federal Register (Vol. 73, No. 115) a final amendment to its Clean Water Act regulations (40 CFR Part 122) that expressly excludes water transfers from regulation under the NPDES permitting program, and defines water transfers as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use; and

WHEREAS, the final rule relies on EPA's interpretation of the federal Clean Water Act and does not limit any ability of a State to use any available authority, including authority regarding nonpoint sources of pollution, to protect the water quality of the receiving water body in a water transfer;

WHEREAS, water transfers and water quality are essential to the social, economic and environmental well-being of the Western States, and

WHEREAS, the United States Court of Appeals in the case of *Friends of the Everglades v. South Florida Water Management Dist.*, 570 F.3d 1210 (11th Cir. 2009), upheld EPA's Water Transfer Rule holding it to be a reasonable construction of the Clean Water Act and therefore entitled to deference by the Federal Courts, and on which decision the United States Supreme Court subsequently denied a Petition for Writ of Certiorari;

Position No. 342

(See also No. 316, revised and reaffirmed July 17, 2009)

(See also No. 278, revised and reaffirmed July 21, 2006)

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council generally supports EPA's amendment to its Clean Water Act regulations as published in the June 13, 2008 Federal Register.

BE IT FURTHER RESOLVED that the Western States Water Council supports the use by a State of available authorities to protect the water quality of the receiving water body in a water transfer.

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A VISION ON WATER

Adopted by the

Western States Water Council

on June 8, 2012

Our Present Condition

Water in the West is an increasingly scarce and precious resource, given population growth and an expanding range of often competing economic and ecological demands, as well as changing social values. Surface and ground water supplies in many areas are stressed, resulting in a growing number of conflicts among users and uses. A secure and sustainable future is increasingly uncertain given our climate, aging and often inadequate water infrastructure, limited knowledge regarding available supplies and existing and future needs and uses, and competing and sometimes un-defined or ill-defined water rights. Effectively addressing these challenges will require a collaborative, cooperative effort among states and stakeholders that transcends political and geographic boundaries.

Our Vision

- State primacy is fundamental to a sustainable water future. Water planning, policy, development, protection, and management must recognize, defer to, and support state laws, plans, and processes. The federal government should streamline regulatory burdens and support implementation of state water plans and state water management.
- Given the importance of the resource to our public health, economy, food security, and environment, water must be given a high public policy priority at all levels.
- An integrated and collaborative approach to water resources management is critical to the environmentally sound and efficient use of our water resources. States, tribes, and local communities should work together to resolve water issues. A grassroots approach should be utilized in identifying problems and developing optimal solutions.
- Any approach to water resource management and development should accommodate sustainable economic growth, which is enhanced by the protection and restoration of significant aquatic ecosystems, and will promote economic and environmental security and quality of life.
- There must be cooperation among stakeholders at all levels and agencies of government that recognizes and respects national, regional, state, local and tribal differences in values related to water resources and that supports decision-making at the lowest practicable level.

**POSITION
of the
WESTERN STATES WATER COUNCIL
regarding
FEDERAL WATER AND CLIMATE DATA COLLECTION AND ANALYSIS PROGRAMS
San Antonio, Texas
October 12, 2012**

WHEREAS, the Western States Water Council is a policy advisory body representing eighteen states, and has long been involved in western water conservation, development, protection, and management issues, and the member states and political subdivisions have long been partners in cooperative federal water and climate data collection and analysis programs; and

WHEREAS, in the West, water is a critical, vital resource and sound decisionmaking demands accurate and timely data on precipitation, temperature, soil moisture, snow depth, snow water content, streamflow, groundwater and similar information; and

WHEREAS, the demands for water and related climate data continue to increase along with our population, and this information is used by federal, state, tribal, and local government agencies, as well as private entities and individuals to: (1) forecast flooding, drought and other climate-related impacts; (2) project future water supplies for agricultural, municipal, and industrial uses; (3) estimate streamflows for hydropower production, recreation, and environmental purposes, such as for fish and wildlife management, including endangered species needs; and (4) facilitate water management and administration of water rights, decrees and interstate compacts; and

WHEREAS, without timely and accurate information, human life, health, welfare, property, and environmental and natural resources are at considerably greater risk of loss; and

WHEREAS, critical and vital information is gathered and disseminated through a number of important federal programs including, but not limited to: (1) the Snow Survey and Water Supply Forecasting Program, administered by the National Water and Climate Center (NWCC) in Portland, Oregon, and funded through USDA's Natural Resources Conservation Service (NRCS); (2) NWCC's Soil and Climate Analysis Network (SCAN); (3) the U.S. Geological Survey's (USGS) Cooperative Streamgaging Program and National Stream Flow Information Program, which are funded through the Department of Interior; (4) Landsat thermal data acquired through the National Atmospheric and Space Administration (NASA) and USGS; (5) USGS ground water measurement and monitoring; and (6) the National Oceanic and Atmospheric Administration's (NOAA) National Weather Service and Climate Programs Office; and

WHEREAS, state-of-the-art technology has been developed to provide real or near real-time data with the potential to vastly improve the water-related information available to decisionmakers in natural resources and emergency management, and thus better protect the public safety, welfare and the environment; and

WHEREAS, over a number of years, the lack of capital investments in water data programs has led to the discontinuance, disrepair, or obsolescence of vital equipment needed to maintain existing water resources related data gathering activities; and

WHEREAS, there is a serious need for adequate and consistent federal funding to maintain, restore, modernize, and upgrade federal water and climate programs not only to avoid the loss or further erosion of

critical information and data, but also to address new emerging needs, with a primary focus on coordinated data collection and dissemination.

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council urge the Administration and the Congress to give a high priority to the allocation and appropriation of sufficient funds for these critical, vital programs which benefit so many, yet have been or are being allowed to erode to the point that it threatens the quantity and quality of basic data provided to a myriad, growing and diffuse number of decisionmakers and stakeholders, with significantly adverse consequences.

**POSITION STATEMENT
of the
WESTERN STATES WATER COUNCIL
in support of
RENEWABLE HYDROPOWER DEVELOPMENT**

**Denver, Colorado
April 5, 2013**

WHEREAS, the water and hydropower resources of the West have been developed through partnerships between energy and water users, and continue to be inextricably connected;

WHEREAS, clean, efficient, inexpensive hydropower is a vital part of the energy resources needed to meet our present and future energy demands; and

WHEREAS, hydropower is the largest source of renewable electricity in the United States, producing some 100,000 megawatts or about 7% of the Nation's electricity needs; and

WHEREAS, the potential exists for further public and private development of as much as 60,000 more megawatts of this valuable resource, including upgrading existing generators, developing small hydro and the power potential from existing man-made conduits and canals, as well as hydroelectric pumped storage projects; and

WHEREAS, such development can often be undertaken with little impact on the environmental and important ecological resources, requiring minimal further environmental review; and

WHEREAS, permitting requirements may be appropriately minimized and streamlined so as to promote reasonable development while avoiding unnecessary costs; and

WHEREAS, the future development of potential hydropower resources should be appropriately undertaken in compliance with substantive and procedural state water law and interstate compacts; and

WHEREAS, the rights and preference privileges of existing water and power users should be respected; and

WHEREAS, federal legislation has been introduced to further authorize and promote the wise and sustainable development of our renewable hydropower resources, also creating jobs and reducing carbon emissions.

NOW THEREFORE BE IT RESOLVED that the Western States Water Council supports federal legislative and administrative actions to authorize and implement reasonable hydropower projects and programs that enhance our electric generation capacity and promote economic development, through streamlined permitting processes, while appropriately protecting environmental resources.

BE IT FURTHER RESOLVED, that the Western States Water Council also supports the development and implementation of appropriate energy and water conservation programs at all levels to minimize demands placed on our natural resources and ecosystems.

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
URGING CONGRESS TO REAFFIRM ITS DEFERENCE TO STATE WATER LAW,
PROVIDE FOR THE WAIVER OF THE UNITED STATES' IMMUNITY TO
PARTICIPATION IN STATE ADMINISTRATIVE AND JUDICIAL PROCEEDINGS,
AND PROVIDE FOR PAYMENT OF FEES REQUIRED BY STATE LAW
Deadwood, South Dakota
October 3, 2013

WHEREAS, water is the lifeblood of each of the arid Western States, the allocation of which determines the future of each Western State's economic, environmental, social and cultural fortunes; and

WHEREAS, each Western State has developed comprehensive systems for the appropriation, use and distribution of water tailored to its unique physiographic, hydrologic and climatic conditions found within that state; and

WHEREAS, the United States does not have a water management system that is equivalent to those of the Western States for the appropriation, use or distribution of water; and

WHEREAS, Congress has consistently recognized the primacy of state water law because of the need for comprehensive water management systems tailored to the unique needs and characteristics of the individual states; and

WHEREAS, the adjudication of water rights claims is absolutely essential for the orderly allocation of water in all the Western States where state law is based on the prior appropriation doctrine; and

WHEREAS, Congress enacted the McCarran Amendment, 43 U.S.C. § 666, to allow the joinder of the United States in state general stream adjudications, and Congress intended the United States to be subject to the same procedures as all other water right claimants joined in state general stream adjudications; and

WHEREAS, many of the Western States are conducting general stream adjudications for the purpose of quantifying all water right claims in accordance with the McCarran Amendment; and

WHEREAS, the United States is often the largest claimant of water rights in these general stream adjudications, and the adjudication of federal water right claims requires a large commitment of time, effort and resources by the state courts and by state agencies; and

(Originally adopted Nov. 17, 1995, readopted Nov. 20, 1998 and revised and readopted Nov. 16, 2001, Oct. 29, 2004, Nov. 16, 2007, Oct. 29, 2010, and Oct. 3, 2013)

WHEREAS, many of the Western States' general stream adjudication procedures require claimants to pay a fee to offset the states' expenses arising from state general stream adjudications; and

WHEREAS, citing the U.S. Supreme Court's decision in *United States v. Idaho*, 508 U.S. 1 (1993), the United States claims immunity from the payment of adjudication filing fees required of all other claimants to offset the judicial and administrative expenses Western States incur in conducting general stream adjudications; and

WHEREAS, for the United States to be immune from sharing in the expenses of these proceedings constitutes an unfunded federal mandate to the states; and

WHEREAS, many Western States are facing budget shortfalls and limited resources, and the federal non-payment of state filing-fees is a significant impediment to their ability to begin or carry out general stream adjudications in a timely manner; and

WHEREAS, that drawn out adjudications are having a detrimental impact on the willingness of stakeholders in watersheds to collaborate on joint management and planning for water supply and water quality; and

WHEREAS, the United States contends that it cannot be joined in state administrative or judicial proceedings with respect to water rights it has acquired under state law other than pursuant to the McCarran Amendment, 43 U.S.C. § 666; and

WHEREAS, it is inefficient and wasteful to require that a separate lawsuit be commenced for the sole purpose of regulating water rights acquired by the United States under state law; and

WHEREAS, the United States claims it is also immune from paying fees to states that are required of all other water users for the appropriation, use or distribution of water; and

WHEREAS, equity and fairness dictate that federal agencies who voluntarily seek to appropriate water pursuant to state law, or who acquire water rights based on state law, should be required to comply with state law, including the payment of fees, to the same extent as all other persons.

NOW, THEREFORE, BE IT RESOLVED that the Western States Water Council supports passage of legislation that at a minimum provides for the following:

1. Requires the federal government to participate in all state administrative and judicial proceedings with respect to water rights it acquires to the same extent as all other persons.
2. Requires the federal government (not Native American tribes) to pay filing fees as well as comply with all other state substantive and procedural water right adjudication laws to the same extent as all other persons.

*(Originally adopted Nov. 17, 1995, readopted Nov. 20, 1998 and revised and readopted
Nov. 16, 2001, Oct. 29, 2004, Nov. 16, 2007, Oct. 29, 2010, and Oct. 3, 2013)*

3. Requires the federal government to pay applicable fees as well as comply with all other state substantive and procedural laws for the appropriation, use and distribution of water rights to the same extent as all other persons.
4. Provides for state administration of all water rights.

BE IT FURTHER RESOLVED that the Western States Water Council also urges Congress to appropriate moneys for payment of unpaid fees to states that have incurred expenses as a result of processing federal claims or federal objections to private claims in state general stream adjudications.

BE IT FURTHER RESOLVED that the Western States Water Council shall send a copy of this resolution to the congressional delegations representing the states and territories who are members of the Western States Water Council, to President Barack Obama, and to the President Pro-Tem of the United States Senate and the Speaker of the United States House of Representatives.