An Agricultural Law Research Article

Long's Peak Report: Reforming National Water Policy

by

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POINT/COUNTERPOINT

LONG'S PEAK REPORT: REFORMING NATIONAL WATER POLICY†

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† Editor's Note: The following collection of essays offers various perspectives on national water policy reform initiatives proposed by the 1992 Long's Peak Working Group. The report, entitled *America's Waters: A New Era of Sustainability*, was originally prepared for a limited distribution in December 1992. While some of the time references are dated, *Environmental Law* is reprinting the report in full to add context to the following comments and encourage further discussion.

AMERICA'S WATERS: A NEW ERA OF SUSTAINABILITY

REPORT OF THE LONG'S PEAK WORKING GROUP ON NATIONAL WATER POLICY*

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PREFACE

The Natural Resources Law Center of the University of Colorado convened a working group of 30 national experts in water policy at Allenspark, Colorado, near Long's Peak on December 6-8, 1992. The Keystone Center facilitated the meeting. During the meeting, we attempted to focus our collective expertise on the critical water policy issues and opportunities for action by the Clinton-Gore Administration.

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* Following the December meeting, the paper was prepared and printed by the Natural Resources Law Center, University of Colorado School of Law, December 1992. The Center maintains its position of neutrality on issues of public policy in order to safeguard the intellectual freedom of its staff and those with whom it associates. Thus, the interpretations and conclusions in this and other Natural Resources Law Center publications should be understood to be solely those of the participants and authors and should not be attributed to the Center, the University of Colorado, the State of Colorado, or any organizations that support the Natural Resources Center research.

This statement is not intended to be exhaustive. Rather, we hope that it will be useful to the new Administration, at an historic moment, in charting national objectives and suggesting specific decisions for developing a new approach toward managing America's waters.

The participants in the Longs Peak meeting attended as individuals, not as formal representatives of their agencies or organizations. The report as a whole is strongly and unanimously endorsed by the participants named below, but may not necessarily reflect the views of their employers.

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I. INTRODUCTION AND OVERVIEW

Sound water policy must address the contemporary and long-term needs of humans as part of the ecological community. Nationally, we have not been using water in a manner that meets these needs on a sustainable basis. Examples include the endangered Columbia River salmon, the overtaxed San Francisco Bay Delta, the poisoned Kesterson National Wildlife Refuge, the salt-choked Colorado River, the vanishing Ogalalla Aquifer, Louisiana's eroding Delta, New York's precarious Delaware River water supply, and the dying Florida Everglades. The environmental costs of current water policy are extraordinary, both to this and future generations.

In America's past, water seemed abundant and nature forgiving. Federal funding was plentiful, and extensive subsidies for development encouraged inefficient use of water. Single interest water policies did not balance the diversity of human and natural needs in water. Intensive economic uses — agriculture, hydropower, flood control, navigation, and urban development — became the dominant forces in managing water. All too often, other concerns — including sound fiscal policy and the needs of Indian tribes, other ethnic communities, and ecosystems — were ignored. Federally financed water projects were built to control most of the nation's surface water. These initiatives have accomplished considerable societal benefits but have resulted in enormous expenditures and elaborate programs with inherent contradictions, inefficiencies, and a lack of coordination.

The era of building major projects has passed. Neither the economy nor the environment can tolerate more such projects. It is time to reorient the federal role to satisfy new needs consistent with a policy of sustainability.

A major movement toward water policy reform already is afoot at the local, state, tribal, regional, and federal levels. Some examples of these innovations include state and federal programs for instream flow protection, pollution prevention, recognition of the public interest, development of watershed and regional water management approaches, and comprehensive settlements of tribal reserved water rights. The Clinton Administration should build upon this momentum, fulfilling Aldo Leopold's "Land Ethic" by

taking firm and responsible action to help create a visionary approach toward America's waters.

A national water policy based on sustainability must include a thorough re-examination of federal policies affecting water quality and aquatic systems consistent with social equity, economic efficiency, ecological integrity, and continued commitment to federal trust responsibilities to tribes. Implementation of a truly national, not "federal," water policy requires the federal government to facilitate, support, and help coordinate efforts to optimize the effectiveness of all levels of government — federal, state, tribal, and local.

II. NATIONAL POLICY OBJECTIVES

A national water policy should reform water governance to achieve four objectives for sustainable water use: water use efficiency and conservation, ecological integrity and restoration, clean water, and equity and participation in decisionmaking. Institutional reform to advance these objectives must be sensitive to human economic needs and the government's financial constraints.

A. Water Use Efficiency and Conservation

Water is used inefficiently all across the United States, whether in agriculture (the largest single user of America's waters), in industry, or in urban areas. Government has played an active role in building water projects but has taken a passive approach toward encouraging water conservation. Despite water's importance as a public resource, state and federal governments have treated it as a free good, allowing the appropriation of water from rivers, aquifers, and lakes without charge. Water is made available to customers at prices far below its actual value, even when it was developed, stored, and transported at great cost.

Changing economic, social, and environmental values and emerging new technology have made water conservation one of the most promising strategies for protecting existing water supplies, maintaining water quality and ecosystems, sustaining instream flows, resolving long-standing water conflicts (including Indian water rights), and establishing a sustainable water program. There is broad public support for achieving efficiency in urban and agricultural water use. Methods include water conservation,

water saving technology, pricing reforms, and reallocation from lower to higher priority uses. Although efficient water use produces economic, social, and environmental benefits, improved efficiency often is viewed as beyond the traditional responsibilities of water and wastewater agencies. To promote greater water use efficiency, the federal government should encourage more widespread use of integrated resource planning and management by water and wastewater agencies and require it as a condition of financial assistance.

General Principles

(1) Increased demand on water resources, rising costs for water treatment, and contemporary environmental values combine to make the efficient use of water resources a central aspect of all water policy.

(2) The federal government should provide leadership, making water conservation an explicit part of every water program and policy.

(3) Transfers of water from one use to another can contribute substantially to water use efficiency, and should be facilitated by the federal government, taking into account environmental and equity considerations.

(4) The efficient use and conservation of water will be optimized through cooperation among federal, state, local, and tribal governments, and by an open participatory process.

B. Ecological Integrity and Restoration

Our nation's rivers, lakes and wetlands have been the source of many human benefits. However, it is increasingly apparent that these benefits come at the expense of the country's natural capital. We have experienced declines in water quality, biological diversity, and the viability of aquatic ecosystems as a result of intensive water development and use.

The rationale for the protection of ecological systems and processes is in part based on human self interest. Yet it is ecosystem health that ultimately translates into community and economic sustainability. Ecological integrity thus is essential to economic sustainability. In addition, it reflects our ethical need to preserve natural areas upon which so many living things depend. Thus,

ecological protection assumes a priority beyond the measure of economic analysis.

Agency mandates frequently are weak, ineffective and conflicting. No single agency serves as the necessary focal point for ecosystem protection needs in ongoing water management decisions.

General Principles

(1) Watersheds should form the basic unit of analysis and activity in order to protect and sustain aquatic biological diversity, including instream, wetland, riparian, and related upland resources. Watershed restoration priorities should, however, reflect the role and importance of these resources as components of larger regional, interstate, or even international ecosystems.

(2) Preventive strategies and integrated responses should replace crisis-oriented management, which has typified our response to the threat of species loss.

(3) Continued improvements in information should be sought, but data limitations cannot justify lack of action. Policy should be based upon "adaptive management," the principle that environmental restoration programs may be designed as experiments to resolve pressing questions where there are major unknowns; flexible programs are based on the best available information and experience and may be amended as new information becomes available.

(4) Restoration activities should be structured and implemented at the local, regional, state, and tribal levels to secure the long-term health and viability of local communities and to re-establish links between community-scale economics and ecology.

C. Clean Water

A central objective of the Clean Water Act — to restore and maintain the chemical, physical and biological integrity of the nation's waters — remains unfulfilled. Clean water is essential to the health and well being of people and ecosystems. It is necessary for economic security and sustainability. Despite some progress, many obstacles stand in the way of maintaining high quality water. Serious remaining problems include: poorly controlled polluted runoff (nonpoint source discharges) — which accounts for

half of national pollution loads; failure to integrate land and water management; fragmented regulatory responsibility; inadequate water quality standards and lax enforcement; and inadequate attention to ecosystem protection.

General Principles

(1) Water quality problems can best be managed on a watershed basis.

(2) Real improvement of the quality of the nation's waters requires aggressive action to deal with polluted runoff.

(3) Water quality protection includes and depends on protection and restoration of aquatic ecosystems.

(4) Pollution should be prevented at its source.

(5) Effective water quality management requires actions based on the essential link between water quality and water quantity.

(6) Water quality protection programs should emphasize integrated resource planning and funding arrangements tied to the achievement of water quality goals.

D. Equity and Participation In Decisionmaking

Federal and state water policy often has exacted extraordinary social costs. Indian tribes have been prevented from receiving the benefits of federal water development in spite of promises made in treaties and the trust obligation of the United States. Traditional Hispanic communities have seen their *acequias* and traditional patterns of water management and use overwhelmed by state and federal water laws and policies. Millions of people in the South have seen fishing and hunting habitat vanish as wetlands have disappeared. Numerous rural communities, especially in the West, have had their water supplies transported out of their watersheds to urban centers.

Much of the citizenry as a whole has been excluded from the making of water policy. The key decisions have been made by large water organizations and their lawyers, engineers, and lobbyists. The field is widely perceived as too complex and forbidding for participation by ordinary citizens. Environmental groups, farmworkers' organizations, and advocacy organizations represent

ing poor people have provided a vital, though incomplete, remedy for this continuing problem of under-representation.

General Principles

(1) The federal government should acknowledge and fulfill the special trust relationship with Indian tribes.

(2) Decisionmaking should include all affected interest groups.

(3) Decisionmaking bodies should provide the public with readily understood information and analysis.

(4) Where a transition from old to new values demands reallocation of water from existing uses, the equities of people with existing uses established under lawful prior policies should be respected.

III. INSTITUTIONAL REFORM

To accomplish the goals of sound water policy, many water institutions must change. For some agencies, this means new approaches to carrying out their duties. In other cases new allocations and combinations of duties and functions are called for.

Governance of water policy is highly fragmented and, in some important respects, outdated. At the federal level, at least 23 subcommittees of Congress have some legislative or oversight authority over federal water programs. Lack of cohesion in policymaking is matched by fragmentation of administrative responsibilities across the executive branch. Many programs are unresponsive to contemporary societal needs and values.

In our federal system, states exercise considerable governmental responsibility over the use of water. State programs are fragmented in part by requirements of federal programs. Local governments and special purpose districts are major actors, but often confine their focus to the specific and immediate demands of a narrow constituency. The existing configuration of institutions is a major barrier to responsible and timely decision and action.

Reform should have as its ultimate objective the capacity to apply authority of all levels of government to the solution of water resource problems through participatory institutions at the "problemshed" level. Policy should then be developed through an

open process that considers all quantifiable and nonquantifiable water values.

General Principles

(1) Institutional design for water resources management should be directed at making the most effective use of all levels of government, and strengthening opportunities and incentives for private action.

(2) Federal systems should be designed to promote integration of decisions and actions of government closest to the levels at which problems are posed and impacts felt.

(3) The federal government should promote integrated resource planning and management to meet water needs. "Integrated resource planning or management" attempts to find ways to meet water needs at the least cost — including economic costs and environmental and other costs and values, whether quantifiable or not — through consideration of all demand-reducing and supply-enhancing measures in a process that provides full opportunity for participation by members of the public.

(4) Federal agency organization for the implementation of federal water management policies should promote decisionmaking efficiency, consistent administration, and public understanding of how such federal responsibilities are exercised.

IV. RECOMMENDATIONS

Our recommendations include proposals for the first 100 days of the Clinton Administration and for the next four years. Some recommendations are general in nature; others arise more directly from the four national water policy objectives we have described. All call for reform in the way existing institutions govern water.

A. First 100 Days

(1) The President should seek congressional approval of the Environmental Protection Agency (EPA) as a cabinet-level agency.

Water Use Efficiency and Conservation

(2) The President should endorse market-based transfers of federally developed water, with adequate protection of the environment

and of the economic vitality of communities from which the water is transferred.

(3) The Secretary of the Interior should assign a high priority to implementing Title 34 of Pub.L. 102-575, relating to the Central Valley Project, to effect the specific purposes of the Act and to set an example for managing other projects.

(4) The Administrator of the Environmental Protection Agency (EPA) should allow use of state wastewater treatment revolving funds for loans to utilities to assist in financing water conservation efforts, especially where long run costs can be reduced. Measures include meter installation, leak detection and repair, and retrofitting homes with water-efficiency fixtures in low-income neighborhoods, public housing, and depressed rural areas.

(5) The President should:

(a) Direct the EPA, the Army Corps of Engineers, and the Department of the Interior, in consultation with interested parties and with reference to the California Urban Water Conservation Agreement, to identify best management practices for urban water conservation, to be used as baseline measures for evaluating applications for federal permits (Sections 402 and 404 of the Clean Water Act) and federal agency Environmental Impact Statements;

(b) Direct the EPA, the Army Corps of Engineers, and the Department of the Interior to identify integrated resource planning procedures to be used by applicants for federal financial assistance for water supply or wastewater treatment; and

(c) Amend and strengthen the existing Executive Order on Energy Efficiency in Federal Facilities to assure that federal departments and agencies take prompt action to implement the requirements of the National Energy Policy Act relating to water and energy conservation in federally-owned buildings.

(6) The Secretary of the Interior should suspend all work on the proposed transfer of the Central Valley Project (CVP) to the State of California until the Secretary, in consultation with the Office of Management and Budget and other experts and interests, promulgates rules that require recoupment of CVP federal construction, operation, and maintenance subsidies and ensure that all environmental obligations are met by any such CVP transfer. This rulemaking should be used in development of appropriate rules to

govern other transfers of Departmental assets to non-federal entities.

(7) The Secretary of the Interior should begin aggressive implementation of Title XVI of Pub.L. 102-575 (Reclamation, Wastewater and Groundwater Studies), and should seek financial commitments from state and local governments as appropriate.

(8) The Secretaries of the Interior and Agriculture should direct that significant federal land transfers (i.e. exchanges, land disposals, sales) intended for residential and commercial development shall not be completed absent consultation with the relevant state and local governments concerning the adequacy of long-term water supplies to sustain the proposed development.

Ecological Integrity and Restoration

(9) The President should announce his strong support for reauthorization of the Endangered Species Act with provisions to promote ecosystem protection actions.

(a) The Secretary of the Interior should act expeditiously on listing threatened and endangered species and pursue timely development and implementation of ecosystem-based recovery plans, with particular emphasis on the Columbia and Snake River salmon.

(b) The Secretary of the Interior should develop a program for identifying ecosystems in distress on the public lands before it becomes necessary to list species as threatened or endangered.

(10) In support of the 25th anniversary of the National Wild and Scenic Rivers Act of 1968, the President should announce his support for a substantial expansion of the National Wild and Scenic River system during the next four years.

(11) The President should issue an Executive Order establishing a policy of watershed-level aquatic ecosystem protection and restoration. The order should direct the EPA and the Departments of the Interior, Agriculture, Defense, and Commerce (with oversight from the Council on Environmental Quality) to: review, revise, and coordinate their activities and operations to use all authorities under existing law to manage federal lands; to operate federally owned or licensed projects and facilities to protect and restore fish, wildlife, and their habitats on an equal basis with other primary project purposes (where such protection is not provided

under the Endangered Species Act); and to use best management practices on federal public lands to achieve compliance with water quality standards (e.g. buffer zones; riparian area protection; limits on grazing, mining, and timber production). The Administration should support legislation to expand agency authority and revise project purposes where necessary.

(12) The President should:

(a) Withdraw the August, 1991 Wetlands Delineation Manual and appoint an interagency scientific task force (the EPA, U.S. Fish and Wildlife Service, Department of Agriculture, and Army Corps of Engineers) to revise the 1987-89 manuals to address regional variations and concerns utilizing the results of the forthcoming National Academy of Sciences report;

(b) Support funding for the Wetlands Reserve Program and other innovative agricultural programs that reverse wetlands loss or serve critical ecosystem needs; and

(c) Announce strong support for the Clean Water Act Section 404 (wetlands protection) permit program.

(13) The President should appoint Federal Energy Regulatory Commission (FERC) commissioners and power marketing administrators who are sensitive to ecological and non-power interests for hydropower licensing and marketing.

Clean Water

(14) The Administration should support annual investments of $2 billion over the next four years to assist communities in complying with the Safe Drinking Water Act. Funding should focus on physical consolidation or upgrading of small systems unable to meet standards and the replacement of lead service lines and plumbing in low-income communities.

(15) The Administration should form a federal-state task force to identify, prioritize, and develop action plans for problem watersheds and pursue funding for those action plans under the nonpoint source program (Section 319 of the Clean Water Act) and the Farm Bill water quality provisions.

Equity and Participation in Decisionmaking

(16) The President should issue a formal statement recommitting the United States to protect Indian water rights and instruct the

Attorney General to provide for the independent representation of tribes in water rights litigation and settlements.

(a) The Interior Department and the Office of Management and Budget should modify the criteria and procedures applicable to Indian water settlements to give primary recognition to the United States' special trust responsibility to Indian tribes and secondary consideration to the exposure of the United States to liability from litigation.

(b) The President should request Congress to: appropriate $250 million to implement negotiated settlements; appropriate sufficient funds to assure the full and effective representation of tribes in water rights litigation; appropriate funding for tribal water management; and authorize a permanent Indian water rights settlement fund.

(c) The Secretary of the Interior should continue and expand the working group on Indian water rights settlements to facilitate Indian water rights negotiations.

(17) The Administration should initiate immediate rulemaking and other actions to ensure that federal programs are administered so as to avoid the creation of inequities and disproportionate effects on identifiable ethnic and low-income communities, and shall take steps to address issues such as:

(a) Fulfilling the needs of traditional Hispanic water management organizations;

(b) Preventing siting of waste facilities and sewage plants predominantly in low-income areas; and

(c) Modifying programs of the Soil Conservation Service (SCS) and other programs for water management and control in coastal Louisiana that result in denying access to local fishermen.

B. Mid-Term Recommendations

(18) Within the first year of the Administration, the President should make a major, comprehensive address on water policy incorporating the recommendations of this report.

(19) The President should create a Water Task Force of federal, state, and tribal governments to develop a strategy for better coordination in the development and implementation of national water

policy. The Task Force should study proposals for a new agency or other structures consolidating all federal water management functions and programs.

(20) Federal agencies with water program responsibilities should look for opportunities to delegate to or share management responsibilities and regulatory authority with governments at the level most closely affected by program decisions, including local, state, tribal, and regional governments. This should be conditioned upon compliance with federal standards. Authority for citizens to bring suit in federal court to compel compliance with federal standards should attend the transfer of regulatory authority.

(21) The Administration should appoint a broad-based group of federal, state, tribal, and citizen representatives to study the imposition of federal, state, or tribal fees for the diversion and use of water for hydropower, navigation, and other commercial purposes as a means of promoting more efficient use of this public resource and providing funds for water management and watershed restoration. The study should consider impacts on low-income families, exemptions for small water users, the retention of proceeds in the basin of origin, and the ability of market mechanisms and other existing institutions to achieve the same goals.

Water Use Efficiency and Conservation

(22) The Secretaries of the Interior and Defense should reevaluate existing or authorized Bureau of Reclamation and Army Corps of Engineers projects in light of contemporary needs and standards, including standards of water use efficiency, to identify opportunities for conjunctive use, water marketing, and the accomplishment of other federal goals, and should seek reauthorizations and deauthorizations as appropriate.

(23) The Secretary of the Interior should conduct an ongoing federal project contract review process triggered by requests for modifications, expirations, and other opportunities not covered by another established procedure such as for water transfers. Contracts should be renegotiated to reflect contemporary water needs, pricing for efficiency, and facilitating reallocation of project water.

(24) The Secretaries of the Interior and Defense should promulgate regulations to facilitate and encourage marketing of water from federal projects to promote efficient water uses to the extent

consistent with the ecological integrity of affected streams and the economic vitality of communities in the area of origin.

(25) The Secretary of the Interior should utilize the pending Reclamation Reform Act rulemaking to modernize conservation practices at federal water projects and undertake aggressive enforcement of these conservation requirements.

(26) The Administrator of the EPA should develop incentives for water use efficiency and conservation. The EPA should:

(a) Make loans and grants, in coordination with the Soil Conservation Service (SCS), for demonstration programs to encourage agricultural water conservation as a means of addressing nonpoint source pollution; and

(b) Establish a clearinghouse for data and information regarding agricultural and municipal and industrial water conservation methods.

(27) Federal agencies investing in conservation should take full advantage of existing federal and state programs designed to protect conserved water as instream flows (such as the State of Washington's trust water rights program). In addition, the Administration should create incentives for states to adopt programs that dedicate a portion of conserved water to instream flow and other environmental purposes including groundwater protection. The Administration should provide incentives for contracting agencies and customers to improve efficiency in use and distribution of federal project water.

(28) The Secretary of the Interior, in the case of Reclamation projects, and the Administrator of the EPA, to the extent permitted by current law, should encourage water pricing by urban water utilities promoting water conservation — e.g., eliminate declining block rates — provided that adequate safeguards are instituted to mitigate the impact on low-income families.

(29) The EPA, Health and Human Services Department (HHS), and Housing and Urban Development Department (HUD) should coordinate to provide opportunities for water conservation in low-income urban (public housing) and rural areas.

(30) Economics will dramatically limit the development of new water supplies. New projects should be planned and authorized by Congress only to meet the highest priority needs. The Adminis-

tration should treat environmental quality as equivalent to regional economic development in applying the Principles and Guidelines. Modifications to existing projects should be considered by the appropriate agency and Congress only after the existing project has been reevaluated in light of new needs and water conservation objectives. Reallocation of existing supplies should be preferred as an alternative to new storage.

(31) The Secretaries of the Interior and Energy should review existing power contracts on a co-equal basis with water contracts. Federal hydropower pricing should reflect the full economic and environmental cost of producing power, and revenues should be used to assist in financing water conservation and ecosystem protection and restoration.

Ecological Integrity and Restoration

(32) The President should order the EPA, U.S. Fish and Wildlife Service (USFWS), and National Oceanic and Atmospheric Administration (NOAA) to prepare a report identifying critically important or representative ecosystems and specifying major ecosystem restoration opportunities in watersheds throughout the nation. Identified restoration actions should include a feasibility assessment containing prospective economic benefits and costs and appropriate incentive mechanisms.

(33) The Administration should establish a National Restoration Trust Fund in the United States Treasury to assist the USFWS and NOAA in efforts to protect and restore aquatic ecosystems. Initial funding should be derived from unspent income in the Land and Water Conservation Fund. Future revenues should be provided from federal water and hydropower surcharges, reductions in water-use subsidies, and establishment of broad-based user fees and assessments. Annual appropriations for ecosystem protection and restoration purposes should not be less than the annual income to the National Restoration Trust Fund.

(34) The new Administration, working through the Department of the Interior, EPA and U.S. Army Corps of Engineers, and in consultation with the states and tribes, should encourage and facilitate the formation of new watershed management organizations for the purpose of integrating water management at the "problemshed" level. A federal statute setting forth the essential

elements of compacts to implement watershed management for interstate basins is advisable.

(35) Federal agencies should support nongovernmental and community-based approaches to the restoration of aquatic ecosystems, including watershed-based Community Restoration Trusts supported by the National Restoration Trust.

(36) The Departments of the Interior and Agriculture should assert rights to instream flows for federal lands and encourage states to adopt and strengthen instream flow programs by using authority to grant or withhold federal funds and federal permit approvals.

(37) The Administration should support legislation that allows states and tribes to protect their most outstanding river segments against hydropower development.

(38) The Administration should seek to amend the Federal Flood Insurance Act to eliminate all subsidies for insurance premiums for new or post-storm reconstructed floodplain development, and to strengthen compliance with the Act.

(39) The EPA and Department of the Interior should establish comprehensive, publicly accessible, watershed-oriented monitoring programs, information bases, geographic information systems, computer models, and decision-support systems to assist public participation in developing water policy.

(40) Resource management agencies should be directed to establish quantifiable measures of ecological integrity which should then be incorporated into agency goals, objectives, and performance evaluation criteria.

(41) The Federal Energy Regulatory Commission (FERC) should condition hydropower licenses to include provisions requiring licensees to develop end use electric and water efficiency programs and to protect and restore watershed ecosystems, including restoring flows for fish and wildlife. FERC and the Administration should support the establishment of a dam decommissioning fund from license fees to cover the costs of dam removal or decommissioning.

(42) FERC licensing and relicensing should treat the ecological and nonpower values of rivers as co-equal with power generation and should ensure that licensees implement environmental and energy efficiency programs.

Clean Water

(43) The EPA should work with the states to develop models by which water quality and quantity concerns will be addressed in an integrated fashion.

(44) The Administration should support and work with Congress to reauthorize and strengthen the Clean Water Act to:

(a) Require enforceable polluted runoff controls for agriculture, timber harvesting and mining in noncompliance areas.

(b) Strengthen pollution prevention measures in industrial, agricultural, and municipal sectors.

(c) Subject discharges from large dams creating water quality problems to NPDES permit requirements.

(d) Strengthen pretreatment programs to ensure that, where appropriate (e.g. for toxics), industrial discharges to municipal treatment systems are subject to the same requirements as other point source discharges.

(e) Keep clean water clean by protecting and restoring instream flows and other aquatic ecosystems, encouraging integrated watershed planning and management, promoting water conservation, and protecting pristine waters. To help achieve that goal, develop a clear statutory anti-degradation policy.

(f) Require the EPA to develop quantitative standards presently lacking for such parameters as nutrients, sediments, and salinity. Make compliance with water quality standards for entities not covered by water quality permits or other mandatory programs subject to the citizen suit provision, and provide for public involvement in the EPA's review of state water quality plans.

(g) Establish a Clean Water Fund with an annual authorization of $5 billion which would be available to states on a cost-sharing basis to use on programs of their choosing designed to bring noncomplying waters into compliance with water quality standards. This funding would be tied to a requirement to develop integrated resource plans. States would have the flexibility to meet a broad range of infrastructure needs, including combined sewer overflow improvements, and to pursue water efficiency, aquatic system restoration, and other measures to control point

and nonpoint source pollution. Failure to attain milestones in a plan could result in cutoff of funding and mandatory controls.

(h) Establish a national discharge fee program to pay all the costs of monitoring and enforcement.

(i) Establish a pollution prevention program that would make available an extra 10% investment tax credit to industries that can demonstrate investments in technologies that avoid discharges of toxic or other pollutants.

(j) Encourage the EPA under Section 303(d) of the Clean Water Act to provide technical and financial support to establish demonstration nutrient pollutant trading programs on a watershed basis in conjunction with state and local governments. The EPA should seek an authorization of $50 million annually for these programs, with the goal of demonstrating cost effectiveness and the efficacy of their monitoring and enforcement.

(k) Establish integrated resource planning procedures for applicants for financial assistance.

(l) Establish basic water conservation requirements for Clean Water Act permits to help extend water supply or wastewater treatment capacity.

(m) Protect the food chain from toxic contamination by sunsetting the most dangerous toxic chemicals and by prohibiting the use of dilution as a substitute for toxic pollution abatement.

(n) Strengthen Section 404 to provide greater protection for wetlands.

(o) End the agricultural exemption from the National Pollutant Discharge Elimination System (NPDES) permit program in noncompliance areas.

(p) Provide financial and technical incentives to states to develop and implement comprehensive groundwater protection programs (including the protection of all freshwater groundwater as a drinking water source) with the EPA assuming jurisdiction when the state fails to implement an adequate program.

Equity and Participation in Decisionmaking

(45) The Administration should establish broad-based, local citizen advisory committees organized around federal water projects to advise federal project operators. The advisory committees should be provided with complete and useful information on all aspects of the projects' operations.

(46) The President should appoint an interagency task force, and support legislation to support locally-based urban and rural stream restoration programs in order to achieve the community, economic, recreational, environmental, and aesthetic benefits that these projects can provide.

(47) The President should convene summit meetings among interests in the Colorado River basin and the Missouri River basin, including state governments, Indian tribes, and citizen groups, to explore formation of basin organizations for including all affected interests in decisions required to meet the many diverse economic, environmental, and social demands on the rivers' limited resources.

THE LONG'S PEAK WORKING GROUP AND RIVER BASIN TRUSTS

BY

MARK O. HATFIELD*

While water is one of the most precious and important resources in the American West, federal water policy is fragmented and mismanaged. In view of these observations, Senator Hatfield reviews the Long's Peak Report as a basis for a visionary new management approach to water policy. He lauds several recommendations that advocate unitary federal, local, and private watershed and ecosystem management. The Senator proposes a new regime of river basin trusts, funded by federal and private investment, that would integrate resource conservation, sustainable economic development, ecosystem restoration, and adaptive management.

According to the Population Reference Bureau, the world's population could explode to twice its current level of 5.5 billion by the year 2035.[1] Accompanying this increase will be a significant escalation in the demand for the one substance upon which all life depends, water. As the demand for this precious resource grows, so will the stakes associated with its acquisition and possession. To deal with this situation, the Long's Peak Working Group was established in December of 1992 to help the incoming Clinton Administration develop an initial framework for the management of the nation's water resources.

The Long's Peak group developed a twelve page report, entitled "America's Waters: A New Era of Sustainability," which includes overviews of several basic principles, as well as forty-seven specific short- and mid-term recommendations for the Clinton Administration relating to sustainable water use.[2] The report of-

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1. Population Reference Bureau, Mid-1993 World Population Data Sheet.

2. AMERICA'S WATERS: A NEW ERA OF SUSTAINABILITY, REPORT OF THE LONG'S PEAK WORKING GROUP ON NATIONAL WATER POLICY (Natural Resources Law Center, University of Colorado School of Law ed., 1992), *reprinted in this*

fers an excellent analysis of the missing pieces of our nation's water policy puzzle and recommends how those pieces should be reconfigured. Many of the recommendations are designed to operate within the nation's existing water management structure, while others point in new directions.

The report makes great strides in prescribing new methods for managing our water resources. It does not go far enough, however, toward dismantling our existing water policy framework and reconfiguring the pieces into a realistic proposal for management of water and other interdependent natural resources. The time has come for a new era in water and natural resource policy in the United States, which is founded on these resource interrelationships and provides incentives for river basin and watershed planning. Building upon the yeoman's work of the Long's Peak Working Group, we can create, develop and implement this visionary new policy approach for the next millennium.

The Clinton Administration has adopted already a number of the suggestions of the Long's Peak Working Group, including changing the Bureau of Reclamation's mission from one of project construction and engineering to water distribution and conservation.[3] The Administration also is pursuing elevating the Environmental Protection Agency's status to Cabinet-level[4], and rewriting our nation's wetlands policies.[5] Indeed, the framework developed by the thirty members of Long's Peak can serve to guide the Administration and the Congress as we engage in major policy debates on such issues as the Clean Water Act[6], the Safe Drinking Water Act[7] and the Endangered Species Act[8] in the coming year.

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volume of Environmental Law, 24 ENVTL. L. 125 (1994) [hereinafter *Long's Peak Report*].

3. Blueprint For Reform: The Commissioner's Plan for Reinventing Reclamation, November 1, 1993.

4. Department of Environment Act of 1993 (S. 171 and H.R. 3425); (S. Report, 103-39)(H. Report, 103-355).

5. Clinton Administration comprehensive wetlands policy announcement, August 24, 1993.

6. Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. §§ 1251-1387 (1988).

7. Public Health Service (Safe Drinking Water) Act, 42 U.S.C. §§ 300f to 300j-26 (1988).

8. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988).

The importance of water to the United States has become more pronounced during the last several years. Significant skirmishes are occurring already regarding the primary and secondary uses of water. During Congressional debate on the Omnibus Reclamation Projects Authorization Bill of 1992[9], members of Congress fought tooth and nail to set aside 800,000 acre-feet of water for fish and wildlife enhancement in California's Central Valley.[10] Additionally, a similar encounter is raging in the Pacific Northwest over the most appropriate use of millions of acre-feet of water for the recovery of several runs of wild Columbia River Basin salmon.

Other critical areas throughout the United States are experiencing problems with water supplies, pollution, and fish and wildlife needs. The Ogallala Aquifer region, which stretches from South Dakota to Texas, is considered "The Bread Basket of World" because of its immense agricultural production capacity of $20 billion per year.[11] Alarmingly, the aquifer is now more than half depleted over much of its range and is showing little sign of recovery.

Lack of water also has been a major problem in the western United States for at least the past seven years due to a severe drought. Indeed, even in the Pacific Northwest, which is often mischaracterized as "the land of liquid sunshine," the drought continues to parch many river basins. Fortunately for Oregon, the drought has subsided, but in many areas of Washington State and the Upper Columbia River Basin drought conditions continue.

The drought in the Pacific Northwest is a classic illustration of the obvious but seldom-acknowledged fact that watersheds do not confine themselves to politically-designated boundaries between localities, states or nations. Rather, boundaries often are drawn across natural river basins and watersheds, creating competition among political entities for control over water resources. In fact, from a geo-political perspective, water in internationally-

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9. Reclamation Projects Authorization and Adjustment Act, Pub. L. No. 102-575, 106 Stat. 460 (1993) (to be codified in scattered sections of 43 U.S.C.).

10. *Id.* at § 3406(b)(2), 106 Stat. 4601, 4715 (1992). *See* Harrison C. Dunning, *Confronting the Environmental Legacy of Irrigated Agriculture in the West: the Case of the Central Valley Project*, 23 ENVTL. L. 943, 963 (1993).

11. Erla Zwingle, *Wellspring of the High Plains*, NATIONAL GEOGRAPHIC, Mar. 1993.

shared basins could prove to be one of the most contentious commodities in the future.

Many times in the past century, nations have engaged in armed conflicts to secure stable supplies of raw materials. During the 1930's and 40's, Japan launched numerous attacks on nations throughout the south Pacific to acquire a stable supply of oil from the Dutch East Indies, now Indonesia. These attacks included Manchuria in 1931, China in 1937, French Indochina (now south Vietnam) in July of 1941, and finally an all-out blitz on south east Asian targets on December 7-8, 1941 which included Singapore, Hong Kong, Thailand, the Philippines, and of course, Pearl Harbor.[12] Fifty years later, flashing back to the Arab oil embargoes of the 1970's, the United States sent troops to the Persian Gulf to protect its oil-rich allies in that region from the aggression of an Iraqi dictator.

Undoubtedly, the one resource for which nations have been most willing to fight and die has been oil. Today, however, as supplies become more scarce, many nations are beginning to realize that water is not only their cornerstone of existence, but their bedrock of national security, too.

In the August 1993 issue of *Moment* magazine, Gary Hoch writes about the impending crisis over water in the Middle East.[13] In his article entitled, "Will the Next War be over Water?", Hoch outlines a scenario whereby the Turkish water commissioner could annihilate literally millions of men, women and children in Iraq simply by shutting off a few crucial valves in the Anatolia Hydro Project of the Tigris and Euphrates rivers — the sources of seventy percent of Iraq's water supply.[14] People would perish first by thirst, then by diseases contracted from unsanitary water supplies, and finally by hunger as the ability to grow crops would disappear. Clearly, the strategic uses of water may far outweigh those of oil in the next century.

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12. Daniel Yergin, *Blood and Oil: Why Japan Attacked Pearl Harbor; FDR's Embargo and the Start of the Pacific War*, WASH. POST, Dec. 1, 1991, at C3.

13. Gary Hoch, *Will the Next War Be Over Water?*, MOMENT, Aug. 1993, at 34.

14. *Id.*

Even today, many nations of the world, particularly the Middle East, find themselves in similar strategically vulnerable situations. For instance, Egypt relies on the Nile for ninety-seven percent of its water;[15] Syria depends on the Euphrates for seventy percent of its electricity production through hydro resources;[16] and seventy to eighty percent of the total water consumed in the Middle East is used for agriculture.[17]

Adequate and stable supplies of water are undeniably the key to the security of these nations. Just as America's dependence on oil led to its military conflict with Iraq in 1991, so too, may dependence on water resources lead nations into political and military confrontations both in the Middle East and elsewhere around the globe.

While the U.S. should remain available to assist other nations in solving their water problems, our immediate task should be to reform our own policies. The primary objective is a prompt and thorough evaluation of our existing water policy framework, priorities and bureaucracy.

As Governor of Oregon, from 1959-1967, I became acutely aware of the need for constant monitoring of water resources and evaluation of water policy priorities. This awareness remained with me as my public service career transitioned from the state to the federal level. As a U.S. Senator I am astounded by the overlapping and conflicting jurisdictions and authorities of Federal water law. It has become clear to me that Federal water policy and its bureaucracy are fragmented, haphazard, and out of control. At least thirteen Congressional committees, eight Cabinet-level departments, six independent agencies, and two White House offices are charged with responsibilities relating to national water policy development and management. This has created considerable confusion among the ranks of water policy makers and water policy implementors.

After years of trying unsuccessfully to work within this structure, I began developing legislation to address the problems. My motivation was similar to that of the Long's Peak Working Group

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15. *Id.*
16. *Id.* at 36.
17. *Id.* at 37.

— our nation cannot afford to wait until it has been overwhelmed by a major water crisis before acting. We must learn from our past mistakes in dealing with natural resource crises — such as the Arab oil embargo of the 1970's — and work to get ahead of the curve in evaluating our nation's current water policies, how they are implemented, if they should be continued, and if not, how they should be changed.

Many members of Congress share my concern about the need to re-evaluate our water policies and joined me in establishing the Western Water Policy Review Commission in October of 1992. The Commission, established as part of the Omnibus Reclamation Projects Authorization Act[18], is charged with undertaking a balanced review of water availability, quality, quantity, and management policies in the western United States. This evaluation will take three years to complete and will involve western governors, Indian tribes, water management agencies, Members of Congress, interest groups and local officials.[19] The Commission will develop a set of recommendations for the Congress and the Executive Branch to improve the nation's water policy foundation.[20]

I was pleased the Long's Peak Working Group also felt that an evaluation of the nation's water policies was necessary when it recommended that, "[a] national water policy based on sustainability must include a thorough re-examination of federal policies affecting water . . . ."[21]

Unquestionably, many of the working group's observations and recommendations regarding our nation's water policies deserve high praise. The most pivotal recommendations are categorized as "mid-term" by the working group and are listed as items 32 through 35 of the report.

> (32) The President should . . . identify critically important or representative ecosystems and [specify] major ecosystem restoration opportunities in watersheds throughout the nation . . . .

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18. Reclamation Projects Authorization and Adjustment Act, Pub. L. No. 102-575, Title XXX, §§ 3001-3010, 106 Stat. 4693-98 (1992).

19. Pub. L. No. 102-575, §§ 3003(c), 3004, 106 Stat. 4695 (1992).

20. Pub. L. No. 102-575, § 3005, 106 Stat. 4695-96 (1992).

21. *Long's Peak Report*, *supra* note 2, at 128.

> (33) The Administration should establish a National Restoration Trust Fund in the United States Treasury to assist the [U.S. Fish and Wildlife Service] and [the National Oceanic and Atmospheric Administration] in efforts to protect and restore aquatic ecosystems. Initial funding should be derived from unspent income in the Land and Water Conservation Fund . . . .
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> (34) The new Administration . . . should encourage and facilitate the formation of new watershed management organizations for the purpose of integrating water management at the "problemshed" level . . . .
>
> (35) Federal agencies should support nongovernmental and community-based approaches to the restoration of aquatic ecosystems . . . .[22]

Rather than listing these as four different options, I prefer to combine them into one single approach to water management borrowing elements from the Long's Peak report and other sources. Water management transcends and encompasses nearly every other aspect of natural resource management. For too long, the state and federal governments have tackled individual resource problems without regard for the effects on other environmental elements. The time has come for a new, holistic approach to water and natural resource management which works toward a set of mutually agreed upon goals.

This approach, upon which I intend to develop legislation, is a new concept for the management of all natural resources — air, fish and wildlife, land and, most important of all, water. This strategy borrows from the current practices of private ecosystem restoration advocates, such as *Ecotrust* in Portland, Oregon, and establishes a market-based, fiscally conservative trust system for the restoration and protection of river basin ecosystems throughout the nation and the world.

This river basin trust concept would specify major ecosystem restoration opportunities in watersheds throughout the nation, directed by community- and regionally-based citizen/government groups and supported by an initial investment by the U.S. government and contributions from corporate and private entities.

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22. *Id.* at 140-41.

"Watershed," "river basin" and "ecosystem management" have become the new "buzz words" in a changing era of natural resource management. All are based on a changing value system whereby commodity production of natural resources is altered to reflect new biologically-based values of resource and species protection. This approach is illustrated by the recent Forest Ecosystem Management Assessment Team (FEMAT) report issued in July of 1993 by the Clinton Administration to address the management of the federal forests in the Pacific Northwest.[23] While I do not necessarily agree with the conclusions in the FEMAT report, its focus on the protection of key watersheds serves notice that a major paradigm shift in the management of our natural resources is on its way.

Unfortunately, however, I fear that river basin and ecosystem management approaches may not work under our current natural resource policies. The most prohibitive obstacles to instituting these new management schemes are, in plain and simple terms, money and the law. The federal government simply cannot afford to foot the bill for the costs of the work natural resource scientists are claiming must now be done. More than a decade of escalating Federal budget deficits has taken its toll on appropriations for the land management agencies. Additionally, our nation's resource management laws often overlap, work at cross purposes and do not function in a coordinated fashion toward a set of common goals.

The Long's Peak Working Group recognized the fiscal shortcomings in our current system and suggested a possible option for meeting the funding needs of ecosystem and river basin management by using the unspent balance in the Land and Water Conservation Fund. Unfortunately, that money is there only in spirit. It was spent long ago by the Office of Management and Budget to reduce the burgeoning federal deficit. We must look elsewhere for capital to finance watershed and ecosystem management efforts. But like any good car salesman, we should talk first about the features of the policy we want before talking about the payments.

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23. Forest Ecosystem Management: An Ecological, Economic, and Social Assessment, Report of the Forest Ecosystem Management Assessment Team, July 1993.

The river basin trust approach must be based on one outstanding principle, conservation. The Long's Peak group also recognized the importance of conservation by acknowledging that "[w]ater conservation [is] one of the most promising strategies for protecting existing water supplies, maintaining water quality and ecosystems, sustaining instream flows, resolving long-standing water conflicts . . . and establishing a sustainable water program".[24]

The concept of conservation of resources was raised to a new level when my amendment designating conservation as a new energy source was incorporated in the 1980 Northwest Power Act.[25] A similar ethic designed around the strict fundamental goal of conservation of all natural resources would be applied under this new program. A river basin approach to resource conservation is consistent with my historic observation that the most viable solutions to natural resource problems emanate from local and/or regional planning. The Northwest Power Planning Council, created in the 1980 Northwest Power Act, is a case where true regional integrated planning has, and continues, to work. For example, the Council has done yeoman's work developing a scientifically and politically credible management plan for wild runs of threatened and endangered Columbia River Basin salmon. The Council's efforts have been crucial in keeping the river system's operations out of the control of the Federal courts and in the hands of the people of the region. In short, an independent third party charged with defining and protecting the interests of an entire region is a key to future success and less controversy.

River basin trusts would require the federal government to establish general river basin management and conservation goals. States and regions would develop plans to meet those goals. To

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24. *Long's Peak Report*, *supra* note 2, at 128.

25. Northwest Electric Power Planning and Conservation (Northwest Power) Act, 16 U.S.C. §§ 839-839h. *See* John M. Volkman and Willis E. McConnaha, *Through a Glass, Darkly: Columbia River Salmon, The Endangered Species Act, and Adaptive Management*, 23 ENVTL. L. 1249 (1993). *See also* Michael C. Blumm & Andy Simrin, *The Unraveling of the Parity Promise: Hydropower, Salmon, and Endangered Species in the Columbia River Basin*, 21 ENVTL. L. 657 (1991) and Stephen Brown, *Breathing Life Back into a Drowned Resource: Mitigating Wildlife Losses in the Columbia Basin Under the Northwest Power Act*, 18 ENVTL. L. 571 (1988).

compel regional interests to participate in the process, an agreement would be reached between the region and the federal government explicitly outlining the plans' relationships to existing management practices, laws, etc. Additionally, regional interests would be provided with assurances that the federal government would not constrain implementation of the plans so long as they conform to all relevant laws and agreements.

River basin planning would not be based on traditional artificially-erected boundaries of counties, states, or nations. Rather it would be done around the natural boundaries established through the evolution of watersheds and river basins. This is one of the most logical methods available for identifying common ecosystems and their dependent parts.

Convincing the Federal agencies, states, and local governments to relinquish some control over the resources within their jurisdictions and vest authority in a regional policy-making body, however logical, will not be easy. A major incentive is needed to initiate the cooperation necessary for the development and implementation of river basin conservation activities. One potential incentive, and one which usually is most effective, is funding.

The most powerful aspect of the river basin trusts program is its funding mechanism. The single largest obstacle to initiating actions to improve the health of ecosystems is the perceived economic disruption befalling regions where economic hardship may already be occurring. To overcome this, the river basin system would establish a trust mechanism using federally appropriated dollars to leverage funding from corporations, interest groups, states, municipalities, individuals and others. The funds would be applied toward the costs of implementing the regionally-developed and federally-guided river basin conservation plans outlined earlier. Actions undertaken would be consistent not only with the principle of resource conservation, but also with economic stability and fiscal responsibility.

While the Long's Peak Report most proficiently suggests that " . . . [t]he new Administration . . . should encourage and facilitate the formation of new watershed management organizations for the purpose of integrating water management at the 'problemshed'

level . . . "[26], it fails to outline clearly the incentives which would compel groups to participate in such planning and implementation efforts. River basin trusts, however, would leverage funding from outside sources for regional watershed management plans by giving private contributors certainty that their money was going toward a specific environmental cause with concrete goals, objectives and tasks, and by extending assurances that economic activities consistent with the river basin plan could proceed.

Clearly, the structure outlined above is a radical break from the traditions this nation has used to manage its natural resources. It recognizes that along with ecological conservation and preservation, Gifford Pinchot's concepts of wise utilization and stewardship should be hallmarks of any resource management system. Such a radical break from deeply entrenched bureaucracies, however, is exceedingly difficult. Change must be approached with caution and must be based on past experiences and concrete data.

One way to acquire experience and gather data is to develop a system of pilot projects for different watersheds throughout the nation. The Long's Peak Working Group also recognized the need for pilot projects: "[the new] policy should be based upon 'adaptive management,' the principle that environmental restoration programs may be designed as experiments to resolve pressing questions . . . ."[27]

To bridge the gap between the theoretical and the possible, we must be willing to institute pilot projects to demonstrate the effectiveness of a particular approach, in this case a regional, cooperative, citizen developed and implemented policy of natural resource conservation and economic certainty.

At the federal level, a major restructuring of government agencies may be required to accomplish this task. Existing departments may need to be reorganized, conglomerated, reduced and in some cases dismantled. Under the river basin trust system a new, streamlined "Department of Resources and Conservation" may need to be created to implement the institutional reforms necessary to allow the new system to function at the river basin level.

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26. *Long's Peak Report*, *supra* note 2, at 140.
27. *Id.* at 130.

These changes will not be easy. Like any other major paradigm shift, sacrifices must be made to attain significant strides in new and bold directions.

The principles of conservation and sustainable use outlined by the Long's Peak group are an excellent beginning to what must become a new way of managing not only our water resources, but our other natural resources as well. The suggestions made by Long's Peak are extremely timely, innovative and necessary, and can serve as the bedrock of a new approach to wise management of resources. It is time for a new American revolution in resource management based on the cooperative planning of resources on a watershed basis. The river basin trust initiative is an extraordinary way to re-empower citizens with the task of preserving the health and welfare of the river basins in which the future generations of their families will live and work.

ECOLOGICAL INTEGRITY, NEW WESTERN MYTH: A CRITIQUE OF THE LONG'S PEAK REPORT

BY

GREGORY J. HOBBS, JR.*

Support for the Long's Peak Report is not unanimous. Mr. Hobbs finds that the report is a one-dimensional argument for federal dominance of western water policy. Specifically, he argues that the report is biased against water storage projects, economic use of the water, and local and state control. Furthermore, Hobbs contends that the report advocates extension of riparian water doctrine, which ignores the realities of water scarcity, the benefits of storage, and the necessity of local custom and control. Hobbs also argues that the Long's Peak agenda will unlawfully violate state water rights constitutionally protected from regulatory takings.

The myth-makers of the American West have produced another one. One hundred and thirty years ago, Bierstadt painted *The Rocky Mountains-Lander's Peak* (1863) and *A Storm in the Rockies-Mt. Rosalie* (1866), immense canvases that fired the Eastern imagination with water shining at the base of savage peaks.[1] In that tradition, the 1992 *Long's Peak Report* conjures up another imaginary western landscape promising "A New Era of Sustainability" for America's waters based on "social equity, economic efficiency, ecological integrity, and continued commitment to federal trust responsibilities to tribes:" a national water policy to "fulfill[] Aldo Leopold's 'Land Ethic'."[2]

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1. *See* WILLIAM H. & WILLIAM N. GOETZMANN, THE WEST OF THE IMAGINATION 145-157 (1986).

2. AMERICA'S WATERS: A NEW ERA OF SUSTAINABILITY, REPORT OF THE LONG'S PEAK WORKING GROUP ON NATIONAL WATER POLICY (Natural Resources

But the *Long's Peak Report* is no Bierstadt. Its loftiness quickly fades into a one-dimensional argument for the exercise of federal agency power over state and local planning. Composed mainly of representatives of the major national environmental groups and their ideological allies, the invitation list foreordained the outcome, a panoply of recommendations intended to nationalize water policy and effectuate a reallocation of existing water supplies.[3] Recommendation 30, for example, asserts that "[r]eallocation of existing supplies should be preferred as an alternative to new storage."[4] Representatives of the Colorado General Assembly, state agencies, water organizations, farmers, and cities who hold rights to those water supplies were not asked to participate, although the forum was hosted by the Natural Resources Law Center of the University of Colorado School of Law.[5] As a result, the report is biased by its anti-storage, anti-use, anti-local-government agenda. The group's timely message about the need for water use efficiency, environmental protection, market mechanisms for water transfers, and community participation in water decision-making is lost in the strident din of preservationism.

Hitching state water law and the Bureau of Reclamation to the whipping post has been a favorite sport of writers like Fradkin[6] and Reisner[7] and professors like Wilkinson and his colleagues at the Natural Resources Law Center who helped to write the *Long's Peak Report*. At Northwestern School of Law of Lewis and Clark College in February of 1991, Wilkinson eulogized the

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Law Center, University of Colorado School of Law ed., 1992) 3, *reprinted in this volume of Environmental Law*, 24 ENVTL. L. 125, 127-28 [hereinafter *Long's Peak Report*].

3. National environmental groups invited include: the Environmental Defense Fund, American Rivers, National Wildlife Federation, Natural Resources Defense Council, The Nature Conservancy, and The National Audubon Society. Those attending but not necessarily committed to the objectives of these groups apparently failed to articulate or gain inclusion of different points of view.

4. *Long's Peak Report*, *supra* note 2, at 140.

5. This article discusses Colorado law and policy as an example of Western water principles which the Natural Resources Law Center ignored in hosting the forum and producing the *Long's Peak Report*.

6. *See* PHILIP L. FRADKIN, A RIVER NO MORE, THE COLORADO RIVER AND THE WEST. (1981).

7. *See* MARC REISNER, CADILLAC DESERT, THE AMERICAN WEST AND ITS DISAPPEARING WATER (1986).

death of a mythological figure he called Prior Appropriation.[8] In subsequent writings, he broadly smears western water use as "prodigal waste" perpetrated by the "lords of yesterday" demonstrating an "essential pattern" that he describes as:

> the *single-minded pressure* to develop water for *extractive* uses; the *competition* among states over interstate rivers; extensive federal *subsidies* for private users; *far-reaching environmental impacts*; the *subversion* of established Indian rights; the *raids* by cities on rural areas; the *blunting* of normal market incentives; and the *inexorable drive* toward bigger and grander projects.[9]

The *Long Peak's Report* echoes the politically aimed hyperbole:

> the *endangered* Columbia River salmon, the *over-taxed* San Francisco Bay Delta, the *poisoned* Kesterson National Wildlife Refuge, the *salt-choked* Colorado River, the *vanishing* Ogalalla Aquifer, Louisiana's *eroding* Delta, New York's *precarious* Delaware River water supply, and the *dying* Florida Everglades. The *environmental costs* of current water policy are *extraordinary*, both to this and future generations.[10]

Here is painted the modern despoliation myth: rapacious water diverters have desecrated virgin America for filthy gain. In comparison, the Nineteenth century boomer agricultural irrigation myth was that "rain follows the plow."[11] Neither myth accurately portrays the West of the past, present, or future.

Wilkinson's so-called lords of yesterday were and are farmers, businesspeople, and community officials. "Water follows the shovel and the city council" would more accurately characterize the history of western water policy. Water projects are the prod-

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8. Charles Wilkinson, *Prior Appropriation 1848-1991*, 21 ENVTL. L. v (1991). For a rejoinder, Anne W. Squier, *Water Quality, Water Quantity: The Reluctant Marriage*, 21 ENVTL. L. 1081 (1991); Gregory J. Hobbs Jr., *The Reluctant Marriage: The Next Generation (A Response to Charles Wilkinson)*, 21 ENVTL. L. 1087 (1991).

9. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN, LAND AND THE FUTURE OF THE WEST. 230 (1992) (emphasis added).

10. *Long's Peak Report*, *supra* note 2, at 127 (emphasis added).

11. Colorado Governor William Gilpin, *quoted in* WALLACE STEGNER, BEYOND THE HUNDREDTH MERIDIAN, JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST. 3 (1954).

uct of state and local long-range planning in response to the natural hydrologic cycle and citizen need. The Colorado-Big Thompson Project (C-BT), for example, was sponsored by farmers and cities who had experienced the Great Depression and devastating Dust Bowl drought of the Thirties.[12] In those days, the national government invested in the livelihood of citizens and the infrastructure of the nation, instead of obstructing both. Local sponsorship and the execution of multi-year repayment contracts ensured continuing community involvement and responsibility.

On the ground, the C-BT project does not look like despoliation. A National Recreation Area surrounds the West Slope features, consisting of Grand Lake and Shadow Mountain, Granby, and Willow Creek Reservoirs. A gold medal trout fishery exists below these reservoirs on the Colorado River. A tunnel through the Continental Divide underneath Rocky Mountain National Park delivers water to 650,000 acres of irrigated farmland and twenty six northeastern Colorado communities, including Boulder, Longmont, Loveland, Fort Collins, and Greeley: highly liveable cities surrounded by a sustainable rural irrigated greenbelt. The river below Fort Morgan now flows perennially because of irrigation and municipal return flows from transmountain deliveries into the South Platte River Basin. Historically, the river ran dry after the late spring snowmelt.

The C-BT Project is not unique. Water diversion and storage have made the West an attractive and productive region for Americans. The *Long's Peak Report* fails as sustainable water policy for this region, and the nation, because it ignores four enduring western factors: 1) water scarcity; 2) state and local citizen initiative; 3) the essential role of water storage; and 4) the necessity for a stable, secure and flexible water allocation law. If implemented, the Report would intensify competition for already scarce water supplies in order to serve "the ecological community," "ethnic communities," "ecosystems," "in-stream flow protection," "pollution prevention," "ecological integrity and restoration," "water quality," "biological diversity," "the viability of ecosystems,"

12. *See* DANIEL TYLER, THE LAST WATER HOLE IN THE WEST, THE COLORADO-BIG THOMPSON PROJECT AND THE NORTHERN COLORADO WATER CONSERVANCY DISTRICT (1992).

"community and economic sustainability," and "watershed restoration."[13]

Presumably, a national water policy would address how much water is needed for these uses, by what means that amount will be quantified and administered in relation to other uses, and how such uses can be served without new storage and without causing injury to state and local economies and established water rights. However, without any study of the feasibility, costs, or impacts of implementing such a policy and without inviting the participation of those with opposing viewpoints and established rights, the authors of the *Long's Peak Report* called for immediate imposition of this supposedly national policy by Executive Order in derogation of state and federal legislative process:

> The President should issue an Executive Order establishing a policy of watershed-level aquatic ecosystem protection and restoration. The order should direct the EPA and the Departments of the Interior, Agriculture, Defense, and Commerce (with oversight from the Council on Environmental Quality) to: review, revise and coordinate their activities and operations to use all authorities under existing law to manage federal lands; to operate federally-owned or licensed projects and facilities to protect and restore fish, wildlife, and their habitats on an equal basis with other primary project purposes (where such protection is not provided under the Endangered Species Act).
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> The Departments of the Interior and Agriculture should assert rights to instream flows for federal lands and encourage states to adopt and strengthen instream flow programs by using authority to grant or withhold federal funds and federal permit approvals.[14]

What the authors of this agenda really seek is a national riparian water law implemented by federal agencies outside of state water law forums. But the eastern riparian doctrine of natural or continuous flow and de minimis use was rejected long ago by Congress[15] and the United States Supreme Court[16] as sustain-

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13. *Long's Peak Report*, *supra* note 2, at 127-28. "Ecological integrity" and "ecosystem management" are preservationist political concepts undefined by federal acts or judicial precedent, and are presently incapable of being integrated into water allocation decisions equitably or with legal certainty.

14. *Id.*, Recommendation (11) at 135, and Recommendation (36) at 141.

15. Desert Land Act of 1877, ch. 107, 19 Stat. 377. *See also* California

able national water law, primarily because of western reality. As Powell observed, beyond the Hundredth Meridian "[a] day's flow at flood time is greater than a month's flow at low water time."[17] Sensibly, he urged building reservoirs high up in the watersheds to serve citizen needs into the future. Powell, Pinchot, and the other progressive conservationists ushered in a "new era of sustainability" which Congress secured by passing the 1897 National Forest Organic Act[18] and the 1902 Reclamation Act.[19] Through the 1866 Mining Act[20] and subsequent legislation, Congress legally severed the waters from the land so that water could be physically removed from the public lands under state law.[21] National forests were created and federal financial aid was provided to local projects in order to ensure a stable and secure water supply through construction of diversion, carriage, and storage facilities on and off federal lands.[22] Pinchot's multi-use manage-

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Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 164 (1935).

16. *See* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702-03 (1899); United States v. Gerlach Livestock Co., 339 U.S. 725, 745 (1950).

17. JOHN WESLEY POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES 13 (1879).

18. 30 Stat. 34.

19. ch. 1093, 32 Stat. 388.

20. ch. 262, 14 Stat. 251.

21. *Summarized in* GREGORY J. HOBBS & BENNET W. RALEY, *Water Quality Versus Water Quantity, A Delicate Balance*, 34 ROCKY MTN. MIN. L. INST. § 24-02[1] (1988) *and Water Rights Protection In Water Quality Law*, 60 U. COLO. L. REV. 841, 857-859 (1989).

22. United States v. New Mexico, 438 U.S. 696, 712 (1978). A recent decision of Judge Robert A. Behrman, Colorado Water Division 1, Greeley, rejected the Organic Act claims of the United States for allegedly reserved channel maintenance flows in the Arapaho, Pike, Roosevelt, and San Isabel National Forests, Consolidated Case No. W-8439-76 (Feb. 12, 1993). The United States has filed an appeal with the Colorado Supreme Court. In his opinion Judge Behrman said:

> Applicant contends that Congress in creating the national forests was not concerned with the development of the west and the necessities of western domestic and irrigation use of the waters from the forests. If this is true, this section of this memorandum is totally irrelevant. But this court believes such development was a primary aim of the forest legislation, and the Supreme Court of the United States has determined that domestic and irrigation use was the principal purpose of Congress in securing favorable water flows. If this court's interpretation is correct, these considerations are highly significant in determining what, if any, water rights Congress intended to reserve in creating the national forests.

ment approach prevailed over the anti-use preservationist advocacy of those like John Muir and the anti-reservation insurgency of westerners like Colorado's Henry A. Teller.[23]

Reclamation law made sustainable water supplies for settlement of the West a matter of national importance. In those days, Congress heard the truth about water storage. During the reclamation hearings, Wyoming engineer Elwood Mead testified before Congress in 1901 about the necessity of water management: "Only a small fraction of the water supply of many western rivers can be put to profitable use unless the flow can be regulated and the water held back until needed."[24]

Sustainability in the West has always meant altering the natural conditions of streams. Contrary to the myth that all irrigation

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23. G. MICHAEL MCCARTHY, HOUR OF TRIAL, THE CONSERVATION CONFLICT IN COLORADO AND THE WEST, 1891-1907, at 240-241 (1977):

> The insurgents, for example, might have had valid reasons for opposing the preservationist ideas of men like John Muir and Hamlin Garland. Moralistic and self-righteous, the preservationists unreservedly condemned pioneers who found "God's trees" "rejoicing in wildness" and destroyed them. Indiscriminately labeling such men and groups as "vandals" and "destroying angels," Muir and his followers sought nothing less than the total reservation of the western public domain. At no time, however, did the wilderness cult fully understand the nature of pioneer life. It did not or would not understand the importance of settlement to frontiersmen, and, unfamiliar with the exigencies of pioneer life, it did not realize the fact that access to local resources was the key to survival. If land devastation was wrong, total land reservation was no less so. Even Pinchot conservationists agreed to that.
>
> By the same token, insurgents had sound reasons for denouncing "Pinchotism." As several historians have pointed out, the men who masterminded the conservation movement — Pinchot and his coterie of resource planners — were "men of science, not economists," who did not reflect the dominant economic faith of the early 1900's and who never fully understood the aspirations of landless pioneer entrepreneurs. Alluding to the problem in a 1906 Senate speech, Henry Teller complained that 'areas as great as many of the states' had been withdrawn "without any application from anybody in the state of Colorado."

24. *Arid Public Lands of the West: Hearings Before the Committee on the Public Lands of the House of Representatives Relating to the Reclamation and Disposal of the Arid Public Lands of the West*, 19th Cong., 1st Sess. 125 (1901).

societies are imperialistic, recent historical research demonstrates that Native Americans, like the subsequent settlers of the region, practiced water management as a shared democratic custom.[25]

Because of scarcity, need, and many competing demands, water in the West is allocated, administered, and surrounded by legal rights, remedies, and restrictions in order to provide stability, security, and flexibility in use of this critical resource. Beneficial use without waste is the operative principle of prior appropriation, a doctrine of sustainability which evolved from local custom. A water right cannot be obtained except in the amount reasonably necessary for beneficial use through a reasonably efficient means of capture, possession, and control.[26] Speculative claims are pro-

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25. NORRIS HUNDLEY, JR., THE GREAT THIRST, CALIFORNIANS AND WATER, 1770's-1990's, at 20-21 (1992).

> In his fascinating study of despotism and the rise of civilization, Karl Wittfogel has argued that large-scale irrigation was possible only in a tightly ordered and hierarchical society whose members surrendered control of their labor, and much of their political and personal freedom, to a centralized authority. Wittfogel's theory does not seem to find support in the experiences of California's aboriginal irrigationists. The Owens Valley Paiute practiced irrigation on an extensive scale, requiring vast amounts of labor. The men were primarily responsible for constructing dams and canals and the women for gathering the harvest. Their efforts, however, were communal, and freely given, both in recognition of the need for a stable food supply and in anticipation that all participants would share in the harvest. Such communal efforts were not limited to irrigation, but were characteristic of hunts for game, when an entire village or groups of villages joined to drive antelope or rabbits. A village or district headman supervised such efforts, but he was chosen by the people, not self-appointed and certainly not a despot. In the case of agriculture, the head irrigator was elected in the spring by a popular assembly that also approved the date for irrigation to begin. This challenge to Wittfogel joins those of others whose findings indicate that political centralization in irrigation societies varies with the circumstances. Studies of irrigation societies with vastly different social and economic structures indicate that they are as apt to be decentralized as centralized.

26. *See* Weibert v. Rothe Brothers, 618 P.2d 1367, 1371-72 (Colo. 1980); Alamosa-La Jara Water Users Protection Ass'n v. Gould, 674 P.2d 914, 935 (Colo. 1983).

hibited.[27] Water rights can be bought, sold, and changed to other uses, so long as injury is not caused to other water rights.[28]

Prior appropriation law has been remarkably adaptable in recognizing new uses while protecting existing uses. For example, Colorado's in-stream flow law[29] provides for the appropriation of water in priority by the Colorado Water Conservation Board, resulting in protection of approximately 8,000 stream miles to date. Under a 1986 amendment, the Board can acquire senior water rights by purchase or donation for change to in-stream flow. The Colorado Supreme Court has held that a boat chute located in the channel of a stream, as well as a nature center diversion into an old stream channel, can result in a valid water appropriation.[30] Storage water can be appropriated, released, and administered in priority to enhance recreational and aquatic life flows.[31] Fish culture, wildlife habitat, mined land reclamation, and human environments are recognized beneficial uses.[32] Alteration of the natural environment cannot become a means for establishing a water right, for example, by drying up wetlands, cutting trees, or urbanizing lands with impermeable surfaces.[33]

These Colorado examples are repeated throughout the West, yet the *Long's Peak Report* calls for less state authority and more federal regulation. Why? Because the operative agenda did not include local water supply planning and protection of existing

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27. Colorado River Water Conservation District v. Vidler Tunnel Co., 594 P.2d 566 (Colo. 1979).

28. *See* Rominecki v. McIntyre Livestock Corp., 633 P.2d 1064, 1068 (Colo. 1981); Strickler v. Colorado Springs, 26 P.313, 316 (Colo. 1891).

29. COLO. REV. STAT. § 37-92-102(3); *See* Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd., 594 P.2d 570 (Colo. 1979).

30. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

31. Board of County Comm'rs of the County of Arapahoe v. Upper Gunnison River Water Conservancy Dist., 838 P.2d 840 (Colo. 1992).

32. *See* Three Bells Ranch Assocs. v. Cache La Poudre Water Users Ass'n, 758 P.2d 164, 173 (Colo. 1988); Zigan Sand and Gravel, Inc. v. Cache La Poudre Water Users Ass'n, 758 P.2d 175, 182 (Colo. 1988); In Re May, 756 P.2d 362, 371 (Colo. 1988); Southeastern Colorado Water Conservancy Dist. v. Fort Lyon Canal Co., 720 P.2d 133, 142 (Colo. 1986).

33. *See* State Engineer v. Castle Pines Metro. Dist., No. 92 SA 164 (Colo. 1993); R.J.A. Inc. v. Water Users Ass'n of Dist. No. 6, 690 P.2d 823, 828 (Colo. 1984); Giffen v. State of Colorado, 690 P.2d 1244, 1247 (Colo. 1984); Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc., 529 P.2d 1321, 1327 (Colo. 1974).

water rights as essential components of national policy. The authors urge "equity" for Native Americans, yet fail to support construction of the Animas—La Plata Project which the Ute tribes have sought for decades.

By ignoring state and local water law, custom, and forums, and encouraging federal agencies to reallocate water supplies through regulatory controls, the *Long's Peak Report* subverts sustainable water policy, rather than offering a viable alternative. If implemented, this agenda will lead to unprecedented conflict, litigation, and intrusion on established rights. Under the Supreme Court's *Lucas*[34] rationale, state-created water rights are property rights which are protected against regulatory takings. Water rights entitle owners to remove water from natural streams and lakes.[35] The exercise of a water right necessarily involves alteration of the natural ecology. In Colorado, for example, a water right is the right to (1) use a particular quantity of water to the exclusion of other uses, (2) for an identified beneficial use or uses, (3) diverted or stored at a specified location, (4) with an administrable priority vis-a-vis other uses of the available water source, (5) resulting in a quantifiable yield.[36] Reallocation of such a right by agency action in order to maintain or restore ecological integrity can result in a compensable partial or total regulatory taking.[37]

The *Long's Peak Report* states that "equities of people with existing uses" should be "respected" where "a transition from old values to new values demands reallocation of water from existing uses."[38] This phraseology implies that courts or administrative agencies may balance interests between an existing use of water and the perceived social and political importance of "new values"

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34. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899-2901 (1992).

35. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882). *See also* A & B Cattle Co. v. United States, 589 P.2d 57, 61 (Colo. 1978).

36. *See* Navajo Dev. Co. v. Sanderson, 655 P.2d 1374, 1377, 1380 (Colo. 1982); Broyles v. Fort Lyon Canal Co., 638 P.2d 244, 249-50 (Colo. 1981); Pueblo West Metropolitan Dist. v. Southeastern Colorado Water Conservancy Dist., 717 P.2d 955, 959-60 (Colo. 1986).

37. For a thoughtful analysis of water rights takings issues under *Lucas*, in light of reallocation proposals like those of the *Long's Peak Report*, see Allbright and Root, *Government Taking of Private Water Rights*, 39 Rocky Mtn. Min. L. Inst. § 20 (1993).

38. *Long's Peak Report*, *supra* note 2, at 132.

in determining whether to pre-empt some or all of the owner's interests in a water right. But water rights are created by law, and a remedy at law — damages — is owed for their taking by government. The authors' choice of "equities" instead of "rights" when describing present water uses clearly demonstrates the fundamentally erroneous underpinning of the *Long's Peak Report* — that a changing federal definition of relative equities among competing uses of water can supersede property interests which have vested under state law.

Fortunately, the Constitution of the United States is not so fragile. Property rights of Americans are protected. Failure to respect them inevitably leads to treating other fundamental rights as transitory vestiges of yesterday which can be replaced by simply articulating "new" values.

Shifting administrative policies cannot be allowed to destroy pre-existing water rights. If the government has a need for water to serve purposes it deems important, it may obtain it in a variety of ways: 1) under state law; 2) by the creation of a federal reserved water right; 3) by purchase or acquisition under authority of a federal statute, such as Section 5 of the Endangered Species Act,[39] which authorizes payment for land or water necessary to conserve endangered species, or; 4) by a regulatory taking for which just compensation is paid. Reliance on federal agencies to create and administer a rational water policy based on shifting equities is not an acceptable substitute for respecting legal rights.

Regulatory agencies are insulated from the demands and consequences of local decision-making and are incapable of devising or administering a fair and adequate water planning and allocation system. Moreover, Congress has directed these agencies to avoid conflicts with state water law and local water resource management.[40] In *Lucas*, the Supreme Court observed that there are a number of non-economic interests in property "whose impairment will invite exceedingly close scrutiny under the Takings Clause."[41] Surely the security, stability, and flexibility afforded to

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39. 16 U.S.C. § 1534 (1988).

40. Clean Water Act § 101(g), 33 U.S.C. § 1251(g) (1988); Endangered Species Act § 2, 16 U.S.C. § 1531(c)(2) (1988); Federal Land Policy and Management Act, 43 U.S.C. § 1701-1784 (1988).

41. *Lucas*, 112 S. Ct. at 2895 n.8.

water rights by state water law ranks among those interests whose importance cannot simply be measured by an award of damages. The health and welfare of a large portion of the United States depends on the establishment and protection of state-created water rights.

The *Long's Peak Report* calls for a reallocation of water to other uses, without proposing or explaining the details. Before long-established water law is overthrown, however, the nation must candidly debate the nature and details of any substitute allocation system.

The authors of the *Long's Peak Report* failed to address key questions which must be answered in any formulation of water policy, including the following:

1) Does state law determine whether a water right is a property right?

2) Does state law determine the scope and nature of a water right?

3) If an existing water right is defined as a property right under state law, should federal environmental laws be used to redefine the nature and scope of the water right?

4) Should federal environmental laws be used to reallocate all or a portion of a water right previously allocated by a state?

5) If federal environmental laws should be used to reallocate previously allocated water, what basis will be used to determine the amount which will be reallocated to other uses? What method will be used to identify the reallocated water and ensure that it is used for the intended purposes?

6) Do the Clean Water Act and Endangered Species Act provide a legal basis for restricting the otherwise legal exercise of existing, historically used water rights? If so, must the United States adjudicate its claims to this water pursuant to the McCarran Amendment? If not, how and by whom will water be administered (i.e., identified and delivered to the intended use without interference by other potential water users)?

7) If a water right is defined as both a property right and a beneficial, non-nuisance use of water, does the restriction of that right by the federal government under environmental regulations constitute a taking of property which requires compensation under the United States Constitution?

8) Should federal environmental laws be used to reallocate waters allocated by interstate compacts or equitable apportionment decrees?[42]

Straightforward answers to these questions would advance a rational debate on whether a "national" policy, instead of the existing policy of federalism in water matters, is either workable or desirable. The recurring penchant of national water reformers to treat the West as their colony, their lack of respect for the wide diversity of western interests, and their desire to rearrange and regulate away established rights, encourage hostility and resistance.[43]

The public interest in environmental protection which the *Long's Peak Report* seeks to vindicate cannot be assured by rhetoric. Federal regulation is a transitory means for protecting the use of water for environmental or any other purposes. There is no substitute for integrating new water uses into a proven, reliable system. The western states have the job well under way. This is the genius of Mr. Prior. Contrary to popular rumor, he's not dead yet. Not by such a Long's shot.

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42. The author's colleague, Bennett Raley, assisted in the preparation of these questions.

43. *See* RICHARD D. LAMM & MICHAEL MCCARTHY, THE ANGRY WEST, A VULNERABLE LAND AND ITS FUTURE 160-207 (1982).

THE RHETORIC OF WATER REFORM RESISTANCE: A RESPONSE TO HOBBS' CRITIQUE OF LONG'S PEAK

BY

MICHAEL C. BLUMM*

Professor Blumm replies to Mr. Hobbs' attack on the Long's Peak Report by contending that Hobbs mischaracterizes or misunderstands the pragmatic nature of the report's recommendations. Blumm contends that underlying Hobbs' critique is a desire to return to a bygone era in which the federal government subsidized Western development by funding large storage projects. The era of water development subsidies is clearly over, Blumm asserts. He also doubts that those, like Hobbs, who fear the new era will be able to sucessfully resist impending water reforms by invoking the Constitution's takings' clause. He concludes by outlining the nature of forthcoming water reform on both federal and state levels.

Greg Hobbs is an unusual talent. Both practitioner and scholar,[1] he is also an able and entertaining speaker, even if you do not agree with his perspective.[2]

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1. *See, e.g.*, Gregory J. Hobbs, Jr., *"Ripeness" Gets New Emphasis: Environmental Litigation*, 13 NAT'L L.J., Sept. 2, 1991, p.32 col. 1.; Gregory J. Hobbs, Jr., *Ripeness, Exhaustion, and Administrative Practice*, 5 NAT'L RES. & ENVT. 10 (Fall 1990); Gregory J. Hobbs, Jr. & Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. COLO. L. REV. 841 (1989); Gregory J. Hobbs, Jr., *Legislative and Judicial Oversight of Rulemaking*, 18 COLO. LAW. 245 (1989); Gregory J. Hobbs, Jr. & Bennett W. Raley, *Water Quality Versus Water Quantity: A Delicate Balance*, 34 ROCKY MTN. MIN. L. INST. 24-1 (1988) [hereinafter *Quality vs. Quantity*]; Gregory J. Hobbs, Jr., *Federal Environmental Law and State Water Law: Accommodation or Preemption*, 1 NAT'L RESOURCES & ENVT. 23 (Winter 1986); Gregory J. Hobbs, Jr., *Discovery and Judicial Review in State Administrative Practice*, 10 COLO. LAW. 249 (1981).

2. Hobbs' response to Charles Wilkinson's "eulogy" to prior appropriation,

Unfortunately, Hobbs' critique of the Long's Peak report[3] is not up to his usual standards. Instead, it is a hyperbolic and bombastic attack on a well-reasoned, moderate call for evolutionary change in water allocation, a system largely grounded in the ideas of the Nineteenth Century. For some reason, defenders of the water law status quo seem to feel that mischaracterization and overstatement is a better defense to calls for reform[4] than reasoned discussion of the deficiencies of a system of water allocation which shortchanges latecomers, instream uses, and Indian tribes.[5]

Hobbs' attempt to indict the Long's Peak report as advocacy of "an imaginary Western wilderness" and "a one-dimensional argument for the exercise of federal agency power"[6] is easily refuted by a reading of the report itself, which the editors have been good enough to reprint in these pages.[7] Nowhere in the report's 47 recommendations is there anything remotely resembling a call for more wilderness or new federal authority over water management. Instead, the Long's Peak report is an appeal to the federal government to exercise authority it already possesses to increase efficiency, fairness, and environmental sensitivity in water use decision making. Hobbs does recognize the report's "timely message" about the need for efficiency, environmental protection, community participation, and market principles.[8] But his critique

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21 ENVTL. L. v (1991), was an impromptu reply to a dinner speech that was doubtlessly prepared overnight and delivered the next morning. Despite these time pressures, his reply will be remembered by those who heard it as one of the most witty and provocative speeches ever given at Lewis and Clark. *See* Gregory J. Hobbs, Jr., *The Reluctant Marriage: The Next Generation (A Response to Charles Wilkinson)*, 21 ENVTL. L. 1087 (1991).

3. *See* Gregory J. Hobbs, Jr., *Ecological Integrity, New Western Myth (A Critique of the Long's Peak Report)*, 24 ENVTL. L. 157 (1994).

4. For a similar example of exaggeration and distortion, see James L. Huffman, *A Fish Out of Water: The Public Trust in a Constitutional Democracy*, 19 ENVTL. L. 527, 568-72 (1989).

5. For a concise summary of the shortcomings of the current system of water allocation in the West, see Charles F. Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, 24 LAND AND WATER L. REV. 1 (1989).

6. Hobbs, *supra* note 3, at 157.

7. *See* 24 ENVTL. L. 125 (1994).

8. Hobbs, *supra* note 3, at 158.

largely ignores these necessary reforms in an effort to characterize the report as a "strident preservationism."[9]

I want to use this space to attempt to identify the nature of Hobbs' objections to the Long's Peak report,[10] for his criticism reflects the deep divisions in the West over water use as we near the twenty-first century. He indicts the Long's Peak report for being anti-use, anti-storage, and anti-local.[11] Because it is necessary to understand what he means by each of these allegations in order to comprehend the nature of the divide over Western water, the first three sections of this response consider these charges in turn. Section IV then examines Hobbs' suggestion that the Fifth Amendment's takings clause may bar efforts to modernize Western water. Section V concludes by explaining why Hobbs' views, although dominant throughout this century, might prove to be too expensive to prevail in the next.

I. ANTI-USE

Western water law is one of the two remaining legacies of the prior appropriation ("first in time, first in right") principles which dominated Western settlement in the nineteenth century,[12] the other being the General Mining Law.[13] Unlike the mining law,

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9. *Id.*

10. I have little comment on Senator Hatfield's article, *The Long's Peak Working Group and River Basin Trusts*, 24 ENVTL. L. 146 (1994), except to note my appreciation for his concern with Western water reform and to hope his concept of establishing river basin "trusts" becomes a vehicle to speed the inevitable reform process. For a similar proposal, grounded heavily on use of federal hydropower revenues by river basin "councils," see John M. Volkman & Kai N. Lee, *Within the Hundredth Meridian: Western States and Their River Basins in a Time of Transition*, 59 COLO. L. REV. 551, 567-76 (1989). However, I do think Senator Hatfield's faith in the Northwest Power Planning Council, *id.* at 153, is unwarranted, given the Council's inability to restructure Columbia Basin hydroelectric project operations to avoid Endangered Species Act listings of several Columbia Basin salmon runs, despite a clear expression of Congress to protect and restore Columbia salmon runs many years ago in the 1980 Northwest Power Act. *See* Michael C. Blumm and Andy Simrin, *The Unraveling of the Parity Promise: Hydropower, Salmon and Endangered Species in the Columbia Basin*, 21 ENVTL. L. 657, 711-13 (1991).

11. Hobbs, *supra* note 3, at 158.

12. Charles Wilkinson has characterized the antiquated rules of Western resource allocation as the "lords of yesterday." *See* his CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE AMERICAN WEST 3-27 (1992).

13. 30 U.S.C. §§ 22-47. *See* WILKINSON, *supra* note 12, at 28-76. *See also*

which is a federal statute, Western water is governed largely by state appropriation systems.[14] But like the mining law, water uses obtain property rights.[15] Only those who use water "beneficially" obtain water rights,[16] and their property rights are defeasible if they waste water.[17] Because it is the basis and measure of a water right, the definition of beneficial use is the key concept of Western water law.

Traditionally, beneficial uses required diversions from the stream in order to put others on notice of their claim to water, but modern recording systems obviated the need for physical diversion. Consequently, over the last generation most Western states amended their definitions of beneficial use to include instream uses. For example, Colorado did so in 1973,[18] and Hobbs indicates that there are now some 8,000 stream miles "protected" under that law.[19] But because these instream rights could have a priority date no earlier than 1973, on overappropriated streams—of which there are many in Colorado—instream rights with late priority dates supply precious little "protection" to instream uses. And because diversionary water rights with early priority dates are inheritable and passed on from generation to generation, the disadvantaged position of instream uses is not likely to improve in the future. True, as Hobbs points out, for the past seven years the Colorado Water Conservation Board has had statutory authority to purchase or receive by donation (but not condemn) senior water rights for conversion to instream flow rights.[20] However, purchases will prove to be extremely expen-

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JOHN D. LESHY, *The Mining Law: A Study in Perpetual Motion* (1986).

14. *See generally* 6 WATER AND WATER RIGHTS (R. Beck ed. 1991) (surveying state water laws).

15. *See* 2 *id.* § 12.02.

16. *See id.* §§ 12.03(c)(2), 14.03(c)(4)(A).

17. *See id.* §§ 12.03(c)(2), 17.03(d). Water rights may also be lost through abandonment and forfeiture. *See id.* §§ 17.03(a), (b).

18. Colo. Rev. Stat. §§ 37-92-102(3), 37-92-103(3), (4), (10) (1973), upheld against a constitutional attack by the Colorado Supreme Court in Colorado River Water Cons. Dist. v. Colorado Water Cons. Bd., 594 P.2d 570 (Colo. 1979).

19. Hobbs, *supra* note 3, at 164.

20. *Id.* at 164-65. Unfortunately, the Colorado legislature has appropriated no funds to purchase water rights. However, the Nature Conservancy recently donated a water right to the Water Conservation Board, which will soon go to water court to be changed to an instream flow right. Letter from Larry

sive to the taxpayers, and donations are likely to be infrequent. Imagine the state of the environment if the Environmental Protection Agency had to purchase or acquire by donation pollution rights from polluters. The prior appropriation, in short, relegates instream uses to a virtually permanent disadvantaged position.

It is this system that Hobbs seeks to defend in his diatribe against the Long's Peak report. But he has clearly picked the wrong target. There is not one word in the report suggesting the need to overthrow the prior appropriation system. In fact, among the report's general principles is the following:

> Where a transition from old to new values demands reallocation of water from existing supplies, the equities of people with existing uses established under lawful prior policies should be respected.[21]

This seems to me to be a clear statement that the Long's Peak report recognized prior appropriation as the operative principle of Western water law and sought only its adaptation to the imperatives of the next century.

Perhaps Hobbs simply misunderstood the pragmatic nature of the Long's Peak recommendations. However, I think his overreaction is one that other defenders of diversionary water uses would share. The thinking seems to be: better to savage calls for moderate reform than to squarely face some of the inefficiencies and injustices in the current system of allocating Western water. For example, Hobbs' attempts to depict the Long's Peak report as a call for Western riparianism,[22] despite the principle quoted above. Not only does he misunderstand riparianism as it is practiced in the East,[23] but he overstates the nature of the "legal severance"

MacDonnell to author (Jan. 3, 1994).

21. AMERICA'S WATERS: A NEW ERA OF SUSTAINABILITY: REPORT OF THE LONG'S PEAK WORKING GROUP ON NATIONAL WATER POLICY (Natural Resources Law Center, University of Colorado School of Law ed., 1992) 6, *reprinted in this volume of Environmental Law*, 24 ENVTL. L. 132 [hereinafter *Long's Peak Report*].

22. Hobbs, *supra* note 3, at 161.

23. Hobbs claims that the doctrine of natural or continuous flow characterizes riparian law when in reality the natural flow doctrine was supplanted by "reasonable use" principles over a century ago. *See* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1820-60 at 34-42 (1977). On riparianism, see 1 WATER AND WATER RIGHTS, *supra* note 14, chs. 6-9.

by which riparian rights ceased to exist on Western public.[24] It is true that, as a result of this severance, most Western water is allocated through state prior appropriation system, but some Western states do recognize some riparian rights,[25] and federal and Indian reserved and regulatory rights co-exist with state-granted rights.[26] The Long's Peak report simply recognizes these realities by calling for federal land managers to exercise their existing authorities to protect instream flows, especially through expenditures of federal funds and conditioning federal approvals.[27]

Hobbs is right to claim that the chief problem of Western water is one of scarcity, although his attempt to characterize prior appropriation as doctrine of sustainability[28] turns the latter concept on its head. Prior appropriation certainly has not sustained streamflows and instream uses in the arid West.[29] Waste of water, nominally prohibited by the prior appropriation doctrine, is rampant Westwide.[30] Instream ecological uses, which were well established (if not legally recognized) before any appropriator diverted a drop of water, are not the prime cause of water scarcity; it is instead the inefficiencies countenanced by the prior appropriation doctrine and its relegation of instream uses to a perpetual position of disadvantage which are the true causes of water scarcity in the West.

II. ANTI-STORAGE

Hobbs' real beef with Long's Peak is that the report is anti-storage. Although it contains no statements opposing new storage

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24. *See* Hobbs, *supra* note 3, at 162.

25. *See* 1 WATER AND WATER RIGHTS, *supra* note 14, ch. 8.

26. *See generally* Michael C. Blumm, *Unconventional Waters: The Quiet Revolution in Federal and Tribal Minimum Streamflows*, 19 ECOLOGY L.Q. 445 (1992).

27. *See generally* Teresa Rice, *Beyond Reserved Rights: Water Resource Protection for the Public Lands*, 28 IDAHO L. REV. 715 (1991-92).

28. Hobbs, *supra* note 3, at 162-64.

29. *See, e.g.*, WILKINSON, *supra* note 12, at 264-65 (citing depletion of the Navajo, Truckee, Colorado, Snake, Madison, Gallatin, Beaverhead, Bitteroot, Bighorn, Big Hole, and San Joaquin Rivers).

30. *See id.* at 260-62; George W. Pring & Karen A. Tomb, *License To Waste: Legal Barriers to Conservation and Efficient Use of Water in the West*, 25 ROCKY MTN. MIN. L. INST. 25-1 (1979); Steven J. Shupe, *Waste in Western Water Law: A Blueprint for Change*, 61 OR. L. REV. 483 (1982).

projects, the report does contain some cautions about new storage in recommendation 30:

> Economics will dramatically limit the development of new water supplies. New projects should be planned and authorized by Congress only to meet the highest priority needs. The Administration should treat environmental quality as equivalent to regional economic development in applying the Principles and Standards. Modifications to existing projects should be considered only after the existing project has been reevaluated in light of new needs and water conservation objectives. Reallocation of existing supplies should be preferred as an alternative to new storage.[31]

Hobbs uses the last sentence of this recommendation to excoriate the entire report for advancing an anti-storage bias. For Hobbs, the answer to the West's water scarcity lies in new water projects.[32] However, water storage projects were a product of an era during which the federal government saw fit to subsidize Western water use with projects like Colorado's Big-Thompson project, which Hobbs considers to be the epitome of wise water management, including the gold medal trout fishery downstream.[33] According to Hobbs, the Big-Thompson project is a reflection of the fact that "[w]ater follows the shovel and the city council"; he ignores the fact that the federal government bought the shovel, and that local sponsors contributed little more than arranging long-term repayment contracts which reimbursed the federal treasury only a fraction of project costs at below-market interest rates.[34] As my good friend Jim Huffman would remind Hobbs, it was federal money that gave us Western dams,[35] and any account that omits the fact that national taxpayers subsidized Western storage for most of this century is incomplete and misleading.[36]

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31. *Long's Peak Report*, *supra* note 21, 24 ENVTL. L. 139.

32. Hobbs, *supra* note 3, at 159-60, 165.

33. *Id.* at 159-60.

34. *See, e.g.*, MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER, 500-01 (1986); DONALD WORSTER, RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST 176-81, 185, 237-39, 281 (1985).

35. *See* the *Clear the Air* column allegedly written to Professor Huffman by Prior Appropriation himself, 21 ENVTL. L. 2253 (1991). Huffman would, of course, also blame all the maladies in the West on socialist government intervention. *See* his article cited in note 4.

36. *See* REISNER, *supra* note 34, at 319-43; WORSTER, *supra* note 34, at 262-

Hobbs suggests that any reallocation of existing federal storage must be preceded by feasibility and cost studies,[37] ignoring the fact that such studies seldom preceded project construction. More study is an old canard that beneficiaries of the status quo often invoke to resist change.[38] Nothing in the Long's Peak report is inconsistent with studying reallocation costs, so long as we also study the benefits as well as the costs of not changing the status quo. Indeed, a careful reading of recommendation 30 confirms this proposition.[39]

Let us be clear that Long's Peak did not advocate reallocation where vested rights are involved. Its recommendations were largely directed at federal agencies, such as the Bureau of Reclamation, the Corps of Engineers, and the Federal Energy Regulatory Commission, where they possess administrative discretion over water project operations or the issuance of water contracts and hydroelectric license conditions affecting streamflows.[40]

Hobbs' attempts to erect the prior appropriation system as an example of multiple use principles,[41] like his attempt to characterize prior appropriation as a doctrine of sustainability,[42] badly mischaracterizes the operation of Western water law. Gifford

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37. Hobbs, *supra* note 3, at 161.

38. Perhaps the quintessential example of employing studies to delay taking effective remedial action concerns the Columbia River salmon, where for years dam operators managed to maintain the status quo by studying the reasons for declining salmon runs. *See, e.g.*, F. Lorraine Bodi, *FERC's Mid-Columbia Proceeding: Ten Years and Still Counting*, 16 ENVTL. L. 555 (1986). Demonstrating that things have not changed much since Ms. Bodi wrote is a December 1, 1993 request by a dam operator to reopen a FERC proceeding to admit into evidence a draft recovery plan for Snake River salmon. The operator wants a reconsideration of juvenile fish bypass system and spill requirements imposed by a FERC administrative law judge in Public Utility Dist. No. 2 of Grant County, Washington, 58 F.E.R.C. ¶ 63,022 (1992). *See* Motion of Public Utility Dist. No. 2 of Grant County Washington to Reopen the Record (Docket No. E9569-003, Dec. 1, 1993). As Ms. Bodi's article illustrates, a coalition of federal, state, and tribal agencies has been attempting (so far only partly successfully) to secure the bypass system and spill since 1976. Bodi, *supra*, at 561.

39. *See* text accompanying note 31.

40. *See, e.g.*, Recommendations Nos. 8, 13, 19, 20, 22, 23, 32, 34, 36, 41, 42, 45, 47, *Long's Peak Report*, *supra* note 21, 24 ENVTL. L. 135-38, 140-41, 143-44.

41. Hobbs, *supra* note 3, at 162.

42. *See supra* note 28 and accompanying text.

Pinchot's multiple use paradigm on the public lands—which emphasized scientific planning by disinterested government experts who would manage resources with a great deal of administrative discretion to produce "the greatest good for the greatest number over the long run"[43]—bears little or no resemblance to how water is allocated in the West. The prior appropriation doctrine features private decision making, deemphasizes government discretion, and leaves almost no role for scientific planning in allocating rights to use water.[44] Whatever uses are made of return flows after an appropriator diverts are better characterized as incidental uses, rather than multiple uses. In truth, Western water is a dominant use system whose basic tenets are antithetical to the multiple use system championed by Pinchot.[45]

The reclamation projects which serve the prior appropriation doctrine by storing water for states to allocate, however, could operate to fulfill multiple use purposes, including instream uses. But too often in the past, they have not.[46] Grand Coulee Dam, for example, could be drafted to supply the spring and summer flows necessary to supply Columbia Basin salmon a biologically sound transportation corridor to the ocean. Glen Canyon Dam could be operated to enhance fish and wildlife and recreation downstream on the Colorado River. It is, in fact, balanced, multiple use of such projects that the Long's Peak report recommended.[47] But those

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43. *See* WILKINSON, *supra* note 12, at 127-31.

44. *See* Wilkinson, *supra* note 5, at 17-19, 22-28.

45. Hobbs also misleads when he invokes John Wesley Powell to support his arguments for storage. Hobbs, *supra* note 3, at 161. Powell advocated self-governing, *self-financing* watersheds, where storage, water use, and land use would be ascertained and constrained by a watershed's own resources. Powell would almost certainly oppose the large storage projects which Hobbs touts because they could not be financed by the watershed, an inherent limitation which gave his vision stability and sustainability, and one which Western water developers rejected long ago. *See* Volkman & Lee, *supra* note 10, at 553-56.

46. In this respect, however, water projects have been no bigger a failure than federal land management, where the multiple use paradigm has produced dominant, commodity-oriented uses and segregated landscapes. *See* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why Multiple Use Failed*, 18 HARV. ENVTL. L. REV. no. 2 (forthcoming 1994).

47. *See, e.g.*, Recommendation 11, *Long's Peak Report*, *supra* note 21, 24 ENVTL. L. 136, cited by Hobbs, *supra* note 3, at 161 (calling for fish and wildlife protection on federal lands and at federal and federally-licensed water projects "on an equal basis with other primary project purposes").

recommendations earn Hobbs' enmity; he apparently considers multiple use of storage projects to amount to "strident preservationism." Fortunately, his views are anachronistic ones, and the Clinton Administration is proceeding with plans to transform the Bureau of Reclamation from a dam construction agency into a modern water management agency operating under true multiple use principles.[48] Hobbs may not like it, but the era of large-scale water project construction is at an end.

III. ANTI-LOCAL

Hobbs' third major charge against the Long's Peak report is that it is anti-local. He claims that the report seeks less state and local control over water and advocates more federal regulation. Such a result, he asserts, would be "undemocratic" because it would ignore local law and customs.[49]

One response to this hyperbole might be to question the wisdom of relying on local custom where the custom is, as is commonplace throughout the arid West, to waste water.[50] Anti-waste provisions in state laws cannot eliminate waste where they are not enforced by local officials, and where citizens have no authority to challenge wasteful practices in court. But the real response to Hobbs' attack lies in a careful reading of the Long's Peak recommendations, no fewer than seven of which emphasize state and local responsibilities.[51] Recommendation 20, for example, suggests that federal water management agencies delegate or share regulatory responsibilities with the government most closely affected by program decisions.[52] Recommendation 37 advocates expanding state authority to allow states to protect outstanding

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48. *See, e.g.*, Western States Water no. 1016 (Nov. 5, 1993) (discussing the Bureau of Reclamation's *Blueprint for Reform*, which aims to transform the Bureau "from a civil works construction agency into a preeminent water management agency"); Tom Kenworthy, "Bureau of Reclamation to See Change," *The Oregonian*, A10, Nov. 2, 1993 (noting that "Congress is no longer willing to authorize the kind of massive hydroelectric and irrigation projects that sustained the agency for decades . . . .").

49. Hobbs, *supra* note 3, at 165.

50. *See* sources cited in note 30, *supra*.

51. *See* Recommendations 19-21, 34-37, 44(g), (j), (p), 47, *Long's Peak Report*, *supra* note 21, 24 ENVTL. L. at 138, 141, 143-44.

52. *Id.* at 138.

river segments from hydropower development.[53] Hobbs' allegation that Long's Peak is biased against state and local planning and regulation is refuted by the text of the report itself.

IV. THE "TAKING" OF WATER RIGHTS

Hobbs concludes his missive by attacking the Long's Peak report for failing to address a series of questions about whether federal environmental laws can alter the nature of an appropriator's property interest in water.[54] These are interesting questions that will ultimately be decided in court, on the basis of concrete facts and real people. A report on national water policy is hardly the proper forum to attempt to resolve the questions Hobbs wants answered. One senses his disappointment in the report may be due to its failure to assist him in a future brief he may be considering.

Let me address a few of the issues Hobbs raises, however. First, while state law does define the nature of state water rights, state law certainly has not defined the scope, nature, and existence of federal property rights in water.[55] Federal reserved rights are federally created and defined and, while the federal government has consented to be joined in state comprehensive stream adjudications,[56] it has not consented to allow state law to define the nature of federal water rights.[57] Second, although the Clean Water Act and the Endangered Species Act do contain admonitions for the federal and state governments to work cooperatively to resolve water rights issues,[58] they do not promise federal acquiescence to state water law where the result would, say, produce a violation of water quality standards or adverse modification to critical habitat of endangered species.[59] Hobbs has written

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53. *Id.* at 141.

54. Hobbs, *supra* note 3, at 167.

55. *See* 4 WATER AND WATER RIGHTS, *supra* note 14, ch. 37.

56. *Id.* § 37.04(a)(1).

57. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983) (state courts must apply federal law to the interpret federal reserved rights).

58. 33 U.S.C. § 1251(g) (Clean Water Act); 16 U.S.C. § 1531(c)(2) (Endangered Species Act).

59. *See, e.g.*, Riverside Irrigation Dist. v. Andrews, 758 F.2d 508, 513 (10th Cir. 1985) (§ 101(g) of the Clean Water Act is only a "general policy statement" cautioning that the Act should not "interfere any more than necessary

about these issues in the past, but he has misinterpreted the federal intent to work cooperatively with states as federal intent to defer to state law.[60]

Takings defenses to assertions of federal reserved rights have been unavailable because of the early priority dates that characterize reserved rights.[61] Those early priority dates will not insulate federal water rights under the Clean Water and the Endangered Species Acts, but successful takings defenses are nevertheless unlikely for several reasons. First, the vested private property right in water under state law is much more limited than Hobbs is willing to concede. Suppose an irrigator has a right to divert 100 cubic feet per second (cfs) of water, but his crops consume only thirty cfs, and another ten cfs is lost through "unavoidable" waste such as carriage losses. Because the prior appropriation doctrine has always limited the scope of the water right by the concepts of beneficial use and waste,[62] a takings claim cannot begin to arise until a regulatory requirement restrains more than sixty cfs of the diversion.

Second, restrictions greater than sixty cfs may be insulated from takings claims by state constitutional and statutory proclamations of the public nature of water,[63] or by judicial application of the public trust doctrine to water diversions.[64] Thus, by definition private property rights in water have always been more contingent than land rights and may be circumscribed by public rights

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with state water management").

60. Hobbs & Raley, *Quality vs. Quantity*, *supra* note 1, at 24-40 to 24-64.

61. *See generally* 4 WATER & WATER RIGHTS, *supra* note 14, §§ 37.02(b), 37.03(b).

62. *See supra* notes 16-17 and accompanying text.

63. For a detailed chart of such proclamations in the Western states, see 2 WATER AND WATER RIGHTS, *supra* note 14, § 12.01 at 85-90.

64. The most famous public trust case in the water law context is the California Supreme Court decision in the Mono Lake case. Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983). But the doctrine has spread to other Western states as well. *See generally Symposium on the Public Trust and the Waters of the American West*, 19 ENVTL. L. 425-735 (1989); 4 WATER AND WATER RIGHTS, *supra* note 14, § 30.02.

without paying constitutional compensation.[65] As Professor Sax observed a few years ago:

> The roots of private property in water have simply never been deep enough to vest in water users a compensable right to diminish lakes and rivers or to destroy the marine life within them. Water is not like a pocket watch or a piece of furniture, which an owner may destroy with impunity. The rights of use in water, however longstanding, should never be confused with more personal, more fully owned, property. Far from being a sudden and unpredictable change in the definition of property, recognition of the right of the state to protect its water resources is only a restatement of a familiar and oft-stated public prerogative.[66]

Third, Hobbs misreads the Supreme Court's *Lucas* case if he thinks that case means that a Clean Water or Endangered Species Act limitation on a state water right is a taking. For one thing, the "categorical rule" established by *Lucas* applies only to complete wipeouts of all value,[67] and it is very unlikely that a restriction imposed to fulfill a federal environmental statute would limit the entirety of a state water right. For another, in the past, the Supreme Court has upheld police power limitations that allegedly diminished the property owner value by as much as ninety percent.[68] *Lucas* does nothing to overturn these precedents.

This is not the place for an extended analysis of state water rights and the takings clause.[69] I wish only to suggest that, notwithstanding Hobbs' assertions to the contrary, *Lucas* does little or nothing to clarify whether and under what circumstances feder-

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65. *See* Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 COLO. L. REV. 257, 264-67 (1990). For an analysis of the historical roots of the public right in water, see 4 WATER AND WATER RIGHTS, *supra* note 14, ch. 29.

66. Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 482 (1989).

67. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 (1992) (conceding that total wipeouts are "relatively rare").

68. *See* Hadacheck v. Sebastian, 239 U.S. 394, 408-09 (1915) (prohibiting operation of a brickyard, diminishing the value of the property 90%); Euclid v. Ambler Realty, 239 U.S. 365, 384 (1926) (zoning ordinance causing a diminution of value of 75%); Miller v. Schoene, 276 U.S. 272 (1928) (state may require cutting of cedar trees, despite no finding of a nuisance).

69. *See, e.g.*, Sax, *supra* note 65; 4 WATER AND WATER RIGHTS, *supra* note 14, § 33.03.

al environmental requirements might unconstitutionally take state water rights.[70]

V. WESTERN WATER LAW IN THE NEXT MILLENNIUM

For nearly a century, water law in the West has had two overriding characteristics: (1) federally subsidized storage projects, and (2) state administration favoring water diverters and leaving instream uses in a permanently disadvantaged position. The federal projects that created water for the states to allocate constituted an enormous contribution of the national taxpayers to Western development. The extent of this federal gratuity is curious, since for years there was little federal direction as to how this water should be allocated. Hobbs infers that the federal government decided to fund these projects with no strings attached in order to reward local planning and defer to local custom.[71] Whatever the motivation, the era of subsidies is clearly over.[72] Not only can the federal taxpayers no longer afford to subsidize Western water development, federal priorities now include instream concerns associated with water quality restoration and endangered species preservation. The Long's Peak report merely reflects these changed priorities in its recommendations concerning changing project operations and asserting federal public land authority to maintain streamflows.[73]

Change will come more slowly on the state level, where the forces which have controlled state water allocation systems remain entrenched. It is for this reason that Hobbs and other resisters of water reform want to characterize reports like Long's Peak as attempts to federalize water law.[74] They assume that if water

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70. For more on *Lucas*, see *A Colloquium on Lucas*, 23 ENVTL. L. 869-932 (1993); *Symposium on Lucas*, 45 STAN. L. REV. 1369-1455 (1993); Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing* 12, VA. ENVTL. L. REV. 439 (1993); John A Humbach, *"Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U.L. REV. 771 (1993).

71. Hobbs, *supra* note 3, at 159-60, 165.

72. *See* sources cited in note 48, *supra*.

73. *See, e.g.*, Recommendations 11, 22-25, 27, 30-31, 36, 40-41, 45, 47, *Long's Peak Report*, *supra* note 21, 24 ENVTL. L. 136, 138-42, 144.

74. Hobbs, *supra* note 3, at 157, 161, 166.

law and policy is thought of a matter left to the states, the historic hegemony of water developers in the administration of water will remain unchanged. They may be right. Certainly the control of state legislators, administrators, and courts by the agricultural and municipal development lobbies has been as complete as the fabled "iron triangle" which supplied the states with federal subsidies for so long.[75]

But it is not entirely unrealistic to think that, just as the resisters to water reform have lost control of the federal appropriations projects, their grip on state water allocation may be loosening. For one thing, municipal and agricultural diverters are not always allies, as was evident in the debates over the Central Valley Improvement Act,[76] where the municipalities embraced change and agriculture unsuccessfully resisted it.[77] For another, the economies of Western states grow less dependent on extractive uses of natural resources with each passing year, and Westerners increasingly seek to preserve and restore instream uses. It may become difficult for the resisters of change to defend underenforcement of the waste doctrine—which currently countenances grossly inefficient irrigation practices[78]—or extensive neglect of beneficial use requirements, producing illegal "water spreading"—allowing diverters to change the place of use without state approval.[79] Widespread public understanding of these abuses may succeed in producing badly needed reforms on the state level, such as (1) increasing public involvement and accountability in water use decision making, (2) ensuring that water allocation is predicated on plans that account for both water quantity and water quality and which recognize surface and groundwater interac-

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75. *See, e.g.*, DANIEL MCCOOL, COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER (1987).

76. Pub. L. No. 102-574, §§ 3400 *et seq.*, 106 Stat. 470.

77. *See* Phillip A. Davis, *Water Bill Heads to Bush's Desk Over Farm Interests' Protests*, 50 CONG. QUART. WEEKLY REP. 3150 (Oct. 10, 1992); Harrison C. Dunning, *Confronting the Environmental Legacy of Irrigated Agriculture of the West: The Case of the Central Valley Project*, 23 ENVTL. L. 943, 960-69 (1993).

78. *See, e.g.*, Waterwatch of Oregon, NEW DIRECTIONS FOR OREGON WATER POLICY 13-14 (1993) (discussing waste in the Deschutes River Basin and concluding that "waste water use is rampant in Oregon").

79. *See* Waterwatch of Oregon, FOR OREGON'S FUTURE—WATER MARKETING IN PERSPECTIVE 6-7 (1993).

tion, and (3) giving citizens the authority to enforce state water laws in court.[80]

Ultimately, Western water law will change because it will prove too expensive not to change. The current system of water allocation suffers from poor enforcement, little citizen involvement, and virtually eschews comprehensive planning entirely. A poignant example of the unwillingness plan concerns the Columbia River. The Columbia's principal tributary, the Snake River, has several species of salmon listed for protection under the Endangered Species Act.[81] Despite the fact that one of the principal causes for the decline of the Columbia Basin salmon runs is lack of sufficient mainstem flows to transport juvenile salmon to the ocean,[82] none of the Northwest states has permanently banned new diversions from the Columbia River and its principal tributaries.[83] For example, Oregon is considering applications to divert some 550 cfs from the mainstem Columbia for activities associ-

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80. A bill that would have accomplished these objectives, Senate Bill 1163, was considered by the 1991 Oregon Legislature but not enacted. *See* Joseph R. Kaufman, *An Analysis of Developing Instream Water Rights in Oregon*, 28 WILLAMETTE L. REV. 285, 287-89, 309-32 (1992).

81. The Snake River sockeye are listed as "endangered" under the Act, 56 Fed. Reg. 58,619 (1991) (codified at 50 C.F.R. § 17.11), while the Snake River spring/summer chinook and fall chinook have been listed as "threatened," 57 Fed. Reg. 14,653 (1992) (codified at 50 C.F.R. § 17.11). *See* John M. Volkman & Willis S. McConnaha, *Through A Glass Darkly: Columbia River Salmon, the Endangered Species Act, and Adaptive Management*, 23 ENVTL. L. 1249 (1993).

82. *See* Blumm & Simrin, *supra* note 10, at 702-13; Michael C. Blumm, *Saving Idaho's Salmon: A History of Failure and a Dubious Future*, 28 IDAHO L. REV. 667, 683-713 (1991-92).

83. *See* Memorandum from John Volkman to Northwest Power Planning Council Members (Dec. 17, 1992) (noting that while Washington, Oregon, and Idaho all issued temporary moratoria on certain Columbia Basin diversions, significant loopholes existed in each state: (1) Washington grandfathered diversion applications filed before December 20, 1991 and exempted all water rights for the Bureau of Reclamation's Columbia Basin Project; (2) Oregon grandfathered permit applications filed before July 17, 1992 (which amounts to 878 applications), including one by the state's Department of Agriculture for over 3.2 million acre-feet of water "for future economic development"; and (3) although Idaho imposed an indefinite moratorium on diversions from the mainstem Snake River, the state did so only because of prolonged drought conditions, not to protect salmon specifically).

ated with expanding the heavily subsidized potato processing industry, an industry which has produced substantial ground and surface water pollution and widespread mining of acquifers.[84]

The irrationality of Western water allocation may be best captured in a proposal by the federal Bonneville Power Administration (BPA) to spend between $250,000 and $300,000 purchasing water rights to 30,000 acre-feet of water to benefit the endangered Snake River salmon, a cost of roughly $10 per acre-foot, or $3,960 per cubic foot per second (cfs).[85] At the same time, the State of Oregon in 1993 issued satisfactory technical reports on applications for new water rights in the Snake River Basin totalling twenty-two cfs plus 150 acre-feet.[86] These new water rights will not cost the applicants anything, but apparently they will soon be able to sell their rights back to BPA for about $88,000.[87] The masterminds of the savings and loan fiasco, after serving their prison sentences, may wish to turn their attention to the water rights arena.

Saving the Columbia Basin salmon runs will require, at a minimum, a new commitment to interstate planning and a new vigilance concerning implementation of anti-waste and beneficial use provisions. States wishing to avoid the prospect of losing control over water use decision making to Endangered Species Act proceedings will amend their water codes and embolden their administrators accordingly. The federal government may be able to encourage this transition, but real change must come from within the states.

The Long's Peak report ought to be seen not merely as an appeal for federal water reform[88] but also as a clarion call for the states to take action to prepare for the inevitable changes they

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84. *See generally* Columbia Basin Inst., *Value Added and Subtracted: The Processed Potato Industry in the Mid-Columbia Basin* (1993). In foregone hydropower alone, the cost of these diversions is $4 million annually. *Id.* at 54.

85. *See* Petition of WaterWatch of Oregon to Withdraw the Columbia River, its Tributaries, and All Hydraulically Connected Groundwaters 7 (Jan. 7, 1994).

86. *Id.*

87. *Id.*

88. *See* Harrison C. Dunning, *Long's Peak and Beyond*, 4 RIVERS 153, 154 (1993) (noting that about half of the report's 17 recommendations for action during the first 100 days of the Clinton Administration received some favorable federal response during that time frame).

will confront in the next century. Hobbs' critique is simply a disguised plea for maintenance of a status quo which has (1) imposed a permanently disadvantaged position on instream users, (2) excluded widespread segments of the public from water allocation decision making, and (3) gives little or no consideration to planning for impending shortages. This is a system that, despite Hobbs' efforts, will collapse of its own inefficiency if it is not reformed.