

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
REGARDING PREEMPTION OF STATE LAW IN FEDERAL LEGISLATION
Bend, Oregon
July 29, 2011

WHEREAS, the future growth, prosperity and economic and environmental health of the West and the Nation depend upon the availability of adequate quantities of water for myriad uses; and

WHEREAS, Western states have primary authority and responsibility for the appropriation, allocation, development, conservation and protection of water resources, both groundwater and surface water, including protection of water quality, instreamflows and aquatic species; and

WHEREAS, the Congress has historically deferred to state law as embodied in Section 8 of the Reclamation Act, Section 10 of the Federal Power Act, Section 101(g) and 101(b) of the Clean Water Act, and myriad other statutes; and

WHEREAS, any weakening of the deference to state water and related laws is inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states; and

WHEREAS, federal deference to state water law is based on sound principles for the protection of private property rights and the collective public interest in managing our water resources and the environment; and

WHEREAS, states are primarily responsible and accountable for their own water development, management and protection challenges, and are in the best position to identify, evaluate and prioritize their needs and plan and implement strategies to meet those needs; and

WHEREAS, any legislation related to any federal water policy, water plan or planning process must recognize, defer to and support State, tribal and local government water laws, agreements, and management processes; and

WHEREAS, the federal government should explicitly recognize and provide support for ongoing watershed and state water management efforts both in and between the states, tribes and local entities, closely consult with the states and provide appropriate technical and financial assistance; and

WHEREAS, the federal government should avoid strategies that increase unilateral mandates on state, tribal and local governments; and

WHEREAS, from time to time federal legislation and regulatory actions have been proposed that are not consistent with sound federalist principles and primary state water related laws, authorities and responsibilities; and

WHEREAS, legislation preempting or discharging requirements for compliance with state law is not consistent with a balanced federalism approach;

NOW, THEREFORE, BE IT RESOLVED, that nothing in any act of Congress should be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to: (a) water or watershed management; (b) the control, appropriation, use, or distribution of water used in irrigation, municipal, environmental, or any other purposes, or any vested right acquired therein; or (c) intending to affect or in any way to interfere with any interstate compact, decree or negotiated water rights agreement.

BE IT FURTHER RESOLVED, that the Administration and Congress should strive to ensure federal laws, policies, rules and regulations are consistent with the principles set forth herein.

Testimony of

**Anthony Willardson, Executive Director
Western States Water Council**

before the

**House Committee on Natural Resources
Subcommittee on Water and Power**

**Legislative Hearing on H.R. 1837
The San Joaquin Valley Water Reliability Act**

June 13, 2011

Introduction

Mr. Chairman and members of the subcommittee, my name is Tony Willardson and I am the Executive Director of the Western States Water Council (WSWC). Our members are appointed by the Governors of eighteen western states. We are a nonpartisan government entity serving as an advisory body on water policy issues, and are very closely affiliated with the Western Governors' Association (WGA). We appreciate the opportunity to testify.

Since H.R. 1847 was only recently introduced, the Council has not had an opportunity to adopt a specific position on the legislation. However, I will address general principles related to federal-state relations that are useful in evaluating specific legislation – including H.R. 1837 – and other actions addressing the serious water-related challenges facing the West and the Nation. During the Council's regular meetings next month, we will have an opportunity to more fully consider H.R. 1837 and will share any further comments thereafter.

My testimony today is based specifically on a July 2010 Council policy position entitled, "A Shared Vision for Water Planning and Policy," as well as a June 2006 WGA Water Report entitled, *Water Needs and Strategies for a Sustainable Future*, the 2008 WGA "Next Steps" Water Report, and ongoing policy discussions. Our 2010 position and the WGA Water Reports include a number of policy statements and recommendations related to federal programs and projects under this Subcommittee's jurisdiction, and which we would hope would be carefully considered as you evaluate H.R. 1837.

With regard to provisions related to preemption of state law, the last paragraph of the Council's position related to A Shared Vision for Water Planning and Policy, states: "...Nothing in any act of Congress should be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to: (a) water or watershed planning; (b) the control, appropriation, use, or distribution of water used in irrigation or for municipal or any other purposes, or any vested right acquired therein; or (c) intending to affect or in any way to interfere with any interstate compact, decree or negotiated water rights agreement."

This language was intentionally patterned after Section 8 of the Reclamation Act of 1902 (and similar Congressional directives). Any weakening of the deference to state water law as now expressed in Section 8 is of concern to the Council – including Section 202 of H.R. 1837. Provisions of this nature are inconsistent with the policy of cooperative federalism that has guided Reclamation Law for over a century, and are a threat to water right and water right administration in all the Western States.

Recognizing that the “future growth and prosperity of the western states depend upon the availability of adequate quantities of water of suitable quality,” western governors created the Council in 1965 to address the need for an accurate and unbiased appraisal of present and future [water] requirements...and the most equitable means of providing for...such requirements....” On a west-wide regional level, the governors charged the Council “...to accomplish effective cooperation among western states in planning for programs leading to integrated development by state, federal and other agencies of their water resources.” Since its creation, the Council has served as a unified voice on behalf of western governors on water policy issues.

Over the years, the Council has continually sought to develop a regional consensus on westwide water policy and planning issues, including many federal initiatives and legislation. The Council strives to collectively protect western states’ interests in water, while at the same time serving to coordinate and facilitate efforts to improve western water management. With respect to the latter, the Council and eleven federal agencies have signed a Declaration of Cooperation creating what we call our Western Federal Agency Support Team (WestFAST), to increase collaboration on water issues of mutual concern.

The Council has long recognized the importance of planning and policy in protecting and wisely managing our water resources for the benefit of our present and future generations, including our environment. The water development, management and protection challenges in the Sacramento-San Joaquin Bay-Delta System are not unique to California, but are reflected across the West and the Nation. Similarly, any solution to California’s water and environmental needs (and compliance with state and federal mandates) affects the rest of the West to a greater or lesser extent. Perhaps this is best illustrated by California’s physical dependence not only on the waters of northern and central California, but also the Colorado River Basin, shared by six other basin states.

In recent years there has been a growing debate over national water policy and the need to elevate water issues as a national priority. The Council has been and continues to be actively involved in those policy discussions.

The States are primarily responsible for allocating and administering rights to the use of water for myriad uses; and are in the best position to identify, evaluate and prioritize their needs. States and their political subdivisions share primary responsibility for planning and managing our Nation’s water resources, both surface and ground water, both quantity and quality.

2006/2008 Western Governors' Association Water Reports

The WGA's 2006 Water Report declared: "States have the primary responsibility for water allocation and management. They have jurisdiction to sanction both new appropriations and transfers of existing uses. They also have the primary responsibility for integrating water quantity allocation and water quality protection. As a result, states can play a critical role relating to growth in the West where water is a scarce resource and competing demands vie for rights to its use." (p.4)

The WGA's 2008 Next Steps Report reiterated: "States have the pivotal role in water planning, as well as allocating and protecting the resources. But in the West, where the federal government is a substantial landowner and has a significant regulatory presence, the federal role is also critical. Cooperation among the states and the federal government continues to be vital. To support the state leadership role, the federal government should help by providing a rational federal regulatory framework, together with technical and appropriate financial assistance.... Developing optimal solutions to the challenges...will require an integrated approach and greater partnerships among state, local and federal agencies. This approach should consider all needs together, develop effective solutions which are complementary rather than conflicting, and provide direction for selecting the most appropriate...solutions. (p. I)

2011 WSWC Shared Water Vision Policy Position

The following WSWC recommendations are presented as a guide for evaluating actions related to federal-state relations and water resources, including H.R. 1837.

- Any vision for any water policy, water plan or planning process must recognize, defer to and support State, tribal and local government water plans and planning processes.
- Federal legislation should explicitly recognize and provide support for ongoing watershed efforts in and between the states, tribes and local entities and closely consult with the states in the implementation of any new federal program(s).
- Any federal legislation should avoid strategies that increase mandates on state, tribal and local governments.
- Comprehensive plans developed under state or tribal leadership with federal assistance should: (a) reduce inefficiencies caused by project-specific responses to competing demands; (b) reduce contradictory actions by multiple state, local and federal agencies; and (c) minimize hastily conceived reactions to the latest real or perceived crisis.
- Federal agencies should use state water plans: (a) to help determine water policy and planning priorities that best align federal agency support to states; (b) to inform decision making regarding regional water issues; and (c) to coordinate investment in water infrastructure.

- Nothing in any act of Congress should be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to: (a) water or watershed planning; (b) the control, appropriation, use, or distribution of water used in irrigation or for municipal or any other purposes, or any vested right acquired therein; or (c) intending to affect or in any way to interfere with any interstate compact, decree or negotiated water rights agreement.

Water, the Economy and Environmental Policy

Clean, reliable water supplies are essential for communities throughout the West and the Nation to maintain or improve their citizens' quality of life. Strong state and national economies require sufficient supplies of good quality water, which in turn depend on protection of water supply sources and the environment and adequate infrastructure for water and wastewater. Investments in water infrastructure also provide jobs and a foundation for long-term economic growth in communities throughout the West.

A clean and safe environment and vibrant economy will best be achieved when government actions are focused on outcomes, not programs, and when innovative approaches to achieving desired outcomes are rewarded. Federal, state and local policies should encourage "outside the box" thinking in the development of strategies to achieve desired outcomes. Solving problems rather than just complying with programs should be rewarded. Governments should reward innovation and take responsibility for achieving environmental goals.

Successful environmental policy implementation is best accomplished through balanced, open and inclusive approaches at the ground level, where interested stakeholders work together to formulate critical issue statements and develop locally based solutions to those issues. Collaborative approaches often result in greater satisfaction with outcomes and broader public support, and they can increase the chances of involved parties staying committed over time to the solution and its implementation.

To better identify and understand opportunities for win-win solutions, an assessment of the costs and benefits of different options should be made looking at life-cycle costs and economic externalities. These assessments can illustrate the relative advantages of various methods of achieving common public goals. However, not all benefits and costs can be easily quantified or translated into dollars. There may be other non-economic factors such as equity within and across generations that should also be fully considered and integrated into every assessment of options. The assessment of options should consider all of the social, legal, economic and political factors while ensuring that neither quantitative nor qualitative factors dominate.

Conclusion

In conclusion, again as declared by western governors in 1965, the "future growth and prosperity of the western states depend upon the availability," and they could have added reliability, "of adequate quantities of water of suitable quality." We must address this reality in the context of balancing current economic and environmental needs and demands – recognizing

the importance of intergovernmental partnerships, respecting our diverse responsibilities and roles, and maintaining the historic deference to state water law embodied in Section 8 of the Reclamation Act. Legislation preempting or discharging requirements for compliance with state law is not consistent with this balanced approach.

Thank you for the opportunity to testify.