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Janet Neuman

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JANET NEUMAN*

Are We There Yet? Weary Travelers on the Long Road to Water Policy Reform

ABSTRACT

From the Gallatin Report of 1808 to the report of the National Drought Policy Commission in 2000, numerous governmental and independent commissions have studied water policy. Congress currently has before it yet another proposal for a national water commission—the Twenty-First Century Water Commission Act of 2009. Although past commissions have consistently recommended certain legislative and executive actions to rationalize water policy, most of those recommendations have gone unheeded. This article reviews the work of previous water commissions, identifies common themes, and considers why repeated calls for reform have fallen on deaf ears. Next, the article suggests acting on the oft-repeated recommendations to conform water policy to scientific, economic, and political realities rather than repeating history by producing another report to be shelved and ignored.

I. INTRODUCTION: HERE WE GO AGAIN—ANOTHER WATER COMMISSION

On January 4, 2009, the second day of the 111th Congress, Representative John Linder from Georgia introduced a bill called the Twenty-First Century Water Commission Act of 2009.¹ Representative Linder's bill called for the appointment of a blue-ribbon panel comprised of individuals "of recognized standing and distinction in water policy issues."² The panel would be tasked with:

* Professor of Law, Lewis and Clark Law School. Thank you to Professor Reed Benson, University of New Mexico School of Law, for inviting me to submit a piece for this anniversary issue of the *Natural Resources Journal*. This article grew out of a presentation on "Rethinking Western Water Law" at the University of Colorado's Natural Resources Law Center's conference in June 2008. Thank you to Professor Mark Squillace, NRLC Director, for inviting me to that conference, to reference librarian Lynn Williams, former Lewis and Clark law student Sarah Liljefelt for research assistance, and to the editors of the *Natural Resources Journal* for many helpful suggestions.

1. H.R. 135, 111th Cong. (2009).

2. *Id.*

- Projecting future water supply and demand,
- Studying current water management programs, and
- Developing recommendations for a comprehensive water strategy.

The panel would be given a three-year timeline and a generous \$9 million budget to produce a report containing its findings and conclusions, as well as propose any legislation or policies to implement its recommendations.

But, wait. Here's a better idea that would save \$9 million and three years of effort. Given a few days and modest rates at the nearest copy shop, we could bind up the reports of previous water study commissions and present those to the president and Congress. The studies have already been done, the recommendations prepared, and the reports issued. To paraphrase Yogi Berra, House Resolution 135 (H.R. 135) is "*déjà vu* all over again."³

The real question that needs further attention is why has so much good work been for naught? This article attempts to answer that question and explores ways to move beyond the study phase and into implementation. Part II briefly summarizes the history of previous water commission reports and describes their major recommendations. Part III considers why so many of those recommendations—containing good, common sense suggestions for improving water management and use—have fallen on deaf ears. Part IV offers thoughts on reviving the best ideas and turning them into concrete action.⁴

3. This quote is attributed to Lawrence (Yogi) Berra, the well-known New York Yankees baseball player. See *Things People Said: Yogi Berra Quotes*, <http://www.rinkworks.com/said/yogiberra.shtml> (last visited July 21, 2010).

4. These suggestions, too, might well be *déjà vu*, as other writers have also tried to turn the many policy reports into action agendas. See generally CHARLES H.W. FOSTER & PETER P. ROGERS, *FEDERAL WATER POLICY: TOWARD AN AGENDA FOR ACTION* (1988); Long's Peak Working Group on Nat'l Water Policy, *America's Waters: A New Era of Sustainability: Report of the Long's Peak Working Group on National Water Policy*, 24 ENVTL. L. 125 (1994) (describing action opportunities for the recently elected Clinton-Gore administration).

II. A 200-YEAR TOUR OF WATER POLICY STUDIES⁵

A. A Road Paved with Good Intentions

Water study commissions stretch back as far as the 1808 Gallatin Report, making them almost as old as our nation.⁶ Secretary of the Treasury Albert Gallatin prepared the 1808 report at the request of the Senate to assess the need for national transportation improvements, including waterway improvements. Gallatin's report recommended that the federal government build waterway transportation infrastructure in the form of canals and other navigation improvements to link up regions of the country—not only along the Atlantic Seaboard, where most of the population was then located, but also far into the interior—to reach the Great Lakes and the midwestern rivers. Gallatin's proposals were initially controversial, due in part to the level of federal spending and indebtedness they would incur. However, many of the report's suggested canals were eventually completed, launching the federal government's participation in waterway development projects.⁷

5. Others have reviewed the work of the many water commissions in greater detail, while this article only discusses a few highlights. See generally WATER RESOURCES POLICY COMM'N, WATER RESOURCES LAW: THE REP. OF THE PRESIDENT'S WATER RESOURCES POLICY COMM'N (1950) [hereinafter COOKE COMM'N]; FOSTER & ROGERS, *supra* note 4; LAWRENCE J. MACDONNELL & DENISE D. FORT, A NEW WESTERN WATER AGENDA: OPPORTUNITIES FOR ACTION IN AN ERA OF GROWTH AND CLIMATE CHANGE (2008).

6. Albert Gallatin, REPORT OF THE SEC'Y OF THE TREASURY ON THE SUBJECT OF PUBLIC ROADS & CANALS (1808).

7. Gallatin's proposed waterway improvements were estimated to cost nearly \$9 million (equivalent to over \$200 billion in today's dollars), proposed to be paid for over a span of 10 years. *Id.* at 66–68. The first segments of the Atlantic Intracoastal Waterway—a series of protected navigation channels and canals that now stretches essentially from Boston to Key West—were authorized by Congress in 1880, several decades after Gallatin's report. See H.R. Res. 465, 111th Cong. (2009) (describing the origins of the Atlantic Intracoastal Waterway). Another interior waterway—the Gulf Intracoastal Waterway, linking Brownsville, Texas, to Carabelle, Florida—was also begun in the late 1800s. See TEXAS DEP'T OF TRANSPORTATION, GULF INTRACOASTAL WATERWAY, available at http://www.texasgulfcoastonline.com/portals/0/pdfs/tx_gulfcoastwaterway.pdf. These waterways were constructed and are maintained by the U.S. Army Corps of Engineers (Corps). Although the two segments were to be joined by a cross-Florida canal, that portion of the project was never completed due to its environmental impacts. See FOSTER & ROGERS, *supra* note 4, at 35 (discussing the “stiff resistance” to the Corps' plan for a cross-Florida barge canal). Some improvements discussed in Gallatin's report, such as the Erie Canal, were built by states or private companies rather than by the federal government. See NOBEL E. WHITFORD, HISTORY OF THE CANAL SYSTEM OF THE STATE OF NEW YORK—TOGETHER WITH BRIEF HISTORIES OF THE CANALS OF THE UNITED STATES AND CANADA (1906), available at <http://www.history.rochester.edu/canal/bib/whitford/old1906> (last visited July 30, 2010) (follow “Chronological Re-

A century later, President Theodore Roosevelt appointed the Inland Waterways Commission. This Commission promoted large-scale, multiple-purpose water development projects throughout the country's major river basins.⁸ The Commission's recommendation to create a single new federal agency to prepare and implement multipurpose river basin plans was met with opposition from, among others, the U.S. Army Corps of Engineers (Corps).⁹ However, the overall suggestion that the federal government should take the lead in developing river basins was more palatable, especially to the extent that such development would be federally funded.¹⁰ Still, implementation of key recommendations lagged years behind the proposals, mirroring the response to the Gallatin Report in the previous century. Many of the projects envisioned by the Commission were not constructed until the time of the New Deal in the 1930s.¹¹

After World War II, President Harry S. Truman formed a study group chaired by former President Herbert Hoover. The Hoover Commission on the Reorganization of the Executive Branch issued reports in 1949 and 1955.¹² The reports recommended "sweeping reorganizations of

sume of Important Laws and Events" hyperlink) (pertaining to the history of the Erie Canal).

8. THE INLAND WATERWAYS COMM'N, PRELIMINARY REP., S. DOC. NO. 325 (1908) [hereinafter INLAND WATERWAYS COMM'N]. In his transmittal letter submitting the report to Congress, President Theodore Roosevelt said "[e]very stream should be used to the utmost. No stream can be so used unless such use is planned for in advance. When such plans are made we shall find that, instead of interfering, one use can often be made to assist another." *Id.* at IV.

9. The report recommended creation of a National Waterways Commission to create waterway development plans and to coordinate efforts of the Corps of Engineers, the Reclamation Service (it became the Bureau of Reclamation in 1923), and other federal programs. *Id.* at 26–27. The chief of engineers for the Corps, General Alexander Mackenzie, who was himself a member of the Inland Waterways Commission, expressed a dissenting view on this recommendation as part of the Commission's report. *Id.* at 30–31.

10. Senator Francis Newlands, the prime architect of the Reclamation Act, was also a member of the Inland Waterways Commission. He filed a Supplementary Report urging a "free hand" and "an ample fund" for an "administrative body of experts" to allow them to plan projects while avoiding indecision, delay, and "the shoals and quicksands of legislation." *Id.* at 31–32.

11. "The Roosevelt administration for the first time worked out the general principles and the specific elements of the multiple-purpose approach to river development that the New Deal put into practice over two decades later." WESTERN WATER POLICY REVIEW ADVISORY COMM'N, WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY 4-21 (1998) [hereinafter WATER IN THE WEST], citing S.P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890–1920 (1999).

12. THE HOOVER COMM'N, REP. ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T (1949) [hereinafter 1949 HOOVER COMM'N]; THE COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, FINAL REPORT TO THE CONGRESS (1955).

the water agencies,”¹³ including consolidation of several programs within the Department of the Interior.¹⁴ The reports also recommended establishing interagency river basin commissions¹⁵ and called for the creation of a Board of Impartial Analysis within the president’s office to perform independent reviews of proposed federal projects.¹⁶

Throughout the next several years, other commissions echoed these strong recommendations to consolidate agencies and form river basin commissions but resistance continued. The President’s Commission on Water Resources (also called the Cooke Commission after its chair, Civil Engineer Morris Cooke) advanced similar proposals in 1950.¹⁷ This group, also created by President Truman, was charged to look at policy questions instead of addressing organizational issues, which was the task of the Hoover Commission.

After an exhaustive investigation, the Cooke Commission criticized the lack of a unified federal water policy. The Commission recommended establishing river basin commissions with an overall Board of Review to ensure that projects were coordinated with multipurpose basin programs. In 1955, the Presidential Advisory Committee on Water Resources Policy, appointed by President Eisenhower, argued yet again for federal agency coordination, river basin committees, and an independent voice on water resource issues by creating a Board of Review, as well as a Coordinator of Water Resources who would report directly to the President.¹⁸

The U.S. Senate commented that, although these reports provided “much useful information,” they offered an insufficient basis for drafting legislation. Therefore, the senators created their own study group called the Senate Select Committee on National Water Resources, which issued

13. Peter Rogers, *Water Resources in the Twentieth and One-Half Century: 1950–2050*, 116 WATER RESOURCES UPDATE 62 (2000). This publication is now known as the *Journal of Contemporary Water Research and Education*.

14. 1949 HOOVER COMM’N, *supra* note 12, at 267–73. The proposed restructuring was designed to address “glaring defects” in organization, “disastrously wasteful conflict,” and “great deficiencies” in data. *Id.* at 280–88.

15. *Id.* at 288–89.

16. *Id.* at 265–66.

17. COOKE COMM’N, *supra* note 5. The Cooke Commission’s effort was incredibly comprehensive, and the results were published in a three-volume report totaling more than 777 pages in Vol. 3 alone.

18. COMM. ON WATER RESOURCES POLICY, WATER RESOURCES POLICY: A REP. BY THE PRESIDENTIAL ADVISORY COMM. ON WATER RESOURCES POLICY (1955) [hereinafter WATER RESOURCES POLICY]. President Eisenhower constituted this cabinet-level group to consider the recommendations of the Cooke and Hoover Commissions. FOSTER & ROGERS, *supra* note 4, at 24–25.

its own report in 1961.¹⁹ The Senate Select Committee was weighted heavily in favor of western reclamation interests, since 13 of the 17 committee members were from western states. The Senate committee focused its attention on potential water shortages and on ever-increasing water pollution, both of which were emerging issues. The Committee's work culminated in the adoption of the Water Resources Research Act of 1964²⁰ and the Water Resources Planning Act of 1965.²¹ Both pieces of legislation finally incorporated some of the river basin planning and coordination proposals, while also laying the groundwork for the last significant phase of federally funded water development projects.²²

The most recent phase of water study commissions began less than half a century ago when Congress adopted the National Water Commission Act in 1968.²³ The legislation was crafted in response to several newsworthy water-related events—including fish kills and oil platform blowouts—and in reaction to intense debates in Congress over the Central Arizona Project and allocation of Colorado River water.²⁴ The 1968 Act established a seven-member National Water Commission (NWC) and broadly charged the group to review national water resource problems, future water requirements, and alternative ways of meeting those requirements.

Five years and \$5 million later, the NWC issued its final report.²⁵ The report exceeded 500 pages and contained more than 200 comprehen-

19. S. RES. 48, 86th Cong. (1961). The report accompanying the resolution noted that “[f]our Presidential commissions and a committee of Cabinet members have made major studies of water resource problems since 1949. The reports . . . provide much useful information, but they have not been in a form for legislative action, and they have not been accompanied by any legislative recommendations of the President.” The Select Committee published its conclusions in Senate Report 29. THE SENATE SELECT COMM. ON NAT’L WATER RESOURCES, REPORT, SEN. REP. NO. 29, 87th Cong. (1961).

20. 42 U.S.C. § 1961 (2000) (repealed 1978).

21. 42 U.S.C. § 1962 (2006). This Act created a federal Water Resources Council and subordinate regional river basin commissions to improve coordination and basin-wide planning. The Council was never able to effectively fulfill its function and it was de-funded by the Reagan administration in the early 1980s. *See generally* BETSY A. CODY & NICOLE T. CARTER, CONGRESSIONAL RESEARCH SERVICE, 35 YEARS OF WATER POLICY: THE 1973 NATIONAL WATER COMMISSION AND PRESENT CHALLENGES (May, 2009).

22. 42 U.S.C. § 1961 (2000) (repealed 1978); 42 U.S.C. § 1962 (2006).

23. Pub. L. No. 90-515, 82 Stat. 868 (1968).

24. FOSTER & ROGERS, *supra* note 4, at 27; Rogers, *supra* note 13, at 63 (discussing the impetus for the 1968 legislation).

25. THE NATIONAL WATER COMM’N, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES (1973) [hereinafter 1973 NWC REPORT]. While the National Water Commission did its work, both President Nixon and Congress were busy on water matters as well. In 1969, Nixon appointed a Task Force on Resources and the Environment, which resulted in passage of the National Environmental

sive and thorough recommendations. The report was further supported by 62 separate research studies, which examined everything from the judicial role in water management to weather modification. This 1973 NWC Report reflected “a major departure” from earlier commission recommendations.²⁶ It emphasized that future demand for water is responsive to water policy choices, rather than being simply a straight-line increase that grows along with population and economic growth. The NWC’s report further highlighted the coming shift from water development to water conservation and an increased attention to water quality.

Many of the NWC’s recommendations were reprised more than two decades later within the context of western water issues.²⁷ In 1992, Congress chartered the Western Water Policy Review Advisory Commission as part of that year’s Omnibus Reclamation Act.²⁸ This Commission issued its final report in 1998, entitled *Water in the West: Challenge for the Next Century*²⁹ (*Water in the West*). Like the NWC Report, this report was just the tip of the iceberg, resting on a foundation of 22 supporting research studies.

Notably, *Water in the West* reiterated numerous key recommendations from the NWC Report. Indeed, the later report referred to the NWC Report as a “benchmark,” noting that most of its recommendations remained “as relevant” in 1998 as they were 25 years earlier.³⁰ *Water in the West* discussed the NWC Report’s “pivotal chapter on making better use of existing supplies,” declaring that the chapter “defined the post-reclamation era” and that the 25-year-old list of recommendations “remains the reform agenda today.”³¹

Although more narrowly focused on specific aspects of water management, two other federally mandated water reports were published between 1990 and 2000. In 1994, the Interagency Floodplain Management Review Committee issued a report on the Mississippi River

Policy Act and creation of the Council on Environmental Quality and the Environmental Protection Agency. Congress also passed the Clean Water Restoration Act in 1966 and the Clean Water Act in 1972. See Rogers, *supra* note 13, at 63.

26. Rogers, *supra* note 13, at 63.

27. Western water issues are far more than a regional concern. Given the continued population growth in the West, the significance of western economic engines (agricultural and otherwise) to the entire country, and the amount of U.S. taxpayer money spent on western water development, the West’s water is a national concern.

28. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600 (1998). The author was a member of this commission.

29. *WATER IN THE WEST*, *supra* note 11.

30. *Id.* at 4–23.

31. *Id.* at 4–24.

floods of 1993.³² In 2000, the National Drought Policy Commission also issued a report.³³ Both reports contained significant criticisms of policies that exacerbated, rather than reduced, damages incurred by floods and droughts.

Congress was only partially responsive to the flood reports. In 1994, Congress adopted flood insurance reform legislation that strengthened the requirements for insuring structures within floodplains.³⁴ However, more comprehensive legislation was tabled that same year and has not been revisited.³⁵

In response to urging from the Western Water Policy Review Advisory Commission, among others, Congress adopted the National Drought Policy Act in 1998.³⁶ The 1998 Act noted that the federal government had “no coordinated Federal strategy” and “no single Federal agency in a lead or coordinating role” to respond to drought.³⁷ The legislation further declared that the federal government should shift its drought response away from ad hoc crisis management toward preparedness, mitigation, and risk management.³⁸ The law established a National Drought Policy Commission to prepare *another* report to advise

32. THE INTERAGENCY FLOODPLAIN MGMT. REVIEW COMM., SHARING THE CHALLENGE: FLOODPLAIN MANAGEMENT INTO THE 21ST CENTURY (1994).

33. THE NATIONAL DROUGHT POLICY COMM’N, PREPARING FOR DROUGHT IN THE 21ST CENTURY: REPORT (2000).

34. National Flood Insurance Reform Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160. The Interagency Floodplain Management Review Committee had found that the National Flood Insurance Program created in 1968 was not working effectively. THE INTERAGENCY FLOODPLAIN MGMT. REVIEW COMM., *supra* note 32. Only about 20 to 30 percent of floodplain occupants had flood insurance, due to a lack of participation by communities, a lack of enforcement of insurance requirements by lenders, and the willingness of the federal government to provide disaster assistance after the fact even to uninsured parties. *Id.* at x.

35. Gerald E. Galloway, Jr., *Floodplain Management: A Present & a 21st Century Imperative*, 97 WATER RESOURCES UPDATE 4, 8 (1994). Criticisms of federal flood policy continue to this day. See, e.g., FEMA, *A Chronology of Major Events Affecting The National Flood Insurance Program* (December, 2005) (report prepared by American Institutes for Research), available at www.fema.gov/library/viewRecord.do?id=2601 (last visited July 30, 2010).

36. National Drought Policy Act of 1998, Pub. L. No. 105-199, 112 Stat. 641. See also DROUGHT AND WATER CRISES: SCIENCE, TECHNOLOGY, AND MANAGEMENT ISSUES 161-64 (Donald A. Wilhite ed., 2005) (describing the impetus for the 1998 Act).

37. National Drought Policy Act, Pub. L. No. 105-199, §§ 2(1), 2(5).

38. National Drought Policy Act, Pub. L. No. 105-199, § 2(2)-(3). Indeed, as of 2000, the federal government had funded at least 88 different drought-related programs spread over a number of different agencies. Ray Motha, *Recommendations on Drought Monitoring by the U.S. National Drought Policy Commission*, in Proceedings of an Expert Group Meeting [of the World Meteorological Organization] held September 5-7, 2000, in Lisbon, Portugal 45, 49 (Donald A. Wilhite, M.V.K. Sivakumar & Deborah A. Wood, eds., 2000) available at http://www.drought.unl.edu/monitor/EWS/ch4_Motha.pdf.

Congress and the president on how to improve federal drought policy.³⁹ That report, issued in 2000, recommended adoption of a National Drought Preparedness Act to create a proactive and coordinated federal drought response.⁴⁰ Although this Act has been introduced several times since 2000, it has yet to become law.⁴¹

Each of the above-described reports carried some official imprimatur of the federal government. Many other water policy studies have also been issued by a variety of regional groups and non-governmental organizations during the same time period.⁴² Beginning with the 1808 Gallatin Report and extending through the twentieth century, it seems that whenever water policy commissions recommended water developments, such as canals, dams, irrigation projects, and other infrastructure, the recommendations were usually heeded, though sometimes many years after the fact. In contrast, the recommendations that did not involve concrete and cash—such as proposing to change the terms of development, modify economic incentives, and alter the institutions of governance—have not fared as well, even though such recommendations have been piling up for nearly as long, since the 1908 Inland Waterways Report.⁴³ The next section takes a deeper look at the proposals that have failed to gain traction despite their regular repetition by water pol-

39. National Drought Policy Act, Pub. L. No. 105-199, §§ 3–4.

40. Motha, *supra* note 38. Rogers, *supra* note 13, at 64, identified the droughts and floods of the early 1990s as two events that “have had great impact on how water policy is carried out.”

41. See, e.g., the National Drought Preparedness Acts of 2003 and 2005 (S. 1454 and S. 802, respectively). Piecemeal changes have been made, however. See National Integrated Drought Information System Act of 2006, Pub. L. No. 109-430, 120 Stat. 2918.

42. See, e.g., FOSTER & ROGERS, *supra* note 4; BRUCE DRIVER, *WESTERN WATER: TUNING THE SYSTEM: THE REPORT TO THE WESTERN GOVERNORS’ ASSOCIATION FROM THE WATER EFFICIENCY TASK FORCE* (1986); D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation*, 21 ENVTL. L. 1 (1991) (originally a Western States Water Council report); Long’s Peak Working Group on National Water Policy, *supra* note 4; D. Craig Bell et al., *Retooling Western Water Management: The Park City Principles*, 31 LAND & WATER L. REV. 303 (1996); NAT’L RESEARCH COUNCIL, *NEW STRATEGIES FOR AMERICA’S WATERSHEDS* (1999); NAT’L RESEARCH COUNCIL, *NEW DIRECTIONS IN WATER RESOURCES PLANNING FOR THE U.S. ARMY CORPS OF ENGINEERS* (1999); WESTERN GOVERNORS’ ASSOC., *WATER NEEDS & STRATEGIES FOR A SUSTAINABLE FUTURE* (2006); MACDONNELL & FORT, *supra* note 5; WESTERN STATES WATER COUNCIL, *WATER LAWS & POLICIES FOR A SUSTAINABLE FUTURE: A WESTERN STATES’ PERSPECTIVE* (June 2008). This is not a complete list, but it contains several key reports.

43. In 1988, FOSTER & ROGERS, *supra* note 4, at 14, listed “development, coordination, and regulation” as the “three main thrusts to federal water policy during the past twelve decades. . . .” The development thrust consisted of navigation improvements, flood control projects, irrigation development, and hydroelectric power assistance. See *id.* at 14–31. Regulation and coordination emerged much later and coordination was never embraced as strongly as the other two. See *id.*

icy study groups. Part III analyzes why the suggestions have fallen on deaf ears.

B. Great Minds Think Alike: Three Recurring Policy Themes

Despite slightly different mandates given to the various water commissions discussed in Part II.A above—as well as the variations in the groups' make-up and the considerably different socioeconomic, environmental, and political contexts for each study—the many reports contained surprisingly consistent themes and suggestions. After grouping the many laundry lists of recommendations into broad categories, three recurrent themes emerge:

- Recognizing the nature of water resources,
- Incorporating economics to encourage conservation and improve efficiencies, and
- Reducing duplication and conflict to improve coordination among water agencies.⁴⁴

These three themes can be found in virtually every report at least since the mid-1900s, even though the particular formulations have changed somewhat over time. Although illustrative rather than exhaustive, the following examples demonstrate the connected threads.

1. *Recognizing the Nature of Water Resources*

Even the early reports recognized the importance of squaring water policy with the integrity of hydrologic systems, though they lacked a sophisticated understanding of environmental issues. President Eisenhower's 1955 Presidential Advisory Committee Report declared "general acceptance of the river basin or major drainage area as ordinarily the most appropriate geographical unit for use in planning water resource activities."⁴⁵ Just a few years earlier, the 1949 Hoover Commission had declared that "the coordinated development of whole river basins with their watershed tributaries is peculiarly essential."⁴⁶ Even the 1908 Inland Waterways Commission observed that "the regimen of streams and the purity and clarity of waters are affected by forests and other natural growth, and by farming, mining, and other industrial operations over the watersheds in which they gather"; thus, the Commission

44. Other consistent and important themes can also be gleaned from the many water policy studies, but doing justice to them all is beyond the scope of this article. Instead, this article focuses on three persistent criticisms of existing policy.

45. WATER RESOURCES POLICY, *supra* note 18, at 16.

46. 1949 HOOVER COMM'N, *supra* note 12, at 288. The Commission recommended the creation of Drainage Area Advisory Commissions to provide a coordinating function in major river basins. *Id.* at 289.

stressed the need to coordinate those land-use activities with the use of the streams.⁴⁷

The importance of recognizing the natural characteristics of water and watersheds was a central theme of the NWC's 1973 Report—not surprising, given the explosion of environmental awareness in the 1960s. After a lengthy discussion of the environmental impacts of past water developments on ecological processes and aquatic species, the NWC Report recommended that future water planning include greater consideration of environmental issues.⁴⁸ Instead of assessing water projects using only economic cost-benefit criteria, the NWC Report stressed the need to consider projects' environmental impacts broadly—including the assessment of changes to hydrologic flow regimes throughout entire river basins, taking into account estuaries, wetlands, species, and aesthetics.⁴⁹ The NWC Report further emphasized the importance of an integrated view of water quantity and quality, surface water and groundwater, as well as land use and water use.⁵⁰

Since the NWC's work, the calls for conforming water policy, use, and management to the scientific realities of the water resource itself have only become more sophisticated and persistent. For example, *Water in the West* emphasized the necessity of organizing water management around hydrologic systems, integrating land and water management, integrating water quality and quantity, and basing water policy on sound science.⁵¹ Similarly, the need to better inform water policy with the inherent nature of water resources was a key component of the drought and flood reports as well.⁵² This theme becomes even more important when considering the impending impacts of climate change.

2. *Incorporating Economics to Encourage Conservation and Efficiency*

The theme of rationalizing water policy to conform to basic economic principles also resonates throughout the volumes of water policy studies. The 1973 NWC Report addressed the issue in some detail, noting

47. INLAND WATERWAYS COMM'N, *supra* note 8, at 21.

48. 1973 NWC REPORT, *supra* note 25, at 19–37.

49. *Id.*

50. *Id.* at 63–108 (quantity/quality), 230–47 (groundwater/surface water), and 351–59 (land use/water use).

51. See, e.g., WATER IN THE WEST, *supra* note 11, at 6-4 to 6-7, 6-11 to 6-21.

52. See, e.g., THE INTERAGENCY FLOODPLAIN MGMT. REVIEW COMM., *supra* note 32, at 43–47, 93–95 (discussing the need to prepare for—rather than try to prevent—future flooding by restoring natural floodplains, among other steps); THE NATIONAL DROUGHT POLICY COMM'N, *supra* note 33, at 2, 18–22 (discussing the need to shift drought response from ad hoc crisis management to prediction, preparedness, mitigation, and risk management).

the widespread lack of effective pricing for water development, delivery and use, and the potential for better metering and pricing to curb wasteful water uses.⁵³ However, the NWC was not the first water policy commission to call attention to the need for incorporating more effective economic signals into water policy, nor was it the last.

The 1949 Hoover Commission's concern about inadequate and conflicting economic evaluation of proposed projects by the federal water development agencies was one reason for its recommendation of an independent Board of Impartial Analysis for Engineering and Architectural Projects to provide "thorough, factual, unbiased" information to Congress so that "only economically feasible projects" would be built.⁵⁴ The potential for using economic incentives and other economic principles, such as "beneficiary pays," to improve water allocation and use had been raised in previous studies as well.⁵⁵ In 1973, the NWC again called for an independent board of review as a check on the federal water development agencies, finding that the agencies "tend to color their calculations with self-interest" and that the president and Congress were still being forced to make decisions on "inaccurate, misleading, and inadequate" information.⁵⁶

The 1973 NWC Report was not the last to recommend further economic rationalization of water policy; this theme has been central to more recent recommendations as well. Unofficial and official observers have drawn the same roadmap in this regard. Independent reports, such as those from the Western Governors' Association and other groups, have continued to elucidate the gap between existing policies and common sense economic principles.⁵⁷ The Interagency Floodplain Manage-

53. 1973 NWC REPORT, *supra* note 25, at 247–60.

54. 1949 HOOVER COMM'N, *supra* note 12, at 265–66. The Commission's view of what constituted an economically feasible project did not seem particularly exacting, however. The report noted that Congress had originally required farmers to pay back the costs of reclamation projects, but the farmers were not able to do so, and the projects did not pay off, but the report went on to say, "[i]t is simply accepted that the national advantage of more farm homes and more national productivity are advantages which will offset Government losses." *Id.* at 278.

55. See, e.g., SENATE SELECT COMM. ON NAT'L WATER RESOURCES, REPORT, SEN. REP. NO. 29, at 59, 87th Cong. (1961); WATER RESOURCES POLICY, *supra* note 18, at 29–35.

56. 1973 NWC REPORT, *supra* note 25, at 406–09 (quoted phrases at 407).

57. See, e.g., DRIVER, *supra* note 42, at 27–28, 31–32, 49–51; WESTERN GOVERNORS' ASSOC., *supra* note 42. This 2006 report of the Western Governors' Association raised the issues of conservation, efficiency, and markets again, in language that suggested little change in the 20 years since Driver's *Tuning the System*. "The WSWC [Western States Water Council] should explore the relative merits and obstacles related to various programs and technologies and legal and institutional means to augment existing water supplies, including water conservation and water use efficiency, demand management (including pricing structures), water and water rights transfers, [and] water banking. . . ." WESTERN GOVER-

ment Review Committee, the Western Water Policy Review Advisory Commission, and the National Drought Policy Commission all discussed the current system's perverse economic incentives at some length.⁵⁸

3. Reducing Duplication and Conflict to Improve Coordination

Water policy commissions have been honking the horn for decades about costly, counterproductive conflict and duplication among water agencies and programs. Calls for improving coordination have resounded from the 1908 Inland Waterways Commission Report to the most recent studies. The 1908 Report recommended "a National Waterways Commission to bring into coordination the Corps of Engineers of the Army, the Bureau of Soils, the Forest Service, the Bureau of Corporations, [and] the Reclamation Service," as well as others.⁵⁹

The 1949 Hoover Commission Report described the "[l]ong-continued friction" between the Bureau of Reclamation and the Department of Agriculture over the planning and operation of irrigation projects, noting that, in some cases, irrigation proposals went to Congress before the Department of Agriculture even knew about them.⁶⁰ The same report lamented the "disastrously wasteful conflict" and rivalry between federal agencies—particularly the Corps of Engineers and the Bureau of Reclamation—stating that it resulted in "a perpetual drag on efficiency," "competition for favor and undue influence," "perpetuation of special-purpose policies," "inequities among beneficiaries[,] and a drain on the Federal Treasury."⁶¹ The Hoover Commission recommended that the Corps' water development programs be consolidated with the Bureau of

NORS' ASSOC., *supra* note 42, at 11 (emphasis added). In fact the report notes, apparently without irony, that this very charge was given to the WSWC "in 1965, when water problems that are now growing acute were first addressed." *Id.*

58. THE NATIONAL DROUGHT POLICY COMM'N, *supra* note 33, at 16–26, 39; WATER IN THE WEST, *supra* note 11, at 3–2 to 3–21; THE INTERAGENCY FLOODPLAIN MGMT. REVIEW COMM., *supra* note 32, chs. 8–9.

59. INLAND WATERWAYS COMM'N, *supra* note 8, at 26–27.

60. 1949 HOOVER COMM'N, *supra* note 12, at 249.

61. *Id.* at 281–84. Even on the rare occasions when the two agencies cooperated, it did not guarantee that the public was well-served. After describing how agencies competed for taxpayer money by duplicating surveys and then rushing to Congress with conflicting, "premature and unsound" proposals, the Commission discussed the Corps' and the Bureau's compromise proposal for developing the Missouri River Basin. *Id.* at 281, 283. The "compromise" basically amounted to burying the hatchet and agreeing to suspend the "devastating criticism" by each agency of the other's components of the plan. *Id.* at 283. The Commission wondered "whether agreement between the two agencies is not more costly to the public than disagreement. . . ." *Id.*

Reclamation in the Department of the Interior in order to eliminate the effects of this counterproductive rivalry.⁶²

In 1973, many of the same calls for coordination were repeated by the NWC. Noting that even after the establishment of a federal-level interagency Water Resources Council in 1965, effective coordination was still elusive and the NWC recommended a number of changes.⁶³ Despite changes implemented in federal research programs by the Water Resources Research Act of 1964, the NWC Report further recommended consolidating several programs within the Department of the Interior to eliminate persistent duplication in data collection, engineering services, and research.⁶⁴

Elimination of duplication and conflict also figured heavily into the recommendations of the Western Water Policy Review Advisory Commission, the National Drought Commission, and the Galloway Commission.

III. LEAVING THE WATER POLICY STUDIES AT THE SIDE OF THE ROAD

The definition of insanity is often expressed as “doing the same thing over and over again and expecting different results.”⁶⁵ Two centuries of major water policy studies leads one to question the sanity of water policy reform efforts, since the policy reports have repeatedly contained the same recommendations but produced only minimal changes. Why should H.R. 135 be any different with its suggestion of another blue ribbon commission to perform yet another comprehensive water study?

Representative Linder, who sponsored H.R. 135, is not a Johnny-come-lately to the water scene, so his proposal cannot be explained on that basis. In fact, H.R. 135 is Linder’s fifth attempt on this issue—he introduced virtually the same bill in the 107th, 108th, 109th, and 110th Congresses.⁶⁶ Linder’s home state of Georgia has had its share of water problems in recent years, including severe droughts, impending munici-

62. *Id.* at 287. The Commission also recommended bringing the Bonneville Power Administration and the Southwestern Power Administration into Interior. *Id.* at 271.

63. 1973 NWC REPORT, *supra* note 25, at 398–406. The Commission faulted lack of authority, lack of funding, and lack of an independent link to the White House for hampering the Council’s effectiveness. *Id.*

64. *Id.* at 409–13.

65. A search for the origin of this quotation turned up a number of conflicting attributions, including seventeenth-century writer John Dryden, as well as Benjamin Franklin and Albert Einstein.

66. H.R. Res. 3561, 107th Cong. (2001); H.R. Res. 135, 108th Cong. (2003); H.R. Res. 135, 109th Cong. (2005) H.R. Res. 135, 110th Cong. (2007). The bill has even passed the House in two previous sessions. Press Release, Office of Congressman John Linder, House Transpor-

pal water shortages, failed privatization of Atlanta's water supply, and interstate water disputes with Florida, Alabama, and Tennessee. Apparently, Linder's concern about water stretches back decades. When he introduced the 2007 version of his bill he said:

I wrote an article in 1978 that predicted that one of the two major challenges for our country in the next century would be providing enough fresh water for our booming population. Now, in 2007, we have a population that exceeds 300 million people, yet we still have no comprehensive water strategy. We cannot wait for a water crisis to hit. We must begin now to plan for future water shortages, before Americans turn their taps and find that no water comes out.⁶⁷

It is unclear whether Representative Linder was familiar with the 1973 NWC Report when he wrote his article in 1978. However, by the time he introduced his legislation a quarter-century later, he must have familiarized himself with previous attempts to reform water policy—particularly the NWC Report—since his 2009 bill closely tracks the 1968 Water Commission Act. Indeed, the charter of H.R. 135 is virtually the same as that of the 1968 Act.⁶⁸ It does not take a crystal ball to predict that, with the same mandate and scope, many of the recommendations will likely be the same as those that have gone before. Unfortunately, the same response—political inaction—is probably just as predictable. Though insanity may be too strong a word, it certainly is not good policy for Congress to spend \$9 million over the next three years to essentially hear the same things other Congresses have heard before; particularly if there is no reason to expect a different executive and legislative response.⁶⁹

tation and Infrastructure Subcommittee Approves Linder Water Bill, (May 8, 2008), *available at* <http://linder.house.gov> (last visited July 30, 2010).

67. Press Release, Office of Congressman John Linder, Representative Linder Re-introduces "21st Century Water Commission Act of 2007" (Jan. 4, 2007), *available at* <http://linder.house.gov> (last visited July 30, 2010).

68. In May of 2009, the Congressional Research Service prepared a report about the NWC's findings specifically to inform the debate on H.R. 135. CONGRESSIONAL RESEARCH SERVICE, 35 YEARS OF WATER POLICY: THE 1973 NATIONAL WATER COMMISSION AND PRESENT CHALLENGES (2009), *available at* <http://www.policyarchive.org/handle/10207/18517> (last visited July 30, 2010).

69. In 2000, water resources scholar Peter Rogers wrote that "we have the advice from all of the Presidential Commissions and the experience gained over the first 50 years. It seems that there is little need to spend more time and effort on new commissions. . . . What remains is the 'political will' to pursue the blueprints already in hand." Rogers, *supra* note 13, at 65.

Some observers might say that the reason the executive and legislative branches have failed to respond is that the recommendations are flawed. However, the sheer consistency of the suggestions—arrived at with a great deal of study and examination by a variety of reasonably qualified people—belies that explanation. So why have these ideas not been adopted? At the risk of oversimplifying the answer to that question, three explanations come to mind. First, many powerful interest groups have a vested stake in maintaining the status quo. By contrast, groups who seek change as part of their agenda have much less economic or political power. Second, many of the recommendations to change water policy threaten the concept of “home” for many people, assuring passionate emotional, political, and economic resistance. Lastly, implementation has been stymied by short memories and preferences for quick fixes over hard work. The following sections explore each of these explanations in turn.

A. Interest Groups Throwing up Roadblocks to Change

Many powerful interests who are invested in maintaining the status quo have blocked codification of half a century of good ideas presented by water commissions. When discussing powerful interest groups, private entities usually jump to mind first. But, in fact, those with a vested interest in resisting change can be found in both the public and private sectors. Public agencies can be powerful economic lobbies against change and, indeed, much of the blame for blocking water policy reform can be laid at the feet of governmental agencies.⁷⁰

Dozens of federal agencies implement dozens of water programs, which are housed in several cabinet departments and the Office of the President—employing as many as 90,000 people at the federal level.⁷¹ Each federal agency has its own constituencies in the private sector and constituencies at the state and local levels, where a combined 300,000 more people work on water issues.⁷² Furthermore, each agency has its champions and power brokers in Congress, where water-related business is fragmented among more than 30 committees (each with multiple

70. See, e.g., Stuart L. Somach, *Closing the Policy-Practice Gap in Water Resources Planning*, 90 WATER RESOURCES UPDATE 19, 19 (1993), available at http://www.ucowr.siu.edu/updates/pdf/V90_A5.pdf (noting that the Bureau of Reclamation “was viewed by some as being part of the water resource problem rather than part of the solution” because of its resistance to change).

71. Peter Rogers, *Why Are Widely Accepted Principles of Water Management So Often Not Followed in Practice?* 90 WATER RESOURCES UPDATE 16, 17 (1993), available at http://www.ucowr.siu.edu/updates/pdf/V90_A4.pdf.

72. See *id.*

subcommittees), more than 75 appropriations accounts, and thousands of legislative staff.⁷³ None of these players want to give up turf or power and, as Peter Rogers observed, “[a]ll these fingers in the pie have led to chaos and the potential for rent-seeking behavior on the part of the actors in the system.”⁷⁴

The rent-seeking behavior occurs both inside and outside the government. For instance, agriculture has been described as the “darling” of existing water policy.⁷⁵ Agricultural water users—accounting for about 80 percent of western water use—often pay only a few dollars an acre foot for their irrigation water, while other users pay many times more.⁷⁶ Agricultural users benefit from the coalescence of “laws, institutions, agencies, politicians, and special interests . . . into a perpetual motion machine [] designed and operating to ensure that water for agriculture is both abundant and cheap.”⁷⁷ Irrigators can hardly be expected to give up this favored position voluntarily. In fact, just the opposite is true—this group will fight hard to keep their dedicated water supplies, generous subsidies, below-market water prices, and regulatory exemptions. No matter how many water commissions recommend infusing water policy with rational economic principles that promote more efficient water use and allow water to move to other users, the agricultural interests will be lined up in opposition.

Nor can states be counted on to champion the suggestions that rationalize the economics of water policy. For many decades, states benefited from federal subsidization of water development, particularly in the West. As David Getches noted: “The momentum of pork barrel politics propelled the traditional role of the federal government as financier, eclipsing the logical force of the National Water Commission’s recommendations.”⁷⁸ The thrust of the NWC recommendations—as well as those of other recent policy commissions—has been to curtail the federal government’s water development and financing role, but that advice is not necessarily preferred by the states. Indeed, powerful state represent-

73. *See id.*

74. *Id.* Political lobbying is a form of “rent-seeking behavior,” whereby interest groups pressure for public policies that will bring them economic benefits. *See* Gordon Tullock, *Rent Seeking*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* (2d ed. 2008).

75. Chelsea Congdon, *Bridging the Gap Between Principle and Practice in Agricultural Water Management*, 90 *WATER RESOURCES UPDATE* 26, 26 (1993), available at http://www.ucowr.siu.edu/updates/pdf/V90_A7.pdf. Agriculture’s favored status straddles both water quantity and water quality laws.

76. *Id.* (using California as an example).

77. *Id.* at 27.

78. David H. Getches, *Water Reform: Ideas Whose Time Has Come*, 90 *WATER RESOURCES UPDATE* 36, 41 (1993), available at http://www.ucowr.siu.edu/updates/pdf/V90_A9.pdf.

atives in Congress successfully killed President Jimmy Carter's 1977 "hit list" that identified environmentally and economically unsound federal water projects.⁷⁹

Furthermore, even though state officials love to complain about duplication, conflict, and lack of coordination among federal water agencies, it does not necessarily mean that states are supportive of the recommended fixes for these problems. Generally, states do not support consolidation of federal programs—they prefer to weaken federal power rather than strengthen it.⁸⁰ By the same token, states have been skeptical of attempts to create regional basin entities, viewing such bodies as just another layer of bureaucracy.

B. Passionate Political Resistance

In addition to the panoply of vested interests opposing water policy reform for economic and agency turf reasons, changing the way water is used in this country also threatens many people in a direct, personal way that is guaranteed to rouse passionate political resistance. Farmers and ranchers who have benefited from federal water development projects and irrigation subsidies feel that many of the proposed changes threaten their very concepts of home and self. They feel that those pressing for change are attacking their way of life—a feeling sure to galvanize emotional opposition.

All of the recent water studies have criticized the uncoordinated and often inconsistent federal policies pertaining to agricultural water use, including subsidies for irrigation water supplies, surplus crop payments or other price supports, and exemptions from many pollution laws because these policies have resulted in wasteful water use, skewed price signals for commodity production, and serious non-point source pollution. Instead of countering these studies on the merits, such criticisms are regularly lambasted as being "anti-agriculture." For example, two U.S. senators who filed a dissenting view to the Western Water Policy Review Advisory Commission's report said:

79. *Id.* The hit list was supported by yet another water policy study, the President's Water Resources Policy Study Task Force. See FOSTER & ROGERS, *supra* note 4, at 30. Many of President Carter's proposals for better cost-benefit analysis, increased cost-sharing, pricing reforms, and environmental review of federal projects were eventually implemented by President Reagan. *Id.* at 34. The Water Resources Development Act of 1986 curtailed the federal share of funding for water projects and steeply increased the cost-share requirements for state and local governments. *Id.* However, the Reagan administration sweetened the pot by including in the Act "literally something for everyone," including authorization for \$16.5 billion in federal funding for over 270 water projects. *Id.*

80. See, e.g., WATER IN THE WEST, *supra* note 11, at app. B (dissenting views criticizing the level of federal involvement in western water issues).

The Commission's anti-agriculture tone is nowhere more evident than in its recommendation to extend federal controls under the Clean Water Act to non-point sources and its cavalier disregard of the Wallop amendment that separates quality considerations from quantity and reaffirms State jurisdiction and primacy in the allocation and use of water resources. The Commission's comments on project transfers, water pricing, water marketing, operation of dams, and other areas all are similarly ill-considered.⁸¹

Another submission from members of Congress called the same report "decidedly biased against irrigated agriculture and commodity production," further stating:

Although additional storage is referenced briefly in the report, the assumption that permeates the report is that water will be taken from agriculture to meet the needs of growing cities, the environment, and tribes. . . . Only in a society as affluent as ours would the value of food and commodity production be as easily discounted as it is in this report.⁸²

A citizen member of the same commission filed a dissent expressing similar views:

The victims in this new process are the rural and productive sectors. . . . In the end, I voted against the majority report because of its insistent tone on accepting what is cavalierly described as the inevitable transition of water use from agriculture to other uses. . . . Current policy is putting family operations out of business. . . . As agriculture shrinks, our vulnerability grows.⁸³

81. Letter from Senators Frank H. Murkowski and Jon Kyl, ex officio Commission members, to Denise Fort, chair, Western Water Policy Review Advisory Commission (April 2, 1998) in *WATER IN THE WEST*, *supra* note 11, at app. B. As the chairmen of the Senate committees on Energy and Natural Resources and the Subcommittee on Water and Power, respectively, these two senators (as well as other specified congressional committee chairs and co-chairs) were made ex officio members of the Commission by its establishing legislation, and they were represented on the Commission by members of their staff. Although the legislation made the congressional representatives non-voting members, in negotiating the charter for the Commission's operation with the appointed chair, these members bargained for voting status.

82. Letter from Senator Ted Stevens and Congressman Don Young, ex officio Commission members, to Denise Fort, chair, Western Water Policy Review Advisory Commission (April 3, 1998) in *WATER IN THE WEST*, *supra* note 11, at app. B.

83. Letter from Patrick O'Toole, Citizen Appointee Commission Member, to Denise Fort, chair, Western Water Policy Review Advisory Commission (April 13, 1998) in *WATER IN THE WEST*, *supra* note 11, at app. B.

Water in the West did not discount the value of food and commodity production, nor did it promote shrinking agriculture. The report only observed what previous water policy commissions had also concluded: Past agricultural water policies have promoted excessive and unsustainable use of water for irrigation on arid lands and allowed substantial unregulated pollution and destruction of natural environments.⁸⁴ In other words, criticisms offered by many water studies have focused on particular agricultural practices in specific locations and on particular economic irrationalities, not on agriculture per se.

What really seems to be going on here is a defense of “my farm” or “my ranch” rather than a defense of agriculture. Even those who level the “anti-agriculture” charge distinguish between “big” and “small” agricultural operations—the latter receiving the most passionate defense. For instance, one of the Commission members quoted above lamented that “[c]urrent policy is putting family operations out of business and *pushing us toward ‘factory farming.’*” This trend has already swept through the dairy and hog industries.⁸⁵

Since independent farmers and ranchers perceive the suggestions that some agricultural water use practices need to change as threats to their concepts of home and self—the very fabric of their lives—it certainly is not surprising that they fight so hard to maintain the status quo.

84. See, e.g., *WATER IN THE WEST*, *supra* note 11, at 2-30 to 2-33 (describing the water quality impacts of irrigated agriculture’s practices and the exemptions of these activities from pollution laws), 3-6 to 3-8, 3-12 to 3-20 (describing unsustainable uses of groundwater and surface water, subsidies to agricultural water users and the need for more rational water pricing). Furthermore, this support for western agriculture has come at the expense of midwestern and eastern agriculture, which have not had access to all of the same subsidies because of the absence of Bureau of Reclamation projects. See generally, Taxpayers for Common Sense, *Celebrating a Century of Subsidies* (June 13, 2002), available at http://www.taxpayer.net/search_by_category.php?action=view&proj_id=482&category=Water%20Resources&type=Project (last visited July 30, 2010) (describing western agricultural subsidies from Bureau of Reclamation projects); RENEE SHARP & SIMONA CARINI, ENVIRONMENTAL WORKING GROUP, *SOAKING UNCLE SAM: WHY WESTLANDS WATER DISTRICT’S NEW CONTRACT IS ALL WET* (Bill Walker, ed., Sept. 2005), <http://www.ewg.org/reports/westlands> (last visited July 30, 2010) (noting that the district “contains some of the largest and most subsidy-rich agribusinesses in California and the nation”).

85. O’Toole, *supra* note 83 (emphasis added). However, this distinction seems to be abandoned when describing the economic contribution of agriculture; for that purpose, the net is cast widely. See *WESTERN IRRIGATION ECONOMIC BENEFITS REVIEW: IRRIGATED AGRICULTURE’S ROLE FOR THE 21ST CENTURY: A POLICY WHITE PAPER FOR DECISION MAKERS: PREVIEW HIGHLIGHTS AND SUMMARY SPONSORED BY THE FAMILY FARM ALLIANCE* in O’Toole, *supra* note 83, at O’Toole app. A-1 (attached to O’Toole letter). See generally THOMAS MICHAEL POWER, *LOST LANDSCAPES AND FAILED ECONOMIES: THE SEARCH FOR A VALUE OF PLACE* (1996) (discussing questionable economic calculations that often overvalue the contributions of western agriculture to regional economies).

Thus, vested economic and bureaucratic interests, a fragmented governmental power structure, and people fighting to maintain their livelihood are all part of a potent coalition lined up against water policy reform. So who supports water policy reform? Although there are lots of groups and individuals who follow certain issues and support particular changes, it does not seem that there are any interest groups with comprehensive change as their agenda—at least none with the equivalent power and passion as those opposing water policy reform.

The majority of the water policy commission members over the years presumably supported the recommendations contained in their commissions' reports. But once the work of the group was completed, those members returned to their "day jobs" in academia, industry, government, and the like. Although some of those day jobs might be in water-related fields, the former commissioners cannot be expected to carry the group's agenda forward after their service has ended. In fact, many of their employers have already staked out clear positions on the issues, often at odds with the positions arrived at by the water commission's report. The results are policy reform proposals that lack champions who can carry the recommendations contained in the reports to the implementation stage.

Many nongovernmental organizations—such as the Environmental Defense Fund, The Nature Conservancy, the Natural Resources Defense Council, American Rivers, Trout Unlimited, and Western Progress, to name a few—have taken a particular interest in both national and regional water policy. However, these groups tend to be involved on an issue-by-issue basis. "Reforming water policy" is not any major group's exclusive, core mission. Furthermore, all of these entities are privately funded, relying on members and private foundations for support. Thus, to some degree, their agendas are driven by those who fund them. Unfortunately, water policy reform in and of itself is not a charismatic issue that attracts the same level of interest as other environmental causes.

C. Short Memories and Quick Fixes

In the absence of interest groups to keep comprehensive water policy reform front and center, it is easy for policymakers to overlook and forget the work that has already been done, as well as the recommendations that have been made. Meanwhile, those opposing reform do their part to keep proposals out of the limelight and hasten the amnesia. For example, when the Western Water Policy Review Advisory Commission issued its final report, the very act of publication came under attack. Two congressional critics of the Commission's recommendations said:

Let us reiterate our position that the report itself should not be issued. The 1992 Act establishing the Commission clearly states that it is the President who is to report to the Congress. . . . In preparing the report, the President is directed to consult with the Commission. Nowhere in the statute does it direct the Commission to publish an independent report, particularly not one this sweeping in its scope and recommendations.⁸⁶

Two other senators declared that the Commission's report was "doomed to gather dust," and further stated that one commissioner's alternative minority report "deserves consideration and presents a far better view of the West and the information submitted to the Commission."⁸⁷ Nonetheless, the senators said, "We will not sign the Alternative because the Commission was not authorized to issue a report."⁸⁸ Instead of directly challenging—and, thereby, acknowledging—a report they did not agree with, these senators preferred to squelch the discussion completely.

One might wonder why Congress would bother to charter an extensive investigation and analysis without asking for a final public report summarizing the results. In fact, these senators' interpretation of the 1992 Act is puzzling since the statute says that the Commission is to "assist in the preparation" of the report.⁸⁹ In any event, since most of the recommendations in the various water policy reports would require federal legislation before implementation, a cold shoulder from powerful members of Congress assures that the proposals will not see the light of day. Thus, the thousands of pages of ideas for water policy—good, bad, or otherwise—have ended up by the side of the road, abandoned and forgotten. Forgotten, that is, until a future water crisis prompts another burst of congressional interest and the creation of another commission to straighten out the policy mess.

It seems that each new proponent of a water policy study thinks that this time, a commission will come up with the "right" answers—proposals that will be embraced by all and solve all of our water problems quickly and easily. But there is no quick fix and no silver bullet for water policy. Until someone is willing to step forward and take on

86. Stevens & Young, *supra* note 82.

87. Murkowski & Kyl, *supra* note 81.

88. *Id.*

89. Pub. L. No. 102-575, § 3004, 106 Stat. 4600, 43 U.S.C. § 371 (2006). The legislation had originally been adopted when control of congressional committees was in the hands of Democrats, some of whom have supported water policy reform proposals. By the time of the final report, however, the same committees were controlled by Republicans, most of whom were overtly hostile to the Commission's work.

the very difficult task of implementing controversial changes, the commission reports will continue to pile up.

Problems in water law generally do not stem from lack of thought or attention; rather, they stem from a lack of action. To accomplish meaningful water policy reform, we do not need to reinvent the wheel—we just need to get it rolling. But how can we make that happen? What can be done differently to overcome the resistance that has been so successful for decades in preventing change in the face of persistent, consistent calls for reform? The next section offers some suggestions.

IV. WHAT TO DO? GETTING WATER POLICY REFORM BACK ON TRACK

In order to break through the entrenched water politics of the past, anyone interested in achieving concrete change will need to form new coalitions, connect the water policy reform agenda to the crucial issues of the day—including climate change, the economy, public health, and homeland security—and get on the radar screens of federal, state, and local lawmakers, while continuing to educate the public and policymakers.

A. Form New Coalitions

Realignment of traditional alliances in the water arena could go a long way toward organizing and presenting the issues in new ways. For instance, in the West, small farmers, ranchers, and rural communities often perceive municipalities, conservationists, and Indian tribes as their enemies on water issues and vice versa. If the assumption is that *any* change in water policy will make some of these groups winners and others losers, then perhaps that attitude makes sense. However, that assumption is polarizing and prevents looking for solutions that are, if not completely win-win, somewhat closer to that end of the spectrum. Assuming the above-mentioned interest groups want their sectors to survive and thrive into the future, they would be much better served by dedicating their time and resources to explore ways to move into the next era of water use and management instead of fighting each other at every turn.

In fact, there are some success stories—situations in which interest groups who have traditionally been at odds have come together to work on water problems. In the most successful examples, cooperation has revolved around a particular geographic location. At times, farmers, fishermen, environmentalists, and tribes have been able to put aside their differences and work together within a shared watershed because they

realize that cooperating to share the water is the best way for any of them to achieve their individual goals.⁹⁰

Addressing the larger, national challenge of designing federal water policy for the future will require more of these new coalitions. Municipalities and conservationists need to work *with* the Extension Service and agricultural interests to help the latter become more efficient and decrease the negative impact of their water use. These groups should also acknowledge their common interests in limiting urban sprawl, protecting open space, and preserving healthy, functioning watersheds. Once common interests have been identified, the groups need to cooperate in pursuing their shared goals, which may involve working on growth control, mitigation banking, or conservation easements, as well as water policy.

Rural communities, farmers, and ranchers often complain that urbanites do not appreciate agriculture's contributions to society and the economy. It is a point of pride for American agriculturalists to provide "an affordable and reliable supply of food and fiber for the nation and the world."⁹¹ However, sometimes this badge of honor is wielded as a shield—*any* criticism of the agricultural industry is angrily deflected as an attack on the "food supply."⁹² Farmers, ranchers, and their rural communities would be better served in the long run if they dropped this defensive posture and worked proactively to make their industry even better—more efficient, more environmentally friendly, more economically sound, and more integrated with the cities in their regions. Agricultural users need to accept that their activities concerning water use will be scrutinized. They also need to recognize that some behaviors that were accepted—and even encouraged—in the past are no longer acceptable. They should also seek allies to help finance these necessary changes, for example, by reaching out to urban food consumers, food processors, recreationalists, and sport fishermen.

By the same token, conservationists need to reach out to farmers and ranchers. Conservationists should search for common ground with fiscal conservatives and property rights groups. Both sides need to drop their holier-than-thou attitude, such as a rancher who brags about her multigenerational pedigree on the land and scorns city dwellers who cannot claim the same, or an urban environmentalist who blames rural

90. See, e.g., *WATER IN THE WEST*, *supra* note 11, at 3-5, 3-7, 3-42, 5-24 (describing a number of collaborative efforts to solve water management problems).

91. A BLUEPRINT FOR EFFECTIVE WATER POLICY IN THE WEST: AN ALTERNATIVE TO THE FINAL REPORT OF THE WESTERN WATER POLICY REVIEW ADVISORY COMMISSION *in* O'Toole, *supra* note 83, at O'Toole-8 (attached to O'Toole letter).

92. O'Toole, *supra* note 83 (saying it is the "height of arrogance for a nation to attack its own food supply").

residents for environmental problems without taking responsibility for his own contribution.

New coalitions of unlikely allies alone would reinvigorate the water policy debate to some extent. In addition, realigned interest groups should seek help from nongovernmental organizations and foundations to garner the necessary resources and continuity for pursuing a comprehensive agenda. However, to be effective, these new coalitions will also need to update their water policy reform agenda and connect it to the crucial issues of the day.

B. Connecting the Platform to the Crucial Issues of the Day

Although many of the best ideas for improving and rationalizing water policy have been around for decades, today's water management context is not the same as it was in the 1970s, 1980s, or even in the 1990s. The front-page issues of the moment—and probably for the intermediate future—include climate change, the economy, public health, and homeland security. Proposals to reform water policy need to be linked to these urgent concerns in order to receive proper attention. Water policy plays an integral role in each of these areas, so no spin is required to show the linkages.

Climate change will cause severe disruptions in water regimes across the country. Thus, it is more critical than ever that water management become more streamlined, better coordinated, more flexible, and more cognizant of natural hydrological characteristics. Furthermore, as we seek to reduce carbon emissions, it is important to remember the close relationship between energy use and water use—everything we do in one arena will affect the other.

The dire economic indicators of the past few years make it crucial to be brutally honest about the economic costs and benefits associated with all types of water use. We must ensure that pricing signals, price supports, government investments, and subsidies are not relics from earlier times and outmoded goals, but are designed with today's social and economic needs and objectives in mind.

An ample supply of clean water is a critical underpinning to public health. We are currently faced with aging water supply systems and sanitation infrastructure, while simultaneously coping with new pollutants, new diseases, and new understandings of epidemiology and toxicology. We are also facing serious food safety issues for the first time in many years, highlighting the need for farm-to-table quality control. All of these public health issues involve water.

Even the issue of homeland security has water components. We must protect water supply facilities, dams, and other critical installations from terrorism or sabotage. We want to maintain as much food security

as possible. Both food exports and international water diplomacy need to be key planks in our new foreign affairs platform. The urgency of these challenges can be met—at least in part—with water policy reform, because water issues are inextricably intertwined with each of these broader contemporary issues of paramount importance.

C. Get on Lawmakers' Radar Screens and Educate the Public and Policymakers

New coalitions with a broad agenda that is linked to today's hot issues ought to be able to get attention from lawmakers. The hot-button issues serve as the ticket to ride, and lawmakers usually prefer coalitions over one-sided advocacy. Cultivating legislative attention is critical to moving an agenda forward. Such cultivation requires a sustained two-pronged effort.

One prong of this effort consists of laying the groundwork for necessary legislation. Parties pursuing water policy reform need to compile the work of previous water policy commissions in a digestible format—prepared with proposed legislation in mind—in order to help legislators master the issues. This will require synthesizing hundreds of pages of recommendations, explicitly describing the legislative changes necessary to implement the recommendations, and comparing the costs and benefits of making the changes to the costs and benefits of the status quo. In particular, concise briefing books should be assembled for new members of Congress in order to shorten their learning curve and bring them up to speed on water issues as quickly as possible.

The second prong of cultivating legislative attention requires developing legislative leadership on water policy reform issues. Although protecting water resources should be a top priority, senators and congresspersons will be reluctant to champion a cause that is likely to bring opposition from many powerful interests—especially if the opposition includes everyone from the federal water agencies to the farm lobby and states' rights groups. This inevitable opposition reinforces the need for new coalitions as described in the previous section.

Effective water policy leaders must have a deep knowledge of water issues—not just sound bites. They must be willing to immerse themselves in the tedious details of water policy, from federal budgeting to agricultural economics, in order to master the area better than the numerous interest groups and to stand up to hardball water politics. Prospective leaders also need to learn the field well enough to teach others, in order to educate fellow legislators and the public. Committed water leaders need to sign on for the long haul and work from a comprehensive vision of improved water policy, even if it means slogging through detailed piecemeal changes in order to get the job done.

If we are going to take the long view, continuity through the political cycles is essential to successful reform. Therefore, leadership on these issues must also be nurtured outside Congress itself. Leaders outside the political process need a measure of political clout and savvy to boost their credibility and effectiveness with politicians and interest groups. Former governors, senators, representatives, high-level executives, or private officials—even former presidents and vice presidents—could all fit the bill, in the same way that former President Herbert Hoover took a leading role on government reorganization issues in the 1950s or the way former Senator George Mitchell contributed to Middle East peace efforts. People playing these leadership roles on water policy reform must be willing to go beyond study commissions and take the reform message “on the road.”

The congressional water policy warrior, whoever it may be, will have a rough road to travel, even with tremendous background knowledge and support from realigned interest groups and outside leaders. Nonetheless, history provides some role models, like the late Senator Paul Simon from Illinois,⁹³ or—on a different issue—the late Senator Mike Synar from Oklahoma.⁹⁴ These individuals schooled themselves in difficult natural resource issues and challenged long-standing federal policies and counterproductive subsidies, in spite of vigorous opposition from powerful vested interest groups.

Finally, legislative leadership, well-informed legislative rank and file, and committed nonpolitical leaders need to educate the public, as well as state and local policymakers, about water issues. Water education has been needed for many decades but has lacked champions to organize its delivery and seek the necessary funding.⁹⁵

93. Much of Senator Paul Simon's contribution to water policy development actually came after he left the Senate, when he published *TAPPED OUT* (1998), a book on global water issues. Since then, others have pursued water issues in his name and as his legacy. Representative Earl Blumenauer from Oregon introduced the Senator Paul Simon Water for the Poor Act of 2005, Pub. L. No. 109-121, 119 Stat. 2533 (codified at 22 U.S.C. § 2152h (2006)), which was passed by Congress and signed by President George W. Bush. Simon's fellow senator from Illinois, Senator Dick Durbin, recently introduced the Senator Paul Simon Water for the World Act of 2009, S. 624, 111th Cong. (2009).

94. Before his untimely death from brain cancer, Congressman Mike Synar, who was from an Oklahoma ranching family, took on the issue of subsidies provided to western ranchers who grazed cattle on public lands.

95. See, e.g., Warren Viessman, Jr., *The Water Management Challenge*, 90 *WATER RESOURCES UPDATE* 13, 14 (1993), available at http://www.ucowr.siu.edu/updates/pdf/V90_A3.pdf; FOSTER & ROGERS, *supra* note 4, at 106–07.

V. CONCLUSION

Over the past 200 years, water commissions have regularly examined the shortcomings of existing water policy. For at least the past 100 years, water commissions have consistently recommended reforming water policy. The following three themes have repeatedly emerged in these calls for reform: (1) conforming water policy to hydrologic realities; (2) straightening out counterproductive economic incentives; and (3) streamlining water-management institutions. Despite regular repetition of these recommendations, powerful vested interests and passionate political resistance continue to block significant change. Overcoming this resistance requires new coalitions that can demonstrate how water policy is relevant to current front-page issues and coalitions that can cultivate the political will and leadership necessary to change the historical course of water policy reform in our country.

Those interested in water policy reform have been on a long, tiring journey and have yet to arrive at a destination. But this failure cannot be attributed to a lack of direction—since the way has been plotted out in detail time and time again. Rather, the problem seems to be that everybody is fighting over where they want to go and who gets to drive, while nobody is following the map. A few motivated legislators, with help from a pit crew of concerned citizens and other water leaders, need to grab the wheel and get the journey back on track.