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The Western Water Policy Review Advisory Commission: Another Look at Western Water

ABSTRACT

Western water policies need to change as the west changes. A national commission has reviewed analyses of demographic and economic trends, water use data from federal and state agencies, climate change studies, ecological and water quality reports, reports from major river basins, and combed other sources to prepare a report. The commission's primary interest is in the institutional aspects of water management. Watershed and basin management entities can integrate different governments, agencies and interests in a region, opening up decision-making and reducing citizen frustration. In addition, federal policies in a number of other areas are addressed in the draft report.

INTRODUCTION TO THE COMMISSION

In 1992 Congress established a presidential advisory commission to examine western water policy.[1] The Interior Department in September of 1995 chartered the Commission; the Congress then extended the deadline for the Commission's report to October of 1997.[2] Unlike more discrete areas that Congress has asked a group to review and report upon,[3] there is nothing limited about the charge given to the Commission. Congress has asked this commission to review both the physical and institutional

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1. Reclamation Projects Authorization & Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4693-98 (codified as historical note to 43 U.S.C. § 371 (1995)).

2. Energy & Water Development Appropriations Act of 1996, § 502, Pub.L. No. 104-46, 109 Stat. 419 (1995).

3. For example, in 1996, Congress established a Water Rights Task Force to study bypass flows and related water rights on national forest land, Federal Agriculture Improvement Act of 1996, Pub. L. No. 104-127, § 389(d)(1), 110 Stat. 1021, and a Nat'l Gambling Impact Study Comm'n to study the social and economic impacts of gambling in the United States. Nat'l Gambling Impact Study Act, Pub. L. No. 104-169, 110 Stat. 1482 (1996).

condition of the west's water and the laws and agencies that affect the management of water in the west. The statutory charge is to:

> (1) review present and anticipated water resource problems affecting the nineteen Western States, making such projections of water supply requirements as may be necessary and identifying alternative ways of meeting these requirements-giving considerations, among other things, to conservation and more efficient use of existing supplies, innovations to encourage the most beneficial use of water and recent technological advances;
> (2) examine the current and proposed Federal programs affecting such States and recommend to the President whether they should be continued or adopted and, if so, how they should be managed for the next twenty years, including the possible reorganization or consolidation of the current water resources development and management agencies;
> (3) review the problems of rural communities relating to water supply, potable water treatment, and wastewater treatment;
> (4) review the need and opportunities for additional storage or other arrangements to augment existing water supplies including, but not limited to, conservation;
> (5) review the history, use, and effectiveness of various institutional arrangements to address problems of water allocation, water quality, planning, flood control and other aspects of water development and use, including, but not limited to, interstate water compacts, Federal-State regional corporations, river basin commissions, the activities of the Water Resources Council, municipal and irrigation districts and other similar entities with specific attention to the authorities of the Bureau of Reclamation under reclamation law and the Secretary of the Army under water resources law;
> (6) review the legal regime governing the development and use of water and the respective roles of both the Federal Government and the States over the allocation and use of water, including an examination of riparian zones, appropriation and mixed systems, market transfers, administrative allocations, ground water management, interbasin transfers, recordation of rights, Federal-State relations including the various doctrines of Federal reserved water rights (including Indian water rights and the development in several States of the concept of a public trust doctrine); and
> (7) review the activities, authorities, and responsibilities of the various Federal agencies with direct water resources management responsibility, including but not limited to the Bureau of Reclamation, the Department of the Army, and

> those agencies whose decision would impact on water resource availability and allocation, including, but not limited to, the Federal Energy Regulatory Commission. Title XXX, § 3005.

The legislation grows out of a tradition in which the nation has periodically examined water policy, using citizen commissions, Congressional staff, and consultants. [4] Commissions are needed to provide this analysis in part because of the phenomenon that all participants in western water encounter: there is no single "point of contact" that coordinates the federal role in western water, much less a single entity that is the acknowledged representative of all western interests in water. Thus, a commission is useful because it provides a perspective independent of any government entity. Moreover, a Commission furnishes a unifying perspective, if only for a brief time, that is lacking from any single agency or organization.

The Commission is an *ad hoc* entity,[5] charged with reviewing the questions posed to it by the Congress and reporting to the Secretary of the Interior. The Secretary of the Interior in turn reports to the President, who is to transmit the report to the Congress.[6] The membership of the Commission consists of 12 members of Congress (the ranking majority and minority members of the Congressional committees with the greatest jurisdiction over water), the Secretaries of the Army and the Interior Department, and eight citizens appointed by the President.[7] It is staffed by an executive director and employees lent by the Bureau of Reclamation. The

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4. *See* COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, DEP'T OF THE INTERIOR, H.R. DOC. NO. 81-122 (1949) (Hoover Comm'n I); COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, WATER RESOURCES & POWER, H.R. DOC. NO. 84-208 (1955) (Hoover Comm'n II) [hereinafter WATER RESOURCES & POWER, H.R.DOC. NO. 84-208]; PRESIDENTIAL ADVISORY COMM. ON WATER RESOURCES POLICY, WATER RESOURCES POLICY, H.R. DOC. NO. 84-315 (1956) (Cooke Comm'n); NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES (1973) [hereinafter WATER POLICES FOR THE FUTURE]; *see also*, PETER ROGERS, AMERICA'S WATER: FEDERAL ROLES AND RESPONSIBILITIES (1993); DOUGLAS KENNEY, NATURAL RESOURCES LAW CTR., RESOURCE MANAGEMENT AT THE WATERSHED LEVEL: AN ASSESSMENT OF THE CHANGING FEDERAL ROLE IN THE EMERGING ERA OF COMMUNITY-BASED WATERSHED MANAGEMENT 7-56 (report to Western Water Policy Review Advisory Comm'n [hereinafter WWPRAC] 1997).

5. Although the term of the Commission is not specified in the legislation, under the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972), action by the executive branch would be required to extend the Commission's term beyond May 16, 1998, which is two years from the date that the Secretary of the Interior issued the second charter under which the Commission operates. 5 U.S.C.A. app. 2 § 14 (West, WESTLAW through Pub. L. No. 105-41, approved Aug. 13, 1997).

6. Reclamation Projects Authorization & Adjustment Act of 1992, Pub. L. No. 102-575, § 3005, 106 Stat. 4695-96.

7. Pub. L. No. 102-575, § 3004, 106 Stat. 4695.

Interior Department has provided resources to the commission and provided the administrative structure through which it operates.

The questions posed by the legislation could have been approached as conventional policy research, of the sort aptly performed by consultants and university centers. Congress's use of a commission, rather than one of its own research arms, suggests instead that it sought policy recommendations that reflected the values of the participants in the Commission, as well as objective data. The Commission has in turn sought the opinions of those who are affected by western water policies. It has had a series of meetings across the west (Portland, Denver, Phoenix, San Diego and San Francisco) at which presentations have been made by a wide variety of interest groups and it has held workshops in different western cities (Sacramento, Portland, Albuquerque, Salt Lake City, Omaha, and Phoenix). Also, the Commission established a mailing list, sending newsletters and the draft report to approximately 3,000 individuals and organizations. Commission members, of course, have direct contact with many people with an interest in the Commission's process. In a notable departure from past commissions, all of the citizen appointees live and work in the west, and all but one of the Commission's meetings have been held in the west.

In addition to seeking public comment, the Commission has contracted for a series of reports to be made to the Commission.[8] These reports address each element of the statutory charge. They include analyses of demographic trends and projects, drought management, water quality issues in the west, the role of alternative dispute resolution in water decision-making, federal budget issues, changing land use patterns, and watershed organizations. The Commission solicited a comprehensive report from the Western States Water Council, which addressed a number of issues from its members' perspectives.[9] The Commission also supported a conference arranged by a professor at Arizona State University to acquaint

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8. A partial list of reports and their authors that the Commission will publish includes: DR. KATHY MILLER, CLIMATE VARIABILITY AND WATER MANAGEMENT IN THE WEST (report to WWPRAC 1997); PAMELA CASE & GREGORY ALWARD, PATTERNS OF DEMOGRAPHIC, ECONOMIC AND VALUE CHANGE IN THE WESTERN UNITED STATES (report to WWPRAC 1997) [hereinafter CASE & ALWARD]; DONALD WILHITE, IMPROVING DROUGHT MANAGEMENT IN THE WEST (report to WWPRAC 1997); WAYNE SOLLEY, ESTIMATES OF WATER USE IN THE WEST (report to WWPRAC 1997); ENVIRONMENTAL PROTECTION AGENCY REGION VIII, WATER QUALITY IN THE WEST (report to WWPRAC 1997); GAIL BINGHAM, SEEKING SOLUTIONS: EXPLORING THE APPLICABILITY OF ADR FOR RESOLVING WATER ISSUES IN THE WEST (report to WWPRAC 1997); THE EOP FOUND., BUDGETING FOR FEDERAL WATER PROJECTS (report to WWPRAC 1997); J. WILLIAM MCDONALD, THE UPPER BASINS' POLITICAL CONUNDRUM: A DEAL IS NOT A DEAL (report to WWPRAC 1997); KENNEY, *supra* note 4.

9. D. CRAIG BELL, WESTERN STATES WATER COUNCIL, WATER IN THE WEST TODAY: A STATES' PERSPECTIVE (report to WWPRAC 1997).

commission members with the status of western aquatic ecosystems, for which a report was produced.[10] Tribal attorneys and members presented a conference at which Commission members were briefed on tribal water resource issues.[11]

While water "issues" can be discussed at an abstract level that extends across the west, much is lost when one does so; the physical setting, institutional alternatives, economic and social pressures vary across basins. National policies are mediated through application in a specific basin and interpreted by federal agents with diverse goals and abilities. For these reasons, the Commission initiated a series of river basin studies, in which authors reviewed the water-related issues in these basins and the physical and institutional responses to them. The basins selected for study were intended to present a range of circumstances and included both large and small basins. The primary authors and reports are: John Volkman, A River In Common: The Columbia River, The Salmon Ecosystem And Water Policy; Dale Pontius, Colorado River Basin Study; Leo Eisel, Platte River Basin Study; Sue McClurg, Sacramento-San Joaquin River Basin Study; Jeremy Pratt, Truckee-Carson River Basin Study; and Ernie Niemi, Water Management Study: The Upper Rio Grande River Basin. Each of these reports was published in draft form, made available for comment, and will be published and distributed by the Commission to federal depository libraries. A number of parties with an interest in the resolution of western water issues seemed almost overwhelmed by the scope and abstraction of the charge to the Commission. The basin studies, where federal policies could be reviewed in a concrete setting, enabled the Commission to elicit focused comments from these observers. The controversy that surrounded some of the studies lent further insight to Commission members, because the controversies mirrored the contentious issues in the basins.[12]

Taken together, these studies provide a crosscutting view of western water policy issues, as well as useful case studies to search for innovation. In the tradition of the National Water Commission, the reports to the Commission are being published as products of the individual authors. Each of these sources has been used for the report of the Commission itself, along with the voluminous published literature. Professor Dan Tarlock, Commission staff members, and other consultants

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10. *Aquatic Ecosystems Symposium* [hereinafter *Symposium*] (report to WWPRAC, W. L. Minckley, ed., 1997).

11. Indian Water-1997: Trends and Directions in Federal Water Policy; Implications and Opportunities for Tribal Action Forum (March 17, 1997) (transcript on file with author).

12. The comments received on basin studies were made available to Commission members for their consideration along with the reports, and the authors were asked to respond to these comments.

have collaborated in draft chapters that will be used as the basis of the Commission's final report.

The Congress has asked for information about topics that make frequent appearances in texts and journal articles. While there are significant research gaps, in most areas the challenge to the Commission is to make research relevant to policy makers, which requires synthesis and assimilation, not additional research. In winnowing down the possible areas of inquiry, we have been guided by several principles: [13] The report should provide a measure of where the west stands with respect to the broadest questions, i.e., is there a crisis in western water? The report should attempt to speak about the future of water in the west: the attention of policy makers needs to be drawn to the transformation that is occurring across much of the west and consider the implications of this for today's water institutions. The recommendations in the report need to be reflective of the diversity in conditions, both physical and social, which are found across the west, and of the diversity of people who are affected by decisions about western water. The report should be reflective of the historical context in which the Commission works and provides reactions to the themes of earlier generations.

The constraints under which the Commission has operated are emblematic of the fiscal austerity that characterizes modern political life. The Commission will spend about two million dollars and two years to complete its report. The National Water Commission, in comparison, spent about $22 million (in today's dollars) and took five years to complete its work.[14] The limitations of funding have been felt in several arenas: one key constraint has been a limited ability to pay outside consultants to review agency performance. The limitations of time have affected the depth of research that could be attempted, but have surfaced even more in recent months as groups have discovered the Commission and sought increased communication with it.

The Commission's draft report will be revised, before it is sent to the Secretary of the Interior. What follows are my personal observations about some of the major themes that have been raised in the course of this work, and not, by any means, the conclusions of the Commission itself.

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13. The report of the National Water Commission is the springboard for these reflections; our list of topics bears similarities to those of its 1973 report. NAT'L WATER COMM'N, EXCERPTS FROM: WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES (1996).

14. *Id.*

WESTERN WATER POLICY THEMES AT THE END OF THE TWENTIETH CENTURY

The examination of "western water policy" is propelled by a question: what is unique about the west at the end of the twentieth century? The historical explanation for the presence of the federal government in the development of western water policy was the nation's goal of populating the west: aridity required management of water, and federal funds often supported this infrastructure. The support, ironically, grew as World War II ended, and the rush to construct dams increased.[15] These projects were built to provide power as well as for agricultural development, but agriculture was the predominant purpose.[16]

The west no longer needs to go to any great lengths to entice new residents; indeed, many westerners are ready to bolt the doors against booming population growth. This population growth is recasting every aspect of western life, including the role of water. The projected growth in the west's population is the most significant fact the Commission has before it. Projections done for the Commission show a 27 percent increase in population in the west in the next 25 years.[17] This comes on top of what has been an era of intense growth: from 1972 to 1997 the 17 western states' populations grew at a rate of 32 percent, while the national population growth rate was 19 percent.[18]

The relationship of the west to the federal government is different from that of the eastern United States in other respects as well. The concentration of Native-Americans in the western states has meant that the trust responsibilities of the federal government are prominent in the west.[19] Federal ownership of lands is also characteristic of the west. With ownership of lands comes the management of resources, and the starts and

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15. In the continental United States between 1910 and 1950, 26 dams with reservoir capacity of a million acre-feet or more were completed, while between 1950 and 1985, 60 dams with reservoirs of this size were completed. MICHAEL COLLIER, ET AL., DAMS AND RIVERS: A PRIMER ON THE DOWN STREAM EFFECTS OF DAMS 4 (U. S. Geological Survey Circular 1126, 1996); *see* MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (1986).

16. RESOURCES, COMMUNITY, & ECONOMIC DEVELOPMENT DIV., U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-96-109, BUREAU OF RECLAMATION: INFORMATION ON ALLOCATION AND REPAYMENT OF COSTS OF CONSTRUCTING WATER PROJECTS 2 (1996).

17. CASE & ALWARD, *supra* note 8 at 30.

18. *Id.* at 7.

19. *See generally* Judith Royster, *A Primer on Indian Water Rights: More Questions than Answers*, 30 TULSA L.J. 61 (1995); M.C. Shay, *Promises of a Viable Homeland, Reality of Selective Reclamation: A Study of The Relationship Between the Winters Doctrine and Federal Water Development in the Western United States*, 19 ECOLOGY L.Q. 547 (1992); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 575-604 (Rennard Strickland et al eds., 1982).

stops of western water policy are perhaps nowhere more evident than in the federal government's claimed rights in waters on federal lands.[20] Finally, national environmental laws, written with no particular regional emphasis, have nonetheless become pivotal in decision-making concerning western rivers. This is particularly true because western river systems are environmentally stressed and many species that are endemic to these systems are threatened or endangered.[21]

Historically, the federal role in western water was primarily one in support of agricultural uses of water. Approximately 78 percent of all water withdrawn for use in the west is used in agriculture.[22] Federal appropriations to the Bureau of Reclamation stem from this historic mission, but the mission is now far more complex as the interests in water have broadened. The Bureau has been engaged in the reexamination of this mission for almost a decade, and one can hear the growing pains of an agency in transition as it attempts to articulate a new role for itself.[23] The Corps of Engineers has shared in the support of agriculture, as well as in flood control and channel maintenance. In some regions the Corps is thought of as a lesser player in the west than is the Bureau of Reclamation, but appropriations tell another story.[24] The Corps is well known for its historic function of protecting navigation; a function that is only significant on a few western rivers. Flood control, hydropower, and associated environmental programs, however, have led to a larger role for the Corps than for the Bureau of Reclamation in western states.[25]

The changing make-up of the west and the roles of the various federal agencies present a myriad of policy questions. The movement of water to cities is inevitable, but the effect on agriculture and communities is not a foregone conclusion. The adjudication of Native-American claims to water and the alternatives that tribes will have for that water requires resolution.[26] An expanded federal role in protecting and restoring rivers

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20. There is significantly more federal land in the west than in the east: Nevada contains 85% federal land, Colorado 48%, Oregon 52%, California 44%, and Alaska 90%. Almost two thirds of the water runoff in the eleven western states originates on federal public land. *See generally* GEORGE CAMERON COGGINS & CHARLES F. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 357-412 (2d ed. 1987).

21. *See Symposium, supra* note 10.

22. WAYNE B. SOLLEY, STATUS AND TRENDS OF WATER USE IN THE 19 WESTERN STATES, (U.S. Geological Survey, Open-File Report 97-; undergoing final USGS Review; forthcoming 1998).

23. *See* Daniel P. Beard, Bureau of Reclamation, *Blueprint for Reform: The Commissioner's Plan for Reinventing Reclamation* (Bureau of Reclamation 1993).

24. *See* THE EOP FOUND., *supra* note 8.

25. *Id.*

26. Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 ARIZ. L. REV. 195 (1994); RICKY SHEPHERD TORREY, TRIBAL WATER MARKETING (report to Western States Water Council and Native American Rights Fund 1996).

signals new missions for federal agencies. Most westerners live in cities, contrary to popular belief, and the role of the federal government in financing infrastructure for the urban west is yet unresolved.[27]

In reciting a list of policy questions, the question of whether there is, or should be, a "western water policy" resurfaces. Each of these questions (and the list that one could generate could be greatly expanded) might be analyzed at a national level, yet the true color and texture of these questions would be lost. In one region, agriculture may be of high value, and reducing that production could have substantial national effects. In another region, irrigated agriculture may anchor open space and thereby preserve biodiversity. There are other regions where alfalfa is produced with highly subsidized water, and agricultural dominance over water occurs at the expense of other potential uses. Obviously the physical characteristics of the west vary, as do the economies and political culture of different regions.

Transcending a list of issues, the Commission has focused a striking degree of interest in "place based management" alternatives. This term is used to describe watershed management initiatives, in which those with an interest in a watershed address the problems of watersheds in an open planning process.[28] However, watershed management is also used to describe initiatives at a broader geographic scale, such as the Bay-Delta process and the Northwest Power Planning Council. These initiatives relate to one of the most frequently voiced complaints about the federal presence in western water, namely the difficulty in getting federal agencies to speak as though they held common objectives, or were at least conversant with each other's interests. In meetings across the west, the complaint that water policies suffer from gridlock was frequently voiced. An accusation of gridlock may result when one party cannot override other interests, as when those who have historically controlled water projects are thwarted. But, it may also reflect the frustration of any group of citizens who seek change. One of the achievements that is ascribed to place based management is that federal agencies can be "brought to the table" and are

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27. Congress has shown its interest in a federal role in supporting municipal infrastructure in recent legislation. Title XVI of the Reclamation Projects Authorization & Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4665, authorizes the Secretary of the Interior to participate in water reclamation and reuse feasibility studies as well as to "construct, operate and maintain" projects to demonstrate and develop treatment technologies for wastewater reclamation with "appropriate Federal, State, regional and local authorities." The Federal share of the costs of the studies and the construction, operation and maintenance is not to exceed 50% of the total costs.

28. *See* Robert W. Adler, *Addressing the Barriers to Watershed Protection*, 25 ENVTL. L. 973 (1995).

therefore more likely to cooperate. If this can be achieved, the task of those with an agenda for change is simplified accordingly.

The concept of watershed management can be traced to earlier movements in which management based on physical rather than political boundaries has repeatedly been recommended.[29] These recommendations have obviously had greater resonance in the academy than in the political circles that would need to adopt them. One exception, however, is found in programs administered by the Department of Agriculture's Soil and Water Conservation Service, now called the Natural Resources Conservation Service. The Soil and Water Conservation Service has administered programs directed at soil protection on private lands using local entities. These districts typically have been administered using county lines, but often with an emphasis on watershed boundaries.[30]

What is most intriguing about watershed management's current visibility is that it is flourishing across the west, arising as a grassroots response to watershed conditions, rather than as a result of a federal program. Its time has come, boosted by the environmental exigencies facing watersheds and the growing sophistication of the west. Federal and state agencies are scrambling to catch up to this popular movement.

The enthusiasm for this approach is undeniable, but the implications it holds for national water policy have yet to be developed. First, while the popularity of watershed management is not news, it is not clear how many rivers, or watersheds, have functioning programs. As the population of the west grows, as states and municipalities increase their capacity to administer programs, and as local initiatives prove themselves, it would seem likely that these approaches will spread. On the other hand, there are many regions where these approaches have not been tried, or have not succeeded.[31]

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29. *See* KENNEY, *supra* note 4 at 5. *See also id.* at app. A; WATER POLICIES FOR THE FUTURE, *supra* note 4.

30. The Soil Conservation Service (SCS) was established by the Act of April 27,1935, ch. 85, § 5, 49 Stat. 164 (codified at 16 U.S.C. § 590e). This statute was repealed on October 13, 1994 by The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, 108 Stat. 3178. Pub. L. No. 103-354, which transferred the duties of the SCS to the Secretary of Agriculture under the Soil & Water Conservation Act of 1977, Pub. L. No. 95-192, § 2, 91 Stat. 1407 (codified as amended at 16 U.S.C. 2001 (1994)). Pub. L. No. 103-354, §246, 108 Stat. 3223 (codified at 7 U.S.C. § 6962 (1994)), also established the National Resources Conservation Service (NRCS). This statute authorizes the use of both Federal and non-Federal employees to carry out the functions of the NRCS. *See* John H. Davidson, *Thinking About Nonpoint Sources of Water Pollution and South Dakota Agriculture*, 34 S.D. L. REV. 20 (1989).

31. The research in this area is nascent. The Natural Resources Law Center examined existing initiatives in two studies, but it is obviously more difficult to identify those areas where initiatives are not proceeding and it did not identify them. *See* KENNEY, *supra* note 4;

Second, the relationship between watershed and basin management needs clarification. The Commission draft endorses both and I would assert that both are required for place based management to be effective. A watershed council can effectively address nonpoint source pollution, which requires changes in local land use practices to control. But federal storage and power facilities, interstate compacts, the presence of endangered species, and other forces also affect watersheds where basin or even national decisions will be controlling. The management of water quality does not directly implicate the magnitude of allocation, development, facility management, and user conflicts that are prominent in many watersheds. Admittedly, there are watershed initiatives with a broad domain, encompassing management of reservoirs, water use, endangered species, and other water resource issues that emanate from a basin level.[32] Basin wide institutions would be a powerful corollary to watershed initiatives, but most basins lack such institutions. The Commission's draft recommendations address how basin entities might be stimulated, but ultimately local, not federal interest will be required to foster them.

A key charge to the Commission was to examine the proliferation of federal agencies. Place based management holds the promise of better coordination of federal agencies, but does not directly address the number or organization of agencies. The realm of reorganization is one that many agency heads and experienced bureaucrats see as unrewarding: at the end of exhausting turf battles one can have nothing to show for one's efforts other than a new organization chart. However, to the public, the notion that these bureaucratic divisions should be perpetuated is a testimony to the powers of inertia. Is it beyond question that the Corps and the Bureau of Reclamation should divide the rivers of the West between themselves? Or that the Fish and Wildlife Service of the Bureau of Reclamation should have responsibilities for some species in a river and the National Marine Fisheries Service of the Commerce Department for others? That the Environmental Protection Agency should collect some data concerning water quality and the United States Geological Survey collect other data? The Hoover Commission reviewed agency roles, with ensuing recommendations made to consolidate agencies.[33] Despite the popular interest in this subject, there

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NATURAL RESOURCE LAW CTR., THE WATERSHED SOURCE BOOK: WATERSHED-BASED SOLUTIONS TO NATURAL RESOURCE PROBLEMS (1996).

32. *See* KENNEY, *supra* note 4, at 7-56.

33. The second Hoover Commission recommended the creation of the Water Resources Board to determine, coordinate and administer broad national policies concerning water resources. *Supra* note 4, WATER RESOURCES & POWER, H.R. DOC. NO. 84-208. The Commission report recommended the transformation of existing agency groups into the Water Resource Board, an executive level office staffed with cabinet members and private citizens with expertise in water and engineering. *Id.*, at 38, 97.

is very little academic writing on the organization of federal water agencies and little enthusiasm in water policy circles for pursuing their reorganization.

The public might also have expectations that the Congress should review and reorganize its own policy structure. The effect of the jurisdictional divisions among congressional committees is well known within political circles but advocates for change have not emerged in the Commission's work. The Congressional Research Service of the Library of Congress did study congressional committees with jurisdiction over water for the Commission and its study was incorporated as an appendix to the draft Commission report.[34]

In many areas of federal programs and mandates, one can imagine a different order in which priorities and programs are driven by locally defined needs and responsibilities. Place based management can be immensely helpful in establishing a local consensus about these areas. However, as important as the promise of place based management is, it does not resolve all of the issues that are raised by federal policies that apply across the west. For example, the Clean Water Act[35] allows EPA to establish national criteria for designated water uses, sets effluent limits for indirect and direct discharges, and imposes a pollution control framework on dischargers to rivers across the country. In the west, these policies may be misdirected, and in some instances, result in unintended consequences.[36] Critical federal policies affect pricing and access to water, the availability of funds and the will to undertake river restoration, progress in controlling nonpoint pollution and irrigation return flows from agricultural lands, the national responsibility to address tribal water rights and infrastructure, and many like areas.

The number of these policies that could be examined created a dilemma for the Commission. I was concerned about our ability to capably review and make recommendations in each such area, yet aware that there are many federal policies that require examination. The draft report does address major policy areas, but at a broad scale, acknowledging that many of these areas have been studied by scholars, Congressional committees, and others. To take an example from the environmental arena: the federal Endangered Species Act [37] leverages the operation and use of rivers in a

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34. CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, WATER IN THE WEST: THE CHALLENGE FOR THE NEXT CENTURY app. (report to WWPRAC forthcoming 1997).

35. The Federal Water Pollution Control Act, (codified as amended at 33 U.S.C §§ 1251-1387 (1994)).

36. An example of an unintended result is the preference of the Clean Water Act for zero discharge, a policy that could desiccate some western streams, if it were fully applied.

37. Endangered Species Act of 1973 (ESA), (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

manner that was inconceivable a decade ago. Opinions vary, obviously, as to whether the Act is an indispensable tool to protect the natural values of our imperiled western rivers, or whether environmental concerns have come to outweigh all other policies and values. There is no shortage of scholars, legislators, agency officials and advocates who are critiquing the operation of the Act and legal questions that it raises. The policy debate that rages over the Act and proposed refinements to it suggest to me that this issue is unlikely to be advanced by the thoughts of one more commission. On the other hand, we have documented the constructive role played by the Act in leading to new agreements on western rivers. [38] Thus we can contribute some insight to the debate over the Act and its operation.

This Commission operates under impediments that are all too obvious to me: too little time, too little money, and a statutory charge that is far more complex than anyone might have anticipated. Despite these impediments, there is a growing interest in the Commission's work. I have found this interest to be directly proportional to the distance that someone sits from Washington. Federal water policy is not thought of by most participants as an abstract concept, but rather as the latest expression of congressional or administrative decision-making in a particular case. For those who are directly interested in a water project, or some question that is directly controlled by the decision making of a federal agency or Congress, understanding of federal policy is purchased through attorneys, consultants, and lobbyists. While much is no doubt hidden, the process is relatively accessible to the players on major projects. In contrast, there is no obvious forum for those who are interested in water policies or their application across the west. The Water Resources Council, established in 1965,[39] is still authorized,[40] but it has not met in many years. Individuals and organizations that are outside of government have reviewed water issues,[41] but all have proceeded on an invitational basis, that is, they were not structured to solicit broad public participation, and none has attempted to be comprehensive in scope.

Excellent research is available on western water. To choose a few examples, the USGS is a repository of current data and in-depth studies. The National Research Council has contributed much through

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38. The basin reports that were initiated by the Commission have elucidated the role played by the ESA in key river basins. The ESA has spurred basins to organize themselves in response to the threat of federal administration.

39. Water Resource Planning Act, Pub. L. No. 89-80, 79 Stat. 244 (1965).

40. The Act is still valid but the council's budget was zero-funded under President Reagan in 1981. ROGERS, *supra* note 4, at 177.

41. *See* Tom Bahr, *The Park City Principles: A New Paradigm for Managing Western Water*, 31 LAND & WATER L. REV. 299 (1996); LONG'S PEAK WORKING GROUP ON NATIONAL WATER POLICY, AMERICA'S WATERS: A NEW ERA OF SUSTAINABILITY (1992); ROGERS, *supra* note 4.

interdisciplinary studies of current water policy issues.[42] At a state level, water research is linked through the National Water Research Institute Program and the University Council of Water Resources. The Western States Water Council has done policy-related studies. Congress has a research arm in the Congressional Research Service of the Library of Congress. Research, then, appears to be more available than forums in which to debate and shape water policies.

CONCLUSION

An *ad hoc* Commission has advantages and disadvantages as a means of gathering information and providing recommendations to policy makers. We have encountered much ambivalence about "yet another Commission" and many have suggested a high standard for our success: our report should be judged by whether or not its recommendations are adopted. But, while the federal executive and legislative branches are the recipients of the report, the participants in western water activities are served by having a federal entity with which a dialogue, however brief in duration, can occur. I think that it would be useful to continue to have periodic reviews of western water policies; these reviews give entities a forum that want to tackle dysfunctional relationships among federal agencies, or call attention to future trends and to engage in long-term thinking about these trends, a forum. A function of government that relates to something as critical as water and that involves the substantial funding that western water receives is likely to be improved through regular review. Equally importantly, an open and accessible policy forum serves citizens.

42. *See* COMM. ON THE FUTURE OF IRRIGATION IN THE FACE OF COMPETING DEMANDS, NAT'L RESEARCH COUNCIL, A NEW ERA FOR IRRIGATION (1996); COMM. ON RESTORATION OF AQUATIC ECOSYSTEMS, NAT'L RESEARCH COUNCIL, RESTORATION OF AQUATIC ECOSYSTEMS: SCIENCE, TECHNOLOGY AND PUBLIC POLICY (1992).