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ESSAYS AND READER COMMENTS

FORGING A NEW STATE-FEDERAL ALLIANCE IN WATER MANAGEMENT

INSTITUTIONAL CHALLENGES IN WATER MANAGEMENT

An individual organization or institution can no longer solve water resource problems of any significance without creating unintended consequences on other parties, or encountering constraints imposed by others.¹ Disputes among water and environmentally related agencies and/or levels of government have been increasing in frequency, while at the same time, these same agencies are becoming more and more dependent on one another for information, resources, and policy decisions. Moreover, there is a growing awareness that the complexity of the nation's institutional arrangement is actually posing a threat to the water resources that these same institutions are mandated to protect: "The proliferation of public agencies dealing with water has lead to a disassociation of their policies, their procedures and their outlook from the operational health of the hydrologic system."²

The complexity and fragmentation of the nation's water institutions are undermining their capacity to solve vital water resource and related socio-economic problems. As the hydrologic system in the United States becomes more stressed and water more scarce through alteration, degradation, and depletion, water resource managers are having to rethink the way policy processes and institutions are structured. The challenges of (a) improving intergovernmental relations to provide more efficient and equitable water policy, and (b) developing a new ethic of shared intergovernmental stewardship of the water resource, are becoming more paramount as the 21st Century approaches.

There is a growing community of interests of state and local water managers and distinguished scholars throughout the nation that are frustrated over the lack of progress in these areas of water policy. Even those at the other end of this gap, those with a federal perspective, recognize the problem. The question is, Why do the rewards of continued rivalry among water institutions seem greater than the mutual gain that could be

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1. B. Gray, *Collaborating: Finding Common Ground for Multiparty-Problems* 43 (1989).
2. Leopold, *Ethos, Equity and the Water Resource*, *Environment*, Mar. 1990, at 18.

derived from collaborative inquiry into the root causes of the situation? Why is no one paying attention to the "big picture"—state and federal roles in the context of national water resource needs, capacity, and policy? Few would debate that the nation benefits from a combined water resource system that is on a par with any in the world; however, current appearances can be deceiving and fleeting.

Today, intergovernmental water disputes are not the exception but the rule throughout the nation. As resource management problems grow increasingly complex and interrelated, so have the institutions and the programmatic and regulatory cures devised by government. Fragmentation, excessive "red tape," hubris, and a lack of incentives for collaboration have become commonplace. The inability of intergovernmental efforts to respond quickly and effectively to rapidly changing resource problems and increasingly divergent decisionmaking environments is ubiquitous.

Part of the reason, that coordination and collaboration between various government agencies are so elusive rests in the separation of powers of the President, Congress, and the states. There has also been an absence of true incentives for improved intergovernmental coordination in water management. As Foster and Rogers (1988) put it in their recent discussion paper, "There is little reward in being a champion of economy, efficiency and even-handedness. Thus little, if any political capital will be expended toward such ends."³ Third, there is no set of agreed upon beliefs that guide national water policy decisionmaking.⁴ And without more collaborative and widely accepted operating premises, the nation's water institutions will continue to experience more "water-decision gridlock."⁵ As a consequence, marked gains in achieving collective ends in water resource and environmental protection will be delayed if not compromised.

THE INFLUENCE OF FEDERALISM ON NATIONAL WATER POLICY PROCESS

The separation of governmental responsibilities is an integral part of the social fabric which makes up our republican form of government. That separation was created for a purpose—to divide power so that no one segment of government could become too powerful. It was not intended to inhibit the design and implementation of viable solutions; to

3. C. Foster & P. Rogers, *Federal Water Policy: Toward An Agenda For Action 89* (1988) (Discussion Paper, Harvard University Energy And Environmental Policy Center, Harvard University, Cambridge, MA).

4. Leopold, *supra* note 2, at 18.

5. See Western Governors' Association, *White Paper: Federal Water Policy Coordination 11* (May 1989) (Unpublished manuscript, Denver, Colorado).

keep different levels of government from working together toward a common goal. For the most part, that separation of powers continues to serve the nation and its citizens well. But the nation's water agencies have become complacent and all too willing to define the public interest in their own narrow terms. The nation suffers from hardening of the institutional arteries. This serious yet subtle problem is not confined to water institutions. It is quite evident in health services, education and financial institutions, as well.⁶ Left unattended, this institutional stagnation will continue to progressively weaken both the credibility and the performance of government service at all levels.

The sheer size and breadth of the federal-state water management structure can be a formidable, if not an intimidating, challenge to the uninitiated. At last count, there were 18 federal agencies in 7 departments and 7 independent agencies, and 25 separate water programs with some 70 separate appropriations accounts. In Congress there are 23 committees and subcommittees. Federal rules and regulations now number around 200. There are reportedly 123 interstate compacts dealing with water appropriations, bridges, ports, and environmental protection. At the state and local level, experts have tabulated over 100,000 entities of every size and description engaged in some aspect of water management.

Within the national water policy structure is a labyrinth of phases, planning steps, interrelated functions, and layers of overlapping jurisdiction with multiple agencies and constituencies. The successful completion of a specific project or program often depends upon the involvement of several federal agencies, with a changing cadre of staff, state officials representing a number of governmental entities, and a variety of representatives from local government as well as private or nonprofit sector organizations. Each of these participants is apt to have different objectives, or at least differing priorities. There is no administrative hierarchy among or between the three levels of government. Each possesses an autonomous source of legal authority, as well as an independent bureaucracy and distinct political constituency.⁷

Since the 1960s, the nation has placed far too much emphasis on federal policy innovation and neglected the effort of looking at what has been created and how well it is working. In the haste to get new federal water and related environmental programs in place, consultation and concurrence to ensure equitable and effective results have been neglected if not ignored. The cumulative impact of federal and state water policy makers' attempts to solve discrete water problems has left in its wake a layered

6. See R. Lamm, R. Caldwell & I. Mehlman, *Hard Choices* 66 (1989) (University of Denver, The Center For Public Policy and Contemporary Issues, Denver, CO).

7. *Advisory Commission on Intergovernmental Relations, Regulatory Federalism: Policy, Process, Impact And Reform* 104 (1984) (Washington, DC).

and fragmented system of laws and agency responsibilities which at times defies our ability to seek holistic problem-solving approaches. Water managers are in desperate need of new and different answers to nagging intergovernmental problems, including:

- **Poor Policy Design and Implementation**—Caused by excessive adherence to traditional agency missions and prerogatives rather than a shared state-federal vision, or “problemshd” perspective.
- **Lack-luster Performance**—Associated with the lack of finality in decisionmaking and the inability to determine effectiveness and adequacy of results (that is, when the cure seems worse than the disease).
- **Inefficiency**—The result of excessive delays, redundant reviews, protracted disputes, and waste relative to anticipated benefits.
- **Limited Accountability**—Agencies free to define the public interest in their own narrow, mission-oriented terms, rather than submit to general policy guidance.

THE RISE OF STATE INFLUENCE IN NATIONAL WATER POLICY

The challenges to water resource management cited above are further complicated by a fundamental “sea change” in national water policy that appears destined to have a profound and lasting effect on associated intergovernmental and interagency relations. A number of factors have contributed to the rise of state influence in national water policy.

THE DEVOLUTION OF FEDERAL PROGRAMS TO THE STATES

For more than a decade, the states have been asked to absorb increased responsibility in water and have significantly enhanced their capacity to manage it effectively. The Water Resources Council and River Basin Commissions were judged to be ineffective, and dismantled in 1981. The states’ need for intergovernmental coordination, cooperation and collaboration was dismissed with a flip remark, “We (in the administration) have concluded that the commissions do not perform any function or provide a service that states are not able to perform themselves.”⁸

During this same period of time, federal legislation like the Safe Drinking Water Act, the Clean Water Act, and the Water Resources Development Act signaled a shift to increased reliance on state resources. Notwithstanding these changes, federally mandated environmental and water-related statutory objectives, requirements, and standards have remained in force. By eliminating federal programs and changing fiscal policies, the nation challenged the states to do more with less federal

8. Wilson & Stubbs, *The Commission's Reach: A Requiem Appraisal*, in *Water Resources Planning and Management in the United States Federal System* 109 (L. Dworsky, North & D. Allee ed. 1986).

resources, and they have! In many watersheds under stress, state and local interests have developed innovative procedures and institutions for protection of the resource base, and their own collective interests. The Chesapeake Bay Initiative, the Northwest Power Planning Council, The International Coalition in the Red River Basin, the groundwater management districts in Arizona, and restoration efforts in the Everglades are but a few examples of innovation at the interstate, state, and sub-state regional levels.

INCREASING STATE CAPACITY TO MEET SHIFTING NATIONAL PRIORITIES

National water policy has been in a state of flux since the National Water Commission Report of 1973. First, the focus shifted to sub-federal management oriented projects that were increasingly nonstructural. Second, water quality and environmental protection increasingly became primary, rather than secondary or relatively unimportant objectives.

The years of experience in implementing these types of programs have brought a maturity and capacity to the state and local level that must be acknowledged and appreciated. The shift in priorities has presented the states with an opportunity to recast national water policy relationships with a stronger state role. The states and local government and federal project sponsors feel they have earned the right to be treated on a par with their federal counterparts. The intent is not to foster a radical and uncontrolled swing in the pendulum that current fiscal and policy trends might suggest, but to bring a more balanced and equitable perspective to national water policy deliberations.

FINANCING OF WATER PROJECTS AND PROGRAMS

The decentralization of responsibility is leading to more local financing, which in turn is forging new political alignments that could eventually pose a real challenge to the fabled "iron triangle." As tax-based funding for water resources becomes harder to secure, water management institutions are having to discover new ways to pay the costs of services demanded on an increasingly market-oriented basis. This was an idea put forth by the Hoover Commission—whose time, it would appear, has finally come.

The switch in financial burden for water programs and projects is forcing the public officials to rediscover who the "customer" is. Water managers are having to overcome the perspective, fostered during Teddy Roosevelt's era, that people need not take direct responsibility for water policy—that they can and should continue to leave matters in the hands

of the "technical experts."⁹ This view is increasingly out-of-sync with the new demands that the public is placing on government. The public is finding new ways to reassert itself and remind public officials that it is the taxpayers who should inevitably decide the future disposition of the nation's water. The wisdom of Thomas Jefferson is instructive. If people aren't enlightened, the remedy is not to take the decision away from them, but to inform their discretion. The principal responsibility for water management no longer need be vested in the hands of a few highly trained professionals. Instead, each facet of society is developing its own management capacity and is eager to share responsibility for making decisions about how, when and where water is used.¹⁰

In summary, as one nationally renowned expert phrased it—"the states are now the driving force in water resources innovation with the federal government floundering to define its role and mission."¹¹ Perspectives such as this are shaking the foundations of intergovernmental relations in water. The result has been that some rather penetrating questions have been raised and remain unaddressed: "What is the fundamental role of the states in water resources within a federal system of governance?"; "How do we build a balanced federal-state model in national water policy?"; and "What vital functions do the federal government perform or need to perform to be strengthened?"

The painful, haphazard, and seemingly unattended process of realigning respective state and federal roles appears to be, therefore, a major part of the intergovernmental problem. This process problem has been most salient among state water managers, in general, and those from the western states especially, along with their governors where water allocation has been historically and increasingly problematic.

THE INTERSTATE CONFERENCE ON WATER POLICY INITIATIVE

The changes in national water policy cited above have engendered a renewed search for mechanisms to help sort through, ameliorate, and equitably resolve attendant intergovernmental disputes. The problem of intergovernmental coordination is not new. The issue has been on the federal water policy agenda since the early 1900s. Coordination has been a key issue for the members of the Interstate Conference on Water Policy (ICWP) since its inception, and particularly during deliberations over the Water Resources Planning Act of 1965. During the mark up of that bill, ICWP strongly favored a state-federal coordination mechanism. The or-

9. S. Hays, *Conservation And The Gospel Of Efficiency: The Progressive Conservation Movement 1890-1920*, p. 267 (1958).

10. Olsenius, *New Approaches To Sub-State and Interstate Regional Entities*, in *Water Resources Planning and Management in the United States Federal System*, *supra* note 8, at 121.

11. *Redefining National Water Policy: New Roles and Directions 6* (S. Born ed. 1989) (American Water Resources Association).

ganization wanted the proposed river basin commissions to be, in principle, state-federal commissions, rather than federal entities with state officials as invited guests.¹²

This objective has not changed much over the past quarter century, but the chorus calling for change is growing louder and more urgent all the time. The Western Governors Conference White Paper, as well as recent reports by the Engineering Foundation and Harvard University, call for this kind of reform.

The focus of the Interstate Conference on Water Policy, Washington, D.C. Seminar in February 1990 was an attempt to bring renewed national attention to the need for bridging intergovernmental gaps and helping streamline water management efforts at every level. Over 50 members of state and local governments engaged in water management met with almost an equal number of leaders from the executive branch and Congress to explore ways of resolving these problems. Feedback from the participants working in small groups at the D.C. Seminar gave overwhelming support to the conclusion advanced in the ICWP Concept Paper. "The need existed for a national forum to coordinate intergovernmental and interagency actions and provide more efficient and equitable water policy to the nation."¹³ The key phrase that emerged from the small group discussions was "reality check"—meaning that current and proposed water resource programs and policies needed to be reviewed so that they reflect the reality of managing water resources in a fragmented system based on intergovernmental and interagency dependency.

NATIONAL WATER POLICY IMPERATIVES

The resuscitation of the historic, federally dominated national water policy is the last thing that is needed.¹⁴ That may have worked when issues were defined along traditional functional lines, or in terms of a technological fix. It is unsuited for the era in which the orientation must be based more on multiple interests, equity, and systems level perspective. Under current conditions, a comprehensive and cohesive national water policy may be unlikely or too much to hope for, and admittedly, collaboration cannot be imposed by some overarching plan or process.¹⁵ However, intergovernmental relations in water will require a more results-oriented ethic.

Obviously, a new ethos among national water policy makers and managers is unlikely to spring forth, born of "whole cloth." It will require

12. Caulfield, *Fulfilling the Promises of the Water Resources Planning Act*, in *Water Resources Planning and Management in the United States Federal System*, *supra* note 8, at 89.

13. *Toward National Water Policy Coordination: the Challenge of Improving Intergovernmental Relations*, 3 (Feb. 1990) (Interstate Conference On Water Policy, Washington, D.C.).

14. S. Born, *supra* note 11, at 6.

15. Wilson, *Do the States Need the Federal Government*, in *Water Resources Planning and Management in the United States Federal System*, *supra* note 8, at 100.

a soul searching endeavor by water resource managers on a decision-by-decision basis; discovering the common values of their counterparts in other agencies and governments and inventing ways to convert zero sum games into win/win decisions based on a broader and more integrative perspective of gain. Hopefully increasing pressure on the water resources of the nation, coupled with the increased scarcity of fiscal resources will create an atmosphere more conducive for collaboration to evolve. Right now there are far too few mechanisms in place that provide opportunities for developing shared vision and resolving intergovernmental and inter-agency disputes.

A President's Council on Water is just one reform of many that needs thorough consideration. Forging a strong, effective intergovernmental alliance won't be easy. It will be a major undertaking that will require substantial time, commitment, and statesmanship from all involved. It may also necessitate some restructuring through legislative action. State and federal roles and responsibilities need to be realigned based on the best assessment of their comparative strengths and weaknesses. Also, their institutional competencies and documented capacity to achieve desired results should be among the principal yardsticks used to build a more efficient, effective intergovernmental working relationship. In addition, new ways must be envisioned for multiple governments and agencies to work collaboratively in policy areas that are "greater-than-local," "problemshd," or "systems level" in perspective and design. Once formed, such structures must support rather than frustrate or impede the water resource solutions which can protect and preserve our nation in the future.

To date, the President, Congress, and the states collectively have not stepped forward to fill the leadership vacuum. The water managers of the nation may be in the best position to step into the breach. That will necessitate taking a unified stand on some fundamental questions. What kind of legacy will be left to the next generation? Will they be victims of water and environmentally related institutions that simply do not work effectively toward the common goal of resource protection? Will they inherit dysfunctional policies and procedures that the current generation of water managers choose to endure in silence rather than to confront through emergent patterns of collaboration?

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