

Metropolitan's existing supplies less reliable and developing new supplies much more difficult. Metropolitan lost the dependability associated with over half of its Colorado River supply with the Arizona v. California litigation with the commencement of operation of the Central Arizona Project. The State Water Project can only deliver one-half of the water that the State contracted to deliver as additional reservoirs and facilities to transfer water from the Sacramento River to the California Aqueduct have not been constructed in northern California. Considerable uncertainty has arisen concerning the reliability of the supply to the City of Los Angeles from the Owens Valley and Mono Basin as a result of litigation. Finally, groundwater contamination has been found locally.

More efficient use of the water resources available to Southern California has been the focus over the last ten years for meeting urban water needs. Metropolitan is a signatory to a memorandum of understanding that commits urban water agencies in California to a series of best management water conservation practices. In 1992-93, Metropolitan has budgeted \$21 million to implement water conservation programs. For a number of years, Metropolitan has provided financial incentives for wastewater reclamation. Southern California is now reclaiming nearly 300,000 acre-feet of wastewater per year. Metropolitan also furnishes financial incentives for the recovery of brackish and contaminated groundwater. Through seasonal pricing of water, Metropolitan encourages storage of water in local groundwater basins in off-peak demand periods. An offstream storage reservoir to regulate the delivery of water for later

storage in groundwater basins is now in the design stage.

With respect to Colorado River supplies, Metropolitan is funding the costs of a water conservation program being undertaken by the Imperial Irrigation District to improve the efficiency of its distribution of water and the on-farm management of water. In return, Metropolitan is receiving the use of the water conserved. In 1992, Metropolitan and the Palo Verde Irrigation District undertook a test land fallowing program in the Palo Verde Valley along the Colorado River. In return for financial compensation, the water saved by foregoing Irrigation is being made available to Metropolitan.

There continues to be great uncertainty regarding the water supply available from the State Water Project. Endangered species issues are beginning to impact operation of the project. The winter run salmon has been listed as a threatened species. Fortunately, the Governor's Drought Emergency Water Bank assisted in reducing the impacts of the drought in 1991 by acquiring water through land fallowing, groundwater pumping, and from surface water storage facilities for sale to those agencies with critical water needs.

All of these strategies emphasizing more efficient use will continue to be important in managing California's water resources in the immediate future as construction of some new facilities will take ten to 15 years. With 80 percent of California's developed water utilized by agriculture, opportunities abound for urban and rural areas to work together on water transfers.

AN ANALYSIS OF COLORADO AND FEDERAL LAW IN CONTRAST TO THE "REPORT OF THE LONG'S PEAK WORKING GROUP"

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(NOTE: The following analysis of the Long's Peak Report, as contrasted with Colorado and federal law on key water matters, was prepared by Greg Hobbs for submission to Members of the Senate and House Agriculture and Natural Resources Committees prior to their February 17, 1993, meeting to discuss the Long's Peak Report.)

- I. Colorado Law. Water Subject to Appropriation By the People of Colorado. *"All water in or tributary to natural surface streams...originating in or flowing into this state have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with sections 5 and 6 of Article XVI of the State Constitution ..."* C.R.S. 37-92-102.

Federal Law. Since 1866, water allocation and use has been subject to state law. *"Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized by local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."* 43 U.S.C. 661 (Mining Act of 1866).

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

- II. Colorado Law. Water Rights Are Property Rights. *"A water right is a property right."* (Weibert v. Rothe Brothers, 618 P. 2d 1367, 1371 (Colo. 1980).

Federal Law. Property rights are protected under the Fifth Amendment of the United States Constitution Against Regulatory Takings. "...nor shall private property be taken for public use, without just compensation." Fifth Amendment, U.S. Constitution.

Long's Peak Report. "The Administration should support legislation to expand agency authority and revise project purposes where necessary." (Recommendation 11, Long's Peak Report.) "Where a transition from old to new values demands reallocation of water from existing uses, the equities of people with existing uses established under lawful prior policies should be respected." Long's Peak Report, P. 6.

- III. Colorado Law. Instream flows are to be appropriated by the Colorado Water Conservation Board in priority for protection of the environment to a reasonable degree. "Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado Water Conservation Board is hereby vested with the exclusive authority, on behalf of the people of the State of Colorado, to appropriate in a manner consistent with Sections 5 and 6 of Article XVI of the State Constitution, such waters of natural streams and lakes as the Board determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree." C.R.S. 37-92-102 (3).

Federal Law. Federal forest land reservations do not establish a water right in the federal government for instream flows for fish, wildlife, recreational or esthetic purposes outside of state law. "All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder." 16 U.S.C. 481 (1897 National Forest Organic Act).

"Not only is the Government's claim that Congress intended to reserve water for recreation and wildlife preservation inconsistent with Congress' failure to recognize these goals as purposes of the national forests, it would defeat the very purpose for which Congress did create the national forest system. The water that would be 'insured' by preservation of the forest was to 'be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder.' Organic Administration Act of 1897, 30 Stat. 36, 16 U.S.C. 481 (1976 ed.). As this provision and its legislative history evidence, Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West. The government, however, would have us now believe that Congress intended to partially defeat this goal by reserving significant amounts of water for purposes quite inconsistent with this goal." United States v. New Mexico. 438 U.S. 696, 713 (1978).

Long's Peak Report. The Departments of Interior and Agriculture should assert instream flows on federal lands and use their regulatory permit authority to impose them. "The Departments of Interior and Agriculture should assert rights to instream flows for federal lands and encourage states to adopt and strengthen instream flow programs by using authority to grant or withhold federal funds and federal permit approvals." Recommendation 38, Long's Peak Report.

- IV. Colorado Law. Water quality regulation should support making beneficial use of Colorado's water and the development of Colorado's interstate compact entitlements. "In order to foster the health, welfare, and safety of the inhabitants of the State of Colorado, and to facilitate the enjoyment and use of the scenic and natural resources of the State, it is declared to be the policy of this State to prevent injury to beneficial uses made of State waters, to maximize the beneficial uses of water, and to develop waters to which Colorado and its citizens are entitled and, within this context, to achieve the maximum practical degree of water quality in the waters of the State consistent with the welfare of the State." C.R.S. 25-8-102(1).

Water rights shall not be abrogated, superseded or impaired by water quality regulation. "No provision of this article shall be interpreted so as to supersede, abrogate, or impair rights to divert water and apply water to beneficial uses in accordance with the provisions of Sections 5 and 6 of Article XVI of the Constitution of the State of Colorado, compacts entered into by the State of Colorado, or the provisions of Article 80 to 93 of Title 37, C.R.S., or Colorado court determinations with respect to the determination and administration of water rights." C.R.S. 25-8-104.

Federal Law. Federal water quality programs under the Clean Water Act shall not supersede or abrogate State water law or impair water rights. "It is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." 33 U.S.C. 1251(g).

Long's Peak Report. The Federal Clean Water Act should be utilized to impose instream flow requirements. "The Administration

should support and work with Congress to reauthorize and strengthen the Clean Water Act to: Keep clean water clean by protecting and restoring instream flows and other aquatic ecosystems, encouraging integrated watershed planning and management, promoting water conservation, and protecting pristine waters." Recommendation 44(e), Long's Peak Report.

- V. Colorado Law. Colorado is a party to nine interstate water allocation compacts. *Animas-La Plata Project Compact, 82 Stat. 885 (1968); Amended Costilla Creek Compact, 77 Stat. 350 (1963); Arkansas River Compact, 63 Stat. 145 (1949); Upper Colorado River Compact, 63 Stat. 31 (1949); Republican River Compact, 57 Stat. 861 (1943); Rio Grande River Compact, 53 Stat. 785 (1939); South Platte River Compact, 44 Stat. 195 (1926); La Plata River Compact, 43 Stat. 796 (1925); Colorado River Compact, 42 Stat. 171 (1921).*

Federal Law. Under the compact clause of the United States Constitution, Congress ratified the nine interstate compacts to which Colorado is a party. California and Arizona have developed their compact entitlements with the assistance of federal funds under the Boulder Canyon Project Act and the Colorado River Basin Project Act. The Animas-La Plata Project and other projects were promised to Colorado, along with other projects in the 1968 Act, in return for the Central Arizona Project.

Construction to be concurrent with Central Arizona Project construction. "The Secretary is directed to proceed as nearly as practicable with the construction of the Animas-La Plata, Dolores, Dallas Creek, West Divide, and San Miguel participating federal reclamation projects concurrently with the construction of the Central Arizona Project, to the end that such projects shall be completed not later than the date of the first delivery of water from said Central Arizona Project." Section 501(b), Colorado River Basin Project Act, 43 U.S.C. 1501.

Long's Peak Report. Development of additional water supplies should be severely limited by economic and environmental considerations, and reallocation of existing water supplies should be preferred. *"Economics will dramatically limit the development of new water supplies. New projects should be planned and authorized by Congress only to meet the highest priority needs. The Administration should treat environmental quality as equivalent to regional economic development in applying the Principles and Guidelines. Modifications to existing projects should be considered by the appropriate agency and Congress only after the existing project has been reevaluated in light of new needs and water conservation objectives. Reallocation of existing supplies should be preferred as an alternative to new storage."* Recommendation 30, Long's Peak Report.

Colorado Law. Return flows from irrigated agriculture do not require federal point source discharge permits. *"Point source' does not include irrigation return flow."* C.R.S. 25-8-103(14).

Federal Law. Return flows from irrigated agriculture do not require federal point source discharge permits. *"The term 'point source' means any discernible, confined and discrete conveyance, including, but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture."* 33 U.S.C. 1362(14).

Long's Peak Report. Federal point source discharge permits should be required for irrigation return flows. *"End the agricultural exemption from the National Pollutant Discharge Elimination System (NPDES) permit program in non-compliance areas."* Recommendation 44(o), Long's Peak Report.

- VII. Colorado Law. Dams do not require federal point source discharge permits. *"Activities such as diversion, carriage, and exchange of water from or into streams, lakes, reservoirs, or conveyance structures, or storage of water in or the release of water from lakes, reservoirs, or conveyance structures, in the exercise of water rights shall not be considered to be point source discharges of pollution under this article."* C.R.S. 25-8-503(5).

Federal Law. Dams do not require federal point source discharge permits. *"In addition to our general doubts, expressed above, about how heavily to rely on the broad goals of the Act, we find specific indication in the Act that Congress did not want to interfere any more than necessary with State water management, of which dams are an important component. Section 101(g), 33 U.S.C. 1251(g) states: 'It is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this [Act].' In light of its intent to minimize federal control over state decisions on water quantity, Congress might also, if confronted with the issue, have decided to leave control of dams insofar as they affect water quality to the states. Such a policy would reduce federal/state friction, and would permit states to develop integrated water management plans that address both quality and quantity."* National Wildlife Federation v. Gorsuch, 693 F.2d. 156 (D.C. Cir. 1982).

Longs Peak Report. Federal point source discharge permits should be required for dams. *"Subject discharges from large dams creating water quality problems to NPDES permit requirements."* Recommendation 44(c), Long's Peak Report.