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Greener and More Equitable: A Vision for Dams and Other Western Water Issues

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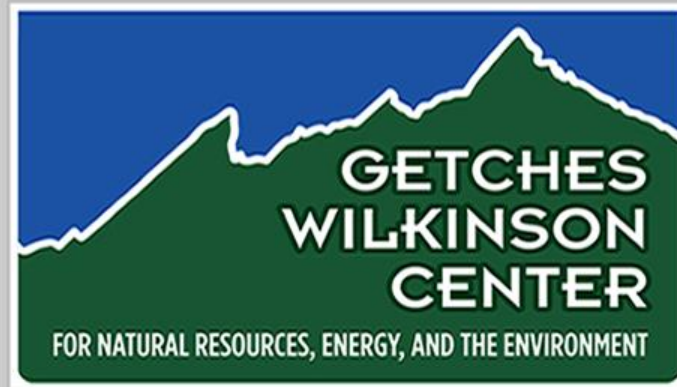
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**GREENER AND MORE EQUITABLE:
A VISION FOR DAMS
AND OTHER WESTERN WATER ISSUES**

By
Bruce C. Driver

DAMS: Water and Power in the New West

June 2-4, 1997

Natural Resources Law Center
University of Colorado
School of Law
Boulder, Colorado

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I. Summary

The West's water problems are not truly problems of an insufficiency of water supply but mostly of unresolved legal and institutional issues, among them: how to put more water in the stream without injuring existing consumptive users; how to finance new small water facilities and mitigate aquatic environmental damage without relying on the federal government; and how to provide water or money to the tribes in a way that works for other users and the environment. The West will solve these problems collegially, if not without rancor, mostly on a watershed basis, when we realize that the solutions must be worked out here and not through federal-agency proxies.

II. Trends, factors and assumptions to provide a context for a "vision" for western water:

- A. The West's population will continue to grow: The intermountain region has been the fastest growing region of the U.S. In recent years Colorado, Nevada, Arizona, New Mexico and Utah are all in the top seven fastest-growing states. California is again growing. Growth rates will remain high.
- B. The value of water for environmental uses will also continue to grow: The new people moving here need water for M&I uses and want water to be used consistently with protection of natural systems, even while they do not want to harm existing irrigation economies.
- C. There is virtually no "unused" surface water in the West:
 - 1. Even where streams may have "unappropriated" water running in them, this water is being used to sustain natural systems or for other purposes downstream.

2. Example of the proposed Union Park Project in the Upper Gunnison River Basin. Whether there is or is not unappropriated water in the Basin is not really the point: Virtually all the water is in use for some purpose.
- D. In some states, there is an over-reliance on the federal government for the protection of environmental values in water:
1. Some states do not consider environmental values in water at the water rights or water rights transfer stage. The result is to throw some of the burden to protect the environment to federal agencies.
 2. Notwithstanding its instream flow program, Colorado is a good example of over-reliance on the feds for this purpose. The Two Forks Project is a past example. The Union Park Project is another example in the making. See In re Board of County Commissioners, 891 P.2d 952 (Colo. 1995). This case suggests that impact on the environment is not relevant to the adjudication of an application for a conditional water right. Briefs of counsel representing water developers told the Colorado Supreme Court in this case that the state may rely on federal agencies to protect the environment.
- E. The relative value of water for electricity production is declining in the West. Key reasons for this are:
1. Low natural gas prices and new, highly efficient ways of burning natural gas to generate power.
 2. An open electric transmission grid, now capable of transporting cheap power to almost any place from almost anywhere on the western grid. See FERC Order No. 888, 1996.
 3. The need to re-operate facilities away from generating primarily peaking power in order

to protect environmental and recreational values. See Operation of Glen Canyon Dam, Final Environmental Impact Statement, March, 1995, U.S. Department of Interior, Bureau of Reclamation.

- F. Pressure to sell or otherwise "defederalize" federal water and power assets will grow, presenting both problems and opportunities:
1. Status of congressional attention to wide-scale defederalization. Legislation to direct the broad sale of facilities used to generate and transmit energy marketed by the federal power marketing administrations (PMAs) has languished but will not go away.
 2. Congress has considered and will continue to consider the transfer of individual water and power projects, some small, some large. 105th Congress examples:
 - a. Oroville-Tonasket Irrigation Project (WA) transfer: SUE THE BUREAU AND GET A RECLAMATION PROJECT FOR FREE!
 - b. Collbran Project (CO) transfer: The issues include endangered fish recovery; growth in the Grand Valley; compliance of the transfer with federal environmental laws; and terms and conditions for the FERC license under which the two power plants will be operated.
 3. Environmental statement of principles (attached). Nine local, regional and national environmental organizations agree to a statement of principles regarding the transfer to non-federal interests of federal water and power facilities. The core principle is that, to gain our support, the transfer must enhance the environment. And why not? The road to environmental mitigation at the dams is less direct once a project is in non-federal hands and non-federal interests usually benefit greatly from the transfer to them of federal water and power facilities. Non-federal interests should be willing to pass some

of that value back to the taxpayer, who after all financed the construction of the facilities, especially when the taxpayer may well have to pay for environmental mitigation.

- G. It's been at least two decades since the feds have been a reliable source of capital for new water projects, even while they have supported investment in water quality improvement.
- H. Water resource management is evolving to be less top-down and more attentive to finding solutions that are winners for all regional and local interests.
- I. Tribal water rights claims will not go away.
- J. Non-point source pollution remains a significant problem.

III. Given the foregoing, here is a seat-of-the pants "vision" of water management and development in the West in the year 2015:

- A. There will be full integration of environmental values into western state water law and policies. This will enable us to make our own decisions instead of, as both sides do now, rely on federal agencies.
- B. The effect of full integration of environmental values into western state water law will be to put and keep more water in the stream for fish and wildlife and recreation.
- C. Water will slowly move away from irrigation, but we shall find ways to compensate rather than "take" the water from irrigators. Public/private watershed or even river basin trusts are one way to fund the acquisition of water from irrigation for instream flows as well as for other mitigation purposes.
- D. The trusts will be funded by a mix of sources:

1. A surcharge on power rates from "below-market" hydro-facilities;
 2. Tax incentives for individuals and businesses to contribute to the mitigation trust; and
 3. State and federal shares.
- E. Many small and even some large federal water and power facilities will have passed into non-federal hands by sale or by lease, but only under conditions that enhance the environment and clean up other problems at these facilities, including financial problems. The new owners will operate these facilities pursuant to system-specific plans that are, at least in effect, approved by Congress. There will still be a federal role in the operation of any large projects that are transferred to non-federal owners.
- F. The West will finally address the issue of meeting tribal water rights, including by establishing that undeveloped tribal water rights may be marketed interstate.
- G. There will be more watershed and even basin water management with local, state and regional stakeholders of all kinds, including the tribes, involved from the beginning. Who makes final operating decisions will still be the subject of dispute.
- H. There will have been no new large water storage facilities built by anyone in the West, least of all the federal government, except where such development will clearly enhance the environment.
- I. Non-point source pollution will be brought under effective control.
- J. Water quality and regulation will become an equal partner with quantity.

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August 29, 1996

Statement of Principles for the transfer of federal water and power facilities and related assets to non-federal interests:

Congress and the Administration are considering proposals to transfer federal entities. These transfers could have detrimental impacts on the environment and other interests. Such transfers, however, can provide opportunities to mitigate past environmental damage and otherwise enhance the environment and provide continuing protection of other public interests, as follows:

1. Fair Price The federal taxpayer is entitled to a fair price for any facilities or assets transferred, one that should be set in light of the market value of the facilities. At a minimum, no federal water or power facility should be transferred for a price less than the present value of all associated outstanding repayment obligations, irrespective of adjustments or of the allocation of facility or asset costs among different uses. In addition, the value of any land or other non-water or non-power assets transferred, as well as the present value of any other anticipated receipts to the U.S. Treasury, should either be added to the minimum price or, preferably, reflected in environmental improvements, including ecologically beneficial land given by the transferee, determined as a result of sections 4 and 5 below.

2. Federal Control Some federal water and power facilities play a critical role in watershed and river management for multiple purposes or in the interstate or international allocation of resources. Control of these facilities should be retained by the federal government.

3. Compliance with Environmental Laws All transfers should comply with the National Environmental Policy Act, Endangered Species Act, and other federal environmental laws. All transferred facilities should operate in full compliance with such laws.

4. Facility-specific Transfer Plans Transfers should be carried out only pursuant to facility-specific plans developed by the applicable federal agencies with the input of all stakeholders. The plans should contain minimum terms and conditions that will require transferees to:

- c. protect existing water resource values that could be affected by the transfer;
- d. mitigate environmental damage, including damage to fish and wildlife, and otherwise

- enhance the environment;
- e. promote the protection and restoration of threatened and endangered species, through measures which may include development and implementation of a habitat conservation plan;
 - f. use any power generation or transmission facilities consistently with national energy policy, especially to support non-hydroelectric renewable resources; and
 - g. avoid adverse impacts on the federal government's ability to fulfill its treaty and trust responsibilities to Indian tribes.

5. Competitive Bidding Once the above minimum terms and conditions are established, the choice of a transferee and the final transfer price should be made on the basis of bids obtained competitively, in which both price and non-price terms are evaluated.

6. FERC License Facility-specific transfer plans which include hydroelectric facilities must be incorporated into a special, one-time, temporary FERC license, which should be enforceable as if it were a conventional FERC license. Upon expiration of the special license, a transferee must obtain and operate facilities pursuant to a FERC license issued under the Federal Power Act and other laws applicable to non-federal hydropower facilities, without waiver.

7. Public Oversight There should be full disclosure of and access to all information material to a full and fair evaluation of the any transfer proposal. Appropriate mechanisms for ongoing public oversight of any transferred facilities must be provided so as to assure compliance with the terms and conditions of the transfer.

8. Impact on the Federal Budget For federal budgetary purposes, net transfer proceeds should reflect both the total receipts from the transfer as well as the total expected revenues foregone by the U.S. Treasury, using the same time periods and discount rates for each revenue stream.

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