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SPECIAL WATER DISTRICTS: THEIR ROLE IN WESTERN WATER USE

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**Natural Resources Law Center
University of Colorado
School of Law**

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I. Introduction

A. Importance: Special water districts [hereinafter water districts] are among the most important type of state political subdivision particularly in the West where more than 95% of the approximately 1000 water districts are located.¹ Even though water districts only comprise about 10% of the public and private organizations which deliver water for irrigation in the west, they distribute about 50% of the total.² Moreover, both the total acreage irrigated and the total population served by special water districts has steadily increased since 1920.³

B. Visibility: Despite their relative importance as water management institutions, relatively little is known about water districts except on a case by case basis for those districts involved in public controversy or litigation. Systematic evaluation of district performance is inhibited by lack of an adequate database both within and between states, disinterest by researchers, and less obviously, the incredible diversity of water district functions, structures, and statutory powers.⁴ A number of recent studies have begun to both further our understanding of water districts and to suggest various reforms.⁵

C. Evolution: The relative anonymity of water district operations is quickly disappearing due to a number of factors. Withdrawal of federal funding to support the

¹. J. Leshy, "Special Water Districts - The Historical Background," in J. Corbridge ed. **Special Water Districts: Challenge for the Future**, [hereinafter Corbridge] Boulder, Co: U. of Colo, Natural Resources Law Center 1985, 11-30.1984 .

². Id. at 13.

³. Id. at 13-14.

⁴. T. De Young, "Discretion Versus Accountability: The Case of Special Water Districts," at 34-37 in Corbridge, *supra* note 1.

⁵. See, 1982 Arizona State Law Journal 345-527 [hereinafter ASLJ]; Corbridge, *supra* note 1; B. Driver, Water Efficiency Program Report, (Western Governors' Association - forthcoming); C. Hobbs, **The Special Districts of California**, Sacramento, CA: The Association of Calif. Water Agencies, April 1979; Robert B. Hawkins, **Self Government by Special District**, Stanford, Ca: Hoover Institute Press, 1976; Don L. Bowen, **Special District Government in Arizona**, Tucson, AZ: U. of AZ. Press, 1982; For an earlier treatment, see J. Bollens, **Special District Governments in the United States**, Berkeley, CA: U. of Cal. Press, 1957.

construction of water storage projects as well as other water infrastructure requirements has caused considerable concern in the west. As water districts turn to the private bond market or to the states to raise needed funds, the institutional and financial viability of these entities is being subjected to close scrutiny. Investors are likely to raise questions about district organization and management, their financial accountability, and their relationship to other water entities in their geographic area.

D. Purpose: The purpose of this presentation is to first review sources of discontent related to water districts followed by an evaluation of recent trends and proposals for reform. Special consideration is given to improving water use efficiencies either through removing or modifying district restrictions on water reallocation or improving operating efficiencies within districts.

II. Challenges to Water Management by Special District

A. Districts as Uncooperative Members of the Intergovernmental Community. In a series of reports on special districts, the Advisory Commission on Intergovernmental Relations concluded that special districts tend to create intergovernmental problems, distort political processes, and lead to the inefficient delivery of services through duplication of services and problems in coordination with other units of governments.⁶ These problems are especially evident in urban areas. Traditionally, water districts served relatively homogeneous rural constituencies. Rapid urbanization throughout the west has contributed to a situation where roughly 50% of all western water districts are found within Standard Metropolitan Statistical Areas.⁷ And rural districts face challenges from thirsty municipal and industrial users who increasingly covet water used in agriculture.⁸ Water districts therefore find themselves in a complex intergovernmental environment

⁶. American Commission on Intergovernmental Relations, [hereinafter ACIR] **State and Local Roles in the Federal System**, (Report A-88), Washington, DC: USGPO April, 1982; ACIR, **The Problem of Special Districts in American Government**, (Report a-22) 1964; ACIR, **Striking a Better Balance**, (Report A-45), 1973; ACIR, **ACIR State Legislative Program**, (Report M-94), 1975 at 114-17.

⁷. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1977 **Census of Governments, No. 2, Finances of Special Districts** 1.

⁸. J. Folk-Williams, Susan Fry, and Lucy Hilgendorf, **Western Water Flows to the Cities**, Santa Fe, NM: Western Network, 1985.

characterized by change and pressure.

1. **Demands for Increased Oversight:** The relatively large failure rate of early water districts led to state regulation of district financial activities.⁹ Occasional abuses including fraud, embezzlement, and misappropriation of public monies by a few water districts over the years has contributed to fuller regulation of all districts in a number of states.¹⁰ More recently, most states have begun to integrate and centralize water management and planning.¹¹ State audit and review of water district fiscal, hydrologic, and other transactions consequently has increased.

B. Districts as Undemocratic Governments. Even though water districts are political subdivisions of the state, they are not creatures of state government nor do they provide the range of services commonly associated with local government. A review of the hodgepodge of water district laws suggests they are strictly tailored to the needs and desires of a narrow band of local interests. A trend has been toward acreage based voting which tends to concentrate control in agricultural hands and in some areas, larger landowners.¹²

1. **Legal challenges to water districts'** provisions for voting and participation in district affairs have appeared. The cases stem from the relatively common practice of restricting voting to landowners and to a lesser extent, weighting votes in direct proportion to economic investment, e.g., one vote per acre.¹³ In Ball v. James, 451 U.S. 355 (1981), the U.S. Supreme Court generally exempted water districts from the one-person, one vote principle.

2. Despite federal court rulings, state courts

⁹. L. Benson, "Desert Survival: The Evolving Western Irrigation District," *ASLJ*, supra note 5 at 397-400.

¹⁰. See Corbridge, supra note 1 at 43-44.

¹¹. U.S. Water Resources Council, *State of the States: Water Resources Planning and Management*, Washington, DC: USGPO, 1982; Terry D. Edgmon and Tim De Young, "State Models of Water Resources Administration," in John G. Frances and Richard Ganzel, eds., *Western Public Lands and Natural Resources*, Montclair, NJ: Allanheld, Osmun, and Co., 1985.

¹² See M. Goodall, J. Sullivan, and T. De Young, *California Water: A New Political Economy*, (1978); M. Goodall and J. Sullivan, "Water System Entities in California: Social and Environmental Effects," in Corbridge, 51-71.

¹³. See generally, T. De Young, "Governing Special Districts: The Conflict Between Voting Rights and Property Privileges," in *ASLJ*, supra note 5.

or legislatures may reach contrary conclusions in order to reduce the amount of political insularity traditionally afforded to water districts.

CASE A.1.: In New Mexico's Middle Rio Grande Conservancy District, for example, the state legislature amended the district's enabling legislation so that board members are now elected by district landowners on a one person, one vote basis instead of appointed by district courts.¹⁴

CASE A.2.: In Utah, members of the governing boards of conservancy districts are now appointed by the Governor from nominees submitted by affected cities and counties as opposed to judicial appointment.¹⁵

B. Districts as Artificial Obstacles to Efficiency: Water districts increasingly are criticized for their role in the inefficient use of water.¹⁶ Inefficiencies are both internal and external to water districts.

1. **Internal inefficiencies** are the result of past and present district policy decisions. Traditionally, water has been priced artificially low in reclamation and analogous state programs as a form of agricultural subsidy. The primary vehicle for revenue generation in water districts is taxation, not user fees. Levy assessments, usually related to landownership, are generally used to repay long-term capital expenditures whereas water tolls are used to cover the variable costs of providing services. Water tolls tend to be low in water districts which hold rights to water (and therefore do not have to pay unit costs) and in districts that provide other benefits, e.g., flood protection, not directly related to water use. The reliance upon levy assessments allows for costs to be distributed over the entire population giving agricultural users a substantial subsidy.¹⁷ In consequence, the price of water is reflective of district financial obligations and/or political preferences rather than the economic value of the resource. Agricultural subsidies both reduce the incentive to conserve water and increase the demand for water supply projects. In addition, many districts do not meter water nor allow for

¹⁴ T. De Young, "Searching for the Milagro Beanfield: The Politics of Surface Water Management in New Mexico," *Public Service*, Vol. 8, No. 1 (1981) at 6.

¹⁵ Corbridge, *supra* note 1 at 26.

¹⁶ See D. Lee, *Political Provision of Water: An Economic/Public Choice Perspective* in Corbridge 51-70; B. Gardner, "Institutional Impediments to Efficient Water Allocation," *Policy Studies Review*, Vol. 5, No. 2: 353-65.

¹⁷ La Veen and Stavins, *op. cit.*, at 31.

internal transfers of water entitlements which further impedes efficient allocation within districts.

CASE B.1.1.: New Mexico's Middle Rio Grande Conservancy District provides flood control and irrigation services to an rapidly urbanizing area which includes Albuquerque, the state's largest city.¹⁸ The proportion of irrigable acreage has declined from about 46 % in 1930 when the district was formed, to about 21 % in 1980. A continuing source of controversy is the district's levy assessment policies. "A" lands, irrigable parcels of one acre or larger, are charged a fixed per acre fee irrespective of assessed valuation or amount of water consumed. (No water tolls are assessed.) "B" lands, non-irrigated lands benefitted by district drainage and flood control services, are assessed an *ad valorem* levy that is collected by the counties in the district. For a number of years, the district kept "A" land charges extremely low so that "B" land levies provided most of the district's revenues. In response to complaints in the late 1970s, the district adopted a 75/25 cost apportionment policy for "B" and "A" lands. Requiring further pricing revisions has been proposed but not adopted in each session of the State Legislature during the 1980s.

2. External or societal inefficiencies in water use are caused in part by water district rules, federal reclamation law, and state water law restrictions on transfers of waters between jurisdictions.¹⁹ Transferring water out of water districts is difficult due to uncertainty about ownership,²⁰ appurtenancy requirements in some states where water and land rights cannot be severed, opposition by districts where transfer of water may impair the ability of remaining users to meet district financial obligations, and situations where administrative approval (district or state level) is a prerequisite for transfers.²¹ More generally, water districts superimpose a system of discretionary administrative law which impedes the movement of water outside of their jurisdiction.

CASE B.2.1: Under Arizona law, irrigation districts, agricultural improvement districts, and water user associations may veto any water transfer both within their jurisdiction and the drainage basin of operation.²²

¹⁸ This case is based on my research which appears in "Searching for the Milagro Beanfield," *supra* note 10.

¹⁹ See C. Meyers and D. Tarlock, *Water Resource Management*, Mineola, NY: Foundation Press, 1979 at Chapter III.

²⁰ Corbridge, *supra* note 1 at 24.

²¹ B. Gardner, *op. cit.* at 359-60.

²² Ariz. Rev. Stat. Ann. S 45-172 (5); See L. Mac Donnell,

C. Districts as Threats to the Environment. Districts have been criticized for their role in creating or ignoring environmental degradation. Environmental problems result when a water district is singularly concerned with providing water to irrigable lands. Traditionally, water supply projects have modified the appearance, ecology, and access opportunities of riparian habitats. More recently, environmental pollution due to agricultural runoff has emerged as a major problem in many locales. Responding to demands for environmental protection, recreational access, and related uses are relatively new challenges which confront many water districts.

CASE C.1.: In an April 1, 1986 suit, the Friends of the Earth have charged that Glenwood Springs' Colo. Water Cons. District has violated Colorado's open record law for not allowing access to his files on endangered species. Says Albrecht of FOE: "These tax-supported water barons are not elected and their arrogance is beyond belief."²³

CASE C.2.: Agricultural waste water contaminated with high levels of selenium and other toxics originating in California's Westlands Water District poisoned livestock and migratory waterfowl in and near the Kesterson Wildlife Refuge. Westlands was able to negotiate an agreement with the Department of the Interior which allowed irrigation and drainage discharge until June 30, 1986. This case may have political and financial implications for water districts throughout the West.

III. Understanding Special Districts: Prerequisite to Reform

A. Water Districts Are Public Organizations. Unlike private entities, public organizations are characterized by their tendency to pursue complex, multiple objectives. Moreover, they may pursue intangible and inherently conflictual goals.²⁴

1. Security and control over water resources

C. Howe, J. Corbridge, and W. Ahrens, "Guidelines for Developing Area-of-Origin Compensation," (Ft. Collins: Colorado Water Resources Research Institute) forthcoming at 8-9.

²³ See Ed Marston, "FOE takes the 'Water Boys' to Court," *High Country News*, April 14, 1986 at 5.

²⁴ See H. Ranney, R. Backoff, and C. Levine, "Comparing Public and Private Organizations," in J. Perry and K. Kraemer (eds.) *Public Management and Private Perspectives*, Palo Alto, CA: Mayfield, 1983 at 96-7.

tends to take precedence over efficiency for local water management institutions.²⁵

2. Water districts generally have the ability to withstand challenges to their discretionary authority and to coerce and monopolize water policy within their jurisdictions. But at the same time, water districts are more subject to public scrutiny than their private counterparts.

B. Water Districts Do Not Promote Irrational Policies. Water districts increasingly are criticized for inefficient use of water. A common critique proceeds as follows: efficient use is technically possible, would save money, and is therefore the "rational" course of action in an environment of increasing demands and finite supplies. Condoning inefficient use—the wont of water districts—is therefore irrational. But such analysis commits an ecological fallacy; the assumption is made that what is rational from a societal level of aggregation is also rational at the district level.

1. In practice, the evaluation of costs and benefits are generally confined to the geographic boundaries of political jurisdictions.²⁶ In his discussion of agricultural subsidies available to water districts, Lee observes:

Once people have committed their wealth to decisions that make sense from a private perspective, only because of private policy, they would suffer a private loss if the policy were to be eliminated."²⁷

Suggestions for reform are varied but usually include changing district pricing policies. Charging a competitive price for water may be opposed by influential political constituencies in the district who help determine policy by service on the district's board of directors. Water district leadership therefore is reluctant to remove subsidies which would increase costs to district

²⁵ See F.L. Brown and H. Ingram, *Water and Poverty in the Southwest*, Tucson, AZ: U. of AZ Press forthcoming at 252.

²⁶ See MacDonnell, *op. cit.*, at 49-50.

²⁷ Corbridge at 62.

²⁸. See D. Mann, "Institutional Framework for Agricultural Water Conservation and Reallocation in the West: A Policy Analysis," in *Western Water Institutions in a Changing West*, Napa, Ca.: John Muir Inst., Vol. 2, 1980, at 45; E. P. LaVeen and R.N. Stavins, "Institutional Impediments for More Efficient Use and Allocation Irrigation Water in the West," Report, Berkeley, Ca.: The Rural America Task Force, The Ford Foundation, September, 1981 at 28-32.

members.²⁸

C. Water Districts Are Litigious.

1. Following from the above, differences in the level at which costs and benefits are calculated frequently lead to conflicts among jurisdictions over the desirability of various actions or projects.

2. From the perspective of the public choice theorist, a predictable consequence of the underpricing of water and restrictions on free trade in water rights is the removal of price as a mechanism for resource allocation. Litigation is used as an alternative means of reallocating water.²⁹

3. Litigation may be preferred as a political strategy by private interests who are able to use water districts as mechanisms for distributing costs throughout the jurisdiction.

D. Water Districts Are Vulnerable. Reliance on a single resource, water, makes many water districts vulnerable to extremes in weather as well as more subtle factors associated with demographic changes.

III. The Political Feasibility of Suggested Reforms: A Selected Review

A. Types of Solutions. Water district reform proposals range from abolition and privatization at one extreme to the centralization and integration of water district discretionary authority into a regional or state water management system at the other. Somewhere in the middle are proposals for pricing reform, changes in laws affecting districts, and exploration of cooperative endeavors.

²⁵ See F.L. Brown and H. Ingram, *Water and Poverty in the Southwest*, Tucson, AZ: U. of AZ Press forthcoming at 252.

²⁶ See MacDonnell, *op. cit.*, at 49-50.

²⁷ Corbridge at 62.

²⁸. See D. Mann, "Institutional Framework for Agricultural Water Conservation and Reallocation in the West: A Policy Analysis," in *Western Water Institutions in a Changing West*, Napa, Ca.: John Muir Inst., Vol. 2, 1980, at 45; E. P. LaVeen and R.N. Stavins, "Institutional Impediments for More Efficient Use and Allocation Irrigation Water in the West," Report, Berkeley, Ca.: The Rural America Task Force, The Ford Foundation, September, 1981 at 28-32.

²⁹ Corbridge at 59.

1. Given the independence of water districts, i.e. rational, litigious, autonomous public organizations, radical transformation of current practices is unlikely.

2. Given the vulnerability of water districts to resource constraints and to a lesser extent, public scrutiny, significant reform has occurred in some locales, largely in response to external threats or water crises.³⁰

B. Regulatory Reform. States have regulated district activities in an inconsistent fashion. For example, even though water districts are required to report fiscal transactions and other data to various state agencies, reporting requirements generally are not enforced. Moreover, comprehensive databases which would enable the identification of particularly inefficient or otherwise wasteful districts do not exist in most states. Stricter enforcement of existing statutes and compilation of comprehensive databases on water districts is a proposal designed as a necessary step toward efficient and equitable regulation. Another possible solution is to require public service commission regulation of all special districts who charge for services.

1. **Evaluation:** Significant regulatory reform is unlikely due to lack of enforcement in some states, considerable financial costs, and political opposition from water districts particularly from smaller districts that tend to be least able to expend time and resources on reporting requirements.

C. Organizational Reform. Relatively few states with significant numbers of special districts have consolidated or merged districts into regional management authorities but there are a few precedents.³¹ More successful are local agency formation commissions which have controlled the proliferation of special districts in some states.³²

1. **Evaluation:** Local agency formation commissions only affect proposed districts whereas organizational reform of existing units of government entails significant transaction costs and is likely to be unsuccessful.

³⁰ Arizona's 1980 Groundwater Management Act is a case in point. See Michael F. McNulty and Gary C. Woodard, "Arizona Water Issues: Contrasting Economic and Legal Perspectives," *Arizona Review*, Fall, 1984.

³¹ With regard to the latter, see Edgmon and De Young, *op. cit.*, for a discussion of regional reforms in Florida and Nebraska.

³² See Corbridge at 37-39; ACIR, *State and Local Roles in the Federal System*, (Report A-88), at 375-81.

D. Voluntary, Cooperative Endeavors. Cooperative agreements between districts and other units of government have a long and varied tradition for water districts. Many water districts contract with state and federal resource agencies for water supplies, operations and maintenance assistance, and other water related functions. Recent proposals explore the possibilities of sharing and or purchasing water district water resources through cooperative agreements.

1. **Evaluation.** Voluntary transactions between water districts who control water and organizations who are willing to pay for the use of surplus supplies or even the temporary use of permanent supplies³³ offers the best, short-term solution to increasing demands for finite resources. Such solutions are limited by the amount of available surplus water or "trade" situations as well as by the extent to which negative externalities generate opposition from third parties.

³³ A recent agreement between the New Mexico Department of Fish and Game and the Middle Rio Grande Conservancy District is a case in point. The district has agreed to let the Fish and Game Department "use" water in a portion of the district's canal system for the development of a trout fishery. Logs, rocks, and other impediments will be installed to create pools along the canal. It appears to be a Pareto solution because the district does not lose any water and the Fish and Game Department gains a new recreational facility literally at the edge of Albuquerque.