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CREATING BETTER GOVERNANCE

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TWO DECADES OF WATER LAW AND POLICY REFORM: A RETROSPECTIVE AND AGENDA FOR THE FUTURE

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NATURAL RESOURCES LAW CENTER
University of Colorado
School of Law
Boulder, Colorado
Deliberation and debate is the way you stir the soul of our democracy.
Jesse Jackson (1941 - _____)

Introduction

The effect of the Congress on western water reform is often understated, leaving the impression that power hungry bureaucrats are responsible for the redundancy that dogs western water policies. The Western Water Policy Review Advisory Commission wrestled with the appropriate role of federal agencies on western rivers, and noted the effect that the division of jurisdiction among Congressional committees has on agency structure and mission. Now that the century mark is approaching for the Reclamation Act of 1902, it is particularly appropriate for us to revisit how the federal government functions in western rivers and the effect of Congressional politics on that issue.

In rivers across the West policy makers confront the questions of how to balance local interests with national interests, how river management purposes can be broadened to include environmental protection, how citizens can participate in decision-making, and how discordant federal policies can be reconciled. The past two decades have witnessed innovation in problem solving that has sidestepped the creation of formal institutions, through the creation of consensus processes, where participation by multiple agencies and stakeholders has resulted in regional solutions. At a national level, water policy reform has not even been particularly salient; funding for the Bay-Delta and the Everglades, for example, has proceeded in the absence of statutory overhaul. Consistent with avoiding formal reform, the Interior Department and the Bureau of Reclamation were changed from within during Secretary Babbitt’s tenure, so that regional and project specific solutions were advanced despite a hostile Congress.

While the attention of the Commission, of academics, and of the Clinton White House focused on the Interior Department, the Corps of Engineers quietly stayed above the fray, revealing only in the last year of President Clinton’s administration how tenuous Executive branch control of the Corps is. A new Administration has proposed to tame the Corps budget, but little else is known about its intentions. In this talk I argue that the direct Congressional relationship to the Corps challenges the viability of many reform initiatives at the regional and local level. As we
consider the successes and failures of institutional reforms, we must consider how the Corps, and the Congress that stands behind it, can be persuaded to become another player at the table.

**Innovation**

The topic of governance continues to exert a pull on the water policy community, because of the realization that the physical dimension of improving water management is far less daunting than the questions presented by how society organizes itself to address our water challenges. See for example, David H. Getches, *Changing the River's Course: Western Water Policy Reform*, 26 Envtl. L. 157 (Spring 1996)

We can identify many basins where water problems are being addressed in a constructive fashion, where gridlock has been broken, parties are talking, water management is improving, restoration is occurring and, although no one is ready to say that a problem is solved, the direction is far more constructive than it might have been in the absence of these initiatives.

The Rio Grande provides examples of these initiatives. I spoke at this conference several years ago about the dire challenges presented by the Rio Grande. See, *Restoring the Rio Grande: A Case Study in Environmental Federalism*, 28 Environmental Law 15 (1998). This river stretches across three states and two countries and is beset by a growing population, declining species, cycles of drought, the depletion of groundwater reserves available for municipal uses, and the typical array of federal, state, tribal, municipal, and national governments with a role in management. I focused on the Middle Rio Grande and summarized the failures in the formation of basin or watershed management entities. It is now five years later, and a host of new organizations has arisen, parallel to those on many other western rivers.

For example, a lawsuit to protect the Rio Grande silvery minnow has resulted in the creation of groups which are pursuing means of maintaining the species, attempting to mediate a result in the lawsuit, and pursuing initiatives aimed at riparian restoration of stretches of the river. There is a lively alliance of environmental groups, and a Pueblo led restoration effort for Pueblo lands. Watershed initiatives have taken firm hold in one of the more retrograde basins in the country.
I would not describe the initiatives on the Rio Grande nor in most other river basins as resulting in basin management, that elusive goal of water policy wonks. Academics and commissions have called for management of rivers along hydrological rather than political boundaries for over one hundred years, as Doug Kenney has thoroughly researched. Douglas S. Kenney, Source Management at the Watershed Level: An Assessment of the Changing Federal Role in the Emerging Era of Community-Based Watershed Management (1997) Experimentation with these mechanisms has not resulted in consensus that any one way of organizing governance is better than another; rather, cycles of experimentation continue. We have not redrawn state lines every generation and the continued attention to governance in water indicates a widespread belief that we haven’t gotten it right yet.

What we have witnessed in this generation of experimentation is the initiation of *ad hoc* groups that have forced established institutions to incorporate the goals of better governance, which include balancing environmental concerns, better coordination among agencies, better public participation, recognizing tribal concerns, and integrating water quality. Each of these goals is addressed to some degree in these experiments.

First, environmental concerns were not part of the western prior appropriation scheme. But, federal environmental laws empowered environmentalists to alter the operations of western rivers, with the power of the courts behind them. Litigation over the protection of the Rio Grande silvery minnow is requiring the major water users to consider how protection of a species can be accommodated within existing rights and obligations.

Second, without changing statutory schemes, water users and managers have joined in the coordination of water resource management in appropriate geographical areas. One concrete sign of coordination on the Rio Grande is the creation of an ambitious hydrologic model that will provide information to all stakeholders about the region’s water resources and how storage facilities are operated.

Third, new stakeholders have been allowed to participate in decision-making, and new opportunities for participation in water decision making abound. NEPA requires planning processes for federal projects, and federal and state entities operate far more openly than they did
a decade ago. It is easy to deride the sincerity of some of these processes, but reread Cadillac Desert to remind yourself of how closed decision-making was a short time ago.

Tribal governments are recognized and acknowledged in water decision making in a way that also was unforeseeable a generation ago. The pueblos that border the Rio Grande have made their interests in the river abundantly clear, through water quality standard setting, accelerated groundwater development, participation in restoration, and attention to the ESA proceedings described above.

Finally, another goal that better governance proponents have asserted is the need to bring together water quality and water quantity management. The agencies that have these missions are not necessarily integrated, but informal mechanisms, such as coordination among agencies, is beginning to remedy this. At a federal level, the Clean Water Action Plan requires federal agencies to coordinate with other watershed entities in addressing watershed health. (This initiative is an administrative, not legislative mandate, and may not be continued.)

These developments are positive and have been well heralded in the literature. The WWPRAC endorsed a new relationship between federal agencies and the citizens of the regions who are affected by them, calling for basin management, with federal agencies required to participate in basin initiatives and to allow greater involvement by local entities.

Despite the progress represented by these initiatives, they are more fragile than we might like to acknowledge. Often they have resulted from ESA mandates. In most cases, participation in them is not required by the statutory mandates of either federal or state agencies. Because the ESA was the motivating force for many of these programs, any attacks on the ESA, or attempted exceptions to its scope, could weaken the motivation to continue to support them. Regrettably, the progress on the Rio Grande would almost certainly evaporate overnight were the ESA not compelling cooperation.
The challenge of reforming governance: the Corps and the Congress

While greater participation in river governance has been the recent trend in the West, I would like to discuss why it is so difficult to get change in formal governance structures for water, and to look at the Corps of Engineers in particular for an answer to this question.

The WWPRAC focused on federal agencies in the West, in response to its Congressional charge. Senator Hatfield established the Commission so that it would work on the presumed duplication and inefficiency of federal agencies. In my work on the Commission, I observed that there is a great belief that agencies are redundant, but there is little serious political or academic attention devoted to the effect that agency structure has on federal agencies and the affected public.

In particular, the relationship between the Corps and the Bureau of Reclamation begs the question of agency redundancy, as it has since at least the 1930s. The Corps and BOR engineers scoured the West, competing over the best dam sites and taking their bitter battles into Washington’s labyrinth of power. Obviously, the Corps operates across the nation, while the BOR is limited to the seventeen western states. The Corps now spends more in the West than does the Bureau, although this includes expenditures in western coastal states. Table I. Nonetheless, within the West there is an arbitrary character to whether a particular river is identified as a Corps basin or a BOR basin. The Commission, based on the unanimous advice given us that fundamental reorganization of water agencies was a “nonstarter” in the Congress, did not tackle this issue, except through the inclusion of an excellent appendix prepared by the Congressional Research Service. (Water in the West, Appendix C)

On the other hand, the debate over the appropriate role of federal agencies in western states often was visited by the Commission. This debate sometimes sounds like a fixed and familiar argument, with Westerners united in demanding state control over all water resources. When it comes to federal environmental controls, the federal funds provided for a program rarely equal the perceived burden on state interests. There, the federalism debate reaches a fevered pitch, and is likely to be touched upon many times during this Congress. But, as historians remind us, the dependence of western states on federal funding makes the demand that the federal government
withdraw from the West a bit more tempered than it appears to be. There is no movement calling for an end to Corps’ programs in the West, despite the obvious questions as to why a federal agency is responsible for protecting communities from flooding, for operation of dams, and for channel maintenance.

A perfect opportunity to think about federalism was this spring when the Bush administration criticized Davenport, Iowa for its refusal to build levees along the Mississippi River. Citizens of the town protested that they did not want to wall the river off from the town and that they had taken appropriate measures to create a floodplain. The Federal Emergency Management Agency threatened the town with the loss of emergency funds if it continues in this refusal. As far as news reports noted, no cost benefit analysis was done comparing the cost to federal taxpayers of floodwalls with the cost of emergency assistance that might be required in a particularly large flood.

In the federalism debate, the Corps of Engineers largely has escaped the scrutiny cast on the Interior Department’s wildlife protection agencies and the Environmental Protection Agency. There is also no strong movement for reform of the Corps, nor for reconsideration of how the Corps relates to other entities in a watershed.

The politics of the Corps, the reason that it has thrived while other agencies have shrunk and suffered constant attack, has been described by several authors. Arthur Maas wrote the definitive study in Muddy Waters: The Army Engineers and the Nation’s Rivers (1951). More recently, Jeanne Nienaber Clarke and Daniel C. McCool, in Staking Out the Terrain: Power and Performance Among Natural Resource Agencies (2d Ed. 1996) further this description.

The Corps is described by Clarke and McCool as a “bureaucratic superstar.” Their analysis of why agencies succeed identifies seven factors under the general division into (1) expertise and control of information and (2) political and constituency support. The factors might be tailor made for the Corps, awarding positive effect to factors that include “prodevelopment; multiple use; utilitarian” mission, “scientific, legal, military bases of expertise,” “scientific, legal, or military leadership,” a “coherent public image,” a “large; evenly distributed” constituency,
“linkages to majoritarian interests” such as “concrete, economic interests,” a “service orientation and functions” and “congressional support.” (Id at pg. 7)


But a more fundamental cure may be required for this agency, along with others on the western landscape. The use of federal tax dollars to pay for these purposes has a powerful effect on what is or is not built on western rivers. The most well publicized scandal involving the Corps in recent years was the subject of several Washington Post articles and reports by the Inspector General, Office of Independent Counsel and National Research Council. See, Washington Post, December 7, 2000, pg A01; U. S. Office of Special Counsel, December 6, 2000. The most telling moment in this scandal came when the White House suddenly realized how remote the Corps was from its direct control, and undertook measures to restore accountability within the Corps. Rather than applauding these tardy measures, senior Republicans rallied to “protect” the agency from Presidential control with an extraordinary amendment to protect the Corps from reorganization. Attachment 3, Washington Post, May 13, 2000, A-02. The blunt message is that the Corps is different from other executive agencies, where the President is accountable for implementation of legislation, and for the successes or failures of management.

I would be hard pressed to prove that the purposes for which the Corps spends money in western rivers are outside the powers granted the federal government. But the practical effect of subsidies in western water is well understood, from subsidies to agricultural water users to subsidies to power users to subsidies to residential users. If states and municipalities were forced to pay the full cost of water, or of the structures built by the Corps, often different solutions would be sought. When nonstructural solutions make better fiscal sense, such as the retiring of development in flood plains rather than the use of levees, they would be used. After a century or
so of experimentation we can judge whether using federal funds to address these needs results in an irremediable distortion of public policy choices.

As with all water stories, the Corps presents paradoxes that make it difficult to generalize about it. Concerns about the Corps mission have been met with policy reform and readjustment over many years. WRDA 1986 incorporated important insights about the importance of balancing environmental protection with other goals and about the benefits to be gained by local cost share. The Corps has since procured legislative authorization for river restoration and has led the federal effort to restore the Everglades. The talent contained within the Corps and its genuine commitment to service deserve acknowledgement and must be incorporated in thinking about how the Corps can best be utilized to serve the American public.
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Why drain our lakes to make more farms when we are already suffering from overproduction? (1923).

Ding Darling made his national reputation as a cartoonist. Many Darling cartoons starkly criticized waterfowl management by depicting weeping, bandaged, emaciated ducks driven from their wetland homes by dredges, bulldozers, developers, and politicians. (Courtesy J.N. “Ding” Darling Foundation)
Table 8.—1997 discretionary funding by state

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<th>State</th>
<th>Corps of Engineers</th>
<th>Bureau of Reclamation</th>
<th>Environmental Protection Agency</th>
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</table>

1 These funds were not allocated in the appropriations act to projects in specific states. They include Operations and Maintenance ($268 million), General Administrative expenses ($46 million), miscellaneous construction and dam safety ($117 million), science ($7 million), and unallocated construction reductions ($29 million).

GOP Senators Seek to Block Corps of Engineers Reforms
Michael Grunwald
Washington Post Staff Writer

Republican senators are pushing to send a blunt legislative message to the executive branch: Thou shalt not touch the Army Corps of Engineers.

An obscure rider tacked on to a farm budget bill last week would build a congressional wall of protection around the Corps, blocking all future efforts to reform management practices that have been under attack by environmentalists, taxpayer advocates and senior Clinton administration officials.

On the heels of a short-lived administration attempt at reform, the amendment would ensure that the Corps remains exactly the way it is.

The language reads: "None of the funds made available in this or any other Act may be used to restructure, reorganize, abolish, transfer, consolidate or otherwise alter or modify the organizational or management oversight structure; existing delegations; or functions or activities applicable to the Army Corps of Engineers."

The senators behind the rider, which was passed by the Senate Appropriations Committee on Tuesday, are the committee's chairman, Ted Stevens (R-Alaska), and Pete V. Domenici (R-N.M.), chairman of the energy and water subcommittee. Aides to Domenici--who steered $14 million worth of Corps projects to New Mexico last year, including a major flood control initiative for Las Cruces--said he and Stevens are unhappy with Army Secretary Louis Caldera's recent "management reforms" designed to bring the Corps under civilian control.

"They want the Army Corps to stay the way it is," Domenici spokesman Chris Gallegos said of the senators. "They want it to be accountable to Congress. They don't want it to shift so much to the administration."

The Corps is an executive branch agency based in the Pentagon and run by military officers who nominally report to civilian officials. In recent months, it has faced charges that top generals manipulated data on a major study of the Mississippi and Illinois rivers and planned a "Project Growth Initiative" to expand the Corps' budget without the knowledge of civilian administrators.
When Caldera announced his reforms March 30, saying they were intended to reaffirm civilian control, Stevens and two other GOP committee chairmen wrote a letter urging Defense Secretary William S. Cohen to suspend them. The Corps has always enjoyed a close relationship with Congress, which regularly initiates and funds dozens of Corps-run water projects in members' districts.

The reforms were withdrawn just a week after Caldera announced them, even though Cohen had "strongly endorsed" them. At the time, Stevens, Armed Services Committee Chairman John W. Warner (R-Va.) and Environment and Public Works Committee Chairman Robert C. Smith (R-N.H.) suggested that they wanted more time to review the reforms, and Caldera said he expected to work with them on his proposals, though they had made their skepticism clear.

Yesterday, the Army called the new proposal "unwarranted and unproductive" in a statement. "We are deeply concerned about the effect this provision would have on the authority and responsibility of the executive branch . . . to manage the Corps," the statement said.

The rider is expected to come before the full Senate on Tuesday. To become law it also would have to pass the House and avoid a veto by Clinton, who in the past has vetoed appropriations bills because of amendments he opposed.

Aides to the senators say they are concerned that the administration is trying to "politicize" the Corps. In the last year, for example, civilian officials have intervened in studies of dam removal options on the Snake River and water management changes on the Missouri River, and in a $7.8 billion restoration plan for the Florida Everglades. In all three cases, the administration altered the Corps' recommendations to reflect environmental concerns.

The Corps' critics say that is what civilian officials are supposed to do. And they say the Domenici-Stevens rider would block more than Caldera's civilian control effort: It would block any attempt to "alter or modify" any Corps "function or activity."

"It's an incredibly sweeping proposal," a White House official said. "It would block any meaningful reforms, and pave the way for projects that gouge taxpayers and the environment."

"The senators feel like the Corps is their pot of pork to play with, and they don't want anyone in their way," said Courtney Cuff, a lobbyist for the environmental group Friends of the Earth. "This is their way of killing reform and keeping the gravy train running."

In fact, taxpayer activists and environmentalists say there is a perfect example of a pork barrel project buried in the same agriculture appropriations bill that contains the Corps rider: The Oregon Inlet Jetties, a controversial $96 million project designed to stabilize a boating channel on North Carolina's Outer Banks. The Interior Department believes the jetties would accelerate erosion on Pea Island National Wildlife Refuge and Cape
Hatteras National Seashore, and it has refused to issue the land-use permits the Corps needs to proceed with the project.

Sen. Jesse Helms (R-N.C.), the project's chief proponent, inserted an amendment that would simply transfer the refuge and seashore land in question from Interior to the Corps, so no permits would be necessary.

A recent report by Taxpayers for Common Sense and the National Wildlife Federation ranked the jetties the fifth-worst Corps project in the nation. But a Helms aide said the area's commercial fishermen have waited far too long for the project, which Congress approved in 1970. "Senator Helms wants this to happen, and the Corps is ready to go forward," the aide said.