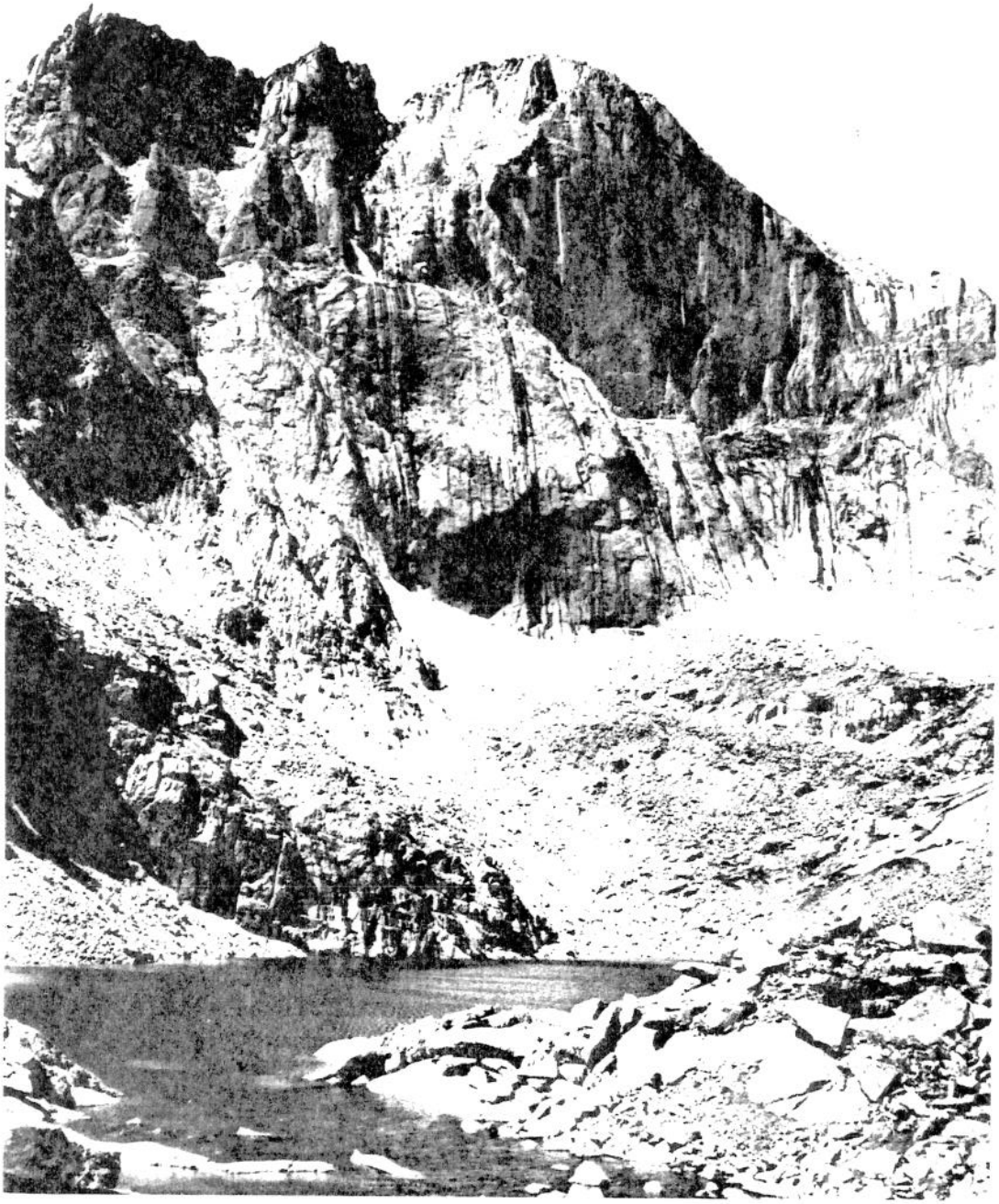
AMERICA'S WATERS:
A NEW ERA OF SUSTAINABILITY



REPORT OF THE LONG'S PEAK WORKING GROUP
on National Water Policy

Objectives and Initiatives

December 1992

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The Natural Resources Law Center
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PREFACE

The Natural Resources Law Center of the University of Colorado convened a working group of 30 national experts in water policy at Allenspark, Colorado, near Longs Peak on December 6-8, 1992. The Keystone Center facilitated the meeting. During the meeting, we attempted to focus our collective expertise on the critical water policy issues and opportunities for action by the Clinton-Gore Administration.

This statement is not intended to be exhaustive. Rather, we hope that it will be useful to the new Administration, at an historic moment, in charting national objectives and suggesting specific decisions for developing a new approach toward managing America's waters.

The participants in the Longs Peak meeting attended as individuals, not as formal representatives of their agencies or organizations. The report as a whole is strongly and unanimously endorsed by the participants named below, but may not necessarily reflect the views of their employers.

Sarah F. Bates, Natural Resources Law Center

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Dana Sebren Cooper, Committee on Energy and Natural Resources, U.S. Senate

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INTRODUCTION AND OVERVIEW

Sound water policy must address the contemporary and long-term needs of humans as part of the ecological community. Nationally, we have not been using water in a manner that meets these needs on a sustainable basis. Examples include the endangered Columbia River salmon, the overtaxed San Francisco Bay Delta, the poisoned Kesterson National Wildlife Refuge, the salt-choked Colorado River, the vanishing Ogalalla Aquifer, Louisiana's eroding Delta, New York's precarious Delaware River water supply, and the dying Florida Everglades. The environmental costs of current water policy are extraordinary, both to this and future generations.

In America's past, water seemed abundant and nature forgiving. Federal funding was plentiful, and extensive subsidies for development encouraged inefficient use of water. Single interest water policies did not balance the diversity of human and natural needs in water. Intensive economic uses — agriculture, hydropower, flood control, navigation, and urban development — became the dominant forces in managing water. All too often, other concerns — including sound fiscal policy and the needs of Indian tribes, other ethnic communities, and ecosystems — were ignored. Federally financed water projects were built to control most of the nation's surface water. These initiatives have accomplished considerable societal benefits but have resulted in enormous expenditures and elaborate programs with inherent contradictions, inefficiencies, and a lack of coordination.

The era of building major projects has passed. Neither the economy nor the environment can tolerate more such projects. It is time to reorient the federal role to satisfy new needs consistent with a policy of sustainability.

A major movement toward water policy reform already is afoot at the local, state, tribal, regional, and federal levels. Some examples of these innovations include state and federal programs for instream flow protection, pollution prevention, recognition of the public interest, development of watershed and regional water management approaches, and comprehensive settlements of tribal reserved water rights. The Clinton Administration should build upon this momentum, fulfilling Aldo Leopold's "Land Ethic" by taking firm and responsible action to help create a visionary approach toward America's waters.

A national water policy based on sustainability must include a thorough re-examination of federal policies affecting water quality and aquatic systems consistent with social equity, economic efficiency, ecological integrity, and continued commitment to federal trust responsibilities to tribes. Implementation of a truly national, not "federal," water policy requires the federal government to facilitate, support, and help coordinate efforts to optimize the effectiveness of all levels of government — federal, state, tribal, and local.

NATIONAL POLICY OBJECTIVES

A national water policy should reform water governance to achieve four objectives for sustainable water use: water use efficiency and conservation, ecological integrity and restoration, clean water, and equity and participation in decisionmaking. Institutional reform to advance these objectives must be sensitive to human economic needs and the government's financial constraints.

WATER USE EFFICIENCY AND CONSERVATION

Water is used inefficiently all across the United States, whether in agriculture (the largest single user of America's waters), in industry, or in urban areas. Government has played an active role in building water projects but has taken a passive approach toward encouraging water conservation. Despite water's importance as a public resource, state and federal governments have treated it as a free good, allowing the appropriation of water from rivers, aquifers, and lakes without charge. Water is made available to customers at prices far below its actual value, even when it was developed, stored, and transported at great cost.

Changing economic, social, and environmental values and emerging new technology have made water conservation one of the most promising strategies for protecting existing water supplies, maintaining water quality and ecosystems, sustaining instream flows, resolving long-standing water conflicts (including Indian water rights), and establishing a sustainable water program. There is broad public support for achieving efficiency in urban and agricultural water use. Methods include water conservation, water saving technology, pricing reforms, and reallocation from lower to higher priority uses. Although efficient water use produces economic, social, and environmental benefits, improved efficiency often is viewed as beyond the traditional responsibilities of water and wastewater agencies. To promote greater water use efficiency, the federal government should encourage more widespread use of integrated resource planning and management by water and wastewater agencies and require it as a condition of financial assistance.

General Principles

- Increased demand on water resources, rising costs for water treatment, and contemporary environmental values combine to make the efficient use of water resources a central aspect of all water policy.
- The federal government should provide leadership, making water conservation an explicit part of every water program and policy.
- Transfers of water from one use to another can contribute substantially to water use efficiency, and should be facilitated by the federal government, taking into account environmental and equity considerations.
- The efficient use and conservation of water will be optimized through cooperation among federal, state, local, and tribal governments, and by an open participatory process.

General Principles

- Watersheds should form the basic unit of analysis and activity in order to protect and sustain aquatic biological diversity, including instream, wetland, riparian, and related upland resources. Watershed restoration priorities should, however, reflect the role and importance of these resources as components of larger regional, interstate, or even international ecosystems.
- Preventive strategies and integrated responses should replace crisis-oriented management, which has typified our response to the threat of species loss.
- Continued improvements in information should be sought, but data limitations cannot justify lack of action. Policy should be based upon "adaptive management," the principle that environmental restoration programs may be designed as experiments to resolve pressing questions where there are major unknowns; flexible programs are based on the best available information and experience and may be amended as new information becomes available.
- Restoration activities should be structured and implemented at the local, regional, state, and tribal levels to secure the long-term health and viability of local communities and to re-establish links between community-scale economics and ecology.

ECOLOGICAL INTEGRITY AND RESTORATION

Our nation's rivers, lakes and wetlands have been the source of many human benefits. However, it is increasingly apparent that these benefits come at the expense of the country's natural capital. We have experienced declines in water quality, biological diversity, and the viability of aquatic ecosystems as a result of intensive water development and use.

The rationale for the protection of ecological systems and processes is in part based on human self interest. Yet it is ecosystem health that ultimately translates into community and economic sustainability. Ecological integrity thus is essential to economic sustainability. In addition, it reflects our ethical need to preserve natural areas upon which so many living things depend. Thus, ecological protection assumes a priority beyond the measure of economic analysis.

Agency mandates frequently are weak, ineffective and conflicting. No single agency serves as the necessary focal point for ecosystem protection needs in ongoing water management decisions.

CLEAN WATER

A central objective of the Clean Water Act — to restore and maintain the chemical, physical and biological integrity of the nation's waters — remains unfulfilled. Clean water is essential to the health and well being of people and ecosystems. It is necessary for economic security and sustainability. Despite some progress, many obstacles stand in the way of maintaining high quality water. Serious remaining problems include: poorly controlled polluted runoff (nonpoint source discharges) — which accounts for half of national pollution loads; failure to integrate land and water management; fragmented regulatory responsibility; inadequate water quality standards and lax enforcement; and inadequate attention to ecosystem protection.

General Principles

- Water quality problems can best be managed on a watershed basis.
- Real improvement of the quality of the nation's waters requires aggressive action to deal with polluted runoff.
- Water quality protection includes and depends on protection and restoration of aquatic ecosystems.
- Pollution should be prevented at its source.
- Effective water quality management requires actions based on the essential link between water quality and water quantity.
- Water quality protection programs should emphasize integrated resource planning and funding arrangements tied to the achievement of water quality goals.

EQUITY AND PARTICIPATION IN DECISIONMAKING

Federal and state water policy often has exacted extraordinary social costs. Indian tribes have been prevented from receiving the benefits of federal water development in spite of promises made in treaties and the trust obligation of the United States. Traditional Hispanic communities have seen their acequias and traditional patterns of water management and use overwhelmed by state and federal water laws and policies. Millions of people in the South have seen fishing and hunting habitat vanish as wetlands have disappeared. Numerous rural communities, especially in the West, have had their water supplies transported out of their watersheds to urban centers.

Much of the citizenry as a whole has been excluded from the making of water policy. The key decisions have been made by large water organizations and their lawyers, engineers, and lobbyists. The field is widely perceived as too complex and forbidding for participation by ordinary citizens. Environmental groups, farmworkers organizations, and advocacy organizations representing poor people have provided a vital, though incomplete, remedy for this continuing problem of under-representation.

General Principles

- The federal government should acknowledge and fulfill the special trust relationship with Indian tribes.
- Decisionmaking should include all affected interest groups.
- Decisionmaking bodies should provide the public with readily understood information and analysis.
- 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.

General Principles

- Institutional design for water resources management should be directed at making the most effective use of all levels of government, and strengthening opportunities and incentives for private action.
- Federal systems should be designed to promote integration of decisions and actions of government closest to the levels at which problems are posed and impacts felt.
- The federal government should promote integrated resource planning and management to meet water needs. "Integrated resource planning or management" attempts to find ways to meet water needs at the least cost — including economic costs and environmental and other costs and values, whether quantifiable or not — through consideration of all demand-reducing and supply-enhancing measures in a process that provides full opportunity for participation by members of the public.
- Federal agency organization for the implementation of federal water management policies should promote decisionmaking efficiency, consistent administration, and public understanding of how such federal responsibilities are exercised.

INSTITUTIONAL REFORM

To accomplish the goals of sound water policy, many water institutions must change. For some agencies, this means new approaches to carrying out their duties. In other cases new allocations and combinations of duties and functions are called for.

Governance of water policy is highly fragmented and, in some important respects, outdated. At the federal level, at least 23 subcommittees of Congress have some legislative or oversight authority over federal water programs. Lack of cohesion in policy-making is matched by fragmentation of administrative responsibilities across the executive branch. Many programs are unresponsive to contemporary societal needs and values.

In our federal system, states exercise considerable governmental responsibility over the use of water. State programs are fragmented in part by requirements of federal programs. Local governments and special purpose districts are major actors, but often confine their focus to the specific and immediate demands of a narrow constituency. The existing configuration of institutions is a major barrier to responsible and timely decision and action.

Reform should have as its ultimate objective the capacity to apply authority of all levels of government to the solution of water resource problems through participatory institutions at the "problemshed" level. Policy should then be developed through an open process that considers all quantifiable and nonquantifiable water values.

(b) Strengthen pollution prevention measures in industrial, agricultural, and municipal sectors.

(c) Subject discharges from large dams creating water quality problems to NPDES permit requirements.

(d) Strengthen pretreatment programs to ensure that, where appropriate (e.g. for toxics), industrial discharges to municipal treatment systems are subject to the same requirements as other point source discharges.

(e) 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. To help achieve that goal, develop a clear statutory anti-degradation policy.

(f) Require the EPA to develop quantitative standards presently lacking for such parameters as nutrients, sediments, and salinity. Make compliance with water quality standards for entities not covered by water quality permits or other mandatory programs subject to the citizen suit provision, and provide for public involvement in the EPA's review of state water quality plans.

(g) Establish a Clean Water Fund with an annual authorization of $5 billion which would be available to states on a cost-sharing basis to use on programs of their choosing designed to bring noncomplying waters into compliance with water quality standards. This funding would be tied to a requirement to develop integrated resource plans. States would have the flexibility to meet a broad range of infrastructure needs, including combined sewer overflow improvements, and to pursue water efficiency, aquatic system restoration, and other measures to control point and nonpoint source pollution. Failure to attain milestones in a plan could result in cutoff of funding and mandatory controls.

(h) Establish a national discharge fee program to pay all the costs of monitoring and enforcement.

(i) Establish a pollution prevention program that would make available an extra 10% investment tax credit to industries that can demonstrate investments in technologies that avoid discharges of toxic or other pollutants.

(j) Encourage the EPA under Section 303(d) of the Clean Water Act to provide technical and financial support to establish demonstration nutrient pollutant trading programs on a watershed basis in conjunction with state and local governments. The EPA should seek an authorization of $50 million annually for these programs, with the goal of demonstrating cost effectiveness and the efficacy of their monitoring and enforcement.

(k) Establish integrated resource planning procedures for applicants for financial assistance.

(l) Establish basic water conservation requirements for Clean Water Act permits to help extend water supply or wastewater treatment capacity.

(m) Protect the food chain from toxic contamination by sunsetting the most dangerous toxic chemicals and by prohibiting the use of dilution as a substitute for toxic pollution abatement.

(n) Strengthen Section 404 to provide greater protection for wetlands.

(o) End the agricultural exemption from the National Pollutant Discharge Elimination System (NPDES) permit program in noncompliance areas.

(p) Provide financial and technical incentives to states to develop and implement comprehensive groundwater protection programs (including the protection of all freshwater groundwater as a drinking water source) with the EPA assuming jurisdiction when the state fails to implement an adequate program.

Equity and Participation in Decisionmaking

(45) The Administration should establish broad-based, local citizen advisory committees organized around federal water projects to advise federal project operators. The advisory committees should be provided with complete and useful information on all aspects of the projects' operations.

(46) The President should appoint an interagency task force, and support legislation to support locally-based urban and rural stream restoration programs in order to achieve the community, economic, recreational, environmental, and aesthetic benefits that these projects can provide.

(47) The President should convene summit meetings among interests in the Colorado River basin and the Missouri River basin, including state governments, Indian tribes, and citizen groups, to explore formation of basin organizations for including all affected interests in decisions required to meet the many diverse economic, environmental, and social demands on the rivers' limited resources.