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Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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WESTERN GOVERNORS
State-Federal Relationship

The Western Governors' Association (WGA) hosted a Summit on Realigning the State-Federal Relationship in Denver, Colorado on August 25. The intent of the meeting was to explore next steps towards implementing Principles to Clarify and Strengthen the State-Federal Relationship, which were adopted by the governors in December 2016, together with the Conference of Western Attorneys General (CWAG), Council of State Governments – West (CSG-West), National Association of Counties – Western Interstate Region, and Pacific NorthWest Economic Region (legislatively created by Pacific Northwest States and Western Canadian Provinces to promote economic well-being and quality of life. The Western States Air Resources Council has recently signed on.

Following approval by the WSWC Executive Committee, in an August 25 letter to WGA, CSG-West and CWAG, WSWC Executive Director Tony Willardson wrote: "On behalf of the Western States Water Council (WSWC), I am writing to communicate our unanimous endorsement of the Principles... and express our support for efforts to implement them. As a government entity whose members are appointed by western governors to advise them on water policy, we are pleased to join others adopting these principles and add our voice to the call for clarifying and strengthening state-federal relations. While the WSWC has a long working relationship with many federal agencies with water resources planning, management, development and protection responsibilities, a number of actions and events have led the WSWC to adopt a number of positions calling for renewed recognition and deference to the primary role of the states with regard to our water resources. Two of these positions are attached regarding the pre-emption of state law in federal legislation, and regarding water-related federal rules, regulation, directives, orders and policies. We look forward to working with you and others to ensure states are granted the greatest degree of deference and flexibility possible under the law."

Other entities invited to the Summit and encouraged to consider signing the document include the Association of Fish & Wildlife Agencies, Environmental Council of the States, National Governors Association, Western Forestry Leadership Coalition and Council of Western State Foresters, Western Interstate Energy Board, and Western States Land Commissioners Association. Each organization was invited to share their views and efforts to advance cooperative federalism, followed by an extended discussion related to federal consultation with states, and what it is that states actually want with regard to participation and consideration of states authorities.

WGA Executive Director Jim Ogsbury noted that six words he really hates are "states, tribes, counties and other stakeholders." Many expressed their frustration with being treated as any other stakeholder – and not as sovereign entities with constitutional and delegated statutory authorities. Federal statutes may recognize states as co-regulators, or states' primary authority to manage natural resources, but generally states are not involved in the development of federal rules, regulations, directives and policies. WGA has prepared a framework for defining state and federal authority, roles and responsibilities, as well as an agency-by-agency matrix of possible reforms. WGA initial efforts have been well received at a "pretty high conceptual level," and WGA will take the lead in creating a more detailed model for meaningful state-federal consultation and coordination. Participants agreed that there is a window of opportunity within which to achieve real improvements in state-federal relations and governance.

WATER RESOURCES/LITIGATION
North Dakota/Northwest Area Water Supply

On August 10, the U.S. District Court for the District of Columbia ruled in favor of *North Dakota and the Bureau of Reclamation in Manitoba v. Zinke* (02-2057), allowing the Northwest Area Water Supply (NAWS) Project to move forward. Congress authorized the project to divert Missouri River water from Lake Sakakawea for irrigation, municipal, industrial, and other uses in 1965 (Pub. L. 89-108), to address "longstanding water

shortages and poor water quality in northwestern and northcentral North Dakota." The NAWS project would transfer water to the Hudson Bay Basin. Congress amended the authorization in 2000 (Pub. L. 106-554) to require NEPA compliance.

The Canadian Province of Manitoba sued in 2002, over the potential introduction of invasive species to the Hudson Bay Basin. Manitoba also objected to Reclamation's failure to select another alternative to supply North Dakota communities, and its interpretation of the impacts of climate change on turbidity. The Court held that Reclamation had "finally" complied with NEPA requirements, and cautioned the parties to continue to work together on an adaptive management plan.

The State of Missouri also sued, asserting Reclamation failed to thoroughly consider "the effects of annually withdrawing billions of gallons of water from Lake Sakakawea on the downstream residents of the Missouri River." The Court noted that the Missouri River System is the largest reservoir system in North America, consisting of six dams and reservoirs operated by the Army Corps of Engineers with the capacity to store 72.3 million acre feet (MAF) of water. "Fully one-third of that storage (23.6 MAF) exists in Lake Sakakawea. At oral argument, North Dakota emphasized the small percentage of water that would be diverted from the Missouri River Basin for NAWS."

Missouri sued under the specific legal doctrine of *parens patriae*, "parent of the country," which requires a state to assert a quasi-sovereign interest apart from the interests of particular private parties. The Court provided a detailed discussion of the inability of a state to represent its residents when challenging federal law under this theory. The Court concluded that Missouri did not have standing to sue on behalf of its residents, at least not as a *parens patriae*.

Notably, the Court did not address water as a matter of full state sovereignty, involving ownership, management, or control of water as a public resource on behalf of its citizens. Instead, it focused on the federal government as the greater political power, the allocation of authorities within a federal system, and that a state cannot institute judicial proceedings to protect citizens of the United States from the operation of its statutes.

Washington/Tribal Treaties Fishing Rights

On August 17, the State of Washington appealed the 9th Circuit's decision in *United States v. Washington*, 853 F.3d 946 (2017), holding that the State must remove culverts that restrict salmon passage to fulfill federal treaty obligations to Indian tribes (see WSW #2198). The petition for certiorari presents three questions: (1) whether the 9th Circuit's interpretation of the treaties, guaranteeing sufficient fish to provide a "moderate living," conflicts with the U.S. Supreme Court decision in *Washington v. Fishing Vessel*, 443 U.S. 658 (1979) that the tribes are guaranteed at most a 50% share of available fish; (2) whether the federal role in designing and permitting the culverts in question should require the court to consider a more equitable solution; and (3) whether the injunction to remove the culverts at great cost violates principles of federalism and comity, when there is no clear evidence of a connection to the tribal fisheries, or that culvert replacement will have an impact.

Beginning in the 1990s, Washington took the initiative in its own economic self-interest to identify and replace fish-barrier culverts, becoming a national leader in developing new culvert designs that allow fish to pass. However, state-owned culverts are a small fraction (less than 25%) of the ubiquitous barrier culverts that are also owned by federal, tribal, municipal, and private landowners. Consequently, the state focused its voluntary replacement efforts on streams without non-state culverts, providing the most cost-effective replacement and meaningful access to habitat. Since 1991, Washington has spent over $135M to replace culverts, and several hundred million dollars on other salmon recovery efforts. The 9th Circuit ordered the state to replace all 817 culverts by 2030, at a cost of several billion dollars, without regard to the fact that 90% of them are co-located on streams with non-state culvert barriers and would not increase available salmon habitat. The state argues that the cost will come at the expense of other salmon restoration efforts to the detriment of fish, the tribes and the state.

The state also argues that the new interpretation of the treaty, requiring the state to ensure enough fish to enable a "moderate living" for the tribes, "is not only irreconcilable with precedent, it is also unworkable." It ignores natural fluctuations in salmon runs, salmon prices, non-salmon tribal incomes, and tribal population. Further, the court's broad decision could be used to attack a variety of development, construction, or farming practices perceived to diminish salmon harvest numbers, or to demand the removal of dams or the elimination of century-old water rights, significantly affecting the state's natural resource management. Additionally, "the future reach of this decision extends far beyond the State of Washington, as the same fishing rights are reserved to tribes in Idaho, Montana, and Oregon."