

Closing the Policy-Practice Gap in Water Resources Planning

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Policies, by themselves, have very little value. Without the development of implementation strategies and the will to carry those policies into actual practice, all that is left are hollow words. In the context of water related issues, the old saw "put your money where your mouth is" appears to have special meaning. This is particularly true when one considers the actual gap between policy and practice in the area of water resource planning. A number of examples underscore this point.

For the purpose of this paper I have chosen three areas of discussion. The first has a national or at least West-wide appeal. In this area I will discuss the United States Bureau of Reclamation's (USBR) attitude toward water resources planning. The second area, which, to a limited degree, builds on the first, focuses on the California example and deals with the question of water transfers. Discussion in this area may be "California unique," but nonetheless, can act as an example of the policy-practice gap at issue. The third area for discussion, also using California as an example, deals with the question of wastewater reclamation and reuse. In all of these areas policy statements that should control how one proceeds are at odds with actual water resources practices.

The "New" Bureau of Reclamation

In most respects the USBR's policy influence in the area of water resource planning is more significant than the policy adopted in any one state. The USBR's influence is clearly felt West-wide, and it can be argued that USBR policy (or lack thereof) dominates the formulation of national water policy.

Initially, of course, the USBR's efforts were all focused on maximizing the development of water for consumptive purposes. This effort was fairly traditional in nature and focused upon the construction of storage and other related facilities in order to facilitate the implementation of the federal policy of assisting in the reclamation of the arid and semi-arid West through water projects primarily aimed at providing water for agricultural purposes. The USBR succeeded, in this regard, probably better than anyone could have reasonably foreseen.

As the West developed, however, other crucial water related issues slowly came to the forefront. These issues fell outside of the ambit of the USBR's traditional policy concern. These issues revolved around environmental questions and, to a more limited degree, on the need to

allocate more water to urban areas, traditionally given a lower priority under reclamation law. In these areas clear federal policy, at least at the congressional level, was, at best, slow to materialize. Rather than taking a leadership role in assisting to develop the policies needed to address these ever increasing concerns, the USBR became the bastion of the old policies which, on one hand, favored continued practices, and on the other, resisted the operation of USBR facilities to address, in any meaningful way, environmental concerns or the need to reallocate water to new urban developments.

The consequence of this attitude was that the USBR was viewed by some as being part of the water resource problem rather than part of the solution. As times changed certain policy makers at the federal level attempted to develop and implement policy that would force the USBR to operate in a manner that better addressed the emerging water resources issues. The USBR resisted. In part aided by its contracting beneficiaries, and hiding behind the letter of reclamation law, it sought to avoid environmental obligations that some were attempting to impose upon it. Additionally, the USBR resisted any attempt to share control over any of the water that was developed by reclamation projects.

The net result of this resistance to adopt new policy direction was that little was done to mitigate, in any meaningful way, environmental problems caused by reclamation projects. Moreover, the USBR refused to actively engage in water transfer or reuse programs that would, in any way, divest it of total control of reclamation water.

Ironically, as time passed, the USBR's water contracting beneficiaries became aware that if something did not change in USBR attitude and policy, a change would be forced upon it and this forced change in policy would not necessarily be beneficial to existing water contractors. As a consequence, water contractors in many areas of the West attempted to negotiate with various environmental and urban interests means to better allocate limited water resources. In most situations the USBR either ignored these discussions or were hostile to them.

During the mid- to late part of the Reagan administration there was a certain degree of recognition within the USBR that something had to be done. This ultimately manifested itself as the "new" Bureau of Reclamation. This new USBR was supposed to focus on the emerging water supply issues in the West and to also address various

environmental questions that had arisen over time. This new policy focus was, in fact, fairly forward looking. However, practice has never come anywhere close to the policy that was articulated. The major weakness was an internal institutional bias against changing the USBR's traditional role. Oddly enough, this bias may have been shared by many who assisted in the development of this new policy. In particular, the USBR retained its paternal attitude toward water resources and also refused to relinquish any degree of control over reclamation water. Moreover, the USBR never really looked outward to obtain assistance in the development of its new policy. Rather, the new policy was generated from within.

The fundamental problem with this approach, of course, was that the new policy was never integrated into the way that the USBR actually operated. As a consequence, the net result of the new USBR policy was that those who did not trust the USBR in the first place had greater reason to doubt the USBR's ability and intentions to act in an appropriate fashion. Additionally, those who relied upon the USBR for water supplies now had a reason to question the USBR's willingness or ability to protect their future. After all, if practice ever actually caught up with the new policy, where would USBR water contractors be?

The USBR model acts as an example of one problem that is created when policy and practice do not match. Broad statements of policy create expectations which must be met. A failure to meet expectations creates significant credibility gaps which, at a minimum, hamper further action. Moreover, a failure to implement good policy is also a failure to address significant problems in a meaningful way.

There is a lot that can be done in practice by the USBR that would be of great assistance in the implementation of its new policy, as well as the now emerging congressional water policy, perhaps best typified by the recent enactment of the Central Valley Project provisions of H.R. 429 (P.L. 102-575). In particular, and as discussed in more detail below, the USBR can facilitate water transfers, rather than acting as an obstacle to those transactions. The USBR could also relinquish its absolute lock on reclamation water. This would facilitate the development of water conservation and re-use projects that would benefit all concerned. Finally, the USBR could act in a less paternalistic manner toward its contractors and others who rely upon the water developed by reclamation projects. After all, the consequences of the USBR policy and practice are never felt by the USBR, but, rather, are felt by the water contractors and by others who rely upon water developed by reclamation projects.

Water Transfers

Water transfers have become part and parcel of the new water resources litany. We must reallocate water from agriculture (where it is wasted or at least where its utility is

doubtful) to urban areas through market mechanisms. The theme of water transfers between "willing buyers and willing sellers" has become part of the dogma.

The clear, if only emerging, policy in water circles is to favor long-term water transfers as a fairly non-disruptive means to solve problems associated with limited water supplies. In California, the Governor, the Secretary of Resources and the Legislature have all made statements in favor of water transfers. Indeed, they have all made it a cornerstone in their position on water policy. On the federal side, the Secretary of Interior and the USBR have also made the concept of water transfers a cornerstone of federal water policy. The problem is that in spite of the policy in favor of them, there simply have been no long-term water transfers approved to date in California, by either the State of California or the USBR. The gap between policy and practice is so great that one wonders whether state and federal water officials are truly in favor of long-term water transfers.

The reason for the gap between policy and practice is apparent and stems, in part, from the failure of those who administer water resources within California to really come to grips with the policy in favor of transfers. Two causes for this reluctance can be readily identified. The first stems from the historic western resistance to transfers. This traditional view questions the wisdom of developing water resources policy based upon the development of a water market. There is an inherent discomfort with the idea of depending upon a water allocation system that depends upon water being secured from a willing seller by the highest willing buyer, with some middle man, third party "finder" or "broker" receiving a piece of the action. The West has long had a general bias against speculation in the water resource. Nonetheless, proponents of water marketing provide answers to questions posed and suggest protections that can be developed to better insure that the public good is protected with respect to any given transfer scenario.

The second impediment to long-term transfers stems from the fact that the very agencies that are supposed to facilitate transfers appear instead to want to block those transfers. For example, in California the Department of Water Resources (DWR), in addition to being in charge of water resource development within the state of California, also operates the State Water Project (SWP) and the State Water Bank. The State Water Project consists of various storage and conveyance facilities designed to move water from Northern California to areas of water need in the southern part of the state. The SWP was designed with the idea of developing water on a number of rivers which have, since the original authorization of the SWP, been included within the state and federal wild and scenic river systems. As a consequence of their inclusion within the state and federal wild and scenic river systems, these rivers are unavailable to water development. The result is an SWP which is short on water but long on need and pumping capacity. As a

consequence, the SWP is in a position to pick up any water that is abandoned or not used upstream. As such, the SWP is a natural competitor with anyone interested in water transfers.

This problem is compounded by the fact that the DWR has established a State Water Bank which is also a buyer of water on the open market. The notion here is to purchase water and bank it for re-sale to needy third parties. Again, the state itself is a competitor in what was supposed to be a free market.

The USBR is also a “competitor” for water that would otherwise be available in the water market. The USBR, in the operation of the Central Valley Project (CVP), has always taken the position that it had a right to recapture all water that was not used by its contractors and to resell this water. The USBR has a number of contracts with entities who, for a number of reasons, cannot utilize their full supply. Rather than allow these entities to transfer this unused contract entitlement, some of which has been fully paid for by the contractor, the USBR insists that this water belongs to the USBR and that it is the only entity that can resell this water.

The natural competition posed by the DWR and USBR to water transfers is highlighted in California because of the DWR and USBR’s essential monopoly on conveyance facilities needed to transfer water from the north to the south. The state and federal governments control water diversions through the Sacramento-San Joaquin Delta by operating the only real pumps and conveyance facilities south. As a consequence, in order to move water through the delta south, one needs to obtain approval from the USBR and DWR. The only way to do this is to establish “to their satisfaction” that, in fact, there is “real” water to transfer. In approving the use of their facilities for transfers, they utilize stringent approval criteria.

The USBR criteria, for example, requires, prior to approving the use of USBR facilities for a transfer: (1) documentation of legal rights to the water; (2) demonstration to the satisfaction of the USBR that the transfer will not adversely affect the CVP or SWP; (3) proof of compliance with all environmental requirements including the Endangered Species Act, the National Environmental Policy Act and the California Environmental Quality Act; (4) detailed operation studies; and (5) the payment of administrative and other charges. Moreover, even water rights transfers not otherwise involving the State Water Resources Control Board (SWRCB) must be reported to the SWRCB. Finally, the USBR will require that carriage water (needed to transport water through the delta) be subtracted from the transfer total. The carriage water charge is set by the USBR and DWR and is available to those entities for their use.

The SWRCB is the entity within California respon-

sible for the allocation and reallocation of water. Long-term transfers, by their very nature, are a means to reallocate water. As a consequence, they stand as a threat to the SWRCB’s existence. After all, if the market is reallocating water, what role does the SWRCB play? As a consequence, the SWRCB has not facilitated water transfers. Indeed, the SWRCB has actually taken a counter-productive role in the process, in essence, arguing that SWRCB reallocation is preferable to transfers.

The obvious solution to this problem is a change of attitude at the relevant agencies. However, those attitudes are not wholly unreasonable given the current water resource allocation structure. While dramatic, a restructuring of the relevant agencies might assist in dealing with this problem. For example, the SWP could be made an independent governmental or quasi-governmental entity. The DWR could then focus on the broader issue of water resource planning. As part of this restructuring, the SWRCB’s water allocation role could also become a part of DWR’s mission. After all, if the agency’s duty does not focus solely on the allocation of water but rather on the broader idea of water resource planning, it should matter little which arm of the restructured DWR is being used to allocate or reallocate water. A working water market would avoid the need for the water bank.

The USBR, of course, should not view its job as one of control but, as described in some detail above, should rather focus on the job of facilitating water transfers. In this regard, the USBR has been given strong direction by Congress within the CVP provisions of H.R. 429 to facilitate transfers in California. Rather than fighting in these efforts, they should help.

While the suggested means to close the policy-practice gap in the area of California water transfers may (or may not) be practical, they do suggest that a lot more needs to be done by policy makers than to simply enunciate policy statements. Also needed are the concrete practical means by which to carry out, in practice, the policy goals that have been established.

Reuse of Recycled Wastewater

Another area where practice and policy seem to diverge is in the area of recycled wastewater. The State of California has a stated policy that encourages the recycling of wastewater. Water Code provisions, in fact, provide that the owner of wastewater treatment facilities own the water that is discharged from those facilities and encourage those owners to take control of discharges so that the discharged treated effluent will be re-used for other reasonable beneficial purposes.

Severe water shortages in California, in the past few years, have focused attention, for the first time, on the use of

these Water Code provisions and on this previously ignored water resource. Until now wastewater has generally been used, if at all, by downstream librarians who have claimed some kind of right to the free use of this water. Now that municipalities and others are forced by reality and concepts of proper resource planning to recycle this wastewater, they are facing opposition from these downstream librarians. Moreover, these individuals have been allowed to utilize the existing water rights and environmental process to protest the reclamation of wastewater by the entities who obtained the water in the first place and who have paid for the cost of treatment. These downstream interests have been allowed to utilize the process to argue that if they are forced to cease their diversions (primarily agricultural in nature), great environmental harm will result. As a consequence, they insist upon full hearings before the SWRCB and full environmental review prior to the time that a wastewater re-use and reclamation project can be permitted.

Thus far, the SWRCB has not been particularly bold in addressing these issues. Rather than aggressively pursuing the clear legislative policy (and even clearer public policy) of facilitating programs that recycle wastewater, the SWRCB has, at best, dragged its feet in dealing with these issues. The solution here is, again, obvious. Practice must follow policy if we are going to move forward in modern water resource planning. The SWRCB must aggressively encourage, facilitate and approve these re-use projects, consistent with state policy and law, rather than catering to those who would block and delay these much needed programs.

Conclusion

There is, of course, a danger in over-generalizing in the area of water resources. This is particularly true when one attempts to use California and California water law practices as the example. What is true in California may, of course, not be true in other states. For example, some states do, in fact, have working, if cumbersome, water transfer mechanisms that actually work. However, the models used here certainly have some West-wide relevance. Certainly the USBR's willingness to carry out policy directions falls within this category.

Also, if nothing else is apparent, one must recognize that policy makers must be held accountable not only to enunciate policy, but also to insure that the means exist to carry that policy out. We cannot be satisfied with the creation of policy alone. We must force the policy makers to address what is necessary to bridge the policy-practice gap.

In some cases that will mean little more than clearly directing those within relevant agencies to carry out the enunciated policy, and when they do not, to hold them accountable. In other areas it may, in fact, be necessary to

implement structural modifications in the administrative system in order to eliminate institutional blocks to the implementation of policy. The key, however, is to understand that most policy is not self-implementing and requires a conscious effort toward implementation before it will be actually realized in practice.

Note

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