USA

Wildlife trumps money interests under U.S. federal water laws

Conflicts among federal agencies and individual states bedevil the management of water

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A polar bear and its cubs are seen in the Beaufort Sea. Sarah Palin, the governor of Alaska and former U.S. vice-presidential candidate, has opposed listing the polar bear as threatened under the Endangered Species Act. U.S. courts have ruled that species whose survival is threatened will trump economic activities.

BY GEORGE WILLIAM SHERK

A few months ago, California Governor Arnold Schwarzenegger issued an executive order proclaiming a statewide drought.

The order, on June 24, 2008, also provided financial assistance for water conservation, facilitated water transfers, sped up drought-related climate research and increased technical assistance to California's political subdivisions. Governor Schwarzenegger committed four state agencies to address and, where possible, to lessen the effects of the ongoing drought.

These agencies, California's Department of Water Resources, Department of Public Health, Department of Food & Agriculture and the Office of Emergency Services, have a lot on their plate.

An alternative response to drought was pursued in Georgia by Governor Sonny Perdue who appealed to a higher authority. On November 13, 2007, Governor Perdue gathered a group of constituents at the state capitol to pray for rain. The Governor's prayer was blunt: "We have come together for one reason and one reason only: to very reverently and respectfully pray up a storm."

And in Alabama, according to ABC News, Governor Bob Riley asked his constituents to pray for an entire week for rain.

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The actions of these U.S. governors were motivated by multi-year droughts in their states. Such droughts are becoming increasingly common. The drought in the Colorado River Basin, for example, has lasted in excess of eight years. Both Lake Mead and Lake Powell on the Colorado River have seen historic low water levels. In fact, research at the Scripps Institute of Oceanography suggests that both lakes could become "dead pools" within the next 15 years.

Research also suggests that climate change could cause water levels in the Great Lakes to decline significantly. Such declines have also been seen in the Ogallala Aquifer, a natural groundwater reservoir extending through eight states from Texas to South Dakota. The drop in the level of this aquifer, which has reached up to 5 feet per year (about 1.5 metres) in some areas, is thought to be more closely related to overpumping (taking out more water than drains in) than to climate change. It has been argued, however, that climate change is one of the factors causing the Ogallala to be overpumped. One estimate predicts that the Ogallala Aquifer will be drained in 25 years.

State law prevailed

Even if water is physically available, it may not be legally available. The federal government has consistently espoused a policy of "state primacy" in the allocation and management of water resources and, equally consistently, has enacted legislation that pre-empted state authority. The rule that has emerged is that states may use only the quantity of water that is not needed for federal purposes. This rule leads to a critical and unanswered question: what quantity of water is needed for federal purposes? Federal law is often vague on this point.

This begs another question. How much water is required to protect threatened or endangered plant and animal species? The water needs of species protected by the Endangered Species Act (ESA) take precedence over the use of water authorized by state water laws. This precedence was shown in Riverside Irrigation District v. Stipo, a Colorado case involving the proposed construction of a reservoir. In this case, the U.S. Army Corps of Engineers refused to issue a permit under Sect 404 of the federal Clean Water Act (CWA) to allow the builders of the reservoir to fill in part of the existing rivers or wetlands.

The Corps refused to issue the permit because operation of the proposed dam would adversely impact critical habitat of the whooping crane and therefore ran afoul of the requirements of the Endangered Species Act. Reviewing courts upheld this decision, concluding that the Corps complied with the requirements of both the Clean Water Act and the Endangered Species Act.

In a case over the pumping of groundwater, a federal judge in Texas reached a similar conclusion in Sierra Club v. Lujan. At issue in the Texas case was the relationship between the pumping of groundwater from the Edwards Aquifer in the east of Texas (authorized by state law) and the need to provide flows from Comal and San Marco Springs for species protected by the Endangered Species Act. The federal judge's decision on this issue was succinct: "Priority is to be given to species whose survival is in conflict with economic activities, such as withdrawal of water from the Edwards (Aquifer)."

Dividing the waters

Where state boundaries do not correspond with the boundaries of river basins, disputes can arise between water users in different states and among states themselves. How much water is each state on a particular river entitled to allocate to users within its boundaries?

Some of these disputes have been addressed through interstate litigation: a state may sue another state to prevent harm to its citizens from actions of private parties in another state. These cases can be brought directly in the United States Supreme Court but can also be heard in lower federal courts.

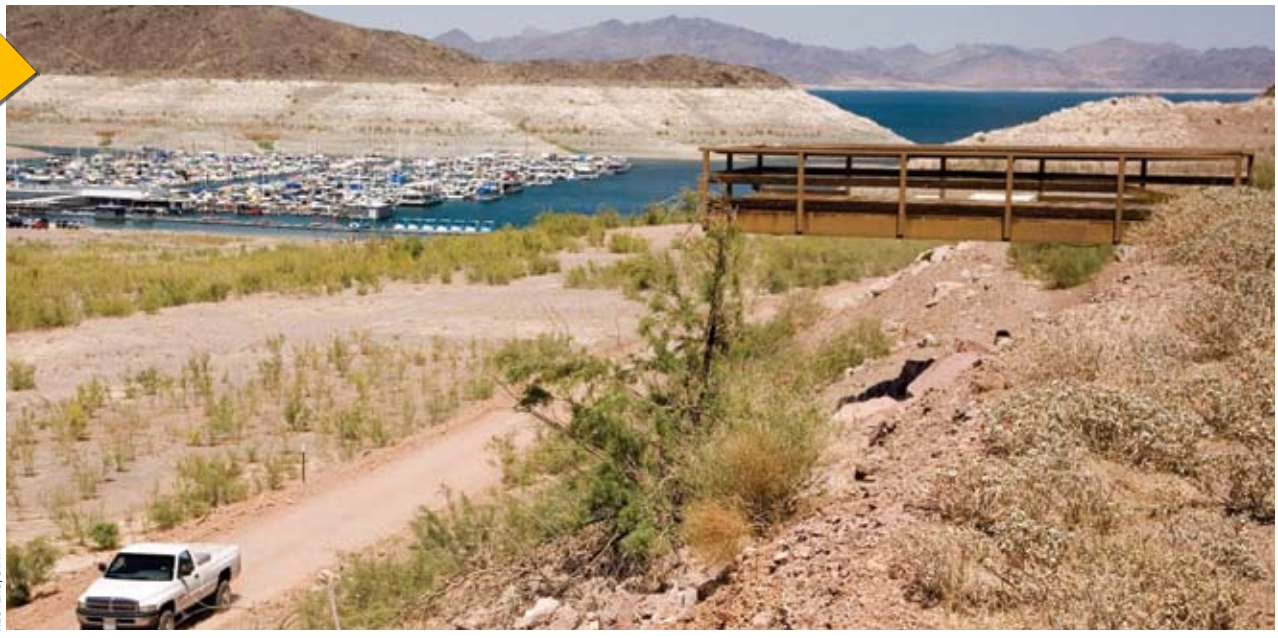
Another way to solve disputes over water is for two or more states to agree on "interstate compacts." Typically, compact agreements involve three steps. First, Congress authorizes negotiation of the compact, usually providing for a federal representative at the negotiations. Second, the compact is negotiated by the states. Third, Congress consents to the compact. Through compacts, Supreme Court adjudication can be avoided. So far, 25 compacts have been reached to allocate interstate waters.

Federal authorities gain control

How much water is required to generate hydroelectricity? Federal law requires developers of most hydroelectric generating facilities to obtain a permit from the Federal Energy Regulatory Commission. In order to obtain such a permit, an applicant must comply "with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion and use of water for power purposes."

For years following enactment of the Federal Water Power Act in 1920, the Federal Power Commission (now the Federal Energy Regulation Commission) deferred to state water laws. This changed in 1946 when, in First Iowa Hydro-Electric Cooperative v. Federal Power Commission, the Supreme Court concluded that the detailed provisions of the Federal Power Act "leave no room or need for conflicting state controls." This conclusion was confirmed in a 1990 Supreme Court decision in the case of California v. Federal Energy Regulation Commission.

How much water is needed to protect water quality? The Clean Water Act gave the powers to states to designate the use of rivers located within the state. In 1994, the scope of this authority was addressed by the Supreme Court in Public Utility District No. 1 v. Washington Department of Ecology. This designation, the Court concluded, may be either in terms of water quality standards to be maintained in the river or in terms of allowable uses. Water quality standards, the Court noted, "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based on such uses."



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The bathtub ring effect (*see arrow above) across this lake in Nevada shows the dramatic fall in water levels in a body that serves Southern California and Las Vegas. Dwindling water levels have spurred state governors in Georgia and Alabama to pray publicly for rain.

The Court also noted that the Clean Water Act authorized the states to set "effluent limitations and other limitations" as needed to ensure compliance with statutory requirements. Such limitations are set out in National Pollutant Discharge Elimination System (NPDES) permits. These permits, which are required for the discharge of pollutants, contain specific provisions relating to the type and concentration of materials to be discharged.

The provisions contained in NPDES permits are determined in part by the volume of pollutants each watercourse can assimilate. This capacity could change in a particular watercourse, for example, through a reduction in stream flows resulting from diversions authorized by state law. In such a case, the requirements of specific NPDES permits may have to be tightened to reduce the type or concentration of materials allowed to be discharged. If that is not done, then the uses that were authorized by state law may have to be limited.

Limiting state authority

There are any number of other examples of federal requirements pre-empting "state primacy" in the allocation and management of water resources. Over decades, various federal Flood Control Acts and Rivers & Harbors Acts have limited the authority of states. Additional restrictions may be imposed by other species protection statutes (such as the Marine Mammal Protection Act), by resource management statutes (for example, the Wild and Scenic Rivers Act) and by resource protection statutes (such as the Safe Drinking Water Act).

Article IV of the U.S. Constitution (the "Supremacy Clause") makes clear how conflicts between federal and state law are to be resolved: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

Settling conflicts

Consequently, when there is a federal-state conflict over the management and allocation of water resources, the requirements of federal law will prevail. In 1941, Supreme Court Justice William O. Douglas noted in Oklahoma ex rel Phillips v. Guy F. Atkinson Co. that "[w]henever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield."

With regard to a conflict between federal requirements and a state's own program for water development and conservation, Justice William O. Douglas concluded that the state "program must bow before the 'superior power' of Congress." This means, in essence, that the states are not sovereign over the allocation and management of water within their borders.

Resolution of the water policy gridlock is frustrated not only because it involves federal-state conflicts but also because it involves federal-federal conflicts. Each of the federal statutes noted above is implemented by one or more federal agencies. Each of these agencies has its own water policies and its own stakeholders who will defend those policies. Ever since the Water Resources Council was abolished during the Reagan Administration, there has been no effective means of resolving water policy conflicts among federal agencies.

Had the Water Resources Council not been abolished in 1981, there might have been an authority that could have resolved the federal-federal conflicts over water in the United States. There is no agency to take its place. Until the leadership vacuum is filled by someone with the strength of Alexander – or the cunning of Machiavelli – there will be no way to cut the Gordian knot, and sort out the overlapping layers of federal jurisdictions over water policy.