

TESTIMONY OF ROGER K. PATTERSON  
ASSISTANT GENERAL MANAGER  
THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

PRESENTED TO:

Little Hoover Commission  
Hearing on State Water Governance

June 25, 2009

Mr. Chairman and Honorable Commissioners:

Thank you for the invitation to participate in your commission's hearing on the governance structure of one of California's most important resources – water. I also will comment on my experience dealing with water rights in Nebraska.

My name is Roger K. Patterson and I am Assistant General Manager for Metropolitan Water District of Southern California. Prior to my position with Metropolitan I was Director of the Department of Water Resources and Director of the Department of Natural Resources for the State of Nebraska. Prior to that I worked 25 years for the Bureau of Reclamation most recently as the Regional Director of the Mid-Pacific Region in Sacramento where I had responsibility for the Central Valley Project.

This testimony will focus on answering the following four questions posed by your commission:

1. Are there areas of conflict between state water management agencies and their inherent ability to manage water rights?
2. Could performance and efficiency be improved under a different governance structure?
3. What structural barriers limit coordination and improved outcomes?
4. What could California learn from governance and water management models in other states?

Before I attempt to answer your specific questions, I wish to make some initial overall remarks focusing on how the water system could be operated more efficiently:

## **Introduction**

The State Water Project (SWP) and the Central Valley Project (CVP) and their appurtenant infrastructure were developed by the federal and state government to harness the water resources of California based on a singular vision crafted in the early 20<sup>th</sup> century. Together, they are perhaps the most elaborate public water utility system developed in our nation. The SWP was designed to accomplish multiple purposes including water supply, flood control, recreation, and fish and wildlife enhancement. The multipurpose expectations within a complex ecosystem has brought to bear great challenges on the operation and decision making of both projects with various state and federal agencies including CA Department of Water Resources, CA Fish and Game, Parks and Recreation, Boating and Water Ways, State Water Resources Control Board, Regional Water Quality Control Board, Bureau of Reclamation, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and Federal Energy Regulatory Commission, to name a few. Despite these myriads of state and federal agencies, each with its own specific mission, the SWP still has the potential to provide multiple benefits for decades to come, but not within its current governance structure.

The SWP is plagued with a wide variety of problems and challenges, some of which are endemic and others of which are interagency in nature. Without exhausting the list, I shall mention a few:

## **Structural Problems**

Conflicting Roles in Operation of the State Water Project and statewide responsibilities: The internal structure of DWR coupled with the varied activities of several agencies on water management have placed an increasing burden on DWR's ability to balance its function as the operator and manager of the state water project facilities with its statutory statewide Delta Levee, water planning, flood control, and power purchasing obligations. This places DWR's contractual obligations to secure and deliver water to its water customers in potential conflict with its broader resources responsibilities. This has the potential to compromise sound infrastructure decisions in the interest of the water system in order to accommodate the demands of other interests (or at least to give such appearance). Conceivably, the interests being accommodated may not be the same as the one bearing the risk and cost consequences of decisions made.

Cumbersome Decision-Making Process and Impact on Cost: This problem is two- fold. First, the existing administrative structure requires application of rules and procedures from other state agencies on the SWP, which often impede timely actions without regard to cost implications on bill payers. Second, and as a corollary to the first, such reliance separates decisions from risks. In essence, these procedures are designed for internal statewide administrative control and do not necessarily consider the cost implications or operational needs of a public utility such as the SWP.

Implementation of Business Tools/Practices for SWP Decision Support System:

The varied functions of DWR and the need to comply with State budgeting and administrative procedures have constrained DWR's ability to timely develop and implement business tools and practices needed for a complex water utility such as the SWP. Even routine activities such as budget preparation and monitoring are difficult, time consuming and duplicative due to the different budget reporting cycles for the general fund and SWP activities. The existing structure provides for limited review and input by the State Water Contractors (SWC) on operations and maintenance expenditures for field operations. The management of the water system could benefit from planning tools and programs that facilitate better alignment of priorities and critical cost decisions and risks. Such tools are difficult to implement within DWR's existing organizational environment.

Lack of Central Coordinating / Decision-Making Body (Governance body): There is no central coordinating body to serve as a governing entity with responsibility and accountability to the bill payers and as a clearinghouse for review, coordination, and resolution of interagency and statewide conflicts. As such, key decisions are sometimes made without adequate consultation or input from key stakeholders such as the SWC.

Incomplete Project Financing: The SWP is a multipurpose project and the State assumed the responsibility for the infrastructure costs of recreation. The Davis-Dolwig Act, Water Code Section 11912, makes it clear that the share of SWP infrastructure and operating costs for recreation and fish and wildlife enhancement are to be paid by the general fund. The general

fund has not provided funding for many years. If left unresolved, this lack of funding will adversely affect the long-term financial health of the project.

Central Valley Project: The CVP is owned and operated by the U. S. Bureau of Reclamation (Reclamation); a Bureau within the Department of Interior. Much like DWR, Reclamation is faced with multiple responsibilities including the operation of the vast CVP. Reclamation must operate within the Federal personnel, contracting, budgeting, and policy system. It is worth noting that the original plan for the CVP and SWP was to build and operate them as one system. Because of fiscal challenges within the State of California the Federal Government was called on to build the CVP with construction of the SWP to follow years later. The result; two projects with separate contracts, water supplies, and operators.

## **Possible Solutions**

### Option A

SWP as an Independent Public Utility: Common and inherent in the problems outlined above is a need to separate the SWP ownership, operations and management from DWR to enable the project to run as an independent public utility consistent with appropriate business oriented practices. Such a public utility would be governed by a Board of Directors. The Board could be appointed or elected. Options for appointment include appointments to the Board being made by the governor, with confirmation by the Legislature; appointment by the customers of the project (as is done at Metropolitan); or a combination of methods.

## Option B

### Creation of an Independent State Water Project Enterprise outside of DWR :

Alternatively, if the State Water Project for policy reasons must remain as part of the Natural Resources Agency, an independent State Water Project enterprise with its own governing structure and operating policies for such activities as contracting, purchasing, hiring and pay could be established. The governing structure could be made up of representatives of the SWC and other stakeholders appointed at large by the governor, subject to senate confirmation. The enterprise would have responsibility for the operation and maintenance of the SWP infrastructure including electric power, plan, design and construction of additional facilities, and accountability to bill payers and the legislature.

## Option C

### Contractor Operated Public Enterprise

This proposal would require the State Water Project contractors to assume the full responsibility for ownership, operation and maintenance of the state water project. The contractors would be responsible for all financial aspects of the SWP and would be required to operate within all appropriate permits and regulations.

I am not proposing any particular option at this point. I believe a thorough evaluation of these and other options should be made involving DWR, the SWP contractors, and other stakeholders before a decision is made. I would encourage the initiation of such an evaluation.

Regardless of which option may ultimately be adopted, a more efficient operation of the SWP may benefit from additional measures including:

Off-loading remote mountain reservoirs to Interested Parties: Remote elements including lakes and reservoirs in the upper Feather watershed developed primarily for the purpose of recreation should be off-loaded to DWR General Fund, Parks and Recreation, Boating and Waterways, or any party which would be able to operate and maintain such facilities in the public interest.

Merging the SWP and CVP: Regardless of which future governance structure is selected for the SWP, consideration should be given to merging the SWP and CVP under joint ownership as originally intended. This would be complicated and not without controversy. It would require an Act of Congress for the title of the CVP to pass from the United States to another entity. Existing contracts would have to be honored as well as all regulatory responsibilities. However, I believe significant benefit would accrue to California over time as the operation, facilities, and water supplies of the two projects became integrated.

With the above remarks in mind, let me now attempt to answer each of your specific questions.

**1. ARE THERE AREAS OF CONFLICT BETWEEN STATE WATER MANAGEMENT AGENCIES AND THEIR INHERENT ABILITY TO MANAGE WATER RIGHTS?**

DWR has the primary responsibility for operation and management of the SWP facilities. Many of the administrative conflicts among state water management agencies and their inherent ability

to manage water rights derive from four primary sources including (i) DWR's varied responsibilities; (ii) the project's many purposes; (iii) the geography, distribution, and use of available water supplies; and (iv) the emergence and prominence of environmental consideration and laws.

While DWR manages the SWP for the benefit of its millions of domestic, municipal, industrial and agricultural customers, it also has general planning, flood control, water management, dam safety and other state-wide responsibilities that are independent of operation of the SWP. As the manager of the SWP, DWR essentially acts as a public utility manager and should be able to focus on how best to provide its customers with a reliable supply of high quality water in a cost effective manner. It should not have to compromise that obligation by considering its broader role as a state water planner and manager (recognizing, of course that it must consider and comply with regulatory obligations imposed on the SWP by regulatory agencies). On the other hand, DWR cannot let its SWP utility manager obligations interfere with what is best for the entire state. This potentially significant inherent conflict puts DWR in a difficult situation and may lead to dissatisfaction by both its water supply customers reliant on its management of SWP water rights and by the entire state reliant on its planning, flood control and other roles. For these reasons we strongly support recommendations to consider creating a SWP utility entity separate from DWR's statewide planning role.

DWR is constrained by regulations administered by the Departments of Finance, General Services, Personnel Administration, the State Personnel Board, the State Controller's Office, and the Attorney General. The standard review times and protocols employed by these agencies are

often not conducive to the unique needs of a state run utility and frequently place DWR at a disadvantage in meeting the business and operational needs of the SWP. In addition, as the State of California balances the interests of multiple agencies it is not uncommon for one state agency to take a position in opposition to another. However, at times DWR is reticent to oppose other state agencies that take positions which may negatively impact the SWP. We would simply characterize this as a significant conflict of interest.

The project's many purposes including water supply, flood control, and recreation and wildlife enhancement, bring together the activities of several state and federal agencies with separate but specific missions to bear on how the state water project facilities are operated and managed. A business-oriented SWP utility separated from DWR's planning role will be more effectively positioned to efficiently run the state water facilities.

Another area of conflict in management of California's water rights lies in the geography, distribution and use of available supplies. Whereas, most of available water supply originates in the northern part of the state, most of the demand for that water occurs in Central and Southern California. Those areas that rely on imported water have invested heavily in the development of California's water delivery system and its ongoing maintenance. To them every additional restriction on water supply is at the expense of their investments and seen as a threat to future growth and their economies. Those from within the area of origin have the added concern to ensure that their preferential rights and ability to tap into available water resources for present and future beneficial use are not infringed upon. All of this combines to add more complications to management of the state's water resources.

Additionally, legislative enactments and lawsuits designed to protect the environment and endangered species and to preserve natural habitats have further complicated how water management agencies do their jobs. A separate business-oriented SWP public utility, while committed to realizing stated environmental objectives, would have a better structured decision-making infrastructure to fulfill that obligation without compromising its water supply objectives.

## 2. COULD PERFORMANCE AND EFFICIENCY BE IMPROVED UNDER A DIFFERENT GOVERNANCE STRUCTURE?

The development of the state's water resource facilities has allowed the development of California's economy. However, the water system may be teetering on the verge of collapse due to some apparent structural problems some of which have been outlined in my opening remarks. The existing governance structure places the management of the SWP within DWR which has other statutory statewide obligations including delta levee, water planning, flood control, and power purchasing. The burden on DWR's ability to balance these multiple functions has the potential to compromise decisions that could be made in the best interest of the project, in addition to the level of effort devoted to it. This places DWR's contractual obligations to secure and deliver water as an advocate for its water customers in conflict with its broader resources agency obligations. This conflict extends to dam safety where the Perris Reservoir, for example, has been identified as seismically unsafe. This reservoir is not essential for water supply but continues to operate for recreational purposes. But the risk and cost of failure are the contractors' not DWR's. Separating DWR's role as the operator and manager of the State's water system

from its regulatory and other statewide statutory functions, with appropriate decision-making structure, will facilitate efficient operation for both functions.

Additionally, those who are charged with the responsibility for financing the infrastructure and maintenance costs have little input into how the system is managed and often not engaged early enough in the planning process. Whereas, the bulk of the costs of the SWP are paid by the State Water Project contractors, they have no authority in cost decision-making. As a result, critical decisions are often made without regard to costs and associated risks. In the interest of preserving the integrity of the water supply system, the management of the water supply facilities should be separated from other statutory obligations of DWR and run independently.

In the area of financial performance, the state has failed to meet its Davis-Dolwig obligations for the SWP infrastructure costs attributable to recreation facilities. The general fund has not provided funding for many years. If left unresolved, this lack of funding will adversely affect the long-term financial health of the project. There are other issues of effective cash flow management that the department is yet to resolve.

Although the SWP is a large energy user within California and routinely sells and buys energy, it is constrained by State regulations to conduct the same transactions and hedge energy costs that publicly-owned and investor-owned electric utilities conduct under state oversight. Hence these constraints lead to higher costs and disadvantageous acquisition and negotiation opportunities. Under current arrangements, energy related contracts and services regardless of the amount involved, must contain State of California required special terms and conditions that are non-

standard to the industry. There is no delegation of authority to DWR for approval of energy related contracts. As a public utility under a different governance structure, the SWP governing board would be able to establish procurement guidelines consistent with state laws, and delegate various levels of approvals to different levels of management, while reserving to itself approval of only the significant and sole source contracts and purchases for the benefit of the SWP. Such procedures would offer the flexibility needed by the SWP to react in a timely manner to energy procurement opportunities and allow the SWP access to the other tools utilities use to assist in controlling costs.

### 3. WHAT STRUCTURAL BARRIERS LIMIT COORDINATION AND IMPROVED OUTCOMES?

The State of California has a vast administrative structure requiring stringent rules and procedures to maintain operational consistency and control for all its activities. DWR as the operator and manager of the SWP is one of the departments of this vast structure subjected to the same rules and procedures as other general funded organizations. However, the operational needs of the SWP are significantly different from those of other organizations, often requiring quick actions in order to maximize opportunities in fluctuating market conditions. Moreover, the vastness of the SWP infrastructure and its maintenance and operational requirements are unique from any other system within the State's organizational structure. Due recognition must be made of these differences rather than deference to strict adherence to statewide rules and procedures to improve timely actions and costs. For example, the Department of General Services (DGS) holds the approval authority over DWR's procurement contracts with limited delegation of authority to DWR and no authorization to negotiate changes to the state standard contract. The

cost of delays in lost procurement opportunities, particularly in the area of energy purchases, including renewable resources, could be avoided with a governing board and a structured delegation of authority within the SWP.

The key concern is the inability of DWR to take timely actions consistent with industry standard, especially in such activities as electric power procurement and implementation of modern technologies such as computerized control and financial systems. The DWR as a state department is subject to the rules of general-funded activities despite being mostly funded by the SWC. DWR is constrained in large measure by its obligation to conform to the expectations and procedures set by other state agencies. For example, the Personnel Board and Department of Personnel Administration are responsible for setting job classifications and pay scales relative to skills set across the whole state enterprise with little consideration for the uniqueness of the SWP, or the complexity of each task environment. Some of the job classifications have created situations where only engineers are performing cost accounting functions, while the non-competitive pay scales have contributed to DWR's inability to attract and retain needed talents. These constraints have placed DWR at a distinct disadvantage in hiring skilled staff especially in the area of energy management, cost accounting, financial management, and technicians needed to rehabilitate aging and complex pumps and generators.

Additionally, there are situations where the DGS' procurement requirements do not lend themselves to the requirements of energy spot purchase in a highly competitive market place. Also, the failure of the state to fulfill its obligations under the Davis-Dolwig Act demonstrates

lack of clear outline for payment of the State's portion of the SWP costs by the Department of Finance.

The above examples underscore the effect of actions by other agencies and their administrative rules and procedures on operation of the SWP. Creating an environment where the operation and maintenance of the SWP will not be subject to such constraints through an alternative governance structure will invariably ensure that the system is more efficiently operated.

#### 4. WHAT COULD CALIFORNIA LEARN FROM GOVERNANCE AND WATER MANAGEMENT MODELS AND METHODS IN OTHER STATES?

It is often said that structure influences outcome. There are several models of governance available when it comes to the management of public water utilities. Determining the most appropriate governance structure for California's state water project will depend on the overarching objectives to be accomplished. Any governance structure must facilitate the accomplishment of the following objectives in an economical and environmentally sensitive manner:

- Efficient operation of the State Water Project
- Responsiveness to customer needs
- Sensitivity to environmental needs
- Accountability to bill payers and the legislature
- Manage the political and trust factor
- Promote integrated management decision making with institutional transparency

- Invest for the future

Some of the models of governance available in other states include:

- Government owned corporation such as the Tennessee Valley Authority
- Government owned, JPA operated such as the San-Luis Delta Mendota Water Authority
- Independent Quasi-Government Agency such as Central Arizona Project, Central Utah, North Colorado Water and Conservation District

A cursory examination of these models clearly reveals three common attributes. The first is that each is governed by an appointed or elected board. The second is that the composition of each board reflects the geographical area served by the organizations represented by the board. The third is that the governing board is accountable to its customers.

Regardless of which model of governance California adopts to manage the SWP, it is important that the SWC be adequately represented in the governance structure. The key focus of such a board would be on financing, water and energy management, and operations and maintenance of the SWP while still meeting the State's water rights and environmental protection guidelines.

As a major contractor, Metropolitan Water District of Southern California is very interested in a well run, effective and efficient SWP in order to meet its own water supply reliability and cost objectives. Metropolitan bears the majority of cost for the SWP paying on the average 65 percent of the power costs, 52 percent of the transportation costs and 46 percent of costs associated with

Table A entitlement. On the average, Metropolitan's annual costs for the SWP are approximately \$500 million.

## NEBRASKA EXPERIENCE ADMINISTERING WATER RIGHTS

I was asked to comment on my experience dealing with water rights and water administration during my time as the Director of Natural Resources for the State of Nebraska.

During my career I have had responsibilities in 13 of the western states. As a result, I have had the opportunity to be exposed to the way various states handle water rights within their respective state. The most extensive experience I have had in this area was during the six and a half years I served as the Director of Water Resources/Natural Resources with the State of Nebraska. In this capacity I served as the top water official for the state and was in charge of the granting and administration of surface water rights. I also had certain responsibilities associated with groundwater use.

While many of the western states handle water rights in a similar manner, there are differences; some of them substantial. In Nebraska surface water is administered under the prior appropriations doctrine – first in time first in right. Groundwater is managed under a correlative rights approach – share and share alike. Surface water rights are granted and administered at the State level. Groundwater is managed at the local level by 23 Natural Resources Districts. The State plays a significant role however in the management of hydrologically connected groundwater. It is the state's responsibility to determine when a basin becomes fully

appropriated. In making that determination, both existing surface water and hydrologically connected groundwater use is considered. A fully appropriated determination by the State results in a moratorium on new groundwater development and the granting of new surface water rights.

All water rights are subject to measurement and reporting. The Department of Natural Resources (DNR) has 5 field offices throughout the state to oversee water rights administration. All diverters are limited to the rate, timing, and place of use in their water right. They are not allowed to divert if their diversion will adversely affect a more senior water right. Water rights can be granted for instream flows for fishery purposes.

All basins within the state of Nebraska have been adjudicated. Water rights must be used within any five year period or they are subject to cancellation. DNR systematically re-adjudicates basins throughout the state during which each water right is reviewed for use. Hundreds of water rights have been cancelled by the state over the years for nonuse.

DNR relies heavily on Administrative Law Judges (ALJs) for many of these contested proceedings. ALJs have proven to be an effective and efficient tool in handling these cases. With the help of ALJs, DNR is able to manage multiple proceedings at any one time. The ALJ reviews the record, takes testimony, and prepares a report with a recommendation. As the Director, I would make the final decision based on the record and report of the ALJ. Any challenge to my decision had to be filed with the Court of Appeals – the State Supreme Court would usually take these cases directly.

A functional water rights system must be based on clear rules with consistent enforcement of those rules. Measurement and reporting of water diversions is key to sound water rights administration.

A copy of the Nebraska Surface Water Statutes is attached for your information.

Thank you for the opportunity to participate in this hearing. I would be happy to answer questions.