

Little Hoover Commission
Concerning the CALFED Bay-Delta Program Governance
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Testimony of
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Mr. Chairman, Members of the Commission, thank you for your invitation to testify before you regarding CalFed. I must confess that in light of the fact that I often had the responsibility as the Assistant Secretary for Water and Science, Department of the Interior to deliver news that was not particularly welcome in the State of California, I would have understood if you never wanted to see me again.¹ I fear that my testimony today might be the last straw even for the gracious people of the State of California.

I served as the Secretary of the Interior's lead representative regarding CalFed from July 2001 to December 2004. Although I do not claim to be an expert on CalFed or any other basin-wide ESA programs, over the past 15 years I have also had some involvement with the Upper Colorado River Endangered Fish Recovery Program, Grand Canyon Adaptive Management Program, Lower Colorado River Multi-Species Conservation Plan, and attempts to develop a programmatic approach to address water-related ESA issues in the Platte River and Middle Rio Grande basins.

Secretary Norton was very supportive of CalFed throughout my tenure as Assistant Secretary, and incorporated its concepts and philosophy into her Water 2025 Initiative. I too strongly believe that programmatic approaches to complex water supply and environmental restoration issues like CalFed are superior to the alternatives so long as all sides honor the agreement implicit in these programs to work within the collaborative program as an alternative to litigation. However, I also believe that the CalFed experience to date offers some "lessons learned" for CalFed itself and for similar efforts elsewhere.

The Need for a Review of CalFed.

I was very pleased to learn that Governor Schwarzenegger had initiated a review of the CalFed Program and that the Little Hoover Commission would be participating in this effort. I also understand that CalFed may be reviewed under the federal "PART" process. I considered requesting a similar audit or review on a number of occasions. I did not do

¹ I appear today on my own behalf and at my expense. Although my testimony refers at times to perspectives and opinions that I held while I was the Assistant Secretary, the Department may have a different perspective on these matters, which is far more important. I have also endeavored to limit my recollection of events to positions that I articulated at the time to others, as I believe that it is important to avoid the appearance that I have conflated then present knowledge with hindsight. And although some of my comments may be construed as criticism of others, I had the opportunity and responsibility to address any areas of concern, and consequently am responsible for any failures to either take affirmative steps to address these concerns or persuade others of the necessity to do so. Finally, my information about CalFed is largely stale, as it has been nine months since my resignation. My comments may have been rendered moot by the passage of time.

so out of concern that this action would have been perceived to have been motivated by partisan concerns and might have had adverse implications for the then ongoing effort to obtain authorization for CalFed in Congress. In retrospect I fear that this was a mistake on my part, and take responsibility for not being “bolder” as the lead federal representative for CalFed.

My concern was not that there were illegal activities, but that it was not possible to identify specific, real world accomplishments related to attainment of the basic CalFed goals of improvements in environmental restoration, water quality, and water supply reliability that resulted from the expenditure of substantial amounts of CalFed funds. My perception was that significant amounts of money were being spent on “process” or on generally accepted “good things” that only had a tangential relationship to the attainment of the basic goals of CalFed. And while this information may have been available from existing documentation, it was not readily accessible at the policy level (at least for one who had not benefited from decades of involvement in CalFed).

Your review of CalFed will hopefully provide guidance on how the Program can better track and validate a relationship between expenditures and real world achievements relating to environmental restoration and improvements in water supply and water quality. In addition, the development of meaningful performance metrics will enable decision makers and the public to determine whether, in fact, the “balance” anticipated by the CalFed Record of Decision exists or not.

CalFed Budgeting and Planning.

As I reflect back on my CalFed experience, it is clear that my approach to CalFed was shaped by the perception that the CalFed ROD was negotiated based on the assumption that there was essentially no limit on the amount of money that would be available for CalFed. I am not making this observation as a criticism of those who negotiated the ROD – using the promise of money to resolve conflicts that would otherwise prevent a consensus is certainly a time-honored practice in the political world. However, there are usually consequences if and when the promised funds fail to appear. I also recognize that California has demonstrated a unique capacity to fund multi-billion dollar efforts through the initiative or referendum process.

In addition, at times it appeared that the vaunted CalFed “consensus” was in fact limited to a strategy to obtain the maximum federal funds possible. I also perceived that there was no real consensus on even the need for additional water storage, let alone for a particular storage option or allocation of fiscal responsibility, which in turn did not bode well for the consensus that would be required for long-term progress on the environmental restoration and water quality goals of CalFed. Consequently, I feared that the “consensus” would disappear when it became apparent that effectively infinite levels of funding would not be provided from the federal government, or when it came time to actually build new storage facilities, whichever came first.

I mention these perceptions because they provide necessary background for my single most acute frustration with CalFed. By the time I became involved in CalFed in 2001 both the state and federal budget surpluses had evaporated. It was apparent to all that there was no chance whatsoever that CalFed would receive anywhere near the level of federal funding anticipated by the ROD. State funding at the levels called for by the ROD looked problematic at best. I understood that it was impossible for any of the stakeholders to publicly agree to accept less than the ROD levels of funding while CalFed authorization was pending in Congress. However, what was possible in my opinion was for CalFed to shift from a multi-year budgeting and planning process that assumed that all of the desired funding would be available to a process that prioritized expenditures and planned for a range of future funding scenarios. Under this approach, specific CalFed projects would be prioritized for funding and implementation so that the most important could be included in the base case for funding, and lower priorities funded only if and when additional levels of funding were provided beyond that needed to support the base case.

To be blunt, I lost confidence in CalFed when it essentially refused to develop budgets that recognized unavoidable fiscal realities. And while future federal representatives will hopefully have more patience, I believe that there are at least two reasons why the long-term integrity and success of CalFed will require a far more realistic approach to planning and budgeting. First, given the sheer magnitude of the CalFed Program, Congress and others outside of California will over time question any process that does not have focused and defined priorities that are tied to Program goals and accompanied by meaningful performance standards. Second, it is entirely possible that the mix and timing of projects selected by CalFed for implementation based on realistic fiscal assumptions will be materially different than a mix and timing of projects based on the assumption that everything will be funded. A failure to use realistic fiscal assumptions in planning and budgeting is highly likely to result in the funding of lower priority projects at the expense of the ability to implement projects that will make the greatest difference.

I would also observe that while it may be satisfying for some to complain about the dearth of federal funding and to blame the current administration, the stark reality is that Congress elected to authorize CalFed at only 20% of the level anticipated by the ROD. Moreover, it is Congress that passes the annual Budget Resolution and Appropriations bills, and Congress has to date decided to not provide anything remotely near the level of funding anticipated by the ROD. Congressional delegations from other states with other priorities are unlikely to be persuaded to fund CalFed at levels anywhere near those anticipated by the ROD.

Governance/Institutional Issues.

Given my belief in a strong role for states within our constitutional form of government, I started with a very strong bias in favor of the federalism that the prior administration imbedded throughout CalFed. I still believe in this approach. However, it became apparent to me that there was and is a considerable gap between the theory and rhetoric of “federalism” and actual implementation.

The first observation that I would make about the state-federal relationship that is inherent in CalFed is that it is important that there be clarity and a common understanding about the role and responsibility of whatever organization exists at the state-federal interface. To be specific, it is critical that the interface either be effectively non-political and neutral between the state and federal governments, or that there be an open recognition that it may act in a political manner on behalf of the State of California. Either alternative can work – what is important is that the entity be one or the other. By way of example, everyone understood and accepted the fact that that Secretary Nichols and I served in both policy and political roles. I do not believe that was a problem for either of us. CalFed was represented to be an “honest broker” that would be both non-partisan and equally responsible to both the State and federal governments. Over time, I concluded that CalFed was both participating in partisan politics and acting as an advocate for the State at the expense of the federal government. The consequence was a corrosive loss of trust and resulting reluctance on my part to rely on CalFed with respect to policy matters.

I believe that aspects of this dynamic could inadvertently develop with the California Bay-Delta Authority. As a State agency, its loyalties are clearly and appropriately with the State, and I would expect that it would act in a political manner on behalf of the State in any forum, including Congress. However, I also perceive that there is some expectation that CBDA also be considered to be an independent and objective resource with respect to the CalFed ROD. I think that it is highly unlikely that it can succeed in doing both, and fear that an attempt to do so will inhibit its ability to function in either capacity.

A far more important issue is that of the function of the CBDA. First, additional clarity regarding the relative roles of the Bay Delta Public Advisory Committee and the CBDA would be helpful. Second, and while I genuinely wish that it were otherwise, the CBDA cannot supplant the jurisdiction and authority of federal agencies. The same appears to be true for California state agencies. What then, is the real function of the CBDA? Is it intended to essentially function as an advisory committee to both state and federal agencies? If so, it needs to be far more nimble and responsive to the realities that drive federal (and presumably State) decision-making.

My perception, right or wrong, of CalFed was that it had become captured by “process for process’ sake,” and was incapable of addressing controversial issues in a timely fashion. Should the CBDA follow the same course, I will predict that over time the actual participation by key agency decision makers will diminish and be delegated instead to employees who do not serve in a management capacity. Federal regulatory agencies (particularly USFWS and USACOE) often operate under mandatory timelines for making decisions. If the CBDA is to provide effective input to these processes, it must be capable of making recommendations within the relevant time periods.

I believe that it would also be fair to observe that there is a perception within the federal team that the CBDA staff and certain of its members misunderstand the limits of their

role regarding decisions that are within the jurisdiction of the federal action agencies. Endless or repetitive debates may be therapeutic, but are not likely to affect agency decision-making. Please understand that I do not make these observations easily or lightly, as those who know me well understand that I am not inclined to defend federal agencies or authority.

I recognize that it is easy enough to ask hard questions and to criticize the existing CBDA structure. I do not pretend to have any easy answers to the question of what should be done to address these problems. What I do know is that the existing CalFed institutional relationships are not working particularly well, and must be modified if CalFed is to attain the lofty goals set forth in the ROD. I do not view the current status as anyone's fault. CalFed is a unique experiment that attempts to create a new institutional structure, and as is the case with anything bold and different, it takes time and experience to find out what works and what does not. Mid-course corrections are inevitable for experiments of this nature, and will result in a stronger process so long as the participants do not become distracted by efforts to place blame or defend a particular approach.

Should California decide that modifications to the status quo are appropriate, I would offer the following observations:

1. If I were California the goal would be to ensure that CalFed continued to receive Cabinet or sub-Cabinet level attention and that there was an integrated federal position between federal agencies. I was always struck by the fact that one of the most important and effective steps in the evolution of the CalFed approach was the decision by Secretary Babbitt and Assistant Secretary Rieke to create what is referred to as "ClubFed." ClubFed was created by the investment of political capital at a Cabinet level as a way to force federal agencies to talk to each other and to develop a common federal positions and implementation strategies. During my tenure as ASWS, "ClubFed" was still operative and effective.

Based on this success, the federal team suggested that any state CalFed legislation focus on creating a state parallel to ClubFed. This approach is deceptively simple. Simply put, there are few domestic political forces that are more powerful and fearsome than a unified California position. Any federal administration would feel compelled to treat a "ClubCal" as an effort that required Cabinet-level attention and a comprehensive response from the federal side. The political dynamics of this approach are arguably far more powerful than are provided by a more elaborate scheme of voting, non-voting, and carefully balanced membership of an organization that has no commonly understood and accepted function. While well intended, the complexity of the existing CBDA membership operates as a distraction at best, and may result in less, not more, policy-level attention from the federal side.

2. One of the great successes of CalFed is that it provides a forum for the development of a science program that is more transparent than what typically exists within regulatory agencies and is based on an objective assessment of program priorities instead of being driven by advocacy positions taken by regulatory agencies or the personal interests of

scientists who happen to be involved in CalFed. This function of CalFed should be preserved and enhanced in any reformulation of existing institutional arrangements.

3. Regardless of whether the institution that exists to support the State-Federal interface for CalFed is constituted as an objective “honest-broker” or a state agency that is expected to further the State’s policy goals, it should focus its attention on efforts to develop a consensus on policy-level goals. To be blunt, the CBDA appears to have degenerated into a forum for revisiting and rehashing decisions by federal agencies that individual CDBA members or staff do not like. If the CDBA or a successor organization wishes to function on a consensus basis, it must accept that a consensus will never be reached on some federal agency decisions, and move on to those areas where a consensus is possible. By way of example, I would suggest that the Babbitt Interior Department had no interest in waiting for the emergence of a consensus regarding its “B2” interpretations, just as we had no interest in waiting for a consensus that supported a change in that interpretation after it was invalidated by a federal court. The CBDA needs to learn to accept these decisions and move on to areas where a consensus is attainable.

4. Under any foreseeable fiscal scenario, there will be substantial federal and state grant programs that can be integrated by the CBDA or a successor agency. Success in this regard will require the development of a prioritized set of goals and the ability to withstand the inevitable political pressure to hand out grants irrespective of whether the recipient projects are directly related to Program priorities.

5. You can “shoot the messenger” (me), but that will not change the harsh reality that CBDA must evolve away from an organization that acts as if infinite funding will magically appear into one that is able to prioritize and effectively spend whatever funding is provided. Budgets are hard. Budgets force people to make choices. Budgets mean that not everyone will get everything. CalFed and the CBDA should focus on prioritized projects that will deliver tangible benefits to the CalFed priorities of environmental restoration, and improvements in water supply reliability and water quality, and the science that supports these objectives.

6. The “CalFed” approach is fundamentally dependent on the mutual agreement of stakeholders to accept the compromises inherent in a collaborative approach over the “winner takes all” opportunities afforded by a resort to litigation. While I do not know where the “tipping point” is, at some point the resort to litigation will render the CalFed approach a failure. Sacramento Valley water users were notably ambivalent about CalFed. Friant Project contractors understandably perceive that the CalFed consensus offers little or no value. Should the next step be litigation over long-term contract renewals, the expansion of Banks to 8500 cfs, or the validity of the OCAP, California may find that the fundamental rationale for a CalFed approach has been destroyed.

I have accepted the invitation of this Commission to testify with the understanding that my perceptions may only be of marginal relevance. With that said, thank you for considering my views on this important matter.