CONSENSUS BUILDING AS A PRIMARY TOOL TO RESOLVE WATER SUPPLY CONFLICTS

MaryLou M. Smith[1]

ABSTRACT

The allocation of limited supplies of water for multiple uses in the western United States is increasingly difficult. Stakeholders have diverse and seemingly irreconcilable needs, with many deep-rooted opinions on how the water should be allocated. A complex system of water rights and the regulations of multiple government agencies add further complications.

The U.S. Department of the Interior has deemed the issue serious enough to undertake *Water 2025: Preventing Crises and Conflict in the West*, to "speed up the resolution of water supply problems and ensure that the solutions are balanced and durable." How will solutions be found? Are more technological solutions needed, or better application of the technological solutions already available? Or are solutions more likely to be found in the arena of resolution of conflict among stakeholders laying claim to the water? How can the public be brought onboard in a meaningful way, when the issues are so complex? Do models used in the past provide the framework through which resolution can be achieved? Does legislative action and/or public referendums help or hinder?

This paper proposes that those responsible for making decisions about water supply allocation should consider creative consensus building processes their primary tool, not a peripheral one. Such processes should take the place of adversarial debate and litigation which often leads to mediocre results and a discouraged, disenfranchised public. Research dollars should be allocated to explore emerging collaboration techniques and to formulate and test state of the art consensus building technologies. Consensus built solutions should replace 1) adversarial debate on the part of legislative bodies and 2) voting by the public via the referendum process. The State of Colorado's current experience with a statewide water supply initiative following a failed public referendum is discussed as a case study.

[1]Vice President, Aqua Engineering, Inc., 4803 Innovation Drive, Fort Collins, Colorado 80525.

Referendum A—Background and Outcome

Referendum A, a 2003 ballot initiative in Colorado to provide a line of credit for water development projects, was soundly defeated by a 2 to1 margin, despite a period of prolonged drought combined with the state's highest growth rate ever. Voters and water leaders interviewed cited the primary reason for defeat to be the measure's lack of specific projects to be funded. Others, including many in the water industry who favor increased storage, did not see the need for this referendum because they believe the issue is not getting money for water storage, but getting water storage proposals through a complicated series of approvals, primarily environmental, something the measure did not address.

Environmentalists voted against the measure believing that conservation is sufficient to solve the state's water supply problems so further storage is not needed, or because they favor a balanced approach that ties serious, long-term water conservation measures with storage solutions crafted to minimize large disruption of ecosystems. West Slope farmers and politicians voiced concern that east slope needs would, under the terms of the Referendum, take priority over their needs without proper mitigation of the effect on their communities.

In 2002, attempts to move permanent storage forward as a critical solution were launched during two different legislative sessions. The first attempt failed, but the second passed both the House and the Senate after provisions were included to address concerns related to conservation and in-stream flow as well as mitigation of negative effects of water infrastructure projects on west slope communities. This legislation, because of the funding mechanism required, had to go before the voters in the form of a referendum.

Before the election, Denver Post pollster Floyd Ciruli wrote: "Lawmakers hoped the referendum would prompt interest groups to work together to find a solution, but it could backfire. This is really a political exercise on building for the future. If the referendum fails, it will be self-defeating. It could set back reaching a consensus for many years." Indeed, it appears that the most obvious outcome of Referendum A is that it seems to have further polarized stakeholders.

Water Buffaloes

Some believe Coloradoans voted against Referendum A to avoid a return to the heydays of the state's "water buffaloes--" a handful of giants such as Glenn Saunders, John Fetcher, and Wayne Aspinall who, according to the Denver Post, earlier "worked political deals to snare huge chunks of federal money for large dams and reservoirs." Their foresight and courage is said to have made possible today's Colorado—large expanses of irrigated farms and Front Range cities. No one doubts the contribution of these men, though some, following the logic of writers such as Donald Worster in *Rivers of Empire*, believe the region would have been better left in its natural form. In fact, Worster proposes that large projects by the Bureau of Reclamation were intended more

to line the pockets of industrialists with agricultural holdings than to serve the public good.

An April, 2004 feature in the Denver Post pointed out that the days of water buffaloes appear to be over, considering that "not one (large) reservoir or dam has been built in Colorado in 40 years." The Two Forks project proposed for the South Platte River cost taxpayers forty million dollars before it died at the planning table in 1990. The Post article quotes a new generation of water thinkers, such as former assistant state attorney general Melinda Kassen, who says "The kind of projects that get built today are… smaller, faster, cheaper, (with) more conservation, more cooperation."

In his article *The Water Divide in Colorado*, pollster Ciruli summarizes key differences of opinion about Colorado water shortages. He says the issues revolve primarily around out of basin diversions and amount of mitigation required, the efficacy of new storage structures, the potential for reliance on conservation and reuse strategies, and the use of agricultural water for municipal and industrial needs. He talks about a new political environment of water which he calls "post-Two Forks thinking." He says that economic development executives, water policy makers, municipal leaders and others are talking more seriously recently regarding methods to bridge differences of opinion. But, he says "only when actual projects are proposed will it be clear if the willingness to compromise is real."

Where are the visionaries who will champion new solutions with the foresight of the last century's water buffaloes? Where are the movers and shakers who will capitalize on the various needs/values/viewpoints and carve out solutions which are not black, not white, not even gray, but maybe chartreuse or purple?

Statewide Water Supply Initiative

Governor Bill Owens, in his January 2002 state of the state address, directed the Colorado Water Conservation Board (CWCB) to launch a "statewide water supply initiative." SWSI, (pronounced SWAH-zee) was to be a forum for diverse water use interests. The Department of Natural Resources (DWR) hired a consultant, Camp Dresser McKee (CDM), to lead diverse stakeholders in each of the state's eight basins to assess: What water is available? What are the demands? What are potential alternatives for meeting demand? Basin roundtables were established to receive and discuss results of the work of DNR and CDM, and to narrow down possibilities into a set of proposed alternatives for CWCB to present to the legislature.

Colorado Water Congress Panel: What Now, After Referendum A?

Convened by Colorado Water Congress in Denver in January 2004, selected state water leaders were asked "What Now, after Referendum A?" Though almost everyone expressed interest in dialogue, the only mechanism cited for such was SWSI. Here are some representative comments:

Don Ament, Colorado Commissioner of Agriculture, spoke of the need for "a new collaboration and a cooperative effort."

Peter Binney, Director of Utilities, City of Aurora, alluded to a successful agreement between Aurora and the Arkansas Valley, and said "I suggest that our legislature start thinking about intrastate compacts, whether they be between basins or between users of the past and users of the future."

Reeves Brown of the West Slope's Club 20 said : "The biggest lesson we learned from Referendum A was we need to build consensus before we build proposals." We need to "get beyond the C words of conflict, courtrooms, and condemnation."

Jo Evans, environmentalist, said "We don't reach consensus when the people are at the table primarily to see that their ox is not being gored."

Bob Ewegen, Denver Post: "I think Referendum A was a constructive dialogue. I supported Referendum A because we need to change the attitude, the dialogue, the way in which water is discussed in this state. We need to at least bring things like win/win solutions to the table."

Jim Martin, Natural Resources Law Center, CU Law School in Boulder**:** "Referendum A was not a dialogue. It was whatever the opposite of dialogue is. What we need is a very broad based, comprehensive, careful, patient dialogue in this state about water. We have to refrain from the sort of heated rhetoric and blame game we have been guilty of in the past. And we need to think more carefully about the others sides' perspectives, needs and wants and try to find some sort of way down the middle that really does provide an equitable solution and a vision for a sustainable Colorado. We need to get more serious about finding a way in which we can create a forum in which all the stakeholders are not only invited, but feel comfortable and capable of participating fully and effectively. That's different than just putting everyone in a room together. Unless we do this, we're going to continue to spin our wheels on this issue because this is such a difficult and complex issue that goes to the very heart of what most of us hold dear."

Frank Jaeger, Parker Water and Sanitation District: "I don't want to see a hundred more bills come across my desk. I've got a stack that thick of water bills that don't mean a hell of a lot to me other than half of them will injure me and the other half will move the fulcrum in my direction. We don't need a plethora of bills that put power on one side of the table or the other, we need business deals, deals which require that both sides walk away feeling comfortable with what happened."

Harold Miskel, Colorado Water Conservation Board, introduced a "set of C words we can work toward: cooperation, collaboration, consensus, communication." He said, "We need to have dialogue that gets to what people are really feeling, what's at the root of their values. We need to be responsive to the concerns of the people who are impacted by proposed projects. We need to build understanding from the bottom up,

understanding of what the needs are, what the resources are, what the concerns and issues are, and then start talking about what the possible options are to take care of these issues and concerns. The only way is for folks to come to the table and talk about these things. That's what the Statewide Water Supply Initiative (SWSI) is all about."

Wally Stealey, Southeast Colorado Water Conservation District, and the most outspoken panel member said, "We're beginning to understand that Harold Miskel's C words have a much greater impact than we thought. But we need real consensus, real compromise, not a definition of compromise that says 'you take, I give.' It must truly be consensus of the citizens of Colorado."

During this panel discussion several stakeholders pointed out that "we need dialogue." But instead, everyone just gave their fifteen minute spiel and participated in a question and answer session afterward. If dialogue is desired, when will it begin? Will Colorado Water Congress convene the next discussion around a consensus building format instead of a panel?

Can SWSI Deliver Dialogue?

At the May, 2004 meeting of the CWCB, DNR staff and CDM consultants reported on completed work related to supply and demand findings, and stated that the next round of basin roundtable activities would focus on generation of alternatives. Alternatives would be proposed by the consultants, and stakeholders would discuss them, presumably coming to consensus about which ones would be presented to the legislature in November.

Also presented were results of an objectives weighting process in which basin roundtable participants had been asked to weigh agreed upon objectives in a forced choice manner. Slides were shown depicting for each basin how different interest groups weighed the various objectives. As one might expect, the results fell along interest lines. Agriculture stakeholders ranked "meeting agriculture demands" the highest, while environmental stakeholders ranked highest "providing for environmental enhancement." CDM said that it planned to track how participants representing different interest groups (stakeholders) score different proposals brought forth as compared to their stance in the objectives weighting process, stating that the process is supposed to lead to a "forum for dialogue and understanding."

One CWCB director, Raymond Wright, expressed discouragement at the findings of the objectives weighting process. Regarding what the weighting process showed in terms of stakeholders weighing objectives according to their own bias, he said, "I don't like this. It implies a high degree of divisiveness." He said that he thinks discussions can be fruitful, however, if they are properly structured and "if stakeholders are encouraged to think win-win."

Part of the SWSI process has been to allow for public input. At the February meeting of the SWSI South Platte Roundtable, environmentalists from more than a dozen

organizations took advantage of the public input time to read prepared statements. The result was not dialogue, but simply a series of monologues—an airing of views.

Western Governors on Water Issues Collaboration

One source which would seem to be important to those interested in serious consensus building at the state level is the proceedings of a 2002 conference chaired by then Governor of Oregon, John A. Kitzhaber, M.D. In his forward to *WaterShed Solutions: Collaborative Problem Solving for States and Communities* Kitzhaber asserts that collaborative watershed partnerships cannot replace legal and regulatory tools but they can become the vehicle through which those traditional tools can be more successfully applied. This valuable document outlines important points about collaboration in watershed matters including that collaboration

- reduces conflict and litigation which often results in unsatisfactory, narrow decisions that don't address underlying problems.
- can turn apparently inflexible federal or state mandates into opportunities
- provides an alternative way of approaching problems that avoids the gridlock often associated with traditional governmental approaches

Conferees agreed that states should appropriate funds for collaborative processes, provide high level training to all levels of public officials and private stakeholders in fundamentals of collaboration, develop demonstration projects to showcase collaboration, and request universities to conduct research on collaborative problem solving.

Drought in the West: Can Consensus and Collaboration Make a Difference? is a special report which came out of the 2002 annual meeting of Council of State Governments-West, which provides a platform for regional cooperation among the legislatures of the 13 western states. The report includes points made by representatives from Montana-based Western Consensus Council who talked about "replacing traditional procedures used to resolve conflicts in the public arena with collaborative models for problem solving." Asserting that traditional procedures result in gridlock, impasse, and skyrocketing legal fees, they presented a table of actions that can be taken within a legislative context to foster collaborative procedures, the most radical of which is "by instituting the collaborative process through statute."

Southern Alberta (Canada) Experience

Many who deal with water issues in the west have been fascinated by the recent experience of the Southern Alberta (Canada) Water Users Group in which consensus was reached despite long odds during their drought of 2000. The group has been highly praised and has earned numerous awards as a result of their achievement. When asked what it took to bring water users to the table to develop a win-win solution, two factors rise to the top. The first is that of crisis. Something had to be done or large numbers of irrigators would lose their crops. The second factor appears to be that the largest user and the user with the most power (the St. Mary River Irrigation District)

willingly gave up some of their rights to benefit others, so that legalities were overridden for the period of the drought. Does this example have lessons for the rest of us?

What Did Referendum A Tell Us about Voters?

Some believe Referendum A did not pass because the public is not well-educated about water issues. An alternative view could be that the public voted against the measure because they *are* educated and they want a full view of the situation so they can make educated decisions. Is it possible that by voting no to Referendum A and leaving the state without a solution to its significant water supply problems, the public was not being blind to realities, but were basically saying they want meaningful choices, not black and white, pieced-together solutions? Is it possible voters saw the bill as basically a storage solution with environmental and western slope mitigation concessions tacked onto it as an insincere attempt to bring along the "other side?"

Many voters interviewed expressed that they felt disenfranchised by Referendum A. They want a multi-faceted, comprehensive solution to state water supply problems, not just large-scale storage. Referendum A did not give them that choice. Furthermore, the voting process itself further polarized constituents, and moved everyone further away from a rational solution with mutual benefits.

Walter Lippman, writing in his 1920's classic *Public Opinion*, says that people form opinions based not on education but on long-held beliefs and values. But if we believe the public *can* be educated, where do we expect them to receive education about complex issues such as water supply? The media does not educate; it gives us sound bites based on the deeply held beliefs and values of those trying to promote their side of an issue. People hear what they want to hear, based on their own deeply held beliefs and values. What can be done to break down those deeply rutted paths? Would collaborative vs. adversarial approaches pull people together—re-engage them, open them up to new ways of looking at issues?

Some say our adversarial system of power politics supports endless conflict among competing interest groups and leaves little room for open-ended exploration of mutually beneficial solutions. Adversarial politics promotes power hoarding and does not allow for the development of trust and respect which can lead to solutions which take into consideration the interests of various stakeholders. As long as solutions for the common good have to compete in an adversarial environment dominated by vested interests, we are fighting an uphill battle.

What Can We Learn about Consensus Building in the Public Policy Arena?

What can we learn from the social sciences to help us solve water supply conflicts? We have a great deal of research into technological solutions. What we most need is to put more of our resources into social technologies—research into ways to bring together divergent viewpoints. We have only begun to understand the inner workings of deliberative models and their social potential. Often we hear that the social sciences, the so called soft sciences, are really the harder sciences to study and to apply. That is

surely true, and the challenge is formidable. But it seems that, under the excuse "you can't change human nature" we have failed to take on the challenge. Are we overlooking the potential for truly globe-changing solutions which could be derived from learning how people can come to understand one another and build consensus? We are in great need of experimental laboratories to try out strategies for using conflict creatively and constructively to generate workable and lasting solutions to conflicts.

Consensus Building Models

In *The Tao of Democracy*, Tom Atlee collects and reports on a variety of methods being used to draw on the wisdom of multiple viewpoints to come up with creative, workable solutions for today's complex issues. He claims we need to look at new ways to "do democracy" because elections, polls, and the numerical adding up of our individual opinions doesn't lead to good decisions which build on our collective wisdom. He believes we need to embrace a more comprehensive view of reality: more view points, approaches, and complexity, so that we can get as good a sense of the whole picture as possible. The premise is that conflict can be a powerful generator of quality problem solving. Atlee cites a number of non-adversarial approaches to conflict which are being used by those he calls social process activists.

Citizen deliberative councils are discussed at length. These councils are typically made up of a group of diverse ordinary citizens. Participants are given extensive education on a given issue and assisted in coming to consensus by a trained facilitator. In Denmark, such citizen councils are convened by the Danish Parliament to study an issue, deliberate with the help of a facilitator, and present findings to parliament. The deliberation process calls for weighing the full range of facts, factors, perspectives, options, and consequences related to the issue and often creates new options in the process. Atlee says "Given a supportive structure and resources, diverse ordinary people can work together to reach common ground, creating wise and deliberate policy that reflects the highest public interest."

U.S. Representative Edward J. Markey speaks of his experience with a citizen deliberative council which undertook an extensive study of telecommunications issues in the Boston area in 1997. Recognizing the political potential of this innovation, he said, "This is a process that I hope will be repeated in other parts of the country and on other issues." Dick Sclove, from the Loka Institute, was the lead organizer of the effort. Of the experience, he said: "These ordinary citizens ended up knowing more about the subject than the average congressperson who voted on the issue, and their behavior conclusively disproved the assertion that government and business officials are the only ones competent and caring enough to be involved in technological decision-making. This lay panel assimilated a broad array of testimony, which they integrated with their own very diverse life experiences, in order to reach a well-reasoned collective judgment grounded in the real needs of everyday people. To me this example demonstrates that democratizing science and technology decision making is not only advisable, but also possible and practical."

Stakeholder dialogues are similar to citizen deliberative councils except that the participants are chosen not from the general citizenry, but from groups who hold various, often opposing views on a given issue, and who have a definite "stake" in the outcome. These dialogues have proven especially effective for "issues that have proven immune to conventional legislative solutions." An emerging form of stakeholder dialogue called The Consensus Council has been championed by former Montana governor Marc Racicot, who created the Montana Consensus Council. In this form of consensus building, a government agency chooses a representative from each significant interest group with a stake in the issue and helps them come to agreement on recommendations, which are then passed in resolution form to the legislature. Politicians back decisions which come out of stakeholder dialogues because they are supportable by a wide variety of constituents. The success of the Montana Consensus Council and that of a comparable one in South Dakota has led to an effort by a major mediation group, Search for Common Ground, to have Congress establish a national Consensus Council. Former U.S. Secretary of Agriculture Dan Glickman is one of those leading the effort. A United States Consensus Council would "serve the nation by promoting consensus-based solutions to important national legislative policy issues, and would convene the stakeholders on a given issue and seek to build win/win agreements—those that reach the highest common denominator among the parties."

At root, these approaches accept the premise that emotion and intuition have a legitimate place in decision making, and that healthy relationships are a powerful resource for finding solutions. Such an approach addresses the questions, "What are the fears of participants on all sides of the issue? How can we come up with solutions that address those fears?" Truly understanding others with opposing values stems from a chance for meaningful expression of those values, and from this interpersonal understanding can come the motivation to build consensus.

How might we integrate citizen deliberative councils or stakeholder dialogues into our political process such that they could make a significant difference and even become a central feature of our political system? What if meaningful, facilitated dialogue following comprehensive study of issues were to become the norm for our elected officials? Is it too much to ask that in a democracy our elected officials should mirror the diversity in our populations? Can we even imagine a democracy in which elected officials whose views run the gamut come together amicably, study the issues, and make their decisions not in an adversarial way but through facilitated dialogue? Can we imagine true openness to new solutions instead of dogged insistence on pre-formed positions?

Where is SWSI Now?

The scheduled basin roundtable sessions were completed in September, 2004. At the South Platte Basin Roundtable Technical Session 4, Rick Brown of the Department of Natural Resources and the consultants from Camp Dresser McKee summarized the findings and set the stage for generation of alternatives to be presented to the Colorado Water Conservation Board and subsequently to the state legislature in November. They showed what the basin by basin water needs of the state are projected to be by the year

2030. The amount of water projected to be available to meet those needs was presented, having been catalogued following communication with each basin's water providers about their plans. The resulting "gap" was shown, again basin by basin, and a very preliminary approach to finding "projects and processes" to fill that gap was discussed. Ensuing discussion centered around both the "gap" which SWSI has identified, calculated to be the shortfall of water after considering the plans of water providers, and what this author calls the "GAP"—the shortfall which the providers already have plans to fill.

Water providers' plans include a wide variety of projects and processes, some of which are increased conservation, agricultural transfers for municipal use, existing reservoir enlargement, and the building of new reservoirs. An example of the latter is the Northern Integrated Supply Plan, or NISP, which the Northern Colorado Water Conservancy District is promoting. NISP participants are several northern Colorado water districts who have joined forces in hopes of building two plains reservoirs. The project is in the stage of gathering public comment prior to the preparation of an EIS--Environmental Impact Statement—a lengthy process which is considered by most as a formidable hurdle for any water storage project to clear.

Two distinctive avenues of questioning at this final basin roundtable technical session were, first, "Are some of the water providers' plans overlapping—are they counting on some of the same sources of water?" and second, "How confident are we that the providers will be successful in implementing their plans, especially given the regulatory and public opinion hurdles to be overcome?" As a result of the discussion, plans were made for assessing even more carefully how much of a "fudge factor" should be considered to allow for the uncertainty, and indeed whether some water providers would want to alter their figures to be more conservative.

For purposes of this paper, the more important issue is what will be done, and in some cases is already being done, to build support for the projects and processes which have been or will be proposed. Many of the projects and processes which fall into the GAP category are already in some stage of being developed and/or analyzed by regulatory process, which includes public comment. How will the water providers proceed in building consensus for their plans? In the case of the smaller gap, the ten percent or so which SWSI has uncovered to be the projected statewide need outside what water providers already have plans to provide, how will processes and projects be proposed to fill that gap? As a part of the September roundtables, Rick Brown from the Dvision of Natural Resources and consultants from Camp Dresser McKee presented a couple of rough ideas for potential processes/projects which might be forwarded to the CWCB and eventually to the legislature as a part of the final SWSI report. The point was made that hopefully this will not be a final report, but that the SWSI process will be ongoing in some form. Would this be the ideal time for the SWSI team to propose to the CWCB and the CWCB to the legislature that the roundtable participants now undertake a year of dialogue in which they develop some creative alternatives hammered out among themselves? The roundtable participants were chosen to provide a wide variety of

viewpoints, including agricultural, urban, and environmental. Why not now move to a stage in which these folks have the opportunity to create ideas together?

Increasingly, water providers are thinking about public opinion as they develop their plans. But the big questions are: "How can we convince water providers to utilize citizen and stakeholder groups upfront to play an active role in developing plans and proposals rather than simply trying to gain their support for plans and proposals after they have been developed? What would it take to convince those responsible for providing water for Coloradoans between now and the year 2030 to place primary, not peripheral emphasis on the process by which alternatives are to be developed and consensus derived?"

Conclusion

The days of water buffaloes brokering deals in smoke-filled rooms is over. We've come far enough to know we have to involve stakeholders and the public in a cooperative process. But are we putting enough into the process to make it work, and are we serious about working the process? If so, why do we keep seeing band-aid bills come out of the legislature and confusing referendums put in front of the voters?

Who has the right to use the water when available supplies do not meet all the demands? That question will be asked more and more, not just in Colorado but across the nation and even the globe.

This paper proposes that answers to that important question must come from consensus-built public policy. Consensus building as a primary tool must be championed by new visionaries who take the lead to develop and apply soft science technology to bring together stakeholders with conflicting interests. Any consensus building related to water supply problems must help folks on multiple sides of the issue understand deeply where various values and beliefs originate, to fully listen to and gain respect for the roots of the view of the other. In exploring those views, creative solutions with potential for acceptance from all can emerge.