NATIONAL WATER LEGISLATION

Tom Morris*

It is a pleasure to be with you today for this Fourth Annual New Mexico Water Conference. I have followed the previous yearly events with great interest and am quite familiar with the excellent developments resulting from this discussion and exchange of ideas and information.

My topic today is Legislation at the national level which affects state water rights. Western State water rights law, basically the prior appropriation doctrine, has for many years been thought to be well established, understood and respected by all concerned with the use, conservation and development of water, that most precious of all natural resources. It, therefore, came as a great shock to all western authorities when the Federal government challenged successfully water rights acquired under State laws based upon the principal of prior appropriation of rights to use of water whereby existing beneficial uses were recognized as constituting a prior right to the water of a stream, that first in time of beneficial use constituted first in right, and that through its beneficial and productive use valid property rights could be acquired.

The right acquired by appropriation of water has been recognized from the beginning of development in the semi-arid West as a property right, as valuable and as much protected by law as title to the land itself.

As I said it came as a shock when it was discovered that water rights acquired under State law, and the State-prescribed procedure for obtaining same could be challenged or ignored by action of Federal agencies. This was revealed by a series of court decisions beginning in 1955. The best known and possibly most far-reaching case was the Pelton Dam Case, decided that year.

I am not going to enter into a long discussion of that case since most of you are already familiar with it. For those who are not, and are concerned closely with water resource development I recommend you familiarize yourselves with it. I commend heartily the dissenting opinion of Mr. Associate Justice Douglas in that case as representing the feelings of the western States.

Briefly, the Pelton case is of major importance because it establishes the principle that severance of water from the public domain by the Desert Land Act of 1877 did not apply to reserved public lands of the United States, a new and startling interpretation of that Act. In the decision the Supreme Court used the term "reservations" to include all public lands withdrawn or reserved from sale or disposition under the public land laws. If this holds, then hundreds of millions of acres of land within the western States and the water resources therein are removed entirely from State control and State water rights laws become lost in a chaotic maze of uncertainty.

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*Representative in Congress from New Mexico, Tucumcari, New Mexico.

As a result of this decision and the succeeding Fallbrook and Hawthorne cases it has become necessary to restore order and system in the realm of water rights. This can best be accomplished by Federal legislation somewhat in the nature of "quit-claim" Acts of Congress.

Water rights are literally the life blood of the economic structure of the West. Year to year variations in total supply are bad enough. In addition now all those concerned with conservation, storage, and development and use of water resources must cope with the possibility that a large proportion of the available sources of water may be beyond the systematic, orderly procedure for establishment of rights under State laws. They may now be subject to the whims of individual Federal agencies which may ignore or contravene these procedures. These agencies of recent years have seen fit to do just that in too many instances.

The general feelings of mistrust created by these court cases throughout the West has led to a heavy demand upon the Congress to bring order out of chaos.

Federal activities in the development of water resources in the West have, from time to time, caused uneasiness as to the status of water rights acquired under State law should the Federal Government assert the right to use the water for navigation or for other Federal purposes. Previously several piece-meal steps have been taken by Congress to reassure the western States.

Section 8 of the Reclamation Act of 1902 served to quiet such fears so far as Federal irrigation projects were concerned.

The Milliken-O'Mahoney amendment to the Flood Control Act of 1944 subordinated the use of water for navigation west of the 98th Meridian to any present and future beneficial consumptive use. This applies to all projects authorized for construction by the Corps of Engineers by that and subsequent Acts and seems to assure that water needed in the operation of its projects would not interfere with water rights acquired under State law.

It had long been presumed that the Desert Land Act of 1877 passed control of non-navigable waters arising from the public lands to appropriation under State laws. The Pelton Dam decision disabused us of that idea.

Since waters arising from many Federal reservations have long since, in many areas, been put to beneficial use under water rights acquired under State laws, this reopened the entire problem of Federal-State relationships in the water rights field by raising a question as to the value of such rights. The Federal government has used the Pelton Dam decision as the basis for casting further doubt on other water rights held under State law.

While this troublesome question has had the fullest impact on the States of the West, I am aware of an increasing interest among Eastern water authorities in this very problem. This augurs well for the chances of some early Congressional action.

Following the Pelton Dam Case, the Cabinet Committee on Water Resources Policy recommended that the principle which recognized water rights as property

rights be accepted and that a study of the whole issue be made. So far no such study has been made nor proposed by the Federal government.

In the succeeding sessions of Congress numerous bills have been introduced which would resolve the issue by requiring all Federal agencies to operate under State laws with respect to water rights. This has met with the opposition of the Executive Departments, particularly the Justice and Defense Departments, primarily on the grounds of doubt as to their constitutionality.

The Departments of Agriculture and Interior have usually signified their agreement with the philosophy expressed in the language contained in the bills and have indicated their willingness to participate in the development and drawing of a workable bill upon which all concerned could agree. Near the close of the 85th Congress the draft of such a short bill, agreed to by the Departments of Justice, Defense, Interior, and Agriculture as well as the Budget Bureau was recommended to the Congress by the Secretary of the Interior.

This bill would have in effect, overridden the so-called "reservation theory" as determined in the Pelton Dam decision. However, the bill made no progress before adjournment of the Congress primarily because it fell far short of being satisfactory to the West.

A number of proposals were made in the just-ended first session of the 86th Congress to bring some order out of chaos in this most important field. I shall discuss them briefly. Unfortunately none of those proposing a positive step toward preventing potential future evasion of States water rights law, particularly in the western States, by Federal agencies, have progressed to the point of holding public hearings. Federal agencies themselves have expressed general opposition to most of them either directly or by suggesting amendments they would require before giving their approval. In most cases these amendments would so water down the effect of the bill itself as to make it nothing but a general statement to the effect that State water rights should be observed, removing mostof the element of compulsion.

The Senate this past session approved a resolution (S. Res. 48) which established a Select Committee on Water Resources. Its declared purpose is the study of development and coordination of water resources development by Federal, State, local and private agencies. Although not specifically stated, it may develop some means of cooperative understanding as to the future status of State water rights. It will depend largely upon existing agencies for information and recommendations, as well as a proposed series of public hearings throughout the nation. The States will have an opportunity to present their views at these hearings. They should take every advantage of this opportunity.

A House bill designated HR 1234 would require Federal officers, agencies and employees to act in accordance with State water laws relative to the control, appropriation, use and distribution of water. It provides that the United States shall sue and be sued in the courts of States when litigation arises from failure to comply with the provisions of this measure. It specifies that Federal agencies comply with the same procedures as citizens of the various States in carrying out Federal law relating to water-resources development and utilization, and that those agencies shall not interfere with any right recognized by local custom or law without due process

of law and just compensation therefor. The terms of this bill would apply to the entire country, although with greatest impact on the western States.

Senate Bill 1592, entitled Western Water Rights Settlement Act of 1959, is the re-introduction of a bill (S.863) that was introduced in the 84th Congress and 85th Congress, and which has been the subject of considerable interest and discussion. Its principal purpose is making Federal lands and agencies subject to State water laws in the States lying wholly or partly west of the 98th meridian. The measure contains a declaration that "Federal agencies and permittees, licensees, and employees of the Government in the use of water for any purpose in connection with Federal programs, projects, activities, licenses or permits, shall acquire rights to the use (of water) in conformity with State laws and procedures relating to the control, appropriation, use or distribution of such water." As introduced in the 86th Congress this bill would suspend any existing Federal Power Commission licenses for impoundments or diversions on non-navigable and intra-state waters if construction has not reached a state of completion which affects such impoundments or diversions. It is similar to HR 2363 introduced previously in the House.

Sixteen western Senators joined together to introduce S. 851. This bill provides that the withdrawal or reservation of surveyed or unsurveyed public lands shall not affect any right to the use of water acquired pursuant to State law and that any public land withdrawal or reservation shall not affect the right of any State to exercise jurisdiction over water rights. It would apply in all States. This is identical to HR 4604, 4607, 4567, and 6140 introduced in the House.

Some conservation interests feel that these bills do not provide adequately for State laws which fail to recognize fish and wildlife conservation and public recreation as beneficial uses of water and thus oppose them unless, as they suggest, amendments are accepted which would provide for the use of water on Federal lands for fish, wildlife, public recreation and multiple-use management purposes by agencies of either the State or Federal governments.

On March 16, 1959, I introduced HR 5718. This I did for the purpose of requiring the Federal government to recognize the authority of the States relating to the control, appropriation, use, or distribution of water within their boundaries. It would apply to water resources on and deriving from the Federal public lands. It declares it to be the policy of the Congress that this authority be given full recognition by the Federal government in connection with Federal programs, projects, or activities for the conservation, development, and use of the Nation's land and water resources.

Section 2 of my bill provides that Federal government agencies, in connection with Federal projects for conservation, development, or use of water shall be bound by all water rights acquired under State laws or recognized by State courts. As a condition precedent to the use of any such water, Federal agencies shall acquire rights to its use in the same manner as, and be given the same consideration as an individual citizen of that State. This must be accomplished by the same procedures in accordance with the laws of the respective States relating to the control, appropriation, use or distribution of water within their geographic boundaries as is required of any citizen of that State. The Federal government agencies shall not acquire

nor interfere with the exercise of any water rights acquired in accordance with State laws or which are recognized by State courts except upon payment of just compensation therefor. This does not preclude acquisition of such water rights by purchase, exchange, gift, condemnation or, where water is available for acquisition; upon proper application to a State for a right to water to be used for any purpose when certified as necessary to the conduct of an authorized Federal program.

These provisions do not affect any right to the use of water acquired pursuant to State law. They do not modify or repeal any provision of existing Federal laws requiring that rights of the United States to the use of water be acquired pursuant to State law. Nor do they affect in any way provisions of international treaties of the United States or any interstate compact or existing judicial decree as to water rights nor those held by or for Indians.

I believe that this bill will halt the steady encroachment by irresponsible Federal agencies upon control of the most important single resource of our western States.

Although there has as yet been no formal action taken upon this bill I feel justified in hoping for action in the next session of Congress.

I am happy to say that other Members of the House of Representatives have proposed identical bills (HR 5555, 5748, 5618, 5587) and six Members of the Senate have joined in sponsoring an identical bill (S. 1416) in that body.

As I noted previously no formal action has been taken as yet on any of these bills. However, the general interest and public discussion which will no doubt be engendered by the public hearings scheduled by the Senate Select Committee on Water Resources, and the report and recommendations of that committee which are scheduled early in the next session, may provide the impetus necessary to prod the various Congressional Committees into action.

There is opposition by some Federal agencies. The Department of the Interior has expressed its opinion numerous times on the general idea of requiring Federal compliance with State water laws. It holds that such action would be an unconstitutional delegation of authority. In general the Federal government does not comply with State law and the States do not comply with Federal law in their activities. The Department has held that to delegate to State authorities control over the operations of Federal programs, projects and activities requiring the exercise of rights to use water might violate the basic right of the Federal Government to exercise its constitutional powers thus raising doubts as to whether Congress can require compliance with State laws by Federal agencies where that requirement would conflict with basic property claims of the Federal government.

The Department of Justice has indicated that there are major State law difficulties in the way of the water program as legislated by Congress. These have resulted from the fact that a large Federal investment must be made in, for instance, a reclamation project, before a beneficial use of water can be shown under State law, and until that stage has been reached water rights are very uncertain.

Opposition has been expressed by Federal agencies to complying with State water laws on the score that an impossible situation is created when a Federal water project is in more than one State, each having different water laws. In general, this is part of the Federal agencies' contention that it is difficult, if not impossible to operate a largely Federal water resource development program under uncoordinated State water laws.

There is no doubt that Western water resource control, and Eastern, to an increasing degree in the future, presents a real dilemma. In the modern era of large-scale, multiple-purpose water resource development, which no one contests the need for, there can be little doubt that Federal assistance is necessary. Yet, the freedom to appropriate water and apply it to beneficial use is essential to the growth, development and prosperity of the public land States. Large investments by private capital and local agencies have rested upon the stability and security of the assumption that by settled rule of law, western water rights were dependent on and determined by State law.

The growing challenge of such water rights by the Federal government in carrying out Congressional mandates for large-scale water resource programs has produced a crisis which must be resolved before the orderly, equitable full development of water resources which is so vital to Western programs can proceed. It is to that end that I have introducted HR 5718. I hope that a solution will be reached following full discussion and I shall continue to work toward that goal.

Thank you.