LET'S GET STARTED ON CALIFORNIA'S WATER PROBLEM

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SCOPE AND MAGNITUDE OF THE PROBLEM

As we appraise the various factors involved in an attempted solution of California's water problem as of October 1955, it becomes increasingly clear that California's need for water will not wait any delays that can be avoided. The Southern California Research Council has just reported that in its view the metropolitan area surrounding Los Angeles embracing all of Los Angeles and Orange Counties will have a population increase of approximately 45% within the next fifteen years and forcasts that by 1970 there will be eight million people in these two counties. Although expressed somewhat sensationally Bruce Bliven of the National Planning Association warned that California must have long range master and continuous precise planning to prevent California from "strangling itself to death" in its own "explosive" growth.

There are many evidences of accelerated interest in doing something decisive in solving California's water problem and doing it without undue delay. Since the reaction of the State to the disappointment from one end of the State to the other arising out of the failure of the 1955 session of the California Legislature to adopt a Water Department Reorganization Bill, there is an increased interest in the need for cooperative efforts on the part of the North and the South to provide more water, work out a formula for its distribution, adequately protect the Counties of Origin, and to settle the basic political, economic, engineering, financial and legal problems involved in order that definite and sound plans can be made to protect California's future.

Illustrative of this interest is the increasing emphasis placed by the press, television and radio commentators upon the importance of working out these problems in order that California may continue to grow and develop as the vast empire of the West. The series of masterly articles written by Mr. Ed Ainsworth of the Los Angeles Times in pointing up with clarity and force the various issues involved, has been a substantial contribution to intelligent public understanding of the whole water question. Other papers such as the Los Angeles Herald Express in its series by Mr. Arthur Hewitt, have served to stimulate

citizen interest to the extent and degree that many people are now saying "Nothing is more important to California than water". "Water is California's lifeline." The magnitude of all that is involved challenges our unselfish interest, our best thinking, our intelligent planning and greatest engineering skill.

All Californians who are proud of the long and romantic history of our great State clearly understand that the problem of the distribution of water from the Counties of Origin or the Areas of Origin to the Counties and Areas of Deficiency and short supply must be settled in such fashion that is fair and acceptable to both the North and the South. It is not an exaggeration to say that if we are not successful in accomplishing this, the most serious controversy in the history of our whole State could be created. Those who love California are in agreement that the water problem must not be the basis for any discussion whatsoever of a proposed division of the State into Northern California and Southern California, but that conversely it must be emphasized there will be reciprocal benefits that will come from an equitable settlement of the problem of distribution to the State as a whole.

We are foolish indeed if through avoidable delay, indecision, stalemate, and nonaction we fail to make progress year by year and recognize the possibility of disaster. As that colorful and rugged individualist William Mulholland, who pioneered the bringing of the Owens River water to Southern California and

Colorado River water to the South bluntly expressed it in his own inimitable way "If you don't get the water, you won't need it". The trite expression "We never miss the water till the well runs dry" has been passed on from generation to generation, but serves also as a stern warning to an intelligent people to outline the scope of our task, resolve our controversies and with the ingenuity and progressiveness that is characteristic of the American people, and particularly of the West, march forward to achievements of which we can be proud.

LET'S DEAL WITH THE FUTURE AND NOT WITH THE PAST

In facing up to the issues involved at this time, it would serve no useful purpose to recite in detail the basis of the failure to have come out of the 1955 session of the California Legislature with a reorganized State Department of Water Resources, nor attempt to fix personal responsibility. It would appear wiser to ascertain what can be accomplished in the near future and devote our time and energies to vigorous and affirmative constructive efforts.

Prior to and during the entire 1955 session nine statewide organizations sincerely interested in the water problem sought to consolidate their forces and work with the official Legislative Committees of the Senate and the Assembly in attempting to give cabinet status to water and reorganize the outmoded water organization machinery now existing in this State. Considerable credit must be given to the Statewide Committee on Water Problems headed by Supervisor C. W. Bradbury of Santa Barbara, representing the

County Supervisors Association of California in his efforts to hold these groups together and improve California's water organization. Other organizations on the statewide committee consisted of the California State Chamber of Commerce, represented by Loren Vanderlip and by W. E. Stewart, the California League of Cities, represented by Richard Carpenter, the Irrigation District Association of California, represented by Robert T. Durbrow, the California Municipal Utility District Association, represented by Rex Goodcell, the Agricultural Council of California, represented by Alan Mather and Ralph Taylor, the California Farm Federation Bureau, represented by Robert Hanley, the California Flood Control Council, represented by John Luther, and the Soil Conservation Association, represented by Assemblyman Francis Lindsay.

Mention is made of these nine statewide organizations and their representatives in recognition of their devoting many hours of unselfish work in the preparation and amending of Senate Bill 1745, authored by Senator Howard Williams and in their following its course through the various committee hearings, as well as other measures dealing with the creation of a new Department of Water Resources.

IF PROGRESS IS TO BE MADE THE SO-CALLED

"UNIT RULE" SHOULD BE ABANDONED.

During all of the time that the representatives of the statewide organizations worked together, they were operating under

a gentlemen's agreement of a so-called "unit rule", an arrangement whereby all nine of the organizations were to be in agreement on matters of basic policy or there would be no support for the bill or any amendment of substance relating thereto. A realistic appraisal of this matter at the present time would seem to indicate that no useful purpose would be served by repeating this experience at a special session (if the same is called by the Governor in 1956), or at a future session, if the stalemate created in 1955 is to be re-enacted. While there may be valid arguments against settling the Attorney General controversy and in giving complete independence to the water rights administration phases of the reorganization bill, I would recommend an abandonment of the unit rule. This would then permit the several statewide organizations who strongly believe that the two problems should be compromised to ascertain whether or not they have sufficient support to secure the approval of the Legislative Committees assigned to such legislation and point toward preparing a water reorganization bill within the next few weeks in the hope and belief that Governor Knight, if assured that there is strong support behind a new draft of a Water Department Bill, that a special session might be superimposed upon the special session starting March 1, 1956. If this is possible of accomplishment at least one year in time could be saved.

ANALYSIS OF BASIC PROBLEMS INVOLVED IN OVERALL SOLUTION OF CALIFORNIA'S WATER PROBLEM.

The somewhat complicated and involved picture in the overall solution of California's water problem assumes some clarity if there is a full understanding of the basic elements involved and their close interdependence one upon the other.

There probably will be a general agreement among the water leaders throughout the State that the entire problem embraces the following fundamental considerations:

1. The legislative organization of California's water machinery, resulting in giving cabinet status to water and in the creation of a new Department of Water Resources. This assumes the consolidation of some existing water agencies and the elimination of others as hereinafter discussed in detail.

2. The imperative need of solving the Counties of Origin problem probably through the legal vehicle of a constitutional amendment rather than a statute to give it permanence and stability. This is essential in order that there may be a constitutional and legally valid machinery for the adoption of a formula in turn resulting in quantitative measurements ascertaining the total amount of water available for export from areas of origin to areas of deficiency.

3. The early selection of the physical projects to be employed to store and convey the water such as the Feather

River Project, San Luis dam and reservoir and the selection of a route to Southern California that is both engineeringly practical and economically feasible. These are illustrative only and the same of course would apply to any other projects under consideration.

4. A settlement of the method of financing such projects as finally recommended by the newly organized Department of Water Resources and approved by the Legislature.

The interdependence of these four questions is so great that the overall solution of the water problem could almost be reduced to a formula that might be stated somewhat as follows: (a) It is essential that there be a water department in order that it may in turn recommend and process the amount of exportable water, the reasonable ultimate needs of Counties of Origin and Watersheds of Origin and the amount of surplus water available for export to areas of deficiency, and (b) all engineering, economic, legal and financial data involved in the selection of projects, and (c) the determination of (a) and (b) will then clear the way for this State ,through the new Department of Water Resources and the Legislature and the assistance of other public and private agencies interested in the problem,make a selection of the physical projects themselves, establish priorities for the acquisition of the sites and rights of way involved, and (d) in a logical manner permits the determination of the method of financing the projects which have been selected and given early priority.

Stating the same problem in converse fashion it could be argued as follows: That until there is a new Department of Water Resources there can be no determination of the quantitative amounts of water available for export, after having fully protected the reasonable ultimate needs of the Counties of Origin and in turn unless such quantitative determinations are known and fixed as a matter of certainty there could be no final decision to build and finance a project such as the Feather River Project and the San Luis Storage Basin. At this point I wish to recognize with emphasis that as most qualified engineers are in agreement, that the logical place to dam up the Feather River is at the Oroville Dam site and the only logical place to store the water is at the San Luis Reservoir, near Los Banos in western Merced County, having in mind the length of time necessary to secure rights of way for such sites, in order to save time these two key acquisitions might be made in advance of a settlement of the other problems respecting whether the Feather River water be run over the Tehachapi Mountains as recommended by the State Engineer, or whether the water be brought down a gravity flow route to obviate the expense of lifting the water 3,375 feet over the Tehachapis. This at an estimated expenditure of 45 millions of dollars annually because it would require approximately 113 million barrels of oil to furnish power to lift the water in addition to the 20% of the power generated by the Feather River Project itself. Or as stated by Mr. Samuel B. Morris, nationally recognized Water Engineer, to make the Tehachapi lift would require "twice the firm power developed by a Hoover Dam".

If this interrelative analysis and interpretation is valid, that all of these basic problems are tied together, they all add up to the need for immediate action on the part of the State of California and the Legislature and all of its agencies to as soon as possible resolve these controversial questions, make choices and save as much time as possible. In my opinion it is folly to permit the whole question to disintegrate into a continued stalemate of nonaction loosing immensely valuable time.

In this connection attention is called to the stern warning made by Mr. Henry Holsinger, Principal Attorney for the State Division of Water Resources as recently expressed at the Statewide Water Resources Committee of the State Chamber of Commerce when he said:

> "A greatly complicating factor is that we do not know just how long a period may elapse before there may be upon us much more acute water shortages than now exist. In all areas of the State there are severely depleted groundwater sources. For adequate water supplies to be developed and made available where need exists will take a substantial period of years and heavy expenditures; but they must be made available and the necessary works must be constructed. I repeat we do not know how much time we have in which these things must be done. Little short of disaster could be the price we might have to pay if we were to fail to timely put into effect the necessary remedial measures."

AVAILABILITY OF WATER FOR STATE PROJECTS AND EFFECT OF PRIVATE WATER RIGHTS.

Aside from any problem of "County of Origin" or "watershed" protection, we must know how much water is available to the State for its projects. We are here dealing with an element which is subject to private ownership and private vested rights.

Private water rights existing under the laws of this State cannot be taken without compensation to the owner. Legislation which attempted to accomplish this would violate Article I, Section 14 of the State Constitution, that private property cannot be taken without just compensation being paid to the owners.

Palmer, etc., v. Railroad Commission,
167 Cal. 163 (1914)

San Bernardino v. Riverside,
186 Cal. 7 (1921)

The following quotation from San Bernardino v. Riverside, supra, points out the nature of water rights in flowing streams:

> "The original rights to the waters of the streams of this state are those which by the common law were vested in the owners of the land abutting upon the stream under the doctrine of riparian rights, as it is commonly termed. (Citations). Such rights are attached to the land as a parcel thereof, and of course, are private property. * * * It follows in consequence of this fact that all other present and existing rights in the waters of streams have been acquired in some manner from the owners of such abutting lands, either by prescription, by contract, or by condemnation. Appropriation under the Civil Code is but another form of prescription. * * * *"

The constitutional amendment of 1928 (Article XIV, Section 3) does not change this principle. By its terms, that Section states:

> "* * * * nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled."

Furthermore, the amendment itself was sustained in the case of Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, as a police power measure. It is elementary that the police power of the state cannot be used to divest rights protected by constitutional provisions.

People v. Elk River Mill, etc., Co.
107 Cal. 221 (1895)

United States v. Gerlach Livestock Co.,
339, U.S. 725 (1950).

The very enactment of the Feigenbaum Act (Stats 1927 Chapter 286) was a recognition by the State of California that if the State were to have any water left to fill its planned works and canals, it must immediately file upon the unappropriated waters of the State.

What water then, is available for the Feather River Project and other planned diversions?

1. Water already appropriated by the Department of Finance under Section 10500 of the Water Code.

2. Excess and surplus waters not already appropriated.

3. Water rights which may in the future be acquired by purchase or condemnation from riparian owners, appropriators, or owners by prescription.

Stating the converse of the problem, the State does not presently have available for use:

1. Water reasonably needed for the present or prospective use of riparian owners.

Peabody v. City of Vallejo,
2 Cal. 2d 351 (1935).

2. Water already appropriated.

Joerger v. Pacific Gas and Electric Company,
207 Cal. 8;

Rank v. Krug, 90 F. Supp. 773 (1950);

Tulare Water Company v. State Water Commission,
187 Cal. 533.

3. Water, title to which has been acquired by prescription.

Akin v. Spencer, 21 Cal. App. 2d 325 (1937)

4. Unappropriated waters not already filed upon by the Department of Finance.

Thus it is apparent that the amount of water presently appropriated by the Department of Finance, plus unappropriated water which the Department of Finance is able to acquire, may well be a practical limitation upon both the amount of water available for the use of state projects and the economic feasibility of their construction.

The Attorney General in his "County of Origin" opinion of January 5, 1955, pointed out that at that time the Department of Finance had made more than 40 appropriations, thus holding such water in trust in a sense for future use under the doctrine and philosophy of the most beneficial use.

Full consideration must be given by the State Engineer to the total amount of water that has already been appropriated by persons and agencies other than the Department of Finance. In the case of Palmer, etc., v. Railroad Commission, 167 Cal. 163 (1914), the Court emphasized that where water had already been appropriated, such water was in the nature of a vested property right and said:

> "The right to the waters of a stream is real property, a part of the realty of the riparian lands originally, and a part of the realty as an appurtenance to any other lands to which it may be rightfully taken when the riparian rights have been divested in favor of the user on non-riparian lands."

In the case of Rank v. Krug, supra, decided in 1950, the Court summarized the California holdings as follows:

> "In each (case) the riparian, prescriptive and appropriative rights theretofore recognized were affirmed and held to be on equal footing with each other against subsequent claimants, and part and parcel of the land * * * *"

In Tulare Water Company v. State Water Commission, supra, the Court characterized even a prospective appropriation as a "valuable property right," of which the petitioner could not be deprived "without due process of law."

In order for the legislature and the other public bodies and individuals concerned to know with some certainty whether there is enough legally available water left to economically justify a given project, full allowance must be made for meeting the requirements of all of the above discussed classifications of water.

RECENT DEVELOPMENTS RELATING TO LEGISLATION TO CREATE A NEW DEPARTMENT OF WATER RESOURCES.

Early in September it was announced by Assemblyman Caspar W. Weinberger of San Francisco, Chairman of the Committee on Government Organization of the Assembly, that his committee had been assigned and accepted the responsibility of working on a proposed bill designed to create a new Department of Water Resources. In a conference which the writer had with Assemblyman Weinberger in San Francisco on September 22, it was learned that the committee is working upon a draft that contemplates a straightline organization whereby the Governor would appoint a director with the confirmation of the Senate and probably serving at the

pleasure of the Governor,but possibly also subject to removable for cause by the Senate. It contemplates also consolidation of the State Water Resources Board, the functions now being undertaken by the State Engineer, as a division in the Department of Public Works, the State Reclamation Board and the Water Project Authority. Such agencies would form the nucleus of a comprehensive overall Department of Water Resources. It might also embrace the functions now being performed by the Districts Securities Commission. But studiedly would in no way disturb the existing power and responsibility of the Colorado River Board, or the duties and responsibility of the Attorney General relating thereto, because there is apparent agreement in most parts of the State that the long history and background of the controversy over Colorado River water and the legal interpretation of the true meaning of the Colorado River Water Compact of 1922 is so delicate and involved that it would be most unwise to, in any manner at the present time, disturb the policies and program now engaged in by the Colorado River Board.

On the basis of the experience arising out of the preparation and presentation of Senate Bill No. 1745, authored by Senator J. Howard Williams, and a consideration of Assembly Bill 777 by Assemblyman Francis Lindsay, apparently there is general support for an advisory Water Board or Water Commission of five or seven members appointed by the Governor, and confirmed by the Senate, either to serve for a term certain, to give continuity to the

policies of the Board or removable by the Governor at his pleasure, who would assist the Director of the Department of Water Resources in formulating the policies of the State relating to water.

The two controversial matters already mentioned, to wit, freedom of operation, of what was set up in Senate Bill 1745, as the Water Rights Administration and the still controversial and somewhat political question as to what part, if any, the Attorney General of California should have as the legal representative of the newly created Department of Water Resources, will probably have to be compromised.

CONSIDERATION OF POSITION OF THE IRRIGATION DISTRICT ASSOCIATION OF CALIFORNIA.

Because of the importance placed on the Irrigation District Association of California in the whole water picture, it must be recognized that the 156 Irrigation Districts composing the Association, which is a confederation of all of the districts, has more than an academic interest in the problem. Since most of the water in California is now used for agricultural production, the interest of this organization in any proposal to form a Water Department is real. As reported by Mr. Robert T. Durbrow, Executive Secretary, in his letter of September 14, 1955 addressed to the Honorable Caspar W. Weinberger "No other organization has a more substantial stake in such a proposal, for a most earnest desire for a workable department which will give leadership in the necessary development of our water resources and wisdom,

justice and good judgment in the administration of our water rights." The Irrigation District Association of California probably also supported by the Agricultural Council of California is concerned also with the adequate protection to the Irrigation Districts in the performing of functions now assigned to the Division of Water Resources in the Department of Public Works where water rights, the issuance of permits and the determination of priorities are passed upon by the State Engineer. When Senate Bill 1745 was given its extended hearing in the Senate Committee on Water Resources and a similar bill was heard in the Assembly, considerable criticism was voiced from the standpoint of good governmental organization and sound political science. It was said that it was unwise to place in the hands of an independent Civil Service employee (such is the present status of the State Engineer) and place in his hands so much power without review by the Governor, a superior director or board or other agency, and with no power in the Legislature to control his activities, except through the indirect method of adopting a critical resolution.

Some valuable time might be saved by considering soon, whether or not the Irrigation District Association would accept as proper protection to its members a carefully drafted Water Rights Administration Appeal Board, of three or five members appointed by the Governor and confirmed by the Senate -- they serving for a four year term and performing their duties at a per diem rate, and that would attract and hold on the Board highly qualified men capable of acting as a Board of Review in deter-

mination of questions now grouped together under the designation of "Water Rights Administration". Also is it expecting too much of this group to anticipate the possibility that it might likewise consider the right of the newly created Water Department to select its own legal counsel and provide that such counsel would represent the State of California in litigation of any character, including that before the Supreme Court of the United States or before any Federal agency such as the Bureau of Reclamation, subject however to the approval of the Attorney General of the State, in recognition of his position as the Chief Law representative of the State of California and most of its departments?

Having had some experience in legislative matters at Sacramento, I am quick to recognize the great importance of having the support of the Irrigation District Association, together with that of the Agricultural Council and the California Farm Bureau Federation, and one would be naive indeed, who did not at the outset recognize the strength of their position. A position earned over the years by able and intelligent leadership in behalf of their clients, the water users and farmers of California, and because of the character and ability of such men as Robert T. Durbrow, Bert Smith, Alan Mather, Ralph Taylor and Robert Hanley great respect on the part of all members of the Legislature has been built up in accepting the viewpoints and official positions of the strong organizations referred to.

I make mention of this difference of viewpoint not to create controversy, but in a realistic way to recognize that in view of the fact that Governor Knight has said publicly and privately that there would be no useful purpose in calling a special session of the Legislature to work on a new Water Department Bill, unless and until he had assurance that the leading organizations most vitally concerned with the problem, were in substantial agreement as to the shape and form that that Water Department should take. I do believe that time can be saved by having the Weinberger Committee come forward with its preliminary draft, as soon as reasonably possible, in order that its recommendations may be carefully reviewed and still leave time for a crystalization of viewpoint on the part of the nine heretofore mentioned State organizations, in the optimistic hope that an agreement might be reached by February 15, 1956, which in turn would permit the Governor time to superimpose a special call upon the budget session of the California Legislature starting March 1, 1956, provided he was convinced the groups had gotten together.

THE EXTREMELY CONTROVERSIAL QUESTION OF STATE'S RIGHTS VS. FEDERAL CONTROL OF CALIFORNIA WATER PROJECTS WITH PARTICULAR REFERENCE TO THE SAN LUIS DAM AND RESERVOIR.

Because the above subject involves sharp differences of political, social and economic philosophy, and because of course the official position of the great County of Los Angeles is fixed by action of the Board of Supervisors, I should make it

clear that in the presentation of this paper as well as my expressions in other water meetings that I am speaking in my own right as County Counsel of the County of Los Angeles and as an individual, sincerely believing that it is tremendously important that California's Water problem be recognized as the paramount problem of the State, and that to permit undue delay is to invite disaster itself. May I also add parenthetically that I know also a safe rule for a public servant with Civil Service status generally is to discuss no controversial questions, but rather to avoid them as long as possible. With these philosophical observations in mind, I wish to place myself on record as believing, after carefully reviewing the long history and background of legislation and litigation as between State control vs. Federal control, that I believe that if it is true that "Water is California's Lifeline" that the welfare of our wonderful State is better protected by adhearing to the one hundred year old rule of States rights and home rule. That dispite the attractions to pursuing and receiving subsidies from the Federal Government, that if the price of that subsidy involves giving up essential control and jurisdiction that the price paid for such subsidies to the Federal Government and its Bureaus may be too great, even though the financing of a billion and a half Feather River Project is involved.

In making a choice as between State ownership and operation of the San Luis dam and reservoir as against Federal ownership of

the same, ingrained in the question is one's view from the standpoint of political, social and economic philosophy. If one fears the great concentration of power in the Federal Government, because the Federal Government and its bureaus is apt to brush aside the desires of the State, it remains largely a political question. For example, one might be alarmed at the recent statement of United States Budget Director Rowland R. Huches,* wherein he admitted:

> "Indeed, the government is, among other things, the largest electric-power producer in the country, the largest insurer, the largest lender and the largest borrower, the largest landlord and the largest tenant, the largest holder of grazing land and the largest holder of timberland, the largest owner of grain, the largest warehouse operator, the largest shipowner and the largest truck-fleet operator. For a nation which is the citadel and the world's principal exponent of private enterprise and individual initiative, this is a rather amazing list."

Therefore, additional time will be saved in getting started on California's Water Plan by a full and clear understanding of the tremendous importance of the State of California always remaining in the firm and confortable and safe position of being able to make its own determinations, as to legislative policy, executive action and legal interpretations under State law. This state should not put itself in the frustrating, uncertain, and weak position of trusting its future

*As reported in Collier's, July 8, 1955, page 26.

to the policies, directives and interpretation of the Federal Government and its bureaus.

Specifically applied to the San Luis controversy it must be kept in mind that the powerful Metropolitan Water District of Southern California, which is one of the notable local water systems in the world, and the equally influential Department of Water & Power of the City of Los Angeles are already strongly and officially on record in favor of State as against Federal ownership of the San Luis dam and reservoir site. Similarly, other agencies and civic organizations and associations have already aligned themselves in support of the position of the Metropolitan Water District -- Los Angeles Department of Water & Power in this very important question.

It is expected of course, that considerable confusion exists because of the lack of definition as to what is meant by the term "integration". Some have argued that it doesn't make too much difference who buys or controls the San Luis site, provided both the Federal Government and the State are able to use it. The State Engineer is already on record, as documented in his official bulletins, reports, and press releases, to be in favor of State ownership, i.e., making sure that the State of California retains in itself the opportunity of control and then making available to the Federal Government the physical facilities of the San Luis dam and reservoir and its appurtenant works, to the fullest extent possible in the event that the Federal Government includes the

Trinity River Diversion Project, as a further expansion of the Central Valley System.

To state the problem in similar terms, many leaders in Southern California who are closely following every phase of the solution of California's water problem are saying with respect to the San Luis dam site:

> "Here is a dam vitally needed in a project which lies totally within the State of California, which is to be paid for by Californians, and therefore we should not let the Federal Government take it over and then permit us to 'integrate' our plan with its plan. In the State's interest it should be the other way around, that is the State should control it and then there would be enough interest on the part of the State to permit the Federal Government to make use of it also, if from an engineering standpoint it is practical to have integration."

CONSIDERATION OF EFFECT OF RECENT UNITED STATES SUPREME COURT CASE OF FEDERAL POWER COMMISSION v. THE STATE OF OREGON.*

As the people of this State ultimately must be the ones to decide whether or not the official policy of the State is for State ownership of the San Luis reservoir and site or Federal ownership of the same, it is not premature in making such choice to give consideration to the stern warning voiced by the Honorable Frank A. Barrett of Wyoming in the Senate of the United States on August 2, 1955, as reported in the Congressional Record covering the Senate proceedings for that date.

*Decided on June 6, 1955, (Docket 367)

Senator Barrett said:

> "In the case of Federal Power Commission vs. Oregon (Docket 367), decided on June 6 last, (1955) the Supreme Court injected great doubt and uncertainty into the validity of many water law principles accepted generally in the public land States."

Without going into an extended discussion of this far-reaching and important subject, the question which most water lawyers believed had been decided by the Supreme Court of the United States in Nebraska v. Wyoming, in 1945 (325 U.S. 589, 611, et seq.), wherein the United States unsuccessfully struggled to be rid of the rule of law that made its water rights on non-navigable streams of the West dependent on State law has again been placed in doubt. In that bench mark case the United States claimed that it owned all of the unappropriated water in the basin of the North Platte River. Briefly stated, the United States Supreme Court held (reserving decision as to whether under some circumstances the United States might be the owner of unappropriated water rights), that under the Reclamation Act of 1902 (32 Stat. 377), and also under the Desert Land Act of 1877 (19 Stat. 377), the United States took the Water Rights like other landowners, namely, pursuant to State law governing the laws of appropriation.

Senator Barrett emphasized that the reason that the case is important is that the rule adopted by the court in Nebraska v. Wyoming, and now under review in the current case of Federal Power Commission vs. Oregon, supra, profoundly affects the economy of most of the Western States, as in the West the United States still owns a vast amount of land, in some states over 50% of all land.

If by mere Executive action Federal lands may be reserved and all the water rights appurtenant to them returned to the United States, vast dislocations in the economies of the Western States may follow.

Pointing up the whole problem as set forth in his warning to the Senate as reported in the Congressional Record, Senator Barrett said:

> "The possibile ramifications of this new decision are practically unlimited. Millions of acres of public lands have been withdrawn or reserved since 1877. Many of these are prime watershed areas. A good many questions arise as a result of the confusion created by the recent Supreme Court decision in the Oregon case.
>
> "(a) Are State law appropriations made on such lands since their withdrawal totally invalid? Or only invalid against Federal uses on such lands?
>
> "(b) Are the Federal rights riparian in character and limited to the watershed of the stream? Or are they applicable to any beneficial use on Federal lands? Cf. Winters v. U.S. (207 U.S. 564).
>
> "(c) Are such Federal rights subject to the doctrine of equitable apportionment among States? Or are they a first charge against the stream capable of destroying appropriative rights acquired under State law? Cf. Hinderlider v. La Plata (304 U.S. 92). See Petition of Intervention of the United States, Arizona v. California, pending in the Supreme Court.
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> "(d) Are rights of the United States to use water for irrigation on reclamation projects carved from Federal reservations or withdrawals superior to those for use on privately owned lands? Or does section 8 of the 1902 Reclamation Act constitute a specific modification of the Supreme Court's interpretation of the Desert Land Act?
>
> "(e) Are Federal rights to use water for the generation of power on Federal reservations as a part of the reclamation project valid without reference to the doctrine of priority?
>
> "(f) Are nonirrigation uses on reclamation projects carved from Federal withdrawals superior to irrigation uses

since section 8 of the 1902 act refers specifically to State laws relating to 'water used in irrigation'?

> "These questions are not intended to exhaust the possibilities. They merely illustrate the possibilities. They merely illustrate the confusion and uncertainty which could result if Congress does not act to clarify the appropriability of water under State law.
>
> "It could take 30 years of litigation to know the full import of this decision. Only Congress can prevent such a cloud on the future development of the West."

By way of summary, if in the backdrop the ninety year rule of the Congress of the United States, going back as far as the Act of July 26, 1866 (14 Stat. 253) is to be brought into question either through administrative action on the part of the United States, by the U. S. Bureau of Reclamation or any of the Federal agencies, it would appear that this legal challenge as pointed up by Senator Barrett might be helpful in assisting the State of California to make a choice in whether it is in favor of State ownership of the water projects or Federal ownership.

In keeping with his proposal that the time has come for the Congress to reaffirm, restate, and reinforce that long list of Federal laws enacted for the express purpose of preserving the integrity of State water law, Senator Barrett has introduced a bill (S. 863) to be cited as the "Water Rights Settlement Act of 1956". Thus there is the fear that there will be a continuing trend toward Federal encroachment on the traditional field of State jurisdiction. As Senator Barrett told the United States Senate:

> " * * * This movement could constitute a serious threat to water rights long since acquired and put to beneficial use in the Western States."

Considerable weight must be given to this matter because in addition to Senator Barrett of Wyoming, the following United States Senators have joined with Senator Barrett in authoring the Water Rights Settlement Act of 1956, and thus stand with him in believing that the continuing trend toward Federal encroachment on State jurisdiction in the field of Water law should be settled by a clean-cut Congressional enactment and not leave it to the uncertainties of administrative action or long drawn out litigation. The co-authors of the Water Right Settlement Act of 1956, which will be considered at the next session of the Congress are Senators Malone from Nevada, Bible of Nevada, Dworshak of Idaho, Allott from Colorado, Goldwater from Arizona, Welker from Idaho and Curtis from the State of Nebraska.

STATE OWNERSHIP OF SAN LUIS vs. FEDERAL OWNERSHIP AND CONTROL SHOULD BE APPRAISED ALSO FROM STANDPOINT OF RESPECTIVE BENEFITS TO SOUTHERN SAN JOAQUIN COUNTY AND SOUTHERN CALIFORNIA.

Departing entirely from any considerations of political or social philosophy, but viewing the decisions to be made solely upon the basis of which project would be most beneficial to the greatest part of California, specific attention is called to the reports and maps officially prepared by the Division of Water Resources, relating to the Feather River Project of the California State Water Plan, wherein the water service areas to be served by the Feather River Project are clearly marked. By contrast the proposed San Luis unit of the Trinity Project, at least as now proposed by the Federal Government, would be limited in its

benefits to property largely lying within Fresno County, and such plan does not now contemplate serving any property in San Luis Obispo County, Kern County, Santa Barbara, Ventura or any other county in Southern California. The Feather River Project of the State Water Plan is designed to deliver water to areas in need from Butte County in the North to and including San Diego County in the South. Conversely stated to date, the California State Water Plan is the only one which will bring water as far south as Kern County, Los Angeles and San Diego Counties, all areas without question of critical water need.

Objectively and fairly searching for the right answers and using the desperate need of the farmers in Kern County for immediate water, or certainly within the shortest possible time that it can be made available, it must be admitted that to the farmer in the lower San Joaquin Valley, who right now is desperately in need of water, that it is not an academic question of State's Rights vs. Federal Control, but it is rather a question of which agency is more apt to furnish the water for which he is in so great need. Therefore, the advocates of State ownership and the implementation of the Feather River Project of the State Water Plan, must accept the burden and the challenge of showing that through that plan, water will the sooner flow in Kern County and other parts of the San Joaquin Valley. In desperation it might be argued by the farmer who has one-third of his farm going back to a state of nature because of the great lowering of the water table, that he will support the plan and the program that saves his farm. If those who are in support of the Statewide Water Plan require additional challenge to the importance of making the basic decisions, which will resolve the controversies and finally get to

the place where there is a definite timetable , there may be a lesson in the following. It can be pointed out by the advocates of Federal ownership and operation that there are in existence vast project works such as the Shasta Dam, the Friant Dam and the Delta-Mendota Canal offering proof that the Federal Government has actually built projects in bringing to fruition the Central Valley Plan. Supporters of Federal ownership thus argue but that the State of California has not yet built any major water projects. This is not recited as an argument for Federal ownership, but rather as a warning to all of us that if we are determined that state acquisition and operation is best for California, that we had better start a program of action.

PARTICULAR PROBLEMS INVOLVED IN THE SETTLEMENT OF THE COUNTIES OF ORIGIN PROBLEM.

Water leaders, water engineers and water lawyers are in agreement that in the settlement of the Counties of Origin problem, at some time, we must reach a place where some agency or court must finally designate in quantitative measurements, such as acre feet, the water that will be available for export and the water that must be reserved for the reasonable ultimate needs of Counties of Origin and Watersheds of Origin. If progress is made, we cannot continue to deal in general principles only. As this paper has been prepared in the nature of a progress report or at least an appraisal of the factors that are inherent in the overall approach, reference should be made to the leadership being furnished by the California State Chamber of Commerce, through its Statewide Water Resources Committee of which Mr. Robert Minckler, President of the General Petroleum Corporation is chairman. A Special Sub-Committee on Counties of Origin was appointed and has already started its work. This committee is composed of the

following: Mr. Burnham Enersen, Chairman, Attorney, President of the San Francisco Bar Association, Mr. Henry Holsinger, Principal Attorney, Division of Water Resources, State Department of Public Works, Mr. Harold W. Kennedy, County Counsel, County of Los Angeles, Mr. Raymond Leonard, Chairman, Feather River Project Association, Mr. Eugene A. Chappie, Supervisor, El Dorado County, and Chairman of the Mountain Counties Water Association, representing the Counties of Origin of Central and Northern California, Mr. Charles C. Cooper, Jr., Assistant General Counsel of the Metropolitan Water District of Southern California, Mr. Martin McDonough, Attorney for Sacramento Municipal Utility District, Mr. Samuel B. Morris, Director, Department of Water & Power, City of Los Angeles, represented by Gilmore Tilman, Legal Counsel, Mr. J. J. Prendergast, President Santa Ana River Water Association, and Honorable Edmund G. Brown, Attorney General represented by Mr. Wallace Howland, Assistant Attorney General. The assignment given to the Sub-Committee embraces the following: (a) a study of the statutory legal problems involved with respect to Counties of Origin; (b) the effect of the recent opinions issued by the Attorney General's office; and (c) to endeavor to submit to the main committee a solution to the problem.

Inherent in the legal problem is not only the effect of Sections 10504 and 10505 of the Water Code, (generally spoken of as the County of Origin Statute) but also is the effect of the later enacted Watershed Protection Statutes which were adopted in

1933. These are now found in Sections 11460 through 11463 of the Water Code, which in turn are codifications of what originally was Section 11 of the Central Valley Project Act of 1933.

The significance of the equal importance of the Watershed Protection Statute is found in Section 11460 itself of which reads as follows:

> "In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."*

THE PROBLEM ARISING FROM THE REQUIRMENTS OF DUE DILIGENCE AS CALLED FOR BY PART 2, DIVISION 2, OF THE WATER CODE AND THE EFFECT OF THESE REQUIREMENTS UPON ALLOCATIONS OR APPROPRIATIONS MADE BY THE DEPARTMENT OF FINANCE, MUST ALSO BE CAREFULLY REVIEWED BY THE WATER LAWYERS.

There are several sections of the Water Code in Part 2, Division 2 which require that an appropriator in order to retain his water right shall use diligence in putting the water to beneficial use.

The most important sections are 1395 and 1396. Section 1395 reads as follows:

*See Opinion of Edmund G. Brown, Attorney General by Wallace Howland, Assistant Attorney General, No. 53/298, Jan. 6, 1955, for a full analysis of the effect of these Sections.

> 1395. "Actual construction work upon any project shall begin within the time specified in the permit, which time shall not be less than 60 days from the date of the permit."
>
> 1396. "The construction of the work thereafter and the utilization of water for beneficial purposes shall be prosecuted with due diligence in accordance with this division, the terms of the permit, and the rules and regulations of the department."

Section 10500 of the Water Code relating to filings by the Department of Finance includes the following provision:

> "The statutory requirements of said Part 2 of Division 2 relating to diligence shall not apply to applications filed under this part * * * *."

It should be noted that this exemption relative to diligence was contained in the original enactment in 1927 and extended until October 1, 1931. The prescribed date has been regularly extended every four years by the Legislature.

If we are to go forward in the building of immense projects, all doubts as to the future effect of the diligence provisions must be laid to rest. It has uniformly been held; for example, that diligence is not excused by reason of financial inability of a claimant to complete his construction work within a reasonable time.

Mitchell v. Canal etc. Co., (1888) 75 Cal. 464, 482, 17 Pac. 246, 251;

N. C. & S. C. Co. v. Kidd, (1869) 37 Cal. 282, 314;

Kimball v. Gearhart, (1859) 12 Cal. 27, 31.

Furthermore, if the applications of the Department of Finance are assigned to the Water Project Authority or some other

construction agency, the diligence provisions will become applicable, and unless the works are constructed and the water put to beneficial use within the times provided, it could well result in a cancellation of the application.

Water lawyers must, therefore, make an early determination whether or not the rule of diligence should be abandoned in its application to the Department of Finance, the Water Project Authority, or to any other agency acting in implementation of the State Water Plan.

CONSIDERATION OF DESIRABILITY OF A CONSTITUTIONAL AMENDMENT WITH SUPPLEMENTARY LEGISLATIVE ENACTMENTS AS LEGAL MACHINERY FOR SETTLEMENT OF COUNTIES OF ORIGIN PROBLEM.

Neither the Counties of Origin statute (Section 10505 of the Water Code) nor the Watershed Protection statutes, Sections 11460 and 11463 have ever been adjudicated or interpretated by an Appellate Court of this State. Recognizing also that the able opinion of the Attorney General is subject to the limitation that it is not binding upon either the Legislature or the courts. It would appear desirable from the standpoint of (1) giving permanence and stability to the settlement of the legal problems, (2) assuring in the same law adequate protection to areas of origin and areas of deficiency, and (3) attempting to save years of time by obviating the necessity of judicial interpretations of Legislative enactments, to deal with the whole subject through the adoption of a constitutional amendment.

The Metropolitan Water District of Southern California, under the leadership of James Howard, General Counsel and Charles Cooper, Assistant General Counsel, proposed Assembly Constitutional Amendment No. 66, at the last session. This amendment was introduced for the purpose of making a start in this difficult problem, but no effort was made by its sponsors to have it adopted at the 1955 session.

By handling the matter in this way a legal vehicle has been made available as a basis of discussion, and already many suggestions have been made with respect to possible amendments to A.C.A. 66. Legal counsel for the Metropolitan District are conferring with water law authorities inviting suggestions as to whether or not the present language of A.C.A. 66 is acceptable. This constitutional amendment recognizes that at some point it will be necessary for some State agency, probably the reorganized State Department of Water Resources, to make quantitative determinations of the amount of water that is available for export and the amount that should be reserved for "recapture by the counties". It also provides for due process, through judicial review by the Supreme Court of California.

Because every part of California is vitally affected by what is done, it is recommended that consideration be given to an intermediary consideration of the recommendations made by the State Engineer or by the State Water Department by the Legislature. That the recommendations containing the quantitative measurements, showing the amounts of water, that should be exported and reserved

would then be reviewed by the Legislature itself, in advance of the judicial review by the Supreme Court. In making this proposal I am fully aware that the quantitative recommendations must be grounded upon engineering studies and knowledge, and is not the type of a problem that could be compromised or altered in the usual way that a Legislative bill is heard and amended. It would be absurd to assume that in a "free conference" type of hearing that the matter could be settled. What is recommended is that by sending the report to the Legislature, would give opportunity to the Senators and Assemblymen to formally receive the report, cross-examine the engineers who have recommended it, and in this way give the fullest opportunity for an understanding of its content. In a practical way it might be provided that the Legislature could accept it in whole, or reject it in its entirety, and if unacceptable remand it back to the State Department for a further report.

If this intermediary Legislative review is incorporated in the constitutional amendment, it gives all of the counties through their own representatives the "grass roots" type of consideration, and completely recognizes that in addition to being an administrative, engineering and judicial problem it more importantly is a factual one, acknowledging the need for Legislative policy and approval.

The Legislature could, if it liked, hold Legislative and public hearings upon the recommendations and if, as already has been said, they are acceptable to the Legislature, then the step

proposed for the important judicial review by the Supreme Court of California as set up in A.C.A. 66, would then take place and give legal finality to the amounts of water decided upon.

A CONSTITUTIONAL AMENDMENT ALONG THE LINES OF A.C.A. 66 WOULD BE HARMONIOUS WITH ARTICLE XIV, SECTION 3 AND NOT IN CONFLICT WITH IT.

Discussion has arisen as to how a constitutional amendment similar to A.C.A. 66 affects Article XIV, Section 3 of the State constitution. This section was adopted in 1928 after the State was shocked by the continuance of the Supreme Court of California to follow the strict doctrine of riparian rights, as originally set forth in Lux vs. Haggin, (69 Cal. 255) decided in 1886. It will be recalled that the historic case of Herminghaus vs. Southern California Edison Company, reported in 200 Cal. 81, decided in 1926, adopted the philosophy proposed by Justice John Shenk, as set forth in his dissenting opinion that the need for water in this State was so great, that the common law rule of riparian rights, borrowed from water wealthy England was not applicable to a state, a large part of which was built upon a semidesert area.

In my opinion the proposed constitutional amendment (A.C.A. 66 of the 1955 regular session) does not conflict with the 1928 amendment (Article XIV, Section 3).

The primary purpose of the 1928 amendment was to prevent waste of water caused by what the United States Supreme Court called in United States v. Gerlach Livestock Company, 339 U.S. 725 (1950), the "dog-in-the-manger" element of riparianism.

The proposed amendment provides for an allocation of water between the counties of origin and the water hungry area of the state -- an allocation of sufficient permanency to justify the construction of expensive diversion projects. There is no effect as between private owners of water rights such as were involved in Article XIV, Section 3. The proposed amendment specifically provides:

> "All allocations shall provide for the recognition and satisfaction of all presently vested rights to water or to the use of water for beneficial use * * *."

In summary, Article XIV, Section 3 put a limit on the riparian right. The proposed section will be a limit on the riparian right. The proposed section will also furnish a legal machinery for placing a limit upon the rights of counties of origin. Of equal importance it will also furnish a legal machinery to fix a guarantee to the mutual benefit of counties of origin and counties in short supply. The water freed by Article XIV, Section 3 is available to any appropriator. The water freed by A.C.A. 66 may be allocated to areas in need.

THE SPECTRE OF OVERFILING BY THE DEPARTMENT OF FINANCE AND THE CHALLENGE OF THE REPORTS OF THE STATE ENGINEER MUST BE DRIVEN FROM THE CLOSET.

As it is the purpose of this paper to present a provocative discussion of the important elements involved in California's water problem, reference should be made to the often voiced contention made by representatives from Counties of Origin, that a false picture resulting in false security has been brought about by the

large number of filings made by the Department of Finance, and that similarly the State may be fooling itself because the reports of the State Engineer do not realistically allow for a larger amount of irrigable land that will need water.

I wish to be clearly understood in this regard as it would be most presumptuous on my part to in any way question or challenge the thoroughness, the accuracy, or the adequacy of the formulas used by the State Engineer in arriving at the recommendations he has. The point is merely made that if it were wise for the Legislature to appropriate $250,000.00 to the Joint Water Problems Committee to enter into a contract with the Bechtel Corporation to review the recommendations of the State Engineer with respect to the Feather River Project, with particular reference to the economic feasibility of pumping Feather River Water 3375 feet over the Tehachapi Mountains, then it might be argued that it was equally valid for El Dorado County or Plumas County or any other County of Origin to make sure that a sufficient supply of water was being reserved for their use before it gave full and unreserved support to a constitutional amendment or legislation dealing with these vital questions. All that is being herein proposed is that the effect of the factual and engineering data is so far reaching to not only Northern California, but also Southern California, that in the public interest the widest possible review should be made to make certain that no major project was being predicated upon the false premise, that assumed a limited need for water in a given county or an adequacy of supply that nature probably could not furnish.

The writer is concerned about the matter because it is being contended by the Mountain Counties Association, representing the Counties of Origin of Central and Northern California, which group is composed of 18 counties under the leadership of Supervisor Eugene Chappie of El Dorado County, that in their opinion based upon studies made by their own engineers and experts, that they have engaged, that if all of the water in the American River system is taken into account, that can be reasonably developed it will amount to only 2 million acre feet, whereas prior appropriative rights and filings by the Department of Finance would call for 6 million acre feet. By way of further illustration representatives of Calaveras County claim that by following the formula used by the State Engineer, there originally was an allocation of only enough water to irrigate 37,000 acres in that county, but that after the farmers had made their own survey, pointing out the inadequacy of the original recommendation, that the allocation was increased to provide that 100,000 acres would probably have need for water.

The nature of the problem is such that if a constitutional amendment or legislation, or statewide approval to the selection or financing of a given project is attained, the people of this State generally must be persuaded as to the accuracy of the data, the formulas and the techniques used in securing the facts upon which these important conclusions are based.

At the present time it is not an exaggeration to say, and I make this statement based upon my years of close relationship with the County Supervisors Association, that many of the Counties of Origin are not yet ready to accept, without question and without adequate proof the recommendations made by the State Engineer affecting their respective counties. Some of these counties have determined that before they are ready to give approval that they must have independent reports from experts of their own choosing. In fairness to the Mountain Counties it must be said that they recognize that millions of gallons of wonderful water are wasting to the sea. They do not wish to be greedy, they want us to have it, provided fair protection is given to them.

Viewed in this light it is readily apparent that time will be saved by a full review of this phase of the problem in order that the people most vitally affected may have assurance, that their interests and rights have been fully protected.

ALL RECOMMENDED APPROACHES AND PROGRAMS SHOULD BE CAREFULLY REVIEWED INCLUDING THE COASTAL WATER SUPPLY AND DISTRIBUTION PROGRAM RECOMMENDED BY CHARLES W. WEBER AND ASSOCIATES OF STOCKTON.

The entire matter is of such far-reaching importance that wise leadership dictates that we not place ourselves into a position of false security, by summarily assuming the validity of recommendations and reports without carefully reviewing them. Very little encouragement to date, has been given to the recommendations proposed to the Legislature by former Assemblyman Charles Weber of Stockton and his associates of Stockton, that the so-called Coastal Water Plan is the logical source of supply

for Central and Southern California. This proposal was made in order that the Sacramento River, the Feather River and the San Joaquin Valley Watershed be released for the fullfillment of the Central Valley Project. Even though it may appear from an engineering standpoint unrealistic and economically infeasible, this plan also should be reviewed by the proper State agency and reasons pointed out why it should be rejected or further studies made as to whether or not it furnishes the basis for an additional source of supply.

It is strongly contended by the proponents of the Coastal water supply and distribution plan that there are 4 million acre feet, (not counting any water from the Klamath River), which could be gathered from the Eel River, the Mad River and the Van Deusen River, and that at a cost not greater than the indicated cost of the Feather River, bring this water under the Delta in a seperate conduit so as not to contaminate it with water from the Delta and bring it into the San Luis Reservoir gathering basin. The coastal water proponents claim also that there is a very large amount of unappropriated or so-called "free water" that would be available from the Klamath River and the Smith River. Possibly this proposal has already been studied by the State Engineer, if not it is recommended that it be reviewed. The writer wishes to state with clarity and emphasis that by referring to the plan in this paper, it is not to be construed or misunderstood as my advocating the Coastal Water Plan in any way. It is included for discussion as this

paper is intended to be an appraisal of developments since the close of the Legislative session and in keeping with my strong belief that progress is made by considering all possibilities, as early as can be to ascertain whether they have any validity whatsoever.

IN ITS DEEPEST ASPECTS THE PROBLEM CALLS FOR GENUINE UNDERSTANDING AND UNUSUAL COOPERATION.

In its deepest aspects the probelm involves tolerance and patriotic cooperation as well as hydrology, water engineering, law, economics, finance, politics, social and economic philosophy. This great State of California, whether we like it or not, is destined to become a vast industrial empire, apparently to be populated by millions and millions of people. We know of course at this point that we are irrevocably committed to a coordinated program calling for the development of all of our water resources. The laws of nature and the topography of the State makes it inevitable that we must deal with many things. As we emphasize the imperative need for speed because several sections of the State cannot wait 20 years, or 30 years, or 40 years for additional water, we know now that it will call for strong and bold leadership, furnished by men of great stature and good will and devoted in a genuine way to the best interest of all of California.

Ed Fletcher Papers

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