

THE NATIONAL WATER COMMISSION DRAFT REPORT^{1/}

by

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BACKGROUND OF DRAFT REPORT

About 1200 copies of the Draft report were distributed to a critical audience in November, 1972. Another 400 copies of an 84-page Summary of the Recommendations were also circulated. The bulky report contains over 1100 pages (showing it), includes 16 chapters and 200 recommendations.

Although it was first believed that the Final report would be ready this Spring, it is my present understanding that it will not appear until mid-June of this year. The Commission record remained open until Feb. 15th. Some of the delay may be the result of gathering material at public hearings in January and February, in Spokane, Phoenix (which I attended), New Orleans and Washington, D.C. The hearings and other "input" may produce revisions of the Draft report, although I have not seen any of the new material.

The law establishing the Commission resulted from various efforts to examine water policies over a long period of time (notes here on earlier efforts) and recommendations made by previous commissions, including the Public Land Law Review Commission which submitted its Final report in June, 1970. Chapter 8 of that report relates to water resources and it recommended a course of action with respect to reserved rights that the National Water Commission had to struggle with also. But the main impetus for the statute creating the Commission came from proposals for development of the Colorado River Basin which raised fundamental questions regarding future national water policies. This background is discussed in the Preface to the Draft Report (iii).

A number of you may have worked on studies for the Commission and know about the Commission's composition and its staff work. The Commission has seven members. Charles Luce of New York is chairman. Roger Ernst, the former Arizona State Land Commissioner, is a member. All present members appear to me to be diligent and well qualified. They are served by a relatively small staff and a number of experts who prepared individual studies.

Most of you know that the Commission will go out of existence not later than September 26 of this year. Congress established the Commission in 1968 and gave it five years and up to 5 million to do the following (among other tasks):

1. Presented at the Joint Annual Meeting of the Arizona Section of the American Water Resources Association and the Hydrology Section of the Arizona Academy of Science, Tucson, Arizona, May 4, 1973.

Duties of the Commission

Sec. 3. (a) The Commission shall (1) review present and anticipated national water resource problems, making such projections of water requirements as may be necessary and identifying alternative ways of meeting these requirements -- giving consideration, among other things, to conservation and more efficient use of existing supplies, increased usability by reduction of pollution, innovations to encourage the highest economic use of water, interbasin transfers, and technological advances including, but not limited to, desalting, weather modification, and waste water purification and reuse; (2) consider economic and social consequences of water resource development, including, for example, the impact of water resource development on regional economic growth, on institutional arrangements, and on esthetic values affecting the quality of life of the American people; and (3) advise on such specific water resource matters as may be referred to it by the President and the Water Resources Council.

COMMISSION PROPOSALS

This statutory charge is very comprehensive and required a great deal of work including about 25 or more separate studies which some of you have seen. Almost half of the studies deal directly with water law, and many others relate to "Institutional Arrangements" which are clearly dependent on law, e.g., interstate compacts, pollution controls, planning, project financing and environmental values, among others.

My effort here will be to call your attention to several sections of the Draft report and explain some reactions to them. General comments are saved for the end with the understanding that we are not speaking of the Final report which may include revisions in specific areas.

References to law and legal institutions are found throughout the Draft Report. In the time allotted I can outline only a few which are found principally in the following chapters:

Chapter 4 (83 pages) Water Pollution Control

All of you know about the 1972 legislation that was passed over the President's veto and that he subsequently impounded a large portion of the funds appropriated. I will not spend time on this matter except to point out that the report disagrees with the 1985 goal of "no discharge" in somewhat rhetorical fashion: "The Commission believes such an abstract and absolute approach ["No discharge" by 1985] to water quality management is as fundamentally unwise as to approach land use with a goal of placing no buildings on the land" (4-3). Instead, the Commission favors the 1965 Water Quality Act, statutory approach which simply indicated general Congressional intent that quality standards shall be such as "to protect the public health or welfare, enhance the quality of water" and provide for the uses stated in the act. (4-7). This chapter contains sixteen Recommendations found on pages 18-83. (I might add, parenthetically, that the law faculty voted to increase my course in water law from 2 to 3 hours, beginning this fall to allow time for water quality matters and enforcement procedures).

Chapter 5 (181 pages) Improving Water Related Programs

This long chapter covers the principal Federal water programs including inland water ways and the Reclamation Act. The chapter has 10 sections. There is time to refer briefly to only one, Section D. Acreage Limitations and Subsidies. The three recommendations following this section advocate discontinuing future irrigation subsidies and abolition of the 160 acre water right limitation in the future when full payment is made by project beneficiaries. (Remember, 160 acre limitation is on water not land.)

There are arguments on both sides of these questions and there isn't time to explore them. I do know, however, that something is wrong when subsidies for irrigation pay for cheap municipal supply, which is the situation in Phoenix as alleged at the hearing there in January. Irrigation water is about \$10.00 an acre foot; municipal users pay from \$50 to \$70.

Chapter 6 Procedures for Resolving Differences Over Environmental and Developmental Values

This chapter, with its detailed recommendations, would take a separate hour or more and I cannot take time to discuss it other than to say that the proposals deserve careful attention, particularly the conclusion that the NEPA requirements should be integrated into licensing procedures.

Chapter 7 (205 pages) Making Better Use of Existing Supplies

This chapter was of particular interest to me and should be to you because it emphasizes (Sec. B), Improved Ground Water Management; (Sec. D), Transfer of Water Rights, including the improving of record keeping, simplification of procedures and the need for changes in the law; (Sec. E), Improvements in State Water Laws to Recognize Social Values in Water; (Sec. F), A Permit System for Riparian States (which except for a few states in the East have no system whatever); (Sec. G), Reducing Water Losses by Improved Efficiency; and, last but equally important, (Sec. H), Re-Use of Municipal and Industrial Wastewater.

This chapter concludes with 68 separate recommendations that contain proposals that some of us have been advocating for over 20 years, e.g., the interrelationship in law of ground and surface waters, public management of ground water districts, the encouragement of re-uses and some clear answers to problems relating to rights in secondary and tertiary sources such as municipal effluent, and salvage and waste waters.

Your section Newsletter of the American Water Resources Association for December pointed out that the Commission has recommended local ground water management where conditions of overdraft exist as in Arizona. Three of the recommendations deserve to be read (if there is time):

Recommendation No. 1: State laws should recognize and take account of the substantial interrelation of surface water and ground water. Rights in both sources of supply should be integrated, and uses should be administered and managed conjunctively. There should not be separate codifications of surface water law and ground water law; the law of waters should be a single, integrated body of jurisprudence.

Recommendation No. 2: Where surface and ground water supplies are interrelated and where it is hydrologically indicated, maximum use of the combined resource should be accomplished by laws and regulations authorizing or requiring users to substitute one source of supply for the other.

Recommendation No. 3: The Commission recommends that states in which ground water is an important source of supply immediately commence conjunctive management of surface water (including imported water) and ground water, whether or not interrelated, through public management agencies.

Chapter 13 Federal-State Jurisdiction in the Law of Waters

This chapter, only 34 pages, is one all of you have heard about and will continue to hear about. It is probably the most controversial.

This chapter addresses several problems that have long been discussed in Congress and elsewhere, yet there continues to be much misunderstanding and folklore about water rights all the way from the oldest water right served by the acequia madre at Espanola, New Mexico, which was ordered dug by Juan Onate in 1598, on up to the highest levels of constitutional law as, for example, in the Pelton Dam case in 1955 which actually rests on the Supremacy Clause of the U.S. Constitution and not on the abrogation of private property rights or some new theory of Federal rights, as has been claimed.

The chapter relies heavily on Frank Trelease's study and is therefore weighted toward a private rights doctrine that has never been fully compatible with public development of land and water uses which became public policy at least with the Reclamation Act in 1902, if not earlier.

Chapter 13 recommends enactment of a "National Water Rights Procedures Act" parts of which are set forth in 11 numbered recommendations (Page 34). The central question faced relates to the nature and extent of "reserved rights." The recommendations adopt and carry forward previous recommendations on water resources made in the 1970 report of the Public Land Law Review Commission of which I was a member.

The proposed Procedures Act is directed to the determination and adjudication of water rights through quantification, the payment of compensation and the resolution of conflicts between Federal and state law. The matter of "reserved rights" has two separate dimensions, viz., non-Indian claims to waters on or from federal property, and Indian water rights. The report makes the point that the Eagle County, Colorado case in state court, in which the U.S. Supreme Court construed the McCarran amendment to mean that the U.S. could be joined in a state water adjudication (because the amendment waived sovereign immunity for that purpose), did not deal with Indian water rights. There is now pending in the U.S. District Court for Colorado, a suit by the U.S. which proposes to adjudicate water rights on a number of streams in southwestern Colorado which serve non-Indians as well as the Ute and Mountain Ute tribes. There is no time to cover this subject which I am sure the Commission is struggling with mightily.

There is much valuable material and thought in the three last chapters, 14, 15 and 16, which deal respectively with Cost Sharing, Capital Demands for Development and Basic Research and Data. They deserve your attention.

SOME REACTIONS TO THE DRAFT REPORT

As you might expect, the comments on the report divide themselves generally between the water user groups, on the one hand -- primarily agriculture and the developers, who are very critical of recommendations that will diminish or remove subsidies -- and environmentalists, on the other hand, who endorse the report except in particulars such as the recommendations on water quality controls. The latter group is joined by some economists.

Why this different reaction is seen in the following summary of controversial recommendations which do not all deal directly with water law:

The Committee Recommends

- A general policy to charge water users the full cost of water services, relying heavily on free-market forces to work out the distribution.
- An end to new irrigation projects, at least until the year 2000; the commission says they are not needed.
- Limitation of new projects for flood-plain protection.
- Imposition of time-limits for water project construction under new Congressional authorizations.
- "De-authorization" and reconsideration of projects authorized more than 10 years ago, but not yet constructed.
- Application of realistic interest rates in calculating both project costs and rates for repayment by beneficiaries, to eliminate hidden subsidies in federal water projects.
- Watershed protection engineering should be taken away from the Agriculture Department; Interior's Bureau of Reclamation should be converted from construction to engineering and water management; and the Army Corps of Engineers should deemphasize construction and begin emphasizing information-gathering and water resource planning.

The creation of a board of review to look at projects and programs may threaten Federal agencies which are often prejudiced in project evaluations by self-interest.

SOME ADDITIONAL REACTIONS AND A CAVEAT

The projection of water demands and their discussion in Chapters 1 and 2 are not entirely satisfactory. But I am wary of projection techniques and the myths that numbers can create.

The market mechanism which is overplayed in the whole report seems to me a kind of naive return to Adam Smith's invisible hand and a secular theology that is not helpful in modern society. People are going to drink and use water no matter what it costs and public moneys have been invested in that proposition for so long I don't think it merits much discussion.

Some of the chapters were written or edited or influenced by lawyers including friends of mine with whom I have disagreed for years. Some of them are very good writers but poor or unsophisticated economists. And yet the report and its recommendations may be given an aura of plausibility or may create superficial attitudes with respect to environment problems and future policies because this group is now very influential in interpreting environmental policy and legislation. This is no reflection however on the Commission and its work. In fact, mine is small criticism for such a large and valuable effort.