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64 Public Land Management and Western Waters

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PUBLIC LAND MANAGEMENT AND WESTERN WATERS: DILEMMAS AND CHALLENGES FOR THE 100TH CONGRESS

by Representative Michael L. Strang

Ladies and gentlemen, my first eighteen months in Congress have clarified and confirmed to me what is in fact a failing among most of my colleagues to thoroughly understand and fully appreciate Western public land management and water issues. This fact is manifested most clearly in the confused public land management and water policies of the federal government. There is an inherent conflict with states' rights.

Therein lies the dilemma we face. It is steeped in emotion and caring for the land among those of us who followed the first settlers on their courageous and dangerous journey to the new horizons of the new world.

I intend to challenge the members of the Centennial Congress to resolve the dilemma that has developed since the very beginning of our Republic regarding proper land management, water rights, and states' rights. To do that will necessitate the pulling together of a Western Water Coalition in the 100th Congress. That is my primary goal.

Why is it necessary?

Not until the Southeastern United States experiences drought conditions that are now upon us; not until the Great Lakes rise to historic high levels that threaten lakefront properties; not until deep-water wells begin to thirst for rain; not until disaster beckons at Eastern doors, do citizens of this part of the nation have much concern about the source and control of the water they use.

Not so in the West. West of the 100th Meridian, in the arid and semi-arid frontiers of our nation, concern about water, where it comes from and who controls it, is a part of our daily being. The West was settled as a society based on mining, livestock grazing, and irrigated agriculture. The federal government owns and controls most of the

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land. Most people in the East, and it seems most in Congress and the rest of the federal government, do not fully appreciate, understand, or, quite frankly, much care about the lifeblood of Western growth and development, and the perils of which we preach.

You should understand that basic water laws differ dramatically between the east and west sectors of our country. In the East, the principal water doctrine is the "riparian doctrine." It recognizes the existence of water rights in the owners of the land having direct contact with a stream or lake, called riparian land. The basic premise is that water rights arise as an incidence of the ownership of the land bordered or crossed by a natural stream.

In the West, the "appropriation doctrine" is dominant. The difference is, while the appropriative right may be considered a part of the land, its initial creation is not a result of land ownership alone, but requires intentional actions to establish the right, such as the application of water to a beneficial use. It is a usufructuary doctrine. It means, "use it or lose it." In addition, the individual states have established regulatory and permitting requirements and procedures to perfect those rights.

In the Homestead Act of 1862, Congress set in motion a succession of general statutes authorizing entry, settlement, and eventual private ownership of tracts within the public domain, and management of the lands and resources of the remaining public lands. Some of the major other Acts include the Desert Land Act of 1877; the Forest Service Organic Act of 1897; the Reclamation Act of 1902; the Taylor Grazing Act of 1934; the Wilderness Act of 1964; the National Forest Management Act of 1976; and the Federal Land Policy and Management Act of 1976.

All in one degree or another set forth federal policy regarding water rights attendant to the public lands. As you know, more often than not, clear guidance is sparse in statutes and their legislative histories as to the intent of Congress. As a result, many of these laws and others were not necessarily clear as to the exact intent of the Congress regarding water rights.

Add to these less than precise legislative actions a series of judicial interpretations of congressional intent that began with the 1908 case of Winters vs. the U.S. The Supreme Court held that by the creation of Indian reservations, the federal government, by implication, reserved the then unappropriated water attendant to those lands in a sufficient quantity to carry out the purposes of the reservation.

At the time it was thought the concept of "implied" federal reserved water rights applied only within the Indian context. However, in the so-called Pelton Dam Case in 1955, and in Arizona vs. California in 1963, the Court expressly applied the reserved

rights doctrine to other, non-Indian, withdrawn and reserved federal lands. The complex matrix of legislative and judicial precedent, not to mention varying solicitor opinions from several Administrations, has not provided a clear and definitive resolution of all water law issues. Quite the opposite.

It is important to understand that only unappropriated water can be reserved under this federal reserved right. But the federal right is not recorded, not fixed to a specific amount, and need not be for a "beneficial purpose" as defined by the various state laws. The right is not subject to state law regarding abandonment, and cannot be lost through non-use. That is important to keep in mind.

The most recent calamity from the Courts came in November of 1985, when U.S. District Judge John Kane ruled in favor of the Sierra Club, which filed suit against the Forest Service for not asserting federal reserved water right claims for congressionally designated wilderness areas. Judge Kane found that wilderness area overlays on the existing national forests carry an automatic federal reserved water right, in addition to the water rights attendant to the original forest reservation. The priority date for the wilderness reserved water right would be the date Congress designated the wilderness. Judge Kane so ruled, despite language in the Wilderness Act which reads, "nothing in this chapter shall constitute an express or implied claim, or denial on the part of the Federal Government as to exemption from state water laws."

An increasing number of us from the West find this assertion on the part of the federal government especially threatening. With demand for water far outreaching increases in present sources of supplies, conflicts between the states and the federal government over the control and use of water are growing sharper and more serious. The problem is a national one, but its threat is especially grave in the public land states of the semi-arid West.

Such sweeping claims by the federal government threaten to retard plans of western states for projects to develop water resources to meet local needs and conditions for our citizens in accordance with state law and customs.

The Colorado Constitution says in Article 16, Section 5: "The water of every natural stream,...is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."

It seems to me the federal government accepted that proviso regarding state water rights, state sovereignty, when Colorado was admitted to the Union in 1876. Other Western states have similar language in their Constitutions.

Between 1956 and 1966 there were some fifty bills introduced in Congress proposing to return the control of water rights to the state governments. These came to be called the Barrett bills, after the original author, Senator Frank A. Barrett, a water attorney from Wyoming. The original bill was called the "Water Rights Settlement Act of 1956 -- A Bill to recognize and confirm the authority of arid and semi-arid states relating to the control, appropriation, use or distribution of water within their geographic boundaries...." The bill said:

> Subject to existing rights under state law, all navigable and non-navigable waters are hereby reserved for appropriation and use of the public pursuant to state law, and rights to the use of such waters for beneficial purposes shall be acquired under state laws relating to the appropriation, control, use, and distribution of such waters....

Though subject to extensive and exhaustive hearings in the House and Senate Interior Committees spanning five congresses, none of these bills ever became law. Former Senator Gordon Allott of Colorado was one of those actively involved in that legislation. He told me recently it is a shame, in light of Judge Kane's decision, that the bills did not pass. He said if we adopted the concepts embodied in the Barrett bills, "Then all of the questions will be placed in a context where the United States, the individual states, and each citizen is placed equally before the law."

I am not at all certain a law such as the Barrett bill could be passed now any more than it could in the fifties or sixties. I do know something must be done to bring some clarity to the morass of Acts of Congress and judgments of the Judiciary. My hope is we will be able to spearhead that discussion in the formation of the Western Water Coalition during the 100th Congress.

The whole issue of public land management, wilderness, and water use must undergo continuous scrutiny. I have taken the position that before we designate any additional areas in Colorado--which already has 2.6 million acres of wilderness--we must first resolve, indeed, reverse, the reserved water right decision thrust into the discussion by the Sierra Club and Judge Kane.

There are inherent dilemmas in current land use management patterns coming out of Congress. The catchall definition of wilderness does not respond well in many cases to the challenges of proper land stewardship. We have obligations to water, wildlife, fisheries, archeology, mining, forestry, and recreation, which are not necessarily best met by locking up resource opportunities in designated wilderness areas.

We have a unique situation in Colorado in that we are the home of the headwaters of four major river systems, with downstream commitments enforced by interstate and international compacts. As a result, Colorado simply is not in a position to compromise on sovereignty over water rights.

At this point, I do not know the outcome of this quest. I do know we must try to resolve the matter. God was good to the West. He gave it unparalleled natural beauty, abundant and varied natural resources, and vast acres of productive soil to help feed our nation and the world. However, He failed to give us enough water to develop and enjoy these gifts. He probably did this to test our resolve at using His gifts wisely. That is our dilemma, and that is our challenge for the Centennial Congress.

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