FEDERAL-STATE WATER RIGHTS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON IRRIGATION AND RECLAMATION

OF THE

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS UNITED STATES SENATE

EIGHTY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 1275

A BILL TO CLARIFY THE RELATIONSHIP OF INTERESTS OF THE UNITED STATES AND OF THE STATES IN THE USE OF THE WATERS OF CERTAIN STREAMS

MARCH 10, 11, 12, AND 13, 1964

Printed for the use of the
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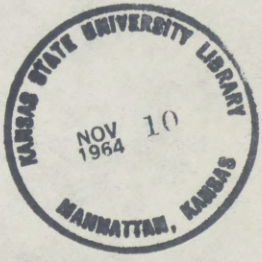

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FEDERAL-STATE WATER RIGHTS

TUESDAY, MARCH 10, 1964

U.S. SENATE,
SUBCOMMITTEE ON IRRIGATION AND RECLAMATION
OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in room 3110, New Senate Office Building, Senator Frank E. Moss (chairman of the subcommittee) presiding.

Present: Senators Frank E. Moss (Utah), Clinton P. Anderson (New Mexico), Frank Church (Idaho), Thomas H. Kuchel (California), Gordon Allott (Colorado), Len B. Jordan (Idaho), and Milward L. Simpson (Wyoming).

Also present: Stewart French, chief counsel; Roy M. Whitacre, professional staff member; and Richard Andrews, minority counsel.

Senator Moss. This is a public hearing by the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs to consider S. 1275, a bill to clarify the relationship of interest of the United States and of the States in the use of waters of certain streams.

Without objection, a copy of the bill, in the sponsorship of which I joined Senator Kuchel, and since then Senators Len Jordan, Church, and Engle have also joined as cosponsors, will be included in the record of this hearing immediately following these remarks.

Also, copies of the reports of several agencies which include the Department of Justice, Bureau of the Budget, and the Department of the Interior will be inserted in the record. The Department of Agriculture has also reported, and I have just received a report from the Department of Defense. Those reports will also be included.

The purpose of S. 1275 is to remove the clouds of uncertainty which hang over water rights in the Western States as a result of the conflict between claims made by the United States to sovereign rights to water arising in the Western States, and claims asserted under State law.

The history of this controversy goes back a long time. From time to time the Congress has enacted legislation, such as the Reclamation Project Act of 1902, the Federal Power Act of 1920, and the Flood Control Act of 1944, which have had a bearing on the problem.

It was not until the *Pelton* decision, in 1955, highlighted the power claimed by the United States over all waters arising from reserved public lands that the need for general legislation to protect water rights obtained under State law became obvious.

The first attempts to resolve this problem were made about 10 years ago through the medium of proposed legislation which would, in effect, have made the United States subservient to the States in its actions in connection with water resource development.

This proposed legislation aroused a storm of opposition that has continued to swirl around and obscure the issues in any attempt to solve the problems created by this inherent conflict.

The problem was considered by the Select Committee on National Water Resources in its studies of water problems facing the Nation over the next four decades, and the committee concluded that "a solution must be worked out, and worked out promptly, for the preservation of the historic pattern under which our people have grown great."

Largely on the basis of that conclusion, Senator Anderson, then chairman of the full Committee on Interior and Insular Affairs, held 2 days of hearings on Federal-State water rights, on June 15 and 16, 1961. A great many constructive statements were presented at that hearing, but at the time it seemed clear that there was insufficient agreement for there to be any hope of a successful legislative enactment in the 87th Congress.

However, on the basis of some of the constructive ideas that were put forth at that hearing, Senator Kuchel and I have continued to nurture the idea of developing compromise legislation which will help to quiet the fears of the westerners that their water rights are in jeopardy.

Just a year ago, March 10 and 11, 1963, in Los Angeles, a symposium on western water law was held in connection with the midwinter conference of the National District Attorneys' Association.

At that meeting, the draft bill which evolved from our work subsequent to the 1961 hearings was discussed and endorsed by resolution of the National District Attorneys' Association, and this draft became the basis for the bill which is now before us.

S. 1275 is a moderate, middle-of-the-road attempt to solve some of the problems which have plagued us. It will, in effect, modify the *Pelton* decision to provide protection for rights to the use of water arising from reserve public lands of the United States.

It will extend the provision of section 1(b) of the Flood Control Act of 1944, which makes future navigation projects subservient to beneficial consumptive uses of water arising in the Western States.

It will provide that when the United States chooses to act under State law, with respect to water rights, it shall do so in accordance with the provision of that law.

And it shall provide that when the United States takes water rights, they shall be taken and compensated for in accordance with proceedings in eminent domain under Federal or State law.

The bill also contains a number of provisos which limit its effect on existing laws, international treaties, interstate compacts or judicial decrees, and existing rights of the United States, the Indians, and other water uses by Federal agencies.

I believe the time has now come for action in this field. If we do not choose to act at this time, we will gradually force State and private capital out of water resources construction in the West. The job is too big for us to permit this to happen. We need all the resources of Federal, State, and local governments and private enterprise if the overall water resources job is to be done.

Before going on to the witnesses scheduled for this morning, I want to give the other members of the committee an opportunity to make such statements as they desire.

(The bill and copies of the reports referred to follow:)

[S. 1275, 88th Cong., 1st sess.]

A BILL To clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (1) the withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter made, shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation.

(2) The provisions of section 1(b) of the Flood Control Act of 1944 (Act of December 22, 1944, 58 Stat. 888–889, as amended; 33 U.S.C. 701–1 (1958)) shall apply to all works hereafter constructed by or under the authority of the United States with respect to waters arising within States lying wholly or partly west of the ninety-eighth meridian.

(3) Any right claimed by the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with the procedure established by the laws of that State.

(4) No vested right to the beneficial diversion, storage or consumptive use of any waters, navigable or nonnavigable, which is recognized by the laws of the State or States in which such waters are diverted or used as compensable if taken by or under the authority of the State, shall be taken by or under authority of the United States without compensation; and where such rights are acquired otherwise than by agreement with the owner, they shall be taken by proceedings in eminent domain under the laws of the United States or of the State or States affected.

SEC. 2. Nothing in this Act shall be construed as—

(1) modifying or repealing any provision of any existing Act of Congress requiring that rights of the United States to the use of water be acquired pursuant to State law;

(2) permitting appropriations of water under State law which interfere with the provisions of international treaties of the United States; or

(3) affecting, impairing, diminishing, subordinating, or enlarging (a) the rights of the United States or any State to waters under any interstate compact or existing judicial decree, (b) any obligations of the United States to Indians or Indian tribes, or any claim or right owned or held by or for Indians or Indian tribes, (c) any water right heretofore acquired by others than the United States under Federal or State law, (d) any right to any quantity of water used for governmental purposes or programs of the United States at any time prior to the effective date of this Act; or (e) any right of the United States to use water which is hereafter lawfully initiated in the exercise of the express or necessarily implied authority of any present or future Act of Congress or State law when such right is initiated prior to the acquisition by others of any right to use water pursuant to State law.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 7, 1964.

Hon. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR SENATOR JACKSON: This responds to your request for the views of this Department on S. 1275, a bill to clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams.

We recommend against its enactment.

S. 1275 would abrogate or weaken principles with respect to use of waters by the United States which have been laid down in a line of decisions of the Supreme Court extending from *United States* v. *Rio Grande Dam and Irrigation Company*, 174 U.S. 690, in 1899, to *Arizona* v. *California*, 373 U.S. 546, in 1963. Intervening decisions of the Court include:

Winters v. *United States*, 207 U.S. 564 (1908);

United States v. *Chandler-Dunbar Company*, 229 U.S. 53 (1913);

Gerlach Livestock Co. v. *United States*, 339 U.S. 725 (1950);
F.P.C. v. *Oregon*, 349 U.S. 435 (1955);
United States v. *Twin City Power Company*, 350 U.S. 222 (1956);
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275 (1958);
United States v. *Grand River Dam Authority*, 363 U.S. 229 (1960);
Dugan v. *Rank*, 372 U.S. 609 (1963); and
Fresno v. *California*, 372 U.S. 627 (1963).

Proponents of S. 1275 say that these cases have so clouded private water rights that non-Federal water resource development has been inhibited. Yet, in 1950 the Supreme Court decided *Gerlach, supra*, which affirmed the protection of private water rights required by the reclamation laws. In the 13 years since that decision, no instance has or can be cited to show that present laws have prevented State or private development. This period corresponds to the era in which proposals like S. 1275 have been pressed upon the Congress.

Meanwhile, the State of California has successfully initiated its $2 billion State water plan. Last month the State successfully floated a $100 million bond issue for construction under its plan. The rights of the United States, so long recognized, have not created a sense of insecurity among investors. Indeed, States and the United States have an identity of interest. Federal water resource projects are obviously undertaken to benefit the citizens of States. Bond purchasers appear to have no thought that the United States will interfere with the development of water necessary for the State water plan.

The working relationship of the United States and the States is exemplified by the experience in California. There the Federal Central Valley project and the State water plan operates side by side in close coordination. In fact, the San Luis Act (74 Stat. 156) provides that they will use joint facilities. The Supreme Court said in *Ivanhoe, supra*, at pages 279–280:

"As the Attorney General of California points out, there is no clash here between the United States and the State of California. Quite to the contrary, the United States and the various State agencies, with commendable faith and steadfastness to one another, have embarked upon and nearly completed a most complicated joint venture known as the Central Valley project. There have at times been differences, but these are inevitable in the everyday implementation of such a giant undertaking. On the whole the parties have kept the ultimate goal firmly centered in their joint vision."

While S. 1275 does not enlarge the power of the States, it will cripple the only mechanism available for regional development.

S. 1275 could unsettle important programs being carried on under congressional authorization, without providing counterbalancing benefits either public or private. Rather than fostering mutual cooperation S. 1275 would tend toward fragmentation in the development of coordinated programs as the Nation's water needs grow more desperate. It would introduce divisive concepts into water resource development, the full effects of which can be known only after years of experience and litigation.

The foregoing observations are substantiated by consideration of the bill's provisions.

Section 1(1) provides that "the withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter made, shall not affect any right to the use of the water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation." It is already the law that the withdrawal or reservation of public lands is subject to existing water rights. However, to subject withdrawals and reservations to future appropriative water rights would upset law announced in 1899 in *Rio Grande, supra*, in 1957 in *F.P.C.* v. *Oregon, supra*, and again last year in *Arizona* v. *California, supra*.

Congress, in the act of July 26, 1866 (14 Stat. 251, 253), as amended by the act of July 9, 1870 (16 Stat. 217, 218) and in the Desert Land Act of 1877 (19 Stat. 377), assented to the establishment of water rights under State law as against the United States itself with respect to nonnavigable waters on the public lands. Section 1(1) would extend this assent to withdrawn and reserved lands, notwithstanding that the withdrawals and reservations may have been made for purposes requiring the use of theretofore unappropriated water. S. 1275 would thereby frustrate the purposes for which the withdrawals and reservations were made. State lawmakers and those acting under them would thereby have decisive authority to permit or prevent the realization of the purposes of the United States.

Rio Grande and *Arizona* v. *California* (1963) involved activities affecting navigable waters. Section 1(1) is silent as to whether the waters that would no longer be available for reservation by the United States include navigable as well as nonnavigable waters. We assume that the intent was to reach both.

Section 10 of the Rivers and Harbors Act of 1890, as amended (33 U.S.C. 403), prohibits "the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any waters in respect of which the United States has jurisdiction." An actual or threatened diversion adversely affecting navigable capacity constitutes such an obstruction. *Rio Grande, supra; Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925).

Without specific reference to section 10, it is to be doubted that S. 1275 would repeal it. However, if S. 1275 should be enacted the litigation it would provoke would undoubtedly beget the claim that section 10 has been repealed and the issue will remain uncertain until final judicial illumination. It is probable that by the silence of S. 1275, the prohibition against obstructions to navigable capacity in the 1890 act would be the means of preserving running streams for such purposes as fish and wildlife and recreation. But is it really in the national interest for such a result to turn upon the accident of whether navigable capacity is affected? How ironic it would be if S. 1275 were to resurrect the search for that "highly fictional navigation purpose" thought by the Supreme Court in *Gerlach* to have been laid to rest. While the *Rio Grande* case invoked section 10, the suit grew out of the complaints of Mexico not involving navigation but to protect the consumptive use by its citizens of the waters of the Rio Grande. (See note from Mexican Legation to Secretary of State dated Aug. 4, 1896; S. Doc. 229, 55th Cong., 2d sess., pp. 2–5.)

The reservation of unappropriated waters for authorized Federal purposes as an incident to the reservation or withdrawal of public lands has proved its worth in the execution of the Nation's conservation programs. S. 1275 would recognize the merits of Federal reservation of waters in certain classes of cases, for it would have no effect upon them. These exempt classes are enumerated in section 2(3) and include: Indian rights, rights of the United States adjudicated prior to enactment of S. 1275, right of the United States to uses lawfully initiated in the exercise of express or necessarily implied statutory authority prior to the acquisition by others of rights under State law, and actual uses for governmental purposes or programs of the United States prior to enactment of S. 1275.

Without pausing here to consider ambiguities in these savings clauses, it appears that, except in the case of Indians, the primary intent of S. 1275 is to strip the United States of power to reserve water for future use. For some reason its proponents frown on the conservation of water.

It appears to be wrong for the United States to conserve water as distinguished, for example, from timber (16 U.S.C. 471), oil (*United States* v. *Midwest Oil Company*, 236 U.S. 459 (1915)), or the public lands themselves (43 U.S.C. 141). Why this should be so is not clear. What is clear, however, is that to permit appropriations of hitherto reserved waters to proceed without regard to the future needs of national programs of conservation would go far to defeat their successful effectuation. Furtherance of those national programs, while still possible although water rights may have to be reacquired, could become a great deal more costly. Some programs could become economically infeasible.

From the earliest days of the conservation movement, the reservation of water has been a recognized concomitant of the reservation of public lands (1 Wiel, *Water Rights in the Western States* (3d ed., 1911), 176, 226, 240–241). The necessity for reservation of waters for national purposes was accurately foreseen by Wiel. Writing in 1911, he predicted that changes could be anticipated in the policy of "free development under local law" which appeared to him to be inconsistent with the conservation movement. Wiel reminded his readers that the right of States to legislate in the field of water rights was Federal in origin, arising from the 1866 act (1 Wiel 164–166). See also *United States* v. *Grand River Dam Authority, supra*. The extent to which national conservation policies remain dependent on the reservation of waters is illustrated in *Arizona* v. *California, supra* (pp. 595–601).

The Stock-Raising Homestead Act of 1916 (39 Stat. 862, 865; 43 U.S.C. 300) will serve to illustrate some of the difficulties and ambiguities that S. 1275 would create. That act provides that "*Lands* containing water holes or other bodies of water needed or used by the public for watering purposes * * * *may be reserved* * * * and, shall, while so reserved, be kept and held open to the public use for such purposes * * *." (italic added). The act was implemented by the Executive order of April 17, 1926. (See 43 CFR 292.1.)

This reservation is of course necessary to keep desirable stockwatering sites open for common access and use by persons grazing stock on the public domain. Clearly such a reservation is worthless without a reservation of the associated water. Section 1(1) would immediately open the waters on these reservations to appropriation. Thus the usefulness of the adjacent public domain as a grazing area could be destroyed, and a person with or without a license to use the public domain for grazing would be able to monopolize the water. Permissible appropriations would not be restricted to stock-water purposes.

In 1948 and in 1950 it became necessary for this Department to assert the rights of the public under the Stock-Raising Homestead Act to water sources withdrawn under the 1926 Executive order as against attempts to appropriate under State law initiated after withdrawals had been made. In both cases the Department concluded that the reservations had removed the water from appropriation. *Jack A. Medd*, A–23951, December 26, 1947, July 28, 1948; M–33969, November 7, 1950.

Section 2 of S. 1275 appears not to protect the public from the monopolization of water which would result from State-law appropriations. To protect the public and to carry out the purposes of section 10 of the Stock-Raising Homestead Act, the United States would have to file for a water right under State law or to assert that "water used for governmental purposes or programs of the United States" in section 2(3)(d) means the same as "public use" in the reservation of stock-watering sites. Either course is inadequate protection of the public. Filing for a water right under State law may be an empty gesture. Many western water sources are already heavily overappropriated. And it is not certain that the language of section 2(3)(d) would justify the United States in asserting rights of the public as distinguished from its own rights "for governmental purposes and programs." Here again, S. 1275, rather than introducing clarity, would sow the seeds for future litigation.

Our discussion of the threat posed by S. 1275 to reservation of water sources under the Stock-Raising Homestead Act is illustrative only. Similar difficulties would be encountered by other programs, especially those for recreation development, fish and wildlife conservation and controlled forest management.

Section 1(2) of S. 1275 would make applicable to all future Federal or federally authorized projects, with respect to waters arising in the Western States, the provisions of section 1(b) of the Flood Control Act of 1944. Thereby the use of water for navigation under all such future projects would be limited to "only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the 98th meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

A similar provision has been included in all rivers and harbors and flood control measures enacted since 1944. However, the language used has given rise to at least one serious ambiguity. That is the question as to whether the use of water for power is or is not a "consumptive use" to which navigation is subordinated. This became an important issue in connection with Missouri River Basin projects a few years ago. Hearings entitled "Missouri Basin Water Problems" before the Committees on Interior and Insular Affairs and on Public Works (U.S. Senate, 85th Cong., 1st sess., pt. 1, May 1, 2, and 3, 1957).

The issue could arise again in the case of the Missouri or other western streams and its resolution should be given careful consideration in any general application of the provision. Moreover, preference for "the consumptive use of water" may not be the most desirable allocation of water uses. The needs of water for such nonconsumptive uses as recreation and fish and wildlife ought to be weighed before a final decision is made. The establishment of the Bureau of Outdoor Recreation is a recognition by the Congress of the growing importance of recreation in the life of the Nation. So also is the consideration now being given to the legislation (S. 859; H.R. 3846) that would establish the land and water conservation fund.

Even in its present case-by-case application, the language of section 1(b) of the 1944 act merits reexamination. We therefore do not recommend enactment of section 1(2).

Section 1(3) of S. 1275 provides that "Any right claimed by the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with the procedure established by the laws of that State."

We recognize that the advocates of S. 1275 contend that section 1(3) would apply only when the United States claims a right under State law. We agree that the provision by itself is so limited. But, if Federal rights under reserva-

tion and withdrawals are to be taken away by section 1(1), as a practical matter, except in the cases enumerated in the savings clauses (sec. 2), all water rights would have to be derived under State law.

At this point it would be well to quote from section 8 of the Reclamation Act of 1902:

"* * * nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws * * *." (32 Stat. 390).

Ivanhoe Irrigation District v. *McCracken, supra*, originated as an in rem proceeding for validation of the contract the district had made with the United States for a Central Valley project with supply under reclamation law. The objector, McCracken, contended that the contract was invalid in that it deprived him of due process and of the equal protection of the laws. He was an excess landowner whose rights to water were limited by the terms of the contract. The Supreme Court of California agreed with him and sustained his objection to the contract. The theory of that court was that section 8 of the 1902 act conferred on the State of California plenary power over waters within its boundaries and that the restrictions imposed by other provisions of the reclamation laws were inapplicable and improper under the law of California. The U.S. Supreme Court reversed. "As we read section 8, it merely requires the United States to comply with State law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of Federal projects * * *. We read nothing in section 8 that compels the United States to deliver water on conditions imposed by the State" (357 U.S. 275, 291–292).

The meaning of section 1(3) is doubtful. If section 1(3) of S. 1275 means the same thing as section 8 of the reclamation act, where the United States acquires water rights under State law, it is unnecessary. If, on the other hand, it is intended to give the States the power to control and condition the delivery of water by the United States, it could be the instrument for nullification of the excess land laws. We do not recommend that the retention or repeal of the excess land laws be left to the uncertainty of judicial interpretation. As a general proposition, the acquired right to the use of water by the United States should no more be subject to the police power of the States than is the acquired right to the use of any other property.

Section 1(4) would make two significant changes in the law. First, it would confer a bounty upon owners of land sought to be condemned by the United States by allowing them to add the "powersite value" which, if the lands remained in private ownership, could not be realized without a license from the United States. *Chandler-Dunbar* and *Twin City, supra*, held that powersite value was not compensable. While section 1(4) refers generally to the taking of water rights "under the authority of" as well as by the United States, it is already the law that a licensee under the Federal Power Act must compensate for water rights necessary under his license. *Federal Power Commission* v. *Niagara Mohawk Power Corp.* (347 U.S. 239 (1954)). Hence the only substantial application the section would have would be in condemnation actions brought by the United States.

The second change effected by section 1(4) would be to foreclose inverse condemnation of water rights in cases involving Federal projects. The construction of a Federal dam often has unforeseen effects on the water rights of private persons. The method provided by inverse condemnation is peculiarly appropriate where water is involved. All other property rights would still be protected in suits for compensation arising from inverse condemnation. Why are water rights singled out as rights which cannot be acquired by this method? To deprive private water right holders of access to the Court of Claims for compensation for inverse condemnation leaves them with only one remedy: to enjoin as a trespass the construction or operation of any project which threatens damage to their water rights. Surely it is not practical to require construction and operation of water development projects to proceed in the courts.

In *Dugan* v. *Rank. supra*, the plaintiff attempted to enjoin the operation of Friant Dam until the courts could adjudicate and determine his claimed water rights and could direct how the project should be operated. The court held that

his remedy was in the Court of Claims and that the project could go forward without judicial interference.

Under section 1(4) the Government, to protect itself and the local beneficiaries of Federal water projects against the harassment of continuously threatened injunctions, would be forced to condemn "by proceedings in eminent domain" all water rights which might possibly be affected, even those which, it may later develop, where not affected at all and might better have remained to be enjoyed by their owners. Cf. *United States* v. *Dickerson* (331 U.S. 745 (1947)).

In summary, we object to the enactment of S. 1275 because it would confuse rather than clarify the relationship of the United States with the States, because it would hinder and interfere with national programs for the conservation of water resources, because it would abandon Federal property rights in the use of water, which rights would have to be reacquired at great cost for future Federal projects and programs, and because it would jeopardize basic policy positions of the United States with respect to the excess land laws and resource development.

The principles that S. 1275 would overturn are not of recent origin. Their genesis is to be found in the earliest cases.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

STEWART L. UDALL,
Secretary of the Interior.

DEPARTMENT OF AGRICULTURE,
Washington, D.C., March 6, 1964.

Hon. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate.

DEAR MR. CHAIRMAN: This is in response to your request for a report from this Department on S. 1275, a bill to clarify the relationship of interests of the United States and of the States in the use of waters of certain streams.

The Department of Agriculture fully recognizes the importance of the question of water rights, particularly to the people of the Western States. However, we do not recommend the enactment of this bill.

Federal-State water rights has been the subject of legislative proposals for a number of successive Congresses. S. 1275 is a modified version of a previous bill. S. 1275 would:

(1) Provide that the withdrawal or reservation of public lands heretofore or hereafter made shall not affect any right to the use of water acquired under State law either before or after the withdrawal or reservation;

(2) Extend to all works constructed by or under the authority of the United States with respect to waters arising within States wholly or partly west of the 98th meridian the provisions of section 1(b) of the Flood Control Act of 1944, which provides that use of water for such works shall be only such use as does not conflict with present or future beneficial consumptive uses;

(3) Require that rights of the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with State law;

(4) Provide that any water rights recognized under State law as compensable if taken by or under authority of the State shall not be taken by the United States without compensation and, if not acquired by agreement with the owner, such rights shall be acquired by the Uinted States by proceedings in eminent domain either under the laws of the United States or the State.

The bill would further provide that nothing in it shall be construed as:

(1) Modifying or repealing any provision of an act of Congress requiring that rights of the United States to the use of water be acquired pursuant to State law;

(2) Permitting appropriations of water under State law which interfere with international treaties; or

(3) Affecting (*a*) the rights of the United States or any State to waters under any interstate compact or judicial decree; (*b*) any obligations of the United States to, or any claim or right owned or held by or for, Indians;

(*c*) any water rights heretofore acquired by others than the United States; (*d*) any right to water heretofore used for governmental purposes or programs of the United States; or (*e*) any right of the United States to use water hereafter lawfully initiated in the exercise of express or implied authority when such right is initiated prior to the acquisition by others of the right to use the water under State law.

Cordial relationships and proper understanding between the Federal Government and the States in this matter of water rights are highly desirable. Many of the programs of this Department are carried out on a cooperative basis with the States, and we are proud of the harmonious relationship that exists between the various States and their agencies in this Department and its agencies.

This Department has required appropriate conformance with the provisions of State laws in the administration of its various programs and activities providing assistance for watershed protection, flood prevention, and soil and water conservation.

One of the principal activities of this Department in connection with which water rights are essential is the administration of the national forest system. This system is comprised of about 186 million acres in 154 national forests, 19 national grasslands, and other administrative units situated in 44 States and Puerto Rico.

The national forests are established and administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The Multiple Use-Sustained Yield Act of June 12, 1960 (74 Stat. 215), directs the Secretary of Agriculture to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. The same principles are applied to the national grasslands.

In the administration of lands in the national forest system under principles of multiple use, water is needed for various purposes. These include ranger stations and other headquarters sites, livestock watering developments, recreation developments, wildlife habitat developments, and the various occupancy uses by the permittees. The needs for water for all of these purposes must be met with full recognition that each of such uses of water is of significant importance. All of these uses must be recognized as beneficial uses of water.

One of the most rapidly increasing uses in the lands in the national forest system is for outdoor recreation. Camping, picnicking, hunting, fishing, and the other forms of outdoor recreation are all on the upsurge. The number of recreation visits to these lands in 1960 was 92.6 million. We expect the final tabulation of 1963 visits to show an increase to approximately 125 million. In order to accommodate the continually increasing recreation use of the national forest system there will need to be a great expansion in the number of recreation developments.

We believe that the responsibility of the Secretary of Agriculture for developing and administering the national forests under principles of multiple use and sustained yield requires that any establishment and recognition of rights to waters on the national forests should not be construed as limiting the Secretary's authority to regulate the use and occupancy of the national forests or to prevent injury to property of the United States. Where a beneficial use of water on the national forests is made in connection with the use and occupancy of the national forests, it should not preclude the Secretary from making discretionary determinations in accordance with rules and regulations for the use and occupancy of such lands. Thus, permits for the use and occupancy of national forest land for grazing or other purposes could be issued, modified, or terminated under the regulations of the Secretary, even though the termination of a permit might result in the permittee being unable to continue the beneficial use of water which he had previously been making in connection with the use of the land under the permit. At the the same time, the Secretary must be free to authorize other appropriate uses of national forest lands under the applicable regulations.

It has long been the policy of this Department to make filings with appropriate State agencies and in accordance with the procedures established by State law on waters needed in connection with the development and administration of the national forests. In this way we have endeavored to indicate those rights which are needed in connection with the administration of the national forests so that both the State officials and those seeking to use the waters from the national forests would have information as to the needs of the Federal Government. The project of making these filings is not complete but it is proceeding

as rapidly as funds and manpower permit. We plan to continue the policy of notifying the States as to the use we intend to make of water needed in connection with the development and administration of the national forests.

The Department of Agriculture is also concerned that effective multiple-purpose development of our water resources will not be inhibited by restrictions beyond those already provided by law. Although the responsibility for comprehensive river basin development is shared with other departments, we represent the interests of farm and rural people whose social and economic well-beign is to a considerable extent dependent upon such development. As an example, there is the rather considerable segment of the rural population whose power needs are served by borrowers from the Rural Electrification Administration. Over 200 of these systems receive their power supply from Federal hydroelectric projects. Many of them would never have come into being but for the development of these projects and the availability of power from them. Their ability to meet consumers' power needs of the future may largely be determined by the orderly and timely development of resources yet untapped. The broad interests of these people in our natural resources development, we feel, should be recognized in the consideration of this matter of water rights.

The Bureau of the Budget advises that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

ORVILLE L. FREEMAN,
Secretary.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C.

Hon. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of Defense on S. 1275, 88th Congress, a bill to clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams.

The general purpose of the bill, as set forth in section 1(1), is to provide that the withdrawal or reservation of public lands either before or after enactment shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of the withdrawal or reservation. In accordance with this general principle, section 1(2) of the bill makes section 1(b) of the Flood Control Act of 1944 applicable to all works constructed subsequent to enactment by or under the authority of the United States with respect to waters arising within States lying wholly or partly west of the 98th meridian; at the present time, section 1(b), which provides that use of certain public works for navigation shall not conflict with various other beneficial uses, is not applicable to all works of the United States, but only to civil works authorized by certain flood control acts. Section 1(3) of the bill provides that rights claimed by the United States for the use of water under the laws of any State shall be initiated and perfected in accordance with State procedures. Section 1(4) provides that no vested right to the use of water shall be taken by the United States without compensation. Section 2 sets worth various interpretations which are to be followed in applying the provisions of the bill.

There have been a number of bills introduced in recent sessions of Congress which made specific provision for the manner in which the United States could acquire or exercise rights to use water. Where these bills have specifically provided that the United States must acquire these rights in accordance with State law the Department of Defense has objected to them. However, a provision which merely requires that vested rights not be acquired by the United States without the payment of just compensation would not be opposed by the Department of Defense, since such a provision merely restates existing law.

Although, the Department of Defense interprets section 1(1) of the bill as providing that the withdrawal or reservation of public lands shall not affect any vested right, the section would appear to deprive the United States of any right to use water which it reserved by virtue of a withdrawal or reservation of public lands and which conflicts with any private rights acquired either before or after the establishment of the withdrawal or reservation. In the past, the Department of Defense has successfully maintained its right to use waters

appurtenant to reserved public lands, and to subordinate this right to subsequently acquired private rights could be seriously detrimental to essential defense programs.

For the foregoing reason, the Department of Defense opposes the enactment of S. 1275.

It is impossible to determine the budgetary effects of the enactment of this legislation.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,

L. NIEDERLEHNER
(For John T. McNaughton).

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., March 6, 1964.

Hon. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 1275, a bill to clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams.

For the reasons given in the enclosed memorandum prepared in this Department we are opposed to the enactment of this bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

NICHOLAS DEB. KATZENBACH,
Deputy Attorney General.

MEMORANDUM RE: S. 1275

The bill would not clarify the relationship of the interests of the United States and of the States in the use of certain waters so much as it would change those relationships. The broad outline of these relationships as they presently exist has been established by a number of Supreme Court decisions.

These decisions establish that the navigable waters of the United States are "the public property of the Nation," *Gilman* v. *Philadelphia*, 70 U.S. 713, 724 (1866); that private ownership of the running water of a great navigable stream is "inconceivable," *United States* v. *Chandler-Dunbar Water Power Company*, 229 U.S. 53 (1913); and that the United States, in the exercise of its powers under the commerce clause of the Constitution, can utilize these waters without paying any compensation for the impairment of alleged water rights recognized under State law, *United States* v. *Chandler-Dunbar*, *supra*; *United States* v. *Appalachian Electric Power Company*, 311 U.S. 377, 423 (1940); *United States* v. *Grand River Dam Authority*, 363 U.S. 229 (1960); *United States* v. *Willow River Power Company*, 324 U.S. 499 (1945); *United States* v. *Twin City Power Company*, 350 U.S. 222 (1955). If Congress so wishes, however, it may provide for payment of compensation for interference with State-recognized rights to use navigable waters, and section 8 of the Reclamation Act of 1902 and section 27 of the Federal Power Act constitute such provision with respect to such interference by projects built under authority of those acts. *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725 (1950); *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954).

As for nonnavigable waters in the public lands States the Supreme Court has recognized that when the United States acquired ownership of the public domain by cession from foreign sovereigns it acquired the rights to use the waters thereon within the bundle of rights which ownership of the land involves, and that absent permission of the United States no one can acquire as against it ownership of the right to use any of such waters. See, for example, *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 235. The Desert Land Act of March 3, 1877, 19 U.S.C. 377, 43 U.S.C. 321, constitutes such permission in the 13 States to which it applies with respect to unappropriated nonnavigable waters on the public lands. The Supreme Court has held that that act authorizes the acquisition by others of

rights to use such waters by following procedures prescribed by State law. *California and Oregon Power Company* v. *Beaver Portland Cement Company*, 295 U.S. 143 (1935). Rights to the use of nonnavigable waters acquired under authority of the Desert Land Act by following procedures prescribed by State law are therefore good as against the United States, and are compensable when taken. However, the Desert Land Act did not constitute a blanket conveyance of the Federal Government's rights to use the nonnavigable waters on the public domain, and the United States retains, with respect to such waters which remain unappropriated, the power to reserve them from future appropriation under State law, as well as the power to utilize them itself and to provide for their utilization by others. Such reservation of the unappropriated rights to use the waters on such lands results from the withdrawal or reservation of public lands for a particular Federal purpose. *Winters* v. *United States*, 207 U.S. 564 (1908); *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955); *Arizona* v. *California*, 373 U.S. 546 (1963).

The paramount national interest in all of the navigable waters of the Nation, and in the reserved and unappropriated nonnavigable waters on the public domain would be largely surrendered to the several States if this bill were enacted.

The first paragraph of section 1 of the subject bill provides that no right to the use of water acquired under State law shall be affected by the reservation or withdrawal of public lands, without regard to whether the right was initiated before or after the withdrawal of such lands.

We believe the enactment of section 1(1) of the subject bill would be contrary to the national interest. With respect to water rights vested as of a date prior to the date of withdrawal, the provision is merely declarative of existing law and there is no need for it. With respect to rights initiated after a withdrawal of public lands, the provision is in effect a determination that rights to use the waters on the withdrawn lands, unappropriated at the time of withdrawal, may thereafter be appropriated by others even though there is a need for them to accomplish the purposes of the withdrawal and that under existing law the withdrawal of the lands for authorized Federal purposes does effect a reservation of the right to use such waters. Cf. *Arizona* v. *California*, *supra*.

At no time in history has foresight been more important in water resource planning. It is essential in Federal planning, planning among States and local planning. By interstate compact, many of the States have allocated waters among themselves and in so doing have recognized and applied the reservation principle. Under such compacts, States developing more slowly than their neighbors have typically reserved far more than their present requirements. In this context no one denies that reservations for future growth and development are absolutely essential to that development. Such reservations, accurately estimated, are vital to the future. The same type of reservation is seen within States. County and watershed of origin laws are clearly based on the same consideration: The reservation for more slowly developing areas of a superior right to use in the future waters presently unneeded.

Against this background, the reasonableness of Federal reservations seems clear. Are the functions of the Federal Government and the lands it holds for all the people of so little value that no foresight is to be exercised to preserve water for future requirements? By what method other than reservation should the Federal Government, supreme within its delegated powers, reserve water for future need?

If the waters on the public domain are thrown open indiscriminately for such use, misuse, or nonuse as may be made of them under State recognized reservations as well as under State recognized rights based on actual use, what can we expect for the future of millions of acres of national forests, parks, grazing lands, highland recreational areas, water storage programs, water, land, and wildlife conservation plans? How many millions of acres needing reforestation, resodding, water for recreational development, water for all the needs that can be anticipated for hundreds of millions of acres held in trust by the United States for future generations of Americans may lay barren and eroded? Is it enough to say we can always condemn the water in the 1980's which was given away to whomever may have taken it in the 1960's and which is then essential to the preservation of a Zion or Yosemite National Park? How much might it cost? How intelligent is it to permit an investment today which will be destroyed tomorrow because waters on which it is based are needed for a purpose that was known before the investment was per-

mitted? How many future projects might be economically unfeasible? The very area that loses a project which offered great local opportunity will suffer most from an indiscriminate abandonment of Federal water rights today.

It is recognized that section 2 of the bill is intended to save to the United States certain rights to the use of water which it has by the withdrawal of public lands, or by utilization of the water, for specific purposes. However, without an actual inventory of the rights of the United States which would be affected by section 1, there is no way of knowing either the adequacy or inadequacy of section 2 for the purpose of saving the rights for which there is either a present or potential need. Absent such knowledge we believe that enactment of section 1 would be at best improvident and in disregard of the interest of the people of America.

Paragraph (2) of section 1 would provide that the provisions of section 1(b) of the Flood Control Act of 1944, 33 U.S.C. 701–1 (1958) shall apply to all works hereafter constructed by or under authority of the United States with respect to waters rising in States lying wholly or partly west of the 98th meridian. Section 1(b) of the Flood Control Act of 1944 reads as follows:

"The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the 98th meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the 98th meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

The same provision has been included in every subsequent Rivers and Harbors, and Food Control, Act.

The author of the subject bill has explained that this paragraph is included here because it "enunciates the policy of preference for consumptive uses as against nonconsumptive uses, west of the 98th meridian" (109 Congressional Record 5377).

There is considerable doubt that the language of this paragraph achieves the purpose attributed to it. Section 1(b) of the Flood Control Act of 1944, in connection with the operation of projects therein authorized, subordinates only "use for navigation" to certain named consumptive uses of the waters there involved. The use for power and the use of water for other nonconsumptive purposes are not subordinated. The language of section 1(b) of the 1944 act hardly supports the suggestion that it declares any policy with respect to preferences as between consumptive and nonconsumptive uses to which it does not make reference.

If Congress in its wisdom were to adopt a general policy of preference for consumptive uses over nonconsumptive uses, we believe it should do so by a method which does not simply extend to all future projects in the West the arguments which have already arisen respecting the meaning and applicability of section 1(b). Specific determination of the uses which are to be preferred should be made, rather than to speak in vague terms of consumptive and nonconsumptive uses. What uses are nonconsumptive? What uses are to be preferred because they are consumptive? Is operation of a project for flood control a consumptive or nonconsumptive use, or is it operation involving no use of the water at all? Is the use of water for hydroelectric power generation a nonconsumptive or consumptive use? If the operation does not involve storage, presumably it is the former. If it does involve storage, does the fact that evaporation losses are incurred make it a consumptive use? If evaporation losses are large, as at Hoover Dam, is the use for power consumptive; if they are relatively slight, as at a reservoir in a cooler climate at a higher elevation, is the use nonconsumptive? If hydroelectric power generation involving evaporation loss from a reservoir is a nonconsumptive use, is power generation at a steamplant involving evaporation of water used for cooling likewise nonconsumptive? If it is not, shouldn't it be? Is there any logical reason to give preference to one type of power generation and not to another?

These questions suggest some of the ways in which section 1(2) of the subject bill is not effective to achieve the purpose which has been ascribed to it. They likewise suggest that a policy of generally subordinating nonconsumptive uses to consumptive uses is neither meaningful nor necessarily desirable, either west or east of the 98th meridian. Many other questions of similar import might be asked. For example, if evaporation losses make hydroelectric power generation a consumptive use, is the storage of water for recreation likewise a consumptive use? If so, is it within the kinds of uses which Congress intends to give prefer-

ence to? Where does the maintenance of fish and wildlife fit into a schedule of preferences? Should this question be answered by reference to whether a prescribed refuge area makes a consumptive or a nonconsumptive use of water? We think it should not; we think the significant and controlling consideration should be to determine whether the maintenance of our fish and wildlife today and in the future is of sufficient importance in the national interest that it should not be subordinated to all uses of future Federal projects for other purposes, such as irrigation, mining, and industrial.

In other words, if there is to be declared a national policy for the preference of one kind of water use over another, either west of the 98th meridian or for the entire country, we believe the policy should be declared on the basis of an advised determination of the relative values of use for one purpose as against another and not on the basis of a general but imprecise theorization that nonconsumptive use is not so good for the people locally or nationally as consumptive use. Our principal basis for objection to the second paragraph of section 1 of the subject bill is that it does not make, or make provision for, such an evaluation, but would, instead, simply make applicable to all future Federal water resource projects in the Western States the subordination of project use for navigation to consumptive uses of water for domestic, municipal, stock water, irrigation, mining, or industrial purposes. It may be that an analysis of preferences on a project-by-project basis is the only meaningful and intelligent method of determining them. The vagaries of nature are great and an ambiguous generalization is dangerous.

Paragraph (3) of section 1 would provide that when the United States claims a water right under State law, such right shall be initiated and perfected in accordance with the procedure established by the laws of the particular State.

The bill recognizes that there are other foundations for Federal rights to the use of water than compliance with State law (see 109 Congressional Record 5378 and 5379, and sec. 2(3)(d) and (e) of the bill. It does not define what set of facts, or law, creates the situation where the United States claims in unperfected right to use water only under State law.

Where the Government secures vested water rights of others it does so by purchase or by exercise of the Federal eminent domain power, paying compensation in accordance with the fifth amendment; if such payment is not made in direct condemnation proceedings it may be compelled by suit under the Tucker Act. When the Government appropriates water rights not already owned by others, there is no need, and no room, for any authorization of the appropriation other than the act, or acts of Congress in which is found the necessary authority for the Federal agents to proceed with the project. In such case, notification to State water agencies might be proper in order that those agencies may know the requirements of, and coordinate their activities with, the Federal project. But to require that accomplishment of the constitutionally authorized Federal purpose shall be contingent upon whether the Federal project can satisfy the requirements of State law for the perfection of appropriative water rights is not proper (see *First Iowa Coop.* v. *F.P.C.*, 328 U.S. 152, and *F.P.C.* v. *Oregon*, 349 U.S. 435), and it is of questionable constitutionality. In its recent decision of *Arizona* v. *California*, *supra*, the Supreme Court refused to construe section 18 of the Boulder Canyon Project Act as requiring that the Secretary of the Interior make determinations respecting the disposition of project water in accordance with State laws. Its reasoning is summed up in this sentence at 373 U.S. 590: "Subjecting the Secretary to the varying possibly inconsistent commands of the different State legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow." This reasoning is equally applicable to the instant consideration.

Further, it is impossible to know or to determine just which of the laws of the 50 States relating to the use of water it is intended the United States should conform to in the initiation and perfection of its water rights for use in the respective States. For example, does the initiation and perfection of a water right for a Federal project in accordance with the laws of California require that the California county of origin and municipal preference laws be complied with? Does initiation of a water right in accordance with the laws of that State require that, by submission of an application for permit to appropriate to the State Water Rights Board, the United States accept the decision of that board, as must other applicants (subject to judicial review, of course), as to whether its project or that of some competing applicant will best serve the

public interest? Does perfection of a water right in accordance with the laws of that State require that the United States accept a license which, as required by California law, is subject to condemnation by the State or certain of its agencies after expiration of a limited time? Does perfection of a water right in accordance with the laws of that State require that, during the course of construction and pending application of the water to beneficial use, changes of plans for a Federal project, reclamation or otherwise, as to points and methods of diversion and place of use may be made only if approved by the State Water Rights Board?

These questions and a hundred more like them relate to matters for which there is no room for further approval or authorization once Congress has approved a plan for and authorized a Federal water development or utilization project. Yet the provision in question would, if it constitutionally can, submit Congress decisions and the exercise of executive discretion thereunder for confirmation, revision, and possible veto by State legislatures and State administrators. We think it would be a serious mistake for Congress to put in the way of its water resource conservation and utilization projects and programs a self-defeating requirement such as section 1(3) of the bill would impose. The national interest would be better served were Congress to make clear that when it authorizes a Federal use of unappropriated water, whether originating on the public domain or elsewhere, no further permission from any source is necessary to prevent frustration of the Federal project by subsequent attempted appropriations of others under authority of State law.

Paragraph (4) of section 1 would provide that no vested right to divert, store, or consumptively use water, navigable or nonnavigable, recognized by State law shall be taken by or under authority of the United States without the payment of compensation. This paragraph would also provide that where such rights are acquired other than by agreement with the owner, they shall be taken "by proceedings in eminent domain under the laws of the United States or of the State or States affected."

Since rights to the use of water are property rights, since the fifth amendment to the Constitution forbids the taking of private property for public use without compensation, and since the Tucker Act (28 U.S.C. sec. 1346(c)(2) and sec. 1491), permits actions against the United States to recover compensation under the fifth amendment for rights taken by the United States, the first part of the fourth paragraph of section 1 makes only one addition to existing law. That one addition, however, is of major significance. It requires that the United States make payment for interference with State-recognized rights to use navigable waters even though those rights ("interests," in the Supreme Court's language in its *Willow River*, *supra*, decision) are subject to a servitude in favor of the United States under the commerce clause of the Constitution. There is no question of Congress power to impose such a requirement. But although we agree with the policy under which it has been determined that a Federal reclamation project's use of navigable waters for irrigation of privately owned lands may not interfere with privately owned State-recognized rights to make similar use of those waters without the payment of compensation (see *United States* v. *Gerlach Live Stock Co.*, *supra*), we are unable to agree that it would be desirable to repeal 150 years of sound decisional law based on the commerce clause of the Constitution. We do not believe that the national interest requires, or justifies, the extension of a gratuity to every claimant under State law of an interest in the diversion, storage, or consumptive use of navigable waters without regard to the nature of the Federal use which causes the interference. It is only when the Federal power is exercised primarily for the direct benefit of an identifiable individual or group of individuals that Congress has in the past made Federal encroachments on State-recognized rights to use navigable waters compensable. Where interference is for the benefit solely of the public at large, without identifiable benefit to competing private interest, there seems to be no basis for giving away to private interests the valuable servitude in the navigable waters which under the commerce clause of the Constitution the Supreme Court has found vested in the United States.

In the early days of the common law and of our Federal Government, navigable rivers were looked upon as highways of commerce and as incapable of private ownership as a public road. That premise is embodied in our constitutional law. Why should these highways be opened today to any interest for any purpose, subject only to the power of eminent domain? If there is a public interest in creation of a private right, a specific grant can be made. If there is equity in an existing use, specific relief can be authorized.

The second part of this section is intended to require that water rights may be taken only in direct condemnation proceedings; a taking by physical seizure, with the claimant of a water right free to pursue his constitutional right to compensation by suit under the Tucker Act, would be prohibited. (109 Congressional Record 5379.) A long-recognized method by which the Federal Government's power of eminent domain has been exercised and compensation made available to property owners (*United States* v. *Dow*, 357 U.S. 17, 21) would continue to be available with respect to all kinds of property rights except rights to the use of water. We fail to see why litigation of a dispute respecting the validity of a claim of interference with a claimed water right by suit under the Tucker Act is more "deplorable" (109 Congressional Record 5379) than litigation of a mistake on the part of project planners with respect to the area of land to be flooded by a reservoir (*United States* v. *Dickinson*, 331 U.S. 745), or of the extent of a taking as a result of low and frequent overflights of aircraft. (*United States* v. *Causby*, 328 U.S. 256.) On the contrary, we think such procedure for testing disputed claims is essential in many instances to the orderly and efficient progress and administration of Government projects and to the protection of privately owned rights which may be affected thereby. Let whoever thinks inverse condemnation "deplorable" try to calculate his loss before the project has operated and he will find, in many instances, it is only after years of operation that the extent of taking, if any, can be determined. Cf. *United States* v. *Dickinson*, *supra*.

In our view, the proposal to prohibit proceedings in "inverse condemnation" with respect to claims of interference with State-recognized water rights is ill advised because authority to take by physical seizure would be denied and compensation for interference with a claimed right which the Government disputes could therefore not be had by suit under the Tucker Act; the construction and operation of a Federal water resource project might be indefinitely delayed until all such disputes could be litigated to a conclusion. Cf. *Malone* v. *Bowdoin*, 369 U.S. 643.

It is based on a misunderstanding of the nature of proceedings in "inverse condemnation" because the Tucker Act was intended as a means of giving claimants of privately owned rights an opportunity to obtain that compensation to which they are constitutionally entitled when the Government, either by design or by mistake, interferes with their rights without proceeding in direct condemnation. "Inverse condemnation" is a procedure which permits the litigation of oftentimes unforeseen results of Federal water resource projects and of more frequent disputes as to whether the claimed rights are valid or the claimed interference has resulted or will result. It is a procedure which affords a remedy to property owners for the inevitable results of the performance of Government functions; it is not a procedure which gives to the Government an opportunity for taking advantage of its citizens.

It would be contrary to the interest of the United States and the interest of all claimants of privately owned water rights to deny such claimants the right to proceed by suit under the Tucker Act when they assert that their claimed rights have been or will be interfered with and the Government denies that this is so.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., March 9, 1964.

HON. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of April 12, 1963, requesting the views of the Bureau of the Budget on S. 1275, a bill to clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams.

The Department of Justice and other concerned agencies, in reports being submitted to your committee on S. 1275, recommend against enactment of this measure for reasons set forth in detail in their respective reports.

For the reasons expressed in the reports of the Department of Justice and the other concerned agencies, the Bureau of the Budget would oppose enactment of S. 1275.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

FEDERAL POWER COMMISSION,
Washington, D.C., March 9, 1964.

Subject: Report on S. 1275, 88th Congress. A bill to clarify the relationship of interests of the United States in the use of the waters of certain streams

THE PROVISIONS OF THE BILL

The operative provisions of S. 1275 are set forth in the first section, divided into four paragraphs.

Paragraph (1) provides that the withdrawal or reservation of public lands, heretofore or hereafter made, shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation. The purpose stated by the sponsors of the provision is to overturn the Supreme Court's Pelton Dam decision, *Federal Power Commission* v. *Oregon*, 349 U.S. 435, and, in effect, modify the Desert Land Act of March 3, 1877, 19 Stat. 377, so that the United States would relinquish to States and private persons its property rights in, and control of, water rights on reserved lands of the United States, as it has under the act with respect to water rights on the public lands, i.e., those lands subject to private entry, and sale and disposition, under the homestead laws. 109 Congressional Record 5377, 19422 (daily), April 4 and October 29, 1963.

Paragraph (2) would make applicable to all works hereafter constructed by or under the authority of the United States with respect to waters arising within States wholly or partly west of the 98th meridian the provisions of section 1(b) of the Flood Control Act of 1944, 33 U.S.C. 701–1(b). Under section 1(b), in connection with the operation and maintenance by the Army Engineers of works of improvement for navigation or flood control, the use for navigation of waters arising in States wholly or partly west of the 98th meridian shall be only such as does not conflict in those States with any beneficial use, present or future, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes. The States affected are those west of the group of States which border on the western shore of the Mississippi River. The stated purpose of the sponsors is to provide for all federally operated or licensed water projects hereafter constructed in the affected Western States a general rule of priority for consumptive uses over nonconsumptive uses. 109 Congressional Record 5378, supra; letter of Senate Committee Minority Counsel Andrews to James H. Krieger, February 13, 1964, pages 7–8.

Paragraph (3) provides that any right claimed by the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with the procedure established by the laws of that State. This provision means, say the sponsors, that if the Federal Government claims a water right under State law it must perfect that right under State procedure. It is said that the provision would not require the Federal Government to base its claim on State law, and would not deny the Federal Government any other power it now has to acquire water rights. 109 Congressional Record 5378, supra; Andrews letter, supra, pages 9–10.

Paragraph (4) contains two provisions. First, it is provided that there shall be compensation for the taking by or under the authority of the United States of a water right vested under State law; and second, when such rights are taken other than by agreement it shall be by proceedings in eminent domain under Federal or State law. It is said that the first provision reiterates existing law in certain areas, such as the holding under section 27 of the Federal Power Act requiring payment of compensation by a Federal licensee under that act for interference with water rights vested under State law, *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239. The provision is needed, say the sponsors, to achieve a like result when the United States or persons acting under its authority create such interferences with State-recognized water rights in navigation and flood control projects without making compensation by reason of a claim of a navigational servitude or easement. The second provision, say the sponsors, is aimed at precluding seizure of or interference with affected water under Federal authority without a condemnation suit instituted in a court of the locality, and to reduce or eliminate thereby the occasions for affected owners to sue for compensation in the U.S. Court of Claims (109 Congressional Record 5378–5379, supra; Andrews letter, supra, pp. 10–11).

Section 2 of the bill contains certain savings clauses (1) continuing in effect provisions of Federal law which require acquisition of water rights pursuant to State law, (2) protecting treaties from interference by appropriations of water under State law, and (3) preserving the effect of any interstate compact, existing judicial decree, Indian rights, existing water rights of others than the United States, any right to a quantity of water used for governmental purposes or programs of the United States at any time prior to the effective date of this act, or any later initiated right of the United States to use water under a present or future act of Congress or State law if the right is initiated prior to the acquisition by others of a right to use water under State law.

COMMENT

We shall limit our comment to the effect of the bill upon the Federal Power Commission's licensing functions under the Federal Power Act, although we recognize that the proposed legislation would affect other interests of the Federal Government. Under that act, 16 U.S.C. 791a–825r, the Commission is authorized to issue licenses to non-Federal entities for the purpose of constructing, operating, and maintaining waterpower developments on any of the streams over which Congress has jurisdiction under its authority to regulate interstate and foreign commerce or upon public lands and reservations of the United States, or for the purpose of utilizing surplus water or waterpower from any Government dam.

Paragraph (1) of the first section of the proposed bill would have an effect on the licensing authority of the Commission, but just how much is not entirely clear. If paragraph (1) has the effect its sponsors claim for it and overturns the *Pelton Dam* decision, it places the Commission's ability to license project works on reserved lands in jeopardy, because it would restore the contention of the States that their approval is needed for the grant of a valid waterpower license on reserved lands of the United States. This was the result which the Supreme Court rejected in the *Pelton Dam* decision, 349 U.S. 435, supra, and which the Supreme Court has said in *Pelton* and elsewhere "could destroy the effectiveness of the Federal act. It would subordinate to the control of the State the 'comprehensive' planning which the act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." *First Iowa Coop.* v. *Federal Power Commission*, 328 U.S. 152, 164, and see also 349 U.S. supra at 445, n. 16. The result would be a complete reversal of our national policy.

There may be doubt that the language of paragraph (1) achieves the avowed object of its sponsors. Read literally it seems to say that the withdrawal or reservation of public lands for power purposes by the United States cannot prevent the vesting of water rights under State law, the taking of which would be compensable by licensees under section 27 of the Federal Power Act. (See discussion of par. (4) infra.) This, too, is a result which we believe would be undesirable because it would defeat the purpose for which the lands were reserved.

For the foregoing reasons, the Commission is opposed to the adoption of paragraph (1).

Paragraph (3) of section 1 may compound the effect of paragraph (1) and is likewise objectionable. On its face paragraph (3) purports to deal only with water rights "claimed" by the United States under State law. However, if paragraph (1) has the effect its sponsors claim for it, the Commission could achieve valid and complete licensing of the use of the unappropriated waters on the reserved lands only by obtaining State approval and subjecting licensees to compliance with State water law.

Paragraph (2) of section 1, as described by its sponsors, purports to offer a guide of preferring consumptive uses of water over nonconsumptive uses in federally operated or licensed water projects west of the 98th meridian. Actually the language of the bill is in terms of subordinating the use for navigation to beneficial consumptive uses for domestic, municipal, stock water, irrigation, mining, or industrial purposes. If paragraph (2) means merely that in granting a waterpower license, the Commission shall subordinate the use of water for navigation to these consumptive uses, the provision would have little significance for a licensed project of the Commission even on a navigable stream, except as the Commission might be prevented from requiring a licensee to release a quantity of water for navigation. If, however, the provision prescribes a general policy for the licensing of water projects, giving invariable preference in licensing to consumptive uses over nonconsumptive uses, including use for power genera-

tion, we think the policy would be unwise. In its licensing of power projects this Commission looks at and attempts to balance the various uses of water affected by a specific project and would be hampered in this respect, as well as in the economic development of waterpower in the Western States, if it were compelled invariably to favor consumptive uses of water over uses for power development. Under either interpretation we object to the adoption of the provision, but if it were clarified merely to subordinate navigation to other uses its impact on optimum multipurpose development would be less severe than under the broader interpretation.

Paragraph (4) of section 1 provides that there shall be compensation for the taking by or under the authority of the United States of a water right vested under State law; and when such rights are taken other than by agreement it shall be by proceedings in eminent domain under Federal or State law. The Federal Power Act, in sections 10(c), 21, and 27, recognizes vested water rights acquired under State law. Such rights are compensable when taken by a licensee, *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 251; and may be acquired by condemnation proceedings, in accordance with section 21 of the act, in the Federal district or State courts. See also, *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 113; *City of Tacoma* v. *Taxpayers*, 357 U.S. 320.

Hence, insofar as the Commission's jurisdiction and practice are concerned, paragraph (4) is repetitive and unnecessary. Whether or not the policy of compensation embodied in the Federal Power Act should be extended to other situations is beyond the scope of our comment.

On the whole, we see no need for S. 1275, and believe it may cause great harm. It would upset the existing balance of Federal and State authority in the development of water resources and would in large measure reverse the national policies embodied in the Federal Power Act. We respectfully urge that S. 1275 not be adopted.

FEDERAL POWER COMMISSION,
By JOSEPH C. SWIDLER,
Chairman.

Senator Moss. I would, therefore, recognize the principal sponsor of the bill, the ranking minority member of this subcommittee and full committee, Senator Kuchel of California.

STATEMENT OF HON. THOMAS H. KUCHEL, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator KUCHEL. Thank you, Mr. Chairman.

Mr. Chairman, I am honored to be associated with my colleagues on this committee in sponsoring S. 1275. We would have you refer to the recommendation of the Senate's Select Committee on Water Resources. I was vice chairman of that committee. All across this Nation that committee held hearings on problems with respect to water.

It is true that one of the recommendations was that a solution be found, and be found immediately, to the regrettable conflict which continues between the Federal Government on the one hand and State and local government on the other with respect to jurisdiction in this field of water.

In a word, Mr. Chairman, what we seek to do in this bill is to set down reasonable ground rules for the U.S. Government to follow.

We seek fair play between the Federal Government and the States and between the States and the Federal Government.

I want first of all to observe some things this bill does not do. This bill has nothing to do with the problem of acreage limitation.

This bill has nothing to do with the matter of the preference rights to Federal power which is afforded to public agencies under Federal law. I support public power development as well as private power

development and I have made a choice between those two as problems involving that question have come before this committee. I support the power preference law, and this bill has nothing to do with that.

I support the acreage limitation as a part of Federal reclamation law and this bill would not affect that, either.

It is not in any sense an attempt to cripple the Federal Government in the exercise of its powers under the U.S. Constitution.

I am delighted to see that all across this country interested public agencies and private citizens have endorsed the provisions of this bill. I am going to read very rapidly that part of my statement which attempts, as clearly as possible, to indicate now what our bill does.

By paragraph (1) of section 1 it would disclaim that a mere reservation or withdrawal of public land thereby reserves water appurtenant to that land.

This would protect all non-Federal water rights held by State governments, irrigation districts, individuals, et cetera, against the claim that the Federal Government has a prior right to divert water to the impairment of those non-Federal rights.

Federal spokesmen have claimed such rights in undefined quantities dating from ancient land set-asides which are silent as to water or, at least, silent as to how much and when it will be diverted. The courts have upheld them in significant instances.

My bill would return us to the principle that use is a necessary element of a water right except under special express situations such as our "State filings" in California.

By paragraph (2) of section 1 we would make general the rule, usually adopted on a project-by-project basis, that in the West, where navigation on rivers is a rare occurrence, in fact, and where water for consumptive uses is dear, the use for navigation in connection with any federally authorized project hereafter constructed shall only be such use as does not conflict with the beneficial consumptive uses of the affected waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

By paragraph (3) of section 1, the bill would require that, if and when the United States chooses to base its claim to a water right on State law rather than on Federal law, as it would be left free to do, such a right shall be initiated and perfected in accord with the procedure established by the laws of that State.

If the Federal Government is going to claim the benefit of a State-based right, it is necessary for the orderly inventory of the State's water and the administration of its system of water laws that the same procedures be followed as are required of non-Federal entities.

This would disclaim the assertion that such State rules are mere police regulations inapplicable to the United States. If the United States buys a piece of property, it must follow the recording acts in order to perfect its title or, at least, to protect itself against a later bona fide purchaser.

If it wishes to assert eminent domain, then its rights do not involve the recording acts. This provision of S. 1275 affords the same election.

By the first clause of paragraph (4) of the bill, it would be assured that compensation must be paid for impairment to State-recognized water rights infringed under navigation and flood control projects.

This is already the law on reclamation and power-oriented projects.

This provision would complete the repeal of the navigational servitude which has been held to give the Federal Government the immunity to impair preexisting rights in broadly defined navigable waters without paying for the harm wrought by the public work which effects the change.

I think we ought to finish the work we have begun in the Reclamation Act and in the Power Act.

The second clause of paragraph (4) of section 1 would direct that when the authority impairing water rights is unable to settle out of court with the water right holder, a suit to determine the compensation should be instituted by the authority.

The Federal agencies have asserted the right to use as a technique of operation the seizure of unliquidated rights without commencing a suit to condemn. My provision would direct that a suit be instituted while the project proceeds.

If there are those who claim to be hurt, but who have not been joined in the suit by the condemning authority, then they may avail themselves of the right to bring an action in inverse condemnation.

There is no intent to give these persons the right to enjoin the project. Nor is there intent to have their redress cut off by reference to the time of the original suit or other date earlier than when their particular harm became recognizable.

Section 2 of S. 1275 preserves certain existing situations. It is consistent with the thrust of the first section which affords certainty and validity as the basis for protection of existing investment and for progress in the future.

It seems that the issues, which are the residium of the verbiage on one side and the other regarding the bill before us, are basically as follows: Whether we are to have Federal water activity in a manner which throws the burden upon one or the few, rather than the many, and whether the Federal Government should run roughshod, procedurally, or whether it should impair the rights it knows it is hurting in an orderly fashion.

In resolving these issues we will, along the way, have some differences which can only be described as those of judgment.

I ask that the balance of my statement be inserted in the record. I thank you very much for the opportunity briefly to speak here.

Senator Moss. Thank you, Senator Kuchel. The entire statement will be placed in the record and be printed as part of this hearing.

(The statement referred to follows:)

STATEMENT OF HON. THOMAS H. KUCHEL, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

It is indeed a personal pleasure for me to be participating in these hearings today to advance the progress of a bill with which I have been so intimately concerned. For many years I have witnessed unnecessary conflicts between reprsentatives of Federal and non-Federal water interests. Indeed, there have even been conflicts of position among the Federal representatives. These regrettable disagreements have been due to the vexing issues raised by certain paramount claims by certain spokesmen for the Federal Government as to that Government's mode of operation in water projects. As many see it, the Federal Government has often made claims not giving adequate recognition, both substantive and procedural, to water rights which, it had been assumed, were validly held by non-Federal interests.

I have authored or cosponsored bills on this subject in previous Congresses. For the greater part of my career in the Senate this issue has been before us. The Senate Select Committee on National Water Resources, of which I was vice chairman, found that a problem does exist. We have crossed that bridge. I also think we have talked about it long enough. Now it is time to do something about it by passing an affirmative, progressive piece of legislation which will assure the non-Federal interests against unfair claims or procedures of the Federal Government and, yet, at the same time, not hobble the Federal Government in achieving the very worthwhile aims which can be achieved through Federal water activity in the fields of reclamation, irrigation, flood control, navigation, fish and wildlife, and recreation.

In order to get this matter off the list of unresolved issues before the Congress, I introduced S. 1275 in the current Congress. I am proud to have been joined in that sponsorship by the chairman of this subcommittee, by two other colleagues on the subcommittee, Senators Jordan and Church, and by my colleague from California, Senator Clair Engle. This is, surely, a bipartisan, indeed, a nonpartisan, effort. Companion bills by members of both parties have been introduced in the House of Representatives.

I take great pleasure, also, Mr. Chairman, in welcoming here today many distinguished citizens of California, as well as citizens from other parts of the Nation who have come forward to benefit us with their time, talent, and opinions by testifying on this bill. I would like to acknowledge the presence not only of witnesses from California, who will be introduced later, but also of several fine water people who have labored hard in the vineyards on behalf of this legislation and who have traveled across the country to attend these hearings. I speak of Hal Kennedy, county counsel of Los Angeles County, of Rex Goodcell, of the Feather River Project Association, and of Richard Dickenson, county counsel of San Joaquin County.

I think it can accurately be said that never before has the interest been so high on this issue. Never before have so many of the diverse groups in support of curative legislation in this field been so united as they are now in favor of S. 1275. I think it is true, also, that never before have the issues involved been so precisely defined as they are at this point as we begin these hearings.

I believe, however, that there still remains some misconceptions on the part of many as to just what this bill would and would not do. It has nothing to do with the issue of acreage limitation under the Federal reclamation laws. It has nothing to do with the public versus private electric power question. It would not affect the public agency preference under Federal power marketing programs. It does not represent an attempt to cripple the Federal Government in the exercise of its powers under the Federal Constitution. I support the acreage limitation as a part of the Federal reclamation laws. I support public power development as well as private power development, the choice between the two, when necessary, being made on an ad hoc basis on the merits at the time in question. I approve of the power preference law. I favor regional water planning and Federal water projects.

The Justice Department report, as do those from the other agencies, reveals much misunderstanding about what would be the effect of S. 1275. We have many witnesses who will describe it fully—so I will not go into great detail at this point. In a word, this is what S. 1275 would do. It would remove possible defects in otherwise valid non-Federal water rights and would give directions as to how the Federal authorities would proceed, both substantively and procedurally, in exercising Federal authority over water, including when the non-Federal rights must be impaired.

More specifically, it does the following:

By paragraph (1) of section 1 it would disclaim that a mere reservation or withdrawal of public land thereby reserves water appurtenant to that land. This would protect all non-Federal water rights held by State governments, irrigation districts, individuals, etc., against the claim that the Federal Government has a prior right to divert water to the impairment of those non-Federal rights. Federal spokesmen have claimed such rights in undefined quantities dating from ancient land set-asides which are silent as to water or, at least, silent as to how much and when it will be diverted. The courts have upheld them in significant instances. My bill would return us to the principle that use is a necessary element of a water right—except under special express situations such as our "State filings" in California, where everyone is on notice as to reserved rights not based on use, and our riparian doctrine.

By paragraph (2) of section 1 I would make general the rule, usually adopted on a project-by-project basis, that in the West where navigation on rivers is a rare occurrence, in fact, and where water for consumptive uses is dear, the use for navigation in connection with any federally authorized project hereafter constructed shall only be such use as does not conflict with the beneficial consumptive uses of the affected waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

By paragraph (3) of section 1, the bill would require that, if and when the United States chooses to base its claim to a water right on State law rather than on Federal law, as it would be left free to do, such a right shall be initiated and perfected in accord with the procedure established by the laws of that State. If the Federal Government is going to claim the benefit of a State-based right, it is necessary for the orderly inventory of the State's water and the administration of its system of water laws that the same procedures be followed as are required of non-Federal entities. This would disclaim the assertion that such State rules are mere police regulations inapplicable to the United States. If the United States buys a piece of property, it must follow the recording acts in order to perfect its title or, at least, to protect itself against a later bona fide purchaser. If it wishes to assert eminent domain, then its rights do not involve the recording acts. This provision of S. 1275 affords the same election, in effect.

By the first clause of paragraph (4) of the bill, it would be assured that compensation must be paid for impairment to State-recognized water rights infringed under navigation and flood control projects. This is already the law on reclamation and power-oriented projects. This provision would complete the repeal of the navigational servitude which has been held to give the Federal Government the immunity to impair preexisting rights in broadly defined navigable waters without paying for the harm wrought by the public work which effects the change. I think we ought to finish the work we have begun in the Reclamation Act and in the Power Act.

The second clause of paragraph (4) of section 1 would direct that when the authority impairing water rights is unable to settle out of court with the water right holder, a suit to determine the compensation should be instituted by the authority. The Federal agencies have asserted the right to use as a technique of operation the seizure of unliquidated rights without commencing a suit to condemn. My provision would direct that a suit be instituted while the project proceeds. If there are those who claim to be hurt, but who have not been joined in the suit by the condemning authority, then they may avail themselves of the right to bring an action in inverse condemnation. There is no intent to give these persons the right to enjoin the project. Nor is there intent to have their redress cut off by reference to the time of the original suit or other date earlier than when their particular harm became recognizable.

Section 2 of S. 1275 preserves certain existing situations. It is consistent with the thrust of the first section which affords certainty and validity as the basis for protection of existing investment and for progress in the future.

It seems that the issues, which are the residium of the verbiage on one side and the other regarding the bill before us, are basically as follows: Whether we are to have Federal water activity in a manner which throws the burden upon one or the few, rather than the many, and whether the Federal Government should run roughshod, procedurally, or whether it should impair the rights it knows it is hurting in an orderly fashion.

In resolving these issues we will, along the way, have some differences which can only be described as those of judgment. These we will have to resolve as our conscience indicates with the help of the testimony presented pro and con. But other issues will turn on questions of wording, of intent, and of effect, of this bill. Those we should be able to resolve more easily.

To help us in our work, I wish to submit for inclusion in the record at this point two extracts from the Congressional Record. One is the speech I made on April 4, 1963, when I introduced the bill. The other is the remarks I made on February 28, 1964, together with a description of the bill, as prepared by our minority counsel.

And now, Mr. Chairman, because I think it will be helpful to us as we proceed, I would wish to address myself, in a general way, to some of the points raised in the memorandum of opposition to S. 1275, which constitutes the report of the U.S. Department of Justice, dated March 6, 1964.

First, I observe that the Justice Department report places great emphasis upon what the United States may now claim under its interpretation of various court

decisions. I think that such an approach largely begs the question. The issue before this subcommittee, as the group delegated the duty to make recommendations as to how the Congress should exercise the powers of the United States under the Constitution, is primarily one of what the law ought to be rather than what it is. Of course, to understand the need for this legislation, it is necessary to know of the legal background, but that background should not be confused with the answer. Besides, good lawyers differ as to what many of these cases mean, especially some of the rather ancient ones which only within the last decade have been interpreted by the courts as the Justice Department interprets them.

And, further, by way of general observation, without in any way derogating the role or good faith of the representatives within the Department of Justice who prepared this report, I do think it is important for us to remember that the Justice Department has established these principles, for which it now argues, not as a judge, not as a policy arm, such as the Congress, but as an advocate for a client. Indeed, many would say that the Justice Department would have been neglectful in its duty if it did not claim for its client, the people of the United States, the greatest extent of rights which could in good conscience be claimed under the particular circumstances at play. Some of the rules now relied upon were developed to salvage very difficult practical situations. There is an old saying that "tough cases make bad law" and I do believe that we should be wary of letting past cases influence us unduly as to what the law should be. We should realize that the Justice Department, under Republican as well as under Democratic administrations, has molded its theories and honed its arguments in defense of positions which appeared at the time to be to the advantage of its client. The courts which adopted those arguments were often faced with an unfortunate situation of wanting to uphold Federal action but were driven to extremes to do so.

Our job is a far different one, for the Congress, in our form of government, represents the client. It is up to us to decide where we think the public interest lies as a prospective matter. We should not be ultimately influenced by particular, specific, past cases. And we should remember that the cheapest, fastest, easiest way to accomplish something is not always the best way. Good government is composed of other factors than expeditiousness alone.

Mr. Chairman, I ask leave to offer various resolutions and other materials I have received in support of S. 1275 and I ask that the record remain open for 15 days after these hearings so that anyone who might wish to do so may submit helpful material for inclusion.

I am looking forward to a productive hearing.

[Attachment 1]

[From the Congressional Record, Apr. 4, 1963]

FEDERAL-STATE WATER RIGHTS—NOW IS THE TIME FOR CONGRESSIONAL ACTION

Mr. KUCHEL. Mr. President, I introduce, for appropriate reference, on behalf of myself and the Senator from Utah [Mr. Moss], a bill to clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams.

One for the vexing and unsolved problems which directly confronts Western America—indeed, the entire Nation—is the continuing, often embittered, jurisdictional dispute between Federal and State Governments over the waters of many of our country's streams. How can our precious waters best be conserved and developed and controlled and put to maximum beneficial use by our people? One direct and relatively simple means of making the solution far more possible is to eliminate the jurisdictional battle, or, at any rate, some of it, which exists between Washington and our State capitals.

I shall not repeat here a detailed history of all the judicial, executive, and legislative actions by which we have arrived at the present situation. Suffice it to say that the present status of the law in many respects the uncertainty of that status is found objectionable by many responsible individuals and groups. I shall describe that status more fully in a moment.

The overall problem of Federal-State relationships in regard to water has many ramifications. Some espouse a doctrine of paramount Federal rights in almost every respect. It has been suggested for example, that the United States should specify all aspects of water development control and use which it might ever wish to assert and let the State operate on what, if anything, remains. I reject that theory as being in derogation of many proper State and local interests and better abilities to determine local needs. Such a theory is likely to lead to less, not more, beneficial utilization of our water resources.

Contrariwise, it has been suggested by some proponents of State supremacy in regard to water that all Federal water activities be subjected to State control. I also reject this theory. It would unduly impair and cripple the constitutional responsibilities of the Federal Government which, over the years, has constructed important and imposing water projects to serve the people.

I think it is because of such risks to the national interest that some of the past proposed legislation in this field has lacked sufficient support and has failed of enactment. But this does not mean that no legislation is needed, nor does it mean that sound legislation, based on principles of fairness to individuals and recognizing the proper roles of both the State and Federal Government, will not be supported in all significant quarters.

I said that it is not my purpose here to provide a history, but it is necessary to describe briefly the essential nature of those several aspects of the total situation which I feel must be remedied at this time. By this you will see that the bill we proposed is not a panacea for all questions in the complex field of Federal-State relationships in regard to water. Rather, it proposes immediate action on only the most pressing issues, upon which I believe men of good will may agree.

WATERS RISING ON FEDERAL LANDS

The spark which ignited the present apprehension among many of us is the *Pelton Dam* decision by the U.S. Supreme Court in 1955 (*Federal Power Commission* v. *Oregon*, 349 U.S. 435). That decision, as is asserted by agents of the United States, and as is feared by various individuals and States, has far-reaching implications for States, such as mine, which have significant water resources arising on reserved or withdrawn lands belonging to the United States.

By the Desert Land Act, March 3, 1877 (19 Stat. 377), the Congress provided, inter alia, that after certain appropriations of water for desertland—

"All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public."

Based on this and other provisions of Federal law, it has been generally assumed that the mere fact that nonnavigable water arises upon any U.S.-retained lands would not affect the rights to the control and use of that water acquired by persons or by State and local governmental entities, so long as such rights are otherwise in accord with State law. In other words, it was assumed Congress said that regardless of what power the Federal Government may have over water arising upon "the public lands and not navigable" such water was free for use by anyone under State law.

Many relied upon such an interpretation, and it was even expressed in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 163–4 (1935) as follows:

"Following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, * * * with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."

But, the *Pelton Dam* decision, to the contrary, defined the term "public lands" in the Desert Land Act to mean only those lands "unqualifiedly subject to sale and disposition" and said Congress did not mean to permit appropriation of water arising on lands withdrawn or reserved from entry for private acquisition. This would apply to vast acreages of watershed in many States as, for example, in my State of California where a great percentage of the total area of the State falls into this category of federally owned and withdrawn or reserved lands.

Without the Desert Land Act being applicable to withdrawn or reserved lands, it would necessarily follow that it is at least unclear as to whether any State-based right, accruing after the withdrawal or reservation, to the use of water arising on such lands could be valid as against a Federal undertaking to control or use such water. It has been said, in *Winters* v. *United States*, 207 U.S. 564, 577 (1908):

"The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied, and could not be."

The resulting assertions and fears are that the United States has, in effect, a priority of appropriation of all the previously unappropriated water arising upon the reserved or withdrawn Federal lands, said priority arising no later than at

the date of the relevant withdrawal or reservation. This theory has cast grave uncertainty on the reliability of individual and non-Federal public appropriations of water made after such withdrawals or reservations. In most of the relevant situations, the pertinent withdrawals or reservations were effected before the non-Federal appropriations upon which those of the West have proceeded to rely in developing water resources. Many of these reservations, as for forests, came around the turn of the century and there was also a general withdrawal of all Federal lands in 1934.

This is not a problem of interest to my State only, but let me give a concrete example of the need for congressional action on this subject. Not the least of the water development projects depending upon water affected by this situation is California's State water plan, now coming into fruition. If the just described fears as to the validity of the appropriation of water upon which this plan depends, water arising upon earlier withdrawn or reserved Federal lands, are not set at rest then the success of the plan is in danger. It is feared, also, that the interest charges to the people of California upon the bonds financing the plan could be significantly higher to offset the risk to the State's asserted rights possible by reason of Federal claims to control and use the water.

I agree with the Senator from Utah [Mr. Moss] that there is no basis in the actual holdings of pertinent court decisions to compel a conclusion that such infirmities as have been raised do exist under a proper interpretation of present law. Therefore, the California project and other private and non-Federal public interests similarly affected should not be open to doubt.

The fact is, however, that assertions are made by agents of the United States, as in the U.S. answering brief, pages 64–65, August 14, 1961, *Arizona* v. *California*, U.S. Supreme Court original No. 8, which give rise to apprehension that the described infirmities might become law. There the Federal Government contended:

"The rights of the United States to use the waters on the public domain, being property rights, may be acquired by others only as authorized by Congress (citations). As observed above, the Desert Land Act is such an authorization with respect to nonnavigable waters on the public lands in certain States. But this act is not applicable with respect to waters upon reserved lands (citing *Pelton Dam* case). Nor is there any other Federal statute which has transferred these proprietary rights from the United States."

We have seen in the tidelands controversy that unsettling assertions made by counsel cannot be ignored for they may ultimately become case decisional law and require legislative rectification.

Let us act now to allay the existing fears caused by such assertions. Let us avoid now the possibility of an adverse judicial decision. This we can do by exercising the proper role of Congress in defining its will as custodian of the property of the United States under article IV, section 3, paragraph 2 of the Constitution. The judicial and executive branches, the States and the people, are entitled to statutory recognition of previously unquestioned vested rights, which will permit continued maximum development of our water resources for the benefit of our people.

CONSUMPTIVE USES PREFERENCE

I move now to a second issue of this total question of Federal power over interests in water, an issue as to which I also feel Congress should act at this time. The West is an arid region where water, the lifeblood of any society, is particularly dear because of its increasing scarcity. There the consumptive uses made of it take on a very special significance. Most Western States' laws say that among competing uses, consumptive uses are considered more important than nonconsumptive.

I propose that Congress recognize this situtaion by a general provision of law relating to all works hereafter constructed by or under the authority of the United States with respect to waters lying wholly or partly west of the 98th meridian. Such a salutary provision now exists as to federally constructed projects in the sphere of flood control and navigation generally in the West. This is by virtue of subsection 1(b) of the Flood Control Act of 1944 (58 Stat. 888–90), said subsection sometimes being known as the O'Mahoney-Millikin amendment. Such provision says, in essence, that uses for nonconsumptive purposes as, for example, by diversion or other control for navigation, shall be subordinate to beneficial consumptive uses, present or future, such as for domestic, municipal, stock water, irrigation, mining, or industrial purposes, as to waters arising in States lying in whole or in part west of the 98th meridian.

The Congress has been writing such a provision into irrigation and reclamation bills on a project-by-project basis. I propose we make it general law as to all Federal projects affecting waters of the West. By doing this, I do not propose to affect the authority of the United States or its licensees to construct works, nor do I mean to touch conflicts between navigation or power functions and other nonconsumptive functions such as preservation of fish and wildlife. I do feel we should enunciate a general congressional policy that consumptive uses are preferred to nonconsumptive uses in the West. This would assure our Western States that the Congress, too, acknowledges the wisdom of the preference which they have found most suitable to their situation. It would remove a potential area of Federal-State conflict.

FEDERAL RIGHTS UNDER STATE PROCEDURE

A third form of congressional action which I suggest, and which would also make general an existing beneficial provision of law now applicable in one area of Federal water activity, would be to extend one rule derived from the Reclamation Act of 1902 (32 Stat. 388) to any right, under State law, claimed by the United States to the beneficial diversion, storage, distribution, or consumptive use of water. Our bill would provide that whenever the Federal Government claims such a right under the laws of any State, it must play the game by the rules, and initiate and perfect such right in accord with the procedure established by the laws of that State. The United States, it seems clear to me, should follow the same steps required of others, if it wishes to compete for rights established under State appropriation procedures.

Such a provision would not deny the Central Government any power it now has to acquire water rights other than by State law. It would apply only when the United States claims an appropriative right under State law. If that is the basis of its claim, rather than, for example, when proceeding by condemnation, should not the Federal Government conform to the administrative procedure of the State for its establishment of such a right? We would then avoid such a regrettable situation as arose in *United States* v. *Fallbrook Public Utility District* (165 F. Supp. 806 (S.D. Cal. 1958)), protracted litigation which I am now informed may be susceptible of satisfactory solution. In that case, the judge describes the U.S. contention on this point as follows (p. 829):

"That California's statutory application and permit procedures for the acquisition of an appropriative water right are police regulations which are inapplicable to the United States, with the result that, even if all other water users must comply with such procedures in order to acquire a valid appropriative right, the United States can obtain the right merely by taking and using the water."

I am told that the Justice Department may now be adopting, in that case, a position consistent with the principle I am here proposing. In any event, the approval of our legislation would bring to an end this kind of dispute.

COMPENSABILITY AND ORDERLY PROCEDURE

Finally, Mr. President, there is a fourth matter requiring the Congress immediate attention. What I propose here is only that which the Bill of Rights indicates justice requires. The fifth amendment provides, among other things, that:

"No person shall * * * be deprived of * * * property, without due process of law."

This should mean that one shall be compensated by the Federal Government for the value of property of which he is deprived by his Government's water project activity, in precisely the same fashion as when the Government takes his property for a post office site. It also should mean that, in following due process, the Government should initiate judicial proceedings before implementing its plan to acquire or impair said property and in such proceedings there should be fixed the extent of compensation. Those constitutional provisions are clear and fair, but unhappily, they have not always been followed in water rights matters.

First, there has developed, under case law, the theory of a navigational servitude which is to the effect that all navigable waterways, broadly defined to include most of our major streams and their tributaries, are subject to preeminent Federal control under the commerce clause of the Constitution (*United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956)). I do not quarrel with that power of control, but I do differ with some extensions of the navigation servitude argu-

ment where they result in vested water rights being noncompensable when the servitude destroys their value. This argument was made by the United States but rejected in a reclamation project case because there the court found a congressional intent in the Reclamation Act to compensate deprived owners of water rights, regardless of what the power might be to do otherwise (*United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950)).

It has also been held that section 27 of the Federal Power Act (41 Stat. 1063) requires compensation by a Federal licensee acting under that act if said licensee interferes with water rights vested under State law (*Federal Power Commission* v. *Niagara Mohawk Power Corp.* (347 U.S. 239); *Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.*, 280 U.S. 369 (1930)).

It has, however, been held that when the United States wreaks similar damage under navigation and flood control projects it need not pay compensation (*United States* v. *Willow River Power Co.*, 324 U.S. 499 (1945)). The result is that the Federal Government may proceed with impunity in impairing vested water rights in the course of nonreclamation or nonpower oriented projects on broadly defined navigable waters, even though such rights would be compensable by State-law standards (*United States* v. *Twin City Power Co.*, supra, pp. 227–228).

I propose we change this situation by providing that when either the United States, or any entity acting under its authority takes in any degree, in the course of any project in regard to navigable or nonnavigable waters, a state-protected water right, just compensation must be paid. It is only fair that the public, generally, through the Federal Treasury, rather than just the aggrieved water rights owner, bear the cost of the particular project, presumably constructed in the interest of all the people. So it is with post office sites, so it should be with water projects. There is no reason for a difference between the incidence of any Federal power over our waters and any other Federal power under the Constitution.

But that is only half of this particular problem. Unfortunately, even in instances where compensation by the United States is already required, as for example, in regard to the same reclamation project involved in the Gerlach case, the Justice Department has claimed the right to seize the affected water unilaterally, as by closure of a river, and put the deprived owners of affected vested water rights to the remedy of a suit in the court of claims. This is known as forcing resort to proceedings in inverse condemnation. As a lawyer, I judge this to be a deplorable tactic. The bill we introduce today should prevent such tactics in the future.

Compensation and orderly procedure should remove a great percentage of the friction in disputes between the Federal Government and those holding water rights recognized under State law. Yet the constitutional powers of the Federal Government would not be impaired. The relative cost of acquiring such rights would be small compared to the total cost of such projects, though just compensation is immensely important to the individuals and non-Federal public agencies involved.

I believe this bill goes a long way toward solving many of the existing or potential problems in the matter of Federal-State water rights. This bill is adapted from my S. 2636, 87th Congress, which, in turn, resulted from the very beneficial exploratory hearings on this subject held by the Senate Interior Committee in 1961. When I introduced that bill I said that I was introducing it for study as an initial step toward solving some of the many problems in this complex field. The verbiage of the pending bill is the result of extensive study and recommendations by many eminent water lawyers. It carries the endorsement of the Western Water Law Symposium conferees at the recent meeting of the National District Attorney's Association. I hope it will be uniformly supported by all those interested in this important field, even though it does not purport to solve all problems in this field.

Section 1 carries the thrust of the bill and, I believe, accomplishes all four of the proposals I have discussed here today. Paragraph 1 repeals, in effect, the definition of "public lands" which was enunciated in the *Pelton Dam* decision. It protects water rights assumed to be validly based on State appropriation and riparian doctrines in accord with the Desert Land Act and the interpretation in the *Beaver Portland Cement Co.* case.

Paragraph 2 enunciates the policy of preference for consumptive uses as against nonconsumptive uses, west of the 98th meridian.

Paragraph 3 provides that if the United States claims a water right under State law, it must perfect it under State law.

Paragraph 4 assures compensation for the taking of vested water rights. The word "vested" does not necessarily mean presently perfected rights—State law will, as it should, control in each case. This paragraph also requires affirmative judicial action by the United States. It should prevent acts of seizure by the Federal Government.

Section 2 of the bill includes several saving provisions for the protection of both the Federal interests and State and individual interests in particular circumstances. Paragraph 1 of section 2 provides that if the United States is under statutory limitation to acquiring water rights under State law, such limitation continues in effect. Paragraph 2 preserves the effect of treaties. Paragraph 3 preserves the effect of compacts, adjudicated matters, Indian rights, existing rights of others than the United States, accomplished Federal rights for governmental purposes, and later acquired Federal rights authorized by an act of Congress or State law.

Different from S. 2636, the present bill does not include a provision by which the United States could be unwillingly joined in water litigation between two or more States. Under present law, it is necessary for the Attorney General to intervene on behalf of the United States if the Federal Government is to be bound by such suits. I believe that section 3 of my former bill was a good provision but some objections to it have been raised and, in order to present a bill suited for wide support, I have not included such a waiver of sovereign immunity.

Another difference in this new bill is that we make it clear that in protecting vested water rights we are protecting the beneficial diversion or storage of water, as well as truly consumptive uses.

Other changes from former S. 2636 are minor.

Mr. President, I think this bill we introduce today provides a vehicle for accomplishing many of the aims sought by the Senate Select Committee on Water Resources, on which I was priviliged to serve as vice chairman. At page 65 of our report we asked for "clarification of the Federal position in connection with water rights." I think this bill would go a long way toward providing a sound basis for continued Federal, State, local, and individual water uses. It would also assure a more healthy climate of mutual confidence, respect, and cooperation in which our Federal Government and State and other interests can join in mutual water planning and development for the future.

This bill deserves the wholehearted support of the Congress.

Mr. President, I ask unanimous consent that the bill may remain at the desk through next Wednesday, and I hope that we may be able to obtain coauthorship from Senators on both sides of the aisle.

I also ask unanimous consent that the text of the bill may be printed in the Record.

The PRESIDING OFFICER. The bill will be received and appropriately referred; and, without objection, the bill will be printed in the Record and will lie on the table through next Wednesday, as requested.

The bill (S. 1275) to clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams, introduced by Mr. Kuchel (for himself and Mr. Moss), was received, read twice by its title, referred to the Committee on Interior and Insular Affairs, and ordered to be printed in the Record, as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That (1) The withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter made, shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation.

"(2) The provisions of section 1(b) of the Flood Control Act of 1944 (Act of December 22, 1944, 58 Stat. 888–89, as amended, 33 U.S.C. sec 701–1 (1958) shall apply to all works hereafter constructed by or under the authority of the United States with respect to waters arising within States lying wholly or partly west of the ninety-eighth meridian.

"(3) Any right claimed by the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with the procedure established by the laws of that State.

"(4) No vested right to the beneficial diversion, storage, or consumptive use of any waters, navigable or nonnavigable, which is recognized by the laws of the State or States in which such waters are diverted or used as compensable if taken by or under the authority of the State, shall be taken by or under authority of the United States without compensation; and where such rights are acquired otherwise than by agreement with the owner, they shall be taken by proceedings in eminent domain under the laws of the United States or of the State or States affected.

"SEC. 2. Nothing in this Act shall be construed as—(1) Modifying or repealing any provision of any existing Act of Congress requiring that rights of the United States to the use of water be acquired pursuant to State law; (2) Permitting appropriations of water under State law which interfere with the provisions of international treaties of the United States; or (3) Affecting, impairing, diminishing, subordinating or enlarging (a) the rights of the United States or any State to waters under any interstate compact or existing judicial decree, (b) any obligations of the United States to Indians or Indian tribes, or any claim or right owned or held by or for Indians or Indian tribes, (c) any water right heretofore acquired by others than the United States under Federal or State law, (d) any right to any quantity of water used for governmental purposes or programs of the United States at any time prior to the effective date of this Act; or (e) any right of the United States to use water which is hereafter lawfully initiated in the exercise of the express or necessarily implied authority of any present or future Act of Congress or State law when such right is initiated prior to the acquisition by others of any right to use water pursuant to State law."

[Attachment 2]

[From the Congressional Record, Feb. 28, 1964]

REMOVING OBJECTIONS TO REGIONAL WATER PLANNING AND FEDERAL PROJECTS

Mr. KUCHEL. Mr. President, earlier in this session a number of Senators introduced S. 1275. A companion bill is pending in the House of Representatives, where it was introduced by a number of the Members of that body.

This bill is of vast importance. It deals with a regrettable, but continuing, controversy in the field of water and water law.

Earlier this month the distinguished minority counsel for the Senate Committee on Interior and Insular Affairs, Richard D. Andrews, wrote an illuminating letter on this subject to James H. Krieger, chairman of the Southern California Water Conference. The letter is an excellent review of the problem involved and of the reasonableness of our legislative vehicle designed to settle a substantial portion of the controversy.

Mr. President, a decade of talk is long enough. The time has come to pass an affirmative piece of legislation in this field so that we can quiet many fears about and objections to broad regional planning and Federal water projects, all with the aim of getting on with the projects. Time taken now to deal adequately and accurately with S. 1275 will be well spent in getting this matter off the list of unfinished business of Congress so that it does not drag on indefinitely requiring effort and time which could be better devoted to harmonious planning and authorization of projects.

As Senator Moss said at the western water law symposium last year, this subject has needed more light and less heat. I hope that Mr. Andrews' letter sheds some light on what S. 1275 would and would not do.

I ask unanimous consent that the entire text of the letter be printed in the Record.

There being no objection, the letter was ordered to be printed in the Record, as follows:

"U.S. SENATE,
"COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
"*February 13, 1964.*

"Mr. JAMES H. KRIEGER,
"*Chairman, Southern California Water Conference,*
"*Los Angeles, Calif.*

"DEAR JIM: I am pleased to respond to your request that I reiterate the essence of the remarks I offered concerning pending water rights legislation when I discussed that and other resource matters at the California State Chamber of Commerce Annual Meeting last December.

"As you know, the bill in question is S. 1275, introduced in the Senate by Senator Kuchel, who has been joined by cosponsors Senators Moss, Jordan of Idaho, Church, and Engle. Identical companion bills in the House of Representatives, H.R. 5914, H.R. 7376, and H.R. 9364, have been introduced by Representatives Hosmer, Hagen of California, and Leggett, respectively. Support for this legislation has been stated by almost every national and California group and individual recognized as responsible authority on matters of this type. Hearings on S. 1275 have been set for March 10 and 11 in Washington before the Subcommittee on Irrigation and Reclamation of the U.S. Senate Committee on Interior and Insular Affairs.

"Though, as indicated, S. 1275 is widely supported, it remains true that some people still express doubts about whether it is necessary or good legislation. However, it appears generally that the very limited number of persons raising objections against the bill have not read what this particular bill itself provides and/or they have a misapprehension as to what its effect would be. Therefore, it is hoped that with their own adequate objective study, and with explanation from proponents of the bill, the few remaining objectors will see that this is necessary, progressive, beneficial legislation.

"I have found it is important to start with what this bill is not, because so many people have an initial reaction of aversion to the whole topic of 'Federal-State water rights.' This aversion stems largely from two causes. First, an honest objection to what some completely different earlier bills in this field would have done; and second, a belief that nothing can be accomplished in this field because it has been talked about for so long with nothing having been accomplished.

"Let me deal with the second problem first. Nothing has been achieved heretofore because some of the proponents of legislation in this field have been unwilling to settle for less than all they desired, thus defeating concerted action and their own cause, and because opponents have not actually understood nor have had adequately explained to them just what the more moderate bills heretofore introduced would have and would not have done. This time everyone who believes there is a need for legislation is working in harness and we are trying to demonstrate the virtues of S. 1275 to all who are willing to listen.

"Senator Clinton P. Anderson, former chairman and still a prominent member of the Senate Interior Committee, indicated the generally favorable climate which exists for a reasonable bill when last spring he said, in discussing this matter at the annual meeting between the Senate Interior Committee and the board of directors of the National Reclamation Association:

" 'We can all agree it is important to get something done. * * * The committee is ready to find some place that seems to be a meeting ground. * * * I would like to see this vexing matter settled.'

"Many of the supporters of S. 1275 have set aside more far-reaching proposals which they have heretofore urged in order to unite behind the moderate S. 1275 so as to present a bill which is within the meeting ground described by Senator Anderson. The proponents are certainly doing their part and it is hoped the previous opponents will give S. 1275 the benefit of their objective analysis and a fair hearing.

"Furthermore, Senator Moss, speaking on this subject at the western water law symposium last March, quoted from the report of the U.S. Senate Select Committee on National Water Resources which acknowledged:

" 'A solution must be worked out, and worked out promptly, for the preservation of the historic patterns under which our people have grown great.'

"And then Senator Moss said:

" 'As chairman of the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, I pledge myself to do everything in my power to push on to a satisfactory conclusion in this controversial area.'

"Thus, S. 1275 is not a bill that is not going any place. Its reasonableness and its wide support indicate that it should and it will be enacted into law. This is because it is not a bill which militates against Federal participation in water development.

"That brings me to the first problem in what I call the reflexive aversion syndrome. That problem is the history of bona fide, i.e., studied, objections to earlier bills. I simply point out that this bill must be judged on what it, itself, would do and when that is understood then I think many of the presently hostile forces will have no valid objection to this bill. In this regard, it is important

to point out that S. 1275, 88th Congress, is not like the so-called Barrett bill, introduced by the late Senator Barrett, of Wyoming, in 1955 as S. 863 of the 84th Congress. That bill, as introduced, would have stripped the United States of its sovereign powers in the field of water development and would have made each Federal water project turn on whether some State official or agency granted sufficient water to support the project. It provided, inter alia:

" 'Federal officers, employees, agencies, and instrumentalities the same as private persons shall proceed in conformity with laws of the State in which the appropriation has been or shall be instituted or perfected, and that each of them shall be governed by the laws of such State in respect to the control, use, and distribution of the appropriated water.'

"That proposed broad relinquishment of Federal powers brought forth a wave of objectors—too many of which continue to assert the same objection to the present S. 1275 though the latter bill contains no such provision.

"The author of S. 1275 has tried to make it clear that he is for Federal participation in water matters and is against stripping the Federal Government of its constitutional powers in this field. Senator Kuchel, in his remarks in the Senate upon introducing S. 1275, said:

" 'It has been suggested * * * that all Federal water activities be subjected to State control. I * * * reject this theory. It would unduly impair and cripple the constitutional responsibilities of the Federal Government which, over the years, has constructed important and imposing water projects to serve the people.'

"Also, Senator Jordan, in his speech before the National Reclamation Association last October, stressed the essentially affirmative nature of S. 1275 when he discussed it under the title 'Sound Water Rights—The Basis for Sound Water Planning and Sound Water Projects.' At that time he said:

" 'S. 1275 would remove many possible doubts which might otherwise exist concerning the far-reaching proposals which we can anticipate will continue to be the rule in the future of water resource development. Enactment of our bill would actually help Federal as well as State and local projects—by clarifying a now too confusing situation concerning Federal authority under Federal projects.'

"That S. 1275 is widely considered a potential help, rather than a hindrance, to Federal water projects and broad water resource planning is demonstrated by the fact much support for pending Federal proposals is conditioned upon enactment of S. 1275. For example, the California Supervisors Association has conditioned its approval of S. 1111, the pending water resources planning bill, on enactment of S. 1275 and the Irrigation Districts Association of California has deemed enactment of S. 1275 a prerequisite to approval of a Pacific Southwest water plan.

"This bill is mainly one dealing with property rights. It has very little to do with intergovernmental relations at all. It gives assurances to all non-Federal entities, be they individuals, local districts, State governments or whatever, that water rights these entities otherwise have are not subject to certain defects or other hazards arising because of certain paramount claims which have been asserted on behalf of the United States.

"It is also in some respects a statement of Federal policy by the Congress as to how the Federal Government will exercise its powers in water control and use matters, without relinquishing any of those powers.

"Here are the features of the bill, with some discussion of some of the issues which have been raised.

"Paragraph (1) of section 1 provides as follows:

" 'The withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter made, shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation.'

"It would deny that a reservation or withdrawal of Federal lands affects rights to water. The theory has been advanced by the executive branch, and has been significantly accepted by the judicial branch, that whenever land is set aside by the Federal Government for any of various purposes there is ipso facto reserved at that time any water appurtenant to that land. S. 1275 would disclaim that any such setting aside of land also denies to upstream and downstream water users the right to acquire the right to use water merely because it arises on or flows through or by such withdrawn or reserved land.

"There are good reasons for Congress, the branch of Federal Government in which such matters are reposed, to speak on this subject and to speak as proposed in S. 1275. Some action is necessary because a long line of statutes make

it highly questionable whether the reservation theory has a sound basis in statutory authority—indeed, whether it is not actually largely precluded already. Because of the confusion raised by recent court decisions, paragraph (1) of section 1 is therefore, needed.

"The law ought to be as provided in said paragraph because (1) the reservation theory impairs otherwise valid water rights unjustly and (2) the reservation theory works unwise allocations of water.

"Historically, it has been assumed that one acquired a valid water right by proceeding in accord with State law, regardless of whether the source or course of the water involved federally owned lands. To now have such rights rendered junior to paramount Federal claims to the water appears to most people to be an unfair and unnecessary way for the Central Government to deal with its citizens or State and local governmental entities which have planned and invested in reliance on the continuance of a supply of water which can now be denied without compensation under the reservation theory. Since the Federal Government has ample authority to acquire all the water it needs for its legitimate Federal functions by appropriating, contracting for, or condemning the necessary rights, and thus spreading the cost over all the project beneficiaries or the taxpayers as a whole, I do not see how anyone can justify foisting the entire burden of this particular aspect of a public purpose upon one or a few who would have the rug pulled out from under them by assertion of the reservation theory. The extent of this problem is related to the vast amounts of Federal land, mostly withdrawn and/or reserved, often at rather ancient dates, which largely constitute the watersheds in many of our States.

"The reservation theory works unwise allocations of water because it puts on the shelf, as of the time of the reservation or withdrawal of the land, many of which, as indicated, date from away back, an unascertainable amount of water for possible future use in purposes which might prove to be not as high as others. This prevents an accurate inventory of water available for appropriation. It prevents harnessing water for public benefit presently. It permits taking water away from existing uses for new uses without an adequate evaluation, at the right time, of which are the highest in public benefit.

"Clear renunciation of the reservation doctrine by S. 1275 would thus not only confirm appropriations of water under State law which have already been perfected, but it would assure the availability of unused water for reliable appropriation currently without having a valuable resource otherwise go unused under the deep freeze of the reservation theory. Again, the ultimate legitimate Federal need for the water can be carried out, after examination at the time in question to be sure it is the highest of the competing needs, through purchase or condemnation of water rights intervening since the setting aside of the land as well as those existing before the withdrawals or reservation. In the meantime, the use of waters under appropriation might well generate sufficient gross product and service, and taxes, to more than make up for the Federal cost of acquiring the rights.

"Therefore, it appears that paragraph (1) is both necessary in clarifying the existing law and is beneficial in assuring the maximum use of our water resources with resultant public benefit, without impairing any Federal power to make other use of the water when a higher use is found.

"Paragraph (2) of section 1 of S. 1275 states a rule with which I have heard no dispute. It provides:

" 'The provisions of section 1(b) of the Flood Control Act of 1944 (act of Dec. 22, 1944, 58 Stat. 888–889, as amended; 33 U.S.C. 701–1 (1958)) shall apply to all works hereafter constructed by or under the authority of the United States with respect to waters arising within States lying wholly or partly west of the 98th meridian.'

"The provisions described state that, as to waters arising within States lying wholly or partly west of the 98th meridian, consumptive uses shall be given priority over nonconsumptive uses. S. 1275 would not distinguish within consumptive or nonconsumptive uses. It would apply only to water projects constructed after enactment of the bill. This happens to be the State law in most of the area involved. It has repeatedly been found a proper rule for Congress to apply to individual Federal reclamation projects. It is the general Federal law as to flood control and navigation projects in the West, by virtue of the 1944 Flood Control Act provision which S. 1275 would now make general Federal law as to all new federally operated or licensed waterworks in the West.

"The need for enactment as general Federal law of this widely accepted-to-be salutary rule is that it will state a reassurance to those who fear Federal projects because they might be operated inconsistent with local principles of priority of consumptive use. Its enactment should bring more people to favor Federal projects.

"Paragraph (3) of S. 1275 has been the subject of a great deal of misunderstanding on the part of those who have not studied it carefully. At first reading I misinterpreted it. It provides:

" 'Any right claimed by the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with the procedure established by the laws of that State.'

"What this means is that if the United States chooses to base its claim to a water right on the State law, rather than on Federal law as it is left free to do, it must abide by that State law. The provision would not require the Federal Government to base its claim on State law. It would simply say that if the United States elects to claim a proprietary right, the same as an individual or non-Federal entity, rather than exercise its sovereign rights, it must play the game by the rules applicable to the acquisition of proprietary rights under State law.

"This provision is aimed at orderly procedure and fair play by assuring that a Federal agency cannot, on the one hand, claim it has a right to water in accord with, rather than by supremacy over, State law and, on the other hand, claim that the statutory and agency-imposed conditions on that right are not applicable. It is aimed at preventing such a claim as is made by the United States in the well-known Fallbrook case, where, waiving sovereignty, the Federal Government says restrictions on its State law water right are mere police regulations inapplicable to the United States. Though rejected by the trial judge in that case, the theory is still advanced by the U.S. Justice Department. Thus, the need for, as well as the wisdom of, this provision of S. 1275 is apparent, too.

"Regretfully, though attempts have been made to keep this point clear from the outset, misconception on the effect of paragraph (3) continue. Some continue to say it would have the effect of the earlier quoted provision of Senator Barrett's first bill. But, as I said at the western water law symposium when discussing Senator Kuchel's draft bill which he later introduced as S. 1275, this provision 'would not require the United States to crawl on its knees to the State agencies to seek the water necessary to carry out congressionally authorized and constitutionally permissible Federal water projects.'

"As Senator Kuchel said, in introducing S. 1275, this provision 'would not deny the Central Government any power it now has to acquire water rights other than by State law. It would only apply when the United States claims an appropriative right under State law.'

"As Senator Jordan said about this paragraph at the time of addressing the NRA, it would simply 'assure that in those instances when the United States claims a water right in its proprietary, as contrasted to its sovereign, capacity it must satisfy the same laws and procedures that would be applicable to you or to me in acquiring a similar proprietary interest in water.'

"Thus, it is clear that paragraph (3) is not intended to strip the Federal Government of its authority under various powers it holds under the Constitution; powers which, when coupled with the supremacy clause of the Constitution, enable the federally authorized project to proceed regardless of whether certain State officials or agencies decide to grant or withold a permit for water necessary to the project. That is why statements are erroneous which claim that S. 1275 would enable State governments to frustrate regional planning and Federal projects. The fact is S. 1275 would not alter the present situation in this regard at all, except to make such planning and new projects more acceptable by confirming the orderly compensability of existing water rights and assuring that consumptive use will be made of the water in question.

"Under existing law, a non-Federal entity such as a State or city government cannot take water from another State except by grace of the latter State's permission. Neither any State nor any of its citizens or political subdivisions is supreme over any other State. S. 1275 would not alter that.

"But the Federal Government, within its constitutional powers, including those which form the basis of its past, present, and anticipated broad activity in water matters, is supreme over States and any lesser entity. It can take the water

if it wishes even if a State law or official should say no. This it does by invoking the supremacy clause, a power uniquely Federal. S. 1275 would not alter that either. Neither paragraph (3) nor any other provision of S. 1275 gives up the supremacy clause or any of the powers it amplifies. Paragraph (3) only applies if the supremacy clause is not invoked.

"Fears have also been expressed by some as to the effect of paragraph (4) of section 1 of S. 1275. It provides:

" 'No vested right to the beneficial diversion, storage, or consumptive use of any waters, navigable or nonnavigable, which is recognized by the laws of the State or States in which such waters are diverted or used as compensable if taken by or under the authority of the State, shall be taken by or under authority of the United States without compensation; and where such rights are acquired otherwise than by agreement with the owner, they shall be taken by proceedings in eminent domain under the laws of the United States or of the State or States affected.'

"Here again misconception flows from a misapprehension of what is intended by the provision. Indeed, upon reading this paragraph one would think that it merely states what the law would naturally be under our Bill of Rights. But it is a necessary provision because the judicial branch has ultimately upheld wide authority claimed by the executive branch which most people feel violates fair play. Paragraph (4) is really only what good government should embrace. What this provision is intended to do is to repeal two modes of operation now utilized without impairing the U.S. power to achieve the same results through more acceptable means.

"The theory of navigational servitude or easement has cropped up to the effect water rights held by non-Federal entities can be impaired without compensation in the course of federally authorized work in connection with very broadly defined navigable waters. The first clause of paragraph (4) is intended to assure as to all Federal projects the rule which has been made applicable as to many already—that regardless of the power to do otherwise the Federal authority will pay damages to any water right holder hurt by the project.

"The second clause of paragraph (4) is meant to assure that this will be done in an orderly manner. Even in cases where compensation is presently required, the power now exists for Federal authorities to seize water without agreement with those otherwise entitled to its use and without first instituting condemnation proceedings. The victim of such a seizure is presently left to speculate as to whether or to what extent his rights are being impaired. He is left to originate a suit, often unknowing of the Government's claims, in the unfamiliar and often remote tribunal of the U.S. Court of Claims.

"S. 1275 would simply require that when the Federal authority, let us say the Secretary of the Interior, determines that it is necessary to impair some existing water rights in order to implement a project, and he has not been able to negotiate compensation, he must institute a condemnation proceeding in the local court, as he would for a post office site, effect immediate control over the water, and proceed to litigate the issue of compensation unless ultimately settled.

"What some objectors have read into this provision of S. 1275 is a risk that one who had not been contracted with or joined in the condemnation proceeding could enjoin work on the project. I do not see any such effect intended or resulting from S. 1275.

"All that it appears to require is that the Secretary make a bona fide determination as to whom he is hurting and to what extent, and then settle with or sue those people accordingly. Thus, if the Secretary decides that A, B, and C would be hurt by the project but D would not be, he need only sue A, B, and C and the project can proceed even if D claims he, too, is hurt and should have been joined. D would have the right to assert his own claim by suit in inverse condemnation, perhaps joining the already pending case. But S. 1275 is not intended to permit a litigant or even a judge to second-guess the Secretary to the extent of stopping work on the project.

"Nor should one who was not sued and who did not appear to have been harmed at the outset of the project have his later appearing claim cut off by relation to the date of a suit against others. The accrual of his cause of action should continue to be determined by other rules of law.

"Because of its fairness and because an objectionable course of action is possible under existing court decisions, paragraph (4) is, therefore, both good, and necessary.

"Section 2 of the bill contains many saving provisions which are self-explanatory. It provides:

"'Nothing in this Act shall be construed as—

"'(1) modifying or repealing any provision of any existing act of Congress requiring that rights of the United States to the use of water be acquired pursuant to State law;

"'(2) permitting appropriations of water under State law which interfere with the provisions of international treaties of the United States; or

"'(3) affecting, impairing, diminishing, subordinating, or enlarging (a) the rights of the United States or any State to waters under any interstate compact or existing judicial decree, (b) any obligations of the United States to Indians or Indian tribes, or any claim or right owned or held by or for Indians or Indian tribes, (c) any water right heretofore acquired by others than the United States under Federal or State law, (d) any right to any quantity of water used for governmental purposes or programs of the United States at any time prior to the effective date of this act; or (e) any right of the United States to use water which is hereafter lawfully initiated in the exercise of the express or necessarily implied authority of any present or future act of Congress or State law when such right is initiated prior to the acquisition by others of any right to use water pursuant to State law.'

"Thus, the bill would not upset things. It would mainly assure that water right holders cannot be upset. By giving such assurance it would thereby facilitate sound water planning and sound water projects by the Federal as well as by the State, local government, special district and private entities.

"The bill has been set forth in its entirety in this letter. An objective study of S. 1275 itself, unclouded by bugaboos left over from different bills or imagined into S. 1275, should reveal that its enactment would not hinder Federal water projects. Rather, it would make them more acceptable to many. It would not frustrate regional planning. It would make this more acceptable, too. It would not give State authorities control over the United States as to the appropriation of water except in those cases where the United States finds it is best to submit to such control. Supreme powers to avoid doing so would remain unimpaired. It would not hold up projects awaiting litigation over water rights. Rather, it would provide a more orderly and illuminated procedure than groping and thrashing around in a purely inverse condemnation proceeding. It would result in a more beneficial allocation of water. It would assure fair play to the rank and file water right holder throughout the United States. It would be an affirmative, progressive step forward in water resource matters—substituting certainty and the basis for cooperation in place of doubt, opposition, litigation, and delay in putting our water to work.

"In other words, the issue presented by S. 1275 is not whether to have Federal projects, regional planning and other water progress. It is whether to have to force it in an atmosphere of mistrust and confusion wrought by extreme Federal claims or to achieve it more readily in an atmosphere of cooperation and certainty. The proponents of S. 1275 favor the latter course, which S. 1275 would go a long way to assure. It is therefore believed that, given a fair chance, this bill will be enacted into law.

"Very truly yours,

"RICHARD D. ANDREWS,
"*Minority Counsel.*"

Senator Moss. Senator Anderson has a statement for this point in the record.

STATEMENT OF HON. CLINTON P. ANDERSON, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator ANDERSON. Mr. Chairman, well, here we go again on that old whipping boy in the field of water rights, the Government of the United States.

In refreshing my recollection for these hearings, I find that during my time in the Senate this is the eighth or ninth bill, at the least, that has been before this committee on the same subject of Federal-State water relationships. I recall that in 1953—some 10 years ago—the late

Senator Frank Barrett, of Wyoming, sponsored S. 2096 in the 83d Congress. This bill would have required all Federal agencies to conform to State laws in water resource development projects. Although both the administration and the Congress were Republican in the 83d Congress, this measure went nowhere.

In the 84th Congress, the late Senator Barrett sponsored his widely known and highly controversial bill, S. 863. This measure would have, to adopt the words of the senior Senator from California, Senator Kuchel:

> Required the United States to crawl on its knees to the State agencies to seek the water necessary to carry out congressionally authorized and constitutionally permissible Federal water projects.

The Barrett bill was the subject of very spirited hearings in which J. Lee Rankin, then Assistant Attorney General of the United States in President Eisenhower's administration, stalwartly maintained opposition to the measure. Late in the session, a modified version of S. 863 was reported to the Senate by our committee with dissenting views, but no action on it was sought.

Again in the 85th Congress Senator Barrett introduced his States rights water bill, obtaining for it the same number, S. 863. This time, the bill did not even get out of committee. In its unfavorable report on S. 863, 85th Congress, the Interior Department proposed a substitute measure which had the concurrence of the Departments of Agriculture, Justice, and Defense, as well the Bureau of the Budget. This is what was and is known as the "agency bill." The provisions of this "agency bill" are those of subsection 1 of section 1 and section 2 of the bill now before us, S. 1275. The agency bill never was introduced—it never has been sponsored in the Senate—but in the next Congress, the 86th, the late Senator O'Mahoney, of Wyoming, did sponsor a measure, S. 851, based on it. S. 851, 86th Congress, however, went substantially farther than the agency bill in that it would have added to the exemptions water rights asserted by a State in its congressionally approved constitution. Because of this addition, S. 851 likewise went nowhere.

Then in the 87th Congress in 1961, we had our hearings on Federal-State water relationships in general. These hearings were highly constructive, clarifying issues and views. In them, I asked a question to which I received no responsive answer, and which I shall ask again in these hearings. That question was, and is—"Just who has been hurt, and not compensated, by assertion by the Federal Government of a water right in defiance or contravention of State law?" That is, wherein has our present system worked a not-compensated-for wrong on any individual or entity?

During the course of the 1961 hearing, not a single specific case was cited to me.

But to continue, briefly, with the history of the fight against what seems to be a strawman: Out of the hearings in the last Congress came Senator Kuchel's S. 2636, based in large part of the agency bill of the 85th Congress, but again going substantially farther.

The measure before us today, S. 1275, is likewise based on the agency bill, but it goes farther, much farther, than did the recommendation of the administration in the 86th Congress. Subsections (2), (3),

and (4) of section 1 are entirely new with respect to the agency's bill and contain some very far reaching and, I believe, potentially troublesome and dangerous provisions.

Mr. Chairman, I am not a lawyer and I am certain the very complicated legal aspects of the bill will be discussed or already have been discussed by the distinguished lawyers on the committee, such as my good friends Senators Kuchel, Allott, Moss, Church, Simpson, and Bible, to name only a few, as well as by the able counsel for the Federal Government, Assistant Attorney General Clark, Solicitor Barry, John Mason of the Federal Power Commission, and others. Also, I am certain that there will be learned counsel among the outside witnesses who have unquestioned expertise in water rights law.

Rather, Mr. Chairman, I would like to raise some factual and policy questions concerning the practical effects and results of the proposed legislation. First, it should be observed that although the title of S. 1275 states its purpose is to "clarify" the relationships of the States and the Federal Government, the so-called clarification seems to consist primarily of a gift of property rights, power, and authority by the Federal Government to the States. Nowhere are the States called upon to do anything, nor recognize in any way any rights of the Federal Government, even under the "savings clause."

By subsection 1, the United States gives up proprietorship of water rights in lands it owns which it has set aside or withdrawn for a particular public purpose. The Supreme Court of the United States has held that a withdrawal or reservation of lands of the United States does establish proprietary rights in the Federal Government to the waters in that reservation or withdrawal. Thus, clearly the Federal Government is giving away valuable property rights belonging to all of the people of all of the States. What is it getting in return?

Subsection 2 subordinates the Federal Government's constitutional authority over navigation to non-Federal consumptive uses on all water projects, not just flood control ones. Is there any quid pro quo?

Subsection 3 would require the Federal Government to follow to the last procedural and substantive detail the 50 different laws and regulations of the 50 or more different bureaus of the 50 States if it asserts a right under State law, regardless of whether a State requirement might conflict with Federal law or policy.

Subsection 4 would place new and additional burdens of compensation and procedure on the Federal Government.

Nowhere in S. 1275 does the Federal Government get anything in return for all it is giving up, and for the new burdens placed upon it. As I say, the States are not even called upon to recognize any Federal rights or prerogatives—except the right to pay a major portion of the costs of the projects affected by the bill.

Such "clarification" is reminiscent of the way the Tasmanian settlers "clarified" their problems with the bushmen. They liquidated them down to the last man.

Now to touch upon some of the practical aspects of S. 1275. First of all, it would increase the costs of water projects by requiring the Federal Government to buy back water rights the Supreme Court has said it now possesses. Costly developments unquestionably would take place using these water rights, making compensation very expensive indeed. All of us, I think, are deeply concerned about the costs

of water projects. Is it the part of wisdom to increase these costs, deliberately, and needlessly?

Second, is there not danger that the divestment of proprietorship in water rights on withdrawn or reserved lands might result in defeating the purpose for which the withdrawal or reservation was made? My immediate concern is the possible effect of S. 1275 upon our wilderness bill when it becomes law, but the same possible danger might conceivably threaten our national parks, national forests, national grazing lands, and the like. National parks, national forests, and grazing lands all are withdrawn or reserved areas in which the bill would say, in effect, that the Federal Government has no proprietary water rights as against State law. Is it a clearly established fact that the Federal Government does not need control over the waters of these areas in order to carry out their purposes?

I raise the question, Mr. Chairman, and urge the subcommittee to give most careful consideration to the answer.

These are only a few of the practical, factual questions that concern me about this bill, Mr. Chairman.

I would like to point out that in the 10 years this controversy has been before this committee, we have initiated a large number of far-reaching water development projects. We have more in various planning stages. In that decade I have yet to have called to my attention a single specific case of harm or hurt to a single individual resulting from Federal proprietorship of water rights in Federal lands withdrawn or reserved for a public use.

If this bill were to become law, just how would the Federal Government go about asserting a water right? As I understand it, the Government then could do so in two ways: One, it could buy back those rights which it now has at possibly prohibitive costs; or it could submit itself completely to State law and thereby might become involved in a maze of contradictions with Federal law and policy. That, it seems to me, is the "clarification" that this bill would achieve.

As I say, this past decade has been one of achievement in water resource development. Much lies ahead of us. Let us not confuse the issue and add to our burdens unnecessarily.

Senator Moss. Senator Church, do you have a comment?

Senator CHURCH. Mr. Chairman, I see the long list of witnesses that have come today to testify. I note that the Department of the Interior, Department of the Budget, the Federal Power Commission, and the U.S. Department of Justice have all recorded adversely to the bill and they have representatives here.

I am sure the committee will want to question. So in deference to that fact and the fact that the Senate will not permit us to sit after 12 o'clock, I am going to defer any statements so that we may get on with hearing the witnesses.

Senator Moss. Thank you, Senator Church.

Senator Allott.

Senator ALLOTT. Mr. Chairman, the same thing applies with respect to myself. I will try to develop my thoughts on this bill out of the questions as we go along.

Senator Moss. Thank you.

Senator Jordan.

Senator JORDAN. Mr. Chairman, I have a brief statement here, but in the interest of hearing as many as we can of the people who have come, I ask unanimous consent that my statement as cosponsor of this bill be inserted in the record at this point.

Senator Moss. Your statement will be inserted.

STATEMENT OF HON. LEN B. JORDAN, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator JORDAN. I am pleased to be a cosponsor of S. 1275, a bill to clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams, because I believe that clarification of the Federal-State relationship in the field of water rights is long overdue.

While this legislation primarily affects the West, it should be of concern to all those interested in the wise and highest possible use of water.

It may be trite to say that water is the lifeblood of the Western States, yet without water our economy would wither and die.

In my own State of Idaho we presently have about 3 million acres of land under irrigation with about 1½ to 2 million acres yet to bring in. Consequently, the interests of my State, of all the Western States, in water is probably paramount and superior to any other.

The Federal Government also has a great stake in the water resource development of the West. It has constructed great dams for power and flood control and irrigation systems to provide water for private and public users other than the Federal Government. The national interest and the Federal investment in the West justify a great interest on the part of the Federal Government in the conservation and development of the water resources.

But the fact is that both the States and the Federal Government must look to the same water resources for their water supply. It seems obvious that the use of two systems of water law—one for the States and their citizens and one for the Federal Government—all pertaining to the same water supply, is impractical and can lead only to controversy, confusion, and chaos.

The solution selected by the Department of Justice is succinctly set forth on page 9 of their report on this bill received by the committee on March 9, 1964:

> The national interest would be better served were Congress to make clear that when it authorizes a Federal use of unappropriated water, whether originating on the public domain or elsewhere, no further permission from any source is necessary to prevent frustration of the Federal project by subsequent attempted appropriations of others under authority of State law.

In short, the Attorney General is saying that the Federal right prevails over all other rights—past, present, and future—regardless of the cost, regardless of the damage resulting. I cannot and will not support such a dogma.

I believe that this bill presently before this committee, S. 1275, is one which deserves the prompt consideration of the Congress as a possible means of encouraging State, local, and private development of our western water resources. If the present state of confusion and the Department of Justice's position of "possible preemption" is allowed to prevail, it can only mean stagnation, controversy, and chaos.

Mr. Chairman, I ask that I be allowed to insert at this point in the record excerpts from a speech I made last October before the National Reclamation Association.

Senator Moss. That will be inserted in the record at this point.

(The document referred to follows:)

EXCERPTS OF SPEECH OF HON. LEN B. JORDAN

SOUND WATER RIGHTS—THE BASIS FOR SOUND WATER PLANNING AND SOUND WATER PROJECTS

* * * * * * *

My subject for today is "Sound Water Rights—Basis for Sound Water Planning and Sound Water Projects." I defend the position that water for consumptive use such as domestic, municipal, irrigation and industrial should have priority over water for hydroelectric purposes. And I defend this position on the grounds that people need water and nothing will take its place, that desert lands need water and nothing can take its place, that food processing and allied industrial uses require water and nothing can take its place, but that electric energy can be supplied from many sources other than falling water and finally, that the primary responsibility for supplying the power needs of an area rests with the people locally.

Our stewardship of the Nation's water resources lies in putting these resources to the highest possible use. Now, let me talk with you about how we can better assure the highest performance of our stewardship through the implementation of what I consider to be a very seriously needed piece of Federal legislation. This past April I joined Senator Kuchel, of California, the ranking Republican on my Interior Committee and on my Irrigation and Reclamation Subcommittee, and the chairman of that subcommittee, Senator Moss, of Utah, in sponsorship of a bill designed to rectify and settle some of the existing problems arising from claims made by representatives of the Central Government in regard to the control and use of our Nation's water resources. This legislation primarily affects the West, but it should be of concern to all those interested in wise use of water and good government.

This bill bears the designation S. 1275. It may be familiar to many of you already. I hope it is. Companion bills have been introduced in the House of Representatives on a bipartisan basis. No hearings on this legislation have yet been held, or even set, because of the failure of various agencies of the executive branch to render the comments which have been requested of them on this bill in accord with the usual procedure.

At this point, let me give you a little background and describe briefly what S. 1275 would do. This is for the benefit of those of you not familiar with the problem or with this bill. Then, I wish to discuss some particular issues within the scope of S. 1275 about which I have been particularly concerned recently. And, finally, I will outline some of the other newer developments in this field—all with the purpose of demonstrating why I am so convinced action must be taken on this bill with a view to clarifying the status of water rights in our reclamation States, as well as in other parts of the Nation under some circumstances.

I will not undertake here to provide a complete history or a detailed legal analysis of what has come to be known as the Federal-State water rights controversy. I commend to you Senator Kuchel's speech in the Senate on April 4, 1963, when he introduced S. 1275, if you desire citations of the pertinent statutory and case law on the subject. Also, I understand that there will soon be published a collection of the several papers on this subject which were rendered by various water experts at the Western Water Law Symposium held in conjunction with the 14th Annual Spring Conference of the National District Attorneys' Association in Los Angeles on March 11, 1963.

S. 1275 of this 88th Congress is a successor to Senator Kuchel's S. 2636 of the last Congress. Earlier bills on the same subject, but differing in various respects, include the bill of former Senator Frank Barrett, of Wyoming, considerably revised as reported in the 84th Congress, and the so-called agency bill first suggested during the 85th Congress, representing the maximum consensus which could be gained at that time from certain of the most affected executive departments of the Federal Government. That agency bill having, as it did, approval by important segments of the Eisenhower administration, perhaps represented the high watermark, until now at least, for the States rights point of view in this

field. It failed of enactment, in large part, because of the lack of broad support from the grassroots groups which withheld support because the bill did not, in their opinion, go far enough to limit Federal power.

I think such an attitude was a mistake. We might have been better off today if support had been forthcoming. Let me make it clear right now that S. 1275, though it does solve more problems than the agency bill, does not go as far as some would wish. It does not, for example, require Federal compliance with State regulation of water in all instances, as your association's resolution 2 of last year's convention would call for.

The important thing is that S. 1275 does all that we sponsors believe can be implemented in this Congress under this administration. I am happy to report that this time the grassroots groups seem to agree with this appraisal and are rendering excellent support. I hope this association will do so at this convention. More about that later.

Now, what does S. 1275 do? Briefly, it first includes all of the agency bill's protection against the reservation theory of the Central Government supremists. From the earliest days of water development in the West and, in particular, ever since the Desert Land Act of 1877, it has been assumed that nonnavigable water having its source on public—that is, Federal land—was available for appropriation by people in accord with State law. This assumption was confirmed by the U.S. Supreme Court as late as 1935 when it said that such water was, to use the Court's words, "subject to the plenary control of the designated States, * * * with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect to riparian rights should obtain."

Then, in 1955 came the infamous *Pelton Dam* decision of the Supreme Court. This opinion restricted the definition of "public lands" in the Desert Land Act to mean only those open to entry under homestead laws and not those which had been withdrawn or reserved. This immediately gave rise to the centralists' contention that, therefore, upon any withdrawal or reservation of public lands the United States thereby ipso facto established for itself a priority to use, at any time in the future, waters of those lands, regardless of whether an individual or private or non-Federal public entity downstream might, in the meantime, otherwise qualify for a right to use the water in accord with the rules and procedures of the particular State.

S. 1275 would cure any possible defect in any such State-based right by providing: "the withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter made, shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation."

Second, S. 1275 would make applicable to all future reclamation and other federally authorized or licensed works with respect to waters of the West the salutary principle of priority of consumptive over nonconsumptive uses. Such a rule is now applicable to flood control and navigation projects generally in the West. It has been written into many pieces of reclamation legislation on a project-by-project basis.

Third, S. 1275 would assure that in those instances when the United States claims a water right in its proprietary, as contrasted to its sovereign, capacity it must satisfy the same laws and procedures that would be applicable to you or to me in acquiring a similar proprietary interest in water. That is only fair. But, sadly, Federal officials of the executive branch have asserted that such State regulation is not applicable to them even when establishing a proprietary right without asserting any constitutional power of sovereignty. A Federal district judge recently rejected this bizarre Justice Department contention, but the Attorney General has appealed that ruling and we need S. 1275 to bury the centralists' contention even deeper.

For a fourth prong in the attack of S. 1275 against centralism, we have what actually should need no statute. But, here the Congress must act to put down what, to me, seems to be a most extreme assertion of the constitutional sovereign powers of the Federal Government.

The Bill of Rights assures anyone deprived of property by the necessary and proper action of the United States that he will be fairly compensated. Further, it is our practice that if agreement with the owner as to value is not reached prior to the impairment, then the United States initiates a court proceeding for the orderly and fair determination of that value. Meanwhile, the Federal project is then undertaken unimpeded by the proceedings to determine the extent of compensation.

However, such has not always been the experience in water matters. There lurks in the case law the theory of the navigational easement. This theory holds that inherent in the Federal constitutional power to regulate interstate commerce is the right to regulate broadly defined navigable waters without regard to existing uses of that water which may otherwise be protected under State law. Congress has relieved the prior right holders of the burden of this servitude in some instances, as under the Reclamation Act and the Federal Power Act. But, in other situations, including navigation and flood control projects, in the absence of specific relief, the United States can presently trammel rights which would be protected in any other context than water. Certainly no other claims that our power to build the Interstate Highway System includes the power to do so without compensating the owners who are deprived of land by it. There is no reason to treat water right owners differently. S. 1275 would abolish that different treatment.

The bill would do even more in this regard. Even in those instances where Congress has refused to exercise the asserted navigation easement, nevertheless, the executive authorities have contended, and the Supreme Court has upheld them, that the United States may impair the water rights without reaching agreement on compensation with the owner and even without instituting court action to determine the issue of value.

The U.S. Justice Department has successfully left the injured party to redress his grievance by himself undertaking to bring suit, often without adequate, accurate information as to the extent of the right the United States is claiming, and in all cases above $10,000 in the remote and difficult forum of the Court of Claims, rather than in his local U.S. district court.

S. 1275 cures that, too. It not only says: "No vested right to the beneficial diversion, storage, or consumptive use of any waters, navigable or nonnavigable, which is recognized by the laws of the State or States in which such waters are diverted or used as compensable if taken by or under authority of the State, shall be taken by or under the authority of the United States without compensation."

But it also goes on to add procedural protection to substantive protection by providing "and where such rights are acquired otherwise than by agreement with the owner, they shall be taken the laws of the United States or of the States affected."

The bill also retains such other limits on Federal power as now exist and protects treaty obligations and other existing rights.

* * * * * * *

The statutes are legion in which the Congress has tried very clearly to maintain the integrity of water rights based on State law. This whole issue of Federal-State water rights really should not exist at all.

But the Justice Department—and I will admit that this occurred to some degree under Republican Attorneys General also—has been searching for every possible loophole, has been dreaming up farfetched interpretations of our statutes, and has been selling a bill of goods to the courts. Sometimes the judge, or judges, have not bought the package. But the Justice Department, having the enormous human and financial resources of the Central Government behind it, as it has, appeals and appeals until a sale is made to some court, which is often not familiar with, or sufficiently respectful of, the nature of water rights in the West. Thus, the Department crams its doctrine down the throats of the little people who have been fighting for integrity of our time-proven and congressionally honored system of water rights.

Thus, the need for S. 1275 is clear. We need it so that, as to the problems it covers, in the words of this association's resolution of last year, we can "at once, enact a law so clear and unambiguous as to be incapable of evasion by either Executive order or judicial interpretation."

This is no mere academic problem, as some seem to believe. It is real. It is with us—today. It does make a difference. It means a great deal to the West. Let me spell that out even more than I have so far. I have specifics which have arisen ever since our legislation was introduced in the Senate.

First, point 1 of S. 1275—the reservation of public lands effect on water rights: On June 3 of this year the Supreme Court announced its opinion in the long litigation over the waters of the lower Colorado River. This was primarily a dispute between Arizona and California, but I will not touch on that aspect here. The point for our purposes now is that the Court clearly upheld the Justice Department's theory that reservation of public lands implied a reserva-

tion of such water appurtenant to that land as may ever be needed in the future on such reservations—Indian, forest, wildlife, or recreation.

This theory the Court applied not only to congressional withdrawals but also to those effected by Executive order alone. And even though nothing was said in the relevant statutes or orders about the matter of water.

Mind you, I do not wish to deny to Indians, wildlife enthusiasts, forest users, or recreationists a call on any water which is needed for their purposes so long as some present higher use does not override. The point is that the Federal Government's reservation theory results in putting on the shelf, so to speak, for possible future use a valuable and often scarce, but usually renewable, resource in a highly unpredictable amount and quite apart from other existing needs for that resource.

For example, in the Southwest, water is precious and all available supplies are beign developed to save existing agriculture or to meet existing or immediately future domestic and industrial purposes. In the case of one of the Federal water reservations the Supreme Court approved in the *Arizona* v. *California* case, the Court put on the shelf for conjectural future agricultural use, which would probably inure more to the benefit of absentee non-Indian lessees rather than the relatively few, 2,000, Indians on the reservation, enough water for the domestic uses of 1½ million people in the burgeoning population centers of the Southwest.

So, my point is that I do not think that is a wise allocation of water, and S. 1275 would avoid such unfortunate results by freeing the longstanding principles of western water law to work as they have for the benefit of the people over the years.

The second point of S. 1275, the consumptive use preference provision, is, of course, right on the nose of the legal issue I took up with the Interior and Justice Departments and on which they refused to tell their position concerning the present status of the law. We need S. 1275 to settle that point.

The third point of S. 1275, the requirement that the Federal Government comply with State regulation when asserting water rights under proprietary principles as distinguished from the sovereign power of eminent domain, is also a current and real issue. The Justice Department has recently announced its intention to appeal the lower court decision, I earlier referred to, which had denied the central supremists' claim of the right to take water without either complying with the State regulation or paying damages to the others it harms in doing so. That is the notorious *Fallbrook* litigation. and we need S. 1275 to avoid such claims by the Department of Justice.

Finally, the fourth point of S. 1275 is hardly academic either. On April 15, 1963, the U.S. Supreme Court handed down another decision granting to the executive branch a broad power to do that which S. 1275 would prohibit; namely, the seizure of water without first instituting court proceedings to determine fair compensation for those who will be harmed by the seizure.

In so doing, the High Court overruled western water lawyers, a western Federal district judge, and a three-judge panel of our western Federal Ninth Circuit Court of Appeals. That is the well-known case of *Dugan* v. *Rank*, formerly known as *Rank* v. *Krug*. S. 1275 would avoid such a result in the future.

So, the situation is clear. There are real and present problems in the field of western water rights.

Water planning, such as is going on all the time and as would be implemented under the terms of other pending legislation, S. 1111, the water resources planning bill, is best done in full awareness of who has what and who can do what with regard to available water. Testimony at our Irrigation Subcommittee's recent hearings on the water planning legislation was, to a great extent to the effect that S. 1275 should be enacted simultaneously with the planning bill, S. 1111. Harmonious and sound water planning requires sound water rights.

Also, the implementation of planning by the construction of projects requires sound water rights. The West cannot afford the luxury of disputes either before, during, or after the construction of our dams, conveyance facilities, and service works. Objections to proposals would often disappear if those who would be affected know where they stand with respect to water rights. We could proceed with the job sooner and run it more smoothly after it is finished. S. 1275 would remove many possible doubts which might otherwise exist concerning the far-reaching proposals which we can anticipate will continue to be the rule in the future of water resource development. Enactment of our bill would actually

help Federal as well as State and local projects—by clarifying a now too confused situation concerning Federal authority under Federal projects.

Just as the problems I have discussed are clear, so is the solution. It is enactment of S. 1275.

* * * * * * *

Senator Moss. We have with us Senator Simpson, a member of the full committee.

We welcome you, Senator Simpson. Do you have a comment you would like to make this morning?

Senator SIMPSON. Mr. Chairman, may I withhold submission of a very short statement I have made until the introduction of the attorney general for the State of Wyoming, and I will just submit mine for the record without reading it in the interest of saving time for the other witnesses.

I want to say I appreciate the opportunity to sit with the subcommittee.

Senator Moss. Very good.

Senator Bible has a statement at this point.

STATEMENT OF HON. ALAN BIBLE, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator BIBLE. Mr. Chairman, I was elected to the U.S. Senate on December 2, 1954, and have been a member of the Senate Interior and Insular Affairs Committee during the entire period of my service in this body.

I can think of no other legislation that has so continuously been before this committee than has been the problems of the relationship between the Federal Government and the respective States over jurisdiction of the waters, particularly in the 17 Western States. Many bills have been introduced bearing different titles. One was designated as a bill to provide that withdrawals or reservations of public lands shall not affect certain water rights. Another was entitled "A bill to recognize the authority of the States relating to the control, appropriation, use, or distribution of waters within their boundaries." Another with a more lengthy title would require Federal officers, agencies, and employees to act in accordance with and submit to the laws of the several States relative to the control, appropriation, use, and distribution of water, and provide that the United States sue and be sued in courts of such State in litigation arising therefrom.

More recently, a bill was introduced that would affirm and recognize the water laws of the States lying wholly or partially west of the 98th meridian. Although these measures and the one now under consideration varied in some degree in their requirements, all had the same purpose, which was, in effect, to require that in the acquisition of water rights, the Federal Government and its agencies would be in the same position as are private citizens, States, and their legal entities in the acquisition and control of the scarcest article in the West today, the ever-decreasing water supply required to support an ever-increasing population.

To those of us who were born and raised in the West, it is axiomatic that those who control water control the economy of any given area. This question, of course, is of utmost significance to my own State of Nevada, as well as to western areas where most of the land is in Fed-

eral ownership. In Nevada, the Federal Government owns about 87,000 square miles of the 100,000 square miles that make up the State of Nevada. We all know that the land area, in my State and in neighboring ones, far outstrip the available water supply. The water available for nearly all of these areas arise in forests and mountains that are federally owned as well as controlled. Consequently, the control of the waters that originate in these areas truly determine whether or not the vast expanses of arid and semiarid land will be developed to their greatest possible use, or whether they will be condemned to remain forever a desert waste.

Ever since our hardy pioneers conquered the West, the control of the water and the establishment of water rights has been an inalienable function of the State government. For many, many years this right has been recognized by portions of the Federal Government and set out in many of the legislative acts that made provisions for the development of the West. The Reclamation Service since 1902 has recognized and complied with State water laws. Similarly, the Federal Power Act of 1920 and the Forest Reservation Act of 1891 recognized these principles.

With this background and history of Federal intent, it would seem clear that the States, filling a vacuum created by the failure of the Federal Government to establish laws or rules or regulations, has, in effect, maintained order in the acquisition and control of water in such a successful manner that there was no reason for the Federal Government to move into a field that had been adequately and properly served by the various States.

This matter came particularly to my attention in the now famous *Hawthorne* case in which the Department of the Navy, after fulfilling all of the requirements of the State of Nevada to secure a permit to utilize underground waters lying within the Hawthorne Naval Ammunition Depot, suddenly reversed its position and refused to complete the orderly procedure that is required under Nevada law and to be granted a permit as was required of all other users within the State of Nevada. Obviously, this reversal of action on the part of the Navy was prompted by the decision in the *Pelton Dam* case.

It would appear to me that the Federal Government is now operating under rules which leads me to the conclusion that a dual standard of water morals governs the various agencies of the several departments in their acquisition of rights to store, distribute, and utilize western waters in the carrying forward of the many plans that the Defense, Interior, Agriculture, and other Federal departments are engaged in.

I think that the time has arrived when the Congress must make a determination as to whether the Federal Government and its departments have a right to bypass, ignore, or challenge State water laws, or whether they should be required to follow the pattern established in the Reclamation Act, and comply with State water laws in the acquisition of water rights necessary for the successful operation of their various activities.

I might say in closing, Mr. Chairman, that I have during my entire service in the U.S. Senate sponsored, joined in sponsoring, and supported before the committee, legislation that would accomplish the purposes set out in S. 1275. Historically, the record will indicate

that in all that time, the executive departments have successfully opposed any legislation that would accomplish the purposes we are sponsoring at this hearing. The present reports of these departments indicate, once again, that a solid phalanx of opposition stands between the proponents of the measure and the accomplishments of the purposes upon which the legislation has been predicated.

I am particularly proud that one of the leaders in this field is my good friend of many years, Mr. Hugh Shamberger, director of the Nevada Department of Conservation and Natural Resources and president of the National Reclamation Association. Mr. Shamberger's appearance before the committee as an advocate for its enactment further indicates to me the value and desirability of the legislation. I know personally that for the last 9 years he has made available his many talents and abilities in a sincere and conscientious effort to resolve the problems that are facing the West because of the failure of the Federal Government to enunciate a policy that would be acceptable to the States and that would still solve the problems that the westerners are faced with in the control of their water.

I urge favorable action of the subcommittee on S. 1275.

Senator Moss. Senator Engle I understand has a statement.

Is Senator Engle or a representative of the Senator here?

If not, the statement of Senator Engle will be inserted in the record.

STATEMENT OF HON. CLAIR ENGLE, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator ENGLE. Mr. Chairman, as one of the cosponsors of S. 1275, I am glad to express my strong support for the bill and to urge you to report it favorably.

My interest in water development has been lifelong. You are aware that I served for many years as a member and for several years as chairman of the Committee on Interior and Insular Affairs of the House of Representatives.

In that body and since coming to the Senate, I have always strived to support our Federal reclamation and Corps of Engineers programs throughout the West. In that work I repeatedly have come across one disturbing thing which all too often has impaired the ability of those working on a project to arrive at a consensus. I speak of the extensive claims made by some as to the Federal Government's asserted paramount right to subject waters to its control without giving adequate recognition to non-Federal rights acquired in accordance with State law.

In order to attempt to solve some of these problems, I have authored a number of bills over the years designed to disclaim some of these asserted paramount rights and, thereby, to give validity to the rights of others without impairing the ultimate ability of the United States to undertake the important projects that I have always supported.

Specifically, as far back as the 84th Congress I introduced a bill, H.R. 8347, to recognize and to confirm the authority of arid and semiarid States in the control, appropriation, use, or distribution of water within their geographic boundaries.

Our past efforts to rectify the unsatisfactory situation have not been fruitful. Our main trouble has been the absence of agreement by those

desiring such legislation as to just what was necessary in order to adequately protect non-Federal rights without impairing Federal powers.

Mr. Chairman, I would be the last in the world who would wish to impair in any way the ability of the Federal Government to accomplish the great public purposes which are possible under our reclamation, flood control and navigation projects. I do not see how S. 1275 could impair that ability.

This bill is in the Federal public interest as well as the non-Federal public interest. I urge its favorable consideration.

Senator Moss. I have just been handed a statement by Senator Wallace F. Bennett of Utah which will be placed in the record at this point.

STATEMENT OF HON. WALLACE F. BENNETT, A U.S. SENATOR FROM THE STATE OF UTAH

Senator BENNETT. Mr. Chairman, it is indeed a privilege to come before this committee today and testify in favor of S. 1275.

As a sponsor of similar legislation in three Congresses in the past, I again will support this or any other bill that will reassert States rights in the water field. I hope some worthwhile action can be taken in this area.

While S. 1275 does not solve all of the problems which exist on the subject of States water rights, I believe it is a sound approach toward resolving some of the major conflicts. The questions of jurisdiction and substantive water rights as they concern the various activities of the Federal Government involve a great portion of Utah's land. I have been informed by Utah officials that the State's administrative agencies are finding Federal-State water problems one of the major problems with which they have to cope.

S. 1275 would resolve some of the uncertainty created by several court decisions as to whether Federal land withdrawals constitute a reservation of the water.

For years and years during which a lengthy record of congressional moves appeared without question to affirm the inviolacy of State water laws, the Federal Government's full intention to abide by them, a surprise reversal came in a U.S. Supreme Court decision in the *Pelton Dam* case in 1955.

Under that verdict, which roused the West, the Federal Government would not be subject to State water laws in appropriating water arising on lands withdrawn by the Federal Government. Since the 1955 decision the attitude of Government agencies has changed considerably.

There is the *Hawthorne* case in Nevada and the *Santa Margarita* case in California, where evidence of apparent deliberate effort has been made on the part of the Justice Department to assert its will on State water laws.

These and other similar precedents are fraught with danger for our drought-stricken West.

There is no reason why rights which the Federal Government desires to initiate cannot be done in accordance with State laws. There are many cases of this occurring in the past in other fields, and certainly there should be considerable cooperation in the important water rights field.

There is no reason why the United States should be allowed to take water rights without eminent domain procedure. This is a simple and fundamental constitutional guarantee which applies to any taker of private property. I believe there are adequate safeguards in the bill which protect the United States, and there should be no legitimate opposition against it as a whole.

In fact, support for the bill has been widespread in my State, and at this point I would like to insert into the hearing record a resolution of the Utah Water and Power Board in support of S. 1275.

Also, I would like to present a resolution from the county commissioners of San Juan County, Utah, which also has the endorsement of the Board of Washington County Commissioners.

(The resolutions referred to follow:)

RESOLUTION OF THE UTAH WATER AND POWER BOARD

Whereas the Utah Water and Power Board has the duty and responsibility to make studies, investigations and recommendations on behalf of the State of Utah which relates to the development, conservation, protection, and control of the water and power resources of the State; and

Whereas certain Federal agencies have raised questions concerning the ownership of the water arising on the Federal lands within the State of Utah and to what extent agencies of the Federal Government must comply with State administrative controls; and

Whereas the individual States are vested with the power to control and administer the water within their boundaries; and

Whereas S. 1275 is a fair approach to the solution of this problem for the agencies of both Federal and State Governments: Now, therefore, be it

Resolved, That the Utah Water and Power Board favors the protection of water rights that have vested under State law; State control over the unappropriated water within the State; priority of consumptive use over navigation; and compliance by the Federal Government with State procedures in acquiring a water right; and be it further

Resolved, That the Interior Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, convening a hearing on this bill in Washington, D.C., on March 10, 1964, be and is hereby urged to favorably consider S. 1275 and recommend its passage by Congress; and be it further

Resolved, That a copy of this resolution be transmitted to the chairman of the aforesaid subcommittee and all other members of Utah's congressional delegation.

The foregoing resolution is dated March 3, 1964.

RESOLUTION OF THE COUNTY COMMISSIONERS OF SAN JUAN COUNTY, STATE OF UTAH

Whereas this board is of the opinion that a Federal-State conflict exists with respect to water rights in the Western States; and

Whereas this board believes that said conflict is prejudicing the rights of the water users of this State and is creating uncertainties in the law which will prevent the most beneficial use of the water resources of this State and Nation; and

Whereas this board has been advised and believes that the legal theories proposed and advanced by attorneys representing the U.S. Government in certain recent legal disputes would be most harmful to local interests and to the Nation as a whole if accepted as law; and

Whereas this board has been advised and believes that the holdings in the so-called *Pelton Dam* case (*Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955)), and the so-called *Hawthorne* case (*Nevada* v. *United States*, 165 Fed. Supp. 600 (D. Nev. 1958) affirmed on other grounds, 279 F. 2d 699 (9 Cir. 1960)), represent a departure from the traditional view which recognizes local control over water resources and, also, that the holdings in these cases constitute a threat to the most beneficial and reasonable use of local water resources; and

Whereas certain agencies of the Federal Government refuse to acknowledge State control over water resources despite the fact that Congress has, on several occasions, passed laws which recognize the authority of the States to regulate and control the use of water; and

Whereas this board believes that water law is real property law and that real property law is a matter for local, not Federal control; and

Whereas on March 10 and 11, 1963, at Los Angeles, Calif., there was held a western water law symposium in connection with the midwinter conference of the National District Attorneys' Association, and at that symposium on March 11, 1963, the Honorable Richard D. Andrews, minority counsel of the Senate Interior and Insular Affairs Committee, presented a bill which would have the effect of repealing the decision of the *Pelton Dam* case and of requiring the United States to pay just compensation prior to the taking of water rights and requiring that the United States in acquiring water rights for projects in areas west of the 98th meridian proceed, in all instances, in accordance with applicable State law; and

Whereas at the conclusion of said symposium on March 11, 1963, a resolution was adopted by unanimous vote of those present urging the introduction in the Congress and the adoption by it of that bill; and

Whereas subsequently on March 14, 1963, a resolution was adopted by unanimous vote of the delegates present at the midwinter conference of the National District Attorneys' Association at Los Angeles, Calif., also urging the introduction in the Congress and the adoption by it of the same bill; and

Whereas subsequently on April 4, 1963, the Honorable Thomas H. Kuchel, for himself, the Honorable Len B. Jordan, of Idaho, and the Honorable Frank E. Moss, of Utah, introduced S. 1275 in the 88th Congress, 1st session, which bill is identical with the bill presented at the western water law symposium by the Honorable Richard D. Andrews: Now, therefore, be it

Resolved, That the Board of County Commissioners of San Juan County, State of Utah, hereby expresses its support for S. 1275 and urges its adoption by the Congress; and be it further

Resolved, That the Office of the County Clerk of San Juan County is authorized and directed to send copies of this resolution, duly certified by the clerk of this board, to the President of the United States, the Vice President of the United States, the Speaker of the House of Representatives, the Secretary of Interior of the United States, the Honorable Thomas H. Kuchel, the Honorable Wallace F. Bennett, the Honorable Len B. Jordan, the Honorable Frank E. Moss, the chairmen of the Committees of the Senate and House of Representatives on Interior and Insular Affairs, and to the National District Attorneys' Association, the National Association of Counties, and the boards of commissioners of each of the other counties of this State.

Passed and adopted this 26th day of August 1963.

WASHINGTON COUNTY,
St. George, Utah, September 13, 1963.

Hon. FRANK E. MOSS,
U.S. Senator,
Washington, D.C.

DEAR SENATOR MOSS: The commissioners of Washington County, Utah, urge the adoption of S. 1275, regarding Federal-State conflict over water rights, and heartily endorse the resolution from San Juan County, Monticello, Utah.

Sincerely,

WASHINGTON COUNTY COMMISSIONERS,
MERRILL STUCKI, *Washington County Clerk.*

Senator BENNETT. Mr. Chairman, as these resolutions point out, Utahans in particular and westerners in general are deeply concerned about the Federal Government's involvement in the West's water.

Right at this time in the West, water shortages are once again plaguing landowners and citizens. Expanded study and research is needed now to make the best use of every possible drop of water in the country.

And an essential prerequisite to the establishment and maintenance of the water rights and priorities is congressional protection for water laws against any whimsical violation by Federal agencies.

As matters now stand there is the ever-present danger that our western water laws may be usurped by the very people to which we might normally look for protection—the Federal Government itself.

Mr. Chairman, I congratulate the committee on its meaningful action in scheduling this hearing on S. 1275. Again I stress my strong support of the bill and with it the hope that it may be reported expeditiously by this committee in order that both Houses of Congress might have an opportunity to act upon it this year.

Thank you.

Senator Moss. Now, Congressman Harding.

Is Congressman Harding of Idaho present?

I had understood he wished to make a statement. If that is the case, it will appear in the record at this point.

(The statement referred to follows:)

STATEMENT OF HON. RALPH HARDING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Congressman HARDING. Mr. Chairman, I want to thank you and your subcommittee for the privilege of appearing here today on this legislation that is so important to Idaho.

In Idaho nothing has been the subject of more controversy than water and water rights.

Water is the life blood of our agricultural economy. Not only are farmers and farm organizations aware of this, but cities, towns, and villages are vitally interested in the development and conservation of water resources and the protection of historic water rights.

Recently Los Angeles, in search of an additional supply of fresh water, proposed a plan to divert Snake River water through the State of Nevada to Lake Mead for storage and eventual domestic and industrial use in their city.

Thousands of Idahoans informed me of their opposition to this proposal. For several weeks after this plan was publicized, telephone calls, telegrams, individual letters, petitions, and resolutions from groups and organizations in Idaho urging the defeat of this proposal flooded my office.

This plan by Los Angeles was conceived in desperation and with great haste and does not have the support of the Secretary of the Interior or any other high Federal officials.

I mention this not only to point out my opposition to the plan of the city of Los Angeles, but also to point out the reaction that a threat of Idaho water generates in our State.

Water has played a unique part in the early development and history of the State of Idaho.

In the early days there was often violence and bloodshed occurring as a result of water disputes. Even in recent years the Idaho press has carried stories of farmers battling at the headgates with shovels over the use of water.

However, with the development of a body of law covering most aspects of water utilization and water rights, disputes are not only less violent, but also less numerous.

Still one undetermined point of law which has resulted in many heated discussions in recent years has been "what rights are possessed by the Federal Government to water already appropriated as well as water to be appropriated in the future, not only on navigable streams but also on streams such as the Snake River and its tributaries which originate on reserved or withdrawn Federal lands."

I feel that the clarification of such questions is of utmost importance. Not only would the possibility of unjust Federal domination be resolved, but also reassurance would be given to our citizens as to the validity of the legal and moral utilization of their water.

Also, this reassurance would have the effect of destroying some of the unnecessary and unreasoning fears that are developing, even when no threat actually exists to water and water rights.

Further, this legislation would encourage a determined effort for multipurpose development of our water resources in Idaho and throughout the West.

Therefore, I commend the committee on its consideration of this legislation and urge its favorable action.

Senator Moss. Now, as the members of the subcommittee have pointed out, we are under suppression of time, the legislative situation being such in the Senate that we will not be able to devote as much time as we would like to this hearing. We knew we were heading into it, but we also felt a great need to move on with the problem and therefore we have gone ahead with the hearing.

We are going to try to proceed as rapidly as possible. However, we do not want to impair our record. We want to make as full and complete a record as we can, both for proponents and opponents of the legislation.

As I have pointed out before in this committee, actually the record is the important thing. We get a lot of impressions sitting here listening and we do try to develop information that will be in the record, but in the final analysis when we sit down to mark up a bill we are looking at that record.

So matters that are inserted in the record certainly are before the committee just as fully as if they were spoken orally here in open session. I emphasize that so that there is no feeling that anything has been thrust aside just because it was inserted in the record. That is not so.

I have a letter from Governor Smylie, of Idaho, for insertion at this point.

(The letter referred to follows:)

OFFICE OF THE GOVERNOR,
STATE OF IDAHO,
Boise, February 25, 1964.

Senator FRANK MOSS,
Chairman, Subcommittee on Irrigation, Committee on Interior Affairs, Senate Office Building, Washington, D.C.

DEAR SENATOR MOSS: It will be impossible for me to attend the hearings which you have scheduled to consider S. 1275.

Nevertheless I desire to have your committee know, and to say for the record, that the State of Idaho strongly supports this bill and urges the subcommittee to favorably report the bill to the full Interior Committee without delay.

Nearly two decades have passed since the struggle to secure enactment of legislation such as this began. As the West grows, and water grows in importance, the desirability of the enactment of this legislation increases. Only when the water rights that are secured under State law are certain and sure, and when those rights have supremacy in Federal law, will we have contrived a sound basis for adjusting the growing needs of all of the West for water.

I am most pleased that Senators Church and Jordan have joined in sponsorship of the bill, and I want the committee to know that the proposal has strong and uniform support in Idaho. The government of Idaho urges speedy enactment of the bill.

With warm personal regards, I am,

Sincerely yours,

ROBERT E. SMYLIE, *Governor.*

Senator Moss. We will begin by asking the representatives of the Federal agencies who have come here to testify this morning if they would like to come to the table. I think it would be appropriate for them all to sit at the table at the same time.

The names I have are Mr. Ramsey Clark, Assistant Attorney General of the United States; Mr. John Baker, Assistant Secretary of Agriculture; Frank J. Barry, Solicitor, Department of the Interior; Mr. Charles Goodwin, Assistant to the General Counsel of the Department of the Navy; Mr. John Mason, Deputy General Counsel of the Federal Power Commission; and Mr. Edward Weinberg, Deputy Solicitor, Department of the Interior.

Now, if some other person has come in the place of any of those names I have called, I would like that he be identified.

Mr. FLORANCE. Mr. Chairman, Mr. John Baker, Assistant Secretary of Agriculture, was scheduled to be here to testify. He was suddenly taken to the hospital and of course he is unable to be here.

His office has asked me to give you his statement and ask that it may be filed as a part of the record immediately following the statement by the Assistant Attorney General, Mr. Clark.

My name is Reynolds G. Florance. I am from the Forest Service.

Senator Moss. Thank you, Mr. Florance. We regret that Mr. Baker is ill and certainly that request will be honored and his statement will be placed in the record when Mr. Ramsey Clark has completed his statement.

I will call first Mr. Ramsey Clark, the Assistant Attorney General for Public Lands of the Department of Justice. He has worked on this problem for a long time.

Would you care to go ahead and make any statement you wish, Mr. Clark?

STATEMENT OF RAMSEY CLARK, ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES FOR PUBLIC LANDS

Mr. CLARK. Fine. Thank you, Mr. Chairman.

S. 1275 follows a long line of legislative proposals dealing with what has been called the Federal-State water rights controversy. The subject is complex and its discussion has, as is frequently true with water rights issues, not been without emotional content.

The bill is short; 53 lines, several hundred words. Its effect, if it became law, would be far reaching, though it is impossible to foresee the thousands of fact situations to which it might apply, or the ultimate interpretation courts might give its words.

An analysis of each section of the bill is contained in the report made by the Department of Justice.

I will make a further statement on only two parts of that bill.

Senator KUCHEL. Excuse me. Do you have copies of your statement?

Mr. CLARK. I just have a working copy with me. I am sorry. I will just comment here on two sections of the bill and, of course, will be available for any questions on any section in an effort to help move the hearing along.

The language in subsection 1 of section 1, beginning on line 3 and ending on line 7 of page 1, as limited by certain parts of section 2, would abandon Federal reservations of water rights not actually used before the date of the act.

In effect, it would give to, or make available for claim by, others, waters flowing on, and off of, surveyed or unsurveyed public lands. It could thus affect in excess of 750 million acres of public lands.

As to those lands, the United States would give away water rights unused at present, but now reserved for future needs.

It must be carefully noted that the bill does not purport to abandon water rights needed to fulfill international treaties, interstate compact provisions, or existing judicial decrees, Indians and Indian tribal rights, rights heretofore acquired by others than the United States, rights to any quantity of water used for governmental purposes of the United States at any time prior to the effective day of the act, or future rights acquired by the United States if initiated prior to the acquisition of rights by others.

The major effect of this language is to release waters in unknown quantities from Federal reservations which may be seriously damaged without the waters released.

Can anyone today say whether this bill would abandon hundreds of thousands, tens of thousands, or thousands of acre-feet of water? Where are the waters that are released? What rivers, what streams, what States and counties?

Can anyone say which of the tens, or hundreds, or thousands of Federal reservations affected will be impaired or destroyed in their purpose because of this proposed quitclaim? Why do we abandon the 1926 withdrawal for the public of water within one-fourth mile of the thousands of springs and waterholes on public lands? Was there no adequate reason to preserve those waters on public lands for future use by the public?

Would this bill take those waters from the public and with them perhaps the only opportunity the public has to use adjacent lands for grazing and give them to unknown individuals?

Is the release of reserved waters tantamount to granting the trees, the fish and wildlife, the grazing value, the recreation potential of vast areas of the public lands, because the further depletion of water resources in the years just ahead, and the droughts to come, will render the lands valueless without utilization of the waters here to be abandoned?

Can anyone now say how marginal the private use to which the waters abandoned may be put will be? Can anyone say that the Federal reservations are not a sound buffer against improvident development when the tremendous annual variations in available water are considered?

Can anyone estimate the degree to which planning and development of new major water supply sources might be deterred by the expectation that waters formerly reserved for Federal lands and now released will meet area needs?

Will this bill impede efforts to meet the real water crises, shortage, maldistribution, and pollution?

When the number of recreation visits on national forests increased from 92.6 million in 1960 to nearly 125 million in 1963; when a number of national forests were temporarily closed to the public because of fire hazard; when recreation use is expected to double in 20 years; should we plan to abandon water reserved to forest lands and national parks because of a waning fear that Federal claims might cloud private rights?

What assurance do we have that all the waters presently needed for reservation purposes on the millions of acres of public lands have actually been used? Don't we know that in many instances they haven't been used?

Each of you should consider the public lands in your States which you know so well. Have they used all waters needed?

What happens to Federal projects under construction, which have been planned for years, but have yet to use their first drop of water? Will the waters reserved vest in junior appropriators? Can private rights be secured on the waters intended for the project, the day this bill becomes law?

It is most important to remember in considering this bill, that for all the hue and cry arising from the Federal-State water rights controversy, not one State, not one county, not one municipality, not one irrigation district, not one corporation, not one individual, has come forward to plead and prove that the United States, exercising alleged proprietary rights in the unappropriated waters of the public domain, has destroyed any private property right or rendered ineffective any State or local governmental regulation. Why? Because it hasn't happened.

If there is a real basis for the fear that Federal claims to unappropriated waters will cloud private titles, how is it that in southern California, where most of the water rises on Federal lands, where virtually all of the natural water supply has been appropriated and overappropriated for years and where millions of acre-feet of the water presently consumed are imported, has never produced a lawsuit based on alleged Federal invasion of a State-recognized water right in which the U.S. defense has been based on a claim of right arising from an earlier reservation not accompanied by actual use?

In the West, it is water that makes land usable. Without water, how much of the public lands would be valueless? A reservation of land without a reservation of water may in many cases be meaningless. What private owner would quitclaim such water rights?

Is to give away these reserved water rights the antithesis of rational water resource and land use planning?

At no time in history has foresight been more important in water resource planning. It is essential in Federal planning, planning among States, and local planning. By interstate compact, many of the States have allocated waters among themselves and in so doing have recognized and applied the reservation principle.

Under such compacts, States developing more slowly than their neighbors have typically reserved far more than their present requirements. In this context no one denies that reservations for future growth and development are absolutely essential to that development.

Such reservations are vital to the future. The same type of reservation is seen within States.

County and watershed of origin laws are clearly based on the same consideration: The reservation for more slowly developing areas of a superior right to use in the future waters presently unneeded.

The Pueblo rights demonstrate the same need. Cities will grow. Water rights for that growth must be secured decades before the need materializes.

Should the city of Denver be criticized because it commenced reserving water rights in the Eagle River in 1921, even though it will probably be two decades from now before the physical means for diverting those waters across the Continental Divide to the city are available?

Is the Supreme Court——

Senator KUCHEL. May I interrupt you to ask just one question on the statement which you have just read. Under what law did the city of Denver make that reservation?

Mr CLARK. The reservations were made by the city under the State law.

Is the Supreme Court of Colorado in error when it determined in January 1964 that Denver exercised due diligence in developing its projects to use those waters? Should Denever now abandon those conditional rights? This is the foresight on which Denver will build in the years ahead. Should the Congress exercise less foresight on behalf of all the people?

Isn't the reservation theory found throughout water law and isn't it the only basis for sound planning? Riparian rights, conditional rights in the appropriation States, compact reservations, State project withdrawals, county and watershed or origin statutes Pueblo rights all include the right to use in the future quantities of waters which cannot be used at present.

How many millions of acre-feet of water in the West are presently reserved under compacts and State laws for future use where it may be decades, if ever, before they can be actually used? The quantity is measured in million of acre-feet.

Against this background, the reasonableness of Federal reservations seems clear. Are the functions of the Federal Government and the lands it holds for all the people of so little value that no foresight is to be exercised to preserce water for future requirements? By what method other than reservation should the Federal Government, supreme within its delegated powers, reserve water for future need?

If the waters on the public domain are thrown open indiscriminately for such use, misuse, or nonuse as may be made of them under State recognized reservations as well as under State recognized rights based on actual use, what can we expect for the future of millions of acres of national forests, parks, grazing lands, highland recreational areas, water storage programs, water, land and wildlife conservation plans?

How many millions of acres needing reforestation, resodding, water for recreational development, water for all the needs that can be an-

ticipated for hundreds of millions of acres held in trust by the United States for future generations of Americans may lay barren and eroded?

Is it enough to say we can always condemn the water in the 1980's which was given away to whomever may have taken it in the 1960's and which is then essential to the preservation of a Zion or Yosemite National Park? How much might it cost?

How intelligent is it to permit an investment today which will be destroyed tomorrow because waters on which it is based are needed for a purpose that was known before the investment was permitted? How many future projects might be economically unfeasible?

The very area that loses a project which offered great local opportunity will suffer most from an indiscriminate abandonment of Federal water rights today.

How meaningful and effective are the exceptions in section 2? Does subsection 3(a) fail to protect the United States in securing a judgment for water rights in cases now pending in courts and abandon U.S. claims to other parties in the cases?

Does the exemption of the reservations for Indians and Indian tribes, section 2(3)(b), demonstrate unequivocally that the other Federal reservations are neither a cloud nor a threat?

Don't the Indian reservation potential uses of water exceed all other Federal reservations? Of course no one suggests the Indian reservations should not have water reserved for their future.

Why is it so important, as is done by section 2(3)(c), to save rights acquired by others on public lands though their actual use may be far more remote than the Federal reservation use? Is it so clear that all Federal rights to use water not used before should be given away, but that all non-Federal rights to use water from public lands in the future, however improbable their use, or undesirable, should be saved?

On how many streams will the abandoned rights of the United States vest immediately in existing junior appropriations which don't secure water under these rights in 9 years out of 10 at present?

What would it mean to farms, cities, industries if the measure of their right to use water in the future was their actual use in the past? It would mean no increase, no growth, and in years of drought it would mean insufficient water to support past needs.

And if farms, cities, and industries in the thirsty West gave up their rights to increase their water use under existing reservations, is it not perfectly clear that in many areas, the waters theretofore reserved would be vested immediately in others where appropriations exceed supply, and claimed immediately when unappropriated waters remain?

Why should the measure of the reservation be, as prescribed in section 2(3)(d), that quantity used by the United States "at any time" prior to passage of this bill? If there was a great logging use in the 1910's, or a major military use in 1917 or 1943 should it persist, though the waters will never again be used for that purpose?

Will the United States have to prove as against any downstream claimant exactly how much water it used in the past, or lose the right to use it?

What alternative does section 2(3)(d) give the United States? In how many instances will it be exceedingly difficult, or actually impos-

sible to prove prior use? How many lawsuits might be required to determine water rights of the United States based upon use prior to passage of this bill?

In 1956, the Forest Service reported nearly 6,000 existing uses in the Lower Colorado River Compact National Forest areas alone. This is less than 10 percent of the national forests, not to mention the much greater areas managed by other agencies.

Under subsection 4 of section 1, could use be enjoined where the finder of fact determined the Park Service had diverted only 100 cubic feet per second in July and August rather than the 200 it estimated for domestic uses in the Yellowstone National Park?

To avoid prolonging this statement, I will refer the committee to the report of the Department of Justice for our analysis of subsections (2) and (3) and subsection (4) to the semicolon on line 15. In passing I would say only that these subsections are fraught with uncertainty and could render unfeasible or more costly many important Federal projects without substantial offsetting benefit.

I will comment briefly on the language in subsection (4) following the semicolon on line 15, primarily because it is illustrative of the inadequacy of the analysis given this bill. In so doing I do not mean to imply that its provisions are of greater concern than those not discussed.

The Lands Division defends every suit brought against the United States for alleged taking of privately owned water rights. These suits are filed under the Tucker Act and are based upon allegations that the United States has exercised what is commonly called the power of inverse condemnation.

If S. 1275 became law and a suit was filed alleging the United States acquired private rights to the use of water by the power of inverse condemnation, we would move to dismiss the suit because the employee, who is alleged to have seized the water, acted in excess of his authority.

Now, I understand that members of the committee and others do not give this meaning to the language. We think the language says the alternative open to the plaintiff would be to seek an injunction against the Federal employees diverting the water. That is the alternative in every case that we face of this type.

If the history of water litigation tells us anything, it is that judicial consideration of water project operations and issuance of injunctions affecting those operations is expensive, time consuming, and disruptive to the accomplishment of project purposes.

The historic case of *Dugan* v. *Rank* began in 1947. Sixteen years and hundreds of thousands of dollars later, it was ordered dismissed by the U.S. Supreme Court.

As decided, the whole case accomplished nothing. It was dismissed as if plaintiff had been thrown out the day he filed his suit in 1947. If the court had decided other than it did, Congress would now have the alternative of closing the Friant unit of the Central Valley project, or building 10 collapsible dams and other structures determined by the Court. It would be impossible to develop water resources to their highest and best use, if this were the law.

I start with the assumption that authorized Federal water projects are desirable and will benefit many people. At times, because of the nature of water, they will invade property rights, just as highways

and missile sites do. It is our responsibility then to see that the person whose right is invaded is paid the fair market value of his right as soon as the extent of the taking can be determined.

In my opinion, based upon my experience with and responsibility for the defense of all cases brought against the United States alleging inverse condemnation of privately owned water rights, the most unfair thing the Congress could do to the owners of those rights is require the United States to condemn them before its project invades them.

We have been sued in only a handful of cases of this nature in the last decade. I think this shows the importance of this proposition. I do not think there are two dozen lawsuits of this nature in the last 10 years compared to thousands and thousands of condemnations, 8,800 last year alone. But in most of these—that is, most of these inverse condemnation suits brought under the Tucker Act—if the plaintiffs in their allegations believe that they are telling the truth, it is impossible for them to determine whether the Federal project invaded their right or by how much, until years after the operation is begun.

By what quantity of water will owners of rights 5, 10, 15, 20 miles below a great dam, be deprived of those rights when the dam is closed? To require condemnation would impose the duty to see the unforeseeable.

If the Secretary determined a project might invade owner A's right 20 miles away but only to a slight degree, he might file a condemnation suit today, describe the project, allege a taking, condemn title to the property invaded and estimate its value at $1. The owner, no better able to foresee the consequences of the project, might decide it will not hurt him and accept the dollar as just compensation.

A judgment is entered. The case is res judicata.

Five years later owner A's orchard may die. It may be then determined that the ground water table has been raised or lowered 10 feet by the project and the trees destroyed by rot or drought.

Owner A has had his day in court. Except for this bill, and under existing law, his rights would be fully protected. He could bring his Tucker Act suit and show the full extent to which his property was taken. This is not extreme example. It is illustrative of the nature of most of the few inverse condemnation suits we now have. This is what these cases are typically about.

Finally, I would say we cannot foresee how much litigation might be generated by this bill. It would, in my opinion, be substantial.

If the committee has any questions on any part of the bill, I will be happy to try to answer them.

Senator Moss. Thank you, Mr. Clark. That is a very extensive statement and it contains a great deal of material that I am sure we will want to question you about.

Since we did not have a reading copy here it is hard to pin it down by simply listening to it and then returning to question. I don't want to foreclose any of my colleagues. For that reason I would like to see the statement as it is reproduced overnight and ask you if you could be in attendance tomorrow at which point I may have some questions I would like to ask you on it.

For example, you talked about Denver's moving under the State law of Colorado to reserve waters in Eagle River as far back as 1921 and said the Supreme Court of Colorado diligently pursued that.

Under this bill what we are really trying to say is, well, you should not have a wild joker in the deck so that the Federal Government in some way might come in any day. Now under our reservation we are going to take some of these lands and, Denver, you are cut off under State law because this water arises on Federal reserve land and we have another use and we are under no obligation to observe the same law that you have been observing.

What we are trying to say in the bill, I think, is that the Federal Government should still have this right if it wants to exercise it. It has a prior right to go and get that water if it has a prior need, but in so doing it must observe the law of Colorado and if it has actually impaired Denver, then Denver must be compensated under the State law.

Isn't that what it comes down to?

Mr. CLARK. Well, I am not sure it does. First I want to point out that the United States has proceeded under the reservation theory while Denver has proceeded under the State law. If Colorado passed a bill that would release all conditional rights, and Denver's 1921 conditional rights which protect it in the Eagle River were liquidated, those rights would no longer be existent.

Now there are many junior appropriations on the Eagle River. The reason Denver had to litigate its due diligence, as I understand it, is that it has to show due diligence each 2 years. There are many people who would like to use that water or claim that they would like to use that water, reserved since 1921 for local projects, and they attack the due diligence of Denver and you have a lawsuit.

Denver has had to maintain its due diligence through these years. If Denver released its conditional right today, then it would have to go in and condemn out all the junior rights that would vest in place of that right that they protected by conditional right since 1921.

Senator MOSS. Well, I violated what I said I was not going to do by questioning until I have a chance really to see the statement in writing, and I would like to do that.

I am further persuaded this is a good course because following the Government witnesses we have two very eminent States attorneys general who will come on and I assume will present the position of State water law more fully and will also give me a better basis.

My colleague Frank Church.

Senator CHURCH. I have one question. I think, Mr. Chairman, you have raised the Denver case as an illustration. Just so I will understand your testimony correctly, Mr. Clark, you pointed to Denver as an illustration of a case where a city under State law had reserved water in a given river for future use; did you not?

Mr. CLARK. Yes, sir; I did.

Senator CHURCH. Was your point that if this bill were enacted we would be denying to the Federal Government the right to do this very thing?

Mr. CLARK. The point was that the reservations made heretofore by the United States would be abandoned.

Senator CHURCH. Yes. In other words, if I understood your point, whereas Denver, under State law, could reserve water for future use, this bill would in effect set aside the efficacy of reservations that the Federal Government has made for future use.

Mr. CLARK. Yes, sir; that is right.

Senator CHURCH. So the bill would deny the Federal Government rights which States and cities assert under State law for future planning in the use of the water?

Mr. CLARK. Yes. It would. I assume that some of these Federal reservations contained the element of foresight; that, for instance, the reservation in 1926 of the land within one-quarter mile of springs and water holes, thousands of them on public lands, was so that the public could go on those lands and use the waters. They could graze cattle, for example, under the federally protected right. Assuming there was foresight in those reservations, it is cut off as of the date this bill becomes law. The United States has to exercise foresight from that date on, but at the date of the cutoff there will be a practical invasion of the reserved water rights that are abandoned because there are so many streams that are overappropriated; there are people with appropriations today junior to these reservations that don't get enough water today 9 years out of 10 under their rights and their appropriations will immediately absorb these waters released and the United States would then be at the end of the line if under subsection (3) (e) of section 2 the Congress authorized an appropriation.

Senator CHURCH. Then the United States, if later the Federal Government, for general public purposes, were to divert water on a reservation, it would then have to buy back from private users whatever had been acquired by the private users by virtue of the force of this bill?

Mr. CLARK. That is right.

Senator CHURCH. You think that is wrong because these private users have taken in the first place with due notice of the Federal Government's right under reservations that now exist. Is that the purport of your testimony?

Mr. CLARK. These people have not charged the United States with any invasion of their rights. We have not found legal claims. We have not found claims really except for the general fear that people have visualized or imagined since the *Pelton Dam* decision.

Senator CHURCH. But in order to understand exactly the rationale behind your position, is it accurate to state that the rationale would be, that inasmuch as these private people downstream, let us, say, from the Federal reservation have taken water with notice of the prior Federal reservation, they should not thereafter, by virtue of the provision of this bill, acquire a right against the Government that the Government would have to pay them for, if the Government later wanted to use that water? Is that the rationale behind your statement?

Mr. CLARK. That is partly it, with an additional qualification. If the Congress looks at that situation and knows that there is a good reason for the general welfare to release that water right it could do so. In addition, in establishing its past uses, which it would have to do to have any future use, the United States would have to establish its actual past use and I think that could be an immense and most difficult proposition.

Senator CHURCH. Mr. Chairman, I want to pursue these questions later, but I don't want to hold up the committee. I think, of course, we are embarked here upon a matter of enormous ramifications that has very sweeping effects. We want to be certain that we understand the Government witnesses and all other witnesses who testify on it.

I think that other questions are certainly in order, but I want to comply with your wishes and expedite the committee's hearings, so long as we have a full opportunity to question these Federal witnesses.

I think that the statement Mr. Clark has made is one of the most forthright opposition statements I have ever heard made by a Federal witness in the matter of a bill brought before this committee, and, therefore, in justice to our responsibilities, we must give it careful attention.

Senator Moss. Certainly I would agree, and that is the reason I am going to ask that the statement be reproducted overnight and be before us in writing by tomorrow morning and on that basis we would ask Mr. Clark to return so that he may respond to questions. However, if there are questions now, I don't want to cut them off.

Senator ALLOTT. Mr. Chairman, may I ask a question on that? Is it possible that we could get this statement reproduced by late this afternoon so that it would be available to us overnight? I think most of us have an engagement tonight which is well known and has been outstanding for a long time, but at least we might have a chance to look at this before tomorrow morning.

Senator Moss. Yes; we will ask the staff to begin at once. We can cut stencils and mimeograph it and also supply the statement to the reporter and it will be done for the record. I was thinking within the matter of 2 or 3 hours; in fact, we could probably have it reproduced so it would be available to us.

Senator Kuchel.

Senator KUCHEL. I want to congratulate Mr. Clark on his fine presentation, but I do think that it would be better procedure for the benefit of those of us in support of the bill, if you were to supply written statements.

For example, when you used this example of the Denver situation, we could go into that specifically and find out what Federal legislation there is now in effect in regard to such matters arising and then determine by questioning what the public interest today should be. So I simply thank you, and I will defer any questions until later on.

Senator Moss. Senator Jordan.

Senator JORDAN. I would like to reserve my questions until I have a chance to see the statement that the Justice Department has submitted here. Would it be unreasonable to request, Mr. Chairman, that members of the executive branch provide us with copies of their statement so that we could better follow them if they read them into the record?

Senator Moss. Well, that is of course the usual practice and ordinarily it is done. This hearing was in doubt for some time as to whether the Federal witnesses would be able to testify at this time or be put off until a later date. I assume that is the reason it was not reproduced and in our hands earlier.

Mr. CLARK. Yes, sir. I am sorry about that. I will have my copy retyped. Now it has handwritten notes on it and marginal notations I made last night, but I can have it retyped and up here by 3 o'clock this afternoon at the latest. I assume that would accommodate the committee and the reporter.

Senator Moss. It would do. If you would send it up here at the very earliest time so that we can reproduce it and get it in the hands

of all the committee members this afternoon, I would appreciate that, Mr. Clark.

I do congratulate you on a fine statement, one that raises a lot of problems and a lot of questions that I am sure we want to dig into.

Next will be a statement by Mr. Baker, Assistant Secretary of Agriculture.

STATEMENT OF JOHN A. BAKER, ASSISTANT SECRETARY OF AGRICULTURE

Mr. BAKER. Mr. Chairman and members of the committee, I am pleased to appear before your committee and present this statement on behalf of the Department of Agriculture as a supplement to the fine statement made by the Assistant Attorney General, Mr. Clark. The Department of Agriculture is in full accord with his statement.

The subject of Federal-State relations in the field of water rights has been before many Congresses in many different forms. The Department of Agriculture fully recognizes the importance of the question of water rights, particularly to the people of the Western States. We believe that it is important that the relationship of the interests of the United States and of the States in the use of certain waters be fully understood. Cordial relationships and proper understanding between the Federal Government and the States in this matter of water rights are highly desirable. However, we believe that the broad outline of these relationships as they presently exist should not be changed—that the paramount national interest in the water resources on public lands should not be surrendered to the several States.

This Department has responsibility for many programs which necessarily deal with the use of water. One example is administration of the national forest system, in which water rights are essential to the administration of these lands and their resources under principles of multiple use and sustained yield. Another example is the concern of the Department, as representatives of farm and rural people, in the multiple-purpose development of our water resources which to this point has included over 200 systems under the rural electrification program which receive their power supply from Federal hydroelectric projects.

You have before you the Department's report on this bill. It sets forth the Department's position recommending against enactment. We believe the primary reasons leading to this recommendation are clear.

Many of the programs of this Department are carried out on a cooperative basis with the States. We are proud of the harmonious relationship that exists between the various States and this Department. Our present and proposed course for handling problems and management of water resources on this cooperative basis has worked out very satisfactorily. We believe that restrictions beyond those already provided by law would seriously inhibit effective multiple-purpose development of our water resources.

Senator MOSS. Mr. Barry will be heard from next, the Solicitor of the Department of the Interior.

STATEMENT OF FRANK J. BARRY, SOLICITOR OF THE DEPARTMENT OF THE INTERIOR

Mr. BARRY. Mr. Chairman, I hate to be one up on the Department of Justice, but my secretary and I were in the office at 7:30 this morning. We managed to hammer out a statement. I will have to ask that you excuse a few editings that occurred after the statement was prepared because it was, as the chairman pointed out, prepared in haste.

The report of the Department, of course, has already been inserted in the record.

Mr. Chairman and members of the committee, in the report of the Department of the Interior on S. 1275 we set forth our objection to its enactment on the following grounds:

S. 1275 would confuse rather than clarify the relationship of the United States with the States;

It would hinder and interfere with national programs for the conservation of water resources;

It would abandon Federal property rights in the use of water; and

It would jeopardize basic policy position of the United States with respect to the excess land laws and resource development.

It is clearly known to be the law today, and it has clearly been known to be the law for over half a century, that when the United States reserves public lands it impliedly reserves such water rights as may be necessary to carry out its purposes.

The soundness of the policy of this law is manifest. Certainly it is reasonable when lands are reserved for Indians, for fish and wildlife conservation purposes, or for recreation purposes, to include in the reservation the waters necessary to carry out such purposes.

Under the Stock-Raising Homestead Act of 1916, the reservation of lands is authorized for preservation of springs and other water resources for the use of the public. It would be foolish to permit the water to be appropriated to the exclusive use of one person, notwithstanding such reservation. It is entirely reasonable to provide, as the law now clearly provides, that any reservation of lands for purposes requiring the use of water includes a reservation of necessary water. Otherwise why have the reservation in the first place?

Section 1(1) of S. 1275 proposes that such withdrawals and reservations—

> heretofore or hereafter made shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation.

A stockraising homestead reservation of lands surrounding a waterhole would not prevent a private party acquiring rights to all the water under State law. The public could be denied necessary access to the water which had been the sole or primary purpose of the reservation. A withdrawal for a game refuge or a fish hatchery could be set at naught by appropriations under State law if section 1(1) becomes the law.

Section 1(3) of the bill provides how the United States may hereafter acquire water rights for its programs. Since water rights may no longer be reserved they will be appropriated under State law and the United States must acquire them by action "initiated and perfected

in accordance with the procedure established by the laws of that State."

Does the phrase "initiated and perfected" mean that conditions appropriate for private parties—that is, conditions required by State law—will also bind the United States?

The original decision of the California Supreme Court in *Ivanhoe Irrigation District* v. *All Parties and Persons*, 306 P. 2d 824, provides an instructive example. There the California Supreme Court said:

> * * * when an outside party, such as the United States, by contract, legislation, or otherwise, steps into the shoes of the State to administer that trust by the development, conservation, and distribution of the trust res, it is bound by the same rules of law as surround and govern the State of California or any other purveyor of water of the State for the benefit of its water users.

Is this what section 1(3) is trying to say? Certainly it is not clear. But the words "initiated and perfected" seem to suggest the United States can acquire only what the State can give it.

In the *Ivanhoe* case the California court held that the State could not under the Constitution and laws of California, discriminate against an excess landowner and that the United States therefore could not enforce its excess land laws.

The U.S. Supreme Court reversed, declaring that the excess land laws are valid and binding in California as elsewhere. Admittedly the language of section 1(3) is not clear, but because of that very fact, confusion will supplant the clarity of the present law.

We do not utter an idle and insubstantial warning. Last Thursday the Sacramento Bee carried a story that a resolution approving S. 1275 was adopted by the California Assembly. An effort was made to attach an amendment to the effect that the legislature's approval of S. 1275 was not to be construed as an interference "with the longstanding Federal policy on acreage limitation."

The sponsor of the resolution replied that such an amendment would not be acceptable to him.

The Bureau of Reclamation has followed the procedures provided for in State laws to acquire water rights. This has assisted the State in maintaining inventories of water and in identifying the quantities being used by Federal projects.

In the case of the Central Valley project in California, the United States entered the picture in 1935, after the State's plans were well along. The State assigned its water right applications for the diversions necessary for the project. The United States initiated additional applications of its own.

It was not until 1961 that the State water rights board issued its decision granting the permits. However, the permits were granted subject to conditions which would, were S. 1275 the law, seriously impair their value, since they were made subject to any future appropriations of water in the Sacramento River Basin.

In fact, in a recent decision, the State water rights board has granted a permit to a private user in the basin to divert 5 second-feet and, notwithstanding the priority in time of Federal permits, has subordinated those permits to the rights granted to the private user.

Incidentally, a protest was made by the Department of the Interior in that proceeding.

If Federal rights must be "initiated and perfected" under State law, as provided in S. 1275, what protection does the United States have for water necessary for the operation of Federal projects constructed at such great expense?

Finally, let me briefly refer to the second part of section 1(4) which would require all condemnations to be by proceedings in eminent domain.

Mr. Clark has implied that damage may be great, but may not be foreseeable.

Section 1(4) is apparently an attempt to do away with inverse condemnation. As a practical matter this means that if a project is built and water rights are not condemned in advance "by proceedings in eminent domain" the actions of Federal employees operating the project will be mere trespasses which can be enjoined.

As a matter of practical fact engineers cannot predict what supplies of water may be affected by cutting off the natural flow of a stream with a dam.

In 1962 a mining company, 44 to 52 miles away from the Columbia Basin project, established in the Court of Claims in a suit for inverse condemnation that its mine was destroyed by the project. This remote effect could not have been foreseen.

If S. 1275 were the law, an injured property owner would be without a remedy except to enjoin the operation of the project as a trespass to his water rights. In the case of the Columbia Basin project this could mean draining the banks equalizing reservoir, 27 miles long.

For these reasons and for the reasons detailed in our report, the Department of the Interior recommends that S. 1275 be not enacted.

Senator Moss. Thank you, Mr. Barry, for your statement.

Do my colleagues have questions?

Do you have questions, Senator Church, at this point?

Senator CHURCH. Are all these witnesses going to be back for questioning, Mr. Chairman?

Senator Moss. I would hope so.

Would it be possible for you also to attend tomorrow, Mr. Barry?

Mr. BARRY. I would be glad to.

Senator Moss. I would appreciate it because in effect we are sort of having the Government's case made and we will hear the State's case and then perhaps our questioning can be more pointed and we will not waste time really.

If there are questions at this time, I will entertain them.

Senator Kuchel.

Senator KUCHEL. Mr. Barry, I need not take any time to repeat what I have already said. The people of my State are indebted to the Department of the Interior for the part that it has played in the development of the natural resources of California. However, to turn to your statement; first, can you give me an example of how this bill, were it to become law, would affect the acreage limitation policy of the Federal reclamation laws?

Mr. BARRY. Well, let's parallel the *Ivanhoe Irrigation District* case. In a project where the Federal Government had to acquire its water rights under State law as provided in this bill because its reservation had not been put to use prior to the time that somebody else's rights were acquired, the reasoning of the California Supreme Court in the

Ivanhoe case, which is outside of the control, of course, of Congress——

Senator KUCHEL. But that decision was overruled by the U.S. Supreme Court.

Mr. BARRY. Indeed it was. The U.S. Supreme Court construed section 8 of the Reclamation Act of June 17, 1902, as not to require the United States to comply with State law except with respect to the need to pay compensation when acquiring water rights which were recognized as vested by State law.

The decision of the Supreme Court of California however, interpreted section 8 in the same manner as section 1(c) could be construed, and that is that the United States stood in the shoes of the State or any other purveyor of water and would be required to comply with whatever laws the State had with respect to the distribution of water.

The case went forward to say that under the law of California it was an unconstitutional—that is, under the State constitution—violation of the rights of an excess landowner, to deny water to him for his excess lands.

Senator KUCHEL. But that was all overruled.

Mr. BARRY. Indeed, it was.

Senator KUCHEL. So why do we have any question here with respect to what this bill would now do?

Mr. BARRY. All right. Now the State could do this again on another project, any State could do it again on another project which is initiated after the passage of this bill. In other words, the Congress could no longer continue to apply the excess land laws to projects that start after the enactment of this bill.

Senator KUCHEL. Well, Mr. Barry, may I respectfully say that you see a hobgoblin here that is not present. It is not the intention of the authors of this bill to impinge in any fashion on the acreage limitation provisions of Federal law.

So as to narrow the problem that I hope we can solve, suppose we wrote into this bill affirmatively that this has nothing to do with the acreage-limitations provision. Then would that satisfy you?

Mr. BARRY. Well, with respect to that particular section.

Senator KUCHEL. That is what I mean.

Mr. BARRY. What I have done here is to give an example of a situation which could develop under section 1(3). That example, when I found it, was enough for me to make the recommendation that the Department should oppose the enactment of subsection (3). I think that we would have to look at the amendment and look at the bill again and make our determination on the basis of what is brought up at that time.

Senator KUCHEL. I say frankly to you I am not acquainted with the wording of the resolution which was adopted by the California Assembly, but surely you and I would not use the refusal by a member of the State legislature to accept an amendment as binding on what the intent of this Congress would be in passing this legislation. I would be prepared affirmatively to write into this bill such language as would clearly indicate the intention of the committee on that point.

Would that satisfy you as to the problem of this bill vis-a-vis acreage limitation?

Mr. BARRY. Well, if it was affirmatively stated that no part of this bill would affect any part of the Federal laws with respect to acreage limitation, then I would have no objection on that particular ground.

Senator KUCHEL. Now with respect to the other problems you raised, I think I will again if I may defer my remaining questions until tomorrow.

Senator Moss. Senator Allott.

Senator ALLOTT. Mr. Barry, one thing I think is being lost sight of in this general context of the acreage limitations, there is an implication that this has been handed down to us like the Bible. The acreage limitation is established by Congress; it may be altered by Congress, it can be abolished by the Congress.

Mr. BARRY. That is correct, of course, but this bill, as Senator Kuchel has pointed out, does not purport in terms to abolish it. To be candid with you, I don't know what my personal views would be if such a bill came forward because it certainly is a question that is debatable as to whether we should continue the acreage limitation in the form in which it was put in the reclamation laws so many years ago. I don't think that it is wise to pass a bill which contains language which could be construed to abandon the acreage limitation or to leave it up to a State court or a State's water rights board to determine whether it will be continued.

I don't think it is wise for Congress to pass such legislation when the acreage limitation itself is such an important issue in congressional policy. I think it ought to be thoroughly debated if it is going to be abolished.

Senator ALLOTT. Of course, am sure that the author of the bill has no such intention.

I want to go into this later, but I would like to ask you what objection you have to section 2(3) (e) which was read:

> Nothing in this act shall be construed as affecting, impairing, diminishing, subordinating, or enlarging any right of the United States to use water which is hereafter lawfully initiated in the exercise of the express or necessarily implied authority of any present or future act of Congress or State law when such rights are initiated prior to the acquisition by others of any right to use water pursuant to State law.

Mr. BARRY. What if, for example, the United States were to have reserved water on this area which the city of Denver has reserved for a purpose equally worthy as it has—I am presenting a hypothetical—assuming there was a prior reservation by the United States; that is, prior to the reservation that the city of Denver has made.

The fact that the United States has a reservation which has been abolished would put the United States in a position subordinate to this right which has been acquired by others to use water pursuant to State law. The United States now owns this property right by virtue of the reservation. I see no advantage in giving up that right for a purpose which might even be inferior to the purpose for which the United States wants it.

Senator ALLOTT. I am frank to admit I don't know what my own Attorney General will say with respect to this when he testifies tomorrow, but I am trying to admit that this is the basic core of this problem.

I was a cosponsor with Senator Barrett on one of the last bills he presented. I was also a cosponsor of S. 851 together with Mr. Bible. He and I, and the late distinguished Senator from Wyoming, wrote S. 851 together, but I think our philosophy was fundamentally different from the way you look at it.

I think that the people of the State have appropriated and used water and are doing so in a lawful way.

Mr. BARRY. Well, the Supreme Court states that originally, as has been said time and again, all of the lands in the West were the property of the United States just like any other property, and laws were passed by Congress by which this property, including water rights, passed into the hands of individuals under the act of 1866, the act of 1877, the Desert Land Act, and so forth.

Now from time to time, in its wisdom, the Congress has authorized the executive branch to reserve lands and in some cases the Congress itself has set aside portions of the public domain and these lands have been reserved for a particular purpose.

This bill recognizes that that reservation was a wise thing in the case of Indian reservations because it exempts them from section 1(1).

Is this the only purpose to which the wisdom of the Congress can be addressed? Aren't there other purposes besides Indians? Aren't there other purposes like fish and wildlife purposes, recreation purposes in a situation where recreation is becoming so important in our national life, where the United States can reserve lands and say: "Look, sometime in the future it is obvious we are going to need these lands for this purpose," and in so reserving the lands also to reserve the water?

I think this is a perfectly reasonable thing for the United States to reserve its needs rather than to require the United States to go to the State and to acquire a water right under State law so that later on it can exercise its foresight and bring about what it tried to accomplish by the reservation.

Senator ALLOTT. Subsection (e) about which I asked you, Mr. Barry, says—

in the exercise of an express or a necessarily implied authority of any present or future act of Congress.

Now Congress certainly is not going—I hope they won't—to authorize any projects where there is not water on the river to justify those projects.

Mr. BARRY. Well, it does. It authorized the Friant Dam as a part of the Central Valley project and it was necessary to acquire water rights between Friant Dam and Gravelly Fiord and take them away from the people who owned them in order to divert the water for what was considered by Congress to be for a more important use further south.

Senator ALLOT. I don't know about that particular situation. Maybe my colleague does. I know that, speaking for the Senator from Colorado, I don't ever intend to authorize or vote to authorize any projects for which there is not water in the river to accomplish the purpose.

It seems to me you have sort of a bugaboo here. If the water is already being used under State law really the only claim the Federal Government has is that the rain happens to fall in this particular area. That is their only claim to it.

Mr. BARRY. That is not the only claim.

Senator ALLOTT. Well, that is the only moral claim they have to it. Under this theory most of the waters which are being used in a good portion of the West all belong to the State of Colorado.

Mr. BARRY. Let me give an example, Senator, in your own State. In the Colorado Big Thompson project, water is diverted from the Colorado River through the mountains to an area which didn't have enough water, on the Platte River, and the Congress, in order to protect the water rights on the western slope where the water was so diverted, built the Green Mountain Reservoir on the Blue River which has not been put to use yet in the upper reaches of the Colorado.

Senator ALLOTT. We have adopted this compensatory dam situation in one occasion after another.

Mr. BARRY. Indeed. But the point is that water was actually being purchased by the United States in a sense from one watershed to divert it to another watershed which didn't have enough water and the project was authorized for the watershed that didn't have enough water.

Senator ALLOTT. I don't follow that. I think that what we were doing there, as a compensatory dam situation, is simply permitting the people on the western slope to take advantage of the rights that they have under State law for the use of that water.

Mr. BARRY. That is right. I think the Congress should handle it as they have on a case-by-case basis.

Senator ALLOTT. We are not buying it from anybody.

Mr. BARRY. It cost quite a bit for the Green Mountain Reservoir, and a principal purpose of the reservoir was to protect the future water use which has not yet come into existence on the western slope by the creation of a dam which would impound about 150,000 acre-feet of water.

Mr. Weinberg asked to make a comment on this last question, if that is satisfactory.

Mr. WEINBERG. One of the principal purposes of Green Mountain, Senator, as a part of the Colorado Big Thompson, was to provide some 100,000 acre-feet of storage, or in other words, making new water, for use on the western slope. This we suggest is a very appropriate way to take care of these problems. The answer to a deficiency of water is provision for water works which will make up the deficiency and not to battle over rights to shortages which can get into some very complicated situations and some very, very long, drawn out litigation.

I would like, if I may, to make one other comment on subparagraph (e). Its meaning is not entirely clear with respect to how a use of water would be hereafter lawfully initiated. If it means that acting pursuant to an act of Congress the United States withdraws land, for example, under the Picket Act of 1910, which has on it a water source and the water is essential to the purpose of that withdrawal, that the United States has thereby lawfully initiated a right to the use of that water then what subparagraph (e) does is start the reservation theory operating all over again from here on out. It is our view that the reservation theory has not proved to be the bugaboo that it has been suggested to be and that if it is proper to reassert the reservation theory by new withdrawals it is and has been proper to apply it all along.

Senator ALLOTT. I don't want to ask any more questions, Mr. Chairman, but I did want to point out that I think that this subsection (e), when it becomes a part of this whole question, is as well as any and it is one I don't think there will ever be any meeting of minds on.

Senator Moss. Senator Jordan.

Senator JORDAN. Thank you. I reserve the right.

Senator Moss. Thank you, Mr. Barry.

We will now hear from Mr. Charles Goodwin, Assistant General Counsel of the Department of the Navy.

Senator KUCHEL. May I take 30 seconds, Mr. Chairman, before Mr. Goodwin commences?

Senator Moss. Yes.

Senator KUCHEL. I want to say most sincerely that I do regret the position of the Department of the Interior. I do want to point out that the language of the first section of my bill is virtually the wording which my friend, Stewart Udall, Secretary of the Interior, wrote into his bill on this very subject in 1959 in the House of Representatives. I say that not for any purpose of embarrassment, but I say that there is a problem here.

To the extent that we can on a give-and-take basis find some way to reach an area of agreement, I think we will be doing a constructive service. In that connection, I ask that the entire language of the bill introduced in the 86th Congress, 1st session, by the then Congressman Stewart Udall, be incorporated in its entirety in this record.

Senator Moss. It will be noted that he was the Congressman from Arizona at that time and not the Secretary of the Interior.

Mr. BARRY. May I just say that Secretary Udall meets himself coming around the corner lots of times now that he represents the United States. He considers his obligation to be to all of the people, and as a Congressman I think that he could properly consider his obligation to be somewhat weighted on the side of his own constituency. This is why Secretary Udall sometimes, in fact all too frequently for those of us who have to come before committees, is now resisting or supporting positions which he supported or resisted before.

Senator Moss. I think we understand the situation.

Thank you.

It may be printed in the record and we will hear Mr. Goodwin.

(The bill referred to follows:)

[H.R. 6140, 86th Cong., 1st sess.]

A BILL To provide that withdrawals or reservations of public lands shall not affect certain water rights

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter established, shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation, nor shall it affect the right of any State to exercise jurisdiction over water rights conferred by the Act admitting such State into the Union or such State's constitution, as accepted and ratified by such Act of admission.

SEC. 2. Nothing in this Act shall be construed as—

(1) modifying or repealing any provision of any existing Act of Congress requiring that rights of the United States to the use of water be acquired pursuant to State law;

(2) permitting appropriations of water under State law which interfere with the provisions of international treaties of the United States; or

(3) affecting, impairing, diminishing, subordinating or enlarging (a) the rights of the United States or any State to waters under any interstate compact or existing judicial decree, (b) the obligations of the United States to Indians or Indian tribes, or any right owned or held by or for Indians or Indian tribes, (c) any water right heretofore acquired by others than the United States under Federal or State law, (d) any right to any quantity of water used for governmental purposes or programs at any time from January 1, 1940, to the effective date of this Act; or (e) any right of the United States to use water which is hereafter lawfully initiated in the exercise of the express or necessarily implied authority of any present or future Act of Congress or State law when such right is initiated prior to the acquisition by others of any right to use water pursuant to State law.

STATEMENT OF CHARLES GOODWIN, ASSISTANT TO THE GENERAL COUNSEL OF THE DEPARTMENT OF THE NAVY

Mr. GOODWIN. Mr. Chairman and members of the committee, I have furnished copies of my statement and I believe they are before you.

Senator MOSS. They are before us, thank you.

Mr. GOODWIN. I am Charles Goodwin, Assistant to the General Counsel of the Department of the Navy, which has been assigned responsibility for presenting the views of the Department of Defense on S. 1275, a bill to clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams.

We appreciate the opportunity of appearing before your committee. The Department of Defense recognizes that water is a precious commodity and that decisions as to its development, utilization and allocation among the many demands upon the limited supply of this great natural resource, call for the highest degree of administrative and legislative understanding and wisdom.

The Department is opposed to the bill. It does not believe that it would be sound and appropriate legislation (1) because it would authorize private persons to acquire Government-owned water rights to national defense needs for water to operate the military reservations; and (2) because it does not clarify the law—it changes it significantly by provisions which are themselves unclear and controversial.

In our opinion, the existing law as to the ownership of water rights appurtenant to reserved public lands is abundantly clear. The United States acquired ownership of the water rights along with the public lands from foreign countries. Congress, under the Desert Land Act, authorized or licensed private persons to appropriate such water rights in accordance with the State law. To the extent they did, they acquired vested property rights good even against the United States and irrevocable without payment of compensation. However, the Desert Land Act has no further application to public lands once they are reserved for military or other purposes. The United States remains the owner of all the unappropriated water rights appurtenant to such reservations and such water rights are no longer subject to appropriation by private persons. On the contrary, they are reserved to the extent required for the national purposes of the reservation and they may be utilized for such purposes without conformance to State appropriations of other procedures. Such utilization, however, may not interfere with appropriate or other water rights vested in private persons. If there is conflict over the extent or priority of water rights, the United States may be joined as a party in a suit for the adjudication of rights to the use of water (43 U.S.C. 666(a)).

The existing law therefore clearly protects vested water rights. It also safeguards the national defense and other Federal interests by reserving the unappropriated water rights on reservations. The bill, however, would jeopardize such interests by authorizing continued depletion of such water rights by private persons after the date of the reservation. In order to assure an adequate supply of water for national defense purposes we would be forced either to condemn appropriated water rights and thus, in effect, buy back the public property, or else to apply for an appropriation of water rights in accordance with many different State laws and procedures not designed and, therefore, of questionable feasibility for Federal projects. We have no right to take private property for public purposes without compensation. We do not believe private persons should be given the right to take public property without regard to the needs of national defense.

Moreover, the provisions of the bill are unclear. There have been many different explanations and interpretations of the purpose and effect of the bill. Among other things, it refers to rights under State laws without specifically indicating whether such rights and laws are to be measured and limited by the U.S. Constitution and the laws thereunder which are declared by the Constitution to be the supreme law of the land. This is the heart of the problem. The Department of Defense is opposed to any change that does not provide for national defense requirements. But, if change is to be made, we feel that the will of Congress should be clearly expressed so as to settle rather than revive controversy in this sensitive area.

Senator Moss. Thank you, Mr. Goodwin.

I cannot conceive that any bill by the Congress could have any effect of establishing a right that is not limited by the U.S. Constitution and the laws thereunder. I would understand that the Constitution was valid and in effect and that it would supersede anything the Congress might try to do in the Constitution. I therefore do not understand your statement here in the last paragraph wherein you say that among other things it does not say whether the rights and laws are to be measured and limited by the U.S. Constitution and the laws thereunder to be declared to be the supreme law of the land. They are declared to be the supreme law of the land and that is the end of it, isn't it?

Mr. Goodwin. The problem is you are referring or incorporating State laws and the question arises as to whether you mean those State laws as they are written on the books without regard to any limitations that might stem from the U.S. Constitution and the laws which this Congress enacts. This is the problem as to just what does this Congress mean? Are you referring to the legislative acts of the States as written without regard to the Federal constitutional limitations and the Federal laws thereunder or are you making them subject to the constitutional limitations and laws?

Senator Moss. Can you point to any instance where a State law is not limited and bound by the Constitution of the United States?

Mr. Goodwin. I know of no such law.

Senator Moss. Of course not. The State laws are subject to Federal Constitution. I think that was settled very early in our Republic, that the Federal Constitution is the supreme law of the land and the State law could be unconstitutional as readily as a Federal law, and it has been so declared by the courts.

Mr. GOODWIN. But State laws must also generally be compatible with Federal laws and rights and the bill does not make clear whether the Congress wants the Federal agencies to give effect to State laws and rights thereunder regardless of whether they would be, except for the provisions of this bill, incompatible with Federal laws and rights.

Senator MOSS. Do you have questions, Senator Kuchel?

Senator KUCHEL. Well, just a couple.

There is not anybody in the Congress, I say to you, sir, who is going to deny the legitimate needs of the Defense Department, that is for sure. Is it not true that the Congress dating back to a hundred years ago and continuing did provide for the acquisition under State law of waters which would arise in public lands? Is that not true? Is that not how the West was developed?

Mr. GOODWIN. For the purpose of acquisition by private persons, yes, sir. It did provide for private persons to acquire water rights on Federal public lands.

Mr. KUCHEL. I will say it in the language of the U.S. Supreme Court in *California-Oregon Power Company* v. *Beaver Portland Cement Company*, 1935, and you listen to this, my fellow committeemen:

> Following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated States, * * * with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain.

Now suppose the Defense Establishment finds it in the national interest to erect a great defense facility and needs to acquire water rights which in the beginning were on public lands and subject to the control of Congress, those water rights have been acquired and perfected under State law. The Defense Department then would be perfectly free under the Constitution to reacquire those water rights, of course, paying compensation therefor.

Mr. GOODWIN. Yes, sir.

Senator KUCHEL. You object, however, to a continuation of that policy now because of national defense needs; is that your position?

Mr. GOODWIN. Yes, sir; insofar as unappropriated water is concerned.

By virtue of the reservation, the law reserves to the national defense purpose whatever unappropriated water is required for the accomplishment of national defense operations on the reserved lands.

Senator KUCHEL. At any time in the future?

Mr. GOODWIN. Indefinitely in the future.

Senator KUCHEL. Ad infinitum.

Mr. GOODWIN. Ad infinitum.

Senator KUCHEL. And meanwhile those waters would not be susceptible of acquisition under State law?

Mr. GOODWIN. I would say this, Senator, that we have not been confronted with any particular situation where private persons want to develop water on national reservations where the reservation of the water is an interference with that kind of project. We have had one instance where we have looked into the particular situation and found that we did not require water for the purpose of the national defense reservation. In that case we made specific arrangements to free and make available whatever water was on the reservation.

Senator KUCHEL. This is part of the policy problem which the committee and the Congress have. I am grateful that it was raised. I think we ought to go into it in greater length. I shall not, however, take any more time now, Mr. Chairman.

Senator Moss. Mr. Church?

Senator CHURCH. Yes, Mr. Chairman.

Just to clarify this point so that I understand it. I take it that there is no disposition on the part of any of the Government witnesses here to question the fact that the Federal Government, many years ago, the Congress as a matter of public policy, with regard to nonnavigable waters, made the appropriation of those waters subject to State law and that under State law private owners can and have for many years acquired vested rights.

Mr. GOODWIN. You are entirely right, Senator.

Senator CHURCH. And the Federal Government must respect those rights and cannot take those rights from the individuals under the constitution without appropriate condemnation proceedings and the payment of just compensation.

Mr. GOODWIN. Yes, sir.

Senator CHURCH. Is there any dispute on that point?

Mr. GOODWIN. No.

Senator CHURCH. All right.

Congress later passed certain Federal laws permitting specific reservations to be made—military reservations, forest reservations, reservations for reclamation, recreation, and other general public uses. Wherever those reservations were made this had the effect of setting aside the waters arising on those reservations for such future use as the Federal Government might foresee for the purpose of the reservation. Is that not correct?

Mr. GOODWIN. Substantially, sir. I think there might be some quibble about the waters arising on the reservation. I would prefer to talk about these as the water rights appurtenant to the reservation.

Senator CHURCH. Let me use then, "appurtenant to the reservation."

Mr. GOODWIN. And to the extent not previously appropriated by private persons.

Senator CHURCH. And to the extent not previously appropriated by private persons. In other words, the reservation could not interfere with vested rights already acquired.

Mr. GOODWIN. Yes, sir.

Senator CHURCH. Now, your objection to this bill, as I take it, is that if we had a military reservation duly set up under Federal law on which the Federal Government has reserved the appurtenant water rights for national defense purposes, which reservation has in nowise interfered with the vested property rights that might theretofore have been acquired by water users, your objection to this bill is that it would have the effect of making that reservation no longer tenable, in that such reservation of water would hereafter be subject to the acquisition of water rights by private individuals under State law, unless the Federal Government were able, through procedures set up by separate State legislatures, to acquire a right for future uses, under the State laws.

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Mr. GOODWIN. Or unless the Federal Government condemned such water rights.

Senator CHURCH. Yes. But your statement here, with respect to condemnation, would be that the effect of this bill could cause the Federal Government to give up its reserved rights and then, later, if it had to use those reserved rights, it would have to buy them back from anyone who might have in the interim acquired a vested interest in the water.

Mr. GOODWIN. Yes, sir.

Senator CHURCH. Thank you.

I think that clarifies the testimony for me.

Senator Moss. Senator Jordan?

Senator JORDAN. Not at this time.

Senator Moss. We will now hear from Mr. Mason, Deputy General Counsel, Federal Power Commission.

STATEMENT OF JOHN C. MASON, DEPUTY GENERAL COUNSEL, FEDERAL POWER COMMISSION

Mr. MASON. Members of the committee, my recollection is that the report on S. 1275, previously submitted by the Commission, has not been incorporated in the record, and at this time I would suggest that that be done.

Senator Moss. I think it has, but to make sure, I will order that it be filed along with the other departmental reports.

Mr. MASON. I do not have a written statement, Mr. Chairman. However, I will make a very brief statement in view of the time limitations and also because of the nature of my appearance here.

As a matter of background, I have been attorney for the Federal Power Commission since 1941. Up until 1957 I was primarily engaged in hydroelectric licensing work. I happened to be the staff counsel on the *Pelton* case at the time it was before the Commission. I was on the brief in that case in both the circuit court and the Supreme Court. I also have some familiarity from my experience over the years with the *First Iowa* case. Both of these have come very prominently into this hearing.

I would like to point out from the Commission's report on page 4 that the Commission has made it very clear that its comment on this bill is limited to the effect of the bill upon the Federal Power Commission's licensing functions under the Federal Power Act although the Commission recognized that the proposed legislation would affect other interests of the Federal Government.

I came here principally with the idea that I might be of service to the committee in answering questions in that limited context. The Commission believes it has a primary interest in the effect this bill might have on the *Pelton* and the *First Iowa* doctrines and I thought I might be of some service in that connection.

I will, for the record, state the Commission's conclusion so that it might be readily available without reading the whole report. It is very short. I quote:

> On the whole, we see no need for S. 1275, and believe it may cause great harm. It would upset the existing balance of Federal and State authority in the development of water resources and would in large measure reverse the national policies embodied in the Federal Power Act. We respectfully urge that S. 1275 not be adopted.

I would like to state just as a general proposition, without in any way limiting the Commission's other objections to the bill, this one point. What the Commission is primarily concerned about in this bill is the claim of the sponsors of the bill, and I am going to quote from the Commission's report so that we get the precise language of the Commission. It appears on page 5:

> If paragraph (1) has the effect its sponsors claim for it and overturns the *Pelton Dam* decision, it places the Commission's ability to license project works on reserved lands in jeopardy, because it would restore the contention of the States that their approval is needed for the grant of a valid water power license on the reserved lands of the United States.

I might add one other fact that has come to my mind, and is not covered in the report, and that is that with respect to power reservations, the Federal Power Act presently provides a means for automatic withdrawal of public lands on the filing of an application, and it also contemplates that if any of the lands are not needed for power purposes the Commission has the responsibility of vacating that power withdrawal. That is done on a continuing basis where cases come to us, several hundred a year, where somebody else wants to make another use of the land and the Commission considers its power value, and if it has none it revokes the reservation. I might add that we do have the machinery there of accommodating other uses.

Senator Moss. Thank you, Mr. Mason, for your comments on the statement made by the Power Commission and in pointing out the objections made by that Commission.

Are there questions of Mr. Mason?

Senator KUCHEL. Yes, Mr. Chairman.

Senator Moss. Mr. Kuchel.

Senator KUCHEL. Mr. Mason, referring to the specific part of your statement which you read, let me say as one of the authors that there is nothing in this bill, and I think you agree with this, that refers specifically to the question of granting a valid water power license on reserved lands of the United States.

Is that not true?

Mr. MASON. I think that is true with respect to the specific language in the bill. It might be so interpreted but there is nothing that mentions this decision or there is nothing that specifically says what the sponsors claim for it.

Senator KUCHEL. So that on this particular question I think it is possible, or at least I would hope it would be possible, for the Federal Power Commission and this committee to find that this question which you raise can be laid at rest in what we seek to do.

Now you said to your very great credit when you were testifying on this problem on June 15, 1961, and I quote from page 76 of the hearings before this committee:

> I would think that one possible solution or one way to quiet the fears, the real legitimate fears, would be to enact a statute which would be similar to section 8 of the Reclamation Act, and section 27 of the Federal Power Act, which would say that the agents of the United States are to pay for any vested water right acquired under State law where any of those rights are interfered with in the construction of navigation or flood control projects unless Congress provides an exception in a specific law authorizing that project.

Are those your views today?

Mr. MASON. They are my personal views; whether they agree with the Commission or not is another question. I think if you read the report of the Commission very closely you will read the Commission has been specific on this point and stated that it considered it to be beyond the scope of its comment. I might add, too, Senator, since you raised the question, I would hope we could make some reference to the prior testimony because I think it is a very good discussion between the committee members and myself, and I take pride in that, over the effect of this bill on the *Pelton* and *First Iowa* situations. I think it would be very helpful to those who are trying to resolve this problem.

In that connection you may recall that on page 79 I suggested to the committee chairman and he adopted and incorporated in the record a statement along the lines you have just read which cites authority, and so on, for that proposition. I think it would be well to print my entire testimony.

Senator MOSS. Without objection it will be printed.

(The statement referred to follows:)

[Excerpt from hearings before the Committee on Interior and Insular Affairs, U.S. Senate, 87th Cong., 1st sess., on problems arising from relationships between the States and the Federal Government with respect to the development and control of water resources, June 15 and 16, 1961]

STATEMENT OF JOHN C. MASON, GENERAL COUNSEL, FEDERAL POWER COMMISSION

Mr. MASON. My name is John C. Mason. I am, at the present time, General Counsel of the Federal Power Commission.

Just as a matter of background I have been an attorney for the Federal Power Commission since 1941, and up until 1956 I was primarily engaged in hydroelectric licensing work.

I happened to be staff counsel on the *Pelton* case at the time it was before the Commission. I was on the brief in that case in both the circuit court and Supreme Court and also have some familiarity from my experience over the years with the *First Iowa* case.

I also have with me Mr. Joseph B. Hobbs, who is an attorney, who has also worked on licensing matters over a long period of years, not only since 1941 with the Commission, but with the Secretary of the Interior back in the days of PWA when the Federal Government was loaning money and building projects.

So both of us come here with long experience in the water field and we are coming here in the spirit of trying to be helpful.

We recognize what the problems are here and we have been living with them a long time and we would like to see them settled as well as anybody else.

The CHAIRMAN. Did you agree with the interpretation of the decision in the *First Iowa* case that a utility could, with impunity, violate the laws of the State of Iowa?

Mr. MASON. No, sir. Mr. Hobbs and I were commenting a moment ago when you read both the holding as to what the *Pelton* case stood for and what the *First Iowa* case stood for from the letter of Mr. Rankin.

We certainly are in complete agreement with that statement of what each case holds.

I could not state it any better. I think both of those are excellent statements of what those cases stand for.

To answer the question directly, certainly I do not think the *First Iowa* case stands for the proposition that the licensee can violate willy-nilly State law.

The CHAIRMAN. We had a hearing on the so-called Barrett bill several years ago in which Mr. Rankin came up to advise the Senate Committee on Interior and Insular Affairs as to his understanding of some of these Supreme Court decisions and his understanding of the law and what the Department of Justice was trying to do. In some ways it was rather a strange proceeding because he represented the then administration which was Republican, and almost his only defender here in the committee was the junior Senator from New Mexico who happens to be a Democrat. He and I got along pretty well. I thought he had done a very fine job explaining the Federal Government's position.

I do not say what he said was correct; I only say that what he said merged pretty well with the things that I had tried to understand and believed these cases to represent.

I am glad to find out you think that was somewhat the purpose of these cases as well.

Mr. MASON. Of course, we have reported on any number of bills—by we, I mean the Federal Power Commission—including the Barrett bill that you referred to.

I don't have any prepared statement because I assumed there would be questions and the position of the Federal Power Commission is pretty clear in the *Pelton* and *First Iowa* cases.

The law is pretty clear. I did not come here to discuss what the law is, but what might be the solution.

As we see the thing the problem is divided into two phases: One is, that if there is a vested State water right, somebody has a water right under State law, is he going to be paid for it as a result of either development authorized directly by Congress or a development authorized indirectly by Congress through a license under the Federal Power Act?

With respect to those licensed under the Federal Power Act, the law is very clear that the licensee must pay for any vested water rights he interferes with or takes over or uses.

Now, the other problem seems to me to be the one that Mr. Stanley spoke about. The real complaint he had is, who is going to control ultimately the federally authorized development? Are the States going to have authority to control it?

That is Mr. Stanley's position. Or is the Federal Government going to control federally authorized developments as the law presently is, as expressed in the *First Iowa* and *Pelton* cases.

Those are the two issues involved. As the Commission in reporting on past bills has pointed out, we have no problem of compensation.

In the *Pelton* case there were no State water rights being interfered with. As a matter of fact, the Commission required the licensee to build a reregulating dam downstream from the main power dam for the purpose of reregulating flows so that the natural unregulated flow of the river could be maintained notwithstanding power development.

That cost $4 or $5 million.

There were other measures taken. All the things that the State requested were granted. The only thing unresolved was who was going to have the final say as to who was going to ultimately issue the final license, the State of Oregon or the Federal Power Commission.

The Commission went to the Supreme Court in the *Pelton* case which interpreted the law to say that the final authority was delegated to the Federal Power Commission by Congress.

With respect to the question of who is going to control the comprehensive development of the national resources referred to in *First Iowa* and also the *Pelton* case, so far Congress has followed consistently for 40 years a comprehensive national plan for water development as expressed in the Federal Power Act. If that policy is to be continued in effect, then the Federal Government, through the Federal Power Commission, must have the final say-so or ultimate control as to comprehensive development.

Our experience over the years certainly has been that if ultimate control is vested in the States we then have 48 or 50 authorities which have the final say-so on national planning for water power development rather than a single one.

There are many projects where one side of the dam is in State A, the other side of the dam is in State B.

If one State has a law which would act to limit a dam to 25 feet and the other State said the dam had to be 100 feet high, under those circumstances there could not be comprehensive development of water resources.

To the Commission the problem is just as simple as that. The Commission has made an effort to stay out of the legal argument as to who owns what. It points out that this comprehensive plan of regulation, as expressed in the Federal Power Act, has been successfully operated for 40 years and urges that, whatever you do, don't disturb basically that system by putting control into the individual States.

I don't know how to state the problem any more simply than that, Mr. Chairman.

The CHAIRMAN. Quite obviously, though, there are States where a great many people worry.

Is there any way that the Federal Power Commission could suggest an amendment that might relieve their worries to some degree?

Mr. Stanley gave some suggestions as to what might be done. He would add a few words here and there to the bill.

Do you see any danger in adding those words?

Mr. MASON. Going back to the so-called administration bill, which we reported on and there has been much discussion about, I am giving my personal view now, but I think some lawyers will agree with me that have considered the problem, as far as the *Pelton* situation is concerned, it is my personal view that the administration bill would not really remedy the situation. It would not give the State what it wants because there is not applicable State law even if you pass the administration bill that would give the State of Oregon the right to appropriate water on reserved lands.

You have to get to the basic problem, the Desert Land Act.

There has not been a delegation by the Congress to the States to control water on reserved lands. That is the key to the whole problem.

Congress did, through the 1860 act, the 1866 act, the 1877 act, as I see it, enact laws to turn over to the States the right to administer water on public lands, but not reserved land, under the *Pelton* decision.

Now, in the absence of some change in that basic delegation, the administration act, the State law would not be applicable after you passed the administration bill. That is my own view.

The CHAIRMAN. Now, Mr. Stanley suggests that where the act refers to public lands, to add "including reserved lands."

You do not think that would really solve much of anything?

Mr. MASON. If you did that and nothing more, you would then have the effect of requiring the licensee to comply with State law when he wants to build a project on reserved lands. By amending that act the way Mr. Stanley suggests, a licensee constructing a project under Federal Power Commission authority on reserved lands of the United States, absent the interstate commerce authority, and solely the land authority, would be subject to the State laws.

That in effect would be a veto of Federal authority by the State if the State refused to issue a water permit.

The CHAIRMAN. Are there any questions?

Senator METCALF. No questions.

The CHAIRMAN. Mr. Hickey.

Senator HICKEY. Mr. Chairman, if I may:

Did I understand you to say you were the counsel in the *Pelton Dam* case?

Mr. MASON. Yes, sir; in the hearing before the examiner in Portland, Oreg., and before the Commission and I also was on brief in the Circuit Court of Appeals in the Ninth Circuit, also in the Supreme Court.

Senator HICKEY. Did I take it from your statement to the committee that in your view you interpreted the *Oregon* case in the very narrow area of applying only to reserved lands?

Mr. MASON. That is all that is involved. The Commission specifically made no finding on the navigability so that the commerce power was not involved.

It was strictly a land deal.

I might add that was done purposely. There was no evidence at all in the record with respect to navigability.

Whether the Deschutes River, the one involved, could be shown to be navigable or not, I do not know. Maybe it could, but there was no evidence introduced in the record relating to navigability so that the Commission, in deciding upon the application, was very careful to say it was assuming the river was not navigable.

The Commission made no finding one way or the other.

Senator HICKEY. You know it gave rise to great speculation as to what the effect would be.

Mr. MASON. We are aware of that.

Senator HICKEY. I think it is important for us to get in the record here that your concept, the concept of the agency you represent, is that this was a rather limited decision with regard to its effect and in no sense does it apply other than to reserved lands.

Mr. MASON. That is correct.

I think that the inability or failure or unwillingness of people to understand the *Pelton* case has caused a lot of controversy which we do not feel is justified.

In the Supreme Court decision the Court was careful to point out that there was no interference with any State water right here, with any vested right.

The natural flow of the stream is maintained throughout the 365 days of the year, 24 hours a day and there was not any claim of damage involved there.

The Court also pointed out the efforts that the Commission made with respect to the fish run, and its requiring the licensee to comply de facto with all reasonable requirements of the State.

The only thing that we could not agree on with the State of Oregon was who was going to have the veto power. The Supreme Court in the *Oregon* case points that out. I am reading from the Supreme Court decision, *Federal Power Commission* v. *State of Oregon*, 349 U.S. 435. I am going to read from page 445, and I quote:

"To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision, 328 U.S. 152, 177–179. No such duplication of authority is called for by the Act. The Court of Appeals in the instant case agrees. (211 F. 2d at 351.)"

I think the *Pelton* case is a decision in which the Court, itself, made every effort to limit its applicability.

Certainly in preparing the briefs and making arguments in the Court the Federal Power Commission was careful to limit its argument the extent that it could. We were concerned only with the authority granted under the Federal Power Act, not who owned the water and these other problems that have come up today.

Senator HICKEY. I think what you have said here is in line with the information given me earlier this year as to what the Farm Bureau people believe the Pelton Dam to be limited to, to a very limited field, and that anything that this committee might do in the way of being beneficial to water users in the arid West it would have to do in the view that the *Pelton* case was a very limited case.

I was very pleased to listen to your analysis of the problem.

I have about three questions. I take it that your view of the establishment of ownership of water in the Federal Government arises from the instruments by which the lands were ceded to the United States, whether it be treaties, annexations, purchase or what, that those property rights that are claimed by the Federal Government stem from the acquisition or ceding of the land. Is that correct?

Mr. MASON. That is correct. I would like to add this comment. You used the term "ownership of water." That is a term that is used very loosely. Actually it is awfully hard to conceive of anybody owning flowing water.

What we are talking about is right of use.

Senator HICKEY. Let us be really articulate then and instead of saying "ownership," say the recognition of property rights in the water or to the water. That, then, would be your basic understanding of the basis of the Government claim?

Mr. MASON. That is my understanding.

Senator HICKEY. Starting off there, do you understand that the Government has in some instances and may in other instances divest itself of this particular property value?

Mr. MASON. That is correct. In that connection, to take an example of that, the Desert Land Act——

Senator HICKEY. That was my next question. Do you believe then that the Desert Land Act you have referred to was a legal means by which the Congress of the United States divested the Federal Government of this particular property right acquired by virtue of annexation, one of the ceding processes?

Mr. MASON. I would not quite state it that way. I would say that the Desert Land Act is the means through which Congress set up the procedure which permits the States to administer use of water on public lands, but I believe that the law is clear that up until the time that someone acquires unappropriated water through State procedures that the water on the public land, not having vested in any private person, may still be withdrawn from that procedure by the Federal Government. That is the reserved land theory.

I believe Mr. Stanley takes the position that the Desert Land Act had the effect of conveying to the States all waters on public lands of the United States.

I do not take that view. I do not think the *Portland Cement* case stands for that. The Congress said we are going to recognize water rights acquired by private individuals through local customs and laws and once they are acquired

we will recognize them but until the party acquires them the Federal Government retains that right.

That is what we are talking about.

Senator HICKEY. In the process of admitting States to the Union, where a State constitution provides at the time it is accepted by the Congress of the United States that the State in and of itself is the owner of all the water within its boundaries, would you say that acceptance of such a constitution by the Congress of the United States prior to the admission of the State would be a divesting of Federal rights by the Congress?

Mr. MASON. In answer to that, I would like to say I am glad I was here this morning and heard the question before. I really have not given thought to that in any of the cases we have had.

I would not be helpful here to guess at an opinion. I do not have an opinion on that.

Senator HICKEY. My State has that peculiar provision.

I think probably as a lawyer you recognize the possibility that such an argument is valid.

Mr. MASON. I certainly recognize the argument is there. Whether it is valid, I have no opinion. I do not know any case in point. I am afraid I would not be much help to you on that because I just do not know anything about it.

Senator HICKEY. Now the concluding question: if we are to effect some legislation, having gone on the premise that the Federal Government can divest itself of its water rights, is it in your opinion that this committee should determine a way or a means by which we could write into the Federal law an additional manner in which the Government could divest itself of these rights, such as was done under the Homestead Acts and other legislation you mentioned? Could that remedy the problem or quiet the fears of people?

Mr. MASON. I would think that one possible solution or one way to quiet the fears, the real legitimate fears, would be to enact a statute which would be similar to section 8 of the Reclamation Act, and section 27 of the Federal Power Act, which would say that the agents of the United States are to pay for any vested water right acquired under State law where any of those rights are interfered with in the construction of navigation or flood control projects unless Congress provides an exception in a specific law authorizing that project.

Those are the only projects left that I know anything about that people are not 100 percent compensated when their water rights are taken.

I am referring to the *Twin City* case (350 U.S. 222) which followed *Chandler-Dunbar* (229 U.S. 53) and distinguished *Niagara Mohawk* (347 U.S. 239). In *Niagara Mohawk* we took the position, consistent with *Chandler-Dunbar*, that the Federal Power Act exercised that navigation servitude and gave the licensee the right to use water rights without paying for them—that is, water rights acquired under State law.

We took the position that those water rights were not good unless we had concurrent Federal rights.

The law is clear today that a licensee cannot take advantage of the navigation servitude in building a project under the Federal Power Act.

If he interferes with a vested right under State law, even though it is on a navigable stream, a licensee has to pay for it.

The Federal Government could apply the same theory across the board to all Federal projects. You could then give assurance that any rights acquired under State law are subject to compensation if the Federal Government interferes with them in any way.

To me that would remove all of this fear of no compensation for vested State water rights.

That may not get to the next part of your problem: What do you do with controlling the use of water on reserved lands? Of course, with respect to power when you use water for power you do not consume the water. There is not anything necessarily or inherently inconsistent between the construction and operation and maintenance of a water power project and the use of the same water upstream and down for irrigation, municipal water use, or any other consumptive use. As a matter of fact, the natural result of most development is that you store floodwater that ordinarily would go to waste and augment low flows during summer months and you automatically have more water downstream for irrigation and other purposes. That is true of the Government's Kern River flood control project in southern California, and many others.

One of the purposes besides flood control is to augment low flows and increase irrigation use downstream.

Senator HICKEY. By virtue of those retaining dams?

Mr. MASON. Yes, sir; by virtue of storing floodwater and then releasing them over the low-flow periods to raise your low flows.

So, with respect to the Federal Power Act, not making any consumptive use of water, we do not have these direct conflicts that occur in the reclamation projects and as occurred in the Friant Dam situation that was talked about this morning.

We really do not see any problem here so far as the Federal Power Act is concerned. We do see it with respect to other types of projects for consumption use—namely, irrigation projects—where the Government is going to use the water or the private parties are going to use it. There you have a direct conflict.

Senator HICKEY. But you recognize that in many of the statutes now on the books, the Government recognizes the State control and right to administer the waters?

Mr. MASON. Yes, sir. As part and parcel of that they recognize the fact that the Congress provided that you are going to get paid for these as in the *Gerlach* case discussed this morning. That was the case where the Bureau of Reclamation under its law thought it should pay for interference with downstream irrigation use, downstream of Friant Dam. Really what they are doing was depriving a man of the right of natural floodflows. The Bureau put the dam there and no more floodwaters flowed over the lands.

The Justice Department came into the case and asserted the navigation servitude, contending that since Congress had authorized the dam for navigation and reclamation, the Federal Government should not pay for such loss of floodwaters.

However, the Supreme Court said that the Federal Government should pay for the water rights which were taken or interfered with that belonged to private owners.

Congress could say the same thing with respect to navigation servitude if it wanted to.

Senator HICKEY. Thank you very much.

The CHAIRMAN. Before you leave now, because this question of the State constitution came up, I asked to have put in a copy of the administration bill that the Department sent to us. When Senator O'Mahoney got that he added to it. He made it Senate 851 and introduced it as Senate 851 but he added a clause. That clause read:

"Nor shall it affect the right of any State to exercise jurisdiction over the water rights conferred by the act admitting such State into the Union or such State's constitution as accepted and ratified by such act of admission."

The Department of Justice commented on the bill and said:

"With this clause contained in the bill this Department would have to oppose it in its present form. There are substantial reasons why we cannot agree as a matter of law that 'any State' has had 'conferred' upon it 'the right * * * to exercise jurisdiction over water rights,' in the manner suggested by the language of the clause quoted. However, we do not press our views in this respect this time further than to suggest very practical reasons why we believe your committee will wish to recommend amendment of the bill by deleting the clause in question.

"If the effect of a State's admission to the Union based on language in the act of admission or its own constitution, has been such as that implied by the clause in question it is fait accompli, and any legislation on the subject is superfluous. But if, on the other hand, the effect of a State's admission was not such that that is so implied, then the clause in question cannot make it so. Furthermore, the mentioned clause deals with an issue which is not germane to the rest of the bill and its inclusion could very possibly cause confusion and misunderstanding in the interpretation and application of any such legislation as a whole. Finally, the clause referred to could not, in my view, have any effect of application in more than 3, more likely only 2, of the 17 so-called reclamation States. We, therefore, join in the recommendation made by the Department of the Interior that this clause be eliminated."

I read that into the record just to show that Senator O'Mahoney, working as diligently as he could in trying to bring about a peaceful solution to this whole matter, ran straight into a stone wall again.

That is one of the problems we have steadily when we try to get some legislation passed.

Mr. MASON. Again in the Commission's reports on those bills I do not recall that we discussed those issues. I do not think we would because interpretation of a State's act of admission is outside of the Federal Power Commission's area, so that this is the first time I had heard that.

I have no comment to offer.

In connection with the question by Senator Hickey, I have a one-page statement here that puts down rather briefly, with citations of cases, a possible enactment to require compensation for State water rights in connection with Federal flood control and navigation projects.

If it will be of any value, I will be glad to submit it for the record. It will give you the cases and citations and will explain with some background what is behind our suggestion.

The CHAIRMAN. We shall be glad to enter that in the record.

(The statement referred to follows:)

"By the exercise of the dominant power of the Federal Government with respect to navigational servitude, Congress may assert its privilege to appropriate, without compensation, those conflicting private property rights which are not protected by the fifth amendment. *United States* v. *Twin City Power Co.* (350 U.S. 222, 224–225). Compare, *United States* v. *Virginia Electric Co.* (365 U.S. 624). However, Congress did not assert that privilege in the Federal Power Act. Water rights, like other property rights taken by the licensee, are compensable under the Federal Power Act. *Federal Power Commission* v. *Niagara Mohawk Power Corp.* (347 U.S. 239, 251). See also, *United States* v. *Gerlach Live Stock Co.* (339 U.S. 725). Compare, *United States* v. *Grand River Dam Authority* (363 U.S. 229). The right to acquire or condemn property rights necessary for a licensed project and, of course, upon the payment of just compensation for them, is granted by section 21 of the Federal Power Act (16 U.S.C. 814). *Federal Power Commission* v. *Tuscarora Indian Nation* (362 U.S. 99, 113). See also, *City of Tacoma* v. *Taxpayers* (357 U.S. 320).

"Consequently, if Congress so desires it could solve the problem by enacting a simple bill merely stating that private property rights subject to the navigational servitude, including water rights, which are in conflict with any development hereafter authorized by Congress shall not be acquired without payment of just compensation therefor, unless the legislation authorizing such development expressly provides for the taking of such conflicting private property without compensation."

The CHAIRMAN. Does that complete your statement, Mr. Mason?

Mr. MASON. I want to add one thought here. This statement refers to those water rights that are not protected by the fifth amendment. If they were protected by the fifth amendment, we would not need this.

The CHAIRMAN. Thank you very much, and thank you for your many courtesies to this committee.

Senator Moss. Thank you, Mr. Mason.

Are there other questions at this time?

Senator ANDERSON. I submit at this time a letter from the Governor of New Mexico in relation to this bill. I find myself a little bit in contradiction with some of the things he says in the letter, but nonetheless, I would like to put it in the record.

If there is no objection from the Senator from California I would like to put in the record a statement which I have received from his State in opposition to the bill. My friendship for the Senator from California is valued, so I will not put it in if he objects to it.

Senator KUCHEL. To the contrary, I think it should be put in. If it is to be put in at this particular point in the record, permit me, Mr. Chairman, to observe that a part of the wording in the letter of opposition deals with this problem of unjust enrichment and acreage limitation. So I simply repeat here what I stated earlier, this bill has nothing to do with that subject.

In order to allay even the most outlandish and unreasonable apprehension on that score, I would wish to write in a specific statement in this bill to demonstrate that.

Senator Moss. Those statements may be placed in the record.
(The documents referred to follow:)

STATE OF NEW MEXICO,
OFFICE OF THE GOVERNOR,
Santa Fe, February 14, 1964.

Hon. CLINTON P. ANDERSON,
U.S. Senate, New Senate Office Building,
Washington, D.C.

DEAR SENATOR ANDERSON: I am advised that the Irrigation and Reclamation Subcommittee of the Senate Interior and Insular Affairs Committee will hold hearings on S. 1275 (a bill to clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams) on March 10 and 11.

It is my view that the decision of the U.S. Supreme Court in *Arizona* v. *California et al.*, makes it imperative that legislation such as S. 1275 be enacted. In this decision the Supreme Court held that in withdrawing public lands for such purposes as national recreation areas, national parks, and national forests the United States intended to reserve water sufficient for the future requirements of these Federal establishments. In New Mexico the greatest impact of this part of the Court's decision would result from its application to the national forests.

The decision gives the Forest Service the right to take at any time whatever quantity of water may be necessary for the purposes of the forest to the detriment of, and without compensation to, those who put the waters arising on the forests to beneficial use after the time the forest was created.

As you know, a large proportion of the water that we use in New Mexico arises on the national forests and most of our streams are now fully appropriated. Much of this water was put to use downstream long before the law authorizing the creation of national forests became effective. (The act of March 3, 1891; U.S. Stats. at Large, 51st Cong. 2d sess., ch. 561, vol. 26.) But many water rights in New Mexico were initiated under territorial or State law after public lands were withdrawn for forest purposes and these rights could be adversely affected if the Forest Service exercised the right conferred by the Supreme Court.

The act of June 4, 1897 (U.S. Stat. L., 55th Cong., 1st sess., ch. 2, vol. 30) provides that "no public forest reservation shall be established except to improve and protect the forest within the reservation, or *for the purpose of securing favorable conditions of water flows*, and to furnish a continuous supply of timber for the use of necessities of the citizens, of the United States;" and that, "all waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, *under the law of the State* wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder." [Emphasis supplied.]

The reservation of an indefinite amount of the water running off the national forests for an indefinite time would discourage the people from developing and using these waters. The above-quoted language suggests to me that the Congress wanted to encourage the use of waters arising in the forests and did not intend to reserve any except the amounts being used when the forests were established. To the best of my knowledge the Forest Service has never appropriated water for forest purposes to the detriment of any water right in New Mexico initiated before or after the creation of a national forest on the watershed involved. The Forest Service has always followed the procedures required by State law in the appropriation and use of water in New Mexico. I am confident that the officials of the Forest Service have no desire now to exercise the right described by the Supreme Court to the injury of any water user in New Mexico.

However, unless and until the Congress makes it clear that it did not intend that the establishment of a national forest would reserve water for the purposes of the forest, the Forest Service must either exercise its rights under the "reservation theory" announced by the Supreme Court, without regard to the injury to water users, or forego the development and use of water for the purposes of the forest. Neither of these alternatives is desirable or in the interests of the State or Federal Governments, and the dilemma can be avoided by the enactment of S. 1275, or similar legislation.

I would appreciate it if you will have this letter made a part of the record of the hearings on S. 1275.

Sincerely,

JACK M. CAMPBELL, *Governor.*

STATEMENT OF PAUL S. TAYLOR, BERKELEY, CALIF.

My name is Paul S. Taylor and I reside in Berkeley, Calif. Between 1943 and 1952 I served as consultant on western water development in the Department of the Interior, and since then have published a half dozen articles in law journals on the excess land provisions of Federal reclamation law. In 1958 I appeared personally before this Committee on Interior and Insular Affairs to give testimony on S. 1425, S. 2541 and S. 3448. The present statement is submitted on my individual initiative and responsibility, in opposition to S. 1275 introduced by Senator Thomas H. Kuchel.

It is curious that a proposal to require Federal recognition of State water rights should be advanced at this time, by a friend of western water development. A similar idea was advanced by friends of western development long ago, then abandoned in the face of realities that are no less real today.

The movement of western citizens for western water development that began in the nineties and culminated in the Federal Reclamation Act of 1902 started with a proposal pointing in the same general direction as the Kuchel bill, S. 1275. The very first convention resolved in 1891 at Salt Lake City that the role of the United States in the West should be diminished and that of the several Western States enhanced. This appears to be the aim of S. 1275. The resolution of September 17 of that year proposed that the Federal Government should grant to the States "all lands now a part of the public domain within such States and territories * * * for the purpose of developing irrigation, to render the lands now arid, fertile and capable of supporting a population."

Soon these western supporters of western development abandoned that approach, as they realized the effective way to advance western water development was to enlarge the role of the U.S. Government, not to diminish it.

The participation of the U.S. Government in western water development is recognized today by everyone in the West as highly necessary, for financial reasons if no other. Even those who oppose Federal antimonopoly policy (the 160-acre water limitation) desire the help of Federal money and profess gratitude for it. S. 1275 is now hailed as a bill for "Removing objections to * * * Federal projects." Have we before the Congress, in S. 1275, one more attempt to preserve the flow of Federal money to the West while obstructing the Federal policy of distributing waters widely—of insuring, in the words of the U.S. Supreme Court, that "benefits may be distributed in accordance with the greatest good to the greatest number of individuals"? (*Ivanhoe* v. *McCracken*, 357 U.S. at 297.)

The committee will note that S. 1275 includes no mention of acreage limitation, and no mention of antimonopoly policy of water distribution. I find no mention of either in Senator Kuchel's statement in the Congressional Record on February 28, 1964, pages 3805–3807. Should the committee conclude that S. 1275 has nothing to do with Federal policy, but only with protection of property rights in water grounded in State law against injury inflicted by the Federal Government? Such a conclusion, in my opinion, would be both shortsighted and untrue. Omission of any mention of acreage limitation in S. 1275 should not be interpreted to mean that the bill overlooks acreage limitation as an expression of antimonopoly policy.

State water right law can determine the distribution—and the extent of the monopolization—of waters within a State, without even mentioning acreage limitation, but merely the law of "property rights," with which the statement inserted in the Record by Senator Kuchel on February 28 (p. 3806, col. 1) says that S. 1275 is "mainly" concerned.

The use of States rights against Federal policy was well known to the original Conservationists. Gifford Pinchot said: "The most specious and least expected argument of the power people was the old States rights argument, dead as Hector since the Civil War. They hang on the fact that water rights belonged to the States, which was true enough, and they have clung to it ever since. The special interests find it far easier to control a State legislature than the Congress of the United States." (Breaking New Ground, p. 339.)

Founders of reclamation were not misled into a false belief that the State governments were better protectors of public policy than the States. They knew the record. When the American Federation of Labor endorsed Federal reclamation in 1901 its resolution recited "that we are unalterably opposed to the cession, by sale or otherwise, of such lands to corporations or speculators, or to the several State governments, and equally to the donation of the proceeds to the States, every such course having heretofore resulted in sales to monopolists, with consequent grave injuries to the rights of actual settlers and producers."

From the record of California an example or two may be cited. As recently as 1957 the California Supreme Court, ostensibly concerned with protection of State property rights in water, found that acreage limitation was prohibited by State law. (*Ivanhoe Irr. Dist.* v. *All Parties*, 47 Cal. 2d 597.) It required a decision of the U.S. Supreme Court to sustain acreage limitation.

Long before, the Supreme Court of the same State of California had also wrestled with State water rights, in the famous case of *Lux* v. *Haggin* (69 Cal. 255) in 1886. The court decided, after long deliberation, to support riparian water rights. It spoke of its search for a public water policy to "secure the greatest good to the greatest number," and gave warning of "a monopoly of all the waters of the State by comparatively few individuals * * * controlling aggregated capital, who could either apply the water to purposes useful to themselves, or sell it to those from whom they had taken it away, as well as to others." Notwithstanding the court's awareness of the desirability of distributing the use of waters widely, and avoiding monopoly, its decision was made in terms of property rights, and the effect was a concentration of ownership and control of the flow of the Kern River, a water monopoly without parallel in the country.

The concern of S. 1275 is with property rights in water, State property rights, and their protection against Federal intrusion, without compensation, or it is so stated. The fact of the matter is, that the record of the Federal Government for providing compensation for water rights taken in pursuance of a Federal project is very good, and has been noted specifically and with evident approval, by the U.S. Supreme Court. (*United States* v. *Gerlach*, 339 U.S. 725, 734, 735.) Is there any valid ground for believing that an individual's rights, property or other, are likely to be protected better by a State than by the Government of the United States? The entire record of Federal reclamation for two generations is the enhancement of individual water rights, under a Federal statute that already requires the Secretary of Interior to respect State water rights. (43 U.S.C. 391, sec. 8.)

Suspicion that policy is in jeopardy from S. 1275 is strengthened by the willingness of the author to set aside the rule, in respect to reserved or withdrawn Federal lands, that water is appurtenant to land. (Congressional Record, Feb. 28, 1964, p. 3806, col. 1.)

The founders of reclamation regarded "appurtenance" as one of the most essential rules to provide protection against monopoly and speculation, and Federal reclamation law requires "appurtenance." The father of reclamation, George H. Maxwell, told the irrigation Congress in 1903: "Speculation and monopoly in these lands or in the water must be rigidly guarded against * * * The ownership of land and water must be united. Speculation in water as a commodity must be made impossible." S. 1275 proposes a separation of ownership, at least in certain important situations, of water from land, by disclaiming "appurtenance."

How far can the effects of S. 1275 go? That is not easy to answer, but they can go far. A contract, approved as to form by the Interior Department and now awaiting execution in Sacramento, offers to recognize around 10 acre-feet of water per acre as the water right of Sacramento River diverters in the Glenn-Colusa Irrigation District. This allowance is close to four times the normal water duty on other parts of the Central Valley project. Would S. 1275, requiring recognition of State water rights as property rights, result in making this district a merchant to other water users of any surplus it might not require in any year? It is the Federal Central Valley project that has firmed up the supply of water for these Sacramento River diverters. Why turn a water service entitlement, as is customary, into a property right, and salable like a commodity? And why impair the navigational water authority of the Federal Government? Was S. 1275 drafted with the Sacramento and San Joaquin Rivers in mind? And if so, why?

Doubtless further analysis of S. 1275 would disclose other possibilities, if not probabilities and certainties, of injury to a national public policy favorable

to widespread distribution of water from public projects, the policy in accord with the greatest good to the greatest number of individuals. The above examples will suffice to indicate the grounds on which I apprehend nothing but injury to public policy from S. 1275.

The title of Senator Kuchel's remarks in the Record on February 28, 1964, is interesting, perhaps revealing. It reads: "Removing Objections to Regional Water Planning and Federal Projects." Whose objections? Everybody in California wants Federal money, but there are some who object to Federal policy.

The State of California is an immense beneficiary of Federal reclamation, and its future depends on regional planning and on more Federal water projects. The California State comments on the latest Pacific Southwest water plan, transmitted by Governor Brown on December 3, 1963, say specifically that "the solution of regional water problems is beyond the financial ability of the individual areas and States and (we) endorse Federal implementation * * *."

And even here, the question of acreage limitation arises once more, the words unspoken, but the ghost unmistakable. One of the State's recommendations is: "14. Federal participation in enlargement of the California aqueduct must be restricted to financing * * *" i.e., no acreage limitations. Are the States really the safest protectors of individual water rights, as S. 1275 appears to imply?

The evidence that the State of California, and perhaps other States, is less than stanch as preserver of the antimonopoly conservation policies of Theodore Roosevelt and Gifford Pinchot, should not obscure the fact that even the Federal Government is sometimes weak, too. According to former Senator William F. Knowland's Oakland Tribune of February 16, 1964, it appears that there is some sort of understanding between the Interior Department and the State of California, that the new Udall Pacific Southwest water plan will make use of the State to avoid Federal acreage limitation law. Point 10 is this:

"10. Making the State of Calfornia the 'marketing agency' for many Federal water projects, thus evading the 160-acre limitation which requires 'Federal water' buyers to break up huge farms into 'family farm' plots."

A much better viewpoint on public policy was expressed on February 3, 1964, in New Orleans by U.S. Commissioner of Reclamation Floyd E. Dominy, when he told the Mississippi Valley Association:

"I am proud of what Reclamation has done in its 62 years of history as a builder of the West. I am proud that our basic principles remain essentially unchanged in concept. * * * We are today, as we always have been, fully committed to the conviction that the family farm is a national asset of fundamental importance."

This statement could well serve as the guide to policy and administration of law, for both Federal and State officials, and for executive, legislative, and judicial branches of government. It is law, and should be preserved against corroding encroachments, whether these are proposed vocally and in so many words, or silently and without warning.

Senator Moss. Now, I do thank all of you gentlemen who have come here and testified. I think you made your position very clear. I ask Mr. Clark and Mr. Barry that they return tomorrow. You others are invited if you are able to return but particularly we would like Mr. Clark and Mr. Barry, because I am certain we are going to have additional questions to ask of those two and the others if they are able to attend. This will be all for this morning. Thank you all very much.

Now we have come to 12 o'clock and the word is that there will be objection to our sitting beyond this time. The Senate just convened. We have arrived at the point on the witness list where Attorney General Mosk and Attorney General Raper will be our next witnesses. In order that we may get on as far as possible, without testimony tomorrow, we will convene sharply at 9 o'clock in the morning, which will give us at least 3 hours. If it is necessary, we will try to find some time to go over even beyond tomorrow because we are anxious to develop a full and complete record so that we may wrestle with this problem and do justice to it.

Senator SIMPSON. Mr. Chairman, I would like to make a request. I have to appear before the Agriculture Committee on the beef import tomorrow at 10 a.m. I have here our attorney general from Wyoming, John Raper. I wonder if those gentlemen would be permitted to testify at the outset rather than have to wait while the local boys are questioned at some length?

Senator Moss. Indeed. I intend to call on both Attorney General Mosk and Attorney General Raper in the morning and perhaps at that point, they having in effect stated the position of the States which is in controversy with the Federal position, we may then ask Mr. Clark and Mr. Barry to come forward and perhaps we can question them from the bench at that time.

Senator SIMPSON. Thank you.

Senator CHURCH. Mr. Chairman, Congressman Harding, of Idaho, has come into the room and I think he has a statement which he would like to make, or submit. Could we accommodate him?

Senator Moss. We could. We called you earlier, Congressman. We are glad to have you here now.

STATEMENT OF HON. RALPH R. HARDING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Congressman HARDING. Mr. Chairman, we have been busy with the farm bill over in my committee, but I would just like to ask unanimous consent to submit a statement for the record. As you know, there is nothing more important in my district of Idaho than water, and water rights, and I want to compliment you and your colleagues for introducing this fine bill and for holding hearings on it, and I want to submit a statement in support of it.

Senator Moss. That has already been placed in the record as though it was delivered in full, Congressman Harding.

I ordered that that be done earlier.

Thank you very much for your attendance.

Senator Anderson.

Senator ANDERSON. Mr. Chairman, I have generally been a bad boy in opposing this type of legislation. As you know, I had something to say about the Barrett bill once or twice. It accidentally got out of the committee one time but, thank God, it never got beyond that. I thank the Congressman.

At a subsequent time I enjoyed the appearance of Mr. Rankin, who was Mr. Eisenhower's representative and who did a fine job of analyzing the Barrett bill in the hope of keeping it in the committee so it did not get out. I probably will have something to say on this bill. Unfortunately, this morning I have been in a meeting to place an electronic laboratory in Boston or some other seaport and——

Senator KUCHEL. How about New Mexico?

Senator ANDERSON. We could not quite sell it; maybe California.

Tomorrow I may be at the same meeting and Senator Simpson is going to beef imports, I remember that. I will try to be here at 9 o'clock. I have had a bad week. If I do not make it, I would like to ask permission to submit a statement which will be somewhat—I don't know how the testimony has been this time, I do not know what Mr. Clark's testimony was, but heretofore the Department of Justice has been against this.

Senator KUCHEL. I regret that is the system.

Senator, do not close your eyes to this. Keep an open mind, listen tomorrow to the attorney general of California. With that fine sense of justice and of the public interest that you have motivating your actions, do not say "No" now.

Senator ANDERSON. I will hold off a while before I say "No," but I appreciate that last suggestion by the Senator from California.

Senator Moss. Certainly you will have permission to file the statement, Senator, if you want to do it tomorrow.

We are now recessed until 9 o'clock tomorrow morning.

(Whereupon, at 11:50 a.m., the committee was recessed, to be reconvened at 9 a.m., Wednesday, March 11, 1964.)

FEDERAL-STATE WATER RIGHTS

WEDNESDAY, MARCH 11, 1964

U.S. SENATE,
SUBCOMMITTEE ON IRRIGATION AND RECLAMATION
OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to call, at 9 a.m., in room 3110, New Senate Office Building, Senator Frank E. Moss (chairman of the subcommittee) presiding.

Present: Senators Frank E. Moss (Utah), Clinton P. Anderson (New Mexico), Frank Church (Idaho), Thomas H. Kuchel (California), Gordon Allott (Colorado), Len B. Jordan (Idaho), and Milward L. Simpson (Wyoming).

Also present: Stewart French, committee counsel; Roy M. Whitacre, professional staff member, and Richard D. Andrews, minority counsel.

Senator Moss. The subcommittee will come to order.

We have before us the problem of time, the same one we had yesterday. I would like to move along as promptly as we can.

We do have a number of out-of-city witnesses, some that have come very long distances. We want to accommodate those people who have come a long ways and who may not have planned to stay any longer than today since the hearings were announced for only 2 days. We will try to press on rapidly, much as we did yesterday.

I had asked the two Government witnesses, Mr. Clark and Mr. Barry, to come back today, but on viewing this long witness list, we may not be able to take up that questioning.

Therefore, I would excuse them today and simply suggest that at a later time the committee will sit and we will then have time perhaps for the questioning that we undoubtedly will want to make of these witnesses.

They, of course, are perfectly welcome to stay and may very well want to listen to the testimony of the attorneys general who are going to be on before us today and other witnesses, but it does look doubtful that we would get to that questioning period that we had anticipated today. We just have too many people to hear and too much to get into this record first.

You are free to leave if you care to do so. You are welcome to stay if you can do that.

We are going to call first on Attorney General Mosk, of California. I think Senator Kuchel would like to introduce the attorney general.

Senator KUCHEL. Yes, indeed, I would.

Mr. Chairman, I am delighted to be able to introduce a friend and a constituent of mine. The attorney general of California has been active in the public service in my State in varied capacities for most

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of his adult life. He served as a legal assistant to the Governor of California many years ago when I was in the legislature.

He had a long career on the bench and he comes today as the chief legal officer for the State of California intensely interested in a solution to a problem which has vexed the people of our State and the West for a long period of time.

I am particularly delighted to be here this morning to introduce you, Stanley, and to present you to the members of the committee for what I know will be a great bit of professional assistance to us in finding the truth and proceeding, I hope, to pass constructive legislation.

STATEMENT OF HON. STANLEY MOSK, ATTORNEY GENERAL OF CALIFORNIA, REPRESENTING THE ASSOCIATION OF WESTERN ATTORNEYS GENERAL

Mr. MOSK. Thank you very much, Senator Kuchel.

Senator Moss and members of the committee, at my right is Assistant Attorney General Charles Corker of the State of California who will be glad to help answer any questions after I make a brief presentation.

I believe copies of my statement have been given to the committee and I am going to shorten my testimony accordingly in the interest of conserving time, Senator Moss.

Senator Moss. You may do so. The entire statement will be in the record and then you may highlight such parts of it as you would like to have.

Mr. MOSK. Very well.

(The statement referred to follows:)

STATEMENT OF STANLEY MOSK, ATTORNEY GENERAL OF CALIFORNIA

My statement in support of S. 1275 will emphasize two things. First, I wish to point up the importance of section 1, paragraph 1, which rejects the so-called reservation theory of Federal water rights. Second, I wish to make clear that the bill will not in any manner interfere with any legitimate interest or activity of the Federal Government, nor would it impede regional planning of water resource development. With both of those general concepts I am basically sympathetic.

In emphasizing the necessity that Congress reject the reservation theory, I do not suggest that other portions of the bill are unimportant. On May 3, I wrote to the members of the California congressional delegation urging them to support S. 1275, directing attention to each of its major purposes. I have appended that letter to this statement in order to make clear why each purpose of the bill is important. However, no purpose approaches in importance the rejection by Congress of the reservation theory.

Let me begin by describing the reservation theory which S. 1275 would reject. The reservation theory is in two parts. First is the claim that the United States owned all the land and water in the Western States when the territories were acquired from France, Spain, and Mexico.[1] The Federal Government con-

[1] Mr. Justice Douglas in his opinion for the Supreme Court in *Nebraska* v. *Wyoming* (325 U.S. 589, 611 (1945)), summarized the U.S. contention this way: "The United States claims that it owns all the unappropriated water in the river. It argues that it owned the then unappropriated water at the time it acquired water rights by appropriation for the North Platte project and the Kendrick project. Its basic rights are therefore said to derive not from appropriation but from its underlying ownership which entitles it to an apportionment in this suit free from State control. The argument is that the United States acquired the original ownership of all rights in the water as well as the lands in the North Platte Basin by cessions from France, Spain, and Mexico in 1803, 1819, and 1848, and by agreement with Texas in 1850. It says it still owns those rights in water to whatever extent it has not disposed of them. * * *"

The Court held that the case was controlled by section 8 of the Reclamation Act of 1902, which directs the United States to acquire water rights for Federal reclamation projects under State law. Hence, the Court avoided passing on the U.S. claim.

tinues to own both the land and the water. The United States parts with its title to lands when it issues patents under the homestead laws, the Desert Land Act, and various other Federal statutes. The United States parts with the waters when, pursuant to various Federal statutes beginning with the act of 1866, appropriators of water acquire a water right under State laws or customs.[2]

The second part of the reservation theory is that when the United States withdraws or reserves lands from the public domain for various Federal purposes—such as national forests, national parks, national monuments, defense establishments—the withdrawn or reserved lands are removed from operation of the Federal statutes which permit appropriation of the unappropriated water. The claimed effect of the withdrawal or reservation of a national forest is that the water right appurtenant to the forest land withdrawn continues in Federal ownership. Appropriations of water under State law initiated after creation of the national forest are asserted to be invalid as against the Federal water right appurtenant to the Federal lands incorporated in the national forest.

This bill would reject the Federal reservation theory. It says in its opening provision:

"The withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter made, shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation."

It is a matter of urgent importance that Congress now speak those 40 words just quoted. I shall state why.

First, the reservation theory is unsound in concept. It confuses jurisdiction with proprietary ownership. When the western territories were acquired, and before they were incorporated in States, the Federal Government had jurisdiction—the authority to make laws—and it had proprietary ownership of all the lands not then in private ownership. Realistically the United States did not have proprietary ownership of unappropriated water appurtenant to the federally owned lands because no one should own unappropriated water.

The heart of the reservation theory is the concept of ownership of a water right based on ownership of land adjacent to a stream. That concept was and is unsuited to the arid West. In the West, there is usually not enough water to supply the needs of all riparian land adjacent to a western stream. Often the available water is needed far more acutely in locations distant from the stream to which a riparian right does not extend. No one can say how much water attaches to a riparian right, and riparian law does not protect established water uses against the demands of new projects.

It is true that a few western courts, including those of California,[3] upheld riparian rights. However, I am convinced they would not have done so if 19th century foresight had been equal to 20th century hindsight. Nearly all changes in the laws of Western States have moved in a single direction—restriction or elimination of the riparian right. In California, riparian rights were limited in 1928 by constitutional amendment.[4]

Second, the reservation theory is unsound in result. Result is more important than concept. We do not come to Congress with a request to rewrite a theory. The result of the reservation theory is satisfactory to no one. No one knows and no one can find out how much water is appurtenant to the various Federal reservations which the United States has withdrawn from the public domain. We have asked Department of Justice attorneys and they cannot tell us. They don't know either.

The national forests, all withdrawn public lands, are the source of most of the runoff in large parts of the West. If, as I would contend, any water right appurtenant to a national forest is limited to the small quantities required for Forest Service purposes, no one cares very much. We want the forest ranger to be secure in his domestic supply, and we take a liberal view of the requirements of the horse trough. It would be much tidier if the United States made appropriations for those needs like everyone else. But that is not what so deeply concerns us.

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[2] Act of July 26, 1866, Rev. Stat. § 2399 (1875), 30 U.S.C. § 51 (1958); Act of July 9, 1870, Rev. Stat. §§ 2339, 2340 (1875), 43 U.S.C. § 661 (1958); Desert Land Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. § 321 (1958).

[3] *Lux* v. *Haggin* (69 Cal. 255, 4 Pac. 919, 10 Pac. 674 (1886)) (4–3 decision).

[4] The history of the California constitutional amendment is related in *United States* v. *Gerlach Live Stock Co.* (339 U.S. 725, 742–55 (1950)).

The water "appurtenant" to the national forest at an outside extreme may be all the water the United States can use on the national forest. It could be, in addition, all the water the Government can use at any location. "Appurtenant," it is said, relates to needs, but the needs are appraised at the time the United States asserts its claim. Claims tomorrow may be far larger than claims today. The isolated desert or mountain fastness of 1964 may be the populous and teeming launching pad for a round trip to Jupiter by 1974.[5]

I hasten to add that California has a number of sites I would advance for favorable consideration for that activity, but I hope no one will think Californians churlish if we suggest that any necessary water right be acquired just like the right to the land; i.e., paid for either through a negotiated sale or through condemnation.

Now, since I have been in this argument before, let me anticipate some counterarguments:

1. "The reservation does not interfere with any vested rights, but permits the United States a right only to unappropriated water."

2. "The States will create fantastic kinds of property rights in unappropriated water, and extort money from the United States in payment for these rights."

The first proposition is the slipperiest use of legal terminology I know. The national forests were created many decades ago. In the Government's contention no appropriation of water since creation of the national forest in question is vested. "Unappropriated" in the Government's lexicon seems to mean unappropriated when the national forest was withdrawn from entry.

The second proposition is an apparition, and nothing more. I find no authority in S. 1275 for any State to create a fictitious species of property to use as a means of extorting compensation from the Federal Government for itself or its citizens. Should a court differ with me—and some courts have done curious things with statutes—Congress still sits.

Third, the reservation theory is utterly unrealistic and in practice unworkable. It has created some of the weirdest water rights known to man. Let me describe a couple of them to you: The water rights of the United States for the Havasu Lake National Wildlife Refuge and the Imperial National Wildlife Refuge both on the Colorado River and both partly in Arizona and partly in California. The first is a diversion right to 41,839 acre-feet per year, with priority dates of 1941 and 1949; the second is a diversion right to 28,000 acre-feet per year with a priority date of 1941. When determined by the special master in *Arizona* v. *California*, the location of the boundary between Arizona and California was uncertain, and no one yet has fixed the respective acreages in Arizona and California.

However, the Supreme Court approved this part of the special master's recommendations. The parties to *Arizona* v. *California* have solemnly stipulated that this may be incorporated in the decree, since that is what the Supreme Court, sure enough, decided. The priority dates are the dates of Executive orders creating or expanding the wildlife refuges, which are bird marshes on the main river. The quantities of water were derived from studies by Federal wildlife planners who swung hastily into action to produce evidence of their plans to introduce during the Colorado River adjudication. The Executive orders merely said, "Let this land be withdrawn for a refuge." They did not say, "Let there be 41,839 acre-feet of water every year to keep and maintain a marsh." They said nothing about water, which is the basic trouble with the reservation theory. It is the basic trouble with the whole riparian doctrine of which the reservation theory is a spurious offshoot.

Priority dates of 1941 and 1949 on the Colorado River are excellent Colorado River water rights in Arizona, and for the Arizona portions of these refuges. There is no doubt at all that the river will satisfy all the priorities earlier than

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[5] In *Arizona* v. *California*, 373 U.S. 546 (1963), the United States successfully established its claim to sufficient water to irrigate all irrigable land on each Indian reservation with a priority date at the creation of the particular Indian reservation. Land classification to determine what land is irrigable reflects changes in both agricultural science and economics. However, the classification made by the United States during the trial was accepted, although a few decades earlier or a few decades later the classification and resulting water needs would doubtless be much different.

The United States sustained only one minor defeat in its Indian litigation: It claimed a priority for the Fort Mojave Reservation as of the date of withdrawal of the land for a fortification against Indians. It received the later priority date at which the withdrawn lands became an Indian reservation. However, it is unlikely that the difference in priority date will make a significant difference. The reservation is uninhabited by Indians and contains no irrigated lands. It can become an important source of revenue through lease of the land and water right to non-Indians.

those dates in Arizona, plus the full portions of the 41,839 and the 28,000 acre-feet for areas that turn out to be in Arizona.

In California, a 1941 priority date from the Colorado River is not likely to supply enough water to quench the thirst of a horned toad. California water rights from the Colorado senior to that date include 5,362,000 acre-feet, plus a few Indian reservations. That is more water than California hoped to get if California had prevailed on every legal issue in the Supreme Court decision. So what we are about to witness when the decree is enforced is a spectacle of the dividing of the waters of the Colorado River, piling them up on the left bank, leaving the right bank dry. The decree can be enforced in no other way.

Moses did something like this with the Red Sea, and so I think did Cecil B. DeMille, but the Supreme Court is breaking new ground. Folks downstream from the wildlife refuges are already worrying about the water quality problems. Ducks which land on the California side of those marshes will inundate themselves in clouds of dust, and then wash it off on the Arizona side. Perhaps this is one reason it is recommended that the Supreme Court retain jurisdiction of the decree.

This brings me to the second part of my message. We are not against wildlife refuges; we are not against Federal projects; we are not against Federal planning. Those refuges on the Colorado would be in a lot sounder shape if the United States had been farsighted enough to acquire a water right for them by some other means than the reservation theory. The reservation theory means whatever the Department of Justice can come up with when litigation arises.

How would it have worked had S. 1275 been the law? The United States might have appropriated water under State law. Had it done so, it would have been directed to follow State procedures, which in my State means taking it up with the State water rights board. Federal agencies have done this from time to time, although it seems to occasion an internal Federal row between any such agency and the U.S. Department of Justice. Or, pursuant to Federal law, the United States might have acquired a water right. This means an act of Congress, general or special, but so does Federal acquisition of land.

If it were necessary to take someone else's water right, there would of course be the necessity of paying for it, but that's how it ought to be. I have resisted with every force at my command the U.S. contention to the contrary.

The Federal Government's assertion that there is no property right in a navigable stream (and almost all streams are deemed to be navigable) chills me to the marrow of my bones. Section 1, paragraph 4, of S. 1275 is designed to end that assertion.

Incidentally, S. 1275 will not interfere with the carrying out of the Supreme Court's decree with respect to the Imperial and Havasu Wildlife Refuges. S. 1275 recognizes that history cannot be rewritten. Section 2 of the bill says:

"Nothing in this Act shall be construed as * * * (3) Affecting, impairing, diminishing, subordinating or enlarging (a) the rights of the United States or any State to waters under any * * * existing judicial decree * * *."

I am glad about that, because I saw the waters of the Red Sea parted on the silver screen when I was a youngster, and I have a consuming curiosity to see it happen in real life.

Now what about regional planning? The question has arisen because the original version of the Pacific Southwest water plan announced last August proposed to move 1.2 million acre-feet from the northwestern part of California to Arizona. There were some pros and cons which I do not now proposed to go into. There are other heady conversations about moving other rivers around. Would S. 1275 interfere with any of those proposals?

The answer is an unequivocal "No." I can state the law on that subject very quickly. It will not be altered after S. 1275 has been enacted.

The first case is *Hudson Water Co.* v. *McCarter*, 209 U.S. 349 (1908). Hudson Water Co. proposed to pipe water from the intrastate Passaic River in New Jersey to Staten Island. The New Jersey Legislature passed a statute declaring it unlawful to conduct water through pipes from New Jersey into any other State, and directed McCarter, attorney general of New Jersey, to put a stop to the proposed export. He did so in the courts of New Jersey. Hudson Water Co. took McCarter to the U.S. Supreme Court, where he made a gallant showing of the needs of New Jersey to retain all the waters of its Passaic River.

In a unanimous opinion read by Justice Holmes, the Supreme Court said McCarter's showing was unnecessary. The State of New Jersey, he said, "finds

itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." [6]

It is important that the Passaic was not an interstate stream. *Kansas* v. *Colorado*, 185 U.S. 125 (1902) ; same case, 206 U.S. 46 (1907), had already introduced principles of equitable apportionment for allocation of an interstate stream. Furthermore, the Court noted, problems of irrigation could be left on one side. And, as the New Jersey court had noted, the commerce clause which might interfere with a prohibition against export of water in bottles, was not offended by this statute which forbade export of water running in pipes.

I think *Hudson Water Co.* v. *McCarter* is good law today. I see no reason why the Court would reach a different result if the purpose of the export were irrigation, and not a municipal use. I think that a State may forbid anyone other than the Federal Government to acquire a water right from the intrastate streams of another State.

There is every reason to suppose that no similar prohibition can be applied by a State against the Federal Government. *Arizona* v. *California*, 283 U.S. 423 (1931), established that Arizona could not by statute prohibit the United States from building Hoover Dam on the navigable Colorado River with one of its abutments in Arizona. *Arizona* v. *California*, 373 U.S. 546 (1963), establishes that the Congress can confer on the Secretary of the Interior power to allocate the waters of an interstate navigable stream. I am confident that no Federal official could do so without an act of Congress.

If water is ever moved from the Eel River in California to the Gila Basin in Arizona, or from the Mississippi to the Columbia, or vice versa, it will take an act of Congress and at least a couple of bulldozers to do so. I think it will not take a constitutional amendment, and I see no reason why it should.

But whether I am right or wrong about this, S. 1275 would leave the law on that subject exactly where it stands today. Any particular interstate movement of water, of the type mentioned, will doubtless provoke strongly held views on both sides. So does S. 1275, but I am happy to report that most of the views of western water lawyers are strongly in favor of its passage. The National Association of Attorneys General and the Western Association of Attorneys General strongly favor its passage, and have passed resolutions to that end.

I am happy to note that the supporters of S. 1275 include a number of people from all regions of the United States. There is good reason for this, despite the feeling of some that the reservation theory is applicable only to public lands States. First, if a water right attaches by operation of law to land the title to which the United States acquired from Mexico by treaty, it attaches to land the United States acquired from John Doe, by purchase or condemnation. The character of any such implied right, in either case, would be a matter of Federal not of State law. Hence, the "reservation theory" is potentially the same kind of problem in Rhode Island, when the Federal Government becomes a landowner, as in New Mexico, where the United States is the original owner of the public domain. Mr. J. Lee Rankin, former Solicitor General, so advised this committee in 1956.[7] Second, expanding water demands all over the United States are producing problems once thought peculiar to the arid West. To our neighbors east of the 100th meridian we can say, in the words of that old tombstone legend:

"As I am now, so you soon must be;
Prepare yourself to follow me."

I appreciate the opportunity to testify in support of S. 1275. I think it is good legislation from the Federal point of view, from the States point of view, and from the point of view of all of the people of the United States.

[Appended to General Mosk's testimony on S. 1275]

To the Senators and Representatives of California in the U.S. Congress:

I am writing to urge that the California congressional delegation unite in giving consolidated and vigorous support to S. 1275 which Senator Kuchel of California and Senator Moss of Utah introduced on April 4, in the present Congress.

I have studied S. 1275 closely. I am fully aware, as are the sponsors of S. 1275, that it will not solve all problems. However, its passage would be an

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[6] 209 U.S. at 357.

[7] See "Hearings on S. 863 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs," 84th Cong., 2d sess., 266–67 (1956).

important accomplishment and would provide assurance to Western States that they can safely plan to develop their water resources.

These are the major features:

1. *The withdrawal or reservation of public lands shall not affect any water right acquired under State law either before or after withdrawal or reservation.*—I believe and I fervently hope that this is a statement of the law which exists today, for if it is not, the Western States are in deep trouble. The national forests, national parks, and other Federal reservations produce most of the runoff in a great many parts of the West. Some of the reservations were created before the turn of the present century. If, by reserving lands for the purpose of a national forest in 1900, the United States reserved a right to the use for any purpose of all the water which flows from the national forest superior to every right acquired under State law since 1900, then cities, farms, homes, and factories throughout the West are today using water which is Federal property, available only through Federal sufferance.

This cannot be so. We know that Congress, when it created or authorized the executive department to create national forests and other reservations, did not intend to legislate with respect to water rights. However, the U.S. Department of Justice has contended repeatedly that water "appurtenant" to reserved and withdrawn lands is Federal property. The U.S. Department of Justice lawyers have not defined "appurtenant" and no one else can do so. Because of this complete uncertainty, this principle contained in S. 1275 is essential. An uncertain water right is better, of course, than no water right, but far from good enough. Certainty is a requisite of all property laws and especially of property like water, essential to human existence.

2. *In the West, consumption of water must take priority over the use of water for navigation.*—There is no dispute about this principle, stated in the O'Mahoney-Millikin amendment to the Flood Control Act of 1944, and in other statutes from time to time. S. 1275 would make the principle apply generally.

Navigation is simply one means of transportation, of which there are a great many alternative means. Navigation is also often a mere legal fiction to insure constitutionality, and having nothing to do with boats. But water consumed by farms and cities has no substitute at any price.

3. *When the United States acquires a water right under State law, it should comply with State procedures.*—Since the Federal Reclamation Act was passed in 1902, it has provided that the United States shall acquire water rights under State law. The United States has done so, without difficulty, for more than half a century. That policy to be effective means that State procedures—such as those which make water rights a matter of public record, for example—must be complied with. Compliance with State procedures is not burdensome, and it would be unconstitutional if the States sought to make it burdensome in any discriminatory sense for the United States to acquire water rights.

Every Western State has carefully developed water rights machinery. The Federal Government has none. Hence, the United States must comply with State procedures, if either the United States or non-Federal water users are to know what their rights are, or how much, if any, water remains available for future development and use.

4. *The United States should pay for the water rights which it acquires.*—There should be no room to argue about this principle, yet argument has been long and noisy. The United States at times contends it already owns the water, because water is "appurtenant" to federally reserved lands, or because the United States has something called a "navigational servitude." S. 1275 would reject those claims. S. 1275 would also provide that condemnation, when it takes place, must provide a judicial proceeding in advance of physical seizure by the Government.

This is the one point on which there may be difference of opinion, since S. 1275 is intended to outlaw so-called inverse condemnation of water rights by the United States. I have come to think this is desirable when dealing with water rights, because the moment at which a physical seizure of a water right takes place is almost impossible to determine. Seizure first, and payment later, converts a water right to a right to money damage. The right to money may be lost before the water right owner knows, or can prove, that there has been a seizure.

A water user should know when the Government has taken his right. A judicial suit is the most definite means of telling him his right is to be taken.

All the foregoing principles are contained in section 1 of S. 1275. The second section contains some safeguards, largely to protect the United States. S. 1275 provides that it shall not affect treaty rights, Indian rights, adjudicated rights, rights under any interstate compact, rights under any State law or any act of Congress passed now or in the future, if the Federal right is earlier acquired. The act is express that the United States shall be protected in "any right to any quantity of water used for governmental purposes or programs of the United States" at any time prior to the date when S. 1275 becomes a law.

Even this, of course, is not the limit of the protection to the United States. Congress can at any time alter, amend, or repeal S. 1275, as it can any other Federal statute, and Congress can enact any statute in the place of S. 1275 within the limits imposed by the Constitution. Any future project authorized by Congress can make any constitutional exception to S. 1275 which Congress deems appropriate.

I cannot conceive how S. 1275 in any way prejudices any legitimate interest of the United States in water rights or water resource development. If I am wrong, I suggest the time has come when that interest must be specifically identified, and some demonstration made of how a legitimate interest of the United States is impaired. Westerners want, need, and seek Federal water development projects. Those projects will be aided, not hindered, and non-Federal projects will be aided, not hindered, if the ground rules are clarified in the manner proposed by S. 1275.

Sincerely,

STANLEY MOSK,
Attorney General, State of California.

Mr. MOSK. First of all, let me state that I am representing not only myself as attorney general of the State of California but also the Association of Western Attorneys General of which I am the president at the present time.

The association has unanimously adopted a resolution in support of Senate bill 1275 as have the national association which General Dunbar will represent and the southern association which General McLeod will represent.

For the past several years many have expressed fears about the implications of the Federal Government's position and we were considered alarmists. Yesterday we heard a battery of Federal lawyers confirming all of the fears of the State water experts.

I do not think that State demands are unreasonable or arbitrary or capricious. As lawyers we thing we ought to be able to look in a book and ascertain what our rights are as States or as individuals. Certainly we ought to know what procedure is to be followed in order to ascertain those rights.

The Government lawyers, it seems to me, must necessarily concede that there is no body of Federal water law. There is no Federal administrative control over water. There is no certainty about present or future rights of States or individuals.

We are utterly dependent upon the future whims of Federal officials. This is unsound legally, it is unsound administratively, and it is unsound economically.

How can the West develop, or indeed any part of the Nation, if presently flowing water is to be wasted because the Federal Government may or may not at some vague and uncertain time in the future use some vague and uncertain quantity of water for some yet undetermined project? The very assertion of the Federal agencies' position it seems to me indicates that necessity for Senate bill 1275.

Now this measure will reject the Federal reservation theory. It says in its opening provision:

> The withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter made, shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation.

We think it is a matter of urgent importance that Congress now speak those 40 words just quoted.

First, the reservation theory is unsound in concept. It confuses jurisdiction with proprietary ownership. When the western territories were acquired and before they were incorporated in States, the Federal Government had jurisdiction—that is the authority to make laws—and it had proprietary ownership of all the lands not then in private ownership. Realistically the United States did not have proprietary ownership of unappropriated water appurtenant to the federally owned lands because no one should own unappropriated water.

Second, the reservation theory is unsound in result. The result, of course, is more important than concept. We don't come to Congress with a request to rewrite a theory; the result of the reservation theory is satisfactory to no one.

No one knows, no one can find out how much water is appurtenant to the various Federal reservations which the United States has withdrawn from the public domain. We have asked the Department of Justice attorneys and they cannot tell us; they don't know either.

The national forests, all withdrawn public lands, are the source of most of the runoff in large parts of the West. I think the figures are about 75 percent of the State of California. There are more in the State of Idaho and other Western States.

If, as I would contend, any water right appurtenant to a national forest is limited to the small quantities required for forest services purposes, no one cares very much. We want the forest ranger to be secure in his domestic supply and we take a liberal view of the requirements of the horse trough. It would be much tidier if the United States made appropriations for those needs like everyone else, but that is not what deeply concerns us.

The water appurtenant to the national forest at an outside extreme may be all the water the United States can use in the national forest. It could be in addition all the water that the Government can use at any location.

"Appurtenant," it is said, relates to needs, but the needs are appraised at the time the United States asserts its claim. Claims tomorrow may be far larger than claims today. The isolated desert or mountain vastness of 1964 may be the populous and teaming launching pad for a round trip to Jupiter by 1974.

Next, the reservation theory is utterly unrealistic and, in practice, unworkable. It has created some of the weirdest water rights known to man.

Let me describe one or two of them for you quickly. The water rights of the United States for the Havasu Lake National Wildlife Refuge and the Imperial National Wildlife Refuge both on the Colorado River, both partly in Arizona and partly in California. The

first is a diversion right to 41,834 acre-feet per year with priority dates of 1941 and 1949.

The second is a diversion right to 28,000 acre-feet per year with a priority date of 1941.

Now, when determined by the special master in the case of *Arizona* v. *California*, the location of the boundary between Arizona and California was uncertain. No one yet had fixed the respective acreages of those refuges in Arizona and California. However, the Supreme Court approved this part of the special master's recommendation. So the parties to *Arizona* v. *California* solemnly stipulated that this may be incorporated in the decree.

The priority dates are the dates of Executive orders creating or expanding the wildlife refuges, which are bird marshes on the main river. The quantities of water were derived from studies from the Federal wildlife planners who hastily swung into action. The Executive orders merely said, "Let this land be withdrawn for a refuge." Neither order said, "Let there be 41,834 acre-feet of water every year to keep and maintain a marsh."

They said nothing about water, which is the basic trouble with the reservation theory. The basic trouble is with the whole riparian doctrine, of which the reservation theory is a spurious offshoot.

Priority dates of 1941 and 1949 on the Colorado River are excellent water rights in Arizona and for the Arizona portions of these refuges. But in California a 1941 priority date from the Colorado River is not likely to supply enough water to quench the thirst of a horned toad. California water rights from the Colorado to that date include 5,362,000 acre-feet plus a few Indian reservations. That is more water than California hoped to get even if it prevailed on every legal issue in the Supreme Court case.

So what we are about to witness when the decree is enforced is the spectacle of dividing the waters of the Colorado River, piling them up on the left bank, leaving the right bank dry.

Now, Moses did something like this with the Red Sea and I think Cecil B. DeMille did too, but the Supreme Court is breaking new ground here. Ducks which land on the California side of those marshes are going to inundate themselves in clouds of dust and then wash it off on the Arizona side.

This is probably one reason why the Supreme Court has retained jurisdiction in this case.

Now we are not against wildlife refuges, we are not against Federal projects, we are not against Federal planning. These refuges on the Colorado would be in a lot sounder shape if the United States had been farsighted enough to acquire a water right for them by some other means than the reservation theory.

The reservation theory means whatever the Department of Justice can come up with when litigation arises.

Now, how would it have worked if Senate bill 1275 had been law? The United States might have appropriated water under State law. Had it done so in our State, it would have taken the matter up with the State water rights board. Federal agencies have done this from time to time, particularly the Bureau of Reclamation and the Department of Agriculture, although it seems to occasion an internal Federal row between any such agency and the U.S. Department of Justice.

Or pursuant to Federal law the United States might have acquired a water right. This means an act of Congress, general or special, but so does Federal acquisition of land. If it were necessary to take someone else's water right, there would of course be the necessity of paying for it, but that is how it ought to be.

The Federal Government's assertion that there is no property right in a navigable stream, and almost all streams today are deemed to be navigable, chills me to the marrow of my bones.

I thing section 1, paragraph 4, of Senate bill 1275 is designed to end that assertion.

Now what about regional planning? The question has arisen because the original version of the Pacific Southwest water plan announced last August proposed to move 1.2 million acre-feet from the northwestern part of California to Arizona. There were some pros and cons to that proposal which I don't want to go into now.

Would Senate bill 1275 interfere with that kind of a proposal? The answer is an unequivocal "No." If water is ever moved from the Eel River in California to the Gila Basin in Arizona or from Mississippi to the Columbia or vice versa, it will take an act of Congress and at least a couple dozen bulldozers to do it, but it will not necessitate a constitutional amendment and I don't see any reason why it should.

Whether we are right or wrong, Senate bill 1275 would leave the law in that subject exactly where it stands today. Any particular interstate movement of water would doubtless provoke strongly held views on both sides, but so does 1275. I am happy to report that most of the views of western water lawyers are strongly in favor of its passage.

In the State of California every agency, both public and private, with the exception of the State Department of Water Resources, is in favor of the passage of this measure, and as I have indicated so is the Western Association of the State Attorneys General.

Now yesterday a number of fears were expressed about Senate bill 1275. Many of them were like the fear that this measure will somehow alter the 160-acre limitation. I think it is very clear that 1275 had nothing at all to do with this.

Let me give you an example of why some of these problems are imaginary. During the trial of *Arizona* v. *California* the United States came forward with formidable sounding claims for various national monuments. The very pleaded statements made the Federal claim seem very large.

California pressed, and the United States resisted, interrogatories designed to discover just how much water the United States claimed. After months of travail, we learned that this was a problem only because the lawyers made it so.

Now I am going to insert in the record a copy of California's interrogatory H–4 to the United States relating to claims for the Bureau of Land Management and the Forest Service and the National Park Service and the U.S. answer. This is just illustrative of how precise claims can be if required.

By examining the Government's data you will learn that rabbits require twenty-five hundredths of a gallon of water per day, small animals and birds require one-tenth of a gallon per day.

The Government made the calculations and then carefully inventoried its wildlife. The claim for a Gila monster as we learned

was one-tenth of a gallon per day times the 12 Gila monsters which constitute the total population of these creatures inhabiting Federal real estate in the lower basin.

Some of our lawyers suspected the claim was overstated. A Gila monster cannot drink more than a half pint of water a day. However, we grew dizzy computing how many centuries it might take for the 12 Gila monsters to consume an acre-foot so we let the matter pass.

The Government can provide a game refuge for its Gila monsters and if it does so they are going to drink all the water they feel like drinking any time they are lucky enough to find it. We could not stop them if we wanted to.

So these, Mr. Chairman, are problems because Government lawyers make them so. The vice of the reservation theory is no one knows how much water the Government claims. No one can find out until the Government consents to be sued and is forced to answer interrogatories as they were in *Arizona* v. *California*.

Yesterday, however, the reservation theory became a great big formidable problem and it is going to remain so until Senate bill 1275 is passed.

I think this is good legislation from the Federal point of view, from the States point of view, and from the point of view of all the people of the United States.

Senator Moss. Thank you, General Mosk, for your comments which summarize the statement that has been placed in the record.

As president of the attorneys general now, you are speaking also for that organization?

Mr. Mosk. The Association of Western Attorneys General.

Senator Moss. Has the full organization taken up this problem?

Mr. Mosk. Yes, it has, and General Dunbar of Colorado will report on the action taken by the national association.

Senator Moss. Thank you very much.

Senator Kuchel?

Senator Kuchel. Well, that is an excellent statement, General. Are you going to be here the rest of the morning?

Mr. Mosk. Yes.

Senator Kuchel. Then I would like in the interest of time to have the other witnesses come forward and then I think maybe we ought to try to sharpen specifically what the objections are. You have been able in my judgment to demonstrate the fallacy of those objections. I have no questions now.

Senator Moss. Senator Jordan?

Senator Jordan. A very fine statement, General Mosk. I concur with Senator Kuchel that it would be well to hear the rest of the presentation and then have a kind of forum discussion of the points.

Senator Moss. Thank you.

Senator Simpson, do you have any questions or comment at this point?

Senator Simpson. No.

Senator Moss. Thank you, General Mosk. California interrogatory H–4 will be made part of the official file on this hearing.

Senator Simpson. Mr. Chairman, just one thought.

I often wondered, General, how we spend $26,800 annually on the research project to determine the jaw apparatus of passive eating

birds and I dare say it is because they want them to take water out of some of that territory in the *Arizona* v. *California* case, the sponsors of the measure.

Senator Moss. Senator Simpson, would you care to introduce our next witness who is the Honorable John Raper, the attorney general of Wyoming?

STATEMENT OF HON. MILWARD L. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. I certainly would, Mr. Chairman.

I want to thank you for the privilege of being here and to sit with your subcommittee on this report of the bill which is endorsed by the State of Wyoming.

I want to say, Mr. Chairman and members of the committee, this bill has a particular significance to the people of my State of Wyoming because Wyoming has on its borders the tributary waters of the Missouri and Colorado of which we will hear more about from Mr. Raper.

I want to say to you, Mr. Chairman and members of the committee, General Raper has a very illustrative career and is one of the great men of Wyoming. He was colonel of the 300th Armored Field Battalion in the Korean conflict, and you may remember that division received a Presidential citation because it was able to protect the regular Army left flank in Korea and prevent it from total collapse.

He is a graduate of the University of Wyoming Law School. He is the product of all 16 grades in Wyoming. He was formerly for 8 years U.S. District Commissioner for the District of Wyoming and presently attorney general for the State of Wyoming.

Mr. Astor, who accompanies the attorney general, is a member of our national resources board and for many years has been a member of that board. It was my privilege as Governor to have appointed him.

Then Mr. Eugene Van Camp, State commissioner.

I don't know in what order they will appear, but it gives me great pleasure to introduce to you Attorney General Raper, of Wyoming.

STATEMENT OF HON. JOHN RAPER, ATTORNEY GENERAL OF WYOMING; ACCOMPANIED BY CHARLES ASTOR, MEMBER OF NATIONAL RESOURCES BOARD; AND EUGENE VAN CAMP, STATE COMMISSIONER OF WYOMING

Mr. RAPER. Thank you very much, Senator Simpson. You are most generous.

Senator Moss. Gentlemen, we are happy to have you with us. You may proceed.

Mr. RAPER. Members of the committee, let me say first of all that we appear here in support of Senate 1275 and we concur in the remarks of Senator Kuchel, of California, at the time this bill was introduced. We also concur in the remarks made by Senator Moss yesterday in this regard.

We see no need, as far as Wyoming is concerned, to go into the background of this bill and the various arguments on one side or the other because I imagine that they will probably be aired pretty thoroughly before this committee is through.

We are interested in Wyoming and the effect of this bill in Wyoming and the effect of what we believe have been threats on behalf of the United States, the administrators of the various agencies and the bureaus of the United States who are charged with water and water related matters where they have consistently, over a period of time, asserted the supremacy of the United States of America over the States in the control and administration of water.

We know of no cases within the State of Wyoming where this threat has ever been brought to any fruition, but we do consider ourselves likely victims in the future in the event that this policy of Federal supremacy should be further pursued.

In Wyoming we feel that the Congress of the United States has already committed itself to the proposition that Wyoming has complete control of all the waters within its boundaries. Article 8, section 1, of the constitution of the State of Wyoming declares all water within the boundaries of the State to be the property of the State of Wyoming.

Now standing by itself we do not purport to represent the State of Wyoming can, by its own act, take from the United States of America an area within which it has a right to act, but Wyoming's claim to all of the waters within its State has been concurred in by act of Congress, the act of administration of the State of Wyoming in 1890, and cited at 26 Stat. 222, chapter 664.

Therein the Congress says that Wyoming's constitution is republican in form and is in conformity with the Constitution of the United States and declares that the constitution which the people of Wyoming have formed for themselves be, and the same is, hereby accepted, ratified and confirmed.

Now to the best of our knowledge, the State of Wyoming has never been called upon to accuse the Congress or any Government agency of any breach of faith in regard to that acknowledgment of Wyoming's ownership of water.

Now upon the approval of the concept of water ownership being within the State of Wyoming, the State in 1890 embarked upon extensive administration of its waters under a prior appropriation approach. The State engineer of the State of Wyoming administers its waters and that office ever since Wyoming's admission to the Union has continued to do so.

Might I say in that connection that there is no indiscriminate passing out of water rights in the State of Wyoming. It is based upon beneficial use and in a priority.

Wyoming has extensive Bureau of Reclamation projects and in the construction of every one of these undertakings which the State of Wyoming is glad to have and appreciates receiving from the United States of America, the Federal Government has consistently complied with the laws of the State of Wyoming in the acquisition of any water rights necessary to complete a project or to make a project feasible.

Water rights have been acquired within the State of Wyoming by agreement and by acquisition proceedings.

Now in our State if there is a water right attached to the land, upon the acquisition of that land the water right goes with it. There is no one within the State of Wyoming entitled to water merely because he owns land. The private owner is no different than the Federal Govern-

ment as far as the State of Wyoming is concerned. That water must be useful, it must be applied to a beneficial purpose before any land is entitled to the use of water.

Because of the efficient manner in which water has been administered in the State of Wyoming there has been a rather close working relationship with the Bureau of Reclamation, with the Bureau of Land Management, Forest Service, Soil Conservation Service, and all of them acquire water rights in connection with Government projects by applying for them to the State engineer and they are granted in regular course.

Might I say that the Corps of Engineers, while it has been slow in complying with Wyoming's requirements in the construction of the extensive business sites around the city of Cheyenne, has complied.

Now if there is to be any claim on behalf of the United States that it has an ownership in the unappropriated waters or any other waters that arise on the public domain and as an owner that it need not conform to State laws, then we are really concerned because within the State of Wyoming the United States of America owns or controls 50 percent of our total acreage.

I have brought with me a supply of a document entitled "Land Ownership in Wyoming Counties," which has been published by the University of Wyoming. Within this document it is indicated that our State's total area is somewhere around 62,664,000 acres and of that the United States of America owns 29,369,000 acres. To that last figure must be added approximately 2 million acres of Indian lands which are controlled by the United States of America in trust for the Arapaho and Shoshone tribes which occupy what is known as the Wind River Reservation.

Now the waters within the State of Wyoming originate at the higher elevations. Who owns the land at the higher elevations within the State of Wyoming? The United States of America is the owner of those lands. The national forests within the State of Wyoming occupy 8.5 million acres.

There has been prepared for the use of this committee a map of the State of Wyoming which shows in particular irrigation development within the State of Wyoming. Now superimposed upon this map are shaded areas which depict, generally speaking, not to exact scale, the national forests within the State.

Senator SIMPSON. Mr. Chairman, could I interrupt? Would you want that map displayed?

Mr. RAPER. There are enough copies that they might be distributed.

Senator MOSS. You may place it on the rack. We do have copies here for members of the committee and I think you may proceed.

Mr. RAPER. Thank you very much, sir.

Now it can be seen by this map that within the forests which have been shaded in a light tan lie the tributaries of the streams that feed substantial irrigated areas of the State. It even shows up in the northwestern corner there that certain waters flow out of Yellowstone National Park and then from there into what is known as the Buffalo Bill Reservoir.

Now, most recently we had a little flurry of excitement in connection with the Grand Teton National Park which is just south of Yellowstone Park. Grand Teton National Park has been more recently

created and has become a tremendous attraction for the people of the United States to the State of Wyoming.

Of course, as that park grows, there begins to be and has been agitation on behalf of the Park Service to gain greater control in connection with the affairs of the park.

We have problems over the elk, we have problems over boating on the lakes and reservoirs located there, but they are important lakes and reservoirs as far as the water supply of the State of Wyoming, and the State of Idaho as well, is concerned.

The most recent threat we think has been to assume control of the fisheries in the Grand Teton National Park which for many years have been wonderfully well administered by the Wyoming Game and Fish Commission.

We are going to have problems in connection with ditches going through the park and undoubtedly these ditches are going to have to be built in such a fashion as to blend into the atmosphere of that park, which is fine.

We do not want to interfere with the National Park Service, but at the same time we want the right to use that water that is there unimpaired and without the frustration of having to work through the United States of America to get it; that is, to the point where it becomes burdensome.

Now the State of Wyoming has never ceded jurisdiction over the lands of the Grand Teton National Park to the United States of America. Yellowstone National Park is on a different basis. Those lands were reserved at the time the State was admitted and the United States of America does have exclusive jurisdiction.

Wyoming has not grown with the same exploding character that California has, but it has been steady. Our population had increased to some 329,000 persons at the time of the 1960 census and it is still growing.

Now most of that population growth has been within the urban areas. The city of Cheyenne, for example, has grown and expanded to the point where it was required to go some 100 miles to acquire water for the city's needs. It had to go to the Medicine Bow National Forest to find an adequate supply. Formerly its water had been taken from a well field located upon the Warren Air Force Base, a Federal reservation.

The city of Cheyenne, we are proud to say, has by itself financed this extensive water acquisition scheme to the extent of some $11 million which to a small city in Wyoming is a lot of money. If the city of Cheyenne and the State of Wyoming had to fuss over whether or not that water could be taken from the Medicine Bow National Forest to meet its domestic needs, then we would have been and would be at this time in real trouble.

Now while there has been a decrease in the rural population of the State of Wyoming, the agricultural production of the State has increased many times over through the use of machinery, through the use of modern agricultural and ranching methods. We find that now the State of Wyoming is ready to go into industrial activity and is proceeding into industrial activity, but in order to do that a lot of water is going to be required.

The State of Wyoming, we think, has proven through practice over these past 73 years that it is perfectly capable of controlling the waters within the State of Wyoming. It wants to continue to assert that control to its benefit and it asserts its claim to the ownership of all water.

The State of Wyoming feels that as a sovereign State of these great United States it ought to be permitted to design and to control its own destiny in these areas that are so important. We have never had any problems over interstate streams. We have been able to get along with our neighbors and practically all of the interstate streams of the State are under compact.

Let me say in that connection that with little exception the waters of the State of Wyoming flow out of the State. It is a very, very small percentage of the waters that the State uses that come from some other State. We are a contributor of water.

So we feel that with the successful past management that the State of Wyoming has exercised over its waters that we do not want this to be interfered with by any threats of assertion of any right which would interfere with the progress of what we consider a mighty great State, For that reason we support this bill.

Senator Moss. Thank you, General Raper, for a very fine statement. We appreciate your coming here to testify on this matter. I think you have stated rather concisely the concern of the States in the management of water and the fact that our Western States all have water laws that provide for the general provision of prior appropriation and then a vested right and that we rely on that right in order to have an orderly distribution of our water.

As every witness repeats, of course land in the West without water is virtually valueless. That is basically what you have been saying.

Do my colleagues have questions of the attorney general?

Senator KUCHEL. No; except I want to congratulate you, too, General. I think your statement is enormously full and demonstrates that this problem runs across the entire West.

Senator Moss. Senator Church, I don't believe you were able to hear most of it.

Senator CHURCH. No. I am sorry I was not able to hear all of your statement, General, but I will read it in the record.

Under Wyoming law do you make provision for filings and does the State award water rights by decree or by a filing process?

Mr. RAPER. Yes, sir, Senator Church. In Wyoming we have an appropriation system. An application is made to the State engineer for a water right in accordance with the requirements of the applying rancher or farmer. He is required to file, along with his application, maps indicating how the water will be used, his irrigation layout generally, and be in a position to establish that he can beneficially use the water for which he is applying.

After a period of time that matter is considered by an agency in the State which we call the board of control. The board of control is made up of four water superintendents of the four water divisions of the State and they sit in with the State engineer and adjudicate that water right and it goes down in the records of the State in accordance with the date of the application.

Senator CHURCH. Now in conformity with that procedure, the State then retains the authority to decide whether or not to grant the application and it passes upon the amount of water to be granted or withheld in any given case, is that not so?

Mr. RAPER. Yes, sir; it does so.

Senator CHURCH. Now would you understand this bill to mean that where the Federal Government has withdrawn lands belonging to the Federal Government and now claims the water appurtenant to those lands, that if this bill were enacted it would be necessary, if the Government wanted to secure, under Wyoming law, the use of the water, the appurtenant water, for the Federal Government to comply with these procedures that you have just mentioned, in order to secure for itself a water right?

Mr. RAPER. Well, now that practice has been followed for many years within the State of Wyoming. If the United States wants to acquire water for use on any of its lands, it makes the same sort of an application as the private owner does. Now, within the Forest Service alone I am advised by the State engineer that we have on file some 300 or 400 applications in which the rights to use water have been granted to the Department of Agriculture.

Now there that water is used at campsites for recreational purposes. It is used for areas around the ranger stations and in some cases there has been a little experimental work going on with trees at the ranger stations and that water is used to irrigate the nurseries.

Senator CHURCH. I know this has been a common Federal practice. My question was that if this bill were enacted, as you understand the bill, would it then become mandatory upon the Federal Government to secure the water right in any given case, by complying with State procedures?

Mr. RAPER. Well, it would become mandatory in the sense that it confirms what we consider to be mandatory now under Wyoming law.

Senator CHURCH. I am speaking now of Federal law.

Have you read the bill?

Mr. RAPER. Yes, sir.

Senator CHURCH. My question is: As you understand this bill, if it were enacted would it then be mandatory as a requirement of Federal law that the Federal Government comply with State law in order to secure water rights that are appurtenant to federally owned land that has been reserved for Federal purposes?

Mr. RAPER. Yes, sir; that is the way I understand it.

Senator CHURCH. So that then the Federal right would be subordinate as a matter of law to the decision of the State government in each case?

Mr. RAPER. I don't think it would be subordinate in the State of Wyoming; I think it would be equal to the rights of all other persons.

Senator CHURCH. Well, you have testified that under your procedures the State has the authority to grant or withhold.

Mr. RAPER. That is correct.

Senator CHURCH. I am just trying to get on the record now the purport of this testimony. The State has the authority to grant or withhold water rights where individuals are concerned. The effect of this law would make it mandatory that the Federal Government be treated in the same way that individuals are treated and that the State would have the authority to grant or withhold in each case.

Mr. RAPER. That is correct.

Senator CHURCH. Thank you.

Senator MOSS. This quasi-judicial tribunal would be the one making the decision as to whether the water was available and, therefore, it would be appropriated in that amount, is that correct?

Mr. RAPER. That is correct.

Senator MOSS. Senator Allott?

Senator ALLOTT. General Raper, I want to congratulate you on your fine statement. I only wish, and I say this in all kindness, that some of our friends in the executive branch of the Government could actually understand that in the Western States which do not follow the riparian concept that the appropriation of water is not a willful deprivation of any kind but that it is, in Wyoming where it is done as you have described it, or in Colorado where it is done by a filing and a subsequent decree, that in all instances that I know of in the West it has to be in accordance with and subject to a beneficial use.

I cannot help but feel that our friends, particularly in the Justice Department, and this has continued over a long number of years as you know, really do not have and never have had a really comprehensive understanding of the water systems of the West, how they are used and how they are applied.

I did want to congratulate you on a very fine statement.

Mr. RAPER. Thank you, Senator.

Senator MOSS. Senator Jordan?

Senator JORDAN. General, I too want to commend you for a fine statement.

I have one question. You mentioned that priority in the Wyoming law had to have beneficial use to have priorities. Would you state those priorities? What is your first priority?

Mr. RAPER. The first priority is the domestic use. The next priority is for watering animals. The next priority is industry and agriculture.

Senator JORDAN. Yes. Then water used for irrigation would come under water used for power?

Mr. RAPER. Excuse me, sir. I perhaps should let Mr. Van Camp answer that. I don't recollect now just what the order is there. He may be familiar with it.

Mr. VAN CAMP. Water for the use of power, Senator, is one of the latter uses. It does not have preference over agriculture and domestic.

Senator JORDAN. Thank you.

Senator MOSS. Senator Simpson.

Senator SIMPSON. Mr. Chairman, just for the record I ask for unanimous consent to have two remarks inserted in the record prior to the testimony of the attorney general.

Senator MOSS. That will be done.

Senator SIMPSON. I would like to say the pamphlet is short and I think it is very graphic and comprehensive. I know that the attorney general would not mind my asking that both the map and the grant ownership be made part of the record.

Senator MOSS. These will be made part of the file. They will not be reproduced. They will be made part of the committee file, yes, indeed.

Senator SIMPSON. I do want to congratulate you, General Raper, for a fine presentation.

I might call your attention to the fact that the most recent attempt of the Federal Government to usurp the properties of the State of Wyoming is the floating of boats on the Snake River and Grand Teton National Park which they attempted to do by directive. I take it you recall that.

Mr. RAPER. I am acquainted with it, Senator. I might say that that has been resolved by the use of this fiction of navigability. It was finally ascertained by the Department of Interior that the Snake River is navigable and therefore the national boating law would apply. Under the national boating law the State is authorized to have improved acts to regulate boating there. Wyoming does have an approved boating law so it now regulates the floating of rafts down the Snake River.

Senator SIMPSON. You knew that the navigability was determined by the fact the water only comes up to about here on the deck [indicating]?

Senator Moss. Thank you, General Raper, and Mr. Van Camp and Mr. Astor. We appreciate your testimony and appreciate your being here to give it today.

Mr. RAPER. Thank you.

Senator Moss. We will now call on the Honorable Duke Dunbar, who is the attorney general of Colorado. I understand he is accompanied by the Honorable Daniel McLeod, attorney general of South Carolina.

Is the General present?

Do you wish to introduce him, Senator Allott?

Senator ALLOTT. Mr. Chairman, I am very happy to introduce Mr. Duke Dunbar, who has been the attorney general of Colorado since 1950. I think the greatest tribute to his own ability is the fact that he has advised both Governors of both parties over these years with a great deal of distinction and erudition.

This morning I understand he represents the Association of Attorneys General although I expect to ask him another question after he finishes. We are happy to have him with us.

Senator Moss. We are indeed.

We are happy to have you also Mr. McLeod. We will ask you to go right ahead.

STATEMENT OF HON. DUKE DUNBAR, ATTORNEY GENERAL OF COLORADO; ACCOMPANIED BY HON. DANIEL McLEOD, ATTORNEY GENERAL OF SOUTH CAROLINA; AND DR. MITCHELL WENDALL, COUNSEL FOR THE COUNCIL OF STATE GOVERNMENTS

Mr. DUNBAR. Mr. Chairman and members of the committee, I am appearing here primarily as the chairman of the Federal-State relations committee on behalf of the National Association of the Attorneys General.

Accompanying me at the witness table here is Dr. Mitchell Wendall, the counsel for the Council of State Governments, sitting on my left.

Senator Moss. Welcome, sir.

Mr. DUNBAR. On my right, the Honorable Daniel McLeod, the attorney general of South Carolina.

Senator Moss. Fine.

Mr. DUNBAR. He is here as a member of the association and also as a chairman of the Southern Association of the Attorneys General.

Traditionally water rights have been acquired, used, and transferred pursuant to State law. Even the developments which have made legislation such as S. 1275 necessary have not diminished the truth that only the States have systems for the general administration of water rights and that private persons must generally look to State law for their rights to use water.

Consequently, the National Association of Attorneys General, as the organization of all State chief law officers, is vitally concerned with the bill now before you.

In the past, it has customarily been thought that the Federal-State water rights problem was a Western one. This view had developed because of the association of water rights controversies with irrigation, and because of the belief that other parts of the country have so much water that a challenge to the rights of a particular water user would be remote. In actuality, clarification of the water rights issue and its settlement by the act of Congress is a nationwide necessity.

Until the Supreme Court decision starting with *First Iowa Hydroelectric Cooperative* v. *Federal Power Commission*, 328 U.S. 152 (1946), it seemed to be well established that State law was the determining factor in fixing water rights. This was true because the individual States had developed the only systematic and complete bodies of water law in the country.

Such is still the case, but the extent to which those bodies of law may be applied is being more and more beclouded by judicial decision such as the *Pelton Dam* case, 349 U.S. 435 (1955) and *Dugan* v. *Rank*, 83 S. Ct. 999 (1963).

These decisions have encouraged some people to contend that the Federal Government possesses an underlying ownership of most of the Nation's water. The effect of this doctrine, whether stated as a principle of outright ownership or merely as an assertion of paramountcy, is to throw the legal basis for private and public non-Federal use of water into grave doubt.

The most far-reaching assertion of Federal ownership is to be found in the concept of navigation servitude. According to this doctrine, the commerce clause of the Constitution has conferred upon the Federal Government an absolute right to enough water to make and keep streams navigable. When this idea is teamed with the broad definition of navigability now entrenched in our law, the result is truly beyond anything contemplated either by the framers of the Constitution or by Congress.

The result of leaving this combination uncorrected would be to encourage the idea that no user of water, other than the Federal Government, has more than a transitory easement which can be swept away whenever the U.S. Government, or any of its agencies, chooses to exercise its underlying right.

It is not enough to say that this Federal authority would be responsibly exercised. Farmers, businessmen, municipalities, and States should not have to make investments of large capital sums and plans for their entire economic futures with such an unnecessary question mark surrounding their activities. The national welfare does not require it; considerations of elementary justice should not condone it.

The merit of S. 1275 is that it centers on the key issue: compensation for rights taken by Government. No one contends that the United States should be obstructed in its efforts to perform its governmental functions. On the other hand, such performance is always related under our constitutional system to the protection of property rights. If the Federal Government diminishes or takes a water right belonging to someone else, it should be required to pay for it no less than if it takes other property rights.

If it is said that this observation begs the question, because the doctrine of navigation servitude makes the Federal Government the real owner, the answer is clear. Ever since 1866 Congress has sought to recognize the place of State law in the acquisition and use of water rights, and there is no reason to believe that Congress has intended that law to be either secondary or transitory.

If Congress has so far failed to reestablish the clarity of this principle, cast into doubt by the courts, this is merely a demonstration that it is more difficult to enact a statute than to keep one from being enacted.

We do not believe it is helpful to the committee to spend time on the involved historical and legal arguments generally rehearsed in discussions of the water rights issue. Learned analyses of the presumed rights of the United States deriving from the Treaty of Guadalupe Hidalgo in the West, the status of the United States as sovereign proprietor of federally owned lands there and elsewhere, and the nationwide operation of the commerce clause have been presented many times.

Likewise, the history of the long line of Federal statutes stretching from the Desert Lands Act to the present day has been explored before this committee on many occasions. What should be determinative of the present issue is that S. 1275 would make certain that the Federal Government would pay for water rights which it acquires or ousts in the same manner that it pays for rights to dry land and structures. This is a basic proposition of equity and due process of law.

Good as S. 1275 is in its present form, there are clarifying changes which would be helpful. Paragraphs 3 and 4 of section 1 of the bill make special reference to "consumptive" use of water. The rationale of the argument presented in this statement is equally applicable to consumptive and nonconsumptive uses. While it is likely that other enumerations in these paragraphs broaden the sweep of the bill beyond irrigation and related activities, the deletion of the word "consumptive" would serve to avoid possible problems in construction.

Another word which seems to have little point in view of the purpose of S. 1275 is the word "vested" in paragraph 4 of section 1. Any right which is sufficiently a property interest in character should be compensated, if taken. It would seem unfortunate to suggest that the salutary effects of the bill might be made, in certain instances, to depend on procedural concepts of vesting.

The National Association of Attorneys General wishes to assure this committee of its wholehearted support of this legislation and its appreciation of its urgency. The association has expressed its views in a resolution adopted at its 1963 annual meeting. A copy of this resolution is attached to this statement and made part hereof.

Mr. Chairman, that is the statement of the National Association of Attorneys General. I ask that the resolution be included in the record.

Senator CHURCH. The resolution will be included at this point.

(The resolution referred to follows:)

RESOLUTION IX—WATER RIGHTS—ADOPTED BY THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Whereas the National Association of Attorneys General, the National Association of Counties, the Section of Mineral and Natural Resources Law of the American Bar Association, and numerous other groups concerned with water resources in the United States have recognized the increasing urgency of a resolution of the Federal-State conflict over water rights; and

Whereas there now exists considerable uncertainty as to the manner of establishing property rights in the diversion, use, or storage of surface and underground water in the several States; and

Whereas this uncertainty arises from the fact that the Congress of the United States has not clearly manifested an intention to recognize the laws of the several States as to the appropriation, diversion, and use of surface and underground waters; and

Whereas this uncertainty gives rise to a clash of interests between the citizens of the several States and the U.S. Government, its agents and licensees as to the right to divert, use or store the surface and underground waters within the territorial limits of the said States; and

Whereas there is need for an orderly and definite rule and supporting administrative procedure for establishing and protecting valuable property rights in the diversion, use or storage of the surface and underground waters of the several States; and

Whereas S. 1275 in the current Congress would take a long step forward in the resolution of important aspects of this controversy: Now, therefore, be it

Resolved, That the 57th Annual Meeting of the National Association of Attorneys General in Seattle, Wash., July 3, 1963, urges and declares that the Congress of the United States should enact S. 1275 at its current session, and that it should further intensively study the remaining and unresolved portions of the problem, including particularly the sovereign immunity of the United States which is frequently asserted to prevent the judicial resolution of conflicts relating to water rights.

Senator CHURCH. I commend you for a very succinct and very clear statement which I think gets to the nub of the objective we seek in this bill which concerns all of us on this committee.

The reason that several of us, including myself, are sponsors of the legislation is simply because we want to make certain of the point you have made so well on page 2 of your statement which says:

> The merit of S. 1275 is that it centers on the key issue: compensation for rights taken by Government. No one contends that the United States should be obstructed in its efforts to perform its governmental functions. On the other hand, such performance is always related under our constitutional system to the protection of property rights. If the Federal Government diminishes or takes a water right belonging to someone else, it should be required to pay for it no less than if it takes other property rights.

I could not concur more in that statement, and that, of course, is the essential objective of the legislation. We will try, in the course of these hearings, to determine whether or not the legislation is well framed to secure that objective, but that certainly is the thing that motivates this committee.

You are an authority in the field of water law. I know of no case, where reclamation projects have been involved, where the Federal Government has failed to regard individual water rights as property interests or has failed to comply with State law. I take it that under the navigational doctrine some doubt has arisen, under the cases

that you cited, which suggests that the utilization of a navigational stream by the Federal Government could possibly jeopardize water rights, under a theory that the Federal Government has the right to control navigable waters even though that right, when exercised, might transgress upon certain water rights recognized under State law.

Do you feel that these cases you have cited definitely raise that issue?

Mr. DUNBAR. I ask Dr. Wendall to answer that question.

Mr. WENDALL. Well, they do raise it, at least as a potential. I don't think that, aside from perhaps an important number of instances which nonetheless are so far rather limited, one can really contend that as of the present date you can parade a long list of horrible instances in which the use of waters for navigation has been in fact such as to deprive other people of water rights.

Actually the growth of this doctrine of navigational servitude is probably too recent to allow of such a list.

The entire point, I think, is that if this doctrine is permitted to grow and if, then, in a country where there is increasing demand and pressure on water supply and it becomes a real element in our water law, then these instances may need to develop potentially and they could develop on any navigable stream.

In this sense I think that S. 1275 is more a piece of farsighted legislation than it is one of correction of practical instances of injustice even though there may be several of those to date. Certainly we should not overlook its corrective aspects, but I think that the problem will grow more in the future than it exists in the present.

Senator CHURCH. I am very interested to hear that statement because I have heard many highly competent water lawyers say that they know of no instances in the whole course of Federal involvement of water development where the Federal Government has ever infringed upon an established water right under State law, without regarding it as a property right and without paying compensation as required under the terms of the fifth amendment.

So I think that this needs to be made a part of the record. It is, in fact, the case, although I agree that the extension of the navigable streams doctrine could one day lead to a claim on the part of the Federal Government to a superior right to the waters of a navigable stream as against an established private water right recognized under State law.

As I say, the nub of this, the objective of this legislation is to make it perfectly clear, as a statement of congressional policy and of Federal law, that wherever the Federal Government does transgress upon an established water right it will always be treated as any other property interest and compensation will be paid for it.

Mr. WENDALL. Senator, if I might presume to comment on that idea, I have heard it advanced many times, too, of course, that the relative absence of instances in the past where the Federal Government actually has pressed these particular claims may be reason for not enacting legislation now, but for waiting until the situation develops. I think this is somewhat beside the point and it misses what is really very basic in the way our economy works. Even if a particular right has not been exercised, assuming that the navigational servitude doctrine is sound—and I don't know whether everybody would admit that that was the

case—but assuming that it exists as a lively possibility, everyone who invests, everyone who undertakes a type of business or economic development has to know that this is a possible limitation on his right to engage in whatever type of activity is based on his use of a particular quantity of water, and that, by itself, is a limiting factor long before you can begin to quote in large numbers instances of actual abuse.

Senator CHURCH. So you would see, as a special virtue of this bill, the fact that it would settle and make more definite the law?

Mr. WENDALL. Yes, sir.

Senator CHURCH. And eliminate an area of some ambiguity that now exists?

Mr. WENDALL. Certainly so.

Senator CHURCH. Senator Kuchel?

Senator KUCHEL. No, I have no questions except to say that your statement is excellent and the two specific recommendations for amendment I think merit consideration by this committee.

What I am hoping for is the possibility that we may arrive here at some agreement on basic policy and if that is possible then to go forward and consider recommended approvals in the language.

Thank you, sir.

Mr. DUNBAR. Mr. Chairman, I would like to divert a minute or two from my representative capacity and talk for a moment as the attorney general of the State of Colorado.

Senator Moss. You may do so. Put on your other hat.

Mr. DUNBAR. I would like to get some remarks into the record concerning the State.

Approximately 36 percent of the land within the boundaries of Colorado is owned by the Federal Government. Most of the runoff of our natural stream is from the watersheds at high elevations. A major portion of the land for these watersheds is in national forests, national parks, or withdrawn land. Some watersheds are in the public lands which are always subject to withdrawal by Executive order. Water for irrigation, industrial, and municipal uses is dependent upon the snowpack of these Federally owned watersheds.

The economy of the State and the well-being of the citizens is dependent upon these watersheds to supply water rights heretofore adjudicated under State law.

Now I join with the conclusions of many others in support of this bill that there is nothing in S. 1275 which will interfere with the Federal Government in the exercise of the sovereign power. It will require the Federal Government to acquire supported rights in accordance with the laws of the several States except when exercising one of its sovereign powers.

We have the State jurisdiction over the preparation, control, distribution, and use of water within their boundaries in accordance with the laws of the land. Such administration of the total water supply of the State within its boundaries with the States will preserve the practice of the past 100 years and will allay the fears of the people as to the Federal Government asserting any superior rights under a claim of original title.

Senator Moss. Thank you for that additional statement, General Dunbar.

Do you have any questions, Senator Allott?

Senator ALLOTT. Just one, Mr. Dunbar. First of all, thank you for your fine statement. I don't know whether you were able to hear yesterday the remarks of Mr. Clark with respect to the Denver situation, but as I understood it and as I have tried to recapture from his statement, the gist of his remarks, there seemed to be some criticism of the fact that Colorado, and particularly Denver, by farplanning, farsightedness, had accumulated water and water rights to take care of the population growth of Denver and that by doing so somehow it had deprived the Federal Government of rights which he deemed that it had.

Would you like to comment on that facet, please, in order that the record may be clear?

Mr. DUNBAR. That is what I gathered from the statement yesterday morning although I could not hear very well from where I was sitting. After reading the transcript of the remarks by Mr. Clark I don't interpret it to necessarily mean that Denver has been criticized for reserving rights for future use. Having in mind that this was done by Denver, I contacted the attorney for the Denver Water Board last evening and asked him to give me some details on the procedure and the history of the Denver acquisition of water rights which they intended for future use commensurate with the growth of Denver.

I have received a rather lengthy telegram from him which I will not read. It is more in an informative nature, explanatory nature, and if there are no objections, I will ask that it be included in the record.

Senator ALLOTT. We would like to have it in the record.

Mr. Chairman, there is no objection to having this wire from the attorney from the Denver Water Board put in the record at this time?

Senator MOSS. No; it may go in the record at this point. It is explanatory of what the witness is saying.

(The telegram referred to follows:)

DENVER, COLO., *March 10, 1964.*

HON. DUKE DUNBAR,
Attorney General of Colorado, Care Senator Gordon Allott,
Senate Office Building, Washington, D.C.:

In hearings before Senate Interior Committee we understand question has been raised as to the power under Colorado law of an appropriator to reserve water not needed for immediate use but for some future purpose. In *Denver* v. *Sheriff* (105 Colo. 193, 202), the Supreme Court of Colorado said:

"A specified tract of land does not increase in size, but populations do, and in short periods of time."

With that flexibility in mind, it is not speculation but the highest prudence on the part of the city to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable period of time.

What is a reasonable period of time can be judged from the fact that in the case of the development of water through the Moffat Tunnel for use in Denver upon which nearly half our population is now totally dependent it took 35 years from the inception of the project to its completion. Anticipating that the water to be brought through the Moffat Tunnel would not be sufficient for the continued growth and economic development of Denver, the city has worked diligently toward the completion of the Blue River resource at Dillon which includes the Roberts Tunnel and Dillon Reservoir. Although the courts denied Denver a priority for the full period, Denver actually has worked on this project since 1922 and only this year of 1964 is the project now ready for use. The Blue River water has been made available in the nick of time because Denver last year found it necessary to draw from its water bank account 84,000 acre-feet of water more than it was able to secure from its priorities. Faced with a dry year in 1964, if the Blue River water were not now available, Denver would be in serious straits on account of a shortage of water supply.

This demonstrates the fact that the board of water commissioners, with its nearly 50 years of experience in judging these matters, knows better than any other agency the timing on when to provide additional water for Denver. In this case the Water Department of Denver figured it out so accurately that the necessity for the Blue River unit has become imminent in the very year of the completion of the project.

It is the opinion of those who operate the Denver water plant that the Roberts Tunnel collection system, of which the Eagle River water is a part cannot be completed so as to furnish water to the people of Denver earlier than the time when the continuing growth of this metropolitan area will demand the first of this water for delivery here. It should be remembered that when World War II broke out the U.S. Government made tremendous demands for water service on the Denver Water Department, all of which were met immediately because of the skill and foresight of this department.

To construct the Eagle River unit requires studies of water runoff in collaboration and cooperation with the U.S. Geological Survey, independent studies of the geology of the terrain involved in the canals and tunnels necessary to collect and bring the water to the Denver water system, the completion of engineering designs based upon the work so accomplished, the securing of the financing necessary to actual construction, the letting of contracts for construction, or the performance of the work by force account after the designs have been completed and financing arranged, and then at last when physical construction has been completed the water is made available for actual beneficial use. Again we submit that the judgment of the board of water commissioners in the timing of all this tremendous work has proved in the past to be correct, and it should not be considered that the judgment is incorrect in connection with the Eagle water which is not being reserved for some indefinite, unforeseeable use but is being developed for a need and a demand which history and experience have indicated quite conclusively will make this water necessary just as soon as reasonable diligence can make it available here.

J. R. Riter is one of the U.S. Government's leading water planners, an engineer in the Bureau of Reclamation. In June of 1957, Mr. Riter, under oath, under cross-examination by the undersigned, admitted that in calculating Denver's water supply he had planned for a population of 550,000 to be served in 1958 while the actual population had become 641,000 by 1957. It was fortunate, indeed, that Denver used its own judgment rather than that of the Federal Government.

It should be noted that the Blue River development which is now an absolutely necessary part of the system necessary to supply water for the continued growth of the Denver metropolitan area was rejected by the Bureau of Reclamation as infeasible, which demonstrates the desirability of taking those steps necessary to create stability in the appropriation doctrines of the State so that local agencies can plan their water resource development without the aid of the Federal Government in appropriate cases. There is certainly no objection to planning by the Federal Government for Federal projects but at the same time this should no be to the exclusion of local planning nor should the Federal Government be given any special preference to access to the waters available. The competition is good for both local and national governments. We are very strongly of the opinion that Denver in its water planning should not be penalized in its access to the waters available by any theory that the Federal Government has some better right than Denver under the appropriation laws which have been the basis for the economic development of the entire West.

GLENN G. SAUNDERS,
Chief Counsel, Denver Board of Water Commissioners.

Senator ALLOTT. Thank you very much.

Senator MOSS. Any further questions? Senator Jordan?

Senator JORDAN. No.

Senator MOSS. Senator Dominick, I understand you have a statement. You were going to introduce General Dunbar, but Senator Allott was here.

Senator DOMINICK. I, as a matter of fact, want to apologize to my good friend Duke for not being here when he first started out. I thought that the session was going to start at 10 and not at 9 and I had a number of people to meet at my office first.

All I want to do is welcome you to the committee and to welcome the opportunity of getting your views here, both as attorney general for Colorado and on behalf of the Attorneys General Association.

Mr. Chairman, I do have a very brief statement here that I would like to include. I don't see any point in having it read unless you care to have it read. If I could just include it here and then maybe ask one or two questions, it would be helpful as far as I am concerned.

Senator Moss. We would prefer that and would like to place it in the record, Senator Dominick, and it will appear as though read. We are pressed for time and we are glad to use that device.

STATEMENT OF HON. PETER H. DOMINICK, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator Dominick. Mr. Chairman, members of the subcommittee, I appreciate your courtesy in allowing me to appear and present this brief statement.

As you may know, I introduced a bill early last year, S. 101, the purpose of which is to confirm rights to the use of water under State law. I commend the subcommittee for scheduling these hearings on S. 1275.

Although the two bills take slightly different approaches, the objective is the same. As you know, this objective is to adequately define Federal-State relations in the field of water rights.

I recognize that Federal-State relations in this field have been generally good. Nevertheless, definitive legislation is needed. The "honeymoon" will not last forever and if and when it is over, the States will be the losers.

We know that the basic problems in this field are twofold. First, the Federal Goverment claims it owns unappropriated waters arising on the public domain and need not conform to State water laws.

Secondly, we all recognize that Congress has the power to control the waters of navigable streams by virtue of the commerce clause.

But these two fundamentals are not irreconcilable. Congress can and must act in order that the Federal Government and the States may have some fixed guidelines under which to operate. Yet every time the subject is mentioned, we are told by the interested executive agencies that the law is clear, that they are right, and that Congress should leave it alone.

This is a particularly unfortunate attitude because to my way of thinking, the existing body of law in this area is not at all clear.

Between the years of 1866 and 1954, Congress has enacted many laws recognizing in one way or another the application of State law in controlling the use of water in the public land States. Many of these laws are patterned after section 8 of the Reclamation Act of 1902. This section states in part:

> Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws. * * *

This has never been held unconstitutional and has worked well thro ıgh the years.

Many of our Western States are now engaged in research and study of their surface and ground water supplies. I know that the State of Colorado is actively engaged in this field and is seriously concerned about the need to pass the pending legislation.

They need to know what their rights are in order that they may plan for the future. Yet the ominous claim of the Federal Government hangs over their head. They have invested much time and money in their present water facilities and they are entitled to know that their investment will be protected.

Congress has the power and the duty to act in this field. I would much rather see us legislate in a relatively calm atmosphere rather than to wait until feelings are aroused because of a major State-Federal confrontation.

I commend the subcommittee for holding hearings on this subject and I am hopeful that a constructive piece of legislation can be forthcoming.

Mr. Chairman, I wonder if I could just ask Mr. Dunbar one question.

I have had people express to me the fear that if this type of bill went through where we were involved largely with compensation for water rights the Federal Government might exercise that this would make the Federal Government more prone to exercise these rights on the theory that all they had was a general liability claim and that therefore they could interfere with the State or private water rights in any way they wanted to without fear of injunctive action or the question of whether their basic opportunity to move in this direction was or was not legal.

What is your own thinking on this? Have you had a chance to explore this type of reaction with anybody?

Mr. DUNBAR. I have not heard that reaction. I have heard statements in some of these documents that I read that there is the fear of that kind, but to me it is just a simple proposition that if the Federal Government has a project which requires water that they acquire this water in accordance with the procedure under our State laws; that if this water interferes with the rights that have been acquired by a power company prior to this, been acquired for private individuals, that the rights taken away should be compensated and the amount of the compensation shall be determined in an orderly manner at the inverse condemnation procedure, the procedure where the amount of damage is determined.

In view of that, I think that the effect of this bill would be stated to allay the fears of private parties who want water rights, that they are not using them at the sufferance of the U.S. Government.

Senator DOMINICK. Thank you very much.

Mr. DUNBAR. Does that answer your question?

Senator DOMINICK. This clears up some of the points that people have been discussing with me and I think a record of this is helpful.

Senator Moss. Thank you.

Thank you, gentlemen. We appreciate your appearance here and your testimony. It has been very helpful to have it.

We will next call on the Honorable Carley Porter, chairman of the Water Committee of California State Assembly.

Is Mr. Porter here?

Mr. PORTER. Mr. Chairman, I understood that Mr. Goldberg was to precede me.

Senator MOSS. He may do so.

If Mr. Goldberg would like to go on now, we will call him then. Thank you for stepping aside.

Mr. Goldberg is the deputy director of the California State Water Resources Commission. He is also representing the Governor here today, Governor Brown of California.

Mr. Goldberg, we are very happy to have you, sir.

STATEMENT OF ABBOTT GOLDBERG, DEPUTY DIRECTOR, CALIFORNIA STATE WATER RESOURCES COMMISSION, AND REPRESENTING HON. EDMUND G. BROWN, GOVERNOR OF CALIFORNIA

Mr. GOLDBERG. Thank you, Senator Moss.

Senator KUCHEL. May I add my own personal pride to greet another Californian who is a friend of mine and who has distinguished himself as a lawyer in the public service in California, although I must add that I regret on this occasion, dissimilar from some others, Mr. Goldberg and I do not have the same views.

Mr. GOLDBERG. Yes. I am afraid this morning, Senator Kuchel greets me in grief.

Senator MOSS. You may proceed, sir.

Mr. GOLDBERG. I have distributed copies of my prepared statement. Are they in the hands of the committee, Senator Moss?

Senator MOSS. They are in the hands of the committee. If you would like, Mr. Goldberg, we will include the entire statement in the record and you may address yourself to such parts of it as you feel you would like to emphasize.

Mr. GOLDBERG. Thank you, Senator. The statement is quite long and I would like to omit parts of it in the interest of time. For example, I will go over the first three pages and begin on page 4. I had intended to omit the portion on page 4 but Mr. Wendall's references to finances this morning make me think that perhaps the material beginning at that page might be of use to the committee.

We believe that S. 1275 is not necessary to help the State financially. Senator Kuchel in the Congressional Record has stated, and I am quoting:

> It is feared * * * that the interest charges to the people of California upon the bonds financing the [California State water] plan could be significantly higher to offset the risk to the State's asserted rights possible by reason of Federal claims to control and use the water.

On the other hand, Senator Moss, you have made statements indicating that these fears may not be justified. On the record Senator Moss appears to be correct.

The State's authority to issue bonds has been thoroughly canvassed, publicly, in the legislature, and in court. We can tell this committee from personal knowledge that among the various forebodings as to the State's own program, fears as to water rights have been happily absent. We sold $50 million of short-term bond anticipation notes in November at an interest cost of 1.97 percent. We sold $100 million of long-term bonds on February 18 at a net interest cost of 3.519 percent. We received competitive bids on both sales. We found nothing to indicate

that the cost of these bonds depended on anything except the factors ordinarily operative in the bond market, for example, the supply of California bonds, the State's credit standing, the length of the term of the debt, and the current level of interest rates.

To test out the validity of this conclusion we had the financial adviser of the department of water resources make a spot check of the bonds of public water or power agencies that have a relationship to the United States analogous to that of the State. He examined the record for the bonds of the following California agencies: the Oroville-Wyandotte Irrigation District which sold bonds in 1960, the Placer County Water Agency which sold bonds in 1963, and the Tri-Dam agency which sold bonds in 1955. He reported that these bonds were priced in the market at rates appropriate to the credit standing of the issuers and to changes in interest rates, and that he found no evidence that their prices were affected by water rights difficulties.

Senator KUCHEL. What types of bonds were they, Mr. Goldberg?

Mr. GOLDBERG. Those were all revenue bonds, Senator Kuchel. They are interesting because the revenue bonds if anything, should be more sensitive to water rights difficulty than the bonds backed up, as ours are, by the general credit of the State.

Senator KUCHEL. The California bonds were general obligations?

Mr. GOLDBERG. Yes. So when we examined these bonds and find no difficulties with them, a fortiori there should be no difficulty with ours.

We also asked the financial adviser to look at the record for the Tacoma Department of Public Utilities, Light Division, and the Portland General Electric Co. He reported that there was no evidence to indicate that the financial standing of either was adversely affected because they won their cases in the Supreme Court.

The Portland General Electric Co. was the company involved in the *Pelton* case and that is the reason we looked at it.

Our real fear has been that somebody may take the "brouhaha" about water rights——

Senator KUCHEL. What does that mean? I heard that yesterday.

Mr. GOLDBERG. I got it from A. J. Liebling and it is growing in vogue. I use it with correctness and certainly with some affection. It means excitement out of proportion to the merits of the issue under discussion.

Senator KUCHEL. Is there any element of irritation in the excitement?

Mr. GOLDBERG. No, I don't think so. Although the word to me looks French, it is actually derived from the Hebrew and I use it with affection and some respect.

Senator KUCHEL. Very good.

Mr. GOLDBERG. So as I say, we are afraid somebody may take the "brouhaha" about water rights seriously, and that we would, in effect, be talked into difficulties. As Senator Moss pointed out, the California State water project, like most water projects, has not at all times commanded the universal assent of all right-thinking men, and therefore—

Care must be taken that opponents of the project are not allowed to stir up the water rights issue so as to continue their opposition to the project in an undercover way.

I would like now in the interest of time to proceed to page 9 of my prepared statement which is a portion of our discussion of section 1(1) of the bill. Our objection, beginning on page 9, to section 1(1) of the bill is that it leaves the United States without any means of withdrawing water to protect future projects.

When you consider the length of time necessary to propose, plan, and accomplish a major water project, there is an imperative necessity that unappropriated water be withdrawn from private, piecemeal appropriations if the future project is not to be harassed by a multiplicity of litigation and burdened with a needless inflation of costs. Thus in 1927, some 3 years before the publication of the original State water plan, the source of the plans now being implemented by the State and the United States, the California Legislature provided a procedure whereby the State could withdraw water from private appropriation and hold such withdrawals without being subject to the requirements of "due diligence."

S. 1275 would be an impedement to Federal water planning because it would leave the United States with no means of withdrawing water for future development save perhaps the incongruous method of judicial proceedings to condemn unappropriated water. The California statutes permitting the State to file for unappropriated water are not, by their terms, applicable to the United States. Even if the State legislature were to give the United States the same privileges as the State, the problem would not be solved. These statutes now provide that the State is exempt from the ordinary requirements of due diligence until 1967. (Compare California Water Code, sections 1396, 10500, and 10504.) Although the legislature has regularly extended the period of exemption from diligence for the State, it is at least conceivable that it would be more stringent with the United States.

It is equally conceivable that Congress would not be disposed to appropriate funds to protect Federal water rights, merely because the United States has not been proceeding with the degree of diligence which, in the judgment of the State legislature, is appropriate for the Federal Government. Although such Federal alacrity to meet the State's demands may be a consummation devoutly to be wished, it hardly seems one likely to be realized.

California is itself a beneficiary of the existing Federal reservation policies. I use the one example of Oroville Dam because it has been the one I have been able to get complete statistics on. This could be expanded to include other reservoirs.

Almost 20 percent of the Oroville Reservoir site, 9,332 acres out of 50,000 acres, is Federal land, and the overwhelming bulk of this, 8,100 acres, is under Federal power site or reservoir withdrawals. In addition to lands under power withdrawals, by filing its application for a license, California received the benefit of section 24 of the Federal Power Act, reserving all U.S. lands within the project from entry. The State would be reluctant to lose the benefit of the water rights which under California or Federal law are associated with the withdrawn lands.

One of the withdrawals on which we rely was made in 1909; three were made in 1911; several were made in the teens and early twenties; and the last was in January 1928. The State was not authorized by its own law to file on unappropriated water, that is, withdraw it from

private appropriation to protect future major projects, until 1927; and the first applications for Oroville were filed on July 30, 1927, the day after the law was first in effect. So there is a period of 18 years during which the State would be protected against intervening appropriations under existing law, but as to which S. 1275 would purport to deny protection.

The savings clause in section 2(3)(c) of the bill does not seem adequate to protect the State. This clause provides in relevant part that the proposed act shall not be construed to diminish "any water right heretofore acquired by others than the United States under Federal or State law." Since the first subsection of section 1 purports to preclude the establishment of a Federal water right, there would be no such right to be saved to the State by section 2(3)(c).

Now one of our principal objections to S. 1275 is the interference or the withdrawal by the bill of the power of inverse condemnation. The fourth subsection of the bill would make two changes in the present law: (1) It would enlarge the class of "rights" for which the United States or its licensees, such as the State, must pay.

You will notice in the prepared statement I have quoted the word "rights" because we are talking about some things that heretofore have not been considered rights, but I know of no other word to use.

And (2) the bill would require that rights be taken by judicial proceedings in eminent domain, that is, cut off the present authority to acquire property by inverse condemnation.

I would like first to speak to the inverse condemnation problem.

The purpose of the second portion of the subsection is to reverse that part of *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 279 (1958), which provides:

> If the [water] rights held by the United States are insufficient, then it must acquire those necessary to carry on the project * * * paying just compensation therefor, either through condemnation or, if already taken, through action of the owners in the courts. 357 U.S. at 291; see also id. at 296–297.

The provision would also reverse the results of other cases recognizing the Federal Government's authority to acquire water rights by inverse condemnation, the most recent being the companion cases *Dugan* v. *Rank*, 372 U.S. 609 (1963) and *City of Fresno* v. *State of California*, 372 U.S. 627 (1963).

The use of inverse condemnation to acquire water rights is a practical necessity. A water right is a usufruct, a right to do something at a particular place. When the operation of a dam interferes with a water right, the interference does not ordinarily occur by Government agents or utility employees going on the water right owner's property. It occurs without physical invasion by altering the regimen of a stream so that there may be less water, or, as in *Dugan* v. *Rank*, as much water as was needed but at a less convenient location or depth. These changes in quantity or accessibility can be very subtle and can occur over a long period of time. In the nature of things the situation of taking the usufruct, an intangible, is totally different than the taking of a tangible site to build a post office or a pile of rocks with which to build a dam.

The operator of a dam knows only what he is going to do. He cannot know but can only estimate what the effect of his conduct will be. Although engineers may make what they consider good estimates, they are only estimates. They are not binding on the courts, which may at

any time find the engineers made a bad guess. When the court disagrees with the engineers, under this bill injunctive relief would be available until the operation accords with the court's concept of sound engineering. This is not speculation; it is fact; it is a synopsis of what actually happened in *Dugan* v. *Rank*.

Even when surface waters are taken and the problem of identification of the owners of the affected rights and the scope of the taking is relatively, but no absolutely, easy, it has long been recognized that requiring resort to judicial proceedings in eminent domain, as opposed to inverse condemnation, is highly impractical. Writing back in 1911, Samuel Wiel said:

> [W]here the stream system is of considerable size and the number of riparian proprietors who would be affected by a diversion of water is large, the proceedings to condemn their respective rights and compensate each for his injury or loss of the flow of the stream would be of such magnitude and so expensive as to practically bar the appropriator from attempting it.

Wiel then goes on to explain that the situation is analytically the same as to appropriators and as to ground water.

Of course, when ground waters are involved, the situation is much more complex. In a ground water area supplied by several streams, and this is typical of California, there is always a question of causation: Is the taking due to A's operations on stream X or B's operations on stream Y? What is the quantum of the taking? Above all, how far does the taking extend? In free ground-water basins the ground-water table shifts constantly, and the effect of the operation is not only difficult to predict, it may be detectable only under circumstances which first became apparent many years after the operation has begun.

In other words, while a statute requiring all water rights to be identified and taken in advance by judicial proceedings in advance of operation might only be awkward and expensive as applied to surface waters, the operation of higher laws, the laws of nature, make it grotesque as applied to ground water.

Passage of a statute such as S. 1275 would threaten a flood of injunction suits. Although it would be practically impossible to obey the statute, failure to obey it would be a ground for injunction, simply because a taking without judicial proceedings would be unauthorized. This, too, is not an idle assertion; it is what happened in *Dugan* v. *Rank*, supra. The operation of Friant Dam began in 1941. The suit began in 1947, and as the mode of operation was altered with development of the project, plaintiffs as far as 9 miles south of the San Joaquin River joined in 1952 to require the release of water into the river simply to keep up the level of water in their wells. The water, of course, was urgently needed for the Central Valley project. The plaintiffs were not suffering a loss of water supply; they were suffering an impairment of convenience and pumping. They stoutly resisted all suggestions that they seek a remedy by way of damages. The result was 16 years of stultifying litigation.

This type of practical problem was foreseen at the time the original State water plan was presented to the legislature. In 1928 a committee of 10 lawyers was organized in California to consider major legal aspects of the plan. This committee recommended a constitu-

tional amendment which would have revised the State law of eminent domain to provide, in part:

3. The conversion of injunction suits against projects into condemnation suits * * *.
12. A taking by the project agency without first making compensation * * *.

I have an error in the statement here, the superscript reference (25) is left out.

The proposed constitutional amendment was not adopted, but the courts have been alert to hold that the right to compensation in advance Even in California, where, unlike the Federal Constitution, the State constitution requires that compensation be paid before the taking, the courts have been alert to hold that the right to compensation in advance of the taking may be waived, precluded by attachment of a public use or subject to an estoppel. These holdings are required by the need to transact public water business in an orderly manner; otherwise, there would be injunction suits breaking out like measles all over the body politic.

We would like to note three further points that come up on inverse condemnation.

(1) If it is felt that the Court of Claims is a remote jurisdiction unfamiliar to lawyers and unsympathetic to plaintiffs, it would seem to be easier to enlarge the monetary jurisdiction of the district courts under 28 U.S.C. 1346(a)(2) than to tinker with the mode of acquiring water rights.

(2) The fear that the statute of limitations may run "before the water right owner knows, or can prove, that there has been a seizure," seems to be based on speculation rather than authority. Actually, the Supreme Court has been rather generous in applying the 6-year statute of limitations under the Tucker Act; the time runs not from the taking, but from the time the "consequences of [the taking] have so manifested themselves that a final account may be struck."

I should have also added in the statement a reference to *Schroeder* v. *City of New York*, 371 U.S. 208 (1962), which holds that the statute of limitations does not begin to run against a known plaintiff who can be given actual notice until such notice has been given. The case involves the taking or a sort of water right. Now notice that was a damage action, the statute on the damage action does not run. The suit started as an injunction suit, but under the principle relating to inverse condemnation, as I described above, the court treated it as a damage action.

Again, if there is a real danger of this surreptitious taking, it would seem easier to meet it by amending the statutes of limitations on actions against the United States—28 U.S.C. 2401, 2501. Note also if the section were law, it would have the effect of cutting off the right to damages from the United States, because, under conventional doctrines, the United States is not liable for unauthorized takings by its agents.

(3) Another effect of S. 1275 is that it might have the effect of depriving the State, as a licensee under the Federal Power Act, of the power it has under State law to acquire property by inverse condemnation. There is an opinion, I have given the reference in the notes, that the New York Power Authority, a Federal power licensee, was limited to taking property by judicial proceedings as

prescribed by section 21 of the Federal Power Act, and could not utilize the New York statutory procedure "to appropriate the land and remove the owner before he has a chance to have a judicial hearing." I do not cite this opinion as authoritative, because the judgment enjoining the New York Power Authority was vacated, and the action was ordered dismissed as moot by the New York Supreme Court. But it is illustrative of how a State agency operating under Federal authority may, by this sort of legislation, have its State authority abridged.

After preparing this portion of the statement I set about reviewing section 21 of the Federal Power Act and subsection 1(4) of S. 1275 just to see where this led. I find that the Federal Power Act provides that any licensee may—and I emphasize the word "may"—acquire property necessary for the project by exercising the power of eminent domain in the State or Federal courts. It was held in the *Tuscarora* cases (257 F. 2d 885; 362 U.S. 608), which are the cases I cited before, that since they might acquire property by judicial proceedings that meant they must acquire property by judicial proceeding.

S. 1275 goes further than section 21 of the Federal Power Act. It says such rights shall be taken by proceedings in eminent domain. So what was merely a grant of authority in the Federal Power Act becomes under S. 1275 a restriction on the exercise of the authority. It is clear that the word "proceedings" as used in S. 1275 is intended to mean judicial proceedings and not the administrative proceedings for taking in advance of compensation that seem to have been provided in New York.

For example, Senator Jordan says that the bill "would prohibit the seizure of water without first initiating court proceedings." I am referring to Congressional Record 29425. Senator Kuchel says that the Government "should initiate judicial proceedings." That is on 109 Congressional Record 5378. So it seems to us that the result of the Tuscarora cases which were debatable under the Federal Power Act would be unavoidable under section 1(4) of S. 1275, and that we would indeed lose the authority to acquire property by inverse condemnation which we have under State law simply because we are a Federal power licensee.

Now the first portion of section 1(4) covers quite a different subject, and that is the rights which shall be compensable. It is said that the first portion of section 1(4) is intended to provide that the United States will not assert its rights to take waters of navigable streams for purposes of navigation without compensation, i.e., to repeal the rule of *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1913). Actually the section goes much further and would appear to render the United States liable for taking every strange form of property right which a State may contrive to embarrass the Federal Government.

I do not use that language, gentlemen, as just a rhetorical flourish. This is exactly what happened in the *Ivanhoe* case, and I know that because I tried that case.

The United States under this bill could be rendered liable for the frustration of every hope or expectation which a State chooses to call property. This would mean that to apply the acreage limitation, the

United States, under the first *Ivanhoe* opinion, would have had to pay excess landholders for the evanescent "rights" which the California court found they were deprived of without due process.

The bill canot be limited to allowing a State to create compensable rights only in waters actually used, for such a limitation would eliminate substantial riparian rights in California. It is an axiom of California law that a riparian right is "a parcel" of the riparian land and that "use does not create" the riparian right "and disuse cannot destroy or suspend it." Since compensation cannot be limited to waters actually used, it would follow that the bill would authorize a State to fix its own charge on unappropriated waters and although it might not be able to prevent their export, it would be able to make the cost of export prohibitive.

For example, it has been suggested that as an instance of actual damage, Senator Moss, who has been described as "speaking from the Federal point of view" might have cited the damage to the Oregon fishery alleged in *Pelton*. California, of course, could not tolerate any rule which allows fish to be preferred to people. If the goal of the bill is to assume an additional, but definable, liability it would be better for the bill to provide that the United States shall pay for those rights established pursuant to State law that are property within the meaning of the fifth amendment to the Federal Constitution.

The third subsection of the bill is, at best, elusive. Mr. Andrews says that at first reading he misinterpreted it. As explained by him and now by Senator Kuchel, it is permissive, merely means that *if*—and I emphasize "if"—the United States claims under State law it must follow State procedures, and is intended to solve the problem of the "notorious" *Fallbrook* case. (Paradoxically, it would not solve the *Fallbrook* case to the extent that United States claims as a riparian or as an appropriator of ground water under the State law, for there is no State procedural requirement applicable in such situations. California Water Code, secs. 101, 1200.)

Somewhat contrary to Senator Kuchel, Senator Jordan says:

> S. 1275 would assure that in those instances when the United States claims a water right in its proprietary, as contrasted to its soverign capacity, it must satisfy the same laws and procedures that would be applicable to you or me in acquiring a similar proprietary interest in water.

So in contrast to Senator Kuchel, Senator Jordan ascribes a mandatory effect to section 1(3). He also speaks in terms which themselves need definition, for the proprietary-governmental distinction has no application to the United States.

The Supreme Court has said:

> The Federal Government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental.

Quite recently, following out the same feeling, the Supreme Court has said:

> [O]ur decisions have made it clear that the Federal Government performs no "proprietary" functions.

Whatever it means, the section suggests the question of what the United States or its licensees can do if the State law forbids or attaches onerous conditions to the federally authorized project. The answer

under the bill would seem to be to bring a condemnation suit against the State to condemn the unappropriated water. In fact, what would be condemned is not property in any meaningful sense, but the State's police power. Query who would be edified by such a rigmarole except the lawyers paid to engage in it.

Finally, the second subsection of the bill is said to be to declare a preference for consumptive uses over nonconsumptive uses in the arid West. It would accomplish this by reference to the Flood Control Act of 1944. But that act does not subordinate nonconsumptive to consumptive uses; it merely subordinates navigation uses to certain other uses (58 Stat. 889). Therefore, S. 1275 shoots wide of the declared purposes of its proponents.

Part of the argument in favor of the bill is that since the decision in *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U.S. 142 (1935)), there has been justified reliance on the severance of water from land in the public domain. However, the rule of that case was expressly limited to "nonnavigable waters" and so excludes "waters of the tributary streams which unite into a navigable water course." The bill, however, does not limit the relinquishment of rights in section 1(1) to rights in nonnavigable streams and sections 1(2) and 1(4) make clear that the bill was not intended to do so. It, therefore, would expand the operation of the acts of 1866, 1870, and 1877, and particularly the latter, to all streams, navigable or not, and instead of merely relieving against venial errors, create new private rights which will have to be extinguished at public expense.

Thank you.

Senator Moss. Thank you, Mr. Goldberg, for a very excellent statement. It is a legal brief and has been well done.

Mr. Goldberg. Thank you, sir.

Senator Moss. I notice with pride that I have been quoted two or three times in here. I hope I have been quoted on the right side of this matter.

I do appreciate your statement and there may be some questions we might have from the bench. Do you have questions Senator Kuchel?

Senator Kuchel. Yes, sir.

What I am going to try to do, Mr. Goldberg, is to see whether or not you and I can agree on some facts and then see where we can agree on what policy ought to be adopted in the national interest. First of all, it is not the intention of the authors of this legislation to affect in any fashion the acreage limitation provision of Federal reclamation law. It is not the intention of the authors of this legislation in any way to impede or to curtail or to eliminate any right of inverse condemnation. It is not the intention of the authors of this legislation, I will say to Mr. Goldberg, to provide a means by which a person could attempt to frustrate any public project by attempting to obtain injunctive relief to prevent it from being built.

What basically the authors of this legislation have as their goal in my judgment is to permit the beneficial use of waters arising on Federal properties not necessary for the Federal Government but these for the people.

I am going to read a statement from a Supreme Court decision. *California-Oregon Power Company* v. *Beaver Portland Cement Company* (295 U.S. 142, 163, and 164, 1935).

Following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris subject to the plenary control of the designated States with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of obtaining the rights should obtain.

That is a fair statement of the fact, is it not?

Mr. GOLDBERG. I think, Senator Kuchel, that you ought to keep on reading because, as I recall that opinion, it goes on to point out about the U.S. authority to protect itself in the public domain. If I recall correctly, they quote thereafter or shortly thereafter from the *Rio Grande* case of 1898 or 1888.

Senator KUCHEL. Well, then without restricting ourselves to the language which I just read, is it not a fact that the Congress of the United States in a series of statutes after the Civil War when there was a great migration West, wanted to make available to people the right to acquire unappropriated waters for their own use in accordance with the laws of the State where the waters were available to them? Is that a fair statement?

Mr. GOLDBERG. The fairest statement that I have been, Senator Kuchel is actually out of the California case, *Peabody* v. *Vallejo*, which I have not cited here. You know how it is with these things, you always write and write and then you don't find the thing you want.

The *Peabody* case in California carefully pointed out that these statutes control only to a limited degree the relationship between the United States and private appropriators.

Actually they had the effect of allowing the States to control the relationships between private appropriators themselves. That was the situation in the *California-Oregon Power Co.* case. It was not a case involving the right of an appropriator vis-a-vis the United States, it was one appropriator against another appropriator.

In California the statutes of 1866, 1870, and 1877 have been held to provide only that an appropriation on public domain is good against the subsequent riparian patentee from the United States.

Senator KUCHEL. Is it good against any subsequent claim by the Federal Government?

Mr. GOLDBERG. An appropriation on private land is not.

Senator KUCHEL. It is not. Should it be in your opinion?

Mr. GOLDBERG. Well, I would like to give you the references. They are the cases collected in note 19 to my statement.

Now when you say "should it be," Senator, you present a different range of problems. It is perfectly clear under California law and I think very properly arguable under the laws of the other States that the United States has rights similar to riparian rights in the public domain. I say similar to riparian rights because, although the California cases talk about them as riparian rights, actually, the later U.S. cases indicate that these rights may not be limited as riparian rights in California, but whatever they are the United States has large water rights associated merely with the fact that it owns these lands and has owned them since the inception of the State or before.

Senator KUCHEL. From the very beginning?

Mr. GOLDBERG. Yes. I can't say without knowing what those rights are, what the points involved are, whether they should be given up. I think that before you can decide whether the rights should be given

away you have to have some sort of quantification of what is involved here, and that to my knowledge is completely absent.

Senator KUCHEL. So that what you are telling this committee is that Congress, in the several statutes which it adopted about a century ago making available the use of water and the acquisition of some kind of a right under State law to that right, did not make available a complete perfection of those rights but that the Federal Government nevertheless retained today some kind of a priority to those waters; is that your statement?

Mr. GOLDBERG. Yes, Senator Kuchel. My knowledge of this begins with Lux against Haggin. Lux against Haggin starts—well, I won't say starts out, it starts at page 336 of an opinion beginning at page 255 of 69 Cal., but anyway it proceeds on the assumption that the United States, either under State law or under the Treaty of Guadalupe-Hidalgo, is the owner of all the water originating on the nonnavigable land. They refer to it as a riparian and they say the United States is at least as good as any other riparian, or its rights are at least as good.

Senator KUCHEL. This view you take I most respectfully suggest constitutes considerably shocking contentions for any individuals or groups, public or private, that may have been utilizing waters in this fashion for a long length of time.

Anyway, let me ask you this. In your opinion, does the Congress of the United States constitutionally have the right to set that problem at rest and by suitable language make available under State law a complete vested right based on beneficial use or of the use to which the State laws provide? To that extent can the Congress make available by statute a complete perfected vested right to waters which arise on public lands? Can it do that?

Mr. GOLDBERG. The reason I hesitate is that I would be disposed to answer you that I suppose the Congress can give away any kind of Federal interests that exist. They gave away land for schools, the school sections, and other purposes, similarly you could give away water. Your question is whether that gives a complete perfected water right and that relates to an interrelationship of State and Federal law that makes it difficult for me to answer the question.

I hesitate there but I will answer you this way, Senator. Yes; I suppose Congress can give away whatever Federal property it desires to dispose of.

Senator KUCHEL. But it is your opinion as a lawyer that it did not do so in the Desert Land Act for the other statutes which it has had passed in that general field?

Mr. GOLDBERG. Well, the Desert Land Act, sir, is limited strictly to nonnavigable streams.

Senator KUCHEL. This is true. Do you make a distinction between the capacity of a person to perfect a water right with respect to nonnavigable streams and navigable streams?

Mr. GOLDBERG. Certainly.

Senator KUCHEL. Of course you do. Then with respect to the Desert Land Act, tell me what your view is as to the availability of the waters there to be perfected into a right under State law.

Mr. GOLDBERG. Under State law, I speak only of the law of California. I have cited two cases in note 19 which apply to the Desert

Land Act in California. They are both under the name Williams against San Francisco involving the city of San Francisco rights. The law enunciated there, as I have stated to you before this morning is that the only one who gets a right good against the United States is the one who makes the appropriation on the public domain before the United States has made a patent of the riparian land to a riparian patentee.

Senator KUCHEL. In the statement you just made, do you assume that the person making the appropriation has complied or has not complied with the law of the State?

Mr. GOLDBERG. I think we better assume that he has complied with the law of the State. Again, I hesitate, Senator, not because the question is difficult but because the cases involved appropriations made so long ago that there was no State law that was applicable. The only thing you had to do under State law when these appropriations arose was go out and cut a slot in the side of the river.

Senator KUCHEL. Well, let me read into the record part of the Desert Land Act of 1877.

All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of the water supply upon the public lands not navigable shall remain and be held free for the appropriation and use by the public.

Under that statute do I understand it to be your opinion as a lawyer that in this instance the waters which this act operated upon were made available to people, public or private, to perfect water rights in perpetuity and always against the Federal Government and anybody else?

Mr. GOLDBERG. The answer is generally "Yes." However, the California cases keep on saying that the United States did not lose its status as a riparian under State law by virtue of the Desert Land Act.

Senator KUCHEL. Does not the colloquy between you and me point up the dreadful messy jungle in which people who have been using water for years find themselves now? Is there not some responsibility upon the part of Congress to set at rest this important problem?

Mr. GOLDBERG. Senator, I would agree with you except I try to rely on the observation of my senses, sir, and I find instead of being in a dreadful messy jungle we are well on the road to coming out of the jungle; that water projects are progressing, people who have been damaged in the course of construction of these projects have been paid. With that observation available to me I cannot find that there is the crying need for legislation that many people assert that there is. Instead, what I find is that every time legislation of this sort comes up it is bundled about with qualifications and restrictions and dubious items which to me reflect only an intent to inhibit the United States. In our instance the State of California is a Federal licensee in operation and construction of our projects without difficulty. There is not one word in S. 1275 that does us anything but harm.

Senator CHURCH. Would you restate that?

Mr. GOLDBERG. I say, sir, there is not one word in S. 1275 that does us anything but harm.

Senator CHURCH. Thank you.

Senator KUCHEL. Now that is your opinion?

Mr. GOLDBERG. Yes, sir.

Senator KUCHEL. The attorney general of California and the Attorney General of the United States disagree. Many of us on this committee disagree. This is again why I am trying to forget the verbiage in this bill, Mr. Goldberg, and try to get a policy agreement.

Mr. GOLDBERG. All right, Senator. Suppose by reason of the indefiniteness associated with the U.S. claims we were to embark on a program of trying to make those claims definite. Now the goal of all water law as developed in the West has been the idea that you can neatly arrange things in boxes and somehow you know who is entitled to each little pigeonhole. It does not work out that way but that is the idea.

Senator KUCHEL. Can you give us a broader sweep on what you believe the water law is? Isn't it that people be permitted to use the waters that the good God above us put down here for beneficial use to the maximum extent possible?

Mr. GOLDBERG. No question about that but actually the way the water law has developed in the West is really a scheme of rationing and it is bound to be just as unsuccessful and as provoking of hostility as was the late OPA scheme of rationing. We are trying to resolve these problems in California. Senator Kuchel, by proceeding in a different direction, and that is that the people will have a project which they can use beneficially. The law of water development is becoming very largely the law of private agencies. We should not confine our thinking, and your analogy seems to do so, to the little private appropriator going on and making his diversion and establishing a homestead. Those days are gone. History has passed us by on that sort of thing. We are now up against the major damsites, the sites that are not easily available and really not very economical any more—the second-best sites that have to be used if you are going to get large-scale water supply.

Senator KUCHEL. But what you have done in your opening remarks, you have raised as your opinion a continuing hazard that there is not any such thing as a vested right under State law of waters which arise in the public domain and that behind it there still exists the right of the Federal Government which you did not want to describe because it was quite involved, but there still exists in your opinion that kind of a supreme or paramount or a superior right on behalf of the United States to take back. Am I correct in that?

Mr. GOLDBERG. I say to you that under the law of California——

Senator KUCHEL. Tell me, Mr. Goldberg. Maybe I am wrong. Am I correct in what I just said?

Mr. GOLDBERG. I think you might escape me a little bit when you talk about a right to take it back. I say it was a right that was never lost.

Senator KUCHEL. Why do we talk about a superior right then? What does a superior right mean or a paramount right?

I think you used the word "superior" right. What does that mean?

Mr. GOLDBERG. I have used an expression "a right similar to riparian rights." The California cases talk about the riparian right as paramount to an appropriator. I gave you the instances where an appropriator had a right against the subsequent riparian.

Well I don't know. I am a Californian. All I can say, I think California is thriving and growing and the only alarm that exists from

the assertion that the United States has rights seems to be from the assertion of various lawyers of my acquaintance, and those they may get agitated.

As far as the State is concerned. in our actual practical operation, we go up there at Oroville, we get a Federal power license, we get whatever rights are pertinent to that license. We now have a project under construction. I think we are proceeding successfully. Now the idea that the United States is going to come in and do various inequities on the forest lands that are going to affect vast multitudes of people down below seem to me to be just conjuring up an imaginative possibility that will never come to happen because certainly whether you have a water right or not you are not going to authorize destruction of existing civilization.

Senator KUCHEL. Just one more question.

Mr. GOLDBERG. Yes.

Senator KUCHEL. I want to ask you this as a friend, and as a fellow citizen. Let us assume that the waters today which are arising on public lands which have been reserved are surplus to the present needs of the Federal Government. Let us assume that for the purpose of my question.

Where is the public interest? Is it not in permitting those surplus waters to be utilized today for the benefit of control under appropriate Federal legislation?

Mr. GOLDBERG. I would have to say, Senator, that I consider that an anticonservation statement. I think that the mere fact that there is a surplus is not evidence that the water should be used. You have to look at that existing surplus and make up your mind whether that surplus should be reserved for future developments or whether that surplus should be allowed to pass now in some other lesser development, private or public.

Now we have this problem in California and we have handled it by this so-called withdrawal of surplus water. I would suggest this. In any particular case it may be that the United States does have surplus water which should be put to use and which the existence of the U.S. claims has forbidden to put to use. So let's look at it procedurally and see if some way can't be arranged to quantify the U.S. claims to provide an administrative procedure surrendering them. We had that in part under the Federal Power Act and tried to approach this thing in a practical fashion. This bill seems to be just a giveaway of whatever rights the United States has and you give away without knowing what they are, even.

Senator KUCHEL. I guarantee this is the last question.

Again I am talking policy, forget the bill.

Mr. GOLDBERG. Yes, sir.

Senator KUCHEL. No. 1, assume that the waters rising on reserved or withdrawn federally owned lands are surplus to the present needs of the Federal Government.

Mr. GOLDBERG. Yes, sir.

Senator KUCHEL. Two, assume that there is a present need for those waters under the law of the particular State in which they are found.

Mr. GOLDBERG. Yes, sir.

Senator KUCHEL. Now, is it not in the national interest by law to make those waters available to serve that present non-Federal need?

Mr. GOLDBERG. Under the hypothesis given in your question, of course the only possible answer can be yes. But——

Senator KUCHEL. If we could fashion legislation to do that, would you object to it?

Mr. GOLDBERG. No, of course not. But I don't think that S. 1275 does it.

Senator KUCHEL. All right.

Senator CHURCH. Mr. Chairman.

Senator MOSS. Yes, Senator Church.

Senator CHURCH. I want to say, Mr. Goldberg, that you have given a very learned paper here, that we would do well to study very carefully because you have questioned whether the provisions of this bill do in fact accomplish what many of us have in mind. You have certainly raised questions that we would be remiss in our responsibility to the public, if we did not inquire into them very carefully before we make a decision on this bill. The possibility that many of these provisions will cause more harm than they will do good, in actual application, and will not serve the objective that we seek, will require careful examination.

Senator Kuchel has mentioned some of the things that are intended. Of course, the real question we have to deal with is whether or not the language in the bill carries out the intent, because the language will be the law.

I want to make clear as one of the sponsors of the bill what I intend individually. I certainly don't intend that we should do away with the supremacy clause of the Constitution of the United States or place the Government of the United States at the mercy of what any given State legislature, at any time, may decide constitutes property which the United States would thereafter have to pay for. I thought we settled that question a long time ago. I am not interested in dissolving the United States into 50 separate principalities. What I am interested in doing is seeing that citizens of the United States, who acquire water rights under valid laws, are upheld against any transgression by the Federal Government, just as I would be interested in seeing to it that they are upheld against any transgression by State governments.

I don't consider State governments any better motivated, or led by men of higher caliber, or more interested in the maintenance of individual liberty, or good conversation, than the Federal Government, and all argument to the contrary I regard as sheer poppycock.

What I would like to see, and the reason that I favor a bill that will accomplish this objective, is assurance for the future that the Federal Government will never transgress upon the rights if individual citizens, that are valid water rights, without the payment of just compensation.

You have made a statement on page 19 of your testimony which I regard as a very important one. You say:

> If the goal is to assume an additional, but definable, liability, it would be better for the bill to provide that the United States shall pay for those rights established pursuant to State law that are properly within the meaning of the fifth amendment.

Mr. GOLDBERG. Yes, sir.

Senator CHURCH. I think that is a very important recommendation, for otherwise we would place the Federal Government at the mercy of its component States, in determining the scope of liability for the Federal Government in any given instance, and this would enable State Governments, which are so minded, to erect a series of barriers that in fact could make Federal projects needed by the public no longer feasible.

Mr. GOLDBERG. Yes, sir.

Senator CHURCH. I must commend you on your statement. It has been an excellent statement and you have called our attention to many things that we must look at very carefully before we decide on the form this bill should take.

Mr. GOLDBERG. Thank you very much, Senator Church, I want to say this because I have discussed it with Governor Brown. We would like to see this problem put to rest. You have this constant irritation. I have been in the water business for some 12 or 13 years and we have always had this problem of people trying to set the United States and the States at swords points. I would certainly have to agree with you, Senator Church, when you deal with the State government or you deal with the Federal Government, they are both bureaucracies of equal iniquity.

Senator ALLOTT. Did you say "inequity"?

Mr. GOLDBERG. I said "iniquity."

I paused, Senator Allott, because I expected some of the State bureaucrats who may be in the audience to transfix me with an arrow.

We would like, of course, to see some procedure that would eliminate this question but this procedure cannot be associated as is S. 1275 in our opinion with things that operate as large practical impediments to the operation and construction of our water projects. This is the sum and substance of it.

Senator Moss. Are there further questions? Senator Allott?

Senator ALLOTT. No. I just want to say this. I want to get to the others but I want to make this remark. While your statement is very comprehensive, it seems to me that to take the position that you have taken that raises the possibility of the subjection of a great many people in this country to all the inequities of which you speak from the Federal Government and that is what a great many of us are concerned about.

Mr. GOLDBERG. Well, I am sorry, Senator Allott. I tried to give the committee the facts as they are known to me or appear to me to be.

Senator ALLOTT. As you see it, sir, and I have no objection to this. I just happen to disagree with your point of view, that is all. I think this is an area which we have to resolve. I don't think we have any choice.

I won't ask any questions, Mr. Chairman, but I didn't want my own position to be mistaken.

Senator Moss. Senator Jordan.

Senator JORDAN. No questions.

Senator Moss. Thank you, Mr. Goldberg. You have indeed given us a very thoughtful paper, well documented, and one that will require our most careful attention as we wrestle with the problem that we have.

Mr. GOLDBERG. You are very welcome, sir, and thank you for your patience.

Senator Moss. Thank you.

Now, Mr. Porter is next, the chairman of the Water Committee of the California State Assembly.

We are beginning to push that clock pretty hard now.

STATEMENT OF HON. CARLEY V. PORTER, CHAIRMAN, WATER COMMITTEE, CALIFORNIA STATE ASSEMBLY

Mr. PORTER. Mr. Chairman, my own Senator Kuchel, and Senators, may I give the court reporter my card for reasons which I will explain immediately?

I will be very mindful, Mr. Chairman, of the clock. It has been my pleasure to appear before various congressional committees, five, I believe, but I am being promoted today since I finally achieved appearing before a Senate committee whereas previously it has been House committees.

The matter on which I speak in support of today is S. 1275 which was the matter of considerable debate and action in the California Legislature the last 9 days in our State capitol. I did not get the measure out of the State senate until 4:25 yesterday afternoon which accounts for my not having copies of a prepared statement. I do have 50 copies of the A.J.R. 2 which urges adoption of S. 1275. I also have 50 copies of Senator Cobey's statement, explaining S. 1275 to the State senate. He is the coauthor and is chairman of the senate water committee, and I am chairman of the assembly water committee.

If I may be permitted I will transmit to your committee a brief statement, come next Monday, when I am back in my office.

Senator Moss. That may be done and it will be placed in the record and the A.J.R. 2 will be printed at the conclusion of your testimony here today.

Mr. PORTER. Thank you.

Now, let me speak briefly on three points. Most or all of you men are lawyers and I am not; but for about 14 years as chairman of several water committees it has been my task to listen to many witnesses and to try to understand water attorneys. Different words mean different things. It is with regret and sorrow that I tell you that my good friend, Abbott Goldberg, does not reflect the attitude of the State of California, and in this instance neither does the administrator of the resources agency, Hugo Fisher, nor does the director of water resources under him, Mr. William Warne.

The attitude of the 18 million people in the State of California—and the water-interested groups and legal-interested groups—is unanimously reflected today by the opinion of our attorney general, Stanley Mosk, urging adoption of S. 1275 or similar legislation. I believe that Senator Kuchel used a most apt phrase when he put a question to Mr. Goldberg, "How do we get out of this jungle?" Mr. Goldberg replied that there was not any particular jungle.

Your 21st witness on the agenda today is Mr. Harvey O. Banks, who was the director of the Department of Water Resources in the State of California when it was my pleasure and honor to carry the Burns-Porter Water Bond Act authorizing the financing and initiat-

ing the construction of the largest man-made waterworks in the world, the Feather River project, $1.750 million. Mr. Banks is qualified to point out that there are some problems in this jungle.

First let me say that I checked with the office of Senator Kuchel and then finally with Senator Engle's office and both of those offices informed me that this and similar legislation has been before the Congress since about 1953, usually in more stringent form.

The second point I would make is that in 1959 the California Legislature passed assembly joint resolution 21 by Assemblyman Lloyd Lowrey urging the Congress to pass Federal legislation similar to S. 1275, which was before the Congress at that time. That resolution was passed in both houses, 70 to 1 in the 80-member assembly and 37 to 0 in the 40-member State senate.

The third point I would mention and make to you is that again the California Legislation urges you gentlemen to approve S. 1275 or similar legislation. We always had the notion on the State level that Congress paid no attention to AJR's. I've prepared many of them and never even got a letter back. People in the capitol at Sacramento told me yesterday that AJR 2, the resolution I bring you today, had been tougher than the water bill in 1959 and I should know, they are right. The assembly passed AJR 2, urging adoption of S. 1275, by a vote of 50 to 4. Actually the vote would have been 61 because I had 11 more votes but they were out at committee meetings and all I needed was 41 anyway. In the senate of 40 members, 2 were excused because of illness, and that makes it 38 present. The vote was 29 aye and 9 no.

It takes 27 votes back there to get any kind of an urgency measure through on a constitutional amendment, or a budget. During the presentation of AJR 2 I underscored the point that I see nothing in S. 1275 which will disturb the harmonious relationship between the U.S. Government and the State of California. No projects will be interrupted and much-needed assurances will be afforded many of our States, particularly the Western States.

Mr. Goldberg and I have discussed this matter privately and publicly as we have discussed many, many other bills before many committees. Occasionally we are on the same side but often we are not. So he and I have an agreement. We do not object to the other one jumping on the one that is not speaking. That is why I wanted to follow Mr. Goldberg because for 4 days back in Sacramento I had to come first and he has had the advantage of mopping up on me. He is a brilliant lawyer and he is an excellent craftsman at the use of the word. He is also a master at the red herring. I would say that when I return to Sacramento, he will try to get even with me.

I would say that the reference to inverse condemnation is to be decided by this committee. One telegram assures me that it is not in S. 1275, that the Federal Government can still do whatever it wants. All that it has to do is to go through regular condemnation procedures and pay just compensation.

Here I am getting into the lawyer's realm. I have found that water engineers tend to talk like water lawyers, water lawyers tend to talk like water engineers and politicians try to talk like both of them, and I have too many of both groups in back of me.

Everyone in California supports this. My Governor does not understand it or he would support it.

Are there any questions?

Senator Moss. Thank you, Mr. Porter. I was aware of your efforts in the California Legislature and I acknowledge receiving your telegram and was very hopeful you would be here today with the job completed. Now you have been able to report the passage of the resolution by the California Assembly and Senate by overwhelming votes. That is quite indicative, I think, of the allegation you make that California, by at least great preponderance, supports it; if not everybody, a large majority of the people support it.

I do say that we, sitting as a legislative body here, are, I think, quite impressed when the matter is deliberated in the State legislative body, and when the vast majority of the members of that group supports a measure it certainly is persuasive with us. I think you have presented very well the position that you take and the work that has been done in the assembly legislature by you in California over a long period of time. Your position indicates that you have given a great deal of attention to water problems for a considerable period of time. So we are pleased to have you come and report to us.

We will include the statement in the record if you prepare one when you return to California. The other matter that you referred to will be placed in the record. I have no questions myself at this point. Perhaps Senator Kuchel has.

Senator KUCHEL. No, except to say I am delighted to welcome a member of the legislature from our State who has been very active during his public service in this field. It has been helpful to the committee to listen to him and to learn that the legislative branch of the government in my State has taken the position which it has with respect to this pending bill.

I thank you very much for your comments.

Mr. PORTER. Thank you.

(AJR No. 2 referred to follows:)

ASSEMBLY JOINT RESOLUTION No. 2

Whereas there exist many uncertainties relating to the establishment of rights for the diversion, use, and storage of the water supplies of California and other States; and

Whereas Federal court decisions in recent years have clouded the title to water rights held under State laws by suggesting unlimited Federal prerogatives with respect to water rights; and

Whereas the continued existence of these uncertainties over water rights is not in the best interests of California or the United States as doubt has been cast upon vested water rights and upon the authority of the States with respect to water rights; and

Whereas cities, districts, and other public agencies in California and the State itself have invested billions of dollars in water development projects in reliance upon water rights, which have been placed in jeopardy by said court decisions and Federal policy; and

Whereas California is vitally concerned with Federal-State water rights relationships, since more than 75 percent of the natural water runoff in California originates from or flows across Federal land or reserves; and

Whereas S. 1275 has been introduced in the U.S. Senate to provide an orderly procedure for resolving these uncertainties in water rights, and would facilitate and in no way interfere with urgently needed regional water planning and development: Now, therefore, be it

Resolved by the Assembly and the Senate of the State of California (jointly), That the Legislature of the State of California respectfully memorializes the Congress of the United States to enact S. 1275 or similar legislation clarifying the relationship of the Federal and State governments in the field of water resources development to insure that water development by the Federal and State and local governments may proceed on a sound basis; and be it further

Resolved, That the chief clerk of the assembly be hereby directed to transmit copies of this resolution to the President of the United States, to the Speaker of the House of Representatives, to the chairmen of the U.S. Senate and House Committees on Interior and Insular Affairs and to each Senator and Representative from California in the Congress of the United States.

Senator Moss. Senator Jordan.

Senator JORDAN. I would like to say I, too, appreciate the statement of this witness. The fact this matter has occupied the attention of the California Legislature is an indication to me that there is an area that needs attention.

We thank you for your statement.

Mr. PORTER. You have mentioned the attention of the legislature. In 1959 I did carry the largest water bill of all time, so we thought. But in the last 9 days I would say that the legislature has been so completely absorbed with A.J.R. 2, which is synonymous with S. 1275, that it became almost as much a water bill as the big Senate bill 1106, the Burns-Porter Act, which authorized construction of our California State water project. So we were quite interested in your bill and we would like it.

Thank you.

Senator Moss. Thank you very much, Mr. Porter. We appreciate your statement.

Mr. Biemiller has filed a statement as legislative representatve of the AFL–CIO which will appear in the record at this point. Also a statement by Jacob Clayman, administrative director, Industrial Union Department, AFL–CIO.

(The statements referred to follow:)

STATEMENT OF ANDREW J. BIEMILLER, DIRECTOR, DEPARTMENT OF LEGISLATION, AFL–CIO

Mr. Chairman, my name is Andrew J. Biemiller. I am director of the AFL–CIO Department of Legislation and I am chairman of the AFL–CIO staff subcommittee on atomic energy and natural resources. I wish to record the opposition of the AFL–CIO to S. 1275, and I request that a statement by the Industrial Union Department, AFL–CIO, and a telegram from the California State Labor Federation, AFL–CIO, both opposing S. 1275, be included in the record at the conclusion of my statement.

For many years, Congress has recognized the special needs of Western States with serious water problems and Congress has taken action to cooperate with these States and to help them solve their water problems. The resources of the Federal Government have helped open up land for irrigation, control floods, generate and market electric power, manage grazing districts, foster mineral development, protect fish and wildlife, promote recreation, soil conservation, and many other land and water resources development programs. Without Federal leadership and assistance, the 17 reclamation States would be seriously handicapped in these programs.

"The Federal Government is and must continue to be the principal steward of the natural resources of the American people," the 1963 AFL–CIO Convention declared, reasserting our endorsement of Federal leadership and action to protect the Nation's interest in conservation and development of our natural resources.

The interest of organized labor in natural resource conservation and development goes back a long way. In 1901, the American Federation of Labor endorsed the antimonopoly policy of what was to emerge as the Reclamation Act

of 1902. The federation declared, at that time, "we are unalterably opposed to the cession, by sale or otherwise, of such lands to corporations or speculators, or to the several State governments, every such course having heretofore resulted in sales to monopolists, with subsequent grave injuries to the rights of actual settlers and producers."

The labor movement has maintained its interest in protection, conservation, and development of our natural resources for the general welfare of the American people, and that is why we are concerned about S. 1275.

Clearly the current conflicts over the respective roles and authority of the Federal Government and the State governments in water resources conservation and development are not new. S. 1275 is the most recent of some 50 bills that have been introduced in both Houses of the Congress since the late Senator Barrett, of Wyoming, sponsored similar legislation in 1955. Although differing in some details, S. 1275 has the same goal—to hand over to the various States by act of Congress the exercise of the constitutional powers of the Federal Government in conservation and development of the Nation's water resources.

We believe the sponsors of S. 1275 are not aware of the dangerous implications of this bill. Although the ostensible, stated purpose of the bill is "to clarify the relationship of interests of the United States and of the States in the use of waters of certain streams," the main result of the proposed "clarification" policy would be to allow the Federal Government to continue to spend large amounts of money to carry out new, complex, and costly reclamation projects and other resources development programs but, at the same time, to subject the Federal Government to the veto of State laws.

Furthermore, if S. 1275 were to become law, the U.S. Federal Government would lose control of the water rights related to national forests, national parks, grazing districts, wildlife refuges, and other Federal lands—even though these lands would remain under Federal control. Thus, to assert these water rights, the Federal Government would be forced to go through long and costly condemnation and litigation proceedings in court.

Gifford Pinchot, the father of conservation in this country, has said that "the special interests find it far easier to control a State legislature than the Congress of the United States." This is the practical fact of life that gives continuing life to proposals like the 1955 Barrett bill and now to S. 1275. Below the plausible and perhaps even appealing surface of S. 1275 lies the same old drive of the special interests who want to control and monopolize the still unappropriated waters on the reserved and withdrawn lands of the United States. They want to keep Federal money flowing into water development in the Western States but they want the Federal Government under the control of the State governments in water development.

Senate sponsors of S. 1275 say this bill results from concern about the Pelton doctrine set forth by the Supreme Court of the United States in 1954 in the case of the *Federal Power Commission* v. *Oregon*, and that it also stems from concern about a case which is still before a Federal court in southern Californi, *U.S.* v. *Fallbrook Irrigation District*. We believe the Pelton doctrine does not threaten existing rights to use of water which are valid under State law. In the *Fallbrook* case, our understanding is that it stems from a basic inconsistency in California State water law. This should be settled by the court before it is invoked as a justification for changes in Federal law.

Proponents of S. 1275 claim also that under the 1949 *Gerlach* decision of the Supreme Court the Federal Government can now preempt water rights of individuals without compensation. We believe, on the contrary, that the Court was particularly emphatic in laying down a sound general policy with regard to protection of individuals against arbitrary action by agencies of the Federal Government.

Mr. Justice Holmes once remarked that a river is not an amenity but a treasure. S. 1275 would dissipate this treasure by opening up for acquisition of private rights water long reserved to meet public needs. It would subject national water resources policies to the veto threat from each of the 17 reclamation States.

Thus, enactment of S. 1275 would be a dangerous backward step, wiping out many gains over the past 50 years in water resources protection, conservation, and development. Therefore, we urge this subcommittee to reject S. 1275 and to reject its approach to Federal-State relations in water resources development.

STATEMENT OF JACOB CLAYMAN, ADMINISTRATIVE DIRECTOR, INDUSTRIAL UNION DEPARTMENT, AFL–CIO

Mr. Chairman, my name is Jacob Clayman. I am director of legislation, Industrial Union Department, AFL–CIO.

I wish to express briefly the views of the industrial union department in support of the opposition to S. 1275 which has been set forth by the AFL–CIO.

The general substance of this bill is very little different from a similar piece of legislation proposed by the Eisenhower administration in 1958. The IUD is happy to learn that the executive agencies of the Johnson administration are opposed to S. 1275.

In view of the growing need for this country to protect the sources of water supply for the demands of the future rapidly expanding, increasingly urbanized population, it is necessary to conserve, preserve, and wisely manage these sources for the benefit of all. The same is true for grazing lands, timber lands, and recreational areas.

Under the doctrine of unrestricted exploitation which pervades S. 1275, there would be made immediately possible, even inevitable, the invasion of America's national forests, national parks and monuments, grazing districts, wildlife preserves, and recreational areas as a result of allowing private acquisition of rights to use of water under subjection to State law. Thus the United States would be left with the land but not the water. Any reassertion of its constitutional rights would require costly condemnation and litigation, under which conditions orderly Federal water resources development could not proceed.

The purpose of this bill is to create a situation where the Federal Government continues to spend millions of dollars in developing western resources, but must do so under the shadow of veto by the governments or agents of the 17 Western States and under their control.

In view of the nationwide implications of the water problem, this return toward the Articles of Confederation could be disastrous for future generations.

The IUD finds that the needs for "clarification" of the Federal and State roles in water development is a fallacious assumption. The clarification has been proceeding under wise decisions on such cases as *Ivanhoe*, *Pelton*, *Cowlitz*, *Arizona* v. *California*, and others. The Supreme Court has upheld the powers of the United States to carry out congressional policies and programs in its own delegated constitutional sphere, without being subjected to the veto of States with conflicting laws or policies.

S. 1275 would reverse this orderly process of clarification, and, in addition, would subject the United States, in attempting to carry out the vast and complex projects of the future and which cover many States, to hamstringing restrictions, additional costs, and years of litigation.

When TVA was called "creeping socialism" by the monopolistic interests who wanted to control or acquire it, their "constructive" approach to the continuing problem of State-Federal relationships in a Federal system of government was to propose Dixon-Yates. The same kind of "constructive" alternatives is found in S. 1275, and with the same kind of backing. It could very well constitute a gigantic raid on our natural resources that would be hard to stop.

The IUD has yet to hear one supporter of this bill who proposes that it should contain the acreage restriction provisions of the 1902 Reclamation Act. We can only conclude that this protection is not in the bill, because with it there, S. 1275 would not be acceptable to its supporters. We are not aware of any Western State that does have such protections in its body of State water law.

The United States carrying out programs under congressional policy has made it possible for the West to be settled, rapidly developed, and assured of a water supply for its people. This bill goes on the principle that Uncle Sam is an enemy and the State governments are the only friends a citizen has. This is erroneous—historically, legally, and in every other respect.

If there has been any unwarranted invasion of the vested rights to use of water by individuals in the West by the United States, we have yet to hear of it. It can only be concluded, therefore, that the real purpose of S. 1275 is not as stated in the bill, but is in reality an effort to place private interests in control of the West's future in water development, through their control of State legislatures, and of State officials.

Therefore, the IUD urges most strongly that S. 1275 be rejected quickly and that any future efforts to clarify Federal-State relationships be approached along lines responsive to the needs of the Nation as a whole, and not to those of special-interest groups.

CALIFORNIA LABOR FEDERATION, AFL–CIO,
March 6, 1964.

Re S. 1275—the so-called Water agency bill.
ANDREW J. BIEMILLER,
Director, Department of Legislation, AFL–CIO,
Washington, D.C.

DEAR SIR AND BROTHER: It is our understanding that the AFL–CIO will be offering testimony in opposition to the above bill at scheduled hearings of the Senate Interior Subcommittee on March 10 and 11, 1964.

We have reviewed this measure and heartily agree it should be opposed as potentially very dangerous to the future development of water resources in the West on a federally coordinated basis. Please advise the committee that the position of the national AFL–CIO fully reflects the sentiments of the California Labor Federation, AFL–CIO.

We are confident that your testimony will make a significant contribution toward defeat of S. 1275.

With best wishes and kindest regards, I remain,

Sincerely and fraternally,

THOS. L. PITTS, *Secretary-Treasurer.*

Senator Moss. There are two or three witnesses who have indicated that they must appear today because they are unable to stay over. It has become apparent that we are going to have to have a hearing tomorrow as well. We have not been able to get to the witnesses who are here and we do want to accommodate them all. All of them are very important witnesses. They represent large and important groups and their testimony must certainly be in this record for us to have a complete record.

My inclination is that Mr. Milton Fricke, of Nebraska, who is chairman of the Water Resources Committee, National Association of Soil and Water Conservation Districts, will be limited to today's attendance in Washington so I will call on him next.

You may testify now, Mr. Fricke.

STATEMENT OF MILTON FRICKE, CHAIRMAN, WATER RESOURCES COMMITTEE, NATIONAL ASSOCIATION OF SOIL AND WATER CONSERVATION DISTRICTS

Mr. FRICKE. Thank you, Senator.

I have a statement that has been passed out. Do you have copies of it up there?

Senator Moss. I am sure we have it on the table.

Mr. FRICKE. I would just like to make a very short statement. I would like to read it; it is short. I will do better; I will make the statement that we are definitely in favor of this bill, the general principles behind it. We desire an action whereby these rights of the people are definitely pointed out.

So there is not this question that has been raised these last few days. We think people who have used these letters do have some rights and need some protection.

Thank you.

Senator Moss. Thank you, Mr. Fricke. Your statement will be printed in full in the record together with your comments. We appreciate your summarizing in that manner. We appreciate your attendance before the committee. Thank you.

Mr. FRICKE. Thank you.

(The statement referred to follows:)

STATEMENT OF MILTON H. FRICKE, CHAIRMAN, WATERSHEDS AND WATER RESOURCES COMMITTEE, NATIONAL ASSOCIATION OF SOIL & WATER CONSERVATION DISTRICTS

As a spokesman today for the National Association of Soil & Water Conservation Districts (NACD), I want to express our appreciation for this opportunity to present our views on S. 1275, which is designed to clarify in relatively limited and specific circumstances the "rights" of the United States and individual States with respect to water.

The NACD, by action of its board of directors, ratified by its council of representatives of 49 State associations of soil and water conservation districts, favors the enactment of legislation embracing the principal provisions of S. 1275.

The National Association of Soil & Water Conservation Districts represents 2,945 soil and water conservation districts in 50 States, Puerto Rico, and the Virgin Islands. Its primary purpose, and the purpose of its member districts, is the conservation, orderly development, and judicious use of land, water, timber, and related natural resources.

Each district is a subdivision of State government. Each district has accepted a responsibility, under State law, to develop and carry forward a long-range program for the development of soil, water, and other renewable natural resources within its boundaries.

Districts are now in their 27th year of service to their home communities and States. More than 14,700 men and women serve on the governing bodies of districts—almost all of them by election (some by appointment), and all of them without pay.

In districts we are vitally concerned with virtually every aspect of water management, water use, and water development. This is part of our responsibility to the States which chartered districts. It is part of our responsibility to the citizens and landowners living within district boundaries—and sharing in the operations and objectives of districts.

In districts we are engaged in water conservation on farm and ranch lands; in irrigation, drainage, and the reduction of waste; in flood prevention; in the development of water supplies for irrigation, municipal use, industrial use, and recreation; and in the reduction of soil erosion and silt movement which are a threat to the life and capacity of every water reservoir, large or small.

Inevitably, therefore, we in districts have a vital interest in the controversy over water "rights." We are among those who would like to hope, however wishfully, that the controversy could be resolved promptly and satisfactorily to all sides. Obviously this is not going to be the case. Complex constitutional and legal considerations are involved and these, realistically, are not subject to ready compromise. The basic issues, in fact, are not anywhere near settlement.

As a result, in those sections of the country where water "rights" are a point of contention, water development—in the form of reservoirs for irrigation, municipal supply, recreation, and so on—can proceed only under a blanket of potential jeopardy unless it is undertaken under the direct auspices of the Federal Government, or unless it is undertaken in watersheds wholly in private, non-Federal ownership.

Even in the latter circumstance, there appears to be neither assurance nor protection for the private "owners" of water "rights" under State laws against a taking by the United States.

The effect of this wide U.S. jurisdiction over water, as confirmed by the courts, could be an important restraint, finally, on non-Federal investment in water development in the arid and semiarid parts of the country. In time, the inhibiting effect of this U.S. supremacy over water resources could extend to every other part of the country.

In short, we are concerned not only with the actual exercise of Federal water authority now, but with the potentially restrictive influences of uncharted Federal authority in the future.

The rules are not clear. If soil and water conservation districts, and local watershed associations, proceed with upstream construction and watershed development on the basis of State-assigned "rights"—and then witness the assertion of overriding Federal "rights" to the water—what happens to their investment in the watershed project? What happens to the values—in land, families, community, and commerce—that were dependent on that water?

The bill now before the committee does not attempt to resolve all the basic and enormously complex issues of Federal-State water rights. Indeed, section 2 of S. 1275 sets forth in some detail large areas of water law and water jurisdiction not affected by the bill.

In our judgment, however, the first section of the bill does provide for limited progress in equity and in clarifying the rules of the system. There are four key provisions:

1. The withdrawal or reservation of public lands shall not affect any water right acquired under State law either before or after such withdrawal or reservation.

2. West of the 98th meridian, water uses for domestic purposes and irrigation would take priority over the use of water for navigation.

3. Any water right acquired by the United States under the laws of a State, shall be perfected according to State procedures.

4. The United States should pay for the water "rights" which it acquires from owners who obtained their "rights" under State laws.

We believe these provisons, if enacted, would represent important progress. Moreover, favorable action on S. 1275 would give substance to the hope that still other steps might be taken, in time, to straighten out the tangles of water law and water rights which cause so much anxiety.

Senator Moss. The next witness I will call is Mr. Harvey Banks, consulting engineer from San Francisco.

Is Mr. Banks here?

Will you come forward, please, sir?

STATEMENT OF HARVEY O. BANKS, CONSULTING ENGINEER, SAN FRANCISCO, CALIF.

Mr. BANKS. Thank you, Mr. Chairman, and Senators.

I have prepared a very short statement which I would like to submit for the committee's consideration. In view of your time limitations I will not attempt to read it, short though it may be.

Senator Moss. Thank you. It will be placed in the record in full and if you would like to emphasize or highlight any part of it you may do so.

Mr. BANKS. For the record, my name is Harvey O. Banks, vice president of the firm of Leeds, Hill & Jewett, Inc., consulting engineers, of San Francisco, Calif. I appear here today specifically on behalf of the Kern County Water Agency of California which has asked me to indicate its support of S. 1275 to you and to ask you to put in the record a copy of their Resolution No. 35 supporting the bill.

Senator Moss. That will be done.

(The resolution is as follows:)

RESOLUTION 35

Whereas hearings have been scheduled on Senate bill No. 1275, which proposed legislation clarifies and makes more definite and certain the application of State law to Federal water rights in certain situations; and

Whereas the Kern County Water Agency strongly favors Senate bill No. 1275 and desires to go on record in support thereof;

Now, therefore, the board of directors of the Kern County Water Agency herewith resolves:

1. That the Kern County Water Agency, State of California, herewith endorses and supports Senate bill No. 1275 and urges its passage into law.

2. That Harvey O. Banks, of Leeds, Hill & Jewett, Inc., consulting engineers for agency, is herewith authorized and directed to represent this agency in forthcoming hearings on said bill in Washington, D.C., and to make known its support and endorsement thereof.

3. That certified copies of this resolution be forwarded to Senator Clair Engle, Senator Thomas H. Kuchel, Congressman Harlan Hagen, immediately, and to Harvey O. Banks, to the Irrigation Districts Association of the State of California, and to any other persons or organizations deemed necessary or desirable.

Mr. BANKS. I will start my summary statement by saying that I have had some considerable experience in this field. Some of the committee may remember that I was director of water resources of the State of California for some time.

Senator KUCHEL. I do remember it, Mr. Banks, and I doubt that anyone in California has been more intimately connected with water, particularly with the recently approved $1,750 million bond issue. I know you are an expert in that regard and I am glad the committee is going to have an opportunity to hear you and to have the benefit of your statement.

Mr. BANKS. Very briefly, Mr. Chairman and Senators, the problem of Federal-State-local relationships must be resolved as soon as possible if the lower levels of government and private entities are expected to accept their share of the responsibility for water development. The situation not only with respect to water rights but also as regards other matters of interorganizational relationships is so confused now that it is extremely difficult for these lower level agencies to proceed with water projects.

If the Congress of the United States and the U.S. Government were willing to accept the full responsibility for all needed water development throughout these United States, then these problems would be of relatively little consequence. But the Congress has repeatedly said that it expects not only the States but also local public agencies and private developers to accept and fulfill their share of the responsibility.

From my own personal experience I can state unequivocably that this is becoming increasingly difficult. With respect to water rights, there are sufficient clouds over the validity of State-created water rights caused by the reservation doctrine that, in my opinion, a local agency in many cases can no longer depend on those as sufficient assurances of an adequate water supply for a proposed project, to say nothing of the impact on vested rights.

In the case of the California State water project, at the time I was director I felt that there was sufficient uncertainty as to the validity of the water rights for that project to be acquired pursuant to State law, that it was necessary to have an agreement with the Department of the Interior as to the interrelationship of the water rights for the State project with those for Federal Central Valley project. As some of you may know, these two projects are quite thoroughly interrelated and divert from the same watershed, that tributary to the Sacramento-San Joaquin Delta. Such an agreement was negotiated with the Secretary of the Interior and signed on the 16th of May 1960. Had the Secretary been unwilling to execute such an agreement, the water rights for the State project would be of questionable value and would not have been adequate to justify the investment of some $2 billion. They have been firmed up by a Federal-State agreement which removes this possible threat.

I think this same approach must apply to any project of any significant size to be constructed by a local agency in the future on a

stream where the reservation doctrine may apply. Such agencies can no longer depend solely upon water rights acquired under State law but must seek agreements with the concerned Federal agencies in order to be assured of adequate water supply. The main thrust of my argument is that if the United States expects others to carry out their proper share of the responsibility in the tremendous task of providing adequate water supplies in the years ahead, Congress must act to put Federal-State-local relationships on a firm basis of law rather than remaining largely dependent on the administrative discretion of the Federal executive agencies. The provisions of S. 1275 are necessary first steps to this end.

There are other points in my prepared statement, Mr. Chairman, but in the interest of saving time for the other witnesses I will not discuss them now.

Senator Moss. I do appreciate that, Mr. Banks, and we will have your full statement in the record for careful examination. We are happy to have you come and testify because of your long experience and background in this field and we will read carefully your point of view.

(The statement referred to follows:)

STATEMENT OF HARVEY O. BANKS, VICE PRESIDENT, LEEDS, HILL & JEWETT, INC., CONSULTING ENGINEERS, SAN FRANCISCO, CALIF.

I appear in support of S. 1275 at the direction of the Kern County Water Agency, which encompasses all of Kern County, one of the most productive agricultural areas of the world. It has a contract with the State of California for the purchase of 1 million acre-feet of water per year from the California State water project with delivery beginning in 1968. The agency is justifiably concerned over the uncertain status of water rights acquired pursuant to State water laws.

The Kern County Water Agency respectfully requests that its Resolution No. 35 in support of S. 1275, adopted February 13, 1964, be made a matter of record at this hearing.

Other agencies among my clients which are concerned with this problem include: Western Municipal Water District of Riverside County, Orange County Water District, Contra Costa County Water District, and Placer County Water Agency.

I should like to add a word as to my background and experience in this matter. From June 3, 1953, to November 1, 1955, as assistant State engineer, I administered water rights for the State of California. From November 2, 1955, to July 4, 1956, administration of water rights was under my supervision as State engineer. I served as director of water resources of the State of California from July 5, 1956, to January 1, 1961. While in this latter capacity, I no longer was charged with administration of water rights, that function having been given to a new and independent agency, the State water rights board, I had very close contact with water rights matters at the Federal, State, and local levels.

During my tenure as director of water resources, and under my direction, the California water plan was completed, published, and accepted by the legislature as the long-range master plan to guide the future control, development, conservation, production, distribution, and utilization of all of the water resources of the State by all entities. Likewise the present California State water project was formulated and construction initiated under my direction; and financing for the project was provided through approval of the $1.75 billion general obligation bond issue on November 6, 1960. On November 4, 1960, I executed the first water service contract with metropolitan water district for 1,500,000 acre-feet per year.

As director, I appeared before this and other congressional committees in support of the several previous bills dealing with this same problem.

With respect to S. 1275, my purpose today is to point out, from a practical standpoint, the imperative necessity for the Federal Government to resolve the present chaotic situation with respect to water rights and Federal-State-local relationships. If this is not done, the lower levels of government and private entities will be forced out of the water development field.

The uncertainties as to the ownership of much of the water resources of any State having any substantial amount of federally reserved or withdrawn land have rendered State water laws and the State administration of water rights largely ineffectual. The Federal Government has no body of water law or policy, or any procedures for the administration and allocation of water resources, to replace these historic State responsibilities and functions. The political process involved in the authorization of Federal projects and the Federal courts will become the mechanisms for administration of the Nation's water resources, a rather unsatisfactory substitute.

To justify any substantial investment in water development, a public agency or private entity must have reasonable assurance that there is and will continue to be water available for the project. Under the reservation doctrine in its fullest implications, there can be no such assurance.

Were the United States willing to assume the full responsibility for all future water resource development, the problems which S. 1275 seeks to cure would be of little consequence. However, Congress has repeatedly said that the States, local, public agencies, and private entities must continue to bear their proper share of responsibility. The problem, then, is to have a body of water law and policy under which all agencies can work in harmony. S. 1275 is a step in this direction.

A brief review of the situation in California may be illuminating. In excess of 75 percent of the natural, intrastate runoff originates on or flows across federally reserved or withdrawn lands, most of which were reserved or withdrawn near the beginning of this century. Federal projects have already been constructed, or are authorized, or are in the planning stage, on most of the State's streams. The Federal Central Valley project diverts from the Sacramento-San Joaquin Delta to which all the streams of the great Central Valley are tributary. Thus the United States is in a position to claim ownership under the reservation doctrine, and to take physical control of most of the State's water resources. The water supply for many local projects large and small, will be in jeopardy should the United States decide to assert that ownership and control.

It is true that the Bureau of Reclamation has acquired its water rights in accordance with State water laws and has negotiated agreements as to water rights with local entities affected by its projects.

The problem will certainly arise, however, whenever and wherever litigation over water rights is instituted. One such lawsuit has recently been initiated, *Orange County Water District* v. *City of Chino*, to adjudicate the water rights of the entire Santa River stream system in southern California, both surface and ground water. Much of the water involved originates on national forest lands. There have been some withdrawals, and several important Federal installations are involved.

With regard to the California State water project, as director of water resources, I was concerned as to the adequacy of the water rights to be acquired under State laws as the basis for making a $2 billion investment, in view of the reservation doctrine then being promulgated by the U.S. Department of Justice. I negotiated an agreement with the U.S. Department of the Interior defining the relative water rights of the Federal Central Valley project and the State's project; and the agreement was executed on May 16, 1960. Had the Secretary of the Interior been unwilling to approve such agreement, the validity of the water rights for the California State water project would, indeed, be questionable.

On most of California's streams, a water user can no longer depend upon State-created water rights alone but must seek agreement with the concerned Federal agencies. If the lower levels of government and private entities are to continue in the water development field, there must be a firmer basis for water rights. This will become increasingly critical as we approach closer to full development of our water resources.

It has been alleged that it is impossible to predict, initially, the effect of a water project on downstream water rights therefore, that the "inverse condemnation" procedure is necessary and equitable. As one who has been actually and actively engaged in water project planning for many years, let me say that it is perfectly feasible to predict project effects as a proper basis for acquiring any

vested water rights necessary for project purposes either by negotiation or by eminent domain proceedings.

At the time a Federal project is proposed for authorization, Congress could be, and should be, informed as to the probable extent of interference with, any necessary taking of, downstream rights.

Fears have been expressed that any limitation placed upon the reservation doctrine would hamper regional planning. This, too, has little basis in fact—regional planning and the implementation of regional plans took place long before the reservation doctrine was put forth. Regional planning is a developmental concept—not a water rights matter.

Again may I respectfully recommend the early enactment of S. 1275 as a much-needed piece of legislation to resolve an increasingly difficult problem in Federal-State-local relationships.

Thank you for the opportunity to appear.

Senator Moss. Are there any comments or questions of Mr. Banks at this point?

Senator ANDERSON. I would like to say, Mr. Banks, now that you have been appearing legally, we appreciate your coming here. You have done a fine job.

Mr. BANKS. It is always a pleasure, Senators, to appear before your committee. Thank you very much.

Senator Moss. Thank you. We will call next Prof. Robert E. Clark, of the University of New Mexico Law School.

Professor Clark.

Senator Anderson, do you wish to introduce Professor Clark?

Senator ANDERSON. Yes.

We have your article in the Western Water Law Symposium. I know you had to travel all night to get here and probably travel all night to get back. I apologize for the inconvenience but this seemed to be the only way to get you here. I am very glad you made it.

STATEMENT OF ROBERT E. CLARK, UNIVERSITY OF NEW MEXICO LAW SCHOOL

Mr. CLARK. Thank you.

Mr. Chairman and members of the committee, I do represent the law school and people in New Mexico who are certainly interested in all the natural resources, including water. I am here at the request of Senator Anderson. If I seem to be academic it is partly because I have been on the plane all night and it also explains why I don't have a prepared or mimeographed statement.

I realize that time is of the essence here and I would like to be as brief as possible. I would like to make a couple of observations that really are observations about federalism and a system of dual sovereignty and different jurisdictions which are concerned with similar problems and as they affect in particular Senator Kuchel's bill, S. 1275.

It seems to me that in all of this discussion the real question about this particular proposed piece of legislation is really a question Senator Anderson has asked: Who has been hurt, who has been hurt and has not been paid? It seems to me that is more than a rhetorical question. There do not seem to be many coming forward saying they were hurt, it is the fear of being hurt that is actually involved.

I suppose another question that I would like to ask would be one similar to St. Paul's proposition about whether you believe or don't believe. The question really here is whether you believe in the prin-

ciple of dual sovereignty and in the principle of Federal control and Federal responsibilities for certain kinds of resources that don't know anything about State boundaries.

The statements that have been made so far have indicated to me that the committee certainly does not want to hear a lot of technical arguments. You have heard about all the cases that have been decided and what they did say or what they did not say, ad nauseam, and I don't want to add to that.

I think Mr. Goldberg's statement of all the technical statements involved in that proposed legislation is very adequate. I would not go so far as he would go on some of these proposals but I think that analysis is the kind of scholarly analysis one could be very proud of.

As I say, I would like to be very brief. The complexities of this bill are, if anything, greater than they were in the Senator's previous bill, S. 2636, introduced before the meeting of the conference of prosecutors that met in Los Angeles a year ago today at which I had read a paper. If I may I would like to ask the Chairman if this paper could be used to shorten the time which I am spending here.

Senator ANDERSON. Federal background?

Mr. CLARK. Yes. This was a very brief paper given at the conference and many of the people who appeared before this committee were also speakers at that conference. The whole procedure appears in the Western Water Law Symposium.

Senator ANDERSON. I ask that this be put in the record.

Senator MOSS. It may go in at this point since Mr. Clark is going to refer to parts of it.

(The paper referred to follows:)

THE LEGAL BACKGROUND OF FEDERAL-STATE WATER RIGHTS CONFLICTS

(By Robert Emmet Clark, professor of law, the University of New Mexico)

(Presented before the Western Water Law Symposium of the 14th Annual Spring Conference of the National District Attorneys' Association, March 11, 1963, Los Angeles, Calif.)

Although I am happy to be here and thus allow New Mexico and my university to be represented on your program, I am not sure why I was asked to come as I am certain that all of the later speakers will give you more of the legal background—and perhaps the foreground too—than I will. In looking over the program list of California and Washington lawyers, it appears that I won't add much balance to the discussion that may follow today.

But, under the innocuous title of "Legal Background," maybe I can anticipate some of this discussion—and perhaps no one will expect me to worry about the balance anyway. According to the titles on the program, it appears that the discussion will very quickly get around to Federal encroachment or the trend to centralism or just condemnation of the monster, big Government. There seems to be no reason why I should join in the chorus and nobody has asked me to.

However, before you hear the opening statement of Mr. Horton and the closing arguments of Messrs. Banks and Enerson (with representatives from the Department of Justice, the U.S. Senate and Mr. Goldberg taking their chances in between), I should like to put in a few thoughts for your consideration.

When Senator Kuchel introduced his S. 2636 in the previous Congress (which he hoped would be the legislative solution to the Federal-State problems we will hear about today), he put much emphasis on the matter of compensation for claims to water rights. He said, "Once the principle of compensability is established, 90 percent of the conflict disappears." He may be right. If he is, I will be disillusioned by the knowledge that the real nature of this cry over States' rights and State water law is really just a question of money.

The immediate "legal background" of the controversy over Federal and State water rights is found in a few decisions of the Federal courts over the past 7 or 8 years.[1] But these decisions—and the noise and smoke that followed them—only point to the long evolution in the functioning of the concept of constitutional government called federalism.[2] Unfortunately, this immediate "legal background" has given fresh impetus to distortion of the concept that has often gone beyond reasoned exploration of the dimensions of our system of dual sovereignty. Recent developments have also encouraged pursuit of new illusions of certainty, rigidity even, and what sometimes looks to me like hope for the triumph of a kind of constitutional rigor mortis in our system of government. Those who want constitutional government to be a certificate of the past only, rather than a "continuously operative charter" [3] for the future also, are consistent, at any rate, in their views on certainty and death.

The adoption of the resolution at your last summer conference urging Federal water rights legislation, and the previous discussion at your March 1962 meeting by Mr. Dickenson,[4] indicate that large numbers of you (and not your Western contingent alone) have general knowledge of the controversy that became popular after the 1955 *Pelton Dam* [5] decision brought out old Federal skeletons.

Here are the facts and holding in the *Pelton Dam* case: The FPC issued a license, over the protests of the State of Oregon, to the Portland General Electric Co. to build a dam on the Deschutes River in Oregon. The site was located where at one end the dam would rest on Indian land. Title to the land on the other side was reserved to the United States for power purposes. The Power Commission granted the license. The State of Oregon objected that it had the sole power to control the use of the stream which is nonnavigable and located entirely in Oregon. The State also contended that the dam would impair the river's capacity to hold anadromous fish and would reduce the usefulness of an upstream fish hatchery. The State of Oregon's Hydroelectric and Fish Commission had previously denied a request for a State permit to the same applicant and apparently for the reasons just stated.

The FPC had examined the measures to protect the fish in the stream and ordered improvements that cost the applicant a substantial sum in capital invesments. The licensee also was required to build small regulating dams below the main one. The State of Oregon appealed to the Ninth Circuit Court which set aside the license. One judge dissented.

The court of appeals [6] discussed primarily the question of whether the United States had relinquished control of water rights in nonnavigable western streams, a question not previously answered although often discussed.

The Supreme Court held that the FPC could license a private hydroelectric power project on a nonnavigable river in Oregon without regard to the law of that State. The court held that because one end of the dam would be on Indian lands and the other on reserved lands, as distinguished from the public domain, the State of Oregon could not use its control over fish to bar the project.

Another important case should be mentioned here. In the Hawthorne Naval Reservation ground water case the U.S. district court held that in maintaining a national defense reservation—a valid Federal purpose under the war and property clauses of the Constitution—the United States had the right to withdraw ground water located under reserved land without complying wih Nevada State law. This decision was affirmed on other grounds by the court of appeals.[7]

If I were to read to you a list of the scholarly articles on these cases and this subject—and I would leave out the propaganda and tirades on the subject I have also read—it would take me longer than my allotted 25 minutes. The

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[1] *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 75 S.C. 832, 99 L. Ed. 1215 (1955); *Nevada* v. *U.S.*, 165 Fed. Supp. 600 (D. Nev. 1958), affirmed on other grounds, 279 Fed. 2d 699 (9th Cir. 1960); *U.S.* v. *Fallbrook Pub. Util. Dist.*, 165 Fed. Supp. 806 (S.D. Cal. 1958). See also *First Iowa Coop.* v. *Federal Power Commission*, 328 U.S. 152 (1946); *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275 (1958).

[2] Engelbert, "Federalism and Water Resources Development," 22 Law & Contemp. Prob. 325 (1957).

[3] *Yakus* v. *United States*, 321 U.S. 414 (1944).

[4] Dickenson, "The Crisis in Federal-State Relationships in Water Rights," paper given Mar. 8, 1962, New Orleans, La. (mimeographed). The resolution, adopted Aug. 18, 1962, at Philadelphia, contains this statement: "Whereas the decision of the U.S. Supreme Court Federal Power Commission v. Oregon (1955), 435, has *further unsettled the law* relating to the use of water * * *" [Emphasis supplied.]

[5] Note 1 supra; Corker, "Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957," 45 Calif. Law Rev. 604 (1957).

[6] 211 Fed. 2d 347 (9th Cir. 1954), cert. granted 75 S.C. 112.

[7] Note 1 supra.

subject has been worked over diligently by lawyers, law teachers, legislators, and staff members for legislators. The legislative draftsmen in Congress have had a long period of more than frustrating employment trying to prepare a State-Federal water rights bill that will be acceptable to all. I lost track of the count after six or eight bills had been introduced, including the first of the Barrett bills. A later speaker on this program can probably give you the current tally on the bills up to S. 2636 introduced by Senator Kuchel in September 1961.

Some of you may have followed the various legislative proposals introduced in Congress since 1955. All are aimed at limiting the real and conjured implications of the *Pelton Dam*, *Hawthorne*, and some other decisions. But on the assumption that what you may have heard was somewhat one sided and, assuming further that you may hear a similar discussion today, I shall try to summarize the important dimensions of the "Legal Background." My aim is to point out that there are two sides to the controversy and also that the problems are not as simple as some excellent legislative draftsmen would like them to appear. This goal will require me to comment on the concept and function of federalism and the law of water.

The present controversy has roots far back in the history of this Nation and in the remarkable compromises that created it. Notice that I do no say alliance or confederation. I say Nation. This larger community in which we enjoy interstate favors, and in which we hope to make interstate contributions, is the United States. To some its Government is an impersonal, far away taxgatherer, policy-maker and oppressor. To others, it is a common unit of national service. This has been historically true with respect to the county governments and other local and urban units that were the first to plan and build community water projects which they did long before the States themselves became interested. We all know that underrepresented urban areas have long felt that the Federal Government represented their views more effectively on many subjects including water resources development. Reapportionment may aid the States in obtaining urban support for State water projects which are now receiving Federal assistance at the local government unit level.[8]

Whether your view is urban or rural or something else, you are aware that the United States has large and grave responsibilities in the field of water resources even though there is no express provision in the Constitution covering the subject. The Treaty Power,[9] the War Power,[10] the General Welfare Clause,[11] the Commerce Clause,[12] and the Power To Dispose of Public Property [13] have long been applied in water resources matters. And for many years before the *Pelton Dam* decision careful students of water law were saying that the question of ownership of unappropriated waters on Federal lands was not entirely settled.[14] Yet we have heard contrary statements recently. Perhaps there is something wrong with our reading of history. It has been said that "Americans are a people not notably endowed with the historic sense. They are given to enthusiasm, and that is good, because enthusiasm moves mountains." [15] This statement certainly could be applied to California and what has happened in the West in connection with the colossal problems of water and land use. Enthusiasm led to the first major use of water in California by largely nonresident trespassers on land that belonged, through bloodshed and purchase, to all of the people of the

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[8] Fox, "River Basins and the States," paper presented before Ninth National Watershed Congress.

[9] Art. II, sec. 2. See *Sanitary District* v. *United States*, 266 U.S. 405 (1926) ; *Missouri* v. *Holland*, 252 U.S. 416 (1920).

[10] Art. I, sec. 8. *Ashwander* v. *Tenn. Valley Authority*, 297 U.S. 288 (1936).

[11] Art. I, sec. 8. See *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950) ; *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275 (1958).

[12] Art. I, sec. 8, cl. 3. *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1 (1824) ; *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940) ; *United States* v. *Grand River Dam Authority*, 363 U.S. 229 (1960).

[13] Art. IV, sec. 3. *United States* v. *Rio Grande Dam and Irr. Co.*, 174 U.S. 690 (1899) ; *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955).

[14] See Hutchins, "Selected Problems in Water Rights," p. 420; the Indian cases strengthened their skepticism also. *Winters* v. *United States*, 207 U.S. 564 (1908) ; *United States* v. *Conrad Inv. Co.*, 156 Fed. 123 (Mont. 1907), affirmed 161 Fed. 829 (1908) ; *United States* v. *Walker River Irrig. Dist.*, 104 Fed. 2d 334 (9th Cir. 1939). Moreover, the exact nature of any water rights derived from the Federal Government remained uncertain. See Sato, "Water Resources Allocation," vol. 1, p. V–8 : "Although *Lux* v. *Haggin*, 69 Cal. 255, 4 Pac. 919 (1886), has given serious consideration to water rights derivative from the Federal Government, the court is not clear as to whether those rights flow as a matter of State determination or of Federal law. * * *" (mimeographed).

[15] Jaffe, book review of Bernstein, "Regulating Business by Independent Commission," 65 Yale L. J. 1068 (1956).

United States. Mountains were moved to get the gold out of them. Of course since those days we have been less inclined to call these miners trespassers as Colonel Mason did in 1849 and President Lincoln and the courts did.[16] In our best pragmatic, as well as sentimental, tradition we first made the miners into squatters, or quasi-trespassers, and then we proceeded to recognize some of their claims. More recently on television all have become heroes in the building of the Nation. But as I have said, we are not a people with a notable historic sense.

We can divide American history since 1789 into three periods [17] that are relevant to land and water problems. The first period was concerned with the sale of public lands for the purpose of raising revenue for the General Government. This period ended in the 1840's or 1850's after the Mexican War, or perhaps some would draw the line in 1862 with the enactment of the first homestead law.[18] The second period was characterized by exploitation and by the efforts of the Federal Government to put public lands into private hands and to encourage settlement in the semiarid regions and to produce food for the expanding population of which a substantial part were immigrants. This second period extended into the 20th century, into Theodore Roosevelt's administration or up to the First World War, or perhaps to 1920 when the Federal Power Act [19] was passed. We now live in a third period, a time of reappraisal, of better husbandry, of population consciousness and a time when we have taken a longer view of the future and our supply of natural resources.

The first period is significant here only insofar as we remind ourselves that the commerce clause was first examined and applied to navigation during that period.[20] Fortunately for us, the judiciary has not adopted a rigor mortis attitude toward commerce and river basin development since that time.

The second period is the source of the present controversy over Federal and State water rights. During this period the Western doctrine of prior appropriation evolved. This was a simple variant of the law of capture, the principle of first use, first right, and it developed on the vast tracts of semiarid land owned by the Federal Government. Meanwhile, in the Eastern or humid States, there were no comparably large areas of Federal ownership with scant supplies of moisture. In those States the common law and real property law shaped and protected the rights of riparian owners. These rights continued to be subject to some changes by the State legislatures in the form of the Mill Act [21] and through the exercise of the State's police power. The evolutionary development in the West began with the California miners, the Mormon pioneers in Utah in 1847 [22] and the earlier settlers along the Middle Rio Grande who had built the first community *acequia* near Espanola, N. Mex., in 1598. These formative years of water law growth were not doctrinal or theoretical. As most prosecutors will admit, a man with a shovel in one hand and a rifle in the other is not a very theoretical fellow.

Water law grew up as a pragmatic patchwork of custom, lower Federal and State court decisions, State, territorial and Federal legislation and a U.S. policy that some have called surrender [23] but we could all agree was one of seeming acquiescence. An important and often overlooked feature of this development is that the claims and disputes were almost entirely between individuals. Water law as a part of private real property law gave almost full attention to claims made vis-a-vis individuals even across State lines. The doctrine of equitable

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[16] 1 Wiel, "Water Rights in the Western States," 836–843 (3d ed. 1911); *U.S.* v. *Parrott*, Fed. Cas. No. 15, 998 (1858). After judgment was rendered for the United States, President Lincoln signed a writ closing the mines in question and ordering the militia to remove the miners from public property. Martz, Cases on Natural Resources, p. 4 (1951).

[17] Martz, supra, note 16. My classification is less precise than Martz' but is based on his.

[18] 12 Stat. 392, act of May 20, 1862, C. 75, sec. 1.

[19] 41 Stat. 1063 (1920); earlier the Reclamation Act of 1902, 32 Stat. 388, 43 U.S.C. 391, and President Taft's proclamation in 1909 withdrawing old lands from entry (43 U.S.C. 141–142) had expressed the conservation and reclamation philosophy. There had been still earlier moves in the same direction in 1891 under the Timber Withdrawal Act and in 1906 the legislation authorizing national monuments, 34 Stat. 225, 16 U.S.C. 431.

[20] See note 12, supra.

[21] Gould, Waters, sec. 253, 579–623. These acts allowed riparian proprietors on payment of damages caused by flooding to erect dams for the purpose of creating water supplies and power for their mills even though the result was to submerge lands of other riparians.

[22] See 1 Kinney, sec. 243, 244 (2d ed. 1912). The Mormons granted control of streams to individuals.

[23] Martz, "The Role of the Federal Government in State Water Law," 5 Kansas Law Rev. 626 (1957): "From 1866 to 1920 the United States surrendered most of its power and discretion over nonnavigable waters to the States * * *."

apportionment, which is a doctrine of public law between States, had not yet been devised. There were few explicit public law aspects of water law until after 1889 when Elwood Mead in Wyoming prepared the first public control statute that was soon followed in various and misbegotten forms in nearly every Western State.[24] Mead's Wyoming statute made way for the climate of thought that produced the Federal Power Act and of our own period of reappraisal and better husbandry. Throughout this second period the full reach of Federal authority remained obscure even after *United States* v. *Rio Grande Dam & Irrigation Co.* was decided in 1899 and in which the Supreme Court said:[25]

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy a right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property."

During this second period divergent theories developed with respect to the disposition of waters on Federal lands and in the Territories, as these lands became parts of new States. Disputes had been settled in California in the lower courts long before *Lux* v. *Haggin*[26] in 1866 fixed the destiny of California water law. The so-called California doctrine adumbrated in that case recognized both riparian and appropriative rights. The basis for recognizing the riparian rights is worth reexamining. The California court recognized both sovereign and proprietary rights in the Federal Government with respect to the Western public domain. The creation of a State-passed sovereignty to the new State. With respect to the proprietary rights, i.e., the riparian rights on such lands after statehood, it is hard to discern from *Lux* v. *Haggin* whether these rights passed as a matter of Federal law, or were actually created anew through the common law's reception into the jurisdiction.[27] In either case derivation of title could be traced back to the United States. Appropriative rights on the public domain were recognized in 1866[28] when Congress advanced the trespasser's appropriative claims by recognizing the priority previously accepted by custom.

Oregon later developed a doctrine that agreed in part with California law. Oregon recognized the proprietary interests of the Federal Government in waters on the public land over which there was a reserved power of disposition. Oregon held that these rights continued after the formation of the new States. But in 1908 Oregon held that the Desert Land Act of 1877 separated water from land of the Federal Government and that a Federal land patent did not convey a water right.[29] The 1877 legislation[30] was viewed as an adoption of and preference for a uniform prior appropriation system in the future. The conflict here with the California conclusion is obvious.

Another view of the transition to statehood in several States, and the effect on water law, is called the Colorado doctrine under which no proprietary interests were recognized and thus no riparian rights existed.[31] Prior appropriation rights were acquired through State law entirely. By this view there was agreement with Oregon that prior appropriation was the accepted uniform rule. The new State could determine its own system of water law and no consent from the Federal Government was necessary. The new States, however, held that the Federal Government had consented to such systems in the legislation of 1866 and later legislation.[32]

All of this might be called the metaphysical side of the "Legal Background" of the *Pelton Dam* and *Hawthorne* cases. You can see from this discussion that several questions were raised and remain unanswered today because they were not all put to rest in 1935 in *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* when the Court said:[33]

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[24] See Water Resources Law, "Report of the President's Commission, 1950," vol. 3, p. 711, app. B, "Summaries of the Water Law Doctrines of the 17 Western States."
[25] 174 U.S. 690, 704, 19 S. Ct. 770, 43 L. Ed. 1136 (1899).
[26] 69 Cal. 255, 4 Pac. 919, 10 Pac. 674 (1886).
[27] See Sato, "Water Resources Allocation," vol. 1, p. V–8, note 14 supra. See note, "Federal-State Conflicts Over the Control of Western Waters," 60 Col. Law Rev. 967 (1960).
[28] Act of 1866, 14 Stat. 253, 43 U.S.C. 661 (1952).
[29] *Hough* v. *Porter*, 98 Pac. 1083, 1091–1092 (1909).
[30] Desert Land Act, 19 Stat. 377 (1877), 43 U.S.C. 321 (1952).
[31] See Bannister, "The Question of the Federal Disposition of State Waters in the Priority States," 28 Harv. Law Rev. 270 (1915).
[32] See *Farm. Inv. Co.* v. *Carpenter*, 9 Wyo. 110, 61 Pac. 258 (1900).
[33] 295 U.S. 142 (1935).

"The Desert Land Act does not bind or purport to bind the States to any policy. It simply recognizes and gives sanction, insofar as the United States and its future grantees are concerned, to the State and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation."

Today several important questions are still unanswered:

1. What precise interest does the Federal Government have or retain in the water on the public domain, or on Federal reservations?
2. What interests in water did the States succeed to, if any, and what controls may they impose?
3. What are the full dimensions of the constitutional powers of the United States which are invoked in protecting and advancing the interests of the Federal Government.

Some will tell you quite confidently that the questions were answered long before the *Pelton Dam* decision. I do not believe all of the questions have been answered.[34] Moreover, I believe that we will go on trying to answer them in a functional, operational manner as we have done in the past under our constitutional system although the proposed legislation gives one pause; for it seems to attempt to do all or part of the following:

1. Change the law and the Constitution so that the Federal Government will be subordinate to the States in some areas of water resources development;
2. Remove uncertainties in the law of water rights largely by filling up the gaps of uncertainty with State law;
3. Make the Federal Government bend its knee procedurally by altering jurisdictional requirements with respect to litigation against the United States or in which the States want the United States to join.

Such proposals obviously have some strong feelings behind them. There are such feelings in the West as we all know. Body and brain temperatures are raised by cries over States' rights and over water rights. One writer has said that "Water law is a shibboleth-ridden, metaphysical, almost religious field."[35] I hope this conference will prove him wrong.

Mr. CLARK. If I may, I would like to read a few paragraphs from it.

Senator MOSS. You may do so.

Mr. CLARK. On page 4:

The present controversy has roots far back in the history of this Nation and in the remarkable compromises that created it. Notice that I do not say alliance or confederation. I say Nation. This larger community in which we enjoy interstate favors, and in which we hope to make interstate contributions, is the United States. To some its government is an impersonal, faraway tax gatherer, policymaker, and oppressor. To others it is a common unit of national service. This has been historically true with respect to the county governments and other local and urban units that were the first to plan and build community water projects which they did long before the States themselves became interested. We all know that underrepresented urban areas have long felt that the Federal Government represented their views more effectively on many subjects including water resources development.

Whether your view is urban or rural or something else, you are aware that the United States has large and grave responsibilities in the field of water resources even though there is no express provision in the Constitution covering the subject. The treaty power, the war power, the general welfare clause, the commerce clause, and the power to dispose of public property have long been applied in water resources matters. And for many years before the *Pelton Dam* decision careful students of water law were saying that the question of ownership of unappropriated waters on Federal lands was not entirely settled. Yet

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[34] E.g., Corker, "Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957," 45 Calif. L. Rev. 604, 606 (1957); King, "Federal-States Relations in the Control of Water Resources," 37 U. Det. N.J. 1 (1959); Martz, "The Role of the Federal Government in State Water Law," 5 Kan. L. Rev. 626 (1957); Munro, "The Pelton Decision: A New Riparianism?" 36 Oreg. L. Rev. 2211 (1957); Sato, "Water Resources—Comments Upon the Federal-State Relationship," 48 Calif. L. Rev. 43 (1960); Trelease, "Government Ownership and Trusteeship of Water," 45 Calif. L. Rev. 638 (1957); note, 5 Utah L. Rev. 495 (1957).

[35] Schwartz, "Federalism and Anadromous Fish," 23 Geo. Wash. L. Rev. 535 (1955).

we have heard contrary statements recently. Perhaps there is something wrong with our reading of history. It has been said that "Americans are a people not notably endowed with the historic sense. They are given to enthusiasm, and that is good, because enthusiasm moves mountains."

This statement certainly could be applied to California and what has happened in the West in connection with the colossal problems of water and land use. Enthusiasm led to the first major use of water in California by largely nonresident trespassers on land that belonged, through bloodshed and purchase, to all of the people of the United States. Mountains were moved to get the gold out of them. Of course since those days we have been less inclined to call these miners trespassers as Colonel Mason did in 1948 and President Lincoln and the courts did.

Turning to page 7 now:

Water law grew up as a pragmatic patchwork of custom, lower Federal and State court decisions, State, territorial, and Federal legislation and a U.S. policy that some have called surrender but we could all agree was one of seeming acquiescence.

The rest of this discussion is a discussion of the various legislation the members of the committee have heard about, the Desert Land Act. I wound up with some questions that were not meant to be entirely rhetorical and some conclusions. These questions still remain unanswered. What precise interest does the Federal Government have or retain in the water on the public domain or on Federal reservations? What interests in water did the States succeed to, if any, and what controls may they impose? They impose on the Federal Government possibly. What are the full dimensions of the constitutional powers of the United States which are invoked in protecting and advancing the interests of the Federal Government? Some will tell you quite confidently that the questions were answered long before the *Pelton Dam* decision. I do not believe all the questions have been answered. Moreover I believe we try to answer them in the functional operational manner as we have done in the past under our constitutional system, although the proposed legislation gives one pause for it seems to attempt to do all or part of the following:

1. Change the law and the Constitution so that the Federal Government would be subordinate to the States in some areas, the water resources development.
2. Remove uncertainties in the law of water rights largely by filling up the gaps of uncertainty with State law.

The last conclusion I reached in Los Angeles is not important here because in Senator Kuchel's recent bill the portion on jurisdiction and sovereign immunity was removed.

The specific points in this legislation that I would like to look at for a moment as a professor, in the first view of it one sees how simple and disarmingly simple, and how abstract it appears. Well, like so many abstractions that attempt to cover specific things it leaves many things more gravely in doubt, it seems to me, and it really tries to change large and known responsibility of the United States that can't be changed and it fills up some unknown areas of law, or unexplored areas of law, with State law, or attempts to. This could, of course, mean that it be the law of many, many jurisdictions rather than merely the Federal which is involving and developing law.

The word "clarification," which I realize came from recommendations in the Senate select committee's report, is a fine word and yet it does not fool anyone here. The clarification here really is the

clarification and goes much beyond the clarification and it applies to many things beyond making something clear. In fact, it is clarification plus additions. Even though clarity and simplicity are great virtues and professors demand clarity and simplicity when they can, you cannot reduce clarity from simplicity or the other way around either.

The next point, it seems to me, that the professor would be interested in is the new problems created by this bill. For example, the problem of consumptive uses in section 1, paragraph (3), the phrase "initiated and perfected" had all sorts of implications for me. In my reading of it I think it would be fair to draw an inference, or perhaps this has been done by others, that this looks like an attempt to put back the California Supreme Court holding in the *Ivanhoe* case that the U.S. Supreme Court said could not be done.

Senator KUCHEL. As long as you are mentioning the *Ivanhoe* case, tells us a little more about that.

Mr. CLARK. I am thinking, Senator, about the 160-acre water right.

Senator KUCHEL. I know you are. Where in this bill do you think the *Ivanhoe* case, the Supreme Court in California, is resurrected?

Mr. CLARK. Well, I just don't know.

Senator KUCHEL. Why do you say it?

Mr. CLARK. I say it raises these doubts.

Senator KUCHEL. Well, to have a doubt raised in a reasonable man's mind there ought to be some reasonable basis for the doubt. Now you tell me in this bill where you find that.

Mr. CLARK. All right. Section 1, paragraph (3).

> Any right claimed by the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with the procedure established by the laws of that State.

Senator KUCHEL. All right.

Mr. CLARK. I wonder, Senator Kuchel, does this really have anything to do with the 160-acre water right limitation? This is what my question is.

Senator KUCHEL. Sir, I do not wonder at all. It does not affect the acreage limitation.

Mr. CLARK. This is the one:

> shall be initiated and perfected in accordance with procedures established by the laws of that State.

I am wondering about the excess land law limitation.

Senator KUCHEL. That is a Federal statute.

Mr. CLARK. Yes.

Senator KUCHEL. Now, where in this language do we impinge upon that Federal statute?

Mr. CLARK. It raises this doubt in my mind. I cannot be any more specific. I just wonder, having read both of those cases in the California Supreme Court, and the U.S. Supreme Court, whether this does cover that.

Senator KUCHEL. Sir, I repeat, this is for the benefit of Senator Anderson and I don't think he is here. It is not the intention of any author of this bill in any fashion to impinge upon the acreage limitation.

Senator ANDERSON. I think I should say, Mr. Clark, that I was here yesterday when Senator Kuchel made that abundantly clear.

Mr. CLARK. I am sorry.

Senator ANDERSON. You had no way of knowing, you were on your way. Senator Kuchel made it completely clear that in no way does he want that involved, and he will have any sort of protecting language in the report, as I understood it, to make that abundantly clear for the future. If that could be of any use, he certainly made it clear and would make it clear again.

Mr. CLARK. I am sorry I was not here or I would not have taken the time to raise that question.

It seems also to go to a fourth point, that this legislation would affect the kind of regional development adversely that is now taking place in the United States and it is taking place with the help of the Federal Government. In this regional development of river basins and so on the problem of compensation arises for rights and for property rights and the problem of inverse condemnation and various problems connected with the general problem of the navigation servitude involved or the power under the commerce laws.

Senator KUCHEL. Where would it interfere, sir, with basin development? How would you explain that?

Mr. CLARK. Well, my own State of New Mexico, Senator, was a State in which the early property clause case arose. This is the *Rio Grande* case I am sure you are very familiar with. In that case, if the Senator remembers, there is a reference to the question of navigability in New Mexico and the territory. The Rio Grande was not navigable within New Mexico. But the problem of where a stream may be affected by potential navigability is a question that remains.

Senator KUCHEL. Which in your opinion would affect a basin development plan?

Mr. CLARK. It might affect the payment of money to persons for——

Senator KUCHEL. Where in this bill do you find that problem raised?

Mr. CLARK. Well, in the section (4) following the one I just referred to, "shall be taken by authority by or under authority of the United States without compensation."

Senator KUCHEL. Does that interfere with the basin development?

Mr. CLARK. I am thinking of any place where the United States uses the navigation power, that commerce clause power, and where the property clause alone is not involved or where other areas of Federal power are involved where it is known that payment must be made.

Senator KUCHEL. As a matter of fact, is it not so that the Government of the United States on a number of occasions has sought water rights from private individuals and paid for them?

Mr. CLARK. Yes.

Senator KUCHEL. It is not novel to pay money to acquire somebody else's property; that is not a novel thing?

Mr. CLARK. No.

Senator KUCHEL. Now, then, would subdivision (4) affect the basin development?

Mr. CLARK. I am thinking of just how this means where there is a conflict between the navigation power under which the Government

does not have to pay and under other powers of the Government where eminent domain must be exercised and payment must be made.

Senator KUCHEL. Give me an example of a situation where the Federal Government has used the navigation power to acquire water rights for the purpose of basin development at any time.

Mr. CLARK. Could we refer to the *Gerlach* case for this illustration?

Senator KUCHEL. You may.

Mr. CLARK. Where Congress actually treated this development as a reclamation project and where the rights were paid for. Because Congress expressed it the Supreme Court indicated in there, I think this was Justice Douglas' dissent against paying interest or something, that it seemed that under the navigation power of the United States it would not have to do with streams of navigable water.

Senator KUCHEL. You refer now to a dissent and not to the opinion of the Supreme Court.

Mr. CLARK. Yes, I refer to Justice Douglas' dissent.

Senator KUCHEL. Is it your point, then, that a basin development is interfered in because the Government of the United States would be required to compensate an individual for a water right if you took it from him?

Mr. CLARK. No. I just wonder whether this would encourage litigation; instead of removing clouds would cause more difficulty. They claim they have more rights and they were not entitled to them.

Senator KUCHEL. I respect your right to that opinion but I disagree.

One more thing. I want to repeat this again for the benefit of the Senator from New Mexico. It is not the intention of the authors of this legislation by any fashion whatsoever to deprive anyone of the right to be compensated for inverse condemnation and that problem, too, can be easily disposed of.

Mr. CLARK. Of course. Senator Kuchel, I wanted to refer to a very good article that is a much better discussion of this than we have here. This is in the Natural Resources Journal, it is called "Federal Power and Western Waters," the role of no compensation. This was published in May of last year. If I may, Mr. Chairman, I would like to refer to this article and leave it here.

Senator Moss. It will be made a part of the record by reference.

Senator KUCHEL. Again, can you tell this committee of an instance in which the United States has used its navigational authority under the Constitution to acquire water rights in connection with any type of water project?

Mr. CLARK. No; these are the same fears that are on the other side that I am raising.

Senator KUCHEL. What kind of a fear is that? What is that fear?

Mr. CLARK. It is like the fear of people being afraid of the Federal Government. I am just as afraid on the other side of that.

The last point I wanted to make was that the restraint placed upon the evolving concept of Federal responsibility for many kinds of resources development is not one that seems to accord with the developments of society as we have seen it so far. The distinction over power and property rights which has been explained here, the encouragement of litigation which I believe this bill would do, would discourage certain kinds of development perhaps. I would really want to emphasize at the end that it seems to me that this whole notion of large

trust powers for public control of a precious resource by the United States is endangered by this kind of attempted legislation. It does not seem to me that it really accomplished anything to encourage persons to look to the Federal Government as well as to the States for development of resources along the lines pointed out to the examiner by the Senate Select Committee.

I appreciate coming here and if I could prepare a written statement, or if the committee would rather have a written statement from me, and I have time to get it in, Mr. Chairman, I would try to do so.

Senator Moss. We would appreciate it if you would prepare a statement, Mr. Clark. We realize you came on rather short notice and we are very pleased to have you come and make the comments that you have today and direct the attention of the committee to some of the things that you have mentioned. I believe it would help us further if upon your return to New Mexico you could take the time to prepare a more complete statement of your views and forward it to us to put in the record. This record will be open for some little time so it does not have to be done immediately but within a reasonable time. If you could sent such a statement, we would include it in the record and would be very pleased to do that.

We do appreciate your coming to testify. There may be further questions.

Senator ANDERSON. I do hope you prepare a statement, but keep in mind the statement that Senator Kuchel has made.

Mr. CLARK. Surely. I am sorry I took that time.

Senator KUCHEL. I am going to ask you one question. You are a good man, I am glad to listen to you. I don't want to do anything to damage my Federal Government. You and I both listened to an able California lawyer here, Mr. Goldberg. I think you will agree with me that his testimony did raise a very serious question with respect to the fact many people in this country have comforted themselves in feeling that they had a vested water right to waters which came from lands owned by the Federal Government.

I want to ask you the same question I asked him. Suppose that the Federal Government withdraws or reserves surveyed or unsurveyed public lands and there are waters arising on those lands which are not necessary—stipulate this—not necessary to the Federal Government's needs but suppose there are people, just plain ordinary people, who need the water. Is it not in the public interest to make that water available to them?

Mr. CLARK. As you ask the question, Senator, I say certainly it would be in the public interest to make it available.

Senator KUCHEL. They are not available today under what Mr. Goldberg and some departmental witnesses have said is the law.

Mr. CLARK. The question is need when? When?

Senator KUCHEL. In accordance with State law I would say.

Mr. CLARK. If needed right now, if it is demanded right now, I think in some cases it would not be in the public interest just the same as the Winter's doctrine to the Indians.

Senator KUCHEL. Should we agree that the State is the best judge of what constitutes a beneficial use of water under State law and the State having laid down its decision as to how that need may be met.

Mr. CLARK. Most of the time that has been true. In many cases it has not been true.

Senator KUCHEL. And do you mean that because of the fact that in some cases it has not been true we should prevent any acquisition of or any use of the waters arising on the public lands which are reserved or withdrawn?

Mr. CLARK. May I ask a question? Could not the Congress provide for this in specific legislation, Senator?

Senator KUCHEL. Piece by piece?

Mr. CLARK. As was done for reclamation law?

Senator KUCHEL It could.

Mr. CLARK. Would that not be a kind of a pragmatic and traditional way of doing it?

Senator KUCHEL. I don't think so, but anyway, it could. Would you object to it if it were done in that fashion?

Mr. CLARK. In the pragmatic fashion; no. I think that is quite a different approach than this.

Senator KUCHEL. Well, the time is late and I would like to thank you.

Senator Moss. Let me thank you again, Mr. Clark, we appreciate it.

I owe an apology to a great number of people that we have not been able to reach today. We are going to continue the hearing over 1 more day. We will come in at 9:30 in the morning. Now, people who are unable to appear tomorrow and who are on the list and who have a statement that they would like to put in the record, that will be acceptable at this point and we will be glad to put it in the record. In fact, we would be very appreciative to have it in the record.

I want to state to all of the witnesses that I appreciate their attendance here and I do regret that the situation on the floor of the Senate makes it impossible to hear in 2 days all who we wanted to hear orally. We will go on tomorrow and try to wind this thing up.

Now, any of you who feel you can't be here tomorrow and would like to put in a statement may do so.

STATEMENT OF ED I. McKINLEY, JR., COMMISSIONER OF SOIL AND WATER CONSERVATION OF THE STATE OF ARKANSAS

Mr. MCKINLEY. Mr. Chairman, I am Ed McKinley of the Arkansas Soil and Water Conservation Commission.

I had furnished a typed statement. Do you have it before you?

Senator Moss. Is Mr. McKinley's statement here?

Mr. MCKINLEY. I have been here 2 days and I would just like to show that I was present and testified. I have to leave this evening.

Senator Moss. Thank you.

Mr. McKinley is the commissioner of soil and water conservation commission for the State of Arkansas and he is representing that group in his State. He has his prepared statement here.

Mr. MCKINLEY. In favor of S. 1275.

Senator Moss. It will appear in full in the record.

(The statement referred to follows:)

STATEMENT OF ED I. MCKINLEY, JR., FOR THE ARKANSAS SOIL AND WATER CONSERVATION COMMISSION

My name is Ed I. McKinley, Jr., resident of Little Rock, Ark., member of the Arkansas Soil and Water Conservation Commission since its inception some 8 years ago.

I appear here in place of John Luce, of Fort Smith, Ark., chairman of our commission. Mr. Luce underwent emergency surgery last week.

We in Arkansas endorse, without reservation, S. 1275. We respectfully, yet strongly, urge favorable recommendation and final passage of this legislation. It is long overdue.

Even the Old World legal systems protected the landowners' rights to the use of water. The use of water is logically first of local concern.

Historically in America, water rights have been obtained, exercised, and sold according to State law.

No act of any State or of the Congress has changed this basic concept. In fact, only the Federal courts have clouded the issue. The shadowy reasoning the courts have begun to weave into "water rights decisions" makes enactment of S. 1275 an immediate necessity.

These cases which began with the *First Iowa* case in 1946 will be fully discussed by attorneys during these hearings.

To us in Arkansas, the question is simple. We are asking you, the Congress, to say through S. 1275 that if the Federal Government appropriates water rights or use, in a given area, it must pay those who are damaged.

We are asking you, the Congress, to say through S. 1275 that the Federal Government does not possess any underlying ownership of the Nation's water.

That is all there is to S. 1275.

But it is of great moment to the present and future generations of America.

While we in Arkansas have a bountiful supply of water for the foreseeable future the effect of S. 1275 is as important to us as it is to any Western State.

First, we are interested, as are our sister States to the West in the preservation of an American tradition and legal foundation.

Second, should the shadows of the Federal court decisions be allowed to continue, without definite congressional action our cities could be prevented from expanding municipal water systems due to inability to get financing.

Our farmers, who secure irrigation water from streams, will find their lands less attractive to buyers and less valuable as collateral to banks.

Proponents of S. 1275 ask only that the Congress enunciate the principle of eminent domain and say in simple yet firm language that the Federal Government will abide by this basic American judicial principle and thus clear this shadow that the courts are casting on this issue that will offer another threat to the successful functioning of a healthy private economy.

Thank you, gentlemen.

STATEMENT OF JOHN J. MEEHAN, SECRETARY OF NATURAL RESOURCES COMMITTEE, CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. MEEHAN. I am John Meehan, secretary of the U.S. Chamber of Commerce Natural Resource Department. I would like to file my statement also, please, in favor of S. 1275.

Senator MOSS. Mr. Meehan has a statement in favor of the bill before us. He is the secretary of the natural water resources in the Chamber of Commerce of the United States.

Thank you.

Mr. MEEHAN. Thank you. I assume you have copies of our statement.

Senator MOSS. Yes.

(The statement referred to follows):

STATEMENT OF JOHN J. MEEHAN FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES

My name is John J. Meehan. I am secretary of the Natural Resources Committee of the Chamber of Commerce of the United States, and manager of the chamber's natural resources department.

I am here today to present the views of the national chamber on S. 1275, a bill designed to clarify the relationship of interest of the United States and the States in the use of the water of certain streams.

S. 1275, although not attempting to solve all features of the current Federal-State conflict regarding water rights, does provide certain important features designed to mitigate the conflict between the States and the Federal Government. These features are:

(1) The withdrawal or reservation of public lands shall not affect any water right acquired under State law whether before or after withdrawal or reservation;

(2) In the West, consumption of water must taken priority over non-consumptive use of water;

(3) When the United States acquires a water right under State law, it should comply with procedures specified by State law;

(4) The United States should pay for the water rights which it acquires.

One of the greatest needs in the water resources field today is to clarify and resolve the troublesome and complex problems of rights and responsibilities with respect to whether the States or the Federal Government shall control development, appropriation, and use of the waters within State boundaries. It should be noted that, generally speaking, the States have satisfactorily controlled the use, allocation, and development of water resources for more than 100 years.

Because provisions of S. 1275 would provide an encouraging first step in resolving the water rights problem, we urge its enactment. Unless S. 1275 or some similar measure is enacted, confusion and uncertainty about State and Federal authority will continue. This uncertainty stems from a series of important U.S. Supreme Court decisions since 1940 with respect to State water law and individual rights to water. Since Federal court decisions are in conflict with State laws, full economic progress and development must await their reconciliation. Vested water rights are based exclusively on State water law and since there is no body of related Federal water law, there is a considerable doubt as to the certainty of these private rights. Confusion as to water rights is bound to delay additional planning and development because of the large investments involved. In addition, States are not going to accelerate enactment of improvements in water law or procedures for administration of water rights when it is doubtful where the authority of the State ends and that of the Federal Government begins. Individual and industrial planning and investment will not reach their fullest potentials in such an environment.

The current uncertainty in Federal-State relations could, in time, be clarified on a case-by-case basis by the courts. This process, however, might extend into the indefinite future. In the meantime, without positive, unmistakable clarification by the Congress, the continuing doubts as to vested water rights and State responsibility and the resultant economic loss are unpardonable.

If the claims of those supporting the view that the Federal Government has primary water rights are sustained, and water, for instance, originating on Federal lands is owned and under the control of the Federal Government, then many of the existing State water rights will be subordinate to Federal development and use of water. This would also apply to those potential rights that might be issued by a State for development of presently unappropriated water.

The seriousness of the conflict between the States and Federal Government over water rights and the need for clarification of the Federal position have been highlighted by the report of the Senate Select Committee on Water (S. Rept. 29, Jan. 30, 1961). The language of the report indicates the need for immediate attention to the problem as follows:

"With demand for water far outreaching increases in present sources of supply, 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 semiarid West, where not only is water even more scarce than elsewhere in our country but where Federal ownership of millions upon millions of acres of land give the Federal Government an asserted basis for claiming proprietorship, 'paramount rights,' or title in fee simple absolute to all unappropriated waters in many of our States.

"Inevitably, such sweeping claims by the Federal Government might retard State plans and projects for development of their own water resources to meet local needs and conditions for their own citizens in accordance with their own local law and custom. As a result, all of our people everywhere are the losers.

* * * * * * *

"The broadening pattern of these conflicts is conclusive proof of the urgent need for clear-cut, definitive action on the part of Congress to work out with the States a redefining of Federal-State powers and responsibilities for control, use, and development of water resources. The Federal Government should not hamstring the States in the States efforts to develop their water resources to meet the needs of their people. Neither should the States hamstring the Federal Government in its efforts to fulfill its functions within the Constitution."

The passage of S. 1275 will not prejudice any legitimate rights of the United States. First, there are express safeguards set forth in the bill. For instance, the language of the bill does not mention the issue of the supremacy of Federal powers. The bill does recognize, however, the existence and compensable character of rights generated under State law which may be taken in the exercise of the Federal powers.

Second, Congress can at any time alter, amend, or repeal all or any part of S. 1275 if it is found to be unworkable or adversely affecting the national interest.

Third, Congress can with respect to any specific project provide for any exception to S. 1275 deemed necessary or desirable. And the bill would not interfere with regional or basin planning or development under present or future legislation.

In summary the national chamber advocates enactment of legislation that will fully clarify the relationship of the States and the Federal Government in the matter of water resources, development, appropriation, and use of water within State boundaries. We believe S. 1275 is a step in the right direction and should be enacted into law.

Senator Moss. As far as I am concerned we could do this on Friday. We will be in touch with you as to the time when you can appear.

Mr. Anderson would like to hear you orally.

Voice. Thank you.

STATEMENT OF EDWARD F. TAYLOR, CHAIRMAN, WATER PROBLEMS COMMITTEE, REPRESENTING MUNICIPAL LAW OFFICERS OF THE UNITED STATES

Mr. Taylor. Edward F. Taylor, chairman of the Water Problems Committee of the Law Officers, representing 1,250 cities and other municipalities throughout the United States. I have a statement on behalf of that organization in support of S. 1275.

Senator Moss. Thank you, Mr. Taylor. Your statement will appear in the record. We appreciate it.

(The statement referred to follows:)

Statement of Edward F. Taylor, Chairman, Water Problems Committee, National Institute of Municipal Law Officers

My name is Edward F. Taylor, a partner in Taylor & Smith, attorneys at law, and chairman of the Water Problems Committee of the National Institute of Municipal Law Officers. I have been requested to give testimony on behalf of NIMLO, an organization of lawyers representing more than 1,250 municipalities throughout the United States, with headquarters in Washington, D.C.

On October 9, 1963, during NIMLO's 28th annual conference at Dallas, Tex., NIMLO unanimously adopted the resolution which is attached to this statement as exhibit A.

This resolution emphatically supports the principle of Senate bill 1275 as introduced by Senators Thomas T. Kuchel, of California; Frank E. Moss, of Utah; and Len B. Jordan of Idaho. NIMLO's definite position in favor of such legislation follows the recommendation of the water problems committee, which has reaffirmed the need to clarify the status of local and Federal water rights in special reports issued in each of the past 5 years. The committee annually has expressed alarm over the misunderstanding and fears that have sprung from the lack of a clear-cut definition of national and local rights to our most vital natural resource—water. The Federal Government's claims of paramount

rights in water supplies essential to municipal growth and survival, and its disregard for the rights our communities have established under State law and custom, have caused a deterioration of Federal-local relations and the mutual trust necessary to carry out our common aims in the maximum development of the Nation's dwindling water supply for the benefit of every American. I am presenting to the Senate, our water problems committee reports for the past 2 years, which give unqualified support to Senate bill 1275, or similar legislation. The makeup of this committee demonstrates that we regard this problem as being no longer confined to the West, with its history of shortage, its impact has hit the East where lack of water has caused suppliers in such States as New Jersey to borrow the irrigation practices born of western drought. You will note that our committee has included municipal counsel from New York City, as well as Los Angeles; from Helena, Mont., as well as Sweetwater, Fla., and San Francisco, as well as Pawtucket, R.I. In the midland States, we find the city attorney of Flint, Mich., in the Great Lakes region, joining with distinguished counsel from Lincoln, Nebr., Safford, Ariz., Louisville, Ky., Enid, Okla., Gallup, N. Mex., and many other widely dispersed municipalities. May I suggest that the record show the representative nature of the committee and the fair cross section it gives of the entire NIMLO membership's support for the proposition under consideration.

The special resolutions committee of NIMLO without dissent, approved the resolution and presented it to the conference, which, in turn, unanimously adopted it. You may be interested in knowing that the resolutions committeemen include the corporation counsel of Chicago, New York, Pittsburgh, Dallas, New Orleans, St. Louis, Paterson, N.J., Des Moines, Richmond, Va., Milwaukee, and both Portland, Maine, and Portland, Oreg. The city attorney of that Oregon city, Alexander Brown, was well acquainted with the Pelton Dam case, and pointed up the threat it may pose to municipal water rights geographically located near federally reserved lands.

The implications of the reservation doctrine have troubled municipal counsel in every part of the Nation. The Federal attitude that it possesses water rights under State law without being subject to the same restrictions imposed by State legislatures upon non-Federal claimants has offended their sense of fairplay. And the potential reach of the "navigational servitude" theory for taking water rights without compensation has become a matter of deep concern.

But fear over encroachments upon water rights has not blinded responsible municipal lawyers to the indispensable contributions of the Federal Government to local areas and the Nation in flood control, water development, reclamation, multipurpose dams, and other achievements of a scope it alone can undertake. The attitude of NIMLO, evidenced by its resolution, is to favor a moderate bill which amply protects the national interest as well as recognizing vital water rights of the more than 1,250 units of municipal government throughout the United States. I believe Senate bill 1275 conforms to the spirit of the resolution adopted in Dallas.

At the same time that it alleviates most, if not all of the more aggravated conflicts between the Federal and local governments in water rights, it does not prejudice any valid interest of the United States.

As legal representatives of local governments, we welcome the following constructive objectives of the proposed bill:

(1) That no water right acquired by municipal government in accordance with State law will be adversely affected by the withdrawal or reservation of public lands.

(2) That the consumption of water for beneficial uses, including domestic, agricultural, and industrial purposes essential to municipal development, will have priority over the use of water for navigation.

(3) That the United States, when it elects to acquire a vested water right under State law, should comply with the same State procedures applicable to non-Federal agencies seeking such rights.

(4) That when the United States takes existing rights, as established under State law, it should pay just compensation for them, and not confiscate them.

We believe these essential elements of Senate bill 1275 provide reasonable conditions for the acquisition and exercise of water rights by Federal agencies. These qualifications do not abridge any constitutional power now conferred upon the Central Government. On the contrary, the bill guarantees that only when the United States lays claim to a water right in its proprietory capacity should

it be required to conform to the same rules that bind other private and public claimants. But when the Federal Government properly asserts a water right in its sovereign capacity, to carry out vital national interests, this bill will not stand in the way. No function within the scope of the supremacy clause of the Constitution, such as water projects authorized by that constitutional provision can be blocked by any local or State agency for lack of a special permit.

In conclusion, let me refer to the resolution once again, in which NIMLO urges the Congress to consider favorably legislation which will preserve to municipal corporations and the States their historic role in water resource development and protect local water rights. We believe proposed Senate bill 1275 is such legislation.

[Attachment]

PROTECTION OF WATER RIGHTS

Whereas municipal corporations throughout the United States, and all members of the National Institute of Municipal Law Officers, are vitally interested in the protection of water rights for reasonable, beneficial use in the orderly development of municipalities; and

Whereas an adequate water supply is essential for domestic, municipal, industrial, agricultural purposes; and

Whereas certain jurisdictional conflicts exist between the States and the Federal Government with respect to water rights and resource development which may detrimentally affect many municipalities; and

Whereas the Select Committee on National Water Resources of the U.S. Senate has reported, after an exhaustive study, that "the broadening pattern of these conflicts is conclusive proof of the urgent need for clear-cut, definitive action on the part of Congress to work out with the States a redefining of Federal-State powers and responsibilities for control use and development of water resources"; and

Whereas extensive hearings have been held by the Congress on this subject over the past 6 years with the result that certain problem areas have been brought into clearer focus and various legislative remedies have been proposed: Now, therefore, be it

Resolved, That the National Institute of Municipal Law Officers hereby urges the Congress to consider favorably legislation which will preserve to municipal corporations and the States their historic role in water resource development and protect local water rights.

STATEMENT OF CLARENCE DAVIS, REPRESENTING STATE WATER BOARD OF MONTANA

Mr. DAVIS. I am Clarence Davis, representing the Water Board of the State of Montana. I have a statement that is in the hands of the committee. I am not able to be here tomorrow. I will ask you to put my statement in the record as I assume you will do.

Senator MOSS. It will certainly be placed in the record. We appreciate your coming this long distance to be with us, Mr. Davis, and wish that we had time to hear you fully. Your statement will be part of the record and will be studied very carefully.

(The statement referred to follows:)

STATEMENT OF CLARENCE A. DAVIS ON BEHALF OF THE MONTANA STATE WATER CONSERVATION BOARD

Mr. Chairman; my name is Clarence A. Davis. I am a lawyer with offices at 1625 K Street NW., Washington, D.C., and I have the privilege of appearing before you on behalf of the Montana State Water Conservation Board.

May I say in the beginning that the Montana Water Conservation Board, during its existence, has built 181 projects which store 438,000 acre-feet of water and diverts another 260,000 acre-feet of water from streams to furnish a full or supplemental supply of water to more than 400,000 acres in the State of Montana. All of this has been done by this board without Federal assistance and in cooperation between the State and individual landowners in Montana.

The board estimates that there are an additional 1,275,000 acres of new land which can be beneficially irrigated and that there is another 350,000 acres of land which should receive supplemental water.

The impact of all this on the economy of Montana is obvious to anyone who understands the West, and for that reason Governor Babcock and this water board have placed themselves squarely in support of S. 1275, believing that its enactment is vital to further water development in Montana and to the stability of the projects which already exist.

Mr. Chairman, I have lived with this problem since 1920 when I had the honor to be the attorney general of my home State of Nebraska, I lived with it at much closer range while I was Solicitor and Under Secretary of the Department of Interior under President Eisenhower. I have attended these hearings for several years, sometimes officially and sometimes unofficially. I have listened for hours to the bogymen raised by the Department of Justice and the other Federal agencies who have a direct interest in retaining control of these natural resources.

The views of the State Water Board of Montana and my own agree with the views of the other Western States which have long since adopted the appropriation theory of water rights. The appropriations of water secured under the laws of the States have long been regarded as vested property rights just as much as the fee simple title of the land. Therefore, the continuing assertions by the various branches of the Federal Government, ranging as they have in many previous hearings all the way from an assertion of the complete and absolute ownership of all of the waters of the United States by the Federal Government, down through the commerce clause and the war power and the property clauses, and especially those which have been made in the last 10 years amount in effect to a cloud on the title of all water rights in the West acquired under the laws of the States. This whole controversy is actually a controversy of constitutional law over the question of the extent of Federal power, but the assertions that have been made as to the extent of that power have been the cause of great alarm. For instance, in previous years the assertion has been made by the Department of Justice, or other Federal agencies, that section 8 of the Reclamation Act which requires the Bureau of Reclamation to secure its water rights under the laws of the States is an unconstitutional statute because it curtails what is alleged to be Federal ownership of waters. It has been contended that the famous Milliken-O'Mahoney amendment which protects consumptive uses of water west of the 98th meridian is also unconstitutional. It is little wonder that the people who have invested millions of dollars of their own money in the development of the West and have relied upon the sanctity of their water rights should be greatly disturbed.

After all of the excellent presentations that have been made at this hearing I shall not repeat the arguments. I should like to say to the committee that I did, while Solicitor and Under Secretary of the Interior Department and in a year or two following that period, make what I hope is a comprehensive analysis of the legal situation involving these rights and in which I undertook to answer the numerous contentions of the Department of Justice on this problem. I shall not repeat that testimony here because of its length. I can only say to the committee that the statement has been widely approved by western lawyers.

I should, therefore, like to ask the committee to incorporate into my statement at this point pages 159 through 169 of the hearings before the Subcommittee of the House on Irrigation in the 86th Congress, July 20 to 23, 1959, which is a Government document entitled "Federal-State Relations in the Field of Water Rights" and is printed as Serial No. 9 of the Committee on Interior and Insular Affairs of the House.

The substance of that statement is that the Federal Government, as a sovereign power, has the unqualified right of eminent domain; that under the eminent domain procedure of the Federal Code the Federal Government can take possession of any water right in the United States on 24 hours' notice by the mere filing of a petition of condemnation; upon which mere filing the title passes. But the vast difference between the proponents and opponents of this bill is that the opponents oppose paying for these State rights which they could secure, but prefer to rest their case on what I call vague constitutional grounds which involve the taking without compensation.

I should like to have attached to this statement Resolution No. 938 of the Montana State Water Conservation Board, signed by the Honorable Tim Babcock as Governor of Montana and attested by the secretary of the board.

RESOLUTION No. 938

Whereas the State water conservation board was created in 1934 by the Montana Legislature for the purpose of meeting a statewide need for the conservation and use of water by constructing and operating projects designed for the purpose, and since its creation has built 181 projects to store 438,017 acre-feet of water and to divert 260,563 acre-feet from streams to furnish a full supply or supplemental water to 405,582 acres, and

Whereas the board has determined that 1,275,870 additional acres of new land can be beneficially irrigated and 352,730 acres of presently irrigated land require supplemental water, and it appears to the board that the irrigation of said land would be most beneficial to the people and the economy of the State of Montana: Now, therefore, be it

Resolved, That the board adopt the following policy:

That the State of Montana, its congressional delegation, prevail upon Congress to whatever extent possible so that it shall be declared a policy of the Congress to recognize, preserve and protect to the utmost, the primary responsibilities and rights of the States in the planning for the conservation, development, and utilization of their water and related land resources; be it

Resolved, That any right claimed by the United States to the beneficial diversion, storage, distribution or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with the procedure established by the laws of the State; be it further

Resolved, That the secretary be instructed to send copies of this resolution to the Montana congressional delegation; to the Honorable Henry M. Jackson, of Washington, chairman of the Committee on Interior and Insular Affairs; Senator Thomas H. Kuchel, of California; and the Honorable Stewart L. Udall, Secretary of the Interior.

MONTANA STATE WATER CONSERVATION BOARD,
TIM BABCOCK, *Chairman.*

Attest:

A. D. MCDERMOTT, *Assistant Secretary.*

Senator ANDERSON. Mr. Davis is an old friend from the Department of the Interior and we all welcome him.

Senator MOSS. We certainly do.

Mr. DAVIS. It might have been refreshing to hear a different voice from the Interior which you would have heard.

Senator MOSS. Yes, sir.

Thank you.

Mr. Kennedy.

STATEMENT OF HAROLD W. KENNEDY, COUNTY COUNSEL OF THE COUNTY OF LOS ANGELES

Mr. KENNEDY. Mr. Chairman, I am Harold W. Kennedy, county counsel of the county of Los Angeles. I am also appearing officially for the National Association of Counties, for the County Supervisors Association of California, for the Southern California Water Conference representing 55 water agencies in southern California and for the Feather River Project Association as chairman of its statewide Federal-State Water Rights Committee.

Could I have permission to file statements in behalf of those organizations? Could I also make the suggestion, Mr. Chairman and gentlemen, that others who have not come to the microphone have the general consent of the committee, those of us who are definitely in favor of this bill would like the opportunity to supplement your record? For example, Mr. Rex Goodcell, president of the Feather River Project Association, is here and he would like the opportunity to file in behalf of his association also a full statement.

Senator ANDERSON. You would not want to confine it to just those in favor?

Senator Moss. Even the sinners may file.

Certainly the permission is granted, Mr. Kennedy.

You have been in attendance here during the entire hearing and we wish we had time to hear from you orally. We grant the permission and the statements may be filed and may be filed by the others who represent the organizations mentioned or others who are in attendance at the hearing who have not been able to have time orally but would like to place a written statement in the record are given that permission to do so. I think it is apparent to everyone that this committee has a broad problem and we should have before us all of the information that we can possibly have and we welcome the statements of responsible citizens and especially those representing organizations which have taken a point of view on the legislation.

Mr. KENNEDY. If I did not make it clear, I want it clear that the great county of Los Angeles officially, after careful consideration, is definitely in favor of this legislation.

Senator Moss. Thank you, Mr. Kennedy. We appreciate it very much.

Thank you all.

(The statements referred to follow:)

STATEMENT OF HAROLD W. KENNEDY, COUNTY COUNSEL OF THE COUNTY OF LOS ANGELES, REPRESENTING NATIONAL ASSOCIATION OF COUNTIES, THE CALIFORNIA COUNTY SUPERVISORS ASSOCIATION, THE FEATHER RIVER PROJECT ASSOCIATION OF CALIFORNIA, THE SOUTHERN CALIFORNIA WATER CONFERENCE, AND THE COUNTY OF LOS ANGELES

Mr. Chairman, my name is Harold W. Kennedy, county counsel of the county of Los Angeles, filing this statement as a part of the record in support of S. 1275. In addition to appearing in my capacity as head of Los Angeles County's legal department, I also appear officially authorized to urge this committee and the Congress to pass this bill in behalf of the following associations and organizations: National Association of Counties; the California County Supervisors Association; the Feather River Project Association of California, where for the past several years I have served as chairman of its statewide Federal-State water rights committee; and the Southern California Water Conference.

With respect to my background and experience in the field of water law and water legislation, as county counsel of Los Angeles County I have represented the Los Angeles County Flood Control District and 16 waterworks districts under the jurisdiction of our county. I am a member of the water resources committee of the American Bar Association's section of mineral and natural resources. I worked with Gov. Goodwin J. Knight in the extensive legislative program that reorganized California's water agencies and created the California Water Commission and the State water rights board and served as vice chairman of Governor Knight's water lawyers committee. During the incumbency of Attorney General Edmund G. Brown, by his appointment, I served as a member of the attorney general's water lawyers committee. For the last 3 years I have been chairman of the statewide Federal-State water rights committee of the Feather River Project Association of California and for the past 5 years have been a member of the executive committee of the Southern California Water Conference embracing 55 public and private water groups in southern California. During the past 10 years I have researched and authored a number of papers emphasizing the necessity of clarifying the relationship of water interests of the United States and the States of the Union, particularly those of the 17 Western irrigation States.

In 1961, I made an extensive research of the legal aspects of the basic problems involved in this difficult and controversial problem and in a 55-page study entitled "Quieting Title to Western Waters—The Federal-State Water Rights Controversy" presented the same to the annual meeting of the Irrigation Districts

Association of California and to the western regional district meeting of the National Association of Counties at Las Vegas, Nev. This research gathered together several hundred citations of pertinent cases in the field of water law and has been printed in a volume entitled "Western Water Law Symposium, 1963."[1] As cochairman of the Western Water Law Symposium held in March of 1963 under the auspices of the National District Attorneys Association in Los Angeles, invitations were extended to representatives of the Federal Government to participate and present their views. Mr. Ramsey Clark, Assistant Attorney General in charge of the Lands Division, presented a paper and I am thoroughly familiar with the opposition position taken by the Department of Justice and the Department of Interior.

THE FEDERAL-STATE WATER RIGHTS PROBLEM IS NOT NEW

Water lawyers and water leaders in the West have long concerned themselves with the problem. Millions of words have been written and spoken as to who has title, that is, who "owns" the unappropriated water running in the rivers and streams of California and the other 16 Western irrigation States. The problem is so difficult and involved because it emerges from a whole series of congressional acts passed by the Congress of the United States, the first of them being passed in 1866. An intelligent and knowledgeable analysis of both the problem and its solution demands a clear understanding of not only the legislative history that underlies it but the interpretations of the Supreme Court of the United States in a whole series of judicial decisions dealing with this delicate subject.

Involved in its appropriate and equitable solution is the deep question of "water rights and federalism." As a point of beginning in searching for a solution it must be fully recognized that the answer must be found within the framework of the constitutional powers of the Federal Government as set forth in the U.S. Constitution. Some water lawyers who take a dim view that an acceptable solution can be found believe that the controversy is over Federal constitutional law. Certain powers enumerated in the Constitution of the United States were delegated to the Federal Government and it is by what many believe to be exaggerated claims for the undue extensions of those powers that this controversy has arisen.

As this is not the proper forum for a detailed legalistic discussion, briefly, these Federal powers may be enumerated as follows: the power to regulate interstate commerce, the war power, the property clause giving Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. The treaty power and the exclusive authority to deal with Indian matters as well as the general welfare clause are likewise involved.

THE SENATE SELECT COMMITTEE ON NATIONAL WATER RESOURCES RECOMMENDED CLARIFICATION BY LEGISLATIVE ACTION

The Senate Select Committee on National Water Resources, established in 1959, studied the relationship of water resources activities to the national interest. This highly competent and bipartisan committee strongly recommended that it was in the public interest to resolve these existing conflicts on water rights and that it would be in the public interest to clarify the same by affirmative action of the Congress. Both Democrats and Republicans joined in the report of the Select Committee on National Water Resources and 17 U.S. Senators joined in the summary recommendations in signing the committee's report, placed "an urgency label" and in the strongest frame of reference summarized its recommendations in the following language:

"The broadening pattern of these conflicts is conclusive proof of the urgent need for clear-cut definitive action on the part of Congress to work out with the States a redefining of Federal-State powers and responsibities for control, use, and development of water resources. The Federal Government should not hamstring

[1] Western Water Law Symposium, edited by Richard W. Dickenson, county counsel of San Joaquin County, Stockton, Calif., copyrighted 1964 by National District Attorneys' Association (formerly National Association of County and Prosecuting Attorneys), 1155 East 60th St., Chicago, Ill.

the States in the States' efforts to develop their water resources to meet the needs of their people. Neither should the States hamstring the Federal Government in its efforts to fulfill its functions within the Constitutional." [2] [Emphasis added.]

WATER IS THE LIFELINE OF CALIFORNIA AND THE WEST AND WHO OWNS THE WATER CONTROLS THE FUTURE

In at least half the geographical area of our country the control of water means the direct control of land, for the land without the water is useless; it means the control of the location of population; it means the power to replace an existing economy with a new economy; to sound the death knell of settled areas and to raise up new areas—all controlled by the manner in which we administer water resources.

The western pioneer and those who followed him built the tremendous industrial and agricultural strength of this country upon the principle of individual ownership and control of land and water and of complete freedom of growth opportunity. Therefore, it is a matter of tremendous importance that there be resolved as soon as possible this gnawing, underlying, unsettled question as to whether in a true and legalistic sense the Federal Government owns and controls western waters or whether California and its irrigation-State neighbors can depend upon State water law.

An appropriate solution demands an acceptable compromise between the Federal claims and the States' claims. Water lawyers and water leaders probing for an intelligent solution now recognize that progress must be made by approaching the matter within the framework of the Government's constitutional powers and the tremendous backlog of statutory and judicial decisions favorable to the West. A solution will not be found by decrying from the housetops the "Federal encroachment of State water rights," nor by the federalists proclaiming against "State interference with Federal water rights."

THE BASIC CONFLICT IN THE FEDERAL-STATE WATER RIGHTS PROBLEM

The need for legislation to define Federal-State relations in the field of water rights centers around two basic problems which may be succinctly stated as follows:

1. The United States claims the ownership of the unappropriated waters arising on the public domain and as owner need not conform to State water laws.
2. Congress has the power to control waters of navigable streams through the commerce clause.

SENATE BILL 1275 CAREFULLY DRAFTED TO RESOLVE WATER RIGHTS CONFLICTS BUT PROTECT BOTH THE FEDERAL GOVERNMENT AND THE STATES

The major features of S. 1275 are as follows:

1. The withdrawal or reservation of public lands shall not affect any water right acquired under State law either before or after withdrawal or reservation.
2. In the West, consumption of water must take priority over the use of water for navigation.
3. When the United States acquires a water right under State law, it should comply with State procedures required by the statutes of the affected States.
4. The United States should pay for the water rights which it acquires in behalf of all of its citizens.

LEGISLATIVE HISTORY OF CONGRESS SUPPORTS AND CONSISTENT WITH S. 1275

Congress has seen fit to enact 17 different acts between 1866 and 1954 recognizing in one way or another the application of State law in governing the use of water resources in the public land States. The Western States have relied particularly on the acts of 1866, 1870, and the Desert Land Act of 1877, and section 8 of the Reclamation Act of 1902, which states: [3]

"Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the

[2] Report of the Select Committee on National Water Resources pursuant to S. Res. 48, 86th Cong., 87th Cong., 1st sess., S. Rept. No. 29, Jan. 30, 1961.

[3] See pp. 295 to 299 of the hearings before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 84th Cong., 2d sess., on S. 863.

control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *."

ALARMING EFFECT OF FEDERAL GOVERNMENT'S "RESERVATION DOCTRINE" EMERGING FROM CATASTROPHIC "PELTON DAM" CASE [4]

For the last 9 years there has been extensive discussion and debate among water lawyers and Government officials as to the true rule stemming from this pronouncement of the U.S. Supreme Court. For almost 100 years before this awesome decision, it had been believed that in accordance with the affirmative acts of the Congress and under the laws of the Western States dealing with the appropriation of water, that the policy of the Government was that waters flowing upon and appurtenant to public lands of the United States shall be available for appropriation and use in accordance with "local customs, laws, and the decisions of the courts." [5]

The tremendous importance of this point is emphasized by recognizing that most of the land in the Western States consists in large part of rivers and underground flows originating upon those public lands, the permission given by early congressional action for the acquisition of water rights upon the public lands pursuant to local customs and laws, was the factor which opened the way for the development of the prosperous economy now enjoyed in the western part of our Nation.

From some of the statements of representatives of the Federal agencies, it would appear that some of them have a misconception as to the effect of this series of early congressional authorizations. Thus, it should be emphasized that this congressional policy did not place Federal lands at a disadvantage or put them in a special category different from private lands, which would impede the promotion and development of water projects which properly should be under the direction and jurisdiction of the Federal Government.

To state the matter accurately, it put Federal lands on an equal basis with private lands in the West in respect to the allocation of water rights. It must be remembered that under the "appropriative rights rule" which prevails in the West and actually originated from the customs of the early gold miners coming to California and the West after the gold strike of 1848 and 1849, water rights are acquired by appropriation and beneficial use and the titles to water rights are legally separate from the titles to lands. Restating the proposition, water flowing across private lands is subject to appropriation by these persons under local laws and customs, and in the same way Congress placed waters upon Federal lands in the same posture. Credit must be given to this wise legislative policy because without exaggeration the right to appropriate needed water pursuant to local customs and laws permitted the West to develop into the prosperous agricultural and industrial empire that is the pride of the Nation today.

These developments took place as we have said starting with the first enactment of Congress in 1866 and so almost literally for 100 years until the *Pelton Dam* case. Under our wonderful free enterprise system, private citizens, local governmental agencies, and water districts, in an orderly way, acquired ownership of water rights on the public lands of the United States, in the same manner as on private lands, also in accordance with local customs and laws of the States.

As emphasized by the statements of the attorneys general of the several Western States and the water lawyers, this 100-year-old policy of Congress was sharply curtailed—almost nullified—by the now famous decision of the Supreme Court of the United States in 1955, widely known as the *Pelton Dam* case. The devastating and practical effect of this decision was that the congressional consent to the appropriation of water under local customs and laws upon the public lands of the United States did not apply to that portion of the public lands which had been reserved or withdrawn from public entry or sale. Restated, the Court held that public lands not open to entry for homesteading, desertland entries, and similar grants, were not to be considered as "public lands" within the meaning of the congressional act of 1866.

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[4] *Federal Power Commission* v. *State of Oregon* (1955), 349 U.S. 435, 99 L. Ed. 1215.

[5] Act of July 26, 1866, 43 U.S.C. 661; act of July 9, 1870, 43 U.S.C. 661; and Desert Land Act of 1877, 43 U.S.C. 321.

The construction placed upon this decision by the Department of Justice of the United States, is that all water rights acquired pursuant to the local laws and customs heretofore referred to are actually placed in jeopardy insofar as they depend upon water arising upon or flowing from lands of the United States which had been reserved or withdrawn from public entry prior to the vesting of the water rights under State statutes. Bluntly stated as to such waters, the Department of Justice now claims that local laws and customs have no application, and that water rights acquired after the date of reservation or withdrawal are not "water rights at all" and thus must not be compensated for when taken by the Federal Government for a Federal project. The lawyers for the Department of Justice take the position that any acquisitions of such unappropriated water are in the category of temporary privileges held at sufferance from the United States and subject to cancellation or destruction at any time by the Federal Government.

EXAMPLES OF THE DAMAGING EFFECT OF THE INTERPRETATION OF THE DEPARTMENT OF JUSTICE

As a member of the Important Interior and Insular Affairs Committee, you are thoroughly familiar with the geography of the Western States and of your own knowledge know that most of the water supplies originate in mountain areas and that most of the mountain areas are covered by U.S. forest reserves, national parks, national monuments, Federal grazing lands, and U.S. military reservations. Of equal concern are the large acreages withdrawn from public entry as sites for potential and future development of hydroelectric power authorized by the Federal Power Act. Emphatically summarized, these reserved and withdrawn lands of the United States actually constitute the source of most of the water supplies of the 17 western so-called irrigation States. So, by the *Pelton Dam* decision of 1955, the Supreme Court virtually canceled the beneficial effects of the congressional policy that started in 1866 and transferred from State control to Federal regulation the major portion of unappropriated (i.e., nonvested water rights) which the citizens of the West had with confidence believed was open for their acquisition and beneficial use.

A part of the difficulty thus far in the failure of the several congressional committees having jurisdiction over the subject matter to pass such a bill is to understand with clarity the practical, legal, and realistic effect of the contention of the Department of Justice and the magnitude of the resulting harm upon the orderly allocation, use, and conservation of the vast amount of unappropriated water that was withdrawn from beneficial use. In the example used, if the cut-off date was in 1910, then the great volume of water which citizens thought they had appropriated, in reliance upon the whole series of congressional statutes, are not grounded upon firm water rights, but are in jeopardy. The fear that we have and the alarm that we are sounding is not in the realm of an academic discussion for law professors, but definitely is in the category of the necessity of the Congress clarifying and resolving the conflict because in a true sense "who owns the water controls the future."

Let us be very specific in a number of examples because the facts are that most of the withdrawals and reservations were made as early as the turn of the century in the 1900's. Earlier I referred to the *Pelton Dam* case as "catastrophic" and the catastrophy stems from the uncertainty of who owns or controls the many acre-feet of water that was believed to have been legally appropriated since the date of the withdrawal or reservation. For further emphatic illustration, let us take a large acreage of national forest land withdrawn in 1910. In the meantime, 50 years have elapsed since the 1910 withdrawal until the pronouncement in *Federal Power Commission* v. *State of Oregon*, 349 U.S. 435, 99 L. Ed. 1215, and thousands of acre-feet have been believed appropriated by following the precise statutory procedures required by the laws of California, Nevada, Utah, Colorado, Idaho, and other Western States. In capsule form, the query is, Are these appropriations now "vested legal water rights" which, if taken by the Federal Government or anyone else, must be paid for, or are they temporary rights or grants now subject to nullification or cancellation at the policy whim of the Department of Interior and the Bureau of Reclamation? If, as a matter of Federal law, private citizens, irrigation districts, and public water agencies (municipalities, counties, and States) did not during this 50-year period legally ripen such appropriations into water rights that are truly owned and vested in the tradition of our law, but may be legally taken or claimed or controlled by one of the many Federal bu-

reaus, then for this reason alone (and there are many others) S. 1275 should receive the immediate approval of the Congress.

Because of the depth of the whole controversy over conflicting water rights, arising from the 100-year legislative history and the several hundred important water cases involved, it is understandable that many persons do not accurately know either the true purpose or the effect of S. 1275. This observation may also include some staff people in the Government who, up to this point, have expressed opposition to the bill. Thus, we must strive for clarity and understanding.

Let us take a further hypothetical example of the importance of the issue with particular reference to the "reservation and withdrawal doctrine." The water used by the Merced Water District in the Great Central Valley of California, flows from the Merced River which arises in Yosemite National Park, which of course is withdrawn or reserved land. Under the Supreme Court ruling, in the *Pelton Dam* case and reaffirmed in *Arizona* v. *California*,[6] the Federal Government could construct a dam in Yosemite National Park and funnel off large quantities of the water arising in the park without compensating users in the vast Merced Irrigation District. S. 1275, at a minimum, would require the Federal Government to make just compensation to those water users in the Merced Irrigation District whose water rights had been created by their following the laws of appropriation in California.

Recognized water lawyers are in agreement that in fact the Supreme Court in *Arizona* v. *California* not only confirmed and approved its decision in the earlier 1955 *Pelton Dam* case, but actually expanded the reserve rights' doctrine and presented a far greater threat to the security of existing water rights than did the *Pelton* decision.

If a compelling statistic is required to buttress the wide and extensive application of the Government's position, let it be remembered that in my State of California the factual and practical realities of the threat must be confronted, if stability is to exist with respect to water rights. When California was admitted to the Union in 1850, title to more than 91 percent of the State's approximate 100 million acres of land was in the title of the United States. As time passed, Congress disposed of about one-half of this land in specific sales and grants to the railroads and others. In a logical way, most of this land that passed into private ownership is in the fertile valleys below the mountain areas. California became the great and prosperous agricultural State that it is because these lands were fertile and water was available. The continuance of a reliable water supply is imperative to our economy.

Looking at the realism of the problem that confronts Californians, about one-half of our State's 100 million acres of land is still in the ownership of the Federal Government, the same largely being controlled by the Forest Service, the National Park Service, Department of Defense, and the Bureau of Land Management.[7] It is estimated by the natural resources department of the State chamber of commerce that of the approximate 50 million acres in Federal control, all of it, except some of the 16 million acres under the jurisdiction of the Bureau of Land Management, is reserved or withdrawn from public entry. Summarized, this means that at least 33 million acres, or one-third of the entire area of the State, falls within the classification of withdrawn or reserved lands and it is not an exaggeration to recite, are directly affected by the Supreme Court's decisions heretofore alluded to, because it is the water that finds its source upon or flows across this one-third of our State, that is jeopardized by the Government's contention that no matter what has happened in the interim since its withdrawal or reservation that the Government has the right to take the water back without compensation. That is why part (1) of section 1 of S. 1275 is so necessary to protect California's water supplies.

The California water plan, if further emphasis is needed on this issue, reveals the staggering statistic that at the present time about 75 percent of the total natural water runoff in our whole State comes from withdrawn or reserved lands under the control and jurisdiction of the Federal Government and its bureaus. Nothing heretofore stated is to be misconstrued as many have argued that the Federal Government in any sense divests itself of forest, park, military and other such lands. What is contended is that if in the time period between the proper

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[6] 373 U.S. 546 (1963).

[7] See "1962 Public Land Statistics," Bureau of Land Management, U.S. Department of the Interior.

withdrawal or reservation by the Federal Government that farmers, cattle raisers, agricultural States, or the official representatives of privately or publicly developed water projects have, through the State laws or appropriation, taken to themselves the right to a certain amount of that unappropriated water, that if later the Federal Government needs it for a national purpose of any character, that just compensation be paid to those who believed that they owned it.

The official comments made by representatives of the Department of Justice at this hearing with respect to S. 1275, would appear to confirm our fears over the ultimate effect of both *Federal Power Commission* v. *State of Oregon* and reaffirmed and extended in *Arizona* v. *California*.

Summarizing and restating the first basic objective of S. 1275, it would change existing law as to the effect of reservations of Federal lands or water rights created under State law. This objective in and of itself demands the passage of S. 1275, but there are other basic and fundamental purposes which the bill also contains.

S. 1275 WOULD CONTINUE CONGRESSIONAL POLICY PROTECTING THE CONSUMPTIVE USE OF WATER AGAINST NONCONSUMPTIVE USES THROUGHOUT THE WEST

S. 1275 would restate the longstanding policy of the Congress and make generally applicable to all Federal projects the policy Congress has followed since 1944 with respect to flood control and navigation projects in preferring consumptive uses of water over known consumptive uses for navigation purposes.

Through the provisions of paragraph (2) of section 1 of the bill, the rule and policy applied by the Congress on a project-by-project basis, that in the West where navigation on rivers is not important, and where, because of the aridity of our climate, water is in short supply, that the use of water for navigation in connection with any federally authorized project, constructed after the passage of the bill shall only be such use as does not conflict with the beneficial consumptive uses of the affected waters. This simply means that in the West (i.e., west of the 98th meridian) water required for domestic, municipal, stock-watering purposes, irrigation, mining, or industrial use would have priority over water used for navigation.

IMPORTANT TO RECOGNIZE LIMITED APPLICATION OF PARAGRAPH (3) OF SECTION 1 REQUIRING THE UNITED STATES TO COMPLY WITH STATE PROCEDURES WHEN IT ACQUIRES A WATER RIGHT UNDER STATE LAW

Ironically and paradoxically this relatively unimportant section has caused many to misconstrue its limited purpose and some of the opponents of S. 1275 have either inaccurately or purposefully raised doubts as to the soundness of the entire bill. It is therefore important for the members of the Subcommittee on Irrigation, all of the members of the Committee on Interior and Insular Affairs and the Members of the Congress to have in mind the very limited application of paragraph (3) of section 1 of the bill. Its requirement is that if and when the United States chooses to base its claim to a water right on State law rather than on Federal law, as it has the choice to do, such a right shall be initiated and perfected in accordance with the procedure established by the laws of that State. Let it be reemphasized that it would apply only when the United States chooses to rely on a water right grounded solely in State law, as opposed to relying on a federally reserved right, a specific congressional authorization, or any other kind of Federal right. In such situations, it is proper and equitable that the United States itself comply with the procedural requirements of State law necessary to establish that right in the same manner as any other water user is required to do.

Very definitely, it does not establish a uniform requirement that the United States acquire rights for its projects in accordance with State law, as does section 8 of the Reclamation Act. It is inserted solely because of the very difficult and controversial situation that arose in the so-called *Fallbrook*[8] case in California concerning water rights for the Camp Pendleton military reservation. In this case, the Government has claimed (and happily unsuccessful up to the present time) a right based on California law, but took the position that it need not comply with the State procedural requirements necessary to perfect that right, the Government claiming that it was an improper application of "State police regulation."

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[8] *United States* v. *Fallbrook P.U.D.* 165 F. Supp. 806, 828–29 (S.D. Cal. 1958).

Public policywise, this is needed because if the Federal Government, through its own free choice, decides that it wishes to rely on a right generated under State law, then in all equity, it ought to comply with the State procedure necessary to acquire that right. Parenthetically, it might be added that so much misunderstanding has arisen over this point, that Senator Kuchel found it desirable to allay the fears of some of the Federal agency people respecting this section, that he placed in the Congressional Record an extended and definitive analysis of not only what the bill would do but what it would not do. The validity of Senator Kuchel's analysis as prepared by Mr. Richard D. Andrews, minority counsel, has been accepted and approved by knowledgeable water lawyers.[9]

S. 1275 WOULD NOT IMPAIR, FRUSTRATE, NOR LEGALLY PREVENT REGIONAL OR BASIN PLANNING BY THE FEDERAL GOVERNMENT

Water leaders with vision, through the West and in other parts of the Nation, must agree with the overall recommendations of the Senate select committee that the broad public interests and the sustaining of our economy demand the most adequate use of our water resources. Such leaders fully recognize the need for regional and basin water development projects that probably would fall under the direction and control of the Federal Government. I share the view that we cannot turn back the clock, but must in a cooperative manner work not only with the Federal Government but also with other States, through interstate compacts, and with other countries, such as Canada and Mexico, to preserve for ourselves and future generations nature's greatest bounty—water.

Consideration for limiting the length of my statement demands that I incorporate, as the lawyers say, "by reference," the logical and persuasive analysis introduced by Senator Kuchel in the Senate on February 28, 1964 (see above Congressional Record reference) that regional planning is not only necessary, but also that S. 1275 would not prevent it. I go further and assert that as far as Californians are concerned, the passage of this bill, as it would put to rest the issues so long discussed and debated embracing water rights conflicts, would serve to stimulate interest in and cooperation for intelligent regional planning where such regional planning is economically feasible, engineeringly prudent, and legislatively wise.

Conversely, neither local planning, State planning nor regional planning of water resource development projects can safely proceed until Congress clears the clouds hanging over the users of waters. That is why I prepared the study in 1961, using the title, "Quieting Title to Western Waters and Why the Federal-State Water Rights Problem Must Be Resolved." [10]

THE UNLIMITED AND FOREWARNING CONTENTION OF THE U.S. DEPARTMENT OF JUSTICE IN APPLYING THE "NAVIGATIONAL SERVITUDE" RIGHTS OF THE FEDERAL GOVERNMENT FURNISHES THE STRONGEST ARGUMENT FOR PASSAGE OF S. 1275

At the hearings held by this subcommittee, representatives of the U.S. Department of Justice in its memorandum dated March 6, 1964, opposing S. 1275, revealed not only to the West but the entire Nation the ominous application of the Government's power stemming from the commerce clause.

The U.S. Department of Justice apparently believes that decisions of the Supreme Court of the United States "establish that the navigable waters of the United States are 'the public property of the Nation' * * * that private ownership of the running water of a great navigable stream is 'inconceivable' * * * and that the United States, in the exercise of its powers under the commerce clause of the Constitution can utilize these waters without paying any compensation for the impairment of alleged water rights under State law * * *."

While the Justice Department memorandum concedes that Congress may, if it chooses, provide for payment as it did in the Reclamation Act of 1902 and the Federal Power Act of 1920, it put the entire Nation on notice of the extent to which it believed the Government could go in the noncompensation of water rights affected on a navigable stream. I stand with Attorney General Stanley Mosk, of California, in the belief that S. 1275 is desperately needed to reverse the attitude and approach taken by the Department of Justice. I believe that the United States should not take rights in navigable waters, with or without compensation, unless Congress so provides.

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[9] See Congressional Record, 88th Cong., 2d sess., vol. 110, No. 36, Feb. 28, 1964.

[10] See Western Water Law Symposium 1963, published by the National District Attorneys Association, supra.

Thus, section 1, subsection 4, is included in S. 1275 to remove the inequitable and illogical situation which has developed by the courts with respect to the so-called navigation servitude, by which the Federal Government may preempt a navigable stream or any of its known navigable tributaries which affect its navigable capacity and destroy vested water rights without compensation. This would be true where it is furthering navigational interest under the commerce clause.[11]

With overzealous aggressiveness, the Government's lawyers have seized upon the rulings in these two cases and if they apply their full force and effect, then in a real sense what are believed to be private property rights, vested in a legal sense, may be taken by the Government, if it chooses, without compensation. The inconsistency of applying such a power when taking on a navigable river must be contrasted with what the Government does in other situations. If the Federal Government takes a water right pursuant to any constitutional power, other than the navigation phase of the commerce power, it has to pay compensation. Proof for this is found in the *International Paper Co.* case in which the Federal Government took certain water rights pursuant to the war power and the Supreme Court held that compensation was constitutionally required. By way of further example, if the Federal Government takes land for a new post office or a customs building, under its constitutional powers, it of course expects to pay for the same and does so. Certainly it is neither logical nor equitable to make a distinction between such takings and the taking of what had been believed by the users to be legally owned rights to water. Thus the anachronism. However, if those rights are taken by the Federal Government pursuant to its power to control navigation, no compensation would be required. Certainly, in logic and in law, no rational basis for this exception to the general requirements of the fifth amendment is presented.

THE AMERICAN BAR ASSOCIATION, THROUGH ITS COMMITTEE ON WATER RESOURCES SECTION OF MINERAL AND NATURAL RESOURCES LAW, GAVE SPECIAL CONSIDERATION TO EFFECT OF NAVIGATIONAL SERVITUDE

The above committee, which is chairmaned by the very able and nationally recognized water expert, Mr. Northcutt Ely, and on which committee I have the honor to serve, gave special consideration to the effect of the navigational servitude doctrine. This committee points out that where the Government takes vested water rights recognized under State law pursuant to the Reclamation Act of 1902 and the Federal Power Act of 1920, that as a matter of legislative policy and administrative policy, just compensation is paid for such water rights. However, where the Government, through the Corps of Engineers, takes water rights that are affected by the building of a project under the jurisdiction of the Corps of Engineers, ironically and illogically no compensation is due. This, of course, is not right and if this subcommittee approves S. 1275, such an inequity will be corrected.

Summarizing this point, the bill would simply extend the protection that Congress has already afforded property rights affected under the Reclamation Act and the Federal Power Act to all water rights taken or impaired by any water resource development projects undertaken by the Federal Government throughout the Nation. In so reciting, it must be remembered that this would put no limit on the constitutional powers of the Federal Government to take any water rights necessary for its projects. As Mr. Ely so clearly states in his very able report:

"It merely provides that the Government shall extend equal treatment to its citizens and compensate them for any water rights which would be compensable if taken by or under the authority of the State. This bill would not endow any asserted rights with a sanctity that they would not have under State law. If a water right would not be compensable under State law it will not be compensable if taken by the Federal Government. S. 1275 would provide a uniform and fair approach to the problem of developing the necessary projects which the increasing demands for water resource development require in a manner which will do justice both to the national interest in such projects and to the water rights holders whose property rights may have to be taken to implement this national policy. If these projects are in the national interest, it is only fair that the Federal Treasury bear the cost of the destruction of existing water rights to

[11] See *United States* v. *Twin City Power Company*, 350 U.S. 222 (1956) and *International Paper Company* v. *United States*, 282 U.S. 399 (1931).

make way for the projects, not the individual water users. I sincerely believe that the cost of acquisition of such rights on most projects is negligible."

In order that water lawyers may not quibble respecting the intent of the Government's lawyers to apply to the fullest the "navigational servitude doctrine," the record should show that the Department of Justice in the brief that it filed on June 30, 1959, before the special master in *Arizona* v. *California*, an extensive argument was made to justify the Government's position which the Government's own attorneys succinctly summed up as follows that:

"As against the United States, privately owned rights to the use of the navigable waters are not possible in the absence of express provision therefor by Congress." (P. 48.)

As thousands of acres of land have been patented in California and Arizona under the Desert Land Act of 1877, upon the administrative findings by the Secretary of the Interior that valid State-law appropriations had been made from the navigable Colorado and Gila Rivers, this is an important point that affects a vast amount of acreage, and thus is not in the category of an academic discussion. Realistically, it is not an exaggeration to say that there is hardly a river in the West that is not legally navigable under the decisions of the U.S. Supreme Court.[12] More than 75 years ago the High Court held that a nonnavigable stream that feeds or flows into a navigable stream, under the navigational servitude theory from the commerce clause, makes the nonnavigable stream also probably legally navigable.

THE FEDERAL GOVERNMENT SHOULD NOT SEIZE WATER RIGHTS AND FORCE OWNERS TO SUE UNDER "INVERSE CONDEMNATION" BUT SHOULD ACQUIRE THEM IN AN ORDERLY MANNER BY EMINENT DOMAIN PROCEEDINGS

This important point is covered in the second part of subsection 4 and discusses the manner in which existing water rights needed for Federal projects shall be taken. Its sponsors are frank to admit that this section of the bill is intended to restrict the summary power of the Federal Government, through its several agencies having jurisdiction, to simply seize water rights without notice to the holders of such rights and without going through eminent domain proceedings. Important in the law is that there be adequate notice and an orderly procedure where property rights are affected. The problem that calls for this section was highlighted by the empirical manner that the Department of Justice and the Department of the Interior took downstream water rights on the San Joaquin River after the construction of Friant Dam. One of the longest cases in water law is that of *Rank* v. *Krug*, now *Dugan* v. *Rank*.[13] In that case, the Bureau of Reclamation, in constructing the Friant Dam unit of the Central Valley project, by negotiation purchased some of the water rights on the lower reaches of the stream below the dam and did contract with other water users that it would maintain certain minimum streamflows. However, in its failure to work out satisfactory settlements with other users having water rights, the Government arbitrarily closed the dam and curtailed the supply of downstream claimants. These water users unsuccessfully sought to enjoin the operation of the project unless the Government would maintain the natural flow of the stream or agree to a physical solution which would guarantee the equivalent of their preexisting rights. Because there was no consent by the Government to sue, these claimants were thrown out of court.

Such water users were forced to the only remedy that they had, and that was to sue for damages under the Tucker Act and go to the U.S. Court of Claims and prove that they had water rights which were interfered with and ask the Court of Claims to determine the amount of compensation that should be paid to them. Up and down California it was not the water lawyers and water leaders alone. In the hundreds of irrigation districts and water districts created under State statute that were concerned, the thousands of citizens were vocal in their bitter condemnation of the manner in which the Federal Government handled the matter.

As county counsel of the county of Los Angeles, on May 5, 1960, I filed with the Board of Supervisors of Los Angeles County, a special report, including recommendations protesting the unfairness of the seizure and pointing out the inconvenience and expense which water owners below Friant Dam were forced

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[12] *United States* v. *Rio Grande Dam and Irrigation Company* (174 U.S. 690 (1890)).
[13] *Rank* v. *Krug*, now *Dugan* v. *Rank* (372 U.S. 609).

to take in protecting their rights.[14] This report highlighted the Federal claim to all unappropriated waters in California that had been made by the U.S. Department of Justice in the case of *City of Fresno* v. *State Water Rights Board of State of California*.[15] This is the California case where the Federal Government took the position that since the Treaty of Guadalupe Hidalgo, by which the United States acquired from Mexico the territory which is now California, the United States has owned and still owns the right to use all unappropriated water in California. The U.S. Department of Justice declared in its brief that the State water rights board had no jurisdiction to consider the application of the city of Fresno for an allocation of unappropriated water in the San Joaquin River, because the Federal Government has legal title to such unappropriated waters and has had the same since the Treaty of Guadalupe Hidalgo was made in 1848.

This portion of S. 1275 (subsec. 4, pt. 2) would deal with the above problem and take care of the situation that if water rights have to be taken for a Federal project, they should be acquired in an orderly manner by having the Government file a proceedings in eminent domain. In so doing, adequate notice would be given to all of the water users who might be affected, a declaration of taking would be filed in the appropriate court, and in conformance with the accepted procedures known to our law, the issues would be joined before the project is built and the rights of unsuspecting users taken. This would avoid the danger of having such rights cut off by the statute of limitations. In short, in the same manner that private property is generally taken for a public purpose, the Federal project would go forward through such a traditional eminent domain proceeding, if the affected water rights were not preliminarily secured by negotiation and agreement. Public law officers generally, I believe, will agree that this is the proper procedure and does not place an unreasonable burden upon the Federal Government. As the Federal project has no doubt been planned and perfected in the general public interest, as between putting the Government to the task of filing such an eminent domain proceeding and summarily taking an individual's property without notice and without court order, public policywise it would appear much fairer to require the Government to so proceed. With all of the studies that have been made by the Bureau of Reclamation, when a Federal project is planned, it is quite well known or comparatively easy for the Government to find out what water rights are affected. Having had considerable experience in the bringing of not hundreds but several thousand condemnation actions in eminent domain, in behalf of the county of Los Angeles, its flood control district, water districts, and the approximate 100 school districts which the county counsel represents, I do not believe that this part of the bill requiring such an orderly action, in the traditional mold of eminent domain, would frustrate the ready completion of necessary Federal projects. The probabilities of such projects being delayed through injunction proceedings are so remote that to make it identifies it with a specious argument. If the Government lawyers continue to have fear on this point, it has been suggested by several that after the Government has filed a condemnation suit in good faith and taken steps to give adequate notice to those affected, provision could be made (even in this bill) that an injunction shall not lie against the construction of a project where the Government had proceeded originally under eminent domain.

By way of synopsis on this point, what S. 1275 would do would require the Federal Government to proceed in a reasonable and orderly fashion to obtain the necessary rights-of-way rather than by the harsh and arbitrary preempting of the waters of a stream and in such a manner require the water users to protect themselves as best they can.

SECTION 2 OF S. 1275 INCORPORATES A SERIES OF SAVING CLAUSES PROTECTIVE TO THE GOVERNMENT

This statement and the record of your committee need not be unduly extended by reciting in detail the several express provisions which as a matter of law may not be essential but which have been incorporated to allay the fears of some who might misunderstand the object and purposes of the bill. These mostly have been borrowed from the so-called original agency bill. Illustrative would be subsection

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[14] See "Special Reports and Recommendations of Harold W. Kennedy, county counsel, County of Los Angeles," filed May 5, 1960, and incorporating a 36-page brief, "Federal Claims Against California's Unappropriated Water."

[15] Fresno Superior Court No. 105245.

1, providing that nothing in this bill would repeal any act of Congress requiring that rights of the United States to the use of water be acquired pursuant to State law. Thus, section 8 of the Reclamation Act of 1902, for example, would not be affected. Subsection 2 reaffirms the existing law that a treaty made by the Government is the supreme law of the land and all rights to international streams are not interferred with in any way. Other provisions of the final saving clause would protect the water rights of Indian tribes, make it clear that the bill would not alter any heretofore made judicial decrees, such as that by the Supreme Court in *Arizona* v. *California*, with respect to the allocation of certain quantities of water, nor valid water rights heretofore acquired by others than the United States under either Federal or State law.

Section 2, subsection (3) deals prospectively with valid future water rights that may be acquired for Federal projects through congressional authorization so long as such rights have ripened prior to the acquisition by others of intervening rights under State law. Such a principle reaffirms the true concept that it is important to protect the priority of water rights, within the corridor of western water law as it has generally when known and understood for the last century.

THE COUNTY SUPERVISORS ASSOCIATION OF CALIFORNIA CONSISTENTLY HAS SUPPORTED A SERIES OF CONGRESSIONAL ACTS AND LEGAL PRINCIPLES SUSTAINING THE ACQUISITION OF WATER UNDER THE LAWS OF APPROPRIATION

While the State of California also has a modified rule of riparian rights controlled since 1926 by a constitutional amendment designed to force the beneficial use of water and discourage the waste of water, and also to encourage "due diligence" in the requiring of diligence in perfecting water rights, it strongly supports the above principles contained in this statement. As early as 1954, as a member of the State-Wide Committee on Water Problems of this association, I researched and presented a compilation of congressional statutes and leading water law cases dealing with the fundamental policy and the legal aspects in the solution of California's water problem.[16]

THE FUTURE STABILITY OF WATER PROJECTS FINANCED BY BOTH PUBLIC AND PRIVATE CAPITAL, DEMAND PASSAGE S. 1275

Some Government lawyers and some opponents of S. 1275 assert that those of us who urge its passage have overstated the urgency of securing congressional approval to this bill. Specific inquiry and challenge have been made as to the conditions which will exist if Congress fails to adopt such legislation. Such challenges have been publicly and adequately met by one of California's most widely known and highly regarded water engineers, Mr. Harvey O. Banks, now vice president, Leeds, Hill & Jewett, Inc., consulting engineers, San Francisco, Calif. He served as director of the department of water resources for the State of California. For the past several years, in papers prepared for water organizations and agencies, he has alerted the people of California that if under our free enterprise system the several States and their agencies and citizens are to go forward and plan with confidence the development of water resources, independently of Federal subsidies or in cooperation with the Federal Government, that it is important that this longstanding and much talked about controversy be both clarified and settled. Mr. Banks, in a recent public statement supporting S. 1275, against the background of his extended experience as a water engineer and as an administrator, stated:

"* * * If this is not done, the lower levels of government and private entities will be forced out of the water development field.

"The uncertainties as to the ownership of much of the water resources of any State, having any substantial amount of federally reserved or withdrawn land, have rendered State water laws and the State administration of water rights largely ineffectual. The Federal Government has no body-of-water law or policy, or any procedures for the administration and allocation of water resources to replace these historic State responsibilities and functions. The political process involved in the authorization of Federal projects and the Fed-

[16] See "Reasonable Use by Reasonable Men," by Harold W. Kennedy, county counsel, county of Los Angeles, presented to the annual convention, County Supervisors Association, Los Angeles, September 1954, printed and distributed as an additional service by Irrigation Districts Association of California, 821 Market Street, San Francisco, Calif.

eral courts will become the mechanisms for administration of the Nation's water resources, a rather inadequate substitute.

"To justify any substantial investment in water development, a public agency or private entity must have reasonable assurance that there is and will continue to be water available for the project. Under the reservation doctrine, in its fullest implications, there can be no such assurance.

* * * * * * * *

"* * * The Federal Central Valley project diverts from the Sacramento-San Joaquin Delta to which all the streams of the great Central Valley are tributary. Thus the United States is in a position to claim ownership, under the reservation doctrine, and to take physical control of most of the State's water resources. The water supply for many local projects, large and small, will be in jeopardy should the United States decide to assert that ownership and control."

THE NATIONAL ASSOCIATION OF COUNTIES, WASHINGTON, D.C.; THE COUNTY SUPERVISORS ASSOCIATION OF CALIFORNIA, SACRAMENTO, CALIF.; THE FEATHER RIVER PROJECT ASSOCIATION OF CALIFORNIA, LOS ANGELES, CALIF.; THE SOUTHERN CALIFORNIA WATER CONFERENCE, LOS ANGELES, CALIF.; AND THE COUNTY OF LOS ANGELES ALL OFFICIALLY PETITION PASSAGE OF S. 1275

The above National and State organizations have long been deeply concerned over the question of the proper and true legal relationships existing between the Federal Government and the States. They recognize in common with the findings of the Senate Select Committee on National Water Resources that the planning, financing, and construction of greatly needed water facilities desperately required in the near future to meet the West's explosive population growth, are quite dependent on the equitable solution of this vexing and involved problem of the West. In their name and in their behalf, the passage of S. 1275, authored by Senators Kuchel, Jordan of Idaho, Moss, Engel, and Church, is respectfully requested.

THE FEDERAL GOVERNMENT AND ITS AGENCIES HAVE THE RESPONSIBILITY TO BE JUST TO ITS CITIZENS

A part of the stability of our great national economy has been predicated upon a governmental philosophy that private property rights are and must be recognized. In addition to individual personal rights due process of law demands the protection of private property rights. Since the time of Justinian in the early Roman law, this has been so and deep in the common law of England and later formalized in Anglo-American jurisprudence the lowliest and least vocal person who owned property has been protected in that ownership. Emphatic in the law and on the highest plateau is the assurance that private property shall not be taken for a general public use without just compensation. This distressing conflict over water rights unless resolved will dim the image of one of the strongest pillars that has from colonial times been a part of American history, tradition, and law. Those of us who are proud, such as I am, both as an American citizen and a public law officer for more than a third of a century, believe it is most important that Congress pass this bill. We distinguish it from that great volume of legislative requests which do not strike at the fundamentals of our society and we identify S. 1275 as politically just, legislatively wise, and in the corridor of the Federal Government's desire to be fair to its citizens.

Senator Moss. We will resume at 9:30 in the morning. We have about six or seven witnesses to be heard in the morning.

Thank you.

(Whereupon, at 12:28 p.m., the hearing in the above-entitled matter was adjourned, to reconvene at 9:30 a.m., Thursday, March 12, 1964.)

FEDERAL-STATE WATER RIGHTS

THURSDAY, MARCH 12, 1964

U.S. SENATE,
SUBCOMMITTEE ON IRRIGATION AND RECLAMATION,
OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:40 a.m., in room 3110, Senate Office Building, Senator Frank E. Moss (chairman of the subcommittee) presiding.

Present: Senators Frank E. Moss (Utah), Quentin N. Burdick (North Dakota), Thomas H. Kuchel (California), and Len B. Jordan (Idaho).

Also present: Stewart French, committee counsel; Roy M. Whitacre, professional staff member, and Richard D. Andrews, minority counsel.

Senator Moss. The subcommittee will come to order.

We have several very important witnesses that we have not been able to hear in the first 2 days and we want to get on with the hearing and complete this record.

Before I call the first witness, Mr. Goldberg has received a telegram that is pertinent to the information before the committee and I believe it should be placed in the record so that it will be available to us. I would ask Mr. Goldberg if he would like to place that telegram in the record.

STATEMENT OF ABBOTT GOLDBERG, DEPUTY DIRECTOR, CALIFORNIA STATE WATER RESOURCES COMMISSION, REPRESENTING HON. EDMUND G. BROWN, GOVERNOR OF CALIFORNIA—Resumed

Mr. GOLDBERG. Thank you very much, Senator Moss.

Late yesterday afternoon I received the following telegram which is pertinent to the testimony which was given here yesterday by Mr. Carley Porter, a member of the assembly from California.

The telegram is addressed to me and I will quote the pertinent parts of it.

The following letter is printed in the Senate Daily Journal, 1964 regular—budget—session, dated March 10, 1964, page 1311.

Hon. GLENN M. ANDERSON,
President of the Senate,
Senate Chamber, Sacramento.

DEAR MR. PRESIDENT: My vote for Assembly Joint Resolution No. 2, 1964 regular—budget—session should not be construed as an unqualified endorsement of S. 1275 in its present form. I think the Congress should consider amendments

which generally (1) would make the protection of the acreage limitation policy explicit; (2) would limit section 1 of the bill on nonnavigable streams; (3) would preserve the right of the United States to proceed by means of inverse condemnation proceedings; (4) would limit the requirement of compensation for vested water rights acquired involuntarily by the United States to those protected by the private amendment of the Federal Constitution.

Whether the just suggested amendments should be adopted in whole or in part is up to the Congress, which will have the time and resources to give them the exhaustive consideration which I believe they deserve.

Very truly yours,

JAMES A. COBEY.

The telegram was sent to me by William E. Warne, Director of the Water Resources of California.

For the record, James A. Cobey is State Senator Cobey, of Merced County, Calif., the chairman of the senate water resources committee, a cosponsor of Assembly Joint Resolution No. 2 and the principal senator responsible for its handling on the floor of the California Senate.

Senator Moss. Thank you very much.

Mr. GOLDBERG. I will give the original to the counsel.

Senator Moss. If you will. This will be part of the record and we are glad to have it. Thank you, Mr. Goldberg.

(The telegram is as follows:)

SACRAMENTO, CALIF.,
March 11, 1964.

R. B. ABBOTT GOLDBERG,
The Madison Hotel,
Washington, D.C.:

The following letter is printed in the Senate Daily Journal, 1964 regular—budget—session, dated March 10, 1964, page 1311:

"Hon. Glenn M. Anderson, president of the senate, senate chamber, Sacramento: Dear Mr. President: My vote for Assembly Joint Resolution No. 2, 1964 regular—budget—session should not be construed as an unqualified endorsement of S. 1275 in its present form. I think the Congress should consider amendments which, generally, (1) would make the protection of the acreage limitation policy explicit; (2) would limit section (1) of the bill to nonnavigable streams; (3) would preserve the right of the United States to proceed by means of inverse condemnation proceedings; (4) would limit the requirement of compensation for vested water rights acquired involuntarily by the United States to those protected by the fifth amendment of the Federal Constitution.

"Whether the just suggested amendments should be adopted in whole or in part is up to the Congress, which will have the time and resources to give them the the exhaustive consideration which I believe they deserve. Very truly yours, James A. Cobey."

WILLIAM E. WARNE,
Director, California Department of Water Resources.

Senator Moss. Our first witness this morning is Hugh Shamberger from Nevada, our good neighbor out there. Mr. Shamberger is president of the National Reclamation Association and this morning he will also be representing the Colorado River Water Users Association. In this committee we know Mr. Shamberger from his excellent work in the field of water resources development over a long period of years. We are pleased indeed to have you this morning, Mr. Shamberger.

STATEMENT OF HUGH SHAMBERGER OF NEVADA, PRESIDENT OF THE NATIONAL RECLAMATION ASSOCIATION, ALSO REPRESENTING THE COLORADO RIVER WATER USERS ASSOCIATION; ACCOMPANIED BY DR. MITCHELL WENDELL, COUNSEL FOR THE COUNCIL OF STATE GOVERNMENTS

Mr. SHAMBERGER. Thank you, Mr. Chairman and members of the committee.

Senator MOSS. Dr. Wendell is also at the table. We are glad to have you back, Dr. Wendell.

Mr. SHAMBERGER. My name is Hugh Shamberger, and I am director of the Nevada State Department of Conservation and Natural Resources. I have been connected with the office of the State engineer of Nevada since 1935, and was State engineer from 1951 to 1957 when I assumed the position I now occupy.

I am president of the National Reclamation Association, an organization that you are well acquainted with. My appearance before your committee is partially in that capacity.

As the request of Mr. Dallas E. Cole, president of the Colorado River Water Users Association, my statement will also extend to that organization which is representative of the seven States within the Colorado River basin. I had the honor of serving as president of that association a number of years ago.

Also, Mr. Chairman, I was requested by Mr. Donel Lane, chairman of the Interstate Conference on Water Problems, who was here the past 2 days, to place in the record the statement of that committee. I think you have that testimony before you. I was advised by Mr. Lane that this statement of the Interstate Conference on Water Problems has the endorsement of Governor Hatfield of Oregon and the State of Oregon and by Mr. Sam Thompson, that this statement has the endorsement of the State of Mississippi, and also from Mr. Harold Wiel, of the department of conservation, New York State, that this statement has the endorsement of the State of New York.

Senator MOSS. Thank you very much. That certainly will be made a part of the record. I am aware that Mr. Lane was here. I am sorry that we could not call him personally, but his statement will be in the record in full.

(The document referred to follows:)

STATEMENT OF THE INTERSTATE CONFERENCE ON WATER PROBLEMS

As a national association of State officials concerned with all phases of water development, conservation, administration, and use, the interest of the Interstate Conference on Water Problems in S. 1275 is obvious. The most recent annual meeting of the conference, held in Chicago in December 1963, adopted a resolution which summarizes our position on water rights legislation and is appended to this statement.

Aside for several saving provisions which merely mark out areas not affected by the bill, S. 1275, would: (1) Make it clear that a reservation or withdrawal of public land of itself would not affect water rights, (2) confirm the water use priority system as to Federal projects already established for waters rising in States wholly or partly west of the 98th meridian; and (3) deal with the question of compensation for the taking of water rights. The first two of these matters are of principal interest to the Western States. The interstate conference supports these provisions as desirable reaffirmations and restorations of situations as we believe Congress has always intended them to be. Of even greater importance is the fact that S. 1275 is of nationwide significance.

The bill is a very important but relatively uncomplicated measure. Apart from the matters just mentioned, it implements one idea; namely, that whenever the U.S. Government acquires rights to use water, it should pay for them. This is nothing more than a statement of the basic principle of eminent domain. If enunciated with respect to any other subject than water rights, it would be accepted as a self-evident proposition. This concept of just compensation is essential to the functioning of any predominantly private economy. Also, in our system of Federal-State relations it must be fundamental, because both the States and the National Government have basic responsibilities for the development and management of natural resources.

Starting in 1866, and for decades thereafter, Congress accepted and affirmatively stated this principle in one statute after another. Although the courts have increasingly departed from it, it is hard to believe that Congress has ever abandoned the idea that State administration of water rights is the sound system. But congressional failure to enact clarifying legislation such as S. 1275 threatens to compound the uncertainties produced by recent Supreme Court decisions.

Private, municipal, and State users of water must have definite assurances of continued security in their rights if they are to invest capital for the improvement of water-related facilities. In addition, the States must have such assurances in order to protect the integrity of their water law and in order that their administrative agencies, maintained and financed for the purpose of regulating water use in the public interest, not be sapped of their morale and physically weakened.

While the present situation has many complex economic, social, and legal nuances the salient features can be made to stand out quite clearly. By constructing a series of historical and constitutional arguments, certain agencies with the executive branch of the Federal Government have attempted to establish that, in practical effect, the U.S. Government owns most of the water in the entire Nation, and that the people (whether acting as individuals, business firms, farm enterprises, or State and local public entities) use it on sufferance. The meaning of the socalled navigation servitude is that whenever a Federal agency so decides, it can assert the supposed "Federal ownership" and cause a cessation or reduction of the private or non-Federal public use. This can be done even if it means the curtailment or destruction of investments, and a change of the uses to which people, acting in local or regional groups, have decided to put the water in their areas. Since almost every stream in the country can be made to fit the legal definitions of navigability, the corrective provisions of S. 1275 would benefit every part of the United States.

We do not believe that either history or constitutional law properly construed should produce such a bizarre result, but consideration of S. 1275 does not require a detailed discussion of what the Founding Fathers might have permitted, what the academic meaning of the transfer of sovereignty from the British Crown or the Republic of Mexico to the United States may have been, or what the Supreme Court has read into the supremacy and commerce clauses of the Constitution. Your committee has heard these matters explored at length on many occasions, and very likely is hearing them again as part of its consideration of S. 1275. For us and for the Congress, the real issue is one of policy.

Another contention that has been made is that the Federal Government has a property interest in certain waters verging on the outright ownership. The thesis is that waters arising on or flowing past federally owned lands belong to the U.S. Government and are somehow immune from any riparian or appropriative principles. Quite aside from the strangeness of this position as a property concept, the public interests of the Nation do not require its adoption, any more than they require the abandonment of the application of eminent domain in any situation relating to governmental functions.

If permitted to travel along its present path, the logic of the Federal rights doctrine is that every drop of water which rises on or flows past or through Federal property is subject to claim by the Federal Government, at any time, without payment of compensation to present users and without reference to the State water laws in which such private and non-Federal public rights are based. In the Western States, where high percentages of the total land surface are in Federal ownership, it would be hard to find a stream or underground reservoir of any significance which does not originate on or touch Federal land. In the East, South, and Midwest, Federal holdings are smaller and less numerous, but they are well enough distributed so that most major water bodies and many minor ones as well could be gathered up in this large concept of Federal preeminence without difficulty.

S. 1275 does not seek to deny water to the Federal Government for any of its undertakings, present or future. What it says is that whenever the United States seeks to use water which, for practical purposes has belonged to others, or to the States, it should pay for the acquisition in the same way that it pays for any other property which it acquires.

Because it would go a long way toward buttressing this elementary principle of just compensation for rights acquired by the Federal Government, the Interstate Conference on Water Problems supports the bill. However, we believe it would be much improved by a change in paragraphs 3 and 4 of section 1. As presently written, these two paragraphs make special mention of "consumptive use" of water. Undoubtedly this reflects the fact that the water rights has long been popularly thought of as a peculiarly western one and as uniquely related to irrigation. Such a conception is erroneous in its restrictive view of the issue. The effect of doctrines connected with navigation servitudes, reserved and withdrawn lands, and Federal property interests goes far beyond those uses of water which consume it. Water for most industrial purposes, public sanitation, recreation, sports and commercial fishing, and hydroelectric power generation are primarily nonconsumptive in character. Private and non-Federal public interest in these uses is fully as important and of even more widespread significance than consumptive uses. Consequently, we urge that there is no valid reason for placing consumptive uses in a special position, even to the extent of singling them out for special mention. The bill would be much improved by changing page 2, line 5, to read "beneficial diversion, storage, distribution, consumptive or other". An identical change should be made in paragraph 4 on page 2, line 10. A substantially equivalent result would be obtained by striking the word "consumptive" from the two paragraphs. In either event, the desirable result would be to make it clear that the Federal Government is obligated to compensate for water rights of any kind which it may take.

Another change which would have an advantageous, clarifying effect would be the omission of the word "vested" from line 9 on page 2. It seems both unnecessary and unwise to invite arguments over what constitutes a "vested" right as opposed to some other kind of right. The meaning of the bill is that any right which is substantial enough to have a compensable economic value should be taken only by the processes of eminent domain. If a right is not substantial enough to be of this character, no compensation would be forthcoming, even in the absence of the word "vested."

We recognize that the water rights question has produced much acrimony during recent years and that S. 1275 is far from the first bill on this subject to come before the Congress. The failure which legislation of this type has previously had stems from two causes: (1) An obscuring of the central issue and a treatment of the question as though it concerned a whole series of matters other than entitlement to compensation; and (2) a lack of coordination among supporters. We believe that the language of S. 1275 and the circumstances surrounding these hearings demonstrate that both of these inhibiting factors have now been overcome.

[Attachment]

RESOLUTION ON WATER RIGHTS ADOPTED AT THE SIXTH ANNUAL MEETING OF THE INTERSTATE CONFERENCE ON WATER PROBLEMS, DECEMBER 6, 1963

Whereas the uncertainties surrounding rights to the use of water have presented serious problems during recent years; and

Whereas, an improvement of the legal situation and the climate for harmonious Federal-State relations in this field are necessary to the proper development and operation of public and private water resource projects and programs; and

Whereas the recognition of water rights acquired pursuant to laws and practices long considered to be settled is an essential element of stability: Now, therefore, be it

Resolved, That the Interstate Conference on Water Problems urges the Congress to enact legislation which will (1) implement and assure the principle of compensation for rights to the consumptive and nonconsumptive use of water perfected or recognized by State law whenever such rights are taken or otherwise displaced by the Federal Government and (2) provide that the withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter made, shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation; be it further

Resolved, That the policy and executive committees of the conference are authorized to cooperate with other organizations to promote these objectives and make such representations as may be appropriate to these ends.

Mr. SHAMBERGER. I have with me Mr. Mitchell Wendell, counsel for the Council of State Governments of the Committee on Water Problems. If the committee has any questions on the statement of that conference, you could direct them to Dr. Wendell.

Senator MOSS. Thank you.

Mr. SHAMBERGER. Mr. Chairman, the question of control and jurisdiction over the streams of the West by the 17 Western States comprising the area lying west of the 98th meridian has long been a matter of concern to the National Reclamation Association. The association has for many years adopted resolutions urging Congress to clarify this matter.

Accompanying my statement there is a resolution adopted at Sun Valley last October to that effect. Also, there is a resolution from the Colorado River Water Users Association which accompanies my statement which was adopted last December in Las Vegas which I would like to have placed in the record.

Senator MOSS. These will follow immediately after your statement.

Mr. SHAMBERGER. Thank you.

Mr. Chairman, the Federal agencies are generally recognizing the State water law, and, in fact, the cooperation is excellent. However, the uncertainty exists as to what might happen to water originating on reserved lands such as forest reserve lands that were unappropriated at the time the reservation was created. Would subsequent appropriators be using such waters at the sufferance of the Government?

We favor the enactment into law of S. 1275 as written. Paragraph 1 of section 1 would provide that the withdrawal of reservation of public lands heretofore or hereafter established shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation.

If you are following my statement, Mr. Chairman and members of the committee, I have skipped over a great part of it because I am just going to very briefly summarize it. I did detail, however, in my statement the *Hawthorne* case which followed immediately after the *Pelton Dam* decision, but I am not going to discuss that in my general presentation.

Senator MOSS. That is perfectly proper. The entire statement will be in the record.

Mr. SHAMBERGER. This is the same language that was used in H.R. 4567, 86th Congress, 1st session——

Senator BURDICK. You are not going to discuss the *Hawthorne* case?

Mr. SHAMBERGER. I have discussed it briefly in detail in my testimony.

Senator BURDICK. I see.

Mr. SHAMBERGER. In the matter of the time element, I am going to skip it.

Senator BURDICK. It is in the attached statement?

Mr. SHAMBERGER. It is.

Senator BURDICK. Thank you.

Mr. SHAMBERGER. This is the same language that was used in H.R. 4567, 86th Congress, 1st session, and which had been developed by Mr. Perry W. Morton, Assistant Attorney General of the United States, and Mr. Elmer Bennett, Solicitor, Department of the Interior, during the previous administration. At that time the Department of Justice, Department of the Interior, Department of Defense, and perhaps other departments, agreed to it. The bill could have no doubt been enacted into law and a grave mistake was made in not supporting it at that time.

This subsection would have corrected the Hawthorne situation and would have done a great deal to ease the situation that has been built up as to the validity of State water laws.

Mr. Perry Morton, Assistant Attorney General, in a speech before the National Reclamation Association at its annual meeting in Denver, Colo., October 29, 1959, in commenting on the aforementioned proposal contained in H.R. 4567, stated as follows:

> Let no one suppose that such legislation would not involve costs in terms of some future Federal developments. It would. It might even make some possible Federal projects fiscally infeasible. On balance, however, I believe that this particular proposal is one which deserves the prompt consideration of the Congress as a possible means of encouraging State, local, and private development of our western water resources.

We think this is a fair statement. In the development of our land and water resources there should be a close relationship between the Federal and State agencies. It has been our observations that each year the States are becoming stronger in this field and where this teamwork has been established the area involved has benefited.

Earlier this year your committee approved and the Senate passed S. 1111 known as the Water Resources Planning Act of 1963. The National Reclamation Association endorsed this legislation. That committee worked very closely with this committee on the legislation. It is good legislation because it calls for representatives of the States and Federal agencies in each basin under study to work as a team. We ask the question—will the present legal uncertainties as to the ownership and control of our water resources act as a barrier to developing such a relationship in our river basin studies?

This is pointed out in the report of the Select Committee on National Water Resources, pursuant to Senate Resolution 48, 86th Congress, in Senate Report No. 29 of the 87th Congress, 1st session, January 30, 1961, contains the following language:

> The broadening pattern of these conflicts is conclusive proof of the urgent need for clear-cut, definitive action on the part of Congress to work out with the States a redefining of Federal-State powers and responsibilities for control, use, and development of water resources. The Federal Government should not hamstring the States in the States efforts to develop their water resources to meet the needs of their people. Neither should the States hamstring the Federal Government in its efforts to fulfill its functions with the Constitution.

I feel it very important, Mr. Chairman, that the optimum development of our water resources of the West is going to depend on the States and the Federal agencies working very closely together. We are fearful that this question over the water rights act as a barrier in some cases to this relationship.

There would seem to be little question but at least a partial solution should be arrived at without delay. It is our opinion that S. 1275

would provide such a solution, and while it doesn't solve all the problems we believe that it will set to rest the many uncertainties as a result of the *Pelton Dam* decision and the claims of the Department of Justice.

We believe that any programs of the United States in the field of water development would not be materially affected by the passage of S. 1275. We fail to see wherein there should be serious objection on the part of the Government.

Mr. Chairman, we urge that favorable consideration be given this bill.

(The statement and resolutions follow:)

STATEMENT OF HUGH A. SHAMBERGER, PRESIDENT, NATIONAL RECLAMATION ASSOCIATION

My name is Hugh A. Shamberger, I am the director of the Nevada State Department of Conservation and Natural Resources. I have been connected with the office of State engineer of Nevada since 1935, and was State engineer from 1951 to 1957 when I assumed the position I now occupy.

I am president of the National Reclamation Association, an organization that you are well acquainted with. My appearance before your committee is in that capacity.

At the request of Mr. Dallas E. Cole, president of the Colorado River Water Users Association, my statement will also extend to that organization which is representative of the seven States within the Colorado River Basin. I had the honor of serving as president of that association a number of years ago.

The question of control and jurisdiction over the streams of the West by the 17 Western States comprising the area lying west of the 98th meridian has long been a matter of concern to the National Reclamation Association. The association has, for many years, adopted resolutions urging Congress to clarify this matter.

At the annual convention of the National Reclamation Association held in Sun Valley, Idaho, last October, a resolution was unanimously adopted resolving that the National Reclamation Association express its approval of S. 1275 as introduced and urge its passage and enactment into law. Mr. Chairman, I would like to submit a copy of this resolution and request that it accompany my statement.

The Colorado River Water Users Association, at its 20th annual meeting held in Las Vegas, Nev., last December, adopted a resolution in support of S. 1275. Mr. Chairman, I would also like to submit a copy of this resolution.

S. 1275, if enacted into law, would set at rest the fears regarding the reservation doctrine as was developed as a result of the *Pelton Dam* case in Oregon (*Federal Power Commission* v. *the State of Oregon*, et al, No. 367, decided June 6, 1955); it would require the United States to comply with State water laws when the United States desires to claim a proprietory right under State law, a procedure which the governmental agencies are generally complying with at present, at least in Nevada; it would make applicable, to all works constructed by the United States westerly of the 98th meridian, the provisions of section 1(b) of the Flood Control Act of 1944 (act of December 22, 1944, 58 Stat. 888–889 as amended; 33 U.S.C. 701–1 (1958)), and would provide that when the United States acquires vested water rights recognized by State law, other than by agreement with the owner they shall be taken by proceedings in eminent domain under the laws of the United States and of the State affected, and further that no such right shall be taken without compensation.

In all of the hearings before Congress concerning Federal-State relations in the field of water rights, and in all briefs and statements concerning the matter subsequent to the *Pelton Dam* case, mention has been made of the *Hawthorne* case. I am not going to discuss the *Pelton Dam* case but I do want to tell your honorable committee what happened in Nevada immediately following the decision in the *Pelton Dam* case, and as a direct result of that decision. I refer to the *Hawthorne* case. I was State engineer at that time and as I was instrumental in the action taken by Nevada, I am familiar with the pertinent details.

This case involved the drilling of wells by the naval ammunition depot at Hawthorne, Nev.; the complying with State water laws in obtaining permits

to appropriate water, and, the sudden stopping of that compliance as far as the appropriation of ground water was concerned, immediately following the *Pelton Dam* decision. In order that you may better understand the situation that developed at Hawthorne, I will describe the events leading up to the present time.

During World War II, 1942–45, the U.S. Government drilled six wells within the naval ammunition depot at Hawthorne to obtain a supplemental water supply for the base. In 1949 the U.S. Government filed applications to appropriate water from said wells and subsequently permits to appropriate water were granted by the State engineer. Following the completion of drilling and equipping the wells with pumps, water was diverted for beneficial consumptive use. The permittee complied with the provisions of the permits by filing proofs of commencement and completion of work. All that remained to be done by the Department of Navy to complete the water rights and to receive certificates of appropriation from our State was the filing of proofs of beneficial use. However, on July 25, 1955, I was advised by the commanding officer at the depot that the permits were being dropped upon instructions of the commandant of the 12th Naval District. This action was based upon an interpretation of the decision of the U.S. Supreme Court in the case of *Federal Power Commission* v. *The State of Oregon*, 349 U.S. 435, (the *Pelton dam* case), and on the premise that all the wells were located on reserved lands; that is, public lands which were withdrawn and reserved for the use of the Navy Department by Executive order.

In the *Pelton Dam* case, the source of water supply was a nonnavigable stream, whereas in the *Hawthorne* case the source of water supply is from a ground water reservoir. In the *Pelton Dam* case the use is a nonconsumptive use (power generation), whereas in the *Hawthorne* case the use is a beneficial consumptive use. The only similarity is that in each case the land involved was reserved land. In the *Hawthorne* case the lands were withdrawn from entry and reserved for use by the U.S. Navy in about 1933.

On December 1, 1955, the State of Nevada filed a complaint for declaratory judgment against the United States of America, in the Fifth Judicial District Court of the State of Nevada, in and for the county of Mineral. On December 7, 1955, service was made on the Attorney General of the United States. The case was transferred to and was heard in the Federal district court at Carson City, Nev., and on August 27, 1958, the court rendered its opinion dismissing Nevada's complaint and holding that the United States need not comply with Nevada law, relying on the *Pelton Dam* case. The following remarks of the judge are interesting:

"Both on reason and, as we shall see in a moment, on authority, this court is forced to the conclusion that there is no mandate in constitutional, statutory, or decisional law that compels the Federal Government to bend its knee to this type of State law and regulation, whether it be arbitrary or benign."

It should be pointed out that there was no evidence that this withdrawal of water by the Navy from ground water storage would endanger the supply of the town of Hawthorne in the immediate future. Conceivably, it could have done so at some future time. However, the case did not turn on this point but on the concept that the Federal Government need not comply with State law on "reserved" lands. Presumably, the decision would have been the same if there had been many users and a dwindling water supply.

The case was appealed to the U.S. Court of Appeals for the Ninth Circuit and on May 29, 1960, the court dismissed the case on the grounds that the United States did not consent to the bringing of the suit and that the suit was therefore barred by the sovereign immunity of the defendant (*The State of Nevada, Ex Rel Hugh A. Shamberger, State Engineer, Appellant* v. *United States of America, Appellee*, No. 16, 389).

To illustrate the illogical position brought about by the *Pelton Dam* decision as applied in the *Hawthorne* case, I will describe the physical situation there. The town of Hawthorne, the county seat of Mineral County, with a population of about 2,000, occupies an area of 1 square mile near the center of the depot area. The town's water supply is partly furnished from two deep wells drawing water from the same ground water basin as the Navy wells. Permits to appropriate ground water were obtained on both wells. One permit, which has been perfected, was earlier in priority than the Navy permits and the other permit was junior in priority. As the town grows, undoubtedly other wells will be needed. Because all the wells are drawing water from the same basin, the amount of water withdrawn by any one well or group of wells would affect the total amount of water available to the other wells in the basin. Thus it is not logical that one

group of wells, those owned by the town of Hawthorne, should be operated subject to the State water law; whereas, another group, those owned by the Navy, should be operated not subject to State water laws. While we are speaking here of the *Hawthorne* case, the same situation could develop in other ground water basins where both Federal and private ownerships exist.

The Government has said that their property right to use waters on reserved areas is limited to unappropriated water. It could well be asked who determines when there is unappropriated waters? It has always been recognized by the States that that determination, together with administering the orderly development of any unappropriated water has been the responsibility of the States. The question also arises as to what recourse the Department of Navy, in the Hawthorne situation, or any other department of the Federal Government in other similar instances, might have taken should subsequent appropriations of water by private interests outside the area of reserved lands jeopardize the Government's use of water. In other words, unappropriated water today may become appropriated water under State law tomorrow.

At about the time when the naval ammunition depot at Hawthorne was dropping their ground water permits due to the reservation doctrine, they were making an application to appropriate water from a surface stream which had crossed privately owned lands and on which there had been some existing water rights. The Navy purchased the land and water rights and then applied for the total flow of the stream. I would like to quote a letter from the commanding officer of the depot dated December 8, 1955, and addressed to me as State engineer. The letter reads as follows:

"Enclosed are the application and map for permit to appropriate the waters [complete flow] from Squaw Creek. All privately owned land within the confines of the depot which Squaw Creek crosses has been acquired by the Government, together with all privately owned water rights. Payment in the amount of $25 covering the required filing fee for the above application will be made through regular Navy channels.

"Since all waters from House Creek flow entirely over land withdrawn from the public domain and reserved for the use of the U.S. naval ammunition depot, an application to appropriate the waters of House Creek will not be filed with the State engineer, State of Nevada."

It is to be noted that there are no private water rights on House Creek nor any private property along its course. Therefore, the Government or the Navy Department chose not to comply with State water law on that particular stream. On the other hand, on Squaw Creek, where the water flowed across previously privately owned land, they complied with State water law.

Also to illustrate the fine line of distinction between obtaining a proprietary right under State law on unreserved lands (i.e., previously private lands) and claiming a sovereign right on reserved lands as in the *Hawthorne* case, let me point out that in late 1961 the 12th Naval District filed an application to appropriate ground water for military purposes on their large naval airbase near Fallon, Nev., about 60 miles from Hawthorne. This base was established during World War II and the land purchased from private owners. The reservation doctrine did not apply here. The application was approved and the final certificate of water right issued this past April.

In Nevada, the Federal agencies are generally recognizing the States water law, and in fact the cooperation is excellent. However, the uncertainty exists as to what might happen to water originating on reserved lands such as forest reserve lands that were unappropriated at the time the reservation was created. Would subsequent appropriators be using such waters at the sufferance of the Government?

We favor the enactment into law of S. 1275 as written. Paragraph 1 of section 1 would provide that the withdrawal or reservation of public lands heretofore or hereafter established shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation. This is the same language that was used in H.R. 4567, 86th Congress, 1st session, and which had been developed by Mr. Perry W. Morton, Assistant Attorney General of the United States, and Mr. Elmer Bennett, Solicitor, Department of the Interior, during the previous administration. At that time the Department of Justice, Department of the Interior, Department of Defense, and perhaps other departments, agreed to it. The bill could have no doubt been enacted into law and a grave mistake was made in not supporting it at that time.

This subsection would have corrected the Hawthorne situation and would have done a great deal to ease the tension that has been built up as to the validity of State water laws.

Mr. Perry Morton, Assistant Attorney General, in a speech before the National Reclamation Association at its annual meeting in Denver, Colo., October 29, 1959, in commenting on the aforementioned proposal contained in H.R. 4567, stated as follows:

"Let no one suppose that such legislation would not involve costs in terms of some future Federal developments. It would. It might even make some possible Federal projects fiscally infeasible. On balance, however, I believe that this particular proposal is one which deserves the prompt consideration of the Congress as a possible means of encouraging State, local, and private development of our western water resources."

We think this is a fair statement. In the development of our land and water resources there should be a close relationship between the Federal and State agencies. It has been our observations that each year the States are becoming stronger in this field and where this teamwork has been established the area involved has benefited.

Earlier this year your committee approved and the Senate passed S. 1111 known as the Water Resources Planning Act of 1963. The National Reclamation Association endorsed this legislation. It is good legislation because it calls for representatives of the State and Federal agencies in each basin under study to work as a team. We ask the question—will the present legal uncertainties as to the ownership and control of our water resources act as a barrier to developing such a relationship in our river basin studies?

The report of the Select Committee on National Water Resources pursuant to Senate Resolution 48, 86th Congress in Senate Report No. 29 of the 87th Congress, 1st session, January 30, 1961, contains the following language:

"The broadening pattern of these conflicts is conclusive proof of the urgent need for clear-cut definitive action on the part of Congress to work out with the States a redefining of Federal-State powers and responsibilities for control, use, and development of water resources. The Federal Government should not hamstring the States in the States efforts to develop their water resources to meet the needs of their people. Neither should the States hamstring the Federal Government in its efforts to fulfill its functions within the Constitution."

There would seem to be little question but that at least a partial solution should be arrived at without delay. It is our opinion that S. 1275 would provide such a solution, and while it doesn't solve all the problems we believe that it will set to rest the many uncertainties as a result of the *Pelton Dam* decision and the claims of the Department of Justice.

We believe that any programs of the United States in the field of water development would not materially be affected by the passage of S. 1275. We fail to see wherein there should be serious objections on the part of the Government.

Mr. Chairman, we urge that favorable consideration be given this bill.

RESOLUTION NO. 8 OF THE NATIONAL RECLAMATION ASSOCIATION

Whereas in several of the past sessions of Congress various bills have been introduced concerning clarification of the conflict of claims to water rights and uses between the Federal Government and rights created under State law; and

Whereas many hearings have been held by committees of Congress upon this subject leading to better understanding of the problem and there has been introduced in the 88th Congress, 1st session, S. 1275 by Senators Kuchel, Jordan, and Moss, which bill as introduced has now been approved by a very large number of representative organizations directly interested in the subject; and

Whereas a committee of the National Reclamation Association has worked diligently in furtherance of this subject and has approved S. 1275, and recommended the approval and support of said bill as introduced: Now, therefore, be it

Resolved, That the National Reclamation Association express its approval of S. 1275 as introduced and urge its passage and enactment into law.

RESOLUTION 1 OF THE COLORADO RIVER WATER USERS ASSOCIATION

Whereas by resolution adopted by the Colorado River Water Users Association at its 19th annual meeting in Las Vegas, Nev., on December 7, 1962, a study was to be made and submitted concerning the protection of State water rights against further encroachment by assertions of Federal executive authority; and

Whereas the States have developed a cohesive and unified body of water law which attempt to achieve maximum certainty in the enjoyment and possession of water rights, and the security of these water rights is essential to the planning, development, and maintenance of water projects on which the economy depends: Now, therefore, be it

Resolved, That the 20th annual meeting of the Colorado River Water Users Association again reiterates its position that the Congress should enact legislation which will declare unmistakably that water rights are a species of real property rights which should be acquired and maintained as other forms of real property rights under the laws of the respective States. To this end, and as a first step toward the ultimate goal this association supports the principles substantially as contained in S. 1275 as introduced and urges enactment of such legislation.

Senator Moss. Thank you, Mr. Shamberger. We appreciate that and it comes as an appreciation of the position taken by one of the great, or perhaps two of the great, water organizations of the country, the National Reclamation Association and the Colorado River Water Users Association.

I particularly liked your emphasis on the fact that one of the effects of this bill would be to encourage States and local units and even private interests to take a share in developing the water resources rather than gravitating everything into Federal development.

Now I think we all recognize that the big, the massive projects are going to have to be Federal because of the need for the resources that cannot be amassed by States or lesser governmental agencies but these must be complemented by innumerable smaller developments that very properly ought to be done by States or even water districts and sometimes private enterprise. If this legislation will have that effect, that certainly is a plus for it.

Mr. SHAMBERGER. We think it will.

Senator Moss. Yes, sir.

Mr. Kuchel, do you have questions or comment?

Senator KUCHEL. This is an excellent statement, and it should be of enormous value to the committee. I think that my colleague from North Dakota, Senator Burdick, in thirsting for information on the Hawthorne problem in Nevada reflected the interest of all of us on that subject.

Let us assume that this bill had been the law at the time of the problem with respect to this town of Hawthorne that the State of Nevada and the Department of the Navy were interested in. The facts are that to the extent that the Navy required and used water it would proceed to acquire and use that water; would it not?

Mr. SHAMBERGER. It had already proceeded to comply with State water laws. In fact, they had reached the point where they were ready to file proof of beneficial use at the time the *Pelton* decision came out. Just overnight they advised us that they joined the application of permits, that they had been advised that due to this decision they did not need to comply with the State water law on reserved lands.

I might point out, Senator Kuchel, that 60 miles away from Hawthorne we have a big naval air base and this base comprises land which was purchased by the Navy. It had a surface water right from one of

the earliest reclamation projects in the country but when they drilled for ground water for domestic use they applied for water and have received certificates. In other words, on another ground water basin they have gone ahead and followed State law, received certificates, and have completed appropriation.

On such a fine line of distinction I pointed out in my statement that the Navy, on water sources on which they had to purchase water rights, they have gone ahead and filed water applications and completed them but in another instance where the stream was impounded on the reservation and there had been no water rights required they stated they did not have to. So it is a very fine distinction between the reserved lands that have been purchased.

Senator KUCHEL. Let us assume that the needs of the Federal Government required the use of water which was unavailable by reason of prior appropriation. Let us assume that this example would deal with the Department of Defense.

Could the Federal Government under the present law have its needs recognized in an appropriate law to acquire by purchase or condemnation the water rights which belong to non-Federal appropriators?

Mr. SHAMBURGER. We consider, of course, water rights as property rights and they could certainly purchase and have been doing it.

Senator KUCHEL. The able lawyer from the Navy Department is here, Mr. Charles Goodwin.

Do you agree with that?

STATEMENT OF CHARLES GOODWIN, ASSISTANT TO THE GENERAL COUNSEL, DEPARTMENT OF THE NAVY—Resumed

Mr. GOODWIN. Yes. No question about it, we can condemn any privately owned water rights providing that Congress gives us the authority to proceed that way.

Senator KUCHEL. I ask my able friend from the Navy Department one more question: Would S. 1275 in any way restrict that right on the part of the Federal Government; in this example, the Navy Department?

Mr. GOODWIN. Not on the part of the Federal Government. I think there is some problem as to whether we could proceed as we now proceed on the basis of requiring water rights for any project that is authorized and proceeding to condemn those water rights on the basis that the condemnation is impliedly authorized.

I think this might make it perhaps necessary that there be very express authorization. I cannot resolve that problem. I think it is one of the questions of interprepation of the present language of the bill.

Senator KUCHEL. I will not take time now but would you furnish this committee with a legal memorandum on the problem you and I have just discussed here with respect to the specific language of the bill?

Mr. GOODWIN. Yes.

(The memorandum referred to follows:)

DEPARTMENT OF THE NAVY,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., March 23, 1964.

Hon. FRANK E. MOSS,
Chairman, Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, U.S. Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: This is submitted in response to the request of Senator Kuchel on March 12, 1964, in the course of the hearings before your subcommittee, that I submit a memorandum as to the authority of the Navy to purchase or condemn private water rights in the event of enactment of S. 1275 and more specifically, as to whether S. 1275 would restrict such authority.

I find nothing in S. 1275 which would restrict the authority of the Navy to purchase or condemn private water rights except to the extent that the last part of section 1(4) might be construed as precluding exercise of the power of eminent domain by "inverse" condemnation. The bill, however, would add considerable to the cost to the Government since under section 1(1) the Government would have to pay for the private water rights without regard to the senior reserved water rights which the Government now owns on military reservations.

More over, even if S. 1275 would not per see curtail the Navy's authority to acquire or condemn private water rights, there is some doubt in my opinion that the Navy's authority to do so would be of the same general scope as its present authority to use the reserved unappropriated water on military reservations. Title 10, United States Code, section 2676 provides that "no military department may acquire real property not owned by the United States unless the acquisition is expressly authorized by law." (See also R.S. 3736, 41 U.S.C. 14.) "A water right is held to be real property, deemed as 'fundamental under the law of riparian rights as under the law of appropriation.'" (Water Resources Law, vol. 3, Report of the President's Water Resources Policy Commission (1950) p. 32, quoting I Wiel, "Water Rights in the Western States" (3d ed. 1911) p. 21.) Accordingly, as a matter of strict logic, the limitations of 10 United States Code 2676 might apply to the purchase or condemnation of private water rights and the Navy could not rely upon its general or implied authority and appropriations, but would have to obtain specific authorization from Congress before it could purchase or condemn such water rights.

However, the rather specialized nature of water rights raises doubt whether they are to be treated like ordinary real property in this regard. The Comptroller General does not appear to have issued an authoritative ruling on the question. In one opinion, 11 Comp. Gen. 455, he referred to a water right "as a vested real property right" and recognized that it could be acquired by the Navy pursuant to the act of May 29, 1928, 45 Stat. 908, which authorized establishment of the Naval Ammunition Depot, Hawthorne, Nev., including "the acquisition of land." This would suggest the need for specific authorization. On the other hand, he has also held in another ruling, 1 Comp. Gen. 560, that specific authorization for the acquisition of real property is not necessary to acquire a water right from a State pursuant to State appropriation procedures. In the absence of an authoritative ruling, we cannot be sure what his opinion would be as to the need for specific authorization to acquire an appropriative water right from a private owner. In contrast, under the present law, we already have the reserved water right and need no authorization to acquire it.

In any case there would be no problem unless the water right cost more than $25,000. Under 10 U.S.C. 2672, the military departments have continuing specific authority to acquire interests in land not exceeding $25,000 in cost. If the cost exceeded that amount, they would have to anticipate the need and include authorization for the acquisition of private water rights as a separate line item in the annual Military Construction Authorization and Appropriation Acts. This would involve at least some delay and administrative and legislative burden, in addition to raising problems of funding.

I shall be pleased to furnish any further information which your subcommittee may deem helpful.

Sincerely yours,

CHARLES GOODWIN,
Assistant to the General Counsel.

Senator Moss. Do you have any questions or comments, Senator Burdick?

Senator BURDICK. Senator Moss, I would like to ask a legal question. I am interested in the *Hawthorne* case. The *Pelton Dam* case was heard on different facts. As I recall, the *Pelton Dam* case you didn't have involved there the consumptive use of water. As a matter of fact, as I recall the case, it principally turned out to be concerning fish and power; did it not?

STATEMENT OF HUGH SHAMBERGER—Resumed

Mr. SHAMBERGER. There was a reservation for power and also for the Indian Reservation.

Senator BURDICK. But the consumptive use of water was not really used at all in that case?

Mr. SHAMBERGER. That is right. The cases are quite dissimilar. The *Hawthorne* case is ground water and consumptive use. The ground water covers the whole valley. The town of Hawthorne was also appropriating the ground water by wells whereas in the *Pelton Dam* case the river was a nonnavigable stream and the use was nonconsumptive.

Senator BURDICK. If this S. 1275 becomes law and in effect it is related to you, in relation to the question by Senator Kuchel, the Navy could still acquire the water rights and it would have to condemn them and pay for them.

Mr. SHAMBERGER. The same as they have been doing.

Senator BURDICK. Then how does it change the present situation?

Mr. SHAMBERGER. It just firms it up and it takes away that question of what could happen under the reservation doctrine if the agencies presently under the doctrine claim all of the unappropriated water that falls on reserved lands. They could completely ignore State law all the way through. This would merely firm up to a great extent, as far as my State is concerned, what they are doing right now.

Senator BURDICK. Thank you.

Senator KUCHEL. Is that not the crux of this whole problem?

Mr. SHAMBERGER. I think it is, Senator.

Senator KUCHEL. I think that is a most important point. This is with respect to unappropriated waters in the area that we are talking about and the desire by a local agency to utilize those waters for beneficial uses.

Dr. WENDELL. I think that this point could be put another way.

As you all know, in courts it has been recognized for a long time that there are circumstances when a declaratory judgment is the most useful thing. Even though it may be argued that an injury has not yet been done or claims that indicate that the injury may well be done, then in some circumstances even courts recognize that it is desirable to set the controversy at rest before it actually occurs.

Now there are not yet too many actual events, if any, in this particular field but there has been a change in law and a change in announced policy on the part of at least some of the Federal agencies. In this particular instance for procedural reasons it is not the courts that can set the matter at rest; in fact, the courts have in some instances been producing some of the uncertainty at the instance of some plain-

tiffs. It is instead in this instance the Congress that is the most appropriate mechanism to produce certainty in the situation.

Senator Moss. That is a very fine statement, too, Dr. Wendell. I think that does summarize it.

Senator BURDICK. In other words, this would not change the fact, it would not change the outcome of the *Hawthorne* case if this were law at the time; would it? The only thing is, as you have just said, it may clarify what may be anticipated sometime in the future.

Dr. WENDELL. It would not have changed the outcome in the sense that it would not have changed the accessibility of water to the Federal Government. It would have changed the outcome, or it might conceivably have changed the outcome, in a slightly different set of circumstances than occurred in the *Hawthorne* case in the sense that if somebody else had already put to use the water that the Navy Department wanted it would have been clear that the Navy Department would have had to pay for it, whereas under present circumstances that may not be as certain.

Senator Moss. Thank you, Mr. Shamberger and Dr. Wendell. We appreciate it. The statement of Donel Lane for the Interstate Conference on Water Problems has been ordered included in the record.

We appreciate your staying with us for the third day of this hearing. That is longer than we had anticipated.

Our next witness will be Mr. John Taylor, who represents the American Farm Bureau. I am well acquainted with Mr. Taylor, who is Assistant Budget Director and who meets with this committee on many occasions. We will be glad to have your testimony this morning, Mr. Taylor.

STATEMENT OF JOHN TAYLOR, REPRESENTING THE AMERICAN FARM BUREAU FEDERATION

Mr. TAYLOR. Thank you, Mr. Chairman.

The subject of water rights has long had the interest and consideration of the American Farm Bureau Federation. The more than 1,628,000 farm family members in the 2,700 county Farm Bureaus, the 49 State Farm Bureaus, and the Puerto Rico Farm Bureau are vitally concerned with any legislation which deals with such an important element of their farming operation as water and the right to the use of water.

We appreciate the opportunity to appear and express our views in support of S. 1275 and to urge its favorable consideration by this subcommittee, by the full committee on Interior and Insular Affairs, and by the Congress.

The history of water and water rights throughout the world is, practically speaking, the résumé of the rise and fall of many nations. It is the history of the control of water, hence the control of the right to produce. We hold that such control or authority should be near the source—in the State of origin.

For over a hundred years of our national life, the Congress recognized this authority of the States in many laws dealing with the subject. The courts have upheld such laws time after time.

We have no desire to review these laws and court decisions at this time. However, in the past few years, several court decisions have

taken another turn; and what had been considered by many to have become "settled law" was upset. These decisions have created uncertainty in established water rights and even in the authority of the States to grant such rights.

Only definitive legislation by the Congress can firmly establish these powers in the States, and we believe such legislation should be passed.

We are convinced that in the current proposed bill a sincere effort has been made to weld together many different viewpoints in regard to water rights. We commend the authors for putting together language on a subject where originally there had been such a wide divergence of views. We feel that these ideas are adequately set forth in S. 1275.

It contains language suggested by the consideration of former measures. It places the responsibility for proper water allocation and adjudication in the States where it properly belongs.

Its operation will require close cooperation between State and Federal Governments which we believe is as it should be. It will not allow usurpation or undue confiscation by the Federal Government; and no State, working under it, should act against its own interest by denying necessary rights to the Federal entity for sound and sufficient reasons.

The voting delegates of the American Farm Bureau Federation at our latest meeting held in Chicago, Ill., on December 12, 1963, adopted the following resolutions:

> We favor legislation to require Federal agencies to comply with State laws relating to the use of water and to respect private rights to use water established under State law.
>
> As a step toward this, we recommend legislation (1) to require licenses of the Federal Power Commission to comply with applicable State laws; (2) to provide that water flowing from "reserved" lands shall be subject to State authority in the same manner as water flowing from other Federal lands; and (3) to provide just compensation if a Federal project adversely affects a private right established under State law.

While this bill does not grant the entirety of this resolution we feel that it is a good start in the right direction and does contain the basic premise of our ideas.

Briefly, the bill does four things which we believe are fundamental. It provides:

(1) That the withdrawal or reservation of public lands shall not affect any water right acquired under State law either before or after withdrawal or reservation;

(2) That consumptive uses of water shall take priority over nonconsumptive uses in States lying wholly or partly west of the 98th meridian;

(3) That when the United States claims a water right under State law, it shall comply with State procedures; and

(4) That the United States shall pay for the water rights which it acquires.

Section 2 of the bill contains safeguards which are right and proper to protect the United States. We feel the enactment of this legislation should not act as a deterrent to the use of water by the United States, but should this occur in specific instances, the Congress could act to protect any legitimate Federal interest.

We urge your favorable consideration, your concerted action, and your speedy approval of this measure. As representatives of the sovereign States, we know you will wish to protect the rights and promote the interests of the several States. On the other hand, we know you are seeking to outline the proper role of the Federal Government. We believe your support of this bill, S. 1275, will allow you to discharge both duties while injuring neither and, at the same time, place the subject of water rights and water allocation in its proper perspective.

The opponents of this legislation attempted to make the point that "the Federal Government owns all the water of the Western States." This is the theory of Federal supremacy, and is a statement with which we do not agree. This is a moot question and has been for many years.

The real issue involved in this hearing and which is covered by this bill, S. 1275, is whether or not the Federal entity is to control the waters of the Western States or whether the use of water shall be allocated by the States. We are convinced that the Congress and only the Congress can settle this issue.

We think further, it is time for the Congress to review its policies with regard to Federal lands; the buying of private lands to add to the public holdings, and the delegations of authority which the Congress has made to buy land without congressional review, such as is the case under the Weeks Act or under the authority granted to the Fish and Wildlife Service.

In witnessing as we have in this hearing, the Department of Justice, the Department of the Interior, the Department of Agriculture, the Department of Defense and the Federal Power Commission, joining hands in opposition to this bill, convinces us that it is time for the Congress to move in to curtail the power of the executive branch of the Government in the field of water rights by enacting S. 1275. We are very disturbed at these trends in Government and only the Congress can correct them.

The Congress is the best avenue of redress of the people in this situation; and this legislation will probably have to be passed over the objections of the executive branch; and, if necessary, we hope you will do just that.

We sincerely recommend that you support and pass this bill as it is written.

I planned to make just a few comments on a question asked by my good friend, the Senator from New Mexico, and I wish he were here. I think that since he is not here I will not make those comments. However, I was going to make them in regard to a question he asked.

Senator Moss. Well, if you would care to do that at some time when Senator Anderson is available, I am sure he would be interested in listening to the colloquy. Senator Anderson is not able to be here today.

Mr. Taylor. Since he asked the question, Senator, I would prefer that he were here.

Senator Moss. Fine.

Mr. TAYLOR. We are, however, in support of the last point I made in the original statement, which in part states:

> The Congress should assume a responsibility to preserve our Federal system by reversing the trends toward centralization of authority in the Federal Government. We urge Congress to safeguard its legislative prerogatives by (1) insisting that Federal expenditures be approved by the Congress on an annual basis; (2) avoiding delegation of broad discretionary powers to the executive branch; and (3) enacting corrective or conforming legislation where the Supreme Court has invaded the legislative area.

I think that this applies very directly in the case before us as far as the Water Act is concerned.

Again I appreciate the opportunity to appear before you and if there are any questions I will try to answer them.

Senator Moss. Thank you, Mr. Taylor. We appreciate your being with us during the days of this hearing and for bringing this statement of the American Farm Bureau Federation to be part of our record.

Any questions or comments to be made?

Senator KUCHEL. No. Thank you very much, sir.

Senator JORDAN. Mr. Chairman, I appreciate the testimony of Mr. Taylor. He made a good contribution to the testimony by his statement.

I am sorry, too, Mr. Chairman, I was not here to hear my old friend Mr. Shamberger of Nevada when he presented his statement. I was busy in a committee in an adjoining room. I hoped I could be here because we are friends of long standing. I do appreciate his statement and the statement of his fine organization.

Senator Moss. Thank you.

Thank you, Mr. Taylor.

We will next hear from Mr. Burnham Enersen, attorney, who today will be representing the California Chamber of Commerce in his appearance before the committee. We are aware of the very excellent work that Mr. Enersen has done in this field of water and his scholarly approach to the problem, so we look forward to your statement, sir.

You may proceed.

STATEMENT OF BURNHAM ENERSEN, ATTORNEY, REPRESENTING THE CALIFORNIA CHAMBER OF COMMERCE

Mr. ENERSEN. Thank you very much, Mr. Chairman and members of the committee.

After arriving in Washington, I was given a message from the executive secretary of the Irrigation Districts Association of California requesting that I ask permission to have entered into the record a certified copy of a resolution adopted by that association at its meeting on February 21, 1964, endorsing the principles contained in Senate bill 1275. I ask leave to have this resolution entered into the record.

Senator Moss. That will be in the record immediately following your statement, Mr. Enersen.

Mr. ENERSEN. Mr. Chairman and members of the committee, as has been stated, I am a lawyer in San Francisco. I happen to be a member of the board of directors of the California State Chamber of Commerce and at the present time to be chairman of the California State

Chamber of Commerce Statewide Water Resources Committee. I am appearing on behalf of that organization.

The State chamber of commerce has some 6,000 members and its members are responsible for about 75 percent of the employment opportunities in our State. Our membership includes a broad cross section of water interests and water users. Our water resources committee is continually concerned with all problems and developments relating to the conservation and use of our waters, and together with many other associations in our State and in other parts of the West we are actively supporting Senate bill 1275. We believe that it is an important step in the solution of some of the problems in this field of water resource development.

Mr. Chairman, I have prepared and have filed with your secretary a written statement which I ask to have included in the record. In the interest of time, I shall not read all of it. I shall have one or two comments to add to it.

Senator Moss. Thank you. It will be included in full in the record and you may highlight it and comment on it as you see fit.

(The statement referred to follows:)

PREPARED STATEMENT OF BURNHAM ENERSEN, REPRESENTING THE CALIFORNIA CHAMBER OF COMMERCE

Chairman Moss and members of the committee, my name is Burnham Enersen. I am a lawyer practicing in San Francisco, Calif., a member of the firm of McCutchen, Doyle, Brown, Trautman & Enersen. I am a director and the chairman of the Statewide Water Resources Committee of the California State Chamber of Commerce, and I appear on behalf of that organization. The 6,000 members of the State chamber of commerce provide about 75 percent of our State's employment opportunities. Our members include a broad cross section of water interests and water users, and our water resources committee is continually concerned with all problems and developments affecting the conservation and use of our waters.

Together with many other associations in California and the West, the California State Chamber of Commerce is actively supporting S. 1275 to clarify the relationships of the States and the Federal Government in water resource development. We believe S. 1275 is an important step in the solution of some of the problems in this field.

We commend this committee for making it possible to express our belief that S. 1275 is reasonable legislation, long needed to resolve uncertainties which hamper both Federal and local water development.

We think there is a demonstrated need for each of the several provisions of S. 1275, and we believe the enactment of all of them will be in the public interest. However, I shall not undertake within the limited time available to discuss all features of the bill in detail. Instead, and without minimizing in any way the importance of the other sections, I shall concentrate upon clause (1) of section 1 of the bill—the provision dealing with the so-called reservation doctrine.

In some 40 words, this clause declares that the reservation or withdrawal of public lands shall not affect water rights theretofore or thereafter acquired pursuant to State law. Brief and simple though it is, this declaration is of great significance and importance, particularly in the Western States. Its enactment will reaffirm a policy declared by the Congress almost a hundred years ago, a policy which has been of enormous benefit to the agricultural and industrial economy of the Western States.

This policy is that waters flowing upon and appurtenant to public lands of the United States shall be available for appropriation and use in accordance with "local customs, laws, and the decisions of courts" (act of July 26, 1866, 43 U.S.C. 661; act of July 9, 1870, 43 U.S.C. sec. 661; and Desert Land Act of 1877, 43 U.S.C. 321). Since most of the land in the Western States was at one time public land of the United States, and since the water supplies of the Western States consist in large part of rivers and underground flows originating upon

those public lands, the permission given in those early statutes for the acquisition of water rights upon the public lands under local customs and laws was the key which opened the gates for the development of the thriving economy we now have in western America.

Let me emphasize here that this congressional policy did not place Federal lands at a disadvantage or put them in any special category, different from private lands. Rather it put Federal lands on a basis of parity with private lands in the West in respect to the matter of water rights. Under the so-called appropriative rights rule which prevails in the West, water rights are acquired by appropriation and beneficial use and the titles to water rights are separate from the titles to lands. Waters flowing across private lands are subject to appropriation by all persons under local customs and laws, and this declaration of policy Congress placed waters upon Federal lands in the same category.

It is no exaggeration to say that if Congress had not established this policy, permitting waters upon the public lands to be appropriated under local customs and laws just like waters upon private lands, the development of the West would have been severely retarded and the West would not be anything resembling what we know today.

This early congressional policy permitted the development of waters for the irrigation of agricultural lands, the watering of cattle, the production in the early days of hydraulic power for mining machinery, the production more recently of hydroelectric power, and the furnishing of water supplies to cities and towns for domestic and industrial use, all under local control and financed by local capital. In recent years there have been many large and valuable water resource development projects under the auspices of the Federal Government in the Western States, but even today the Federal projects represent in the aggregate but a very small percentage of the total number of projects by which water is conserved, controlled, and distributed in our part of the country.

In California, for example, where the present reproduction cost of all existing facilities for conservation and use of water is in the order of $6 billion,[1] 93 percent of the more than 1,000 water conservation dams now in existence have been in existence have been built with local capital—by private enterprise, local water companies, cities, municipal water districts, irrigation districts, water storage districts, and other agencies locally owned, managed, and financed. This was made possible, as I have said, by the wise policy adopted by the Congress almost a hundred years ago of permitting private citizens and local governmental agencies to acquire ownership of water rights on the public lands of the United States—just as on private lands—in accordance with the local customs and laws of the States.

This policy of Congress was drastically curtailed—almost nullified—by the famous decision of the Supreme Court of the United States in 1955, known as the *Pelton Dam* case (*Federal Power Commission* v. *State of Oregon*, 349 U.S. 435, 99 L. Ed. 1215). In that decision, a majority of the Court held—over the protests, not only of the State of Oregon, but of 12 other States appearing as amici curiae, 3 of them, Indiana, Michigan, and Pennsylvania being east of the Mississippi River [2]—that the congressional consent to the appropriation of water under local customs and laws upon the public lands of the United States did not apply to that portion of the public lands which had been reserved or withdrawn from public entry or sale. In one brief paragraph in that decision, the Supreme Court held that public lands not open to entry for homesteading, desert land entries, and the like, were not to be considereed as "public lands" within the meaning of the congressional declaration of 866.

The effect of this decision as construed by the Department of Justice of the United States, is that all water rights acquired pursuant to local laws and customs are placed in jeopardy insofar as they depend upon water arising upon or flowing from lands of the United States which had been reserved or withdrawn from public entry prior to the vesting of the water rights. As to such waters, the Department of Justice now claims that local laws and customs have no application, and that water rights acquired after the date of reservation or withdrawal are not "rights" at all, but are merely temporary privileges held at sufferance from the United States and subject to cancellation or destruction at any time by

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[1] As estimated in 1957 by the California Department of Water Resources in Bulletin No. 3, "The California Water Plan," p. 227.

[2] The other nine were Louisiana, Minnesota, Montana, Nebraska, Nevada, North Dakota, Texas, Utah, and Washington.

the Federal Government. Furthermore, the effect of that decision is that no private or local development of water rights in the Western States can safely be undertaken hereafter, if it depends upon the use of waters originating or flowing upon reserved or withdrawn lands of the United States, unless a permit or license is obtained from some duly authorized agency of the Federal Government.

The members of your committee are familiar with the geography of the Western States and know that most of the water supplies originate in mountain areas and that most of the mountain slopes are covered by U.S. forest reserves. Other large bodies of public land are held as national parks, national monuments, and military reservations. There are also a great many areas withdrawn from public entry as sites for potential power development under the Federal Power Act. In sum, these reserved and withdrawn lands of the United States constitute the source of most of the water supplies of the Western States. By its decision in 1955 the Supreme Court of the United States virtually canceled the congressional policy of 1866 and transferred control of the regulation and ownership of most of our water rights from our own State governments to Washington, D.C.

Let me illustrate the magnitude of this problem by reference to my own State. When California was admitted to the Union in 1850, title to more than 91 percent of the State's 100 million acres of land was vested in the United States. Over the years, Congress disposed of about half of this land in sales and grants. Understandably, most of this land that has passed into private ownership lies at low elevations in the fertile valleys and plains. Because of the nature of our climate, these valley lands cannot sustain an economy without water arising on the mountain lands still in Federal ownership. About 80 percent of our seasonal water supplies begin with precipitation during 5 winter months, as snow in the mountain ranges and rain in the lower elevations and foothills. We have very little precipitation during the growing season. Most of the developable and controllable water supplies occur in the form of runoff or drainage from the mountain and foothill lands, largely owned by the United States. Without conservation and use of these water supplies California, as we know it, could not exist.

About one-half of our State's 100 million acres of land is still in Federal ownership. These Federal lands are controlled primarily by the U.S. Forest Service, the Bureau of Land Management, the National Park Service, and the Department of Defense. The acreages are approximately as follows:

U.S. Forest Service	19,962,454
Bureau of Land Management	16,121,403
National Park Service	4,040,117
Department of Defense	8,231,033
Other agencies	1,347,630
Total	49,702,637

Source: "1962 Public Land Statistics," Bureau of Land Management, U.S. Department of the Interior.

All of this land except some of the 16 million acres under control of the Bureau of Land Management is reserved or withdrawn from public entry. Thus at least 33 million acres, or one-third of the entire State, fall within the category of reserved or withdrawn lands and are directly affected by the Supreme Court's decision. It is the waters arising upon or flowing across this one-third of our State which are involved in the issue raised by clause (1) of section 1 of the pending bill. What is even more important is that these lands are the source of the great majority of our water supplies.

Attached to this statement is an official map of the national forests in California as of 1960. As this map shows, the lands withdrawn or reserved for our 19 national forests and about half of the 4 million acres of national park reservations include almost all of the headwaters and extensive reaches of our major streams. These include in part the Sacramento, Feather, Yuba, American, Mokelumne, Stanislaus, Tuolumne, Merced, San Joaquin, Kings, Kaweah and Kern Rivers which drain into the Central Valley; the Eel, Mad, Van Duzen, Trinity, and Klamath Rivers draining into the Pacific Ocean on the north coast of California; and the Owens River which has been developed to serve Los Angeles. Because some private land is intermingled with the withdrawn land, an exact figure on runoff from the Federal reserves would be difficult to obtain. It can, however, be reliably estimated from analysis of the California water plan streamflow information that about 75 percent of the total natural water runoff in California comes from the withdrawn or reserved Federal lands.

For the record, I would like to add we are not suggesting that the Federal Government divest itself of national forest or national park lands. The State chamber of commerce has always supported the national forest and national park concepts. They contribute much to our economy and to our western way of life. Nor are we suggesting that Federal resource development be in any way curtailed.

As I indicated earlier, our precipitation pattern differs from the Eastern States. It has been necessary to impound or divert the runoff from most of these streams to provide water supplies during the many virtually rainless summer months and for "carryover" storage during the drought years which also characterize our climate.

The history of this development is the history of our economy. Starting with diversions by miners in the gold rush days, the runoff from lands now in national forests and parks has been substantially developed. The city of San Francisco invested many millions of dollars and is continuing to invest millions more in bringing its water supply from the Tuolumne River in Yosemite National Park and Stanislaus National Forest. East Bay Municipal Utility District serving Oakland and other East Bay communities is currently completing a $300 million development program for water supplies from the Mokelumne River flowing from the Eldorado and Stanislaus National Forests. The city of Los Angeles developed the Owens River runoff from Inyo National Forest for its municipal supply several decades ago at costs running into hundreds of millions of dollars. San Joaquin Valley counties, the most productive farm counties in the Nation, are producing crops only because the waters draining the Sierra and Sequoia National Forests and Sequoia-Kings Canyon National Parks have been developed as sources of irrigation water. The capital expenditures for water development on these lands over the years were, of course, immense, and they were in most cases financed by loans or bonds still in large part outstanding.

A similar pattern of development has taken place or is still underway on most of the rivers which arise in the seven national forests bordering on the Sacramento Valley in northern California, including the State's own $2,000 million Feather River project which will carry water to southern California and other portions of the State that can no longer rely on diminishing ground waters or supplies presently available. According to the California State Department of Water Resources, the water needs of our growing population and economy are such that we will need to develop an additional 7 million acre-feet of annual water supply by 1975. These 7 million acre-feet are available from water now wasting to the ocean—water flowing from our principal watersheds; namely, the withdrawn national forest lands in northern California.

It is true that under the *Pelton Dam* decision the reservation or withdrawal of lands from public entry does not have the effect of canceling water rights acquired by local customs and laws prior to the date of such reservation or withdrawal. However, this saving clause, if one might call it that, is of very little practical value because the dates of the reservations and withdrawals for forest reserves were in most cases in the 1890's or the early 1900's, and many of the withdrawals and reservations for other purposes are also of very early dates. The members of the committee will recognize that most of the development of water resources in the Western States has occurred after those dates and, therefore, the integrity of these projects is placed in jeopardy by the Supreme Court's decision insofar as they depend upon waters which originate upon or flow across forest reserves and other reserved and withdrawn lands of the United States.

The passage of S. 1275 will correct this situation and put withdrawn or reserved Federal lands back where they belong—on a parity with private lands—so that waters originating or flowing upon these lands can be appropriated for beneficial use in accordance with local customs and laws.

As I understand the comments of the Department of Justice with respect to S. 1275 as recently filed with your committee, the Department confirms my understanding of the effect of the *Pelton Dam* case. The Department of Justice does not deny—in fact, it asserts, or at least implies—that the so-called reservation doctrine which sprang from the Supreme Court's 1955 decision has the ultimate effect of transferring control of most of the water rights in the Western States to Washington, D.C. The Department believes that this is sound policy and that it is in the national interest. The Department contends that substantial quantities of undeveloped water should be reserved for future developments. Apparently, the theory is that by forbidding or severely restricting private and local development of presently undeveloped water resources, the Federal Government will be serving the best interests of future generations.

This is very interesting, but it is the first time I have every heard a suggestion from a responsible source that the interests of the public can best be served by preventing rather than encouraging the development and use of our water resources. The last century of the development of the Western States has not been accomplished by suppressing, prohibiting or discouraging the conservation and use of water resources. The exact opposite is the truth.

In its memorandum the Department of Justice expresses alarm that the passage of clause (1) of this bill would throw the waters of the West open to "use, misuse or nonuse" under State laws. Surely the Department cannot seriously believe that the thirsty Western States would permit the "misuse" of their waters or would prevent the use of them when they are needed. I cannot speak on behalf of other States, but I know that in California we have a 90-year history of State concern and planning for the maximum overall development and use of our limited water resources. Almost 40 years ago, pursuant to statutes enacted for the purpose, the State of California itself filed applications to appropriate all of the unappropriated waters on our major streams so that the State could control the appropriation of the waters and make sure that they would be developed and used in a manner consistent with the best interests of the entire State. Several years ago the State officially adopted a comprehensive "State water plan" for the ultimate development of all of our waters at an estimated construction cost of about $12 billion. The first phase of that plan is now under construction at a cost of about $2 billion. Attorney General Kennedy need not be afraid that California is going to permit the "misuse" of its waters or that it is going to prevent them from being used when they are needed. And he may be sure that we in California do not think it is necessary to transfer the control of our remaining water supplies to Washington in order to protect these precious resources from being abused.

I hope the time has not yet arrived, if indeed it ever does, when local initiative shall be powerless to assert itself in the economic development of the local area through beneficial use of our water resources, until permission is obtained from some bureau or agency in Washington, D.C.

The passage of the first clause of S. 1275 will reverse the unfortunate paragraph in the 1955 decision of the Supreme Court of the United States and will restore to its original force and effect the congressional policy first declared in 1866 and followed consistently with enormously beneficial results until the Supreme Court curtailed it in 1955. Section 2 of the bill properly provides that rights which have vested at the time of the enactment of the bill will not be affected. Other appropriate safeguards are included, not the least important of which is a provision expressly protecting the rights of Indians and Indian tribes and the obligations of the United States to them.

Against the possibility that my emphasis upon the first clause of this bill might indicate a lack of interest in the other provisions, let me comment very briefly upon each of them. The second clause is a highly desirable provision making generally applicable to all Federal projects certain provisions of the Flood Control Act of 1944, subordinating navigational use of water in the Western States to beneficial consumptive use for irrigation, municipal, and other purposes. Water being a commodity in very short supply in the Western States, the policy that beneficial consumptive uses shall have priority over navigational use is a highly salutary policy and should have general, rather than limited, application. (I note that the Department of Justice treats this clause as though it subordinated all nonconsumptive uses to consumptive uses, and then the Department proceeds to ridicule such a concept. Of course, the bill does no such thing. It merely extends the already existing subordination of navigational uses so that this policy which Congress enacted 20 years ago respecting flood control projects shall apply to all Federal projects in the West.)

The third clause of section 1 declares that if the United States desires to have a water right under State laws, then the United States shall initiate and perfect that right in accordance with the procedures established by those laws. This clause has been the subject of objection on the ground that it would "hamstring" the activities of the United States in water resource development. I believe the objections are not well taken. No one seriously wishes to impede or "hamstring" the legitimate interests and activities of the United States in this field. This clause does not have any such purpose or effect.

The clause does not require the United States to obtain water rights in accordance with State laws. Instead, it provides very simply that if the United States wishes to have a water right recognized under State laws then the United States must comply with State procedures for the purpose of obtaining such a right.

This provision will prevent the United States from saying, as it has on occasion, that it can obtain a right recognized under State laws without complying with State procedures. Water law is a part of our general law of property. Title to property is controlled by the law of the State where the property is located. If the United States wishes to obtain title to land in accordance with the laws of the State where the land is located, the United States must do so in a manner which the laws of the State recognize and protect. In principle there is no difference between title to land and the title to a water right. In either case State law and State procedure must control. When seeking a water right under State law the United States should—as in fact it usually does—follow the same procedure under State law as a private citizen or any other government agency.

Clause (4) declares what would seem to be an axiomatic principle that whenever the United States or its licensee damages a vested water right recognized under the laws of the State, and such damage would be compensable if caused by the State or under its authority, then the owner of such rights shall be entitled to compensation. One would think it would hardly be necessary to write such a principle into the laws of the United States. Unfortunately, however, it is necessary because the Department of Justice of the United States has on occasion asserted that water rights vested under State law can be taken or damaged by the United States for the purpose of improving navigation without paying any compensation whatsoever. (See, for example, *United States* v. *Gerlach Livestock Co.* (339 U.S. 725 at 736 and 740.)) The adoption of this principle will make it clear that one whose vested water rights are damaged by the United States is entitled to just compensation, the same as any other property owner, whether the damage results from a reclamation project, a flood control project, or a navigation project constructed by the Federal Government.

The latter part of the fourth clause specifies that damage to be paid to the owner of such water rights shall be determined "by proceedings in eminent domain" if it cannot be settled by agreement. This feature of this clause is the subject of some legitimate concern, and some criticism, on the ground that it would require condemnation proceedings to be instituted in advance of construction and thus might delay development. It is also said that the inverse condemnation procedure in the U.S. Court of Claims or in the U.S. district courts is often a more effective and more equitable remedy for the injured party, and that this procedure would be prohibited by this clause. In my view the important part of clause (4) is the requirement for payment of just compensation when water rights are damaged or taken by or under the authority of the United States. I think the procedure by which the damages are determined is a secondary matter. I would hope that the criticism which is leveled at the procedural part of this clause will not deter the Congress from enacting in any event the substantive portion requiring just compensation to be paid when water rights are damaged.

In conclusion, let me say that the enactment of this S. 1275 is urgently requested by many organizations and individuals in California and other States. I know of no association in California having any special knowledge or experience in the field of water resource development which opposes the enactment of this bill.

This enactment will not solve all the problems having to do with the relationship between the States and the Federal Government in respect to the control, ownership, development, and use of our water resources. This bill is an excellent beginning, but I trust that after it is enacted this committee and its counterpart in the House of Representatives will continue to give close attention to the solution of other problems in this area. The organization I represent today and the host of others interested in this subject will continue to concentrate on these problems and to offer assistance in their solution.

Thank you for your very kind attention.

(The map referred to is in the files of the committee.)

Mr. ENERSEN. Mr. Chairman and members of the committee, I desire to speak particularly about clause 1 of section 1 of the bill.

I don't mean by that to indicate any lack of interest in the other provisions but because of limitations of time I would like to discuss that clause especially.

In some 40 words this clause would declare that the reservation or withdrawal of Federal lands shall not have any effect on water rights

theretofore or thereafter acquired pursuant to State law. The enactment of this clause would reaffirm a very important policy adopted by the Congress almost a hundred years ago. This policy is that waters flowing upon or appurtenant to public lands of the United States shall be available for appropriation and use in accordance with local customs, laws, and the decisions of courts.

Most of the land in the Western States, of course, was at one time public land of the United States and most of the water supplies of the Western States consist of rivers and underground flows which are appurtenant to those lands. Consequently, the permission which was given by Congress in 1866 and later for the acquisition of water rights upon the public lands under local customs and laws was literally the key that opened the gates for the development of the western economy as we know it today.

I want to emphasize that this declaration of policy by the Congress did not place the public lands of the United States at any disadvantage or put them in any special category different from private lands. On the other hand, it simply put Federal lands on a parity with private lands in the matter of water rights under the appropriative doctrine with which the members of this committee are thoroughly familiar. It prevails throughout the West. Water rights are acquired by appropriation and beneficial use and title to water rights is separate from title to lands. Waters flowing across private lands are subject to appropriation by all persons under local customs and laws throughout the West and this 1866 declaration of policy by the Congress put Federal lands in exactly the same status.

I am sure it is not an exaggeration to say that if Congress had not adopted this policy permitting waters on public lands to be appropriated like waters on private lands in the West, then the development of the West would have been severely retarded and it would be nothing like what we know today.

This policy permitted the development of waters for irrigation of agricultural lands, the watering of cattle, the furnishing of water to homes and industries, development of waterpower, all under local control and financed by local capital.

Now in California it has been estimated that the present reproduction cost of all of the water resources development facilities, dams, canals, transportation services, the reservoirs, pumps—present reproduction cost of all of them is in the order of $6 billion. This includes public as well as private developments.

It is interesting to know that of the approximately 1,000 conservation dams we have in California, more than 93 percent of them were built by private capital or by capital furnished by local governmental agencies such as cities, municipal water districts, irrigation districts—of which we have more than a hundred in the State—water storage districts, and other entities locally managed and locally financed. All this was made possible, as I say, because the Congress almost a 100 years ago decided as a matter of sound policy that the waters on public lands could be appropriated under local customs and laws just like the waters on private lands.

Now the *Pelton Dam* case, which has been discussed by almost every witness, very, very sharply curtailed that policy in 1955. I might say that it was decided by the Supreme Court of the United

States over the protest of not only the State of Oregon, which was directly involved, but also 12 other States through their attorneys general filing briefs as amici curiae in support of the position taken by the State of Oregon. Three of those States were east of the Mississippi—Indiana, Mississippi, and Pennsylvania.

By that decision in one very brief paragraph the Supreme Court said that the consent given by Congress almost a 100 years ago to the appropriation of waters which were appurtenant to public lands did not apply to that part of the public lands which was not open for entry or sale under the homestead laws, the Desert Land Act and similar statutes.

The effect of this decision as now construed by the Department of Justice is that all water rights acquired pursuant to local customs and laws in the Western States are placed in jeopardy insofar as they depend upon waters arising upon, or flowing from, lands of the United States which had been reserved or withdrawn from public entry prior to the vesting of the water rights.

As to such waters, as you have heard here in the last 3 days, the Department of Justice claims that local laws and customs have no application and the water rights acquired after the date of the reservation or withdrawal of the public lands to which they are appurtenant are not rights at all, they are merely temporary privileges held at sufferance from the Federal Government.

Furthermore, as Mr. Banks pointed out in his testimony yesterday, the effect of that decision is that no private or local development of water rights in the Western States can now safely be undertaken if it depends upon the use of waters originating upon or flowing across or from the reserved or withdrawn lands of the United States unless the developer obtains a permit or license of some kind from a duly authorized agency of the Federal Government.

Now, the members of your committee of course are familiar with the geography of the Western States and you know that most of our water comes from mountain slopes in the form of rain and more importantly in the form of the runoff from melting snows. You know that most of those mountain slopes are owned by the Federal Government and most of them are in the category of forest reserves, which are not available for sale or entry under the homestead laws.

I would like to illustrate this by reference to my own State of California. You have had illustrations given with respect to the State of Wyoming and the State of Colorado. I think the situation in California will be equally important for your committee to consider.

When California was admitted to the Union in 1850, about 91 percent of its total area consisted of public lands of the United States. The total area of California, incidentally, is about 100 million acres. In the intervening years since 1850, through duly authorized actions by the Congress, the Federal Government has sold or granted or otherwise disposed of approximately half of the area of the State so that at the present time about 50 million acres, or about half of the area of California, is in private ownership and the other one-half is in the ownership of the United States.

As is quite understandable, most of the land that passed into private ownership is the fertile land in the valleys and on the lower slopes of the mountains. As I am sure you will readily understand, and un-

doubtedly already know, those valley lands depend for their livelihood, their economy, upon the water which comes down off the mountains when the snow melts in the spring.

I have attached to my prepared statement a map which I am sure the committee will find interesting showing the forest reserves in California as of 1960.

Now the map shows the forest areas in green. If the committee members care to look at the map they will see there are some 19 national forests in California. If you are familiar with the geography of California you will know that the Central Valley lies between the Sierra Nevada Mountains on the east and the Coast Range on the west. You will, I am sure, be interested to notice that the green area on this map covers almost all of the Sierra Mountains extending from the Oregon border down to the Mojave Desert on the eastern border of California. It covers almost all of the northern part extending from the city of Redding to the Oregon border and it covers a very large part of the coast range coming down the west side of the Sacramento Valley. There are also certain national forests along the coast in the vicinity of Los Angeles and on down to San Diego. Those forest reserves represent an aggregate area of one-fifth of the State, about 20 million acres, all reserved or withdrawn from public entry.

Coming back to geography, you will see that these forest areas represent the headwaters and a large part of the reaches of many, many of our important streams, including the Sacramento, all the streams coming into the Central Valley from the east, from the Feather on the north down to the Kern on the south. They also include a large part of the rivers which drain into the ocean in the northern coastal area; the Eel, the Mad, the Van Duzen, the Klamath, and others.

In addition to the Forest Service, the Federal Government has about 8 million acres in Defense Department establishments and 4 million acres in Park Service reserves.

There are about 33 million acres in the total area of Federal land in California under reservation or withdrawal. This is not all for the Forest Service reserves. The forest reserves are about 20 million and the balance is principally Defense Department and National Park Service lands.

We don't have an exact figure, Mr. Chairman, of the portion of our water resources which originate upon these reserved or withdrawn lands. The reason we cannot get an exact figure is that there are some private lands intermingled with these forest reserve lands and other public lands up in the moutain areas. But we have a reliable estimate that approximately 75 percent of the total natural water runoff in California comes from reserved or withdrawn Federal lands.

Now of course I am sure you will realize we have no quarrel at all with the Federal land policy of establishing and maintaining forest reserves and national parks. These are very, very important to all of us and we are very glad to have them. The map which I have given and the figures which I have given will indicate, I think, the importance, at least to California, of the policy established by the Congress in 1866 of permitting local government agencies and private capital to obtain valid and vested water rights under local customs and laws upon the waters coming off these Federal lands up in the mountains.

Just a few examples:

The city of San Francisco has invested many millions of dollars in its development of a municipal supply from the Tuolumne River which comes from Yosemite National Park and Stanislaus National Forest.

In Oakland and the other East Bay cities the Municipal Utility District has invested about $300 million in its bringing of water resources from the Mokelumne River which comes from the Eldorado and Stanislaus National Forests.

The city of Los Angeles' first major development was the development of the Owens River in the eastern part of central California conserving water from the runoff in the Inyo National Forest at a cost which I believe is in excess of $200 million.

San Joaquin Valley counties, which are incidentally the most productive agricultural counties in the Nation, are producing crops today only because they were able to develop and conserve and distribute and use the waters which come into the valley lands from the streams coming off the western slope of the Sierra Nevada, the Sequoia National Forest and Sequoia-Kings Canyon National Parks and other national forests in that part of the State.

Mr. Chairman, all this was affected very directly by the *Pelton Dam* decision because under that decision, as interpreted by the Department of Justice, every one of the water rights which attached to waters coming off the Federal forest reserves after the day that those reservations were made are subject to being recalled or canceled by the Federal Government without compensation. We had some doubt in the days preceding this hearing whether the Department of Justice takes that position with regard to the effect of the *Pelton Dam* case but I think that after the comments of the last 3 days we can have no further doubt about it.

As somebody said, the purpose of S. 1275, one of its main purposes, is to make sure that rights of this kind, when they are taken by the Federal Government, shall be the subject of proper compensation.

The passage of S. 1275, and particularly clause 1 of paragraph 1, will correct this situation by restoring the congressional policy first enunciated in 1866 and, by reversing the little paragraph in the *Pelton Dam* decision so that reserved and withdrawn public lands will be put in the same category as other public lands and will be subject to the possibility that private and local governments can obtain water rights under local customs and laws just as they can on lands which are still open to entry.

I am sure all of us have a very high regard for the ability of the lawyers in the Department of Justice; they perform very admirably their primary function of representing the Government in litigation. In all of the cases which have involved this subject they have come before the courts presenting very well, and in most cases very effectively, the best arguments they possibly can in favor of their client, which is the U.S. Government. And they are coming before this committee with, I am sure, the same purpose in mind, making the strongest possible case for retaining in the hands of their client the maximum power that they can possibly justify. This is somewhat reminiscent, Mr. Chairman, of the *Tidelands* case. We all recall that very vividly, I am sure, particularly those having ocean boundaries on their State borders. It all started with a contention by the De-

partment of Justice. After having gone through the courts with complete success, the subject became of such importance that it was necessary for the Congress, as it did, to reverse the decision of the Supreme Court and put the tidelands back in the category where for over 100 years everyone had assumed they were, until the Department of Justice was successful in its efforts to appropriate them to the Federal Government.

Now the Department contends that the so-called reservation doctrine which sprang up from this *Pelton Dam* case not only is correct but that it is necessary as a matter of public policy for the Federal Government to reserve all of these waters for future development. Apparently the theory is that by forbidding or by severely restricting local development of presently undeveloped, unappropriated waters, the Federal Government will somehow be serving the best interests of future generations.

Now members of the committee, this is very interesting but it is the first time I ever heard a suggestion from a responsible source that the best interests of the public are served by preventing rather than encouraging the development and use of our water resources. The last century of development in the Western States has not been accomplished by suppressing or discouraging the conservation and use of water resources; the exact opposite is the truth.

Now in its memorandum filed with this committee, the Department of Justice expressed some alarm that if the Federal Government should relinquish the power which the *Pelton* decision gave with regard to these waters, that then the waters would be subject to "use, misuse, or nonuse" under State law. I think I am quoting correctly from their memorandum.

I cannot speak for other States because I do not know about them but I know in California we have a 90-year history of State planning and concern to be sure that we obtain the maximum possible development for the best interests of everyone from our limited water resources. Almost 40 years ago, pursuant to statutes enacted for that purpose, the State of California itself filed applications for the appropriation of all of the unappropriated waters on our major streams. This was for the purpose of making sure that future development by whomever it is done shall be consistent with the master plan adopted by the State for the maximum beneficial use of these waters.

Several years ago, in 1957, the State of California adopted the California water plan. I have a copy of the basic volume in my hand. It is a very impressive document and it calls for the maximum development of these waters at an estimated construction cost of $12 billion. The first phase of that plan is now already under construction at an estimated cost of about $2 billion. I think Attorney General Kennedy and his staff need not be afraid that California is going to permit the misuse of waters or that it is going to prevent them from being used when they are needed. He may be sure that we in California do not think that it is necessary to transfer the control of our remaining water supplies to Washington in order to prevent them from being abused.

Now Mr. Chairman, I shall comment very briefly upon one or two of the other sections of the bill. The suggestion has been made that the clause with respect to the acquisition of water rights under State

law may hamstring the Federal Government and require it in each case to comply with the whimsical procedures established by various State governments. I wish to emphasize that this clause does not require the Federal Government to proceed under State laws whenever it wants a water right.

It simply says that if the United States wants a water right recognized under State law it shall comply with State procedures. I think it was pointed out earlier in the hearings that if the Federal Government wants a title to land which will have the benefit of the State recording statutes, it must comply with the State laws with regard to the title of the land.

The same is true if it wants a water right which is recognized under State law and is given the protection of the State law.

Now there are many other methods by which the Federal Government can obtain a water right if this bill passes. One of them obviously is if the water right is already privately owned it can acquire by condemnation or by purchase.

Another method would be in the authorization act for the project Congress could itself expressly cancel the permission previously given for the acquisition of water rights under local customs and laws in the area and on the land which is affected by that particular project.

It may be, though I don't know myself whether it is true, that there are already general statutes authorizing the executive department to reserve water rights in particular areas for particular purposes in the future.

Finally——

Senator KUCHEL. What did you say?

Mr. ENERSEN. I said there may be, though I am not certain, general statutes already in effect which would enable the executive department—the Secretary of the Interior, for example—to make a reservation of water rights as distinguishd from land in a particular area.

Senator KUCHEL. Would you be able to look into that problem when you return home and advise the committee and, if so, could the chairman put your comments into the record on that question?

Mr. ENERSEN. I would be glad to.

Senator MOSS. Yes, it would be most important. You could file an additional statement. We would appreciate it.

(Mr. Enersen later reported he found no such statute.)

Mr. ENERSEN. Yes, Mr. Chairman.

Finally, there has been a good deal of discussion about this question of inverse condemnation as compared to ordinary eminent domain proceedings. That provision is part of the fourth clause which specifies that the owner of a water right which is recognized under State law shall be entitled to be compensated if that water right is damaged or taken by the Federal Government or its licensee and provided that the right would be compensated if taken by the State.

Well, that substantative provision, the first part of the fourth clause, it seems to me, is by all odds the most important part of that provision declaring specifically that the Federal Government shall compensate those whose water rights are granted by the Federal Government. The reason why it is necessary is that the Federal Government has contended that if the damage occurs in the name of the navigation servitude, then no compensation is required. You are familiar with

that contention in the *Gerlach* case which was mentioned earlier where the Supreme Court in its opinion recited that the Department of Justice contended that no compensation was required because navigation was the purpose to be served by the Central Valley project. The Supreme Court found it unnecessary to decide that because it decided it was basically not a navigation project.

I think, myself, the means by which that compensation is determined, that is, the procedural part of this problem is much less important than the substantive provisions and I would hope debate about the procedural problems would not deter the Congress from enacting the substantive provisions under which it shall be required.

Mr. Chairman, this bill is an excellent bill. We very strongly urge its adoption. We also must say we do not think it solves all the problems. We know this committee and its counterpart in the House will continue to be concerned with other problems in this field, and the organization which I represent and others similarly situated will continue to offer their help as best they can.

Thank you very much.

Senator Moss. Thank you, Mr. Enersen.

This certainly is a most excellent statement. At times in following your prepared statement in part as well as listening to your comment on it which you summarized in large part, I think you have been able to direct your attention right to the heart of the problem, the fact that the majority of our water resources arise on what are reserved lands and for that reason, as long as there is doubt remaining as to whether water rights might be retained and held by the Federal Government, we will have this controversy.

We should have some regularity and some certainty. That is what we are really trying to get in this bill, which is a modest step in that direction. At least it would give us some degree of certainty and regularity in dealing with the problem.

I appreciate your testimony and your coming here today all the way from California to be with us. You have been with us all through the hearing.

My colleagues may have a question or a comment.

Senator Kuchel?

Senator KUCHEL. This is a splendid statement, Mr. Enersen, and it will be of enormous value to the committee.

I do not think that anyone has commented so far on the appropriate provisions of the Flood Control Act and I think it would be helpful if you can do it in just a moment or so, to refer to what section 1(b) of the Flood Control Act of 1944 provides, how it would apply with respect to this bill, and then maybe a comment or two on what motivated the Congress to insert that provision in the act originally, the policy involved, if you can make a statement on it.

Mr. ENERSEN. Senator Kuchel, I will be very happy to.

Section 1(b) of the Flood Control Act of 1944 is quoted on the fifth page of the memorandum of the Department of Justice which has previously been filed by the committee.

It is brief and I will read it for the record:

> The use for navigation in connection with the operation and maintenance of such works herein authorized for construction of waters arising in States lying wholly or partly west of the 98th meridian shall be only such use as does not

conflict with any beneficial consumptive use present or future in States lying wholly or partly west of the 98th meridian of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

This is the entire text.

Now the similar text has been included in subsequent flood control authorization bills. The purpose of the principle is to make clear that in the Western States, where water is in very, very short supply, the uses for navigation shall be subordinate to these other beneficial consumptive uses as enumerated. A use for navigation, of course, necessarily implies that the water upon which the vessel floats eventually gets out to the ocean and, of course, is not available for any consumptive use. It is gone. Congress decided in 1944 that in the Western States a beneficial consumptive use shall have priority over the use for navigation.

The purpose of clause 2 of section 1 of this bill was to make this very salutary principle of general application in the Western States to all types of Federal projects, not merely flood control projects authorized by particular authorization statutes.

Now in their comments on this bill in their memorandum, the Department of Justice has undertaken to treat it as though it said that all nonconsumptive uses in Western States shall be subordinate to these specified consumptive uses. The bill does not say that. The bill deals only with the navigation use, not with other nonconsumptive uses like, for example, power uses.

The memorandum of the Department of Justice then undertakes to ridicule the position on the ground that the definition of consumptive and nonconsumptive uses is very difficult and that this would create confusion and that it therefore should not be done.

Well, in the first place that, I think, is a misconstruing of the bill. In the second place, as properly construed, this subordination of the navigation use to the specified beneficial consumptive uses in the West has been in the law for 20 years in various forms with reference to certain specific projects. I certainly have not heard of, and the Department does not point to, any instance in which that has created difficulty or confusion. I believe, on the other hand, it has been a very salutary principle and should be made of general application.

Senator KUCHEL. As it has been applied in the West, this section of the Flood Control Act simply means the Federal Government in flood control projects on navigable streams shall not apply any navigational servitude at the expense of other enumerated uses of the water.

Mr. ENERSEN. Precisely so.

Senator KUCHEL. How practical does that work out, Mr. Enersen? Can you recall any flood control project in California since 1944 where any problem arose in the application of that section?

Mr. ENERSEN. The Kings River project, which was authorized by the 1944 act. The waters of the Kings River are tributary to the San Joaquin, which in turn is a navigable stream. Under the provisions of that act water can be stored for conservation and flood control purposes in the flood control reservoir behind the Pine Flat Dam and water so stored and subsequently used and consumed by application to the land for irrigation never gets down to the San Joaquin to support navigation.

I have never heard of a single complaint about any disadvantage resulting from that circumstance and I am sure none could arise.

Senator KUCHEL. Just one more question.

Do you recall any reclamation project in which similar language has been incorporated by Congress?

Mr. ENERSEN. Senator Kuchel, I do not recall any.

Senator KUCHEL. That is all. Thank you very much, sir.

Senator Moss. Senator Jordan, do you have any comments?

Senator JORDAN. Yes.

Mr. Enersen, this is one of the finest statements on the subject I have ever been privileged to hear. I commend you for it. You have clarified the *Pelton Dam* case in my mind better than it has been done before.

I think you hit the nail on the head precisely with the statement which you did not read from your prepared paper. I refer now to page 6, the second to the last paragraph. I agree with you fully when you say in your statement:

> I hope the time has not yet arrived, if indeed it ever does, when local initiative shall be powerless to assert itself in the economic development of the local area through beneficial use of our water resources until permission is obtained from some bureau or agency in Washington, D.C.

It is my opinion that is precisely what we hope to establish by the passage of S. 1275. We shall not have to run to Washington, D.C., to carry out the beneficial use and development of the water resources of the West in an orderly fashion and in the public interest, also.

I thank you for your fine statement.

Mr. ENERSEN. Thank you.

Senator Moss. Senator Burdick?

Senator BURDICK. I think you have done a good job, too, Mr. Enersen.

On page 3 I think this sums up the situation quite clearly. You state, and I quote:

> It should be pointed out that there is no evidence that this withdrawal of water by the Navy from the water storage would endanger the supply to the town of Hawthorne in the immediate future. Conceivably it could have been done in some future time.

That is just about the situation, is it not, that we do not have any contest or conflict between the Federal Government and the States now in any particular area?

Mr. ENERSEN. I do not know of any.

Senator BURDICK. It is what we anticipate—further growth and future development.

Mr. ENERSEN. A very, very large part of our problem is exactly that. We know in California we are going to have to develop an annual supply of 7 million acre-feet in addition to all present supplies in the next 10 years. That water has to come, by circumstances of nature, from the Federal forest reserve. If the views of the Department of Justice are correct, no one can afford to use water unless he has some duly authorized license from the Federal Government.

Senator BURDICK. To get this really clear in my mind, if this bill became law, water rights with respect to States would be recorded by the respective States and all water rights rising within their boundaries.

Mr. ENERSEN. Right.

Senator BURDICK. In other words, regarding the statute just like you would on surface lands.

Mr. ENERSEN. Yes.

Senator BURDICK. Would that mean that if the U.S. Government wanted to install a defense plant of some kind on reserved lands that they would have to acquire water rights either by purchase or condemnation from the State?

Mr. ENERSEN. If there were unappropriated waters available, Senator Burdick, the Federal Government could acquire a water right for the Defense Establishment just like you or I could for a farm or house by going to the State and getting an application on file. When it did that it would receive the protection of the State laws so that that right would have a priority against future attempts to appropriate the same water under State law.

Senator BURDICK. That is precisely my point. In other words, taking your map of California, there is no distinction of a water right arising away or apart from the Federal reserved lands or those arising on reserved lands.

Mr. ENERSEN. Correct.

Senator BURDICK. And whether it is the U.S. Government or an individual or a corporation, they would have to apply for and get title to the water right.

Mr. ENERSEN. If they want the protection of State law, of course they would.

Senator BURDICK. That is all. Thank you.

Senator KUCHEL. So that there may be no misunderstanding, however, it is not true that in a given instance would such a problem as our colleague from North Dakota has described that Congress could determine a present requirement on the part of the U.S. Government with respect to territory in a reserved public land area and determine also that the waters there would be committed to the State board and Federal Board?

Mr. ENERSEN. To the extent not already appropriated.

Senator KUCHEL. Precisely.

Mr. ENERSEN. Yes.

Senator BURDICK. We do not make any exception like this in legislation.

Mr. ENERSEN. Pardon?

Senator BURDICK. We don't make an exception like this in this legislation before us.

Mr. ENERSEN. No, this legislation, if adopted, would simply place those Federal lands back in the same category just like you said before.

Senator KUCHEL. That is right.

But is it not true that where we say in the bill "Any right claimed by the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with the procedure established by the laws of that State." That is to say, to the extent that the Federal Government claims under State law.

Senator BURDICK. To the extent the Federal Government has a right under the State law.

Senator KUCHEL. No, to the extent it claims a right under the State law. It may still claim under Federal law.

Mr. ENERSEN. The protection of the State law is a valuable thing in water rights. You have a priority system usually dependent upon the time when the water is put to use or the date when the application is filed, and it is not merely a burden on the Federal Government to go to the State water rights board and seek a water right—it is a benefit. By doing so they get the protection of the law. Just as Senator Kuchel said a moment ago, they get the protection of the recording act as when a private party files a deed and gets title to land.

Thank you very much for your patience.

Senator Moss. Thank you, Mr. Enersen. We do appreciate your statement.

(The resolution referred to follows:)

RESOLUTION OF THE IRRIGATION DISTRICTS ASSOCIATION OF CALIFORNIA

Whereas the Irrigation Districts Association of California has consistently urged Federal recognition of the increasing need for water, and settlement of Federal-State problems in this field; and

Whereas there now exists considerable uncertainty as to the manner of establishing property rights in the diversion, use or storage of surface and underground water in the several States; and

Whereas this uncertainly arises from the fact that the Congress of the United States, although it has deferred to them, has not clearly manifested an intention to recognize the laws of the several States as to the appropriation, diversion, and use of surface and underground waters; and

Whereas this uncertainty gives rise to a clash of interests between the citizens of the several States and the U.S. Government, its agents and licensees as to the right to divert, use, or store the surface and underground waters within the territorial limits of the said States and causes delays in starting or even failure to start essential water conservation projects in the semiarid areas of the United States; and

Whereas it is in the interest of all that an orderly and definite rule and the supporting administrative procedure be established to protect valuable property rights in the diversion, use, or storage of the surface and underground water of the several States herein mentioned; and

Whereas S. 1275 introduced by Senator Thomas H. Kuchel and coauthored by Senators Moss and Jordan has the following primary purposes; (1) To assure payment of just compensation whenever the United States impairs a valid water right held under State law; (2) To require judicial determination through condemnation proceedings of the value of such rights if agreement cannot be reached; (3) To recognize in connection with Federal projects in the West the same rule as generally applies under State law as to preferential consumptive uses by agricultural and homes; (4) To make clear the fact that setting aside of Federal land does not set aside water arising on or flowing through such land: Now, therefore, be it

Resolved, That the Irrigation Districts Association of California approves the purposes of stated above and urges the Congress of the United States to enact S. 1275 declaring it to be the policy of the Congress that the laws of the several States shall be the means and method of establishing property rights in the appropriation, diversion, use or storage of surface and underground waters within the territorial limits of the respective States and providing that such laws shall be binding upon the United States and all of its officers, employees, and licensees.

Senator Moss. We have several statements here, we will print at this point. Some of the witnesses have had to leave.

The first statement is from Randolph Hodges for the Florida Board of Conservation.

We also have a statement of Raleigh Robinson, of Tennessee, director of water resources of department of conservation and commerce. We will insert these statements at this point.

(The statements referred to follow:)

STATEMENT OF RANDOLPH HODGES, DIRECTOR, FLORIDA BOARD OF CONSERVATION

Water is literally Florida's economic lifeblood. It provides recreational opportunities which attract millions of tourists; it nourishes our fruit and vegetables that sustain the Nation during winter months; it serves in myriad ways our rapidly growing industrial complex, and it is the vital factor of life to our burgeoning cities, towns, and villages. Presently and into the foreseeable future, Florida has ample water resources to meet all requirements, if the resources can be distributed in time and place to areas of need. Florida is expending every possible effort, both independently an in cooperation with agencies of the Federal Government, to accomplish these ends.

Inevitably, however, as our unprecedented growth continues, a time will come when in some areas there will not be enough water to satisfy all users and rights to use water will become of great concern. When this occurs, it is vitally important that the allocation of the available supply should be administered under the property laws under which the resources have been developed. Florida statutes include a declaration of policy which recognizes the rapid growth of the State in population, agriculture, and indstry and that the water resources must be protected, conserved and controlled to assure the reasonable and beneficial use in the interest of the people of the State. The statutes state that the waters of the State of Florida are a natural resource and that their control and development is within the jurisdiction of the State. Further, the State in exercising its powers may establish measures to use and protect the waters.

Florida statutes, while stating that the State's water resources shall be put to beneficial use and may be allocated in a fair and equitable manner, recognize that the property rights of persons owning land and exercising existing water rights appertaining thereto shall be respected and such rights shall not be restricted without due process of law divested without payment of just compensation. The State also has powers under the water resources law to authorize diversion and nonriparian use of surplus waters while still protecting the property rights of the riparian owners.

Many of Florida's surface streams border or flow from or into Federal lands such as national parks, national forests, migratory game refuges, fish and wildlife management areas and military reservations. These Federal installations all require water for which their rights are established under State law. If these rights should be altered or extended under Federal law, it would be at the expense and ultimate detriment of adjacent and downstream water users. This could result in economic chaos to private industry established with a clear understanding of their rights under the State law.

It is important that the established water law provide broad flexibility to meet future requirements, but it must be responsive to the needs of the users without transgressing on individual property rights. The State is close enough to the people to fulfill these requirements, and the Florida water law provides the desired flexibility. All of this could, however, be nullified by a Federal court decision imposing Federal water law in place of Florida law. Accordingly, we urge this committee, and, through you, the Senate of the United States to give favorable consideration to S. 1275 in order to affirm the rights of the States to administer their resources in the ways best suited to their individual needs.

STATEMENT OF RALEIGH W. ROBINSON, DIRECTOR, DIVISION OF WATER RESOURCES, TENNESSEE DEPARTMENT OF CONSERVATION, NASHVILLE, TENN.

The State of Tennessee has a strong interest in the provisions of S. 1275, and has been concerned for some time. House Joint Resolution No. 45 of the 1959 Tennessee General Assembly memorialized "* * * the Congress and President of the United States to safeguard and preserve established State and individual rights to the use of water within the separate States." Recent court decisions and administrative acts of some of the Federal agencies are of grave concern, if Tennessee is to continue to administer intrastate waters within its own boundaries. Chapter 324 of the Tennessee Public Acts of 1963 requires anyone who withdraws over 50,000 gallons of water in 1 day to register such withdrawal with the division of water resources. Pursuant to a questionnaire under this act on September 20, 1963, one of the Federal agencies replied as follows, "In transmit-

ting this information pursuant to your request, however, it should be recognized that the Commission does not consider that any of the activities of Carbide under its contract with the Commission involving the use of water are subject to the provisions of Tennessee statutes or of any implementing regulations. Submission of the enclosed questionnaires should not be viewed as a 'registration' under State statutes or regulations." Another Federal agency now administering thousands of miles of shoreline and who make large withdrawals of water verbally State that information will be given but that they do not recognize the provisions of chapter 324 as applying to them. This same agency in a publication of March 1963 on page 57 stated that they had the "* * * responsibility to protect the objectives for which the public investment was made and [was] delegated specific authority to make certain that conflicting activities of others would never prevent or impair their achievement." Should such a statement be true, the State, in the control of water, could only operate as an arm of a Federal agency.

The State of Tennessee is active in the field of water resources. The division of water resources, now with engineers, geologists, and hydrologists was organized in 1957 for the purpose of maintaining a perpetual inventory of the existence, availability, and uses of water along with the identification of conflicts in the uses of water and other water problems. It is the further responsibility of the division to make recommendations as to the Tennessee law of water rights and whether or not there are to be administrative controls over the uses of water. We have actively participated in the Interstate Conference on Water Problems and endorse the action of that group as it applies to S. 1275. The early passage of this legislation is of great importance. House Joint Resolution No. 45 is submitted as part of the record.

Senator Moss. Mr. Harry L. Graham, legislative assistant to national master, National Grange.

We are very glad to have you, Mr. Graham. We had another representative of our national farm organizations and we are pleased to hear from you, sir.

STATEMENT OF HARRY L. GRAHAM, LEGISLATIVE ASSISTANT TO NATIONAL MASTER, NATIONAL GRANGE

Mr. GRAHAM. Thank you, Mr. Chairman.

I have listened to this discussion for a couple of days and I hope the committee is not any more confused about it than I have been. I am particularly concerned about who speaks for California, if anybody does.

At the beginning I would like to read into the record this telegram which I received from the California State Grange.

Senator Moss. All right, sir. You may proceed in that manner.

Mr. GRAHAM (reading):

SACRAMENTO, CALIF., *March 9, 1964.*

THE NATIONAL GRANGE,
Washington, D.C.:

California State Grange and its 397 subordinate granges throughout California oppose Senate bill 1275 in its present form. Its provisions are distinctly aganist conservation of the various States as well as national water resources. The Grange, since its inception in California over 90 years ago, has consistently endorsed the preservation of the Nation's water resources as belonging to all the people and that they be held in perpetuity for the benefit of all the people. Present bill S. 1275 would open the doors to private and other aggressive interests to appropriate waters that should held for the benefit and use of all our inhabitants. We urge all interested in actually conserving public water resources to oppose its passage.

J. B. QUINN,
Master, California State Grange.

Mr. GRAHAM. Let me say that my testimony is not intended to be qualified testimony in terms of the water laws of the Federal Government or of the State of California. Our interest rather is in the general trend of this legislation and our concern is in that area.

For almost 100 years the National Grange has worked for the conservation of the land and water resources of the Nation. Indeed, for almost half a century it was first the lone and always the predominant voice.

Under its leadership much of the present law had its beginning. Thus we developed our national forests, national parks, and reserves of minerals, forests, and water.

We have witnessed many attempts to raid these reserves. Some legal and some illegal, and have opposed them. The legislation before this committee, regardless of its stated purpose, "to clarify the relationship of the interests of the United States and of the States in the use of the waters of certain streams," unfortunately, in our opinion, clarifies it too much. Under the language of the bill, when the intricate legal questions which this legislation admittedly involves are settled, State laws would remain paramount and the Federal legislation, which has long protected the interests of the "people," would lie prostrate before the idol of "States rights."

Leaving aside the substantial arguments against this legislation contained in the legal memorandum filed by the Department of Justice, the language which says, "the withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter made, shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation" is so all-inclusive of time and area that existing law would be a shambles and the resources and reserves of the Nation would be a wasteland up for grabs.

May I interject to say that we are especially concerned about the right of anyone to acquire water pursuant to State law after the establishment of a reserve or the withdrawal of land. This, if carried to its logical conclusion in other areas of Federal ownership of land and other resources, would make meaningless the contracts that were involved between the Federal Government and the States or the commitments or the ownership claimed by the Federal Government.

Senator MOSS. Well, if the Federal Government wished to reserve some lands and some water that was then appropriated, at the time they wanted to make the reserve, they would simply have to file an application with the State agency at that point and it would then be protected by State law as being reserved to the Federal Government.

Mr. GRAHAM. The language of the bill, Mr. Chairman, says that after this was done, after the withdrawal or after the reservation, if someone was to perfect his claim pursuant to State laws, that this would take precedence over the Federal.

Senator MOSS. I think that is true if the Federal Government neglected to take this action. The thing is, the Federal Government is given a separate status that should be exercised in an orderly manner just like everyone else within that State where the water rights are recorded.

Go on with your statement.

Senator BURDICK. Mr. Chairman, at this point you raised an interesting point in my mind. Suppose that a Federal agency made an application for a State water right. What would happen if the State agency denied it?

Mr. GRAHAM. This is the whole point, it seems to me, of the legislation. The Federal Government has no assurance that the State would grant the right. The language of this legislation, as we read it, indicates that land which, if the Supreme Court decision are correct, belongs to the people, belongs to them regardless of whether it is recorded according to State laws or not.

Senator Moss. Well, we are not going to presume that the State capriciously would turn down an application to the Federal Government. If the water existed and was unappropriated, we would presume it would do that for a private individual if he applied for it, and we presume that they are going to act regularly and in an orderly manner if it happens to be the Federal Government.

Mr. GRAHAM. By this same token, what is the reason to presume that the Federal Government would act any differently if the State would make an application?

Senator Moss. Well, all right. If we changed it all around and abolished all the State control of water and said from here on the Federal Government will exercise control, that is another thing, it is true. Here you have the dual sovereignty.

You go ahead. I do not want to interrupt your statement.

Mr. GRAHAM. To us it is important, despite the denials of the sponsors of this legislation, that it is not intended to change the acreage limitations under the Federal reclamation law, that it does not favor private power over public power, that it would not affect the public agency preference under Federal power marketing programs, the fact remains that a lot of competent legal minds hold that the proposed legislation could be so interpreted regardless of the intent of the bill.

If it can be so interpreted, we do not believe that we can be so naive as to think that it would not be so interpreted by some people.

This legislation does not only protect public irrigation projects or State interests, it throws the arm of Federal protection around anyone or any group who would acquire water rights pursuant to State laws and places them above the Federal law and national interest.

This it seems is a radical departure from constitutional law and judicial precedents. It is a dangerous and even fatal blow to many of our most treasured heritages and lays our necessary reserves open to speculative exploitation.

I am skipping now to the bottom of page 3 of my prepared statement.

You will remember that the National Grange had some experience in this matter in recent years and we lost a building in Washington. I notice today they are starting to tear the roof off of that original building and destroy it. We never questioned the right of the Federal Government to so act. After working 5 years perhaps I am a little more suspicious but I have seen in areas where the Federal Government is getting ready to appropriate power for the use of the Government some pretty unusual procedures followed by the people who owned this property of trying to prove an increment of value far beyond that which was justified by sales in the surrounding areas. Be-

cause of some experience of this kind I am suspicious of any kind of a proposal that would permit the development of claims against the Government which seem to be unjustified.

Now it seems to us that one of the major problems that is involved here is this definition of navigational rights. I am now laying aside my prepared statement.

If the longstanding contention that navigational rights belong to the Federal Government is true, then are we going to change this program of navigational rights—this position—or do we really need to redefine what is navigable streams? If the definition were clarified in the case of water which has arisen in these mountains which is, obviously, not navigable, dropping some 40 percent on the grade—if that is clarified, than the obvious requirement that the Federal Government be forced to pay for the rights that would have been developed would come into play and the ordinary procedures of acquiring land of eminent domain would also require that the Federal Government pay for the loss of the owners of these rights.

In other words, what I am trying to say is that there are ways of approaching this without this all-inclusive and widely embracing type of statement at the beginning of this legislation which would solve the issues and do it without quite so much threat to what seems to us to be the legitimate interests of the people of the United States in terms of national forest and these related activities of the Federal Government.

Now if Congress could quickly determine the right of the Federal Government in cases of argument between them and the State, then it seems to me it is a reasonable question to ask why Congress could not also determine in this same period of time the question of the legitimate needs of State or local areas that are in dispute. It seems to me also a little bit unrealistic to talk about the protection of the State laws according to the Federal Government when the argument is that the Federal Government is all powerful at the same time. That is exercising extremely great power.

We have difficulty in understanding why it is to be believed that the State is more beneficent than the Federal Government or vice versa. We think there are some arguments to be entertained both ways. Frankly, I am one of these people, and I think the National Grange shares this opinion. The belief of this open warfare or open hunting season on the Federal Government that seems to be in vogue today is a very easy thing to do, of course, but I do not think it necessarily has added a great deal to the dignity or the respect of the Federal Government.

Frankly, I have a great deal of respect for the people who make the laws of this Nation and who sit in the Senate and in the Congress, and I am not nearly as afraid of the Federal Government as some people are. I recognize there are some bureaucratic decisions that can be made that sometimes are very exasperating but I do not think they are confined to the Federal Government; they have been in State governments also. This is the kind of an oversimplication which seems to us to not add too much to the ultimate solution of the problems which are very complexing and which you gentlemen recognize as very serious to spend the amount of time that you are spending on it.

Senator Moss. Thank you very much for your statement.

Let me add that I have no fears at all about the Federal Government. I think it is a government of the people fully as much as any State government and in some respects at times seems more responsive than some State governments seem to be, but I do not think that is the point here.

I do not think that the purpose of this legislation derives from any distrust of the motives of the Federal Government as such. This is an attempt to work out a solution to a problem that has grown by reason of some court decisions where it is uncertain as to how water rights are to be acquired, protected, and utilized. We get this withdrawal idea that leaves an indefinite power, as it were, in the Federal Government and this is to try to make definite so we have certainty and know how to operate with water rights.

I appreciate your point of view and I appreciate your concern with the problem, the concern of the Grange. We will consider your statement very carefully as we wrestle with this problem and try to come up with a bill, if we can, which will accomplish the objectives I think that all of us have in mind and not do violence certainly to the rights of the Federal Government or the people in any respect.

Mr. GRAHAM. I think this is correct. We have no fear of the judgment of the committee or of the Senate on this when this is finally thrashed out; we have respect for both. However, the bill as it was presented is the bill that we are testifying on and we are hoping that it does not come out of the committee like it went in. I am pretty sure there will be testimony, and it probably won't.

This is a problem which seems to us to require rifle rather than shotgun treatment, and we simply are expressing some concern that it does not get lost in this general approach from the point that the specifics are clarified. The original purpose of the bill is not accomplished when making it so general that we have added confusion to another type of confusion by a general type of legislation.

Senator MOSS. Thank you very much, Mr. Graham. We appreciate your statement. Your full statement will be made part of the record.

(The statement referred to follows):

STATEMENT OF HARRY L. GRAHAM, LEGISLATIVE ASSISTANT, NATIONAL GRANGE

My name is Harry L. Graham, legislative assistant to the master of the National Grange.

For almost 100 years the National Grange has worked for the conservation of the land and water resources of the Nation. Indeed, for almost half a century it was first the lone and always the predominant voice.

Under its leadership much of the present law had its beginning. Thus we developed our national forests, national parks, and reserves of minerals, forests, and water.

We have witnessed many attempts to raid these reserves, some legal and some illegal, and have opposed them. The legislation before this committee, regardless of its stated purpose "to clarify the relationship of the interests of the United States and of the States in the use of the waters of certain streams" unfortunately clarifies it too much. Under the language of the bill, when the intricate legal questions which this legislation admittedly involves are settled, State laws would remain paramount and the Federal legislation which has long protected the interests of the "people" would lie prostrate before the idol of "State rights."

Leaving aside the substantial arguments against this legislation contained in the legal memorandum filed by the Department of Justice, the language which says, "the withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter made, shall not affect any right to the use of water ac-

quired pursuant to State law either before or after the establishment of such withdrawal or reservation" is so all-inclusive of time and area that existing law would be a shambles and the resources and reserves of the Nation would be a wasteland up for grabs.

Despite the denials of the sponsors of this legislation that it is not intended to change the acreage limitations under the Federal reclamation law, that it does not favor private power over public power, that it would not affect the public agency preference under Federal power marketing programs, the fact remains that a lot of competent legal minds hold that the proposed legislation could be so interpreted regardless of the intent of the bill.

Is there anyone among us who is so naive that he does not believe that with the money involved someone won't make this interpretation?

This legislation does not only protect public irrigation projects or State interests, it throws the arm of Federal protection around anyone or any group who would acquire water rights pursuant to State laws and places them above the Federal law and national interests.

This is not only a radical departure from constitutional law and judicial precedents, it is a dangerous and even fatal blow to many of our most treasured heritages and lays our necessary reserves open to speculative exploitation.

In order to do this, the people of the United States are asked to freely relinquish proprietory rights which the Supreme Court has said are theirs. Even the States under this law would be powerless to protect themselves from anyone who obtained these rights pursuant to the State laws.

If water rights are no more difficult to claim than mineral rights in some Western States, it becomes almost a "finders keepers, losers weepers" situation. The obvious result would be chaos.

Future Federal development of water resources would then be dependent on the ability fo the Federal Government to cut through the tangle of divergent and sometimes opposing State laws, taking unpredictable amounts of time and requiring an astronomical expenditure of public funds to buy back that which the courts have held already belongs to the people.

To repeal the navigational rights held by the Federal Government would be unthinkable.

The second clause of paragraph (4) of section I would change for the worse the law and practices of eminent domain. The suggestions would not grant one who claimed to be aggrieved any protection not already provided by law.

You will remember that the National Grange had some experience in this matter in recent years. While we did not like the action of the GSA we did not contest their right to so act.

Indeed, several years' experience as a condemnation appraiser who saw many obvious attempts to claim an unjustified increment in the value of property convinces me that the present procedures give the maximum protection to both the Government and the owner. If it does not, then this law can be clarified without throwing the baby out with the bath.

Furthermore, if it is possible to separate "water rights" from the reserve or withdrawn land, then can it not also be possible to separate oil and mineral rights, as well as timber and grazing rights from the land? Where would this procedure end except with the exploitation of all these rights? Can we maintain a Federal park system, a forest system, or any other such system with this law?

As another point, we would propose that there is nothing about a State law that makes it automatically better than a Federal law. Indeed, a pretty good case could be made of the opposite point of view.

There is little to suggest that rights of people are more secure under State law than Federal law as the present debate in the Senate indicates all too well.

The proper division of the powers of the State and Federal Governments does not mean that there are or should be great voids where there is no clear-cut ultimate authority. The concept that the State has rights in this field which are paramount over the national interests is a dangerous precedent to establish by law.

What we need, if anything, is the clarification of condemnation procedures, the expediting of claims, and the preservation of the right of those whose property is taken to a just and reasonable compensation. This would clarify the law and could very well serve the national interests.

Making the Federal Government subservient to the various State governments and anyone who had followed State procedures would not be in the best interests of the people of the United States.

The National Grange, therefore, enters a vigorous dissent and urges the sponsors of this legislation to pursue another course to accomplish their stated aims, one not so fraught with danger or so full of legal entanglements.

Senator Moss. Our next witness is Richard W. Dickenson, representing the National District Attorneys' Association.

If you will come forward, Mr. Dickenson, you will be recognized.

STATEMENT OF RICHARD W. DICKENSON, REPRESENTING THE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION

Mr. DICKENSON. Mr. Chairman and members of the committee, I am Richard W. Dickenson and I appear here on behalf of San Joaquin County and also on behalf of the National District Attorneys' Association, of which you served as president for 2 years and my good friend Hal Kennedy here was also president. That association, at its recent midwinter meeting in Phoenix, adopted, by unanimous vote of the delegates present, a resolution in support of this bill, and I am filing with you that resolution. I would ask that it be included in the record of these proceedings.

Senator Moss. It will be included at this point.

(The document referred to follows:)

RESOLUTION OF THE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION

Whereas this association is of the opinion that a Federal-State conflict exists with respect to water rights in the Western States; and

Whereas this association believes that said conflict is prejudicing the rights of the water users of the Western States and is creating uncertainties in the law which will prevent the most beneficial use of the water resources of the Western States and Nation; and

Whereas this association has been advised and believes that the legal theories proposed and advanced by attorneys representing the U.S. Government in certain recent legal disputes would be most harmful to local interests and to the Nation as a whole if accepted as law; and

Whereas this association has been advised and believes that the holdlings in the so-called *Pelton Dam* case (*Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955)) and the so-called *Hawthorne* case (*Nevada* v. *United States*, 165 Fed. Supp. 600 (D. Nev. 1958), affirmed on other grounds, 279 F. 2d 699 (9 Cir. 1960)) represent a departure from the traditional view which recognizes local control over water resources and, also, that the holdings in these cases constitute a threat to the most beneficial and reasonable use of local water resources; and

Whereas certain agencies of the Federal Government refuse to acknowledge State control over water resources despite the fact that Congress has on several occasions passed laws which recognize the authority of the States to regulate and control the use of water; and

Whereas this association believes that water law is real property law and that real property law is a matter for local, not Federal, control; and

Whereas on March 10 and 11, 1963, at Los Angeles, Calif., there was held a western water law symposium in connection with the midwinter conference of the National District Attorneys' Association and at that symposium on March 11, 1963, the Honorable Richard D. Andrews, minority counsel of the Senate Interior and Insular Affairs Committee, presented a bill which would have the effect of repealing the decision of the *Pelton Dam* case and of requiring the United States to pay just compensation prior to the taking of water rights and requiring that the United States in acquiring water rights for projects in areas west of the 98th meridian proceed, in all instances, in accordance with applicable State law; and

Whereas at the conclusion of said symposium on March 11, 1963, a resolution was adopted by unanimous vote of those present urging the introduction in the Congress and the adoption by it of that bill; and

Whereas subsequently on March 14, 1963, a resolution was adopted by unanimous vote of the delegates present at the midwinter conference of the National District Attorneys' Association at Los Angeles, Calif., also urging the introduction in the Congress and the adoption by it of the same bill; and

Whereas subsequently on April 4, 1963, the Honorable Thomas H. Kuchel, for himself, the Honorable Len B. Jordan of Idaho, and the Honorable Frank E. Moss of Utah, introduced S. 1275 in the 88th Congress, 1st session, which bill is identical with the bill presented at the western water law symposium by the Honorable Richard D. Andrews: Now, therefore, be it

Resolved, That the National District Attorneys' Association hereby expresses its support for S. 1275 and urges its adoption by the Congress, and be it further

Resolved, That copies of this resolution, duly certified by the secretary of this association, shall be transmitted to the President of the United States, the Speaker of the House of Representatives, the Secretary of Interior of the United States, the Honorable Thomas H. Kuchel, the Honorable Len B. Jordan, the Honorable Frank E. Moss, the chairmen of the committees of the Senate and House of Representatives on Interior and Insular Affairs, the Honorable Richard D. Andrews and to the National Reclamation Association, the National Association of Counties, California State Chamber of Commerce, Irrigation Districts' Association of California, California Farm Bureau Federation, County Supervisors' Association of California, League of California Cities, Sacramento River & Delta Water Association, Department of Water Resources of the State of California, the Council of State Governments, the Interstate Conference on Water Problems, the Feather River Project Association, the chairman of the Section of Mineral and Natural Resources Law of the American Bar Association, the Delta Water Users Association, and to the National Association of Attorneys General.

The above resolution was adopted by unanimous vote of the delegates present at the midwinter conference of the National District Attorneys' Association on March 5, 1964, at Phoenix, Ariz.

Mr. DICKENSON. I would also like to file with you a statement which I have prepared on behalf of San Joaquin County to which is attached the brochure on "The Delta and its Future * * * if any!" and ask that they be included in the record.

Senator MOSS. Your statement may be included in the record. The brochure will be made part of the files on this bill.

(The statement referred to follows:)

PREPARED STATEMENT OF RICHARD W. DICKENSON, COUNTY COUNSEL OF SAN JOAQUIN COUNTY, CALIF.

Mr. Chairman and members of the committee, I wish to thank you for the opportunity to present this statement to you today. My name is Richard W. Dickenson. I am county counsel of San Joaquin County, Calif., and I am ex-officio counsel for the San Joaquin County Flood Control and Water Conservation District which is a countywide district created by chapter 46, California Statutes of 1956, first extraordinary session, and governed by the Board of Supervisors of San Joaquin County. I appear here today at the direction of my board of supervisors.

San Joaquin County comprises approximately 926,720 acres of which approximately 179,000 acres are located in the delta. Of the total acreage in the county 614,170 acres are devoted to agriculture. The total value of the crops produced in San Joaquin County for the calendar year 1963 is approximately $208,289,224. San Joaquin County ranks fifth in value of agriculture produced in the Nation.

The delta is located at the confluence of the Sacramento River and the San Joaquin River. The waters from these two rivers join and flow westward from the delta into San Francisco Bay. The entire delta comprises some 738,000 acres of extremely fertile land. The 700 miles of waterways in the delta provide abundant recreational opportunities and the 50 islands of the delta contain peat soil with a fertility unequaled anywhere in the world. The economic security of San Joaquin County is dependent upon the agricultural and recreational

assets of the delta and, in turn, these assets are dependent upon the availability of an adequate supply of good quality water.

The delta will play a significant role in the future development of California's water resources because all water to be transported from northern California to southern California must, of geographical necessity, pass through or around the delta.

San Joaquin County fully supports S. 1275. We believe that S. 1275, if adopted into law, will be beneficial to our county, or State, and to the Nation as a whole.

We in San Joaquin County are dependent upon an adequate supply of water of good quality, sustained by water rights, which we view as being property rights entitled to the full protection of law.

We are alarmed by the fact that the U.S. Bureau of Reclamation has taken the official position before the California State Water Rights Board that that "board is without power to impose any conditions in permits to be issued to the United States upon approval of its applications" to appropriate water in California (decision D 990, pp. 22–27, State water rights board, adopted February 9, 1961). This position was set forth in the brief of the United States of America filed in the matter of applications 5625, etc., to appropriate unappropriated water from the Sacramento River and Sacramento-San Joaquin Delta in furtherance of the Federal Central Valley project which lead to the decision in D 990 of the State water rights board and I append, as exhibit A, to the original of this statement a certified copy of excerpts from pages 27, 31, 33, and 56 of the brief of the United States of America, setting forth in detail the argument made by the United States on October 10, 1960.

We are further alarmed by the fact that, subsequent to a determination by the State water rights board that the Bureau of Reclamation must comply with State law and procedure in acquiring rights to appropriate water, officials of the Bureau of Reclamation and the Department of Justice have stated that the Bureau of Reclamation is not legally bound to adhere to conditions imposed by the California Water Rights Board in permits issued to the Bureau of Reclamation. Many of such conditions are designed to protect the rights of water users in San Joaquin County. This argument was most forcefully made by counsel for the Bureau of Reclamation of the U.S. Department of Interior in a case pending before the State water rights board concerning Applications 18115 and 19451 to appropriate water from Stoney Creek. In this hearing when Mr. Martin McDonough, counsel for the Sacramento River and Delta Water Association, which protested the applications, asked that the above mentioned decision D 990 of this board be received in evidence, Mr. Clark, counsel for the Bureau of Reclamation, objected to its introduction "because the decision itself is void on its face in that the board has exceeded its jurisdiction in imposing conditions and reservations and restrictions on the activities and the responsibilities of the United States, and that as such it is an absolutely void decree and has no force or effect whatsoever." In response to an inquiry of the chairman of the State water rights board as to whether that was his personal opinion or the Government's official position Mr. Clark replied that it is the Government's official position and also that the Government did not go into court to contest the decree as "it is void insofar as it contains those provisions, and is not essential to it." I append, as exhibit B, to the original of this statement a certified copy of pages 70 and 71 of the transcribed report of the hearing held November 29, 1961, before the State water rights board on Applications 18115 and 19451.

We are further alarmed by the position taken by representatives of the U.S. Department of Justice in the brief filed in the case of *City of Fresno* v. *State Water Rights Board*, No. 105245, in the Superior Court of the State of California in and for the county of Fresno. That case involved the right of the city of Fresno to use water from the San Joaquin River now impounded at Friant Dam, which had been constructed by the United States as part of the Central Valley project of the Bureau of Reclamation. The United States contended therein that all unappropriated water in the State of California is federally owned. In its brief the United States took the view that the Federal Government acquired the right to use all unappropriated waters by the Treaty of Guadalupe Hidalgo, whereby the United States acquired from Mexico the territory now comprising the State of California. It was argued by the United States that when the United States acquired the territory now comprising the State of California, it acquired all lands and all rights to use water within the State and that this ownership, as to unappropriated waters, has not been

divested pursuant to any act of Congress. The brief of the United States further argues that there was no unappropriated water in the San Joaquin River after the United States constructed and closed Friant Dam. The Federal Government argues that the mere act of closing the dam on October 20, 1941, constituted an appropriation of water by the United States. Thus, the United States reasons that, since there was no unappropriated water in the San Joaquin River, there was nothing for the State water rights board, whose jurisdiction depends on there being unappropriated water, to decide. This argument means that the United States in constructing a reclamation project would not have to comply with State law although required to do so pursuant to section 8 of the Reclamation Act of 1902. It means that in this instance the State of California would not have control, insofar as the Federal Government is concerned, in the utilization of unappropriated water within the State. A dismissal with prejudice in the *Fresno* case was filed on January 19, 1961. Thus the argument made in the *Fresno* case will not be pursued in that particular action; however, undoubtedly it will be raised again. The argument was most recently raised in the brief of the United States of America in connection with the hearings on applications 18812 and 18813 of the United States of America to appropriate unappropriated water of the Calaveras River, said brief being filed on June 19, 1963. I append, as exhibit C, to the original of this statement a certified copy of the introduction page of said brief wherein this argument is repeated.

We are alarmed by the so-called *Pelton Dam* case (*Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955)) and the so-called *Hawthorne* case (*State of Nevada ex rel. Shamberger* v. *United States*, 165 F. Supp. 600 (D. Nev. 1958), affirmed on other grounds in 279 F. 2d 699 (9th Cir. 1960)), which constitute a threat to the traditional right of a State to control and regulate intrastate streams and ground water.

We are alarmed by the case of *Dugan* v. *Rank* (372 U.S. 609, 10 L. Ed. 2d 15, 83 S. Ct. 999 (1963)) which the Supreme Court of the United States finally settled in 1963 after 16 years of costly litigation. That case indicates that, when the Bureau of Reclamation takes water rights on the San Joaquin River by diminishing the flow of the stream, the injured water users may not, because of the doctrine of sovereign immunity, sue the United States in a Federal district court, but must prosecute their claims, if at all, in the U.S. Court of Claims. In most cases, such a requirement places an unbearable financial burden on the individual landowner who has been harmed by the activities of the United States. The Supreme Court in the *Dugan* case pointed out that consent is given by statute to join the United States as a defendant in any suit for the adjudication of rights to the use of water in a river system but that all of the claimants to water rights along the river must be made parties in order for that statute to apply. This means, in a stream such as the San Joaquin River or the Sacramento River, that many thousands of landowners would have to be joined after an exhaustive legal and engineering investigation has been made to ascertain their names.

There is a serious problem existing in the lower San Joaquin River by reason of the fact that an adequate quantity of water and particularly water of good quality have been lacking in that area for many months during dry years. The problem of water quality has been aggravated by operations of the Central Valley project of the U.S. Bureau of Reclamation in that water provided by the Delta Mendota Canal is utilized on the west side of the San Joaquin Valley on lands of high mineral content; thus the return flow from these lands of drainage water is of similarly high mineral content, and this in turn results in a dangerously high mineral content in the water of the lower San Joaquin River.

As a result of the dry year of 1961 particularly, severe damage was done to field crops, row crops, and orchards in those lands taking water from the lower San Joaquin River. To show the critical situation that existed in 1961, which may easily happen again in another dry year, I quote from a report which I made on May 1, 1961, to the Board of Supervisors of San Joaquin County.

"On April 19, 1961, the flow in the San Joaquin River at the Vernalis Gaging Station reached 82 cubic feet per second. On that same day the total dissolved solids in the San Joaquin River at the Banta-Carbona Irrigation District intake canal reached 1,124 parts per million. Since that date the amount of water in the river has increased, and the amount of total dissolved solids has decreased. We are, however, advised by Mr. Allan Hall, superintendent of the Banta-Carbona Irrigation District, that the improvement in quantity and quality which has taken place in the last few days is caused by the recent rains, and further that he anticipates that by July the conditions which prevailed on April 19,

1961, will have once again been reached. We are attaching hereto a chart which shows the amount of total dissolved solids contained in the flow of the San Joaquin River at the Banta-Carbona Irrigation District intake canal and the total cubic feet per second in the San Joaquin River at the Vernalis Gaging Station (commonly known as the Durham Ferry Bridge).[1] Figures are not available for all days. However, the figures are sufficiently complete to give a good indication of the serious problem which prevailed during the month of April, a problem which is expected to occur again for most of the coming summer months. In addition, we have been furnished with laboratory reports analyzing the San Joaquin River water for certain days during the month of April. A typical example is the attached report for April 24, 1961.[2] The report was prepared by the Nelson Laboratories of Stockton. It should be noted that column 2 in the attached report indicates river water. The most significant factor with respect to column 2 is that it indicates 428 parts per million of chlorides which are chemicals of an extremely damaging nature to crops and trees. In order to compare the existing water quality conditions in the lower San Joaquin River, the best reference point is to the quality criteria of the State of California, Department of Water Resources. Such criteria are contained in Bulletin No. 89 entitled 'Lower San Joaquin Valley Water Quality Investigation' of the department of water resources. At page 80 is said report the following chart is shown indicating the classification of water bearing dissolved solids:

"Qualitative classification of irrigation waters

"Chemical properties	Class 1—Excellent to good	Class 2—Good to injurious	Class 3—Injurious to unsatisfactory
Specific electrical conductance, in micromhos at 25° C.	Less than 1,000	1,000 to 3,000	More than 3,000.
Total dissolved solids in parts per million	Less than 700	700 to 2,000	More than 2,000.
Chlorides, in parts per million	Less than 175	175 to 350	More than 350.
Sodium in percent of base constituents	Less than 60	60 to 75	More than 75.
Boron, in parts per million	Less than 0.5	.5 to 2.0	More than 2.0.

"We are advised that the above chart, if anything, is substantially less than conservative. It is the opinion of many, including Mr. Austin Mahoney, agricultural commissioner of San Joaquin County, that a total of more than 500 parts total dissolved solids per million is injurious."

The Bureau of Reclamation will sell to any of the landowners in the area of the lower San Joaquin River any surplus water that it has in the Delta Mendota Canal, but this is not a firm supply so those landowners cannot be permanently assured of any water therefrom.

Water users in San Joaquin County are aware of the fact that the Bureau of Reclamation is considering plans for the construction of a canal along the eastern periphery of the delta and that, if constructed, the canal would allow the water of the Sacramento River to bypass the delta. The construction of such canal together with existing and planned future diversions from the San Joaquin River, the Sacramento River, and their tributaries would further reduce the available water supply to the delta. The legal remedies available to the water users in the delta for the protection of their interests from Federal encroachment by resort to the courts are of doubtful practical assistance and are little more than theoretical by reason of the great cost involved. Existing and proposed projects affecting the Sacramento-San Joaquin River system will affect the delta in two ways: (1) The delta could be cut off from its historic supply of water, and (2) the delta will have to bear the adverse effect of drainage water of poor quality from the western side of the San Joaquin Valley as well as the incursion of salt water from San Francisco Bay. The delta is an area that cannot be supplied with water of good quality from wells.

Further information regarding the delta is contained in the brochure "The Delta and Its Future—If Any!" copies of which are filed herewith.

We in San Joaquin County believe that S. 1275 would be beneficial to San Joaquin County because it would require the United States to proceed in eminent domain before it takes water rights and would further require it, when it acts

[1] This chart is attached hereto as exhibit D.
[2] This laboratory report is attached hereto as exhibit E.

in a proprietary capacity, to be subject to the provisions of State law. We believe that S. 1275 would thus provide a minimum standard of fair treatment in the event the United States finds it necessary to take or interfere with water rights, which are property rights. The States of the Union, not the Federal Government, are best equipped to regulate and administer property rights.

If you should desire further information regarding any of the problems discussed herein, we in San Joaquin County will be pleased to supply it to your committee.

EXHIBIT A

Certificate 5994
Application 5626, etc.
Permit
License

State of California)
State Water Rights Board) ss.

I, Kathryn Holley, having custody of the files and records of the State Water Rights Board, State of California, do hereby certify that I have carefully compared the attached Xerox copy of excerpts from pages 27, 31, 33 and 56 of Brief of United States of America for Appropriation of Unappropriated Water of the Sacramento River and that the same is a true, full, complete and correct copy of the said pages on file in this office.

(SEAL)

WITNESS my hand and the seal of the State Water Rights Board, State of California, this 26th day of February, 19 64

/s/ Kathryn Holley

Title Supervising File Clerk

RIGHT OF THE CALIFORNIA STATE WATER RIGHTS BOARD TO IMPOSE CONDITIONS

While the Department of the Interior reaffirms its desire to abide by State water laws and to construct and operate projects in cooperation with State and local interests, the State in this instance is without authority or jurisdiction to control, limit, or prescribe the construction by the United States; or to control, limit, or prescribe the manner, method, or extent of operations

of it; or the method by which the United States will perform its functions; or to impose conditions relative to such construction, operation or performance of functions.

Any condition which would be imposed necessarily would be a reference to an event the happening of which would cause the rights vested in the United States by the permits to become forfeited. This we submit the Board has no authority or jurisdiction to do.

Excerpts from Page 27

As was stated at the hearing, the basis of our objection to the imposition of conditions in the issuance of a permit is founded on the Constitution of the United States (R.T. 12,430). Art. IV, § 3 provides that the Congress shall have power to dispose of and make all needful rules and regulations respecting the property belonging to the United States.

Excerpts from Page 31

One of the conditions which have been suggested by protestants is based on section 11460 of the Water Code of the State of California. The suggestion is that the permits be issued on the condition that they are subject to the rights of the watershed of origin of the waters sought to be appropriated. Another condition suggested is a requirement for the release of water for salinity control. The suggested right of the Board to impose such conditions is based upon an interpretation of section 8 of the basic Reclamation law (32 Stat. 390). That

section is not applicable to the United States, nor does it authorize the State to impose conditions on the United States in the construction, operation, or maintenance of federally-owned and operated property:

Excerpts from Page 33

Although the bare legal title to such water remained in the State, it necessarily follows that the actions of the State were such as created a trust for the benefit of whatever entity would construct and operate the Project to bring the benefits to the people of the State, and that since that entity, pursuant to the urgings of the State, is the United States, that the State is holding the legal title in trust, and that the United States is entitled as a matter of law to a permit for the water applied for by the State in these applications.

Excerpts from Page 56

EXHIBIT B

STATE OF CALIFORNIA)
STATE WATER RIGHTS BOARD) ss.

CERTIFICATE 5992
APPLICATION 18115 & 19451
PERMIT
LICENSE

I, Kathryn Holley, having custody of the files and records of the State Water Rights Board, State of California, do hereby certify that I have carefully compared the attached/xerox copy of pages 70 and 71 of Reporters Transcript for Hearing held November 29, 1961 and that the same is a true, full, complete and correct copy of the said pages 70 and 71 on file in this office.

(SEAL)

WITNESS my hand and the seal of the State Water Rights Board, State of California, this 25th day of February, 19 64.

/s/ Kathryn Holley

Title Supervising File Clerk

Sacramento. A. This is the only one we have from Congress that I know anything about.

MR. CLARK: I think that is all.

CHAIRMAN McGILL: Very well. Any questions, Mr. McDonough?

MR. McDONOUGH: No questions.

CHAIRMAN McGILL: Mr. Craig?

MR. CRAIG: No.

CHAIRMAN McGILL: Mr. Alexander?

MR. ALEXANDER: No.

CHAIRMAN McGILL: You are excused. Thank you.

MR. McDONOUGH: I do have a brief offer and statement on behalf of the Sacramento River and Delta Water Association whenever you find it convenient to receive it.

CHAIRMAN McGILL: As soon as Mr. Minasian ---.

MR. MINASIAN: I have completed.

CHAIRMAN McGILL: Proceed, Mr. McDonough.

MR. McDONOUGH: Mr. Chairman, the Sacramento River and Delta Water Association, an organization of water users along the Sacramento River and in the Delta, has protested these applications. A list of the members of the Association is attached to the protest. On behalf of the Association I ask that Decision D-990 of this Board dealing with the disposition of the waters of the Sacramento River be marked for identification as Exhibit "1" and received in evidence.

CHAIRMAN McGILL: Very well. Any objection?

MR. CLARK: I object to the introduction into evidence of the Decision to which Mr. McDonough has just referred because the Decision itself is void on its face in that the Board has exceeded its jurisdiction in imposing conditions and reservations and restrictions on the activities and the responsibilities of the United States, and that as such it is an absolutely void decree and has no force or effect whatsoever.

CHAIRMAN McGILL: Is that your personal opinion, or the Government's official position, Mr. Clark?

MR. CLARK: That is the Government's official position as expressed by me, Mr. Chairman, yes. This Board does not have the jurisdiction to control any operations of the Central Valley Project as is purported to be done in that decree.

CHAIRMAN McGILL: If that be the case I am just wondering why the Government did not go to court to test ---.

MR. CLARK: Because the decree is void insofar as it contains those provisions, and is not essential to it. I will essentially take it to court at this time. In other words, time will not give validity to an invalid provision, and lapse of time will not give it, and the Board does not have the jurisdiction. Merely stating it does not give it that jurisdiction. Here you are getting into the exercising of the Congressionally delegated responsibilities and Constitutionally imposed responsibilities of the United States, and you cannot take those away from the proper administrative officer of the United States.

EXHIBIT C

STATE OF CALIFORNIA }
STATE WATER RIGHTS BOARD } ss.

CERTIFICATE 5993
APPLICATION 18812 & 18813
PERMIT
LICENSE

I, Kathryn Holley, having custody of the files and records of the State Water Rights Board, State of California, do hereby certify that I have carefully compared the attached xerox copy of Introduction page of Brief of the United States of America for the Appropriation of Unappropriated Water of the Calaveras River.

(SEAL)

and that the same is a true, full, complete and correct copy of the said Introduction Page on file in this office.

WITNESS my hand and the seal of the State Water Rights Board, State of California, this 26th day of February, 1964.

/s/ Kathryn Holley

Title Supervising File Clerk

INTRODUCTION

This brief will discuss the evidence presented at the hearing on Applications 18812 and 18813 and present the argument of the United States. The argument will demonstrate that the evidence shows the applicant as a matter of comity has met all statutory requirements of the State of California[1] and that the public interest would be best served by the granting of permits to the United States.

1 The United States is appearing before this Board in conformity with the directive contained in § 8 of the Reclamation Act of 1902 (32 Stat. 390, 43 U.S.C. 372, 383). There is at present a legal controversy as to the legal effect of an appearance by the United States before a State Water Rights Board as an applicant to appropriate water. The legal position of the United States as promulgated by the Department of Justice is well known. The legal argument of the Department is founded on the thesis that the United States was the initial proprietor of lands and waters appurtenant thereto in the Western States and any claim by a state must derive from this Federal title. See United States v. Gerlach Live Stock Co., 339 U.S. 725, 747; Federal Power Comm'n v. Oregon, 349 U.S. 435; United States v. Grand River Dam Authority, 363 U.S. 229, 235 (1960). The Department of Justice argument was upheld by the Supreme Court's decision in Ivanhoe Irrigation District, et al. v. McCracken, et al., 357 U.S. 275.

There will be no attempt made to argue this legal question in this brief. Decision of the question by judicial tribunals of competent jurisdiction bind both the State and the United States.

36-961--64---16

EXHIBIT D

Total Dissolved Solids
Parts Per Million

Date		Cubic Feet Per Second
March 4	748	450
March 27		450
March 28	775	480
March 29	663	450
March 30	694	390
March 31	725	390
April 1	719	
April 2	725	
April 3	771	360
April 4	847	275
April 5	923	189
April 6	925	
April 7	878	
April 8	840	
April 9	847	
April 10	837	215
April 11	840	
April 13	923	
April 14	935	189
April 15	910	
April 16	891	
April 17	910	137
April 18	985	110
April 19	1124	82
April 20	1054	
April 21	998	87
April 22	875	132
April 23	797	
April 24	676	245
April 25	645	305
April 26	645	275
April 27	664	245
April 28		245

EXHIBIT E

Phone HO 2-7393 Report No.9092

NELSON LABORATORIES

AGRICULTURAL CHEMISTS AND CONSULTANTS

1145 West Fremont Street

Stockton 3, California

April 24, 1961

To Banta-Carbona Irrigation District

Box 299

Tracy, California

FOLLOWING ARE THE RESULTS OF ANALYSIS OF A SAMPLE OR SAMPLES AS RECEIVED FROM YOU BY THIS LABORATORY:

NAME OF MATERIAL Water RECEIVED April 21, 1961

	1. Clever Pump 11:52 4/21/61	2. No. 3 Station All river 11:45 4/21/61	3. No. 6 Sump All C.V.P. 11:30 4/21/61
Carbonate (CO_3)	None	12.0 ppm	None
Bicarbonate (HCO_3)	164.7 ppm	152.5 ppm	79.3 ppm
Chloride (Cl)	153.0 ppm	428.0 ppm	30.0 ppm
Sulfate (SO_4)	225.0 ppm	115.0 ppm	45.0 ppm
Calcium (C_a)	64.6 ppm	88.0 ppm	17.2 ppm
Magnesium (Mg)	37.3 ppm	48.2 ppm	9.8 ppm
Sodium (Na)	132.0 ppm	214.5 ppm	33.0 ppm
Percent Sodium	47.5%	52.7 %	46.1%
Total Salts	777.9 ppm	1058.8 ppm	214.6 ppm
Boron (B)	0.70 ppm	0.61 ppm	0.27 ppm

NELSON LABORATORIES

Mr. DICKENSON. I do not want at this time to take the time of the committee to go through all of the matters that are set forth therein. I think I have pointed out certain facts to which none of the other speakers has alluded. Briefly, however, our position is this:

We are a county in northern California, a county that is fifth in the Nation in value of agriculture products. Much of the county is contained in that area of the State known as the delta which is formed by the confluence of the Sacramento and San Joaquin Rivers. We in San Joaquin County are concerned about the present situation regarding water rights. I think the committee should realize that water law is real property law; it is law which has traditionally been administered by the State.

As has been pointed out by some of the prior speakers, we are not in any way attempting to restrict the Federal Government in the lawful exercise of its powers. Just as was pointed out, when the Federal Government purchases land and records the deeds, it gets certain protection under State law. Certainly, when the Federal Government files for a water right, which is a right given by the State law, it would seek the protection of State law, and, we feel it should comply with the procedures of State law regarding water rights.

I have set forth here and attached to the statement some excerpts from proceedings before the State water rights board where the Federal Government has made contentions that it is not bound by conditions that are inserted by that board in permits issued to it to take unappropriated water. We believe that the Federal Government, when it claims a right under State law, should be in no different position from any other landowner who is seeking a water right. Those conditions, I might add, which were involved were reasonable ones, such as requiring a filing of annual reports or requiring, in one particular instance in which we are interested, that the Bureau of Reclamation enter into negotiations with the landowners in the delta regarding salinity control. Apparently representatives of the Bureau of Reclamation have taken the broad position that the State water rights board has no power to insert such conditions in permits issued to it.

I have also set forth in the statement a condition that I am sure the members of the committee are not aware of; namely, the situation existing in regard to poor quality of water in the lower San Joaquin River which has been due to the operations of the Federal Government in two ways. One, by reason of the closing of the Friant Dam, the historic flow of the San Joaquin River down into the delta has been interfered with and that flow has been turned south. Then, by reason of the construction of the Delta-Mendota Canal, water from that canal has been used on lands of high mineral content and the drainage from that water has gone into the San Joaquin River. This has meant that the landowners in the lower San Joaquin River have been faced with not only a diminished flow but that the flow which exists are waters of high mineral content which have damaged the land.

We feel that S. 1275 in requiring, among other things, that the United States in taking or interfering with water rights, must proceed by eminent domain, is beneficial.

I think that is all that I would like to present to you today, Mr. Chairman.

Senator Moss. Thank you very much, Mr. Dickenson. We appreciate your comments and appreciate your being here and also bringing the resolution from the National District Attorneys' Association.

I have here a statement from the Texas Water Commission endorsing S. 1275. That statement will be placed in the record and appear at this point.

(The document referred to follows:)

STATEMENT OF JOE D. CARTER, CHAIRMAN, TEXAS WATER COMMISSION

The Texas Water Commission is the administrative agency within the State of Texas charged with the responsibility of administering the water laws of the State. It is vested with broad powers with respect to the appropriation and utilization of public waters. It is authorized to pass upon all applications for permits to appropriate State waters, and to approve all applications and issue permits when there is water available and such applications are made in the proper form and in compliance with the provisions of law and regulations of the commission. The proposed applications must contemplate the allocation of water to one or more of the purposes provided for by law and the issuance of a permit would not impair existing water rights, or vested riparian rights, and not be detrimental to the public welfare.

The State's title to water within its domain was acquired at the time of the revolution and some individual water rights of long standing date back to the days of Spanish sovereignty. The Republic of Texas, established as a nation in 1836, recognized the grants of lands and waters which had been made by the predecessor governments of Spain and Mexico. The character of ownership of its lands and waters was not changed by the treaty provisions under which Texas was admitted to the Union. In the annexation process Texas retained its rights to the water in its wholly contained streams except as to certain rights relating to navigation which were reserved to the Federal Government.

Therefore, it may be said in general that the State of Texas is the sovereign source of title to all the waters in its self-contained streams, to that portion of the water of the interstate streams allocated to Texas by compact, and to all of the water of the Rio Grande allocated to the United States under treaties with Mexico. The laws of Texas govern the control, distribution, and use of these waters. The legislature in 1889 provided a procedure whereby water rights could be acquired in addition to those granted with the land under the dominion of Spain, Mexico, the Republic of Texas, and the State of Texas. The Texas Legislature in 1913 restated the principle of State ownership of all the waters of the State and enacted the basic provisions which form the present permit system for appropriation of these waters. Texas water law is based upon the principle that originally the sovereign owns all of the surface water of the State and holds these waters in trust for the public. In the annexation proceedings in 1845 this sovereignty was retained by Texas.

It is the purpose and policy of Texas to investigate the character of the principal requirements of the watershed areas of the State for authorized uses, to the end that distribution of the right to take and to use these waters may be equitably administered and economically coordinated, so as to achieve the maximum of public value from this resource.

The economy of Texas and also of the other 17 Western States covered by the original Reclamation Act of 1906, as amended, is largely built upon the recognition that the right to use water is a property right. Vast areas of land in Texas and other Western States are of little value if deprived of water. The right acquired by the appropriation of water has been recognized from the beginning of development of the West as a property right, just as valued and usually more so, and just as much protected by the law, as title to the land itself.

In Texas the control of water means the direct control of the lands dependent upon it, and such land without water is often of limited value or even useless. Control of water also controls the location of industry with its attendant population. It means the power to replace an existing economy with a new economy; the power to destroy settled areas and to raise up new areas—all by the manner in which the water resources are administered.

The Texas Water Commission heartily endorses S. 1275 as a bill to clarify the relationship of interest to the United States and other States of the use of water of certain streams. We concur in the fundamental principles embodied

in this proposed legislation and request the committee's usual sincere consideration.

This bill serves two purposes:

First, it protects and preserves water rights as property rights. This assures stability of local economy and maintains property values. Orderly development of property in the United States is dependent on a continued recognition of the supremacy of the States in land and water law, so as to preserve the property rights that have been acquired and protected under such laws.

Second, S. 1275 restates and reaffirms a basic congressional policy. The principle of supremacy of the State water laws over the ownership, distribution, and use of both its ground and surface waters has been recognized in the reclamation States lying wholly or partially west of the 98th meridian not only by Federal law, but by State law and the enabling acts by which many of the States were admitted to the Union. The United States of America and numerous Federal agencies have repeatedly respected this policy in the past by filing applications for water permits in Texas, and continue to do so today. It should be added that without exception these permits have been granted, and the usual statutory fees have been waived by the Texas Water Commission and its predecessor, the board of water engineers.

The Texas Water Commission therefore joins with member States of the Southern Water Resources Conference as well as other interested groups in heartily endorsing the proposed legislation as it was written and was introduced on April 4, 1963, in the Senate of the United States.

Senator Moss. Now there is one witness left and that is Mr. Northcutt Ely. Senator Anderson had requested Mr. Ely to testify at a time he could be present because he wanted to ask him some questions. Mr. Ely has kindly agreed to come tomorrow when Senator Anderson will be back. He will be heard at 10 o'clock tomorrow morning. As far as I know, he is the only witness left.

This will be an open hearing if any of you wish to come and hear Mr. Ely present his paper. It is already prepared and we have a copy of it. You are invited also to be with us tomorrow.

Now if there are any statements that were prepared that I did not get into the record, I would ask you to bring them forward to be placed in the record. Because we have asked for some additional materials, this record will be open for a few days. If any of you upon returning home who have not been asked to supply any more materials but have something that you think really can contribute to the consideration of this problem on either side, I hereby grant you permission to send me a letter or statement of that sort and I will see that it is made part of the record.

We do want the widest area of information that we can acquire. We consider this problem—which I am sure everyone recognizes, no matter what viewpoint they take—of tremedous importance to water law in the United States. We are trying to solve what appears to us to be a severe problem and we want to do it, of course, in a way that will not jeopardize any rights or powers that exist now but at the same time will serve to regularize and clarify and settle our water law and our uses of water.

All of us who live in the West, which are most of the people appearing here, know that water rights are of paramount importance. That is the reason this problem is pressing us.

I am reminded by staff that witnesses who testified at some length orally may wish to look at their testimony after it is in transcript form before it is printed'. If any of you feel the need to do that, the transcript will be available here in the committee in a few days

and you are certainly at liberty to read your testimony and make any corrections of errors that you may see in it.

I announced, Mr. Ely, that you would be here at 10 tomorrow when Senator Anderson would be here.

Mr. ELY. Thank you, sir.

Senator MOSS. Thank you.

We are in recess until 10 o'clock tomorrow morning.

(Whereupon, at 11:34 p.m., the hearing in the above-entitled matter was adjourned, to reconvene at 10 a.m., Friday, March 13, 1964.)

FEDERAL-STATE WATER RIGHTS

FRIDAY, MARCH 13, 1964

U.S. SENATE,
SUBCOMMITTEE ON IRRIGATION AND RECLAMATION
OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 3110, New Senate Office Building, Senator Frank E. Moss (chairman of the subcommittee) presiding.

Present: Senators Frank E. Moss (Utah); Clinton P. Anderson (New Mexico); Quentin N. Burdick (North Dakota), and Len B. Jordan (Idaho).

Also present: Stewart French, committee counsel; Roy M. Whitacre, professional staff member, and Richard D. Andrews, minority counsel.

Senator Moss. The subcommittee will come to order.

We are very pleased, Mr. Ely, that you agreed to come before us this morning. Senator Anderson particularly wanted to hear your testimony and he will be able to be with us at least part of the time this morning. We will begin with you and we do have two other witnesses who will be heard.

We will go ahead with Mr. Ely, since Senator Anderson will have to leave soon.

STATEMENT OF NORTHCUTT ELY, CHAIRMAN, COMMITTEE ON WATER RESOURCES, SECTION OF MINERAL AND NATURAL RESOURCES LAW, AMERICAN BAR ASSOCIATION

Mr. ELY. Thank you, Mr. Chairman.

I am very much honored to be here and because Senator Anderson's time is limited I shall attempt to cover the scope of this bill rather rapidly and then come back later, if you wish, to more detailed consideration of individual sections.

I appear here before your committee by direction of the American Bar Association, and I tender for your record a statement and the resolution of the House of Delegates of the American Bar Association in support of S. 1275 together with instructions from the association to appear here on behalf of them.

The resolution directs support for S. 1275 or similar legislation.

The bill before you covers really four or five subjects. I should like to summarize it, not necessarily in the order of their importance but in the order that they appear in the bill.

Section 1 contains four subsections. Subsection (1), which appears on page 1, provides that:

> the withdrawal or reservation of surveyed or unsurveyed public lands heretofore or hereafter made, shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation.

The intention of this section is not to deny to the United States the power to research or withdraw the water for use of any Federal reservation. It is directed at the practice of the United States of making withdrawals of land without saying anything at all about the quantity of water required. These withdrawals are made sometimes by statutes, more frequently by executive action, but in either event no one can find out how much water the United States intends to reserve for withdrawal and appropriation by others.

For example, on the Colorado River there are four Indian reservations on the main stream created at various times from 1866 down to about 1910, some by statute, some by Executive order. Nobody knew how much water was in fact required or claimed for those reservations until the case of *Arizona* v. *California* was in the course of litigation then belatedly and only in response to interrogatories which the United States resisted answering was it disclosed what the calculation was, indeed what the amount claimed was. In fact the quantities to be claimed were calculated during the course of the litigation with some rather extreme results.

For example, there is one reservation called Chemehuevi on which there are no Indians at all. The bottom lands were purchased from the Indians when Parker Dam was built. They were paid. The bluff lands are all that remain. I do not think anybody ever intended to irrigate them, but in the course of the litigation the Indian Bureau presented maps on which they had drawn lines showing where canals might be built on these uplands.

As a result, the special master directed that water, in a substantial quantity, in excess of 20,000 acre-feet had in fact been reserved when this reservation was created about 1908, and had a priority as of that date.

It is difficult enought ex post facto to fit that kind of a claim into an inventory of the water resources available for use within a State. Had the quanity been large it would have been impossible.

The vice of the reservation theory, as it is practiced, is simply that no one knows, when the land is withdrawn, how much water is intended to be withdrawn along with it. The United States, if this bill became law, could still proceed under section 2(e) on page 3 to initiate a water right independently of State law by reserving or withdrawing that water by a public pronouncement of the quantity. The satisfactory method would be to have the United States report to the Congress, and specifically to this committee the quantities that it was reserving or withdrawing, with adequate time for examination by the Congress of the justification of those quantities.

Senator BURDICK. Pardon me, what page of the bill are you referring to now?

Mr. ELY. I am addressing primarily section 1, subdivision (1) on page 1, but I refer to the unrestricted power of the United States to reserve water by special act on page 3 at line 13. That is section 2(5)(d).

Senator ANDERSON. Since there has been one interruption, may I get to another one?

This Indian case that you mention, the reservation, bottom lands were sold and they now irrigate the bluff lands.

Do you not think it would be desirable for this committee to inquire from the Federal Government on what theory they now seek to irrigate these bluff lands when the lands normally to be cultivated have been sold and disposed of a long time ago?

Mr. ELY. I am sure the answer would have to be that they stand upon the original Indian reservation. The Department contends that all of the lands within that reservation are entitled to have water even thought the official making the reservation may or may not have intended making it so.

Senator ANDERSON. In the case of the Navajo project, with which you are familiar, my State had some grave objections to the plans of the Indian Bureau because they were going to cultivate little fingers of land, narrow strips of land, up and back and forth. I am beginning to find out why they are going to spend $1,750 an acre when they can do a better job with $500 an acre on a flat piece of ground. We finally got rid of some of the fingers of land but not all of them. I am wondering whether the doctrine of the *Winter* case gives them authority to take any amount of water that they may deem necessary.

Mr. ELY. That is what we discovered to be the claim in *Arizona* v. *California*. The quantity of water may change depending upon the change of feasibility standards or indeed on soil classifications.

Senator ANDERSON. If you help phrase the question, it might be sent to the Bureau of Indian Affairs, Department of the Interior. Raise that question and find out on what theory they are doing it.

Mr. ELY. I shall be glad to.

Senator ANDERSON. Thank you.

Senator BURDICK. Then since there have been two interruptions, I have one more.

You are familiar with the *Hawthorne* case?

Mr. ELY. In general, yes.

Senator BURDICK. In the *Hawthorne* case there really was no case between the naval installation and the town of Hawthorne. Now let us change facts a bit. Let us assume there was not adequate water for both purposes. I believe it was underground water in this case, but let us assume there was not adequate water and there was a contest between the Defense installation and the town of Hawthorne. The Government would then apply to the State of Nevada for a water right.

What would be the outcome of that application? There would be no relief under the section you just quoted.

Mr. ELY. Under this section 1 the mere withdrawal of the desert lands for the creation of an ammunition depot would not automatically reserve under the laws of the United States the underlying water for the use of the reservation.

Had the United States desired to do that, assuming that S. 1275 were law, it would simply proceed under section 2(3)(e) to state that it did reserve the underlying water to the extent of an exact number of acre-feet for the use of this reservation.

My personal view is that a reservation of that character, made under the laws of the United States, if specific, would be operative and that the State of Nevada could not deny the United States the right to use the underlying water for the military purposes of the reservation. But United States would be wiser, in my personal opinion, to proceed under the laws of Nevada rather than under Federal law for the reason that if the underlying water does prove inadequate, it is to the interests of both the Government and the other users that there be some machinery for the allocation of the underground water. There is none so long as both jurisdictions proceed in separate compartments. As a practical matter, I think the United States, in the case such as you are presenting, would be far wiser to simply acquire its rights under the laws of Nevada and proceed under those laws to insist upon an equitable allocation of the waters between the adjoining landowners and the reservation. But it could, in my opinion, proceed under section 2(3)(e) and disregard the laws of Nevada if it elected to do so. I think it would be unwise but I am not denying the power of the United States constitutionally to do that, nor would I entirely destroy its statutory opportunity to do so.

Senator BURDICK. I have some doubt whether they can do it under subsection (e). If you read the last portion of it it says "any present or future act of Congress or State law when such right is initiated prior to the acquisition by others of any right to use water pursuant to State law.

Mr. ELY. Yes.

Senator BURDICK. Suppose we have installations installed here next year and it competes with the water in the town in California, let us say. When they apply for that water right to the State of California then they have to weigh the merits of the two claims; do they not?

Mr. ELY. Bear in mind there are two ways of procedure intended to be left open by this act. One is to proceed under the laws of the State, the other is to proceed under 2(3)(e), lines 17 and 18 on page 3, to initiate this Federal right by a reservation under Federal law which states the quantity reserved.

Senator BURDICK. But this town has a vested right.

Mr. ELY. If a town has a vested right and is using underground water, surely the United States should not dry up that town and have the people move out of the area, without compensation.

Senator BURDICK. You understand this is a hypothetical question.

Mr. ELY. Yes, of course. Surely the United States is not going to dry up towns that are using these underground waters. If it has to have that water for military purposes, and takes it regardless of consequences, then it ought to pay for it so that these people can turn elsewhere to get a supply. One of the vices of the reservation doctrine is that the United States, without announcing the quantity it requires, creates reservation of land. There then is created a floating mortgage in the sky, uncertain in quantity but with a fixed priority date, the date of creation of this reservation, which, when finally asserted by the United States, has the effect of depriving the communities that have, in fact, put the water to use during this interval, of their water right, and without compensation. I say that that is wrong. I say now what I should have said at the beginning, that the Congress has plenary power in this subject. You are dealing here with the property clause of the Constitution. Later I will refer to the commercial clause. In

both cases your power is plenary. You are not bound by what the previous laws have said or what the courts have said about those laws. The question is, having had a problem exposed to you as these hearings surely have, you are writing on a clean slate. You are deciding what policy should be written on that slate by a body with plenary authority.

I say that the result which has been reached, and is in the offing, under the reservation theory goes too far.

I would not go as far as some of my colleagues do, to deny the United States the power to withdraw land or the power to withdraw water. But I say, let us play fair about it and have the quantity of water announced when the reservation is made, so that the related priorities of the reservations and of the State law appropriations are known, so that intervening individuals who risk their whole livelihood on developing these waters are not destroyed.

For example, a great deal of attention was paid here by the Government witnesses to the situation of the city of Denver. They asked whether it would be fair to wipe out what they called the reservation made by the city of Denver for water in the mountains. The great difference is that Denver, proceeding under the laws of Colorado, was required to state the quantity as well as the date of priority.

But a Federal reservation of withdrawal states no quantity of water at all.

Furthermore, there was due process in the case of Denver. Anyone who objected to the appropriation made by Denver could appear before State tribunals and have the matter fought out, what its quantity ought to be and what the relative priorities ought to be.

Not so with respect to Federal reservation; it is made in an administrative agency downtown. No announcement at all is made of the quantity of water, or, sometimes, what they intend to do with it. Ten, twenty, fifty years later a successor says, retroactively, what quantity of water was reserved decades ago, and this cuts off all intervening rights. That is not fair.

I will proceed, because of the time problem.

Section 2 of the bill simply makes applicable the provisions of section 1(b) of the Flood Control Act of 1944:

> All works hereafter constructed by or under the authority of the United States with respect to waters arising within States lying wholly or partly west of the 98th meridian.

That language has been in each flood control act since 1944. It has thus been reenacted a dozen times by the Congress. It is a wise statutory provision. It got into the 1944 Flood Control Act on the recommendation of Secretary Ickes. He wrote the Senate Committee on Commerce, which had under consideration the bill which became that Flood Control Act, proposing language which was not quite like this but about which he said this:

> In the absence of any general statute affording adequate protection for the beneficial consumptive use of water in the West, a proviso such as the foregoing constitutes in my judgment the very minimum of protection required for the States of the Upper Missouri River Basin.

Senator ANDERSON. Is that what is called the O'Mahoney-Milliken amendment?

Mr. ELY. Yes.

As a result of this action by Secretary Ickes the O'Mahoney-Milliken amendment was put in the Flood Control Act of 1944.

Now it is either a good law or a bad one. It is a good one, we think. The effect is to protect consumptive uses against the exercise of the navigation servitude for construction in the Western States.

This should be remembered in connection with subsection (4) of section 1, which provides that—

> vested rights to the beneficial diversion, storage, or consumptive use of any waters, navigable or nonnavigable, recognized by the laws of the State or States in which such waters are diverted or used as compensable if taken by or under the use of the State, shall be taken by or under authority of the United States without compensation.

The intention of both of these provisions is to protect the user of water against the exercise of the navigation servitude, without compensation.

Let me describe what I am talking about. There is confusion about the navigation "power" of the Congress, which is a segment of the commerce power, and the navigation "servitude." The commerce power, including the power to improve navigation, is plenary. The navigation servitude subjects interests in navigable waters to be taken by the United States without compensation.

The navigation servitude, I am told had its origin in Magna Carta, which provided that certain dams in a section of the Thames should be taken down, as impediments to public navigation. This mandate applied to the King as well as to the nobles and its effect was to protect unimpaired the right-of-way, the use of the rivers by the public. That was all of its purpose. It applied to the tidal waters because those were the navigable waters in England. In this country the navigation power, taken along with the corollary navigation servitude, has been applied to streams that are not tidal. Indeed the effect of the Supreme Court's opinion in the *Appalachian* case has been to extend to commerce power of the Congress to virtually all of the streams of the United States, navigable or nonnavigable, because the Congress can assert its power to improve navigable streams by protecting the inflow from their nonnavigable tributaries.

There is scarcely a fork of the creeks that is not subject to the Federal jurisdiction under the *Appalachian* case.

It has been seriously suggested that the irrigation rights, rights to consumptive use from both navigable and nonnavigable streams, are subject to the exercise of the navigation servitude by the United States. Subsection (2) of section 1, like the O'Mahoney-Milliken amendment, simply provides that improvements for navigation—that is, not just flood control projects, but all projects built under the navigation power—shall, with respect to the area west of the 98th meridian, be built without reliance upon the navigation servitude.

If you are going to take rights to the use of water in this part of the United States, where consumptive use is a predominant interest, you shall not destroy them without compensation. That is the whole effect of the language.

Subsection (3) provides that:

> Any right claimed by the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with the laws of that State.

I should emphasize, Mr. Chairman, that this does not direct that the United States shall acquire water-rights only by proceeding under

State law. This says that if the United States elects to acquire water rights by proceeding in accordance with State law, it shall do so in accordance with the State's procedure. In the parallel case of the acquisition of the title to dry land in a State, the United States does so in accordance with State procedure.

I had thought that if the United States wanted to acquire water rights under a State law it should have to do so in accordance with the State law. But the United States makes the contrary assertion; it has done so on at least two occasions in which it has asserted that it may claim under the laws of the State, but without complying with the procedure that the State law fixes.

We say that if the United States wants to get its rights under State law, let it accord to State procedure.

Specifically, in California one gets his rights under State law by proceedings before the State water rights board. Its proceedings assure due process. It delivers what quantities are available for appropriation, and what conditions should be attached to the State permit to appropriate. The United States has proceeded before the State Water Rights Board in California, but it has denied the authority of that board to annex conditions to the permits or licenses it issues.

Specifically in California there is a county-of-origin law which is designed to protect the mountain counties which may ultimately need water appropriated below them. The United States has denied the power of the State water rights board to insert in permits granted to the United States any provision which recognizes the county-of-origin law.

This creates the certainty of confusion and controversy for the future. Does the United States, when it builds a project in California and acquires a State water right for doing so, somehow get a right which is independent of the carefully thought-out State statutes which attempt to balance the interests of the mountains and the lower counties, whereas the State itself, if it builds that project, or if a city or district builds it, is bound by those county-of-origin provisions?

If the United States does not want to be bound by the provisions in State law, then let it proceed independently under section 2(3)(e) by asserting a Federal right independent of any State law. That should be done by coming to this committee and getting a specific statute authorizing it to construct a specific project in disregard of a State law and in reliance upon a Federal water right. I think if such a bill is brought before this committee or its counterpart in the House, it will receive careful scrutiny. This is the arena in which that issue ought to be tried out.

Senator JORDAN. Mr. Ely, in that connection if the Federal Government should elect to comply with State law, could they be selective in saying which State laws they will comply with and which they will ignore?

Mr. ELY. That seems to be the position of counsel for the United States in those cases. It is a wholly unsound position, I agree.

Senator BURDICK. Mr. Ely, I am not going to labor this one point that I have been pursuing, but I do not see any difference between procedural State law and Federal law as to rights vested.

Mr. ELY. You mean the procedure for vesture of rights?

Senator BURDICK. No, you said that if the Federal Government did not wish to pursue State law they could pursue Federal law, but the provision of subsection (e) here circumscribes that right and does not give the Federal Government the right to pursue in areas where the right has already been vested.

Mr. ELY. I agree with you and I think that is precisely what the situation should be, if the United States desires to use water which has already been acquired and put to use by somebody else, it has the power of condemnation. Really, about 90 percent of the troubles we are talking about arise from the claims of counsel for the United States of the right to take water rights without compensation. I do not deny the power of the United States to condemn a water right and pay for it. The real problem underlying all of this controversy, or 90 percent of it, is this: Shall the United States have the right to take water that has been put to use by somebody else without paying just compensation? It should not. It does so under the guise of the navigation servitude and it reaches an inequitable result.

The case of *Dugan* v. *Rank*, discussed yesterday, took 16 years to finally get up through the U.S. Supreme Court and the end result was a decision by the Court that the whole litigation was abortive because the United States was a necessary party. It had not been sued, could not be sued without its consent. The problem was simply whether certain people who were using water were or were not going to be compensated by the United States. The compensation they wanted, which was perhaps unreasonable, was that the United States be required to put in check dams to keep the water coming to them. The whole problem could have been readily solved from the beginning had the United States simply undertaken to condemn those water rights and pay for them, give them their day in court with their true adversary, the United States, opposing them across the table.

In another great Central Valley case, *Gerlach Livestock Co.* v. *United States*, the United States resisted any obligation to pay for the water rights, because it claimed to have proceeded under the navigation power and asserted there could be no water rights in the navigable San Joaquin River.

The U.S. Supreme Court said No, this project is being built under the reclamation law, pursuant to the welfare clause of the Constitution and not under the navigation power, and therefore you must pay.

Had the U.S. Supreme Court agreed with counsel for the United States that that project was being built under the navigation power, then the counsel for the Government would have succeeded in his contention that no compensation was payable.

The effect of S. 1275 is to put that kind of a 16-year controversy at rest. S. 1275 provides that when the United States takes water being used by somebody else, if that right is compensable if taken by the State, then it is compensable if taken by the United States.

The objection has been raised here that this opens the door by the creation of the States by some kind of inflated water rights that people have not heard about before. I trust the courts to see that any attempts of inflation of that kind would be quickly deflated. The Federal Power Act has been on the books for 40 years. Section 27 of the act directs that rights vested under State law shall be respected and paid for. There has been no inflation of water right values.

The U.S. Supreme Court, in the *Niagara Mohawk* case, said that a Federal power licensee must pay for water rights in a navigable stream, vested under State law. That was an equitable result. Nobody is going around as a result inflating those rights, as far as I know.

Similarly, the Reclamation Act has been on the books for 60 years and under section (8) water rights taken must be paid for. There is no inhibition to the functioning of the U.S. Government if it has to pay for what it takes. This is true of the operation of section 8 on navigable as well as nonnavigable streams.

Senator Moss. Mr. Ely, were you here when Mr. Goldberg discussed the *Ivanhoe* case? It seems to me he talked about this inflated rights idea. I wonder if you can comment on that.

Mr. ELY. I heard Mr. Goldberg. The burden of the *Ivanhoe* case was simply that the United States, in delivering water to Mr. McCracken, who was a water user located 150 miles away from any surface source of supply, could require as a condition of his getting this importation that he obey the limitations that the reclamation laws placed on the acreage that could be served in single ownership. That is all that was decided, and the decision was sound in that respect, in my view.

There was no problem in the *Ivanhoe* case of inflation of prices to be paid by the United States. The question of compensation for water rights was not involved. Indeed, the Court called attention to the fact that section 8 was intended to deal with the problem of compensation where the United States acquired water rights, and that that problem was not before the Court. I don't see why it should be dragged in by its bushy tail here. It has nothing to do with the problem that you are talking about.

While I am on the subject of the acreage limitation, because it has been mentioned here, I desire to reiterate what Senator Kuchel has told the committee, that nothing in this bill is intended to deal with the acreage limitation in any way whatever. Just to clear that up so there can't be any doubt about it, I would suggest the committee might want to consider an amendment. I will pass it up to you now. It would say, in so many words that:

> Nothing in this act shall amend, alter or repeal any provision of any law which limits the acreage in single ownership that may be served with water made available under the reclamation law, and the same acreage limitations that are imposed by the reclamation law shall be application to water made available under any other Federal law pursuant to a Federal reservation or withdrawal.

Let me call to your attention the second half of that sentence because of another vice of the reservation theory as it is being practiced. Take the Colorado Indian Reservation on the main stream of the Colorado River. The decree in *Arizona* v. *California* recognizes the right of that project. It has old priorities.

The United States is in the process now of leasing out the land on that Indian reservation to non-Indians. It has a magnificent water right. The United States proposes to increase the uses on Indian reservations on the main stream by 400,000 acre-feet. That is enough water for 2 million people at 5 people per acre-foot.

But do not think it is doing so in accordance with any acreage limitation. Not at all. The land on the Colorado Indian Reserva-

tion is being leased out to large corporations in blocks of 5,000 acres or more at a time. One such deal was closed 2 weeks ago.

This room has been washed in crocodile tears over acreage limitations up to our shoelaces in the past several days. If those who are concerned about the imaginary effect of S. 1275 on acreage limitations mean what they say, this is a magnificent opportunity to impose that limitation on waters used under the reservation power. It is outrageous that water should be taken from existing users on the Colorado River Basin, who will be required to destroy an existing economy, to be put to use for the advantage of large corporations who will lease the water rights on the Colorado River Indian Reservation and put it to use without any attention whatever to the excess land law. These are 25-year leases. I think if the 160-acre limitation were imposed in connection with reserved water rights you would see a more reasonable use of water and a lesser destruction of the economies to put these reservations to use.

Senator Moss. I appreciate your discussion of that point, Mr. Ely. It is something that I think certainly this committee also ought to make inquiry about and do it very soon.

I assure you that we will.

Mr. ELY. Thank you, sir.

I referred previously to subsection (4) of section 1, which requires compensation by the United States for the taking of the water right if the taking was compensable under the laws of the State.

The second half of that subparagraph beginning on line 15 at page 2 says:

> Where such rights are acquired otherwise than by agreement with the owner, they shall be taken by proceedings in eminent domain under the laws of the United States or of the State or States affected.

The intention here is to direct the United States to follow the forthright pattern of affirmative proceedings in eminent domain if it desires to acquire water rights. The results of failing to do so are evident in the cases that have been discussed here coming out of the Central Valley. *Dugan* v. *Rank* was 16 years of absolutely fruitless litigation. Those who were stubborn enough to litigate in *Dugan* v. *Rank* were virtually told by the United States, "If you do not cave in, and if you appeal to the Court of Claims, we will raise the 6-year statute of limitations against you." I have no doubt that that will be done.

I hold no brief for the people who were stubborn there. I know nothing about the merits of their case. But if the United States, in thousands and thousands of cases, as Mr. Clark indicated here, proceeds by eminent domain, there is no particular reason why it cannot do so in water rights cases. Section 21 of the Federal Power Act gives to a licensee under that act a power of eminent domain. He may proceed under State or Federal law. Licensees do it all the time. There is no particular problem presented. If there are many water users on the stream, let them be notified and served. If it is impossible to do that, I don't say the United States must mark time forever waiting to get a project started because it cannot find all the water interests in the river. Not at all. It can start building the works any time it wants to. It can take, under the laws of any State and of the United States, by simply filing a notice of taking. It does not have to postpone the building of the project; it adjudicates the

water rights while building, and pays for them. If the United States has undertaken in good faith to negotiate for water rights, or if time does not permit that and it files a condemnation action, then certainly no water user who is left out of such a suit is going to be able to get an injunction from any Federal court to stop that project.

His injury is compensable in damages, he cannot prove irreparable injury; how in the world can he get an injunction? If there is any doubt about it, you can add a few lines to this section to say that the United States has started a condemnation action, no one shall be entitled to an injunction against the construction of the project, his remedy is to enter that condemnation action and present his claim.

Nor do I suggest that the right of inverse condemnation is cut off. If the United States takes but does not institute a condemnation action, then, of course, the party injured ought to have a remedy in the Court of Claims. That is what inverse condemnation means and ought to mean; that a party who is injured by the taking and is not compensated in an eminent domain proceeding still has his rights preserved. The trouble is that the tendency is in the direction of using this inverse condemnation doctrine, which was really for the protection of the injured private owner, as a substitute created by the courts for affirmative eminent domain proceedings by the United States. It is wrong. There is no need for it.

If the objection is that somehow this bill cuts off the right of the injured person, then correct that by four or five words. If the objection is that this makes it possible for anybody to enjoin the United States, correct that too in four or five words. The intent is to put back on the rails the direct eminent domain process which in a case like *Dugan* v. *Rank* would have saved some 16 years of litigation and all its expense.

Section 2 contains a number of disclaimers or qualifying clauses that are taken over verbatim from the so-called agency bill that was written by the Departments of the Interior, Defense, and Justice some years ago. The effects are these, running rapidly over them:

Subsection (1), which is on page 2, line 20, provides that nothing in this act modifies or repeals any provision of any existing act of Congress that requires that rights of the United States to the use of water be acquired pursuant to State law. In other words, section 8 of the Reclamation Act, and similar statutes, are unaffected.

Subsection (2) provides that nothing in the act shall be construed as permitting the appropriations of water under State law which interfere with the provision of international treaties of the United States. That is self-explanatory.

Subsection (3), on page 3, line 3, provides that nothing in this act shall be construed as affecting, impairing diminishing, subordinating, or enlarging any one of five classes of powers or rights of the United States to waters under any interstate compact or existing judicial decree.

Let me pause there to say that counsel for some of the Government agencies here referred to interstate compacts as reserving water, therefore why should not the United States be allowed to reserve water? The distinction is that every interstate compact that I know of speaks of water in specific quantities, acre-feet, second-feet, so that all parties know the quantity reserved or withdrawn. Certainly the Colorado

River compact does that; and whatever ambiguities there are in that compact result in its failure to be more specific. By contrast a Federal reservation is made in terms of land, not in terms of water, and you cannot tell the quantity of water reserved.

Subparagraph (b) provides that nothing in this act shall be constructed as affecting any obligation of the United States to Indians or Indian tribes, or any claim or right owned or held by or for Indians or Indian tribes.

The effect of that language is to preserve whatever rights the Indians have in consequency of any reservation. It does not undo the effect of any reservation already made for the benefit of Indians, even thought that reservation may have the built-in difficulties that I have been describing this morning; namely, that you cannot find out the quantity of water from reading any description of the lands that are withdrawn. We do not attempt to cure that problem. You could not cure it without giving the Indians their day in court. I just do not think it is feasible in attempting, to cure the other problems that have been discussed here, to now require that every Indian reservation be brought forward for examination and a legislative determination of the quantity of water reserved for it. If that could be done feasibly and fairly, then it would be a desirable thing to do, but so far we have simply put that big problem to one side in this bill.

Subsection (c) protects any water right heretofore acquired by others than the United States under Federal or State law. This has been critized by witnesses here as failing to also encompass rights heretofore acquired by the United States under Federal or State law. Obviously if the United States has a valid right under Federal or State law this bill would not cut it off. The problem is to define the rights the United States has under Federal law; that is, rights impliedly created by reservations or withdrawals. The very purpose of this bill is to get some order into that confusion.

You cannot automatically exempt all rights claimed by the United States under Federal law or you undo the whole purpose of the bill.

Subsection (e) is important. It protects any right of the United States to use water which is hereafter lawfully initiated in the exercise of the express or necessarily implied authority of any present or future act of Congress or State law when such right is initiated prior to the acquisition by others of any right to use water pursuant to State law.

That, in my view, is eminently fair. The United States may proceed under its own laws to create a water right for itself by reservation or withdrawal or exercise of any Federal power, provided only that it will announce to the world what the quantity established is, and what the date of the priority claimed is. That priority will then fit automatically into the inventory of the water resources of the region.

Now that in a very hasty way, Mr. Chairman, covers the bill as I see it. I would be very happy to answer any questions.

Senator Moss. Well, it was a most excellent analysis of the terms of the bill and one that I am glad you have made, Mr. Ely. I had thought as you were going through that it would have been well to have you right at the beginning of the list of witnesses because of the very clear analysis that you made of the sections of the bill and your complete familiarity with the command of these various cases with which we have had to deal here. Those of us who have had less oppor-

tunity and perhaps less ability to deal with water law than you needed a little education. I think you have given it to us in a very excellent manner. I think you have discussed a good many of these points along the way.

I particularly appreciate your proposing a draft of some language to set at rest the question of the acreage limitation because as Senator Kuchel has repeatedly protested, and the others who have joined in the bill have protested, this legislation is not designed in any way to impair the acreage limitation. Perhaps by this language we can make it so clear that that claim cannot be advanced by others who read the bill with fear of what it might accomplish.

Now you do have a full statement that you have submitted, and of course this will appear in the record in full in addition to your discussion here which was so helpful.

(The prepared statement follows:)

STATEMENT OF NORTHCUTT ELY, CHAIRMAN, COMMITTEE ON WATER RESOURCES, SECTION OF MINERAL AND NATURAL RESOURCES LAW, AMERICAN BAR ASSOCIATION IN SUPPORT OF S. 1275

Mr. Chairman, my name is Northcutt Ely. I am pleased to appear today in support of S. 1275 in my capacity as chairman of the Water Resources Committee of the American Bar Association's Section of Mineral and Natural Resources, pursuant to a resolution adopted by the ABA House of Delegates endorsing legislation "designed to preserve to the States their historic role in water resource development and to eliminate some of the impediments to fuller Federal-State cooperation in this field" and authorizing association representatives to appear in support of legislation "similar in substance to the attached draft of bill." The attached draft of legislation is wholly identical to S. 1275. I would like to insert that resolution in the record at this point.

In my view there are several significant reasons why Congress should enact S. 1275. First, the need for such legislation is greater now than ever, including the period immediately following the *Pelton Dam* decision, *FPC* v. *Oregon*, 349 U.S. 435 (1955), when concern with this subject was at its peak. The report of the Senate Select Committee on National Water Resources (S. Rept. No. 29, 87th Cong.), as well as intensive studies by State and Federal agencies indicate that we are rapidly approaching a crisis in our water supply picture. The consequent necessity for the construction of more and greater water resource development projects increases the likelihood of conflicts. Second, the Supreme Court's recent decision in *Arizona* v. *California*, 373 U.S. 546 (1963), has expanded the reserved rights doctrine to pose a far greater threat to the security of existing water rights than did the *Pelton* decision. Similarly, the Supreme Court's recent confirmation in *Dugan* v. *Rank*, 372 U.S. 609 (1963), of the right of the Federal Government to acquire water rights by seizure emphasized the urgent need for legislation requiring the Federal Government to follow an orderly condemnation procedure in acquiring water rights for its projects. Finally, a uniform Federal policy of providing compensation for such rights as may be taken is long overdue.

S. 1275 has five basic objectives. First, it would change existing law as to the effect of reservations of Federal lands on water rights created under State law. Second, it would make generally applicable to all Federal projects the policy Congress has followed since 1944 with respect to flood control and navigation projects in preferring consumptive uses of water over nonconsumptive uses for navigation purposes. Third, in those situations where the Federal Government chooses to rely on a water right under State law for a project, as opposed to relying solely on a Federal right of some kind, S. 1275 would require the Federal Government to comply with applicable State procedural requirements. Fourth, the bill would require that compensation be paid for all existing water rights taken by any Federal project, thus making of general applicability the policy now embodied in the Reclamation Act of 1902 and the Federal Power Act of 1920. It would change existing law that allows water rights to be taken in the furtherance of flood control, navigation, and other Federal projects without

compensation through the invocation of the navigational servitude. Finally, it would establish a more orderly procedure for the acquisition of existing rights by the Federal Government than has been followed in connection wtih some Federal projects.

Mr. Chairman, the widespread recognition of the need for taking a first step in settling some of these long-smoldering disputes is evidenced by the almost unanimous support of S. 1275 by a host of National and State organizations. Furthermore, it is significant that the American Bar Association, for which I speak today, has carefully considered and endorsed this proposed legislation. In that regard I would like to sketch in a very brief background of the origin of S. 1275. In the exploratory hearings that were held by the full Senate Interior and Insular Affairs Committee on this problem in June of 1961 (hearings on Federal-State water rights before the Senate Committee on Interior and Insular Affairs, 87th Cong., 1st sess.), it seemed to be the consensus that any legislative action in this field would have to be of much narrower scope than had been proposed by Senator Barrett and others in the mid-1950's and late 1950's. Most considered it unlikely that any legislation could be enacted, or at least be signed by the President, which required all Federal officials to comply with any and all State procedures with respect to the construction and operation of all Federal water resource development projects, inasmuch as such a requirement might vest an undesirable veto power in the States. It was felt then that the appropriate starting point for legislation in this field would be the so-called agency bill which had originated in the Department of the Interior under President Eisenhower and had received the endorsements of the Departments of Defense and Justice. At that time a number of witnesses who testified at the exploratory hearings also expressed the view that many of the problems in this field could be resolved by a clear congressional mandate providing compensation for all water rights recognized under State law whenever such rights were taken or infringed by the construction or operation of any Federal project. This is the principle already embodied in the Reclamation Act of 1902 and the Federal Power Act of 1920. *U.S.* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954). Concern was also expressed at that time over the Federal Government's action in the construction and operation of the Friant Dam in California, primarily in connection with the manner in which the Bureau of Reclamation had gone about acquiring some of the water rights for that project under the so-called inverse condemnation doctrine. As a result, many felt that the Federal Government ought to be required to follow an orderly procedure in acquiring any water rights needed for its projects by instituting eminent domain proceedings and giving adequate notice to all water rights holders who might possibly be affected by the project. This is, in my view, an eminently sound and just expectation. The foregoing, Mr. Chairman, is what I consider to have been the consensus of the exploratory hearings held in 1961, which viewed with some detachment and objectivity the many facets of the problems in this field.

During those hearings I submitted a draft bill for consideration as a moderate first step toward accomplshing some of the more limited objectives that most of the witnesses in 1961 hearings thought desirable. Following those hearings the Water Resources Committee of the Section of Mineral and Natural Resources of the American Bar Association subjected that draft bill to extensive study. The committee is composed of lawyers from all parts of the country, primarily from the Western States however, and most of them having had extensive experience in the water resource development field. Meanwhile Senator Kuchel introduced the original draft as S. 2636 in the latter part of the 87th Congress. As a result of the review of the draft bill by the water resources committee, a number of amendments were adopted. The principal amendment was the deletion of section 3 of the draft bill, which would have broadened the consent-to-suit provisions of the so-called McCarran amendment (sec. 208 of the act of July 10, 1952, 66 Stat. 560, 43 U.S.C. sec. 666) to permit joinder of the United States in Supreme Court suits between States over interstate waters. The amended bill was introduced by Senators Kuchel, Moss, and Jordan as S. 1275 in the 88th Congress. Senators Engle and Church have since joined as cosponsors. At the annual meeting of the American Bar Association in August 1963 the house of delegates adopted the resolution which I have already inserted in the record. Meanwhile, grassroots support for the proposal mounted throughout the Nation. The result is an impressive array of support from most National, State, and local organizations concerned with water resource development. Spokesmen for many of those organizations will be testifying here today.

Now, Mr. Chairman, I would like to go over the various sections of the bill very briefly and then try to answer any questions the members of the committee might have. Section 1, subsection 1, is taken verbatim from the agency bill approved by the Departments of the Interior, Justice, and Defense in the late 1950's and would take a first step toward restricting the scope of the so-called Federal reserved rights doctrine. The agency bill was drafted in response to the clamor for legislation following the *Pelton Dam* decision. However, although the principle underlying the Court's decision in that case was rather awesome to the holder of State-generated water rights, the Federal Power Commission was very careful to see that the reservation doctrine was not applied as to interfere with existing vested water rights on the Deschutes River in Oregon. At best, then, that case held that State jurisdiction over water rights under the provisions of the Desert Land Act did not extend to waters appurtenant to federally withdrawn or reserved lands, as distinguished from waters on the "public lands" referred to in the Desert Land Act. It did not state what the other consequences of such reservations or withdrawal might be.

The Supreme Court's decision last June in *Arizona* v. *California* has brought the impact of the reservation theory on existing water rights dramatically to the fore, and has so applied it that the threat to existing water rights posed by the *Pelton Dam* decision pales by comparison. In the Colorado River case the Department of Justice asserted that it was entitled to sufficient water from the Colorado River system to satisfy the reasonable needs of a large number of Federal reservations in the lower basin even though (1) the Federal agencies responsible for the various reservations (such as Indian reservations, fish and wildlife refuges, national forests, and national parks) might never have complied with State law to acquire water rights for such reservations, (2) Congress had never expressly legislated to provide a water supply from unappropriated waters in the lower basin for those reservations, and (3) the asserted claims (the magnitude of which was unknown) would clearly curtail other existing uses. The Department of Justice argued that the mere withdrawal or reservation of such lands from the public domain by the executive branch had, by implication, reserved sufficient water to satisfy the reasonable needs of all such reservations. The special master accepted that argument in his report to the Supreme Court, and I think it would be helpful to quote some of his reasoning. The full text of his decision on these Federal claims is set out at pages 210–14 of the 1961 hearings.

"It has been established that the United States has the power to reserve water for the benefit of an Indian reservation, created out of public lands, and that such a reservation of water creates a water right good against subsequent appropriators even if they beneficially use the water before the reservation uses it. In short, the United States has the power to create a water right appurtenant to such lands without complying with State law." (Rept. 257.)

* * * * * * *

"The *Winters* case has been cited many times as establishing that the United States may, when it creates an Indian reservation, reserve water for the future needs of that reservation, and that appropriative water rights of others established subsequent to the reservation must give way when it becomes necessary for the Indian reservation to utilize additional water for its expanding needs." (Rept. 258.)

As to other kinds of Federal reservations, the master applied the same rationale by which he had sustained the Federal claims for Indian reservations.

For example, with respect to the Lake Mead Recreation Area he asserted:

"I conclude that the United States had the power to reserve water in the Colorado River for use in the Lake Mead National Recreation Area for the same reasons that it could reserve such water for Indian reservations. Although the authorities discussed above which establish the reservation theory all involved Indian reservations, the principles seem equally applicable to lands used by the United States for its other purposes. If the United States can set aside public land for an Indian reservation and, at the same time, reserve water for the future requirements of that land, I can see no reason why the United States cannot equally reserve water for public land which it sets aside as a national recreational area. Cf. *FPC* v. *Oregon*, 349 U.S. 435 (1955)." (Rept. 292–93.)

He made a similar application of the doctrine to two Federal mainstream wildlife refuges and for the Gila National Forest on the Gila and San Francisco Rivers in Arizona. (Rept. 297–98, 334–35.)

The Supreme Court approved the master's recommendations in every particular. Thus the Court has taken the *Winter's* doctrine, which holds that the Federal Government may reserve water upon the public domain for Indians without complying with State law, and extended it to Federal withdrawals for national recreation areas, fish and wildlife refuges and national forests. The quantity of water impliedly reserved for such purposes is to be limited only by the reasonable future needs of each reservation. For Indian reservations, the water requirements for all irrigable acreage is to be the limit of the right. As to what that quantity might be for other reservations, one guess is as good as another.

The cloud which this doctrine casts on present or future projects dependent on water rights generated under State law is apparent, particularly in light of the extent of withdrawn or reserved Federal lands in the western public land States. In 1959 in testimony before the House Interior and Insular Affairs Committee on H.R. 4567, the agency bill, then Under Secretary of the Interior Elmer F. Bennett testified that there were then 225 million acres of Federal land under withdrawal or reservation in the 48 continental United States with an additional 90 million acres under withdrawal or reservation in Alaska. He testified that "the greater part of these areas which are under withdrawal or reservation were withdrawn or reserved in the early years of this century. Literally millions and millions of dollars—no one knows how much effort and human energy—have gone into the development of water resources at the local level in all of our Western States subsequent to the time that these lands were withdrawn or reserved.

"If this doctrine is held by the courts to be sound and Congress does nothing about it, it amounts to no less than a sword of Damocles over the water rights which provide a basis for economic development and growth of all of our Western States" (hearings before the Subcommittee on Irrigation and Reclamation of the House Interior and Insular Affairs Committee, 86th Cong., 1st sess., series 9 at 327).

A particular vice of the reserved rights doctrine is that no diligence requirement is imposed upon the United States in developing these reserved waters as is imposed on every other water user in the Western States where the law of appropriation is predominant. Consequently a water user on a project developed on a State-generated water right good against every other water user in the State, may find years later that the Federal Government had previously reserved that water on which the project is dependent. If the Federal Government determines to utilize it for some purpose on the Federal reserve, the existing project must be curtailed to make room for the new Federal development. This, Mr. Chairman, is not good policy, whatever one may think about it as a matter of good law. It is not conducive to orderly water resource development. The doctrine should be rejected, reserving to Congress the right to legislate, project by project, with respect to developing the water resources of any federally reserved land.

The danger of the reservation doctrine is not merely an interesting, academic question as some have suggested. What is means on the Colorado River in the lower basin, for example, is that approximately 1 million acre-feet of water from the main stream (in diversions, about half that much in terms of consumptive use) has been put on the shelf, largely for future development of assorted Federal reservations, at a time when there is not even an adequate supply to cover existing main stream uses and the immediate needs of the burgeoning population of the Pacific Southwest States. It should be emphasized that this million acre-feet relates only to main stream uses. The court found it unnecessary to resolve Federal claims to reserved rights on the lower basin tributaries, with the exception of the Gila River and its interstate tributaries. Those unresolved claims are substantial, amounting, for example, to 70,000 acre-feet for the Navajo, Hopi, and Zuni Reservations on the Little Colorado River system alone.

What the full impact of the reservation doctrine may be no one can predict with precision. It is clear that it will be substantial, however. Several concrete examples may be cited. In 1931, at the suggestion of the Secretary of the Interior, the so-called Seven Party Agreement establishing intrastate priorities among the California Colorado River users was entered into and embodied in the California-Federal water delivery contracts. The agreement makes no allowance for either the Fort Mohave, Colorado River, or Chemehuevi Indian Reservations, nor for the two main stream wildlife refuges which lie partly in

California. The Indian reservations may have been overlooked in part because then, as now, they are uninhabited. How the allocations of about 100,000 acre-feet of diversions for those reservations are to be accommodated to the Seven Party Agreement remains to be seen. The resulting dislocation in California is severe enough, but one can imagine what the consequences would have been in Arizona if similar existing projects had been constructed and were required to cut back to make room for the 800,000 acre-feet of main stream diversion rights for Federal reservations in that State.

Further, the longstanding Gila River decree in Arizona, which long ago purported to adjudicate all rights on that stream, will have to be modified to accommodate the reserved rights of the Gila National Forest.

Turning to subsection 2 of section 1, section 1(b) of the Flood Control Act of 1944 and similar provisions in subsequent flood control acts provide that consumptive uses of water shall be given preference over navigation on all projects thereafter constructed west of the 98th meridian. S. 1275 would make that legislative declaration of general applicability to all projects hereafter constructed in the West. Consumptive uses of water grow crops and sustain life. Nonconsumptive uses of water provide for navigation, generate power, and perhaps serve some recreational purposes. Since water is in particularly short supply west of the 98th meridian, Congress has wisely established a preference for consumptive uses on flood control projects as against uses for navigation purposes. We think that policy should be extended to all Federal projects.

Subsection 3 of section 1 has a very limited and narrow purpose. It would apply only when the United States chooses to rely on a water right grounded solely in State law, as opposed to relying on a federally reserved right, a specific congressional authorization, or any other kind of Federal right. In that case it is only right that the United States comply with the procedural requirements of State law necessary to establish that right just as any other water user in that State. It does not establish a uniform requirement that the United States acquire rights for its projects in accordance with State law, as does section 8 of the Reclamation Act. It is prompted solely by the situation that arose in the so-called *Fallbrook* case in California concerning water rights for Camp Pendleton Military Reservation. In this case the Government has claimed (unsuccessfully thus far) a right based on California law but contended that it need not comply with the State procedural requirements necessary to perfect that right.

Here is the court's characterizations of the Federal Government's claim (*U.S.* v. *Fallbrook P.U.D.*, 165 F. Supp. 806, 828–29 (S.D. Calif. 1958)):

"(2) STATE POLICE REGULATION THEORY

"That California's statutory application and permit procedures for the acquisition of an appropriative water right are police regulations which are inapplicable to the United States, with the result that, even if all other water users must comply with such procedures in order to acquire a valid appropriative right, the United States can obtain the right merely by taking and using the water."

This is poor policy as well as poor law. If the Federal Government chooses to ignore State law and rely on some other kind of federally generated right for a project, so be it. However, if Federal officials choose, for whatever reason, to base their claims on a right which is peculiar to State law, then in all fairness they ought to comply with the State procedure necessary to acquire that right. While I know of no other situation in which the Government has made the very unusual claim that it made in the *Fallbrook* case, I think it desirable to lay that kind of contention to rest. However, I would not consider this provision a sine qua non for any first step in trying to resolve some of the Federal-State jurisdictional conflicts. Pehaps the apprehension and resistance that it has engendered in some quarters, I presume through lack of understanding of its extremely limited objectives, might outweigh the advantages I see in it.

Section 1, subsection 4 is, along with subsection 1 perhaps, the meat of this bill. It would remove an illogical anachronism which has been developed by the courts with respect to the so-called navigation servitude, by which the Federal Government may preempt a navigable stream or any of its nonnavigable tributaries which affect its navigable capacity and destroy vested water rights without compensation so long as it is furthering navigation interests under the commerce power. See, e.g., *U.S.* v. *Twin City Power Co.*, 350 U.S. 222 (1956). Here is the anachronism. If the Federal Government takes a water right pur-

suant to any constitutional power other than the navigation facet of the commerce power it has to pay compensation. That is demonstrated by the *International Paper Co.* case in which the Federal Government took certain water rights pursuant to the war power and the Supreme Court held that compensation was constitutionally required. *International Paper Co.* v. *U.S.*, 282 U.S. 399 (1931). However, if those rights had been taken by the Federal Government pursuant to its power to control navigation, no compensation would be required. I can find no logical basis for this exception to the general requirements of the fifth amendment in any of the decisions. Fortunately, the Supreme Court has said that even though compensation is not constitutionally required in such cases, Congress may provide for compensation as it sees fit. Thus with respect to certain Federal water resource development programs, Congress has already provided that if vested water rights recognized under State law are taken or infringed then compensation shall be paid. This is true under the Reclamation Act of 1902 and the Federal Power Act of 1920. It is not true with respect to projects that may be built by the Corps of Engineers.

Let us assume a situation where a site is proposed for development in the West. If that project is built by the Bureau of Reclamation and existing water rights are taken to carry out the Federal purpose, then the holders of those rights are entitled to compensation. If the site is developed by a project licensed under the Federal Power Act, and other existing rights are impaired, compensation is due. However, if the project should be built by the Corps of Engineers, then compensation need not be paid for those water rights. This is illogical, unfair, and cannot be supported on any rational basis. Moreover, since the Reclamation Act applies only to the 19 Western States, the existing situation seems to discriminate against the rest of the Nation where most Federal water resource development is undertaken by the Corps of Engineers. S. 1275 would simply extend the protection that Congress has afforded property rights affected under the Reclamation Act and the Federal Power Act to all water rights taken or impaired by any water resource development projects undertaken by the Federal Government throughout the Nation. If compensation is fair, just, and equitable in one situation, it is certainly appropriate no matter who the constructing or authorizing agency may be or where the project may be located. This puts no limit on the constitutional powers of the Federal Government to take any water rights necessary for its projects. It merely provides that the Government shall extend equal treatment to its citizens and compensate them for any water rights which would be compensable if taken by or under the authority of the State. This bill would not endow any asserted rights with a sanctity that they would not have under State law. If a water right would not be compensable under State law it will not be compensable if taken by the Federal Government. S. 1275 would provide a uniform and fair approach to the problem of developing the necessary projects which the increasing demands for water resource development require in a manner which will do justice both to the national interest in such projects and to the water rights holders whose property right may have to be taken to implement this national policy.

If these projects are in the national interest, it is only fair that the Federal Treasury bear the cost of the destruction of existing water rights to make way for the projects, not the individual water users. I sincerely believe that the cost of acquisition of such rights on most projects is negligible. A few years back such costs on the great Central Valley project in California comprised less than 1 percent of total project costs. In this connection I think the Department of the Interior should provide the Congress with this data so that we can see what costs have been involved in this area in the implementation of the reclamation program for 60 years.

Before leaving this point, I should point out that it should properly lay to rest one of the Justice Department's most recent efforts to negate the congressional directives in the Reclamation Act and the Federal Power Act by asserting that indeed no private water rights can ever be acquired in a navigable stream absent congressional consent. The Department's contention is most succinctly summed up in its brief of June 30, 1959, before the special master in *Arizona* v. *California*, in which it spent several pages of argument attempting to justify the position that:

"As against the United States, privately owned rights to the use of the navigable waters are not possible in the absence of express provision therefor by Congress" (p. 48).

California's evidence in *Arizona* v. *California* demonstrated that thousands of acres of lands have been patented in California and Arizona under the Desert Land Act of 1877 upon findings by the Secretary of the Interior that valid State law appropriations had been made from the navigable Colorado and Gila Rivers. Moreover, millions of acres have been patented under that act in areas throughout the West necessarily dependent on appropriations from navigable streams. Indeed there is hardly a stream in the West not legally navigable. We do not think that the Justice Department can seriously contend that the water rights on which such development depends are invalid and can be destroyed with impunity, but S. 1275 would make it clear that Congress does not share that view.

The second part of subsection 4 deals with the manner in which existing water rights needed for Federal projects shall be taken. It is intended to restrict the power of the Federal Government to simply seize water rights without notice to the holders of such rights and without going through eminent domain proceedings. The problem is highlighted by *Dugan* v. *Rank*, 372 U.S. 609, the *Friant Dam* case decided by the Supreme Court last term. In that case the Bureau of Reclamation in constructing the Friant Dam unit of the Central Valley project purchased a number of water rights on the lower reaches of the stream below the dam and contracted with other water users that it would maintain certain minimum streamflows. It failed to work out satisfactory arrangements with other users asserting various claims. When the dam was finally closed and operations begun, the water supply to some of claimants downstream was curtailed. Those users sought to enjoin the operation of the project unless the Government would maintain the natural flow of the stream or agree to a physical solution which would give them the equivalent of their preexisting rights. The Supreme Court held that the suit could not be brought against either the United States, either directly or through certain Bureau of Reclamation officials, because there had been no consent to suit. More importantly, however, the Court held that the Federal Government by the mere closure of the dam had partially taken the water rights of the complaining users and that the appropriate remedy was a suit for damages under the Tucker Act. Presumably the Court of Claims will make the necessary determination as to what water rights, if any, were taken and compensation should be paid as required by the Reclamation Act. However, the problem here concerns the proper relationship of the Federal Government to its citizens.

If water rights have to be taken for a Federal project, they should be acquired in an orderly eminent domain proceeding in which adequate notice is given to all the potentially affected users, a declaration of taking is filed in the appropriate court, and all issues are joined before the project is built and some unsuspecting user's rights taken with no more notice than that the project is in operation. The danger of such user's rights being cut off by the statute of limitations in such cases is substantial. The orderly way for everyone to know what his rights are, to know what the Federal Government intends to do, and just what is going to be accomplished in the way of curtailment of existing rights by a Federal project is through the traditional eminent domain proceedings if the necessary rights cannot be acquired by agreement. Contrary to some arguments which I have heard, I think that this is no great burden on the Federal Government. But even if there are any burdens here, they properly should be placed on the Federal Government rather than on the individual water users. When a planning report is made for a reclamation project, for example, the Bureau of Reclamation is well aware of whether existing rights on the stream may be impaired by the operation of the project. The Bureau should be required to make a good faith effort to buy those rights. If they are unsuccessful, they should file a declaration of taking and then get on with the project.

Some have argued that requiring the Federal Government to go through eminent domain proceedings will unduly hold up the construction of projects. This certainly has not been so under existing law and is clearly not the intent of this provision. What is intended is that the Federal Government should at least institute eminent domain proceedings and make a good faith effort to give reasonable notice to all water users downstream who might be affected by the project. I do not think that someone who is overlooked in this process would be entitled to come in and stop the project by an injunction suit against a Bureau official. First of all, efforts to obtain injunctions against the operation of Federal projects have uniformly been so unsuccessful that it is not a very real possibility even under existing law. However, if that were a real threat, it would be very simple to provide that if the appropriate Federal agency has filed a con-

demnation suit and had taken good faith measures to give adequate notice of taking to water users who reasonably might be expected to be affected by that project, then an injunction shall not issue against the construction of the project for which these water rights are sought. This would mean that some individuals might have to be brought into the eminent domain proceedings late in the game or, if they are completely overlooked, might have to resort to the Court of Claims. I do not think this would occur very often, but if it did the matter would be handled in the way it was in *Dugan* v. *Rank*, i.e., by invocation of the inverse condemnation doctrine. All S. 1275 would do then is put the burden on the Federal Government to go forward in a reasonable and orderly fashion to obtain the necessary rights to get the project underway rather than simply preempting a stream and throwing the burden on all the water users to try to find out what has been taken, if anything, and how they are to go about either getting water or compensation. This is just good policy. It is a matter of the Federal Government dealing equitably with its citizens.

Finally, section 2 of the act is a series of savings clauses that are taken from the original agency bill. I think that most of these are self-explanatory. Subsection 1, for example, states that nothing in this bill would repeal any act of Congress requiring that rights of the United States to the use of water be acquired pursuant to State law. Thus section 8 of the Reclamation Act of 1902, for example, would not be affected. Subsection 2 simply states existing law that a treaty is the supreme law of the land and all rights in international streams are not to impair or interfere in any way with the provisions of any treaty affecting those waters. Subsection 3 is a general disclaimer providing that certain other existing rights and obligations are not intended to be impaired or modified in any way by this legislation. In particular, subsections (a) through (d) preserve (*a*) the rights of the United States or any State under existing compacts or judicial decrees, (*b*) obligations of the United States to the Indian tribes or rights held for any Indian tribes, (*c*) valid water rights heretofore acquired by others than the United States under Federal or State law, (*d*) any existing uses by the Federal Government which were made for a valid governmental purpose under either State or Federal law.

Subsection (e) is a prospective provision which would make it clear that valid future rights may be acquired for Federal propects by congressional authorization so long as such rights are initiated prior to the acquisition by others of intervening rights under State law. It is a simple statement of the priority principle which has been at the heart of water resource development in the West for a hundred years.

PROPOSED AMENDMENT TO S. 1275

Section—. *Acreage limitations*

Nothing in this act shall amend, alter, or repeal any provision of any law which limits the acreage in single ownership that may be served with water made available under the reclamation law, and the same acreage limitations that are imposed by the reclamation law shall be applicable to water made available under any other Federal law pursuant to a Federal reservation or withdrawal.

RECOMMENDATION OF SECTION OF MINERAL AND NATURAL RESOURCES LAW, AMERICAN BAR ASSOCIATION, ADOPTED BY THE HOUSE OF DELEGATES, AUGUST 13, 1963

Whereas certain jurisdictional conflicts exist between the States and the Federal Government with respect to water resource developments; and

Whereas the Select Committee on National Water Resources of the U.S. Senate has reported, after an exhaustive study, that "the broadening pattern of these conflicts is conclusive proof of the urgent need for clear-cut, definitive action on the part of Congress to work out with the States a redefining of Federal-State powers and responsibilities for control, use, and development of water resources"; and

Whereas extensive hearings have been held by the Congress on this subject over the past 6 years with the result that certain problem areas have been brought into clearer focus and various legislative remedies proposed: Now, therefore, be it

Resolved, That the American Bar Association urges the Congress to consider favorably legislation designed to preserve to the States their historic role in

water resource development and to eliminate some of the impediments to fuller Federal-State cooperation in this field; and be it further

Resolved, That the American Bar Association urges the Congress to consider natural resources law be authorized to appear before appropriate committees of Congress in support of the foregoing resolution and legislation similar in substance to the attached draft of bill.

I hereby certify that the above is a true and correct copy of the resolution as adopted.

GIBSON GAYLE, Jr., *Secretary*.

Dated September 16, 1963.

Senator Moss. I know that Senator Anderson, and also Senator Burdick said they were coming back. They had other things they wanted to do and they may yet come in before you leave.

I speak for them as well as for myself in telling you how much I appreciate your staying over and giving us this very enlightening discussion.

Senator Jordan may have some questions, or some comments.

Senator JORDAN. I just want to join the chairman, Mr. Ely, in commending you for a very fine analysis of this bill item by item and line by line and in the thorough and complete manner that you have done it. Frankly, as a cosponsor of the bill I think you have taught me things about the bill I did not know. I am grateful to you for it. You have cleared up a good many points, I think, in a sound and convincing manner.

I would judge, Mr. Ely, that your suggested amendment might better be added as subparagraph (f) at the end of the bill, following (e).

Mr. ELY. It might very well go there, Senator Jordan.

Senator JORDAN. That would be a logical place for it.

Mr. ELY. Or give it a new section number, as you wish.

Senator JORDAN. Either way.

Senator Moss. Mr. Ely, the staff has called my attention to two points that I would like to get your comment on if I could. Calling your attention to section 1, subparagraph (3), on line 5, page 2, I wonder if you would accept or comment about the amendment that was proposed by the Interstate Conference on Water Problems in which they add two words at the end of line 5 "or other" so it would read "beneficial diversion, storage, distribution, consumptive or other uses of water under the laws of any State."

Mr. ELY. I would have no objection to that, Mr. Chairman, so long as you keep in perspective that you are talking about voluntary proceedings by the United States at its election to proceed under State law. All that this subparagraph says is that if the United States elects to do that, it shall be governed by State procedure.

In that framework, the amendment suggested seems appropriate.

Senator Moss. I think the basis for their suggestion was to obviate the dispute as to whether the use of water for power purposes was actually consumptive or nonconsumptive.

Mr. ELY. Yes. Well, if the committee does that, bear in mind that this bill does not in any way change the jurisdiction of the Federal Power Commission. It is as much necessary to obtain a license under the Federal Power Act after enactment of this bill as before. There was no intention to require either the United States or licensees, to act under State laws in displacement of Federal powers. Quite the contrary. I would not want to leave any such implication that would be taken out of context.

Senator Moss. This same group has also recommended that the word "vested" on line 9, page 2, be stricken. Do you care to comment on that?

Mr. ELY. I would recommend that you should not do that, Mr. Chairman. The word "vested" appears in section 27 of the Federal Power Act. I do not think the committee should expose the bill to the charge that speculative paper rights of some kind are intended to be required to be paid for in the furtherance of the Federal project. I don't believe in that. What we are attempting to do is to protect rights that have vested.

By "vested" I mean rights that are associated with works that are constructed or in process of construction with due diligence at the time the right is taken by the United States. I don't think the Government ought to be required to pay for hopes.

Section 27 of the Federal Power Act respects vested rights under State law and it has been on the books 40 years. There may be disputes as to what "vested" really means but there it is in the Federal Power Act. I think I would keep it.

Senator Moss. Your position is this is a word legally construed and has a definite meaning, and that in order to deal with a real right other than some speculative right you should retain the word "vested"?

Mr. ELY. That is right. For example, I would not expose the United States to payment in a case like the *United States* v. *Grand River Dam Authority*, payment for a purely hypothetical paper right. There the State of Oklahoma had purported to appropriate the waters of a nonnavigable tributary for the exclusive use of the Grand River Dam Authority which, however, had as yet not built works.

It claimed that this right was compensable. The United States built flood control dams that made part of this river unusable by the authority.

The U.S. Supreme Court held that this type of a hope was not compensable. I would not want to get rid of the word "vested" and be accused of attempting to give the States the right to create paper rights that the Government had to pay for.

Senator Moss. Thank you, Mr. Ely.

Senator JORDAN. Mr. Ely, even under the reservation theory or under navigational servitude, do you see any possibility of a conflict between development by the Federal Government of Federal power projects downstream on the river that might foreclose the irrigation some time in a future of additional arid lands in headwaters or in the midwaters of the drainage system?

Mr. ELY. Yes, there is such a danger. That is one reason why I think the sponsors of this bill have been wise in subparagraph 2 of section (1) in providing that the provisions of the Flood Control Act of 1944 shall apply to all Federal works or works built under the authority of the United States so that the power project, which is essentially a Government exercise of the navigation power, shall not be in position to assert a priority against an irrigation project built later under either State or Federal law.

The water rights of that power project should not necessarily be derived from the fact that its construction is federally licensed. Let me explain here. The *Pelton Dam* decision that has caused so much of this furor, viewed on its facts, was perfectly sound. The

damsite was on Federal reserved lands, on which the license was issued in the exercise of the property clause of the Constitution and not because the stream was navigable. It was not navigable. The holding was that such a licensee was not to be prevented from building his dam because the State of Oregon had declined to give him a permit, the refusal being based on the assertion that this dam would interfere with fish runs.

No contention to interference with consumptive uses was involved at all. The license provided on its face that there should be no interference with any vested right. There weren't any. Moreover, the license subjected the rights of the licensee to all of the future upstream consumptive uses that the Commission could think of. They were prospective Federal reclamation projects. The licensee's rights, whatever they might be, were subject to those even though they were not yet vested.

Thus S. 1275 really would put into law what the Federal Power Commission put into that license, except that we would limit the protection to vested rights.

The difficulties that are created by the *Pelton* decision are these: What kind of a water right did this licensee get; did the Federal Government create some kind of a riparian right by the fact that it owned these lands? Does this power company have a riparian right of some sort in a State that has abolished riparian rights? Does it have some kind of Federal appropriative right? If so, does it date from the creation of the reservation in 1919, or the issuance of the license in 1959?

We cannot tell what water right that company has. It would be far more tidy if its water rights were fixed by reference to some inventory. There is no Federal inventory of water rights.

A second big problem created by the *Pelton* decision is one so ably illustrated by the six distinguished lawyers who sit at this table on behalf of the United States, who now demonstrated that the fears of those who read the *Pelton Dam* decision as to its implied effects are indeed realities; namely, that the United States really does claim, with respect to all of the national forests, all of the reserved lands, and I suppose all of the withdrawn lands, some kind of a Federal water right to take all of the water that arises on those reservations, those withdrawn lands, and not only put those waters to use on that real estate in derogation of any intervening water rights built up by private people below or above, but also to dispose of them to some user at a distance, even though he is not located on withdrawn lands.

Senator JORDAN. Or by the Federal Government at a distance?

Mr. ELY. Yes. When I first heard that worry expressed, I discounted it, but I no longer do so. Any doubts are dispelled by what you have heard in this room within the last 3 days. This is the claim of the United States, and it must be clarified and put at rest. If there was not a jungle before, it has grown in these 3 days and exists now. Every water right in the West is at hazard.

Let me go one step further. The claim has been made that the United States, having acquired these lands as the original owner from Spain or France, Mexico, whatever, still owns both land and water rights, unless you can find a Federal statute that divested their title in some way. This we sometimes call the King of Spain theory.

The outstanding statute that the United States counsel recognized as giving any one a right to the use of the waters upon the public domain is the Desert Land Act, passed in 1877. This act provides for a homestead, originally for 640 acres, later for 320, to acquire a patent from the United States. The applicant, in addition to other requirements, must prove to the satisfication of the Secretary of the Interior that he has a valid appropriative right under State law. He must have made an appropriation under State law.

More than 10 million acres in the West have gone to patent under the Desert Land Act, in every State in the West. The entrymen in every case have proved to the satisfaction of the Secretary of the Interior that they had valid appropriations under State laws upon specified streams. What are these streams? All of them, under the rule of the *Appalachian* case, are either navigable waters of the United States, or else Federal jurisdiction attaches to them because their use would impair the navigability of the navigable waters into which they feed.

If the position of the United States, that there can be no appropriation under State law of navigable waters, is sound, then the titles of 10 million acres of the reclaimed desert of the West were unlawfully issued by the Secretary of the Interior.

Now I cannot believe that the lawyers who have made that assertion before this commttee had thought it through, to realize the consequences of what they are saying. The Desert Land Act was never intended to have any such effect. This argument is derived entirely from the fact that the final words of the Desert Land Act reserved to the public the waters upon the public domain not approriated and not navigable.

The reason why that language "not navigable" was put in I cannot certify to you, because it went into the bill in conference. Both houses had passed the Desert Land Act without those words. The conference committee added the words and what they intended about it they did not disclose in any report. It is easy enough to see what they probably meant. Under the common law the bed of a navigable stream is owned by the State. Only the State could access to; United States could not. By contrast, the waters upon the public domain that were not navigable, surrounded on either side by public lands, were not accessible to the public unless the United States, by statute, made them accessible and it did so by the Desert Land Act in the final words of that paragraph.

Senator JORDAN. Mr. Ely, I share your concern. My apprehension has been increased, not lessened, in the past week of these hearings by the testimony of the Federal attorneys. I could not agree with you more when you say that if we ever had any doubt of whose rights are in danger, the administration lawyers have served notice on us here this week.

Now, our situation in my State, and I am sure you are familiar with it, is that we have about 3 million acres of land presently under irrigation. Most of the water originates on reserved lands. Two-thirds of the area of my State is federally owned.

On the lower Snake and Columbia Rivers the great power dams built by the Federal Government are not required to comply with State water laws, nor are they required to have State licensing. The payout

schedule for these dams is calculated on a certain streamflow based on historic water supplies.

Now, it may very well be demonstrated that irrigation increases power downstream by capturing floodflows which would otherwise pour over the power dam spillways and waste into the ocean. Approximately two-thirds of the floodwaters thus retarded and applied to the land for irrigation will return to the streamflow at a time when the floods have subsided and the water thus retarded by irrigation use will be a useful addition to normal streamflows when all flows can be used to generate power. Thus irrigation makes a genuine contribution to downstream power and this fact should be recognized and evaluated with respect to future irrigation projects.

Now I believe that my State needs the protection provided by S. 1275 because we expect in years to come that we will bring in a million, perhaps 2 million, acres of arid land not under cultivation and not having a water right at this time. There is only one source of water, and most of it comes off of the Federal reserve lands. We irrigate our 3 million acres of land from the same source that supplies power downstream.

My concern is this: What is going to happen when we do bring in this additional arid land in my State? What is the conflict going to be between water for irrigation and water presently being used under the power of the Federal Government to generate electricity?

I believe that S. 1275 will give us immeasurable protection in this area and I ask you if you concur?

Mr. ELY. I do indeed, Senator. When you have the time you may want to read a law review article called "Federal Power in Western Waters—the Navigation Power and Rule of No Compensation" by Eva H. Morreale, published in Natural Resources Journal, volume 3, No. 1, page 177. This is published by the University of New Mexico School of Law and this is a sober and scholarly but frightening review of these various potentials.

The author reaches the conclusion that the United States, proceeding under the navigation power, may take without compensation the water rights put to use on nonnavigable tributaries in irrigation and desertland, and may restrict the compensation paid to the desertland value of the lands that are taken. It is perhaps an extreme view, but it indicates the type of fear you have expressed.

If S. 1275 were law, it would apply the provisions of the O'Mahoney-Milliken amendment only to works hereafter constructed. If you want real assurance for the situation you are describing, it should fairly read "heretofore or hereafter constructed."

Senator JORDAN. In order to accomplish that, I would conclude from your remark that an amendment should be offered on line 11 of page 1 of the bill to insert after the word "works", "heretofore and".

Mr. ELY. Yes. I know of no case in which works have been built west of the 98th meridian in the past where the assertion of this policy would work any hardship to the United States.

Senator JORDAN. So that subsection (2) of the bill would read, so I get it clearly in mind, like this:

The provisions of section 1(b) of the Flood Control Act of 1944 (Act of December 22, 1944, 58 Stat. 888–889, as amended; 33 U.S.C. 701–1 (1958)) shall apply to all works heretofore and hereafter constructed by or under the authority of the United States with respect to waters arising within States lying wholly or partly west of the 98th meridian.

That would accomplish what we are talking about?

Mr. ELY. Yes, sir.

Senator JORDAN. Thank you, Mr. Ely, for a very helpful contribution to our effort here. It has been most gracious and constructive.

Senator Moss. You have indeed.

Senator Kuchel, the principal sponsor of the bill, is unable to be here this morning and was very disappointed that he could not hear your testimony. In the interest perhaps of making the record to see if there are parts that we feel should be added, I wish you would address yourself to any questions that Mr. Andrews, who is the minority counsel for the committee and works with Senator Kuchel very closely, may have.

I understand he has one or two questions he would like to ask.

Mr. ANDREWS. Yes, I do, Senator. Thank you.

First of all, Mr. Ely, let me say how sorry Senator Kuchel is that he could not be here today. As you know, he had to go to California yesterday evening. He had hoped that he would have a chance to hear you but in order to accommodate Senator Anderson you were scheduled for today. We regret that Senator Anderson had to leave earlier.

Senator Kuchel does have several questions on this matter. I would first like to address ourselves to the one which we just left because I thought that I myself had in the past claimed too much for subsection (2) of section 1. As I understand it, that would only incorporate the provisions of the cited section of the Flood Control Act of 1944 which in essence was described in Senator Kuchel's remarks at the opening of this hearing when he said:

> The use for navigation in connection with any federally authorized project hereafter constructed shall only be such use as does not conflict with the beneficial consumptive uses of the affected waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

Now is it your testimony that if the United States should assert the commerce navigation power to construct a power project this provision of S. 1275 would subordinate the use for power purposes to competing specified consumptive uses?

Mr. ELY. It would not prohibit the use for power purposes but it would make obviously compensable the taking of any consumptive use.

Mr. ANDREWS. What if the United States were to construct the power work under the general welfare clause; would it not be true that as against later vesting rights to consumptive uses such as Senator Jordan is concerned about, there would be no protection?

Mr. ELY. If you want to go further than the O'Mahoney-Milliken amendment, additional language would be required. The language in S. 1275 would simply make the O'Mahoney-Milliken amendment applicable to all works built hereafter under the authority of the United States. That subordinates their use for navigation or power to irrigation and other consumptive uses.

Mr. ANDREWS. Including licensees of the United States?

Mr. ELY. That is correct. Under the provisions of ahe O'Mahoney-Milliken amendment. But that in turn simply says the use for navigation in connection with the operation of maintenance of such works, and so forth, shall be only such as does not conflict with any beneficial consumptive use present or future.

If the use is for power, unrelated to navigation, the question has never been resolved, so far as I konw, as to how the O'Mahoney-Milliken amendment applies to it. It was truly intended as a compromise, to reconcile consumptive use requirements of the upper Missouri Valley with those of navigation below. Consumptive use prevails.

Mr. ANDREWS. In order to assure Senator Jordan of the protection he wishes, we would really have to have a broader provision which would clearly extend the protection of consumptive uses against power uses rather than only against navigation by incorporation of the O'Mahoney-Milliken amendment, would we not?

Mr. ELY. That is conceivable, Mr. Andrews. If you want full protection for future irrigation uses in Idaho against present power uses on downstream dams, you might have to have broader language than we have discussed here today. But if the power development is justified as one incident to navigation, and that has been its usual constitutional basis so far, then I would say the O'Mahoney-Milliken amendment, made applicable to those downstream projects, would protect consumptive uses.

Mr. ANDREWS. I see.

Senator JORDAN. I hope before you leave here, Mr. Ely, you give us the benefit of your advice as to exactly what language you think would accomplish the purpose which we are discussing.

Mr. ELY. I will try to. It opens up a really tremendous field, the whole problem of protection of the area for later development. You can realize here the merit of some of the Government contention about this related problem.

My feeling is that they too want the opportunity for future, but presently unknown, development in headwater reaches. The trouble is that they go much too far. But if we really want to protect the right to later irrigation development against immediate downstream power development you have a problem that would have to be threshed out with care.

I have a feeling that the man who has made an investment in good faith in a power development is entitled to protection against the destruction of the value of the investment by uses initiated later upstream. He is entitled to compensation from the irrigators.

Senator JORDAN. Just to comment on that, private power companies building power dams in my State have as a condition of their license that whatever rights they might have for water for power are forever subject to future reclamation needs. We cannot do that, of course, in the case of federally constructed dams, with respect to the licenses, because they are not licensed by the State.

Mr. ANDREWS. Mr. Ely, there has been considerable concern here expressed by some as to what might be the results of requiring compensation to be determined, under subsection (4) section 1, in accordance with State law definition of compensable rights. Would it be your opinion that the words "vested" and "beneficial" qualify all of the words "diversion, storage, or consumptive use" so that at least the State definition of compensable rights must meet the common meaning of "vested" on the one hand and also "beneficial" on the other hand?

Mr. ELY. I think you are unquestionably right.

Mr. ANDREWS. The question has been raised that this provision would give rise to a claim of compensability made by persons like those who in the *Ivanhoe* case claimed they had a right to have water from the Federal project for in excess of 160 acres, and an assertion that to deprive them of that was a compensable right. Do you believe that such would be a compensable right under this section?

Mr. ELY. Not at all. If I remember the facts in the *Ivanhoe* case, Mr. McCracken, the litigant, had never used any water at all from the source from which the United States was to bring water. He was, indeed, 150 miles away from it, pumping underground water. The United States said it would bring him supplemental water, but upon its terms.

Mr. ANDREWS. The 160-acre limitation, of course, only applies to project water; that is, in addition over and above what the user had prior to that time.

Mr. ELY. That is correct.

Mr. ANDREWS. Now, would it be your opinion that these same words, "vested" and "beneficial," would also protect against any claim that areas of origin, or watersheds, or counties of origin had a compensable right under State law which must be paid for by the United States if any Federal project were constructed, inconsistent with such right?

Mr. ELY. Well, there is no intention here so far as I know to protect what might be called a political right, using the term in the better sense, that is, right created by statute for the protection of an area of origin not related to any prior appropriation.

Mr. ANDREWS. Certainly the word "vested" in common meaning does not include any such thing as a direction to a State official which is the nature of the area of origin protection under California law.

Mr. ELY. That is right.

Mr. ANDREWS. So you would say "vested" and "beneficial" would protect against any such claim being successfully asserted, and the Federal courts could ultimately protect against any attempted abuse by State authorities or courts?

Mr. ELY. I think you are quite correct. The United States does not have to proceed in a State court, it proceeds in its own courts and the interpretation of this Federal statute presents a Federal question.

Mr. ANDREWS. Do you see anything in this bill which would grant any right to any non-Federal entity to enter upon any Federal land for the purpose of making use of water?

Mr. ELY. No.

Mr. ANDREWS. In other words, those rights of entry upon Federal land would be either as they now exist or later created by other statute?

Mr. ELY. That is right. This statute would not affect that one way or the other.

Mr. ANDREWS. Then there is no danger by this act that any person would be given a right to enter the wilderness area and divert water to the disadvantage of that area?

Mr. ELY. No.

Mr. ANDREWS. If the water happened to rise upstream from that wilderness area and some non-Federal entity did acquire a right under State law to divert that water, could the Federal Government nevertheless protect the wilderness area downstream under existing authority by enjoining such a project or condemning that person's prior right if it is already vested?

Mr. ELY. Yes.

Mr. ANDREWS. Is it true that at the time the Desert Land Act was passed the definition of navigability was much more restricted than it is now presently understood to be?

Mr. ELY. Decidedly.

Mr. ANDREWS. Was the definition at that time roughly as stated in the old case of *Daniel Ball* where they stressed that navigable waters were only those which were navigable in fact?

Mr. ELY. That is correct.

Mr. ANDREWS. You say paragraph (3) of section 1 is intended to guard against the situation in the *Fallbrook* case where, as I understand it, the Federal Government claimed that it had a right to divert water from the stream and take it outside of the watershed even though it had no appropriative right under State law to do so and yet it claimed under State law in that case.

Mr. ELY. I do not pretend to be a good demonologist in the *Fallbrook* case.

Mr. ANDREWS. Let us assume that it did under State law in that case.

Mr. ELY. The specific point that I have referred to in connection with the *Fallbrook* case is the claim of the United States there that it was entitled to a right under State law, but was not required to conform to the State procedures to establish it. It said it did not have to take its application for a permit to the State water rights board. That position has been more recently reasserted, as you will see by the statement of Mr. Dickenson of San Joaquin County. That is in the record. He refers to two instances.

In 1960 and 1961 the United States, in proceedings before the State water rights board, denied the authority of that board in granting a permit to the United States, to attach to it any conditions whatever, particularly the conditions to respect the California county of origin law. The position of the United States has been that it is entitled to a water right under the laws of California but free of that restriction. If the Government is correct about that, then manifestly another tremendous field of chaos is opened up.

Can the United States transport water from northern California to southern California proceeding under the guise of State law appropriations made by the United States but free of California's county of origin law; whereas, if the State does that, the State is subject to county of origin law and so is any licensee in it except the United States?

Mr. ANDREWS. Of course, even with S. 1275 as law, the Federal Government would remain free to totally disregard State law and proceed under Federal law to do that very thing if Congress so provided.

Mr. ELY. Yes, with the great difference that to do so the United States would have to bring a bill authorizing such a project before this committee, where there would be a thorough hearing of the policy involved. If the decision were made to disregard the counties of origin, that would be by the specific will of Congress and not by the election of an administrative officer.

Mr. ANDREWS. That is correct. Is it not so that the evil of the situation, where the Federal Government claims the right under State

law but repudiates the conditions, is that one does not know when the Federal authorities are going to assert the power to be free of what conditions, so there again you are left in doubt?

Mr. ELY. That is right. According to Mr. Dickenson's statement, in 1961 in another proceeding the United States resisted the introduction of its own State law permit in evidence, because it contained a condition requiring compliance with California's county-of-origin law. It said that the condition was an unconstitutional restriction, void ab initio.

Mr. ANDREWS. They already hold many permits of long standing with similar conditions as those and which they have never yet attacked but would be free to do so unless they are bound to abide by the State law once claiming under it, is that correct?

Mr. ELY. Yes. Keep in mind we always say "if" the United States claims its rights under the law.

Mr. ANDREWS. Yes.

Mr. ELY. May I now add the language from the *Fallbrook* case. This is the Government's contention in its brief in the *United States* v. *Fallbrook Public Utility District*, 165 F. Supp. 806, 828–29 (S.D. Calif. (1958)). This is the court's characterization of the Government's claim, the court speaking:

> (2) State police regulation theory that California's statutory application and permit procedures for the acquisition of an appropriative water right are police regulations which are inapplicable to the United States, with the result that, even if all other water users must comply with such procedures in order to acquire a valid appropriative right, the United States can obtain the right merely by taking and using the water.

Mr. ANDREWS. Is it not true that in that case the court held that the United States had stipulated it was not proceeding under sovereign powers, exercising the supremacy clause, but was proceeding as the same as a private party?

Mr. ELY. I think you are right but I do not claim expertise on that matter.

Mr. ANDREWS. Also in the *Fallbrook* case I believe it was asserted by the Federal Government that they had a riparian right to a certain amount of water, yet in the *Fallbrook* case they claimed the right to export that outside the watershed while under State law that is not an incident of the riparian right, is that right?

Mr. ELY. You are certainly correct as to the latter, and I believe that the Government did make that claim.

Mr. ANDREWS. In the *Fallbrook* case this particular aspect made no difference for the reason that the United States was the last riparian on the stream and the rule I just explained, "no export out of the watershed," is for the benefit of downstream riparians so there will be a return of water to the stream, is that correct?

Mr. ELY. Yes.

Mr. ANDREWS. But if the United States were to assert a similar right as a riparian upstream and would claim to have the right to export riparian water outside the watershed, they would be impairing persons downstream, is that correct?

Mr. ELY. Yes.

Mr. ANDREWS. Now in regard to the second clause of subparagraph (4) of section 1, what I term the "direction" to commence condemnation proceedings, this bill would not in any way reverse the Supreme

Court's holding in *Rank* v. *Krug* (*Dugan* v. *Rank*) to the effect that a non-Federal entity may not enjoin a Federal project; isn't that correct?

Mr. ELY. As to that feature of the case you are correct. What would have happened, I hope, if S. 1275 had been law was that the United States would have instituted condemnation actions against these people who were objecting to having their water supply interfered with and gone ahead to judgment. The case would have been over 12 years ago, instead of dragging on for 16. But had the Government not done so, then I do not think that the injured water user would have been in a position to get an injunction.

Mr. ANDREWS. Do you know whether or not existing Federal procedural law would permit one who had not been joined in an affirmative condemnation action brought by the United States to intervene in that suit, or would it be necessary for him to go to the Court of Claims in a separate proceeding?

Mr. ELY. I cannot give you a dependable answer to that. It might be useful to incorporate here language to provide for that very thing.

Mr. ANDREWS. It would be much more desirable if the litigants were all in the same suit rather than one in the affirmative condemnation action and the other in the inverse condemnation action?

Mr. ELY. That is right; and, if they have a right to intervene, they should be denied specifically any right to enjoin. So a man would either have to come into the condemnation action, or hold his peace; he would be denied specifically the right to enjoin. I do not think he could get an injunction anyhow, but if that is a real fear, a few words added to the bill will answer it.

Mr. ANDREWS. Now just so we get this clear, I think there has been some confusion sometime during the proceedings, section 8 of the Reclamation Act of 1902, regardless of what it may have been previously assumed to mean, now, by virtue of the *Fresno* case and *Rank* v. *Krug*, it does not mean that the United States must acquire water necessary for Federal reclamation projects by proceeding under State law, is that correct, sir?

Mr. ELY. Certainly the holding of *Arizona* v. *California* is that the United States may store and dispose of unappropriated water without complying with State law. No one claimed the contrary, so far as I know, but the court went out of its way to say this.

Mr. ANDREWS. That case also.

Mr. ELY. The first *Arizona* v. *California* case in 1931 held that the United States could construct the Hoover Dam and thereafter dispose of the stored water without complying with what the court called the police regulations of the State. The *Arizona* v. *California* decision that has just come down, going further, holds that the Secretary of the Interior can dispose of stored water, within a State, without conforming to that State's laws of priority. This is contrary to the holding of the special master.

Mr. ANDREWS. Of course that was based on the particular project act.

Mr. ELY. Yes. If a statute, such as the Boulder Canyon Project Act, as interpreted by the court, authorizes the United States to store and dispose of water, it does not have to acquire its water rights under State law. Otherwise, he must acquire water rights for a reclamation

project under State law by purchase under section 7, or condemnation, or by initiating such rights under section 8.

Mr. ANDREWS. And nothing in this bill is intended to place an interpretation on section 8 of the Reclamation Act that prevents the United States establishing a water right under Federal law, if a Federal statute, such as that project act, so authorizes?

Mr. ELY. You are correct.

Mr. ANDREWS. The only thing that sections 7 and 8 now do is to say that in determining who must be paid when compensating those who have been hurt by reason of a project under the Reclamation Act, you look to State law for the definition of those who have been hurt?

Mr. ELY. Yes. Section 8 states that beneficial use shall be the basis, the measure, and the limit of the right.

Mr. ANDREWS. Similar to the vested and beneficial qualifications of subparagraph (4) of this section?

Mr. ELY. That is right.

Mr. ANDREWS. I believe in your formal statement you point out that there have been no horrendous financial calamities come to the United States by reason of having to pay some of the Reclamation Act claims since the *Gerlach* case.

Mr. ELY. That is correct, and that deserves emphasis. The United States in the *Gerlach* case was called upon by Mr. Justice Douglas to submit a memorandum as to their practice as to acquiring water rights and originating them. That memorandum, which I will supply if you like, is very informative. It disclosed that in every instance on every watershed, whether the stream is navigable or nonnavigable, with the single exception of the lower Colorado River because it is governed by the Project Act, the United States had either acquired or initiated water rights under State laws. If it acquired them, it had to pay for them in accordance with section 7 of the Reclamation Act. It has been doing so for 60 years, always acquiring water rights either by paying for them or by initiating them under State law, as a private party might do. I think the total cost of water rights for the Central Valley project is less than 1 percent of the project cost, and I do not know of any instance where a project could be rendered unfeasible because the Government would have to pay for the water.

Mr. ANDREWS. Now the exception preserved by clause (b) of subsection (3) of section 2 recognizes that Indians, being people, naturally are assumed to have consumptive needs and reservations for their use are, therefore, in a different class from reservations for other purposes, is that correct?

Mr. ELY. Well, it is a blanket protection of a different class of beneficiaries to whom the United States owes a particular fiduciary obligation. It admittedly takes out of the scope of the bill a very large block of water and it leaves unsolved many questions that ought to be solved. The effort in this bill, as I understand it, has been to restrict it to the topics upon which there was a reasonably general concurrence.

Mr. ANDREWS. That would, in effect, leave standing the decision of the *Winters* case because that dealt with an Indian reservation.

Mr. ELY. That is correct.

Mr. ANDREWS. And *Arizona* v. *California* was the first time this theory was ever held by the ultimate Court to apply to reservations other than Indian.

Mr. ELY. That is right. As far as I know, you are correct. Fish and wildlife reservations and recreation areas in Nevada.

Mr. ANDREWS. If subsection (1) of section 1 were now enacted, the contention might be made by some that this bill, in effect, gives new, presently accruing rights to persons who otherwise could have had their rights defeated by the reservation doctrine. But is it not your understanding that subsection (1) of section 1 is not meant to be creating new rights but only removing clouds which would otherwise exist on existing or later accruing rights and this is notwithstanding section 2(3)(c)?

Mr. ELY. I think that is correct. You are not creating any new rights, you are simply removing a barrier to the acquisition of them under appropriate laws.

Mr. ANDREWS. And confirming those that exist under a common understanding apart from the reservation theory.

Now is it not true that even though most of the water in a particular State may already be appropriated, and, therefore, enactment of this bill would have a primary purpose of confirming those rights against the reservation doctrine, it would also be true that enactment of this bill would encourage development of the remaining unappropriated water and also remove deterrents to modernization of works, addition of the new headgates, revitalization of facilities now used to put to work presently appropriated water?

Do you get my point? In other words, Senator Kuchel was making the point the other day that by passing this bill we would encourage water being put to use. Now in the State of California it happens that about 90 to 95 percent of the water is already put to use actually or is appropriated under the so-called State filings, but even in California this bill would have the effect of confirming that those people presently using water could go ahead and spend money to revitalize their works, et cetera.

Mr. ELY. If I understand you correctly, I agree. The shocking thing to me in the last few days' hearings is to discover the philosophy expressed in a number of ways, which is the diametric opposite of the philosophy and purpose of the Federal statutes ever since 1866. The uniform policy of the Congress for a hundred years has been that private citizens shall be encouraged in putting to use the water resources of the country, by their own initiative and investment. Where these undertakings surpassed the ability of the private citizen, the reclamation law was created to make Federal financing available to do that very thing. But that same law stipulates that water rights shall be appurtenant to the land irrigated as the statute says in section 8. The individual, the landowner, is viewed as the person for whom this reclamation law makes water available by way of a right that is appurtenant to his land.

The Desert Land Act, the Homestead Acts, the whole philosophy of these laws, has been to put the Nation's resources to work and not to lock them up.

Now if I understand correctly what the Government witnesses have been telling you for the last few days, their proposal is that from now

on, there shall be reserved for a decision by Federal administrators, the question of how all of the waters originating upon the withdrawn Federal lands—and bear in mind they are all withdrawn—shall be put to use. That is another way of saying anybody from now on who attempts to put to use water which is derived from any Federal lands does so at his peril, with the advance knowledge that at some future time, x years from now, a Federal administrator may determine on a better use of that water and take it away from him and do so without compensation.

The fears generated by the *Pelton* decision, that I thought were exaggerated, have been amplified and confirmed in this room. What the Government witnesses propose is a complete reversal of the administrative policy of the Congress for the last century.

Mr. ANDREWS. Pardon me, Senator, for taking longer than I expected. I am going to have to step aside because of the time and the need to hear from other witnesses.

Senator MOSS. Yes, we are pushing against our limitation of time and we do have two witnesses yet to hear. I think you have done a fine job.

Mr. ANDREWS. I wonder if permission could be granted to build a record with Mr. Ely later?

Senator MOSS. Yes. Perhaps you could submit interrogatories to him if he would be willing to answer specific questions. I think it is important. The record can get the answers to anything that is left in doubt or that is left open here, and Mr. Ely is certainly one that can do that because of his long experience and his knowledge of water law. I don't want to build just a repetitive record. I think we have a pretty good one at this point.

Yes, you can have that permission with the cooperation of Mr. Ely either to do it in written form or if the reporter could stay here for a brief time, but I do need the open hearing to hear two others.

Thank you, Mr. Ely, for a very excellent job. We appreciate your appearing here to testify. You certainly have given us a great deal of help.

Mr. ELY. Thank you, Mr. Chairman. I am honored.

Senator JORDAN. May I ask about the time? The Chair has now passed the hour when the Senate convenes.

Senator MOSS. We might fudge a little bit.

Senator JORDAN. Is it the intention of the chairman to conduct hearings on this bill on Saturday or next week?

Senator MOSS. No, this will finish today. We may open another day but not Saturday.

Senator JORDAN. Will we have a chance to propound questions to the administration witnesses either in writing or orally?

Senator MOSS. Yes. We expect at a later date when we get our transcript in hand to then have a time when we can talk with the Government witnesses.

Senator JORDAN. I thank the Chair.

Senator MOSS. Mr. Porter, who is the chairman of the Water Committee, California State Assembly, asked to be heard further very briefly this morning. He appeared before us yesterday.

Mr. Porter.

STATEMENT OF CARLEY PORTER, CHAIRMAN, WATER COMMITTEE, CALIFORNIA STATE ASSEMBLY—Resumed

Mr. PORTER. Mr. Chairman, Senator Jordan, thank you very much. For the purposes of the record my name is Carley V. Porter.

After the hearings of this Senate committee have concluded, the testimony of the witnesses during the past 4 days will be the only material upon which and with which your expert staff will work.

I am concerned today, however, about the order and sequence of some of the testimony from my State of California. You will recall that Mr. Abbott Goldberg and I testified on Wednesday, March 11, with Mr. Goldberg against S. 1275 and with me presenting Assembly Joint Resolution 2 asking the Congress to approve S. 1275 or similar legislation. You will recall also that the attorney general of our State, Stanley Mosk, spoke in favor of S. 1275.

I was informed when I entered the room yesterday a little bit late that Mr. Goldberg appeared again and read into the record a telegram which I feel may be misinterpreted, a message over the signature of State Senator James A. Cobey, from California. This message from Senator Cobey is no afterthought of the senator's. He is a coauthor of the Assembly Joint Resolution No. 2 and I am the principal author; he is chairman of his water committee, I am chairman of mine. We work closely.

At the time he presented and debated the subject of S. 1275 on his senate floor he referred to each of the four points presented as additional testimony by Mr. Goldberg on Thursday, March 12. I appear briefly to set in proper focus today the history of the California State Senate when it debated Assembly Joint Resolution No. 2 or S. 1275 on Monday and Tuesday of this week. That senate approved it by a vote of 29 to 9.

I would request that the Senate Journal of March 10, 1964, of the California Legislature be made a part of your committee record. I received it by airmail special delivery last evening. Especially I refer to that part of the Senate Journal commencing on page 131. I have a copy of it here. Senator Cobey made six documents a part of that day's official record.

No. 1, the telegram received and entered yesterday and five others. The telegram was sent to Mr. Goldberg by Mr. William Warne, our State director of the department of water resources, who is also against S. 1275. I am apprehensive lest the time and manner of its insertion in your record be misinterpreted. Had Mr. Goldberg asked me, I would have joined him in making Senator Cobey's letter a part of your record. I have now done so in a manner in which I hope expresses the cooperative willingness of the California State Legislature to work out any desirable amendments, and you have referred to many of them today.

The six documents which Senator Cobey inserted in our senate history immediately upon concluding the second day's debate on Assembly Joint Resolution 2 were:

No. 1, the statement contained in the telegram that he and I had prepared—he prepared it and I agreed to it—before he took the measure up on the floor of the State senate.

No. 2, he inserted and had printed in our journal his floor explanation of S. 1275 and Assembly Joint Resolution 2.

No. 3, he had printed in our journal a copy of S. 1275 as you gentlemen have it.

No. 4, he inserted an analysis of S. 1275 by our legislative counsel. There are no opinions in that but it is a factual analysis of the bill.

No. 5, he inserted in our journal a legislative counsel opinion answering questions which I had propounded to that body: "If S. 1275, presently before the U.S. Congress, is enacted as introduced, could the Federal 160 limitation be abrogated by State law?"

Our opinion and answer is very brief: "In our opinion the enactment of S. 1275 would not negate the application of the Federal 160 limitation."

No. 6, he inserted as a part of the record of that day's business the statement of the attorney general of our State which you already have in other parts of your record.

I wanted to set this in the proper sequence as it happened, and that is the history of it. I concur with many of the suggestions of the witnesses and committee members of the possible need for amendments. That is the true legislative process and we have agreed on much of it.

Thank you very much.

Senator Moss. Thank you, Mr. Porter.

Those items that are not in our record already will be inserted. The ones that already appear in the record will simply be referred to and the page number given where they do appear in the record, such as the attorney general's statement, for instance, that we have in full.

Mr. PORTER. It will also be my pleasant task upon returning to California to tell the people how long and how hard and how diligently the Senate of the United States conducts its hearings. You have devoted a tremendous amount of time to this one bill.

Senator Moss. Well, I thank you. It is a very important matter and we certainly are trying to make the best record we can.

Mr. PORTER. Thank you.

(The data referred to are as follows:)

CALIFORNIA LEGISLATURE

1964 Regular (Budget) Session

SENATE DAILY JOURNAL

[Eighth Legislative Day—Eleventh Calendar Day]

IN SENATE

SENATE CHAMBER, SACRAMENTO,
Tuesday, March 10, 1964.

* * * * * * *

CONSIDERATION OF DAILY FILE

THIRD READING OF ASSEMBLY BILLS

Assembly Joint Resolution No. 2: Porter, Collier, Williamson, Flournoy, Ashcraft, Belotti, Cologne, Frew, Garrigus, Henson, Johnson, Lanterman, and Monagan (Coauthor: Senator Cobey)—Relative to Federal and State water rights.

Resolution read, and presented by Senator Cobey.

The roll was called, and the resolution adopted by the following vote:

AYES—Senators Backstrand, Begovich, Bradley, Burns, Christensen, Cobey, Donnelly, Farr, Gibson, Grunsky, Holmdahl, Lagomarsino, Lunardi, McCarthy, Miller, Murdy, Nisbet, Petersen, Pittman, Quick, Rees, Regan, Schrade, Stiern, Sturgeon, Symons, Way, Weingand, and Williams—29.

NOES—Senators Arnold, Geddes, McAteer, O'Sullivan, Rattigan, Rodda, Sedgwick, Short, and Teale—9.

Resolution ordered transmitted to the Assembly.

MOTION TO PRINT IN JOURNAL

Senator Cobey moved that his letter and statement concerning S. 1275, the text of S. 1275, and the following letters of the Legislative Counsel and Attorney General be printed in the Journal.

"SENATE, *March 10, 1964.*

"Hon. GLENN M. ANDERSON,
"*President of the Senate,*
"*Senate Chamber, Sacramento.*

"DEAR MR. PRESIDENT: My vote for Assembly Joint Resolution No. 2, 1964 Regular (Budget) Session should not be construed as an unqualified endorsement of S. 1275 in its present form. I think the Congress should consider amendments which, generally, (1) would make the protection of the acreage limitation policy explicit; (2) would limit Section 1(1) of the bill to nonnavigable streams; (3) would preserve the right of the United States to proceed by means of inverse condemnation proceedings; (4) would limit the requirement of compensation for vested water rights acquired involuntarily by the United States to those protected by the Fifth Amendment of the Federal Constitution.

"Whether the just suggested amendments should be adopted in whole or in part is up to the Congress, which will have the time and resources to give them the exhaustive consideration which I believe they deserve.

"Very truly yours,

"JAMES A. COBEY."

MARCH 10, 1964.

STATEMENT ON BEHALF OF A.J.R. 2 BY SENATOR JAMES A. COBEY, CHAIRMAN, SENATE COMMITTEE ON WATER RESOURCES

The purpose of A.J.R. 2 is simply to express the support of the California Legislature for California water rights laws at the time the U.S. Senate Interior and Insular Affairs Committee is considering S. 1275. This bipartisan measure is intended to reconfirm, beyond any further judicial misinterpretation, the 100-year-old congressional policy under which the right to regulate and appropriate waters flowing from Federal withdrawn lands, such as national forests and parks, have been vested in the States as are other property laws. Acting under this policy which has been contravened by the *Pelton Dam* decision (*Federal Power Commmission* v. *Oregon*, 349 U.S. 435), the California Legislature over the years has enacted most of our water rights laws, a master plan for orderly and beneficial use of water available in California and has authorized filings by the State to assure optimum water development in the interests of the entire State.

Debate over other minor features of S. 1275, such as the best technical procedure for determining "just compensation" when the Federal Government takes or damages water rights, only confuses and obscures the basic issue. On that issue, the only issue embodied in the language of A.J.R. 2, there should be no disagreement by anyone who understands the real need to uphold the water rights upon which most all of the water projects built in California depend. If the contentions of the U.S. Department of Justice are allowed to prevail, all of the water falling upon and flowing from Federal withdrawn lands belongs to the United States, can be exported without regard to State water rights laws or withheld from development. From these Federal lands flows 75 percent of the entire natural water runoff in California. Ninety percent of the State filings are on these unappropriated waters.

The Water Committees of the California Legislature have given S. 1275 and A.J.R. 2 careful study. The "reservation doctrine" is not a new problem. The legislature in 1959 adopted a resolution supporting congressional legislation which would have set aside the "reservation doctrine" espoused by the U.S. Justice Department.

At a time when California is confronted with regional water plan proposals, it is most important that Congress have the expression of the people of our State through the legislature via A.J.R. 2 restating our firm support for the water laws of the State.

Passage of A.J.R. 2 will not be welcomed by representatives of Federal agencies who believe the Federal Government should control all water development and determine who should get the benefits of future water supplies. Passage of

A.J.R. 2 is needed to support the large bipartisan group from California now in Washington on behalf of water users in all parts of the State.

* * * * * * *

STATE OF CALIFORNIA,
OFFICE OF LEGISLATIVE COUNSEL,
Sacramento, March 8, 1964.

Hon. JAMES A. COBEY,
Senate Chamber.

WATER RIGHTS—No. 3212

DEAR SENATOR COBEY: You have asked for an analysis of S. 1275 presently before the U.S. Congress.

Subdivision (1) section 1 of the act provides that no right to the use of water acquired pursuant to State law, regardless of when acquired, is affected by the withdrawal or reservation of public lands whenever made.[1]

Subdivision (2) of section 1 provides that section 1(b) of the Flood Control Act of 1944 shall apply to all works hereafter constructed by or under the authority of the United States with respect to water arising within States lying wholly or partly west of the 98th meridian.[2]

Section 1(b) of the Flood Control Act of 1944, referred to, provides that the use for navigation in connection with flood control projects, of waters arising in States lying wholly or partly west of the 98th meridian shall be only such as does not conflict with any beneficial consumption use, present or future, in States lying wholly or partly west of the 98th meridian of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

The effect of subdivision (2) would appear to be that the use for navigation, in connection with any works hereafter constructed by or under the authority of the United States, of waters arising in States lying wholly or partly west of the 98th meridian shall not conflict with the beneficial consumptive use, present or future, in States lying wholly or partly west of the 98th meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

Subdivision (3) of section 1 requires that any right which the United States claims under the laws of any State to the beneficial diversion, storage, distribution, or consumptive use of water must be initiated and perfected in accordance with the procedure established by the laws of that State.[3]

STATE OF CALIFORNIA,
OFFICE OF LEGISLATIVE COUNSEL,
Sacramento, February 26, 1964.

Hon. CARLEY V. PORTER,
Assembly Chamber.

WATER RIGHTS—No. 2934

QUESTION

DEAR MR. PORTER: If S. 1275 presently before the U.S. Congress is enacted as introduced, could the Federal 160-acre limitation be abrogated by State law?

OPINION

In our opinion the enactment of S. 1275 would not negate the application of the Federal 160-acre limitation.

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[1] Cf. *Federal Power Commission* v. *State of Oregon* (1955), 349 U.S. 435 (the so-called *Pelton Dam* case).

[2] The 98th meridan runs through North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas.

[3] Cf. the reply brief of the United States in *City of Fresno* v. *State Water Rights Board* (No. 105245, Superior Court in and for the County of Fresno), in which it is contended that the United States need not obtain a permit under State law since it already owns all of the unappropriated water of the San Joaquin River.

ANALYSIS

Subdivision (3) of section 1 of S. 1275 reads as follows:

"Any right claimed by the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with the procedure established by the laws of that State."

The Federal 160-acre limitation is contained in section 5 of the Reclamation Act of 1902 (43 U.S.C. 431) and reads as follows:

"No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner * * *."

In our opinion the quoted language of S. 1275 relates to procedures by which the Federal Government may perfect certain water rights which it claims. On the other hand, the 160-acre limitation relates to the operation of Federal projects.

The question presented here is similar to one presented in the case of *Ivanhoe Irrigation District* v. *McCracken* (1958) 357 U.S. 275, 2 L. Ed. 2d 1313. It was there contended that State law rather than the Federal 160-acre limitation was applicable to contracts whereby the Federal Government was to furnish water from Federal reclamation projects. The contention was based on section 8 of the Reclamation Act of 1902 (43 U.S.C. 383) which provided that the act is not to be construed as interfering with State laws "relating to the control, appropriation, use, or distribution of water used in irrigation."

The Supreme Court rejected the contention that section 8 made section 5 inapplicable. The Court stated at 2 L. Ed. 2d 1325: "As we see it, the authority to impose the conditions of the contracts here comes from the power of the Congress to condition the use of Federal funds, works, and projects in compliance with reasonable requirements." The Court further stated "As we read section 8, it merely requires the United States to comply with State law when in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of Federal projects" (2 L. Ed. 2d 1325). We believe that subdivision (3) of section 1 of S. 1275, like section 8 of the Reclamation Act of 1902, relates to the acquisition of water rights and would not be construed to overrule the long existing policy of the Federal reclamation program with respect to the 160-acre limitation.

Very truly yours,

A. C. MORRISON,
Legislative Counsel.
By DON VICKERS,
Deputy Legislative Counsel.

Senator Moss. Mr. Howard Zahniser, executive director of the Wilderness Society, is our next witness.

Mr. Zahniser, we appreciate your staying.

STATEMENT OF HOWARD ZAHNISER, EXECUTIVE DIRECTOR, THE WILDERNESS SOCIETY

Mr. ZAHNISER. Mr. Chairman, you have a better judgment of the stringency of the time limitations than I do. My statement is brief and I should be glad to present it in full and answer any questions. If in your judgment it would be better to have it put in the record as though read while the members of the committee skim it, I would answer any questions. I should be glad to do that, too.

Senator Moss. Thank you. That is very cooperative of you. You may read your full statement if you think best.

Mr. ZAHNISER. Mr. Chairman, my name is Zahinser—Z as in Zebra, A, H, N, I, S, E, R—my first name Howard. I am executive director of the Wilderness Society with headquarters at 2144 P Street NW., Washington, D.C., and editor of the quarterly magazine, The Living Wilderness.

I should like to suggest some possible wilderness aspects of the legislation being considered by the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs "to clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams," the bill, S. 1275.

It is not my intention to become involved in the perplexities with which the subcommittee is dealing in its consideration of legislation on this important subject, nor to add to the confusions to be clarified by such a bill, but rather to suggest considerations that may avoid further complication in connection with policies and programs to preserve some of the areas of wilderness still in public ownership and within our Federal lands.

I came to these hearings at their beginning on Tuesday of this week, on March 10, having read the bill but having no clear understanding of its implications, and I have listened with great interest and with benefit for my own understanding of the problems involved. As a result of what I have heard and of my further consideration of the bill in the light of the many excellent statements made and the colloquies that have followed them, I have prepared the brief statement that I should now like to make to the committee for its consideration and for inclusion in the printed record.

To a great extent the areas of wilderness that we are privileged to have with us are in existence now because of the nonuse of the lands involved for any of the many purposes that have changed so much of our land from the wilderness that it once was to the marvelous civilization that we enjoy. In the past, in other words, areas of wilderness remained because our pioneers and their successors found nothing that they could do with them. Now, on the other hand, we have such areas specially designated for preservation because there has developed a positive understanding of their human values as wilderness. In the future, it is my conviction, we shall have these and other areas of wilderness remaining for ourselves and for those who will follow us only to the extent that we do deliberately put them to use, a positive, now recognized use, in the preservation of the wilderness. All of our lands, I am convinced, are destined to be put to some human use. Those that are perpetuated as wilderness will be only those that are put to use as wilderness and protected as such.

The change from wilderness as lands with no use to lands put to this clearly recognized public use emphasizes the importance of considering wilderness preservation as one aspect of a total land management program that meets all our needs. Certainly the need for water is the one dominant need in many of our areas. Watershed protection is one of the multiple uses that wilderness preservation serves. We should do everything that we can to avoid conflicts between water needs and wilderness needs. Similarly, it would seem sound public policy to make every effort to consider wilderness preservation needs in connection with programs involving water resources.

I am sure that I am speaking for sympathetic ears when I say this here. The sponsor of the bill being here considered and the chairman of this subcommittee, Senator Kuchel and Senator Moss, are among the champions of sound wilderness preservation policies and programs in the Senate, and Senator Anderson, who has been raising the questions with regard to the legislation, is a wilderness preservation leader whom I have long been glad to follow.

I am sure that the members of the subcommittee will appreciate my interest both in avoiding involvement as a representative of the Wilderness Society in any controversies with regard to water rights as such and also my concern that the effects of legislation with regard to water rights be carefully considered in connection with our developing national policy and program for wilderness preservation.

Senator Anderson, in a statement with regard to this bill, S. 1275, has raised the question as to whether there is—

> danger that the divestment of proprietorship in water rights on withdrawn or reserved lands might result in defeating the purpose for which the withdrawal or reservation was made.

Senator Anderson said that his immediate concern is related to the program and policy that will be established when the Wilderness Act already passed by the Senate has become law, but he commented also that—

> the same possible danger might conceivably threaten our national parks, national forests, national grazing lands, and the like.

National parks, national forests, and grazing lands all are withdrawn or reserved areas in which, according to Senator Anderson's interpretation and statement, this bill (S. 1275) would say, "in effect, that the Federal Government has no proprietary water rights as against State law."

Senator Anderson concluded the paragraph in his statement regarding this aspect of our consideration here with the question:

> Is it a clearly established fact that the Federal Government does not need control over the waters of the areas in order to carry out their purposes?

I, like Senator Anderson, Mr. Chairman, would raise this question. I, in Senator Anderson's words, would "urge the subcommittee to give most careful consideration to the answer."

I also was specially impressed with the comment in the statement of the National Association of Attorneys General that, and I quote from its sixth paragraph—

> the merit of S. 1275 is that it centers on the key issue: compensation for rights taken by government.
>
> No one contends that the United States should be obstructed in its efforts to perform its governmental functions.

this statement went on to emphasize.

In the colloquy that followed the presentation of this statement Senator Church said with regard to the two sentences that I have quoted that "this is the intention of the proposed legislation."

This statement, with Senator Church's emphasis with regard to it, is reassuring.

As Senator Church commented at another time in these hearings, as I recall his remark, it is the language that becomes the law, and accordingly it is the language of the bill with which I presume I should be most pertinently concerned, and in this connection I should like also to note a question that seems serious to me.

In the first sentence of the bill, in section 1(1), I read that—

> the withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter made, shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation.

Leaving out some of these words I thus read that the reservation of public lands shall not affect any right to the use of water acquired pursuant to State law either before or after the reservation.

In other words, it seems, according to this proposal, that a person might obtain, under State law, a right to use water within a Federal area of wilderness even after the area had been set up, and if this right involved the construction of a dam or of roads or other facilities it would involve a violation of the wilderness character of the area. It would be contrary to the purpose for which the Federal area of wilderness had been established.

I do not wish to be misunderstood as arguing that there can be no circumstances in which there may not be a nonconforming use of a wilderness area for water purposes. The Senate-passed act S. 4, which I support and advocate, does, in fact, provide for such nonconforming use when found to be more in the public interest than the continued preservation of the wilderness—a determination to be made by the President of the United States—in other words, by the highest Federal official.

I do wish to urge upon the subcommittee the consideration of the effect of this bill and particularly its language on the preservation of areas of wilderness, and I would suggest that if the bill is to be acted on favorably it include a provision that nothing within it is to be interpreted as authorizing entry into a duly designated area of wilderness for purposes inconsistent with the dominant purpose of the wilderness area.

It is always pleasant to appear before the members of the Committee on Interior and Insular Affairs, and as usual, I am today appreciative of the considerate attention I have enjoyed.

Thank you very much.

Senator Moss. I would ask you if you could perhaps state in just a very few words the thrust of your statement.

Mr. ZAHNISER. I wish to point out that whereas in the past areas of wilderness existed simply because nobody could find any use to put them to, more recently preservation of wilderness has been recognized as a desirable human use of areas, and there are at present a number of areas designated for that purpose. In the future it is my conviction there will be no such areas except those that are designated for preservation as such. All of our lands will be put to some human use and the only way in which we shall have wilderness areas will be by recognizing that that is a human use and deliberately designating some lands for that purpose. That recognition of wilderness preservation as a definite use of land emphasizes the importance of considering it in connection with any other use of land, and I do not wish to add to the complexities of the water situation.

I have appreciated very much sitting through these hearings these past few days and learning about them myself. Senator Anderson in his statement has raised a question that I wish to refer to. On the other hand, I noted that the National Association of Attorneys General indicated in their statement that the intention of the proposed legislation is in connection with compensation, and Senator Church emphasized that. However, Senator Church also indicated that what counts is the language in the bill, and I read in the first section that the reservation of public lands shall not affect any right to the use

of water acquired pursuant to State law either before or after the reservation. I read that leaving out some of it.

If this right involved the construction of a dam or of roads or of other facilities, it could involve a violation of the wilderness character of an area that would be affected, and this would be contrary to the purpose for which Federal areas of wilderness have been established. I do not wish to be misunderstood as arguing that there could be no circumstances in which there may not be a nonconforming use of wilderness area for water purposes.

The Senate-passed S. 4 which I support and advocate does, in fact, provide for such nonconforming use when found to be more in the public interest than the continued preservation of the wilderness. That is a determination to be made by the President, but I wish to urge upon the subcommittee the consideration of the effect that this bill, and particularly its language, might have on the preservation of the areas of wilderness. I would like to suggest that if the bill is to be acted on favorably it include a provision that nothing within it is to be interpreted as authorizing entry into a duly designated area of wilderness for purposes that would be inconsistent with the dominant purpose of the wilderness area.

That is the substance of my statement, Mr. Chairman.

Senator Moss. Well, I appreciate that.

It is my understanding that the wilderness may not be invaded in any sense through this bill. I think in some of the questions that Mr. Andrews was putting to Mr. Ely that this was emphasized again. As I recall, the answer of Mr. Ely was that where the Federal Government had a wilderness area that there was no water right below which could be made in derogation of the preservation of the wilderness area as such which would include its character as far as structures and roads were concerned unless under the terms of the bill you find the overriding requirements and the exceptions made.

The other thing that I thought was quite significant was his answer to the question about whether or not in a situation where water had its origin above the wilderness areas and traverse the wilderness area, if the Federal Government must then do one of two things: If in need of the water in the wilderness area, if there was a prior existing right you must condemn it and pay for it in order to come in, and the answer was, "Yes." Or if anyone attempted to perfect the right after the wilderness was in existence, it could enjoin that action, and the answer was "yes" to that. That I think would be the real import of the bill: that a wilderness area does have a use of water; water is part of the wilderness area, and as long as it is set aside for that particular purpose——

Mr. ZAHNISER. Water in an area of wilderness can hardly be considered as other than part of it.

Senator Moss. It is part of the environment. It is neither retarded nor retained artifically, nor is it drained artifically. It is allowed to stay on that wilderness area just as nature would handle it.

Mr. ZAHNISER. The wilderness areas do provide valuable protection of watershed and contribute to the conservation of water.

I heard the colloquy to which you refer, Mr. Chairman, and it confirmed my impression that this was a matter that was worthy of bringing to the attention of the subcommittee. It encourages me to urge that

the subcommittee carefully examine into the matter and consider the importance of adding another provision that will clarify the bill which is intended to clarify.

Senator Moss. Well, that will be weighed very carefully, Mr. Zahniser, certainly. I am sure that this subcommittee is most anxious to provide adequate protection to wilderness areas. We in the full committee of course have considered the wilderness in the past here and have considerable familiarity with it and strong support of it. I know that the disposition of the majority of the committee is to assure that the wilderness areas are given adequate protection.

Mr. ZAHNISER. As I mentioned in my statement, the author of this bill, Senator Kuchel, and you, Senator Moss, the chairman of this subcommittee, are among the outstanding champions of wilderness preservation in the Senate. On the other hand, Senator Anderson has raised questions about the legislation on wilderness preservation that I have long been glad to follow. I do not wish to complicate the consideration of the legislation but just to make sure that this does not result in any further complications.

Senator Moss. Thank you very much, Mr. Zahniser.

This phase of the hearings will now come to an end. However, we do expect that there will be some later hearings held, particularly as was announced the first day. I think the subcommittee will want to invite the Government department witnesses to return on a subsequent day when we have had time to examine our transcripts and are able to spend some time in hearings because we would like a number of questions answered. We went rather rapidly over that phase of the hearing. The witnesses presented some excellent statements but we had very limited time for examination of them. I know the committee will want to do that.

We are now adjourned, subject to call of the Chair.

(Whereupon, at 12:17 p.m., the subcommittee adjourned, subject to call.)

APPENDIXES

APPENDIX A

(Additional statements and communications filed for the record are as follows:)

STATE OF UTAH,
OFFICE OF THE GOVERNOR,
Salt Lake City, March 25, 1964.

Hon. FRANK E. MOSS,
Senate Office Building,
Washington, D.C.

DEAR SENATOR MOSS: I am writing to request that you place in the record of the hearings recently conducted by your subcommittee of the Senate Committee on Interior and Insular Affairs on S. 1275 the following brief statement setting for the position of the State of Utah, which is strongly in support of this bill. It is my understanding that, although the hearings have ended, the record is being held open for this purpose.

Utah, along with other Western States, is constantly faced with the fact that water represents the limiting factor on growth and development in a dry climate such as we have, with the exception of a few limited areas, over the western half of this Nation. We have built up over the years a canon of water law and have established under that law a system of water rights that is inextricably bound up with every facet of our economy. If our water laws were invalidated, or if a cloud were cast over our water rights, our entire economy would be seriously jeopardized.

It is significant that the Congress has, over the years, clearly recognized these facts, and has repeatedly taken meticulous care to honor and preserve State water laws.

On the other hand, the courts have tended to take a view which is almost exactly opposite and which could lead to the overriding of State water law by agencies of the Federal Government, with disastrous results. Unfortunately, some agencies of the executive branch of Government have adopted this point of view, in spite of the clearly expressed intent of the Congress, thus posing a severe and increasing threat to the welfare of the States.

It appears that the only effective remedy to meet the existing situation, and to give the Nation's economy and those of the respective States reasonable protection in the future, is the passage by the Congress of legislation so specific that it cannot be ignored or misinterpreted.

S. 1275 would work to this end without in any way interfering with the proper exercise of Federal authority or endangering the ability of the Federal Government or any of its branches to obtain needed water under the established water laws of any of the States. S. 1275 would merely require agencies of the Federal Government to follow the established procedure of eminent domain in acquiring water in the various States—which simply means that the Federal Government would pay for what it gets and that the property owner would be compensated for his loss, both firmly established principles of our way of life.

For these reasons, the State of Utah strongly urges favorable action on S. 1275.

Yours sincerely,

GEORGE D. CLYDE,
Governor.

OFFICE OF THE MAYOR,
Los Angeles, Calif., April 6, 1964.

Senator FRANK E. MOSS,
Chairman, Irrigation Subcommittee of the Interior and Insular Affairs Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR MOSS: I would like to add my support to the expressions of firm support you have already received from many water serving agencies, and representatives of business, legal, and governmental organizations of many States asking favorable consideration and action of your subcommittee on behalf of Senate bill 1275.

This measure has long been seriously needed, not only in the West but also in the other States throughout the Nation, to clarify and bring order out of the present chaotic situation which exists as between Federal water rights and those rights to use water acquired under the laws of the several States.

At present, Federal representatives claim that they have the authority to take water, the right to the use of which has been acquired under State laws, and to develop such water for the Government's purposes whenever the need arises without compensation. Senate bill 1275 would require the Federal Government to proceed by the orderly and equitable route of condemnation to acquire such water rights, which have vested under State law and to pay just compensation therefor.

The sweeping effect of the Federal Government's present doctrine of reservation to itself of rights to water originating on Federal lands or withdrawn lands is dramatically illustrated in California, and in the other Western States where the Government has large land holdings. In California, approximately one-half of the State's 100 million acres is federally owned, and about three-fourths of the natural water runoff of the State is from federally reserved or withdrawn lands.

I do not agree with the fears expressed before your honorable subcommittee by the deputy director of the State department of water resources, who appeared at the direction of Governor Brown and opposed Senate bill 1275 on the grounds that it would hamper the U.S. Government in water development.

I share the views, as stated by Attorney General Mosk and supported also by the U.S. Chamber of Commerce, the California State Chamber of Commerce, the American Bar Association, the American Farm Bureau Association, the National Supervisors' Association, the National Institute of Municipal Law Officers, and other closely familiar with the problem, that this bill is urgently needed, and that it will neither interfere with the Federal Government's legitimate activities nor hamper the Federal development of water resources.

Senate bill 1275 will not solve all of the problems but it will represent an important forward step toward removing many of the doubts and uncertainties in the present conflicting situation between Federal and State water rights, and I commend it to your consideration.

Cordially,

SAMUEL WM. YORTY, *Mayor.*

STATE OF OREGON,
STATE WATER RESOURCES BOARD,
Salem, March 16, 1964.

Hon. FRANK E. MOSS,
U.S. Senator, Committee on Interior and Insular Affairs, Senate Office Building, Washington, D.C.

DEAR SENATOR MOSS: I was in Washington, D.C., on March 11, 1964, prepared to testify in favor of S. 1275 in my capacity as chairman of the Interstate Conference on Water Problems, executive secretary of the State Water Resources Board of Oregon, and on behalf of the Honorable Mark O. Hatfield, Governor of Oregon.

The Governor and the State water resources board specifically endorse the testimony that was prepared for presentation on behalf of the Interstate Conference on Water Problems. It is our understanding that copies of the conference statement will be included in the record even though time did not permit oral presentation of this to your committee.

On behalf of the aforementioned, we strongly support and concur in the statement of the Interstate Conference on Water Problems.

Thank you for your courtesies.

Sincerely yours,

DONEL J. LANE,
Executive Secretary.

(The statement referred to appears on p. 183.)

STATEMENT OF ANGUS MCDONALD, ASSOCIATE DIRECTOR, LEGISLATIVE SERVICES, NATIONAL FARMERS UNION AND LEONARD KENFIELD, PRESIDENT, MONTANA FARMERS UNION

Mr. Chairman and members of the committee, the National Farmers Union and the Montana Farmers Union are in opposition to S. 1275, believing that it is a threat to that provision of the reclamation law which provides that water impounded at Federal projects be distributed on a family farm basis. We call attention to the fact that section I of the bill provides that water on reserved lands may be open to filing by private parties. We also call attention to the very clear statement that "water rights agreed pursuant to State law shall not be affected by the withdrawal or reservation of public lands."

Attention is called to the following resolution adopted by the Montana Farmers Union in November 1963:

"LIMITATION OF 160 ACRES

"We believe that the benefits of new water supplies developed with Federal funds should be enjoyed by the greatest number of people. The aim of the present 160-acre limitation is to prevent the acquisition of large water rights for speculative purposes.

"Therefore, we believe this limitation in the Reclamation Act should not be weakened or bypassed and the present laws be strictly enforced.

"Breakdown of the 160-acre limitation would allow big land companies, banks, insurance companies, and railroads to monopolize water that belongs to all the taxpayers.

"RIVER DEVELOPMENT

"Since the river waters belong to the people of this Nation, we are opposed to any legislation designed to make payments to private concerns for waters that flow from any of their storage basins.

"We urge reservation of potential damsites and construction of multipurpose dams.

"We were deeply disappointed in the action of the House of Representatives in not including Knowles-Paradise in the public works bill and urge its inclusion with all possible speed.

"It is imperative that all Federal water rights be protected from private or State encroachment."

Members of this committee must know that all over the West thousands of water rights have been filed by individuals and corporations, both before and after withdrawals of public lands. The purpose of Theodore Roosevelt and others who withdrew the lands was to safeguard our national resources from those who would exploit them exclusively for private benefit. The U.S. Government holds in trust these natural resources to be developed and used in the public interest.

To turn over the water on these lands (and they are worthless without water) to State legislatures would result in the most gigantic giveaway in history. Great corporations and wealthy individuals as in the past would bring great pressure on State legislatures and officials to legalize so-called water rights which had existed because of filings before or after the reservation.

The public lands of the West are not only important to the people in the 17 Western States but to every citizen of the United States. The U.S. Government has a legal and moral obligation to protect and conserve our lands in the public domain which include our parks and national monuments. It is unthinkable that this Government would turn over lands to the States to be exploited by private interests in every instance where these interests had exerted sufficient pressure to legalize claims to water which had been lying dormant for many years.

Attention is called to the last part of the bill which says that nothing shall be construed "as lessening or enlarging" any use of water now administered by the U.S. Government. It seems obvious that the great increased population of the West will necessitate an enlargement of our resource facilities of water in areas reserved for scenic beauty and of water which is conserved not only for irrigation but for residential and industrial use.

Under this bill, unless a State legislature agreed no hydroelectric or multipurpose project dependent on intrastate water could be built unless the State government gave permission.

Senator Kuchel is understandably concerned about the conflicting jurisdiction of State and Federal Governments and the numerous controversies and lawsuits which exist all over the West. His bill would multiply confusion and create chaos. It would open a veritable Pandora's box and result ultimately in appropriation of the water in the West by those groups with the greatest political and economic power.

A small water user coming in conflict with the Kern County Land Co. or the Southern Pacific Land Co. which control many hundreds of thousands of acres of western lands would have no chance whatsoever. He would have to acquiesce in the demands of the giant corporations and relinquish the use of water on reserved lands. Under the stewardship of the Federal Government he has used streams and waterholes but under this bill he would be denied such use unless he happened to have filed first.

In considering this legislation we ask that the members of this committee ask themselves this. Which Government instrumentality would be the most responsible and just arbiter in a dispute over water rights? Are water users to be subjected to endless litigation between States and balkanization of water rights in the 17 Western States. If the State is to have the final decision on the use and control of water that flows within its boundaries we might as well forget about a national conservation service or any administration in the Government which undertakes to administer our resources for the benefit of the region or the people of the country as a whole.

We call particular attention to the *Ivanhoe* decision which upset the plans of the vested interests in California. If this bill had been law those who attempted to preempt water regardless of the 160-acre limitation would have been able to take possession of the water and pay no attention whatsoever to the Federal rule which provided that the water from a Federal project be distributed on an equitable basis. This legislation not only would destroy the rights of individuals who have little economic and political power but it would pave the way for the destruction of the Federal Government and take us back to the period of the Articles of Confederation.

Consideration of any problem of the Federal Government involving States rights necessitates an understanding of the theory of American constitutional government. The theory of constitutional law as pointed out by John Marshall in *McCulloch* v. *State of Maryland* rests on a division of powers between the States and the Federal Government. The States came together in 1789 and agreed to delegate certain powers to the Federal Government, the remaining powers were left to the States, as Marshall pointed out. He said:

"The Government of the United States, then though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding."

The great Chief Justice emphasized the independence of the Federal Government. In its sphere of powers he said it was not dependent upon the States:

"No trace is to be found in the Constitution of an intention to create a dependence of the Government of the Union on those of the States; for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment to its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution."

From the question of independence, Marshall developed the doctrine of supremacy:

"This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them."

Marshall, in this blunt language, thus delineated the powers of our Federal Government. He was not unmindful, however, that under the American system of government the States, also, have great powers. The Chief Justice succinctly set forth the sovereignty of the States in the following language:

"The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on

that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given to the people of the United States, to a Government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them."

The increasing interest of certain groups in States rights seems to stem from their disagreement with certain court decisions. The one most commonly referred to is the *Pelton Dam* case. This case attracted nationwide attention because it involved the problem of fish. The Federal Power Commission issued the license to a private utility company to build a dam on Deschutes River in Oregon and because the building of a dam would interfere with migration of fish from the sea up the rivers of Oregon, the State of Oregon tried to bring about invalidation of the license. It may be that the Federal Power Commission acted unwisely in granting this license. However, we should realize that if a State is able to set aside a license granted by a Federal agency, if a State had such authority, every proposed hydroelectric project, both public and private, would be in jeopardy. The question in the *Pelton* case, we think, was primarily answered by the Supreme Court when it set forth the power of the Federal Government to administer its own property and water flowing through Indian lands.

Other cases which are usually mentioned in colloquies revolving around the *Pelton Dam* case should also be mentioned. The right of the Federal Government to use water on its own property was challenged in the State of Nevada. The sovereign U.S. Government was told to come to the State engineer, hat in hand, and humbly beg for permission to use water on Federal property. This involves not only a question of consumptive use of water and the right of a State to challenge such use but the question of national defense. The question of national defense, we think, also enters into the situation involving the San Diego Naval Base in southern California. In order to provide sufficient water for the operation of the naval base which existed only for purposes of national defense, the Government purchased from a private corporation water rights in the Santa Margarita River and consequently undertook to supply the needs of the military installation. These activities were challenged repeatedly and according to our information, the State of California legalized certain water rights relating to the water purchased by the Federal agency.

In order to understand the implications of such activities, the limitations of State laws in regard to use of water should be understood. A number of State courts have declared that water rights be extended to unappropriated water within the State boundary and that beneficial use shall be the measure and the basis for granting the rights. A corollary of this principle is that actual diversion and priority is necessary to firmly establish the water righhts. However, State laws are very explicit on this point and once the right is established, it is exclusiveely its property and it is a vested interest which no one can take away.

Scenic beauty cannot be the basis for a water right. Use of water under State laws can and has destroyed scenic beauty. I refer the committee to the *Empire Water and Paper Company* v. *Cascade Town Company*, 205 Fed. 123, 129; also 181 Fed. 1011. Here is what the court said in those cases:

"The case before us is exceptional, but we think complainant is not entitled to a continuance of this falls solely for their scenic beauty. The State laws proceed upon more material lines * * *.

"If all the water flowing over the falls, directly applied to the lands in the usual way of irrigation, would be required to produce the effect of the distributed mist and spray as now utilized, we think defendants would have no right to divert it for a manufacturing purpose * * *. But the trial court based its decision of this branch of the case largely upon the artistic value of the falls, and made no inquiry into the effectiveness of the use of the water in the way adopted as compared with the customary methods of irrigation."

Continuing, the decision points out:

"It may be that if the attendant of the lawmakers had been directed to such natural objects of great beauty they would have sought to preserve them, but we think the dominant idea was utility, liberty and not narrowly regarded, and we are constrained to follow it."

Neither can fish or ducks be associated with a water right. The courts have rejected, except for commercial purposes, a vested right to the use of unappropri-

ated water for fishing. In regard to the wildlife refuges, the Utah Supreme Court said that water may not be appropriated for the propagation of wildfowl:

"To our minds it is utterly inconceivable that a valid appropriation of water can be made under the laws of this State (for wild waterfowl), when the beneficial use of which, after the appropriation is made, will belong equally to every human being who seeks to enjoy it. It would be a little short of an anomaly in any system of jurisprudence that would authorize the restraining of a person from diverting water used solely for the propagation of ducks, and then deny injunctive, or any, relief against the same person if he should enter upon the land irrigated, shoot the ducks ad libitum, and appropriate them to his own use. If the beneficial use for which the appropriation is made cannot, in the nature of things, belong to the appropriator, of what validity is the appropriation? The very purpose and meaning of an appropriation is to take that which was before public property and reduce it to private ownership. The whole procedure under our statute, relating to an appropriation of water, is a series of steps to that end * * *.

"It certainly must be conceded that the purpose of the law is to endow the appropriator of the water with all the insignia of private ownership. The certificate is his deed; his evidence of title, good, at least against the State, for all it purports to be, and good as against everyone else who cannot show a superior right" [*Lake Shore Duck Club v. Lake View Duck Club*, 50 Utah 76, 166 Pacific 309, 310, 311 (1917)].

The court further stated:

"* * * contemplated in making the appropriation of water must be one that inures to the exclusive benefit of the appropriator * * * accordingly * * * water cannot be appropriated for the purpose of cultivating food for wildfowl on public land * * *."

We bring these decisions as examples of problems arising from Federal versus State water rights, not with a suggestion that we have reached a dogmatic conclusion on all of these matters. However, we do feel that a determination must be made by our Government whether it will continue to operate as a sovereign government and as a world power or go back to the days of Articles of Confederation with all of the different entities pulling against each other. We also suggest that the Government of the United States as represented by this committee, this Congress, the Supreme Court, and the executive department is truly responsive to the needs of all our people. We suggest that family farmers may be put just as great if not a greater reliance on our Government in Washington for the encouragement and protection of agriculture as State governments which may be dominated by special interests. It seems to us that Federal Government, and especially the Senate of the United States, nearly always act in the public interest. Members of this committee as well as other Senators undertake to consider all points of view and arrive at decisions which will benefit the greatest possible number of people.

Statement of Sam Thompson, Chairman, Mississippi Board of Water Commissioners

Mr. Chairman, I am Sam Thompson, chairman of the Mississippi Board of Water Commissioners, and a past chairman of the Interstate Conference on Water Problems of the Council of States Government.

In the above capacities and having served this past year as a member of the policy committee of the Interstate Conference on Water Problems, I assisted in the development of the testimony presented on its behalf.

The subject matter and position taken by the interstate conference has been discussed over a period of several years by the Mississippi State water agencies. Knowing of these hearings, we have given it more intense study in recent weeks.

On behalf of the State of Mississippi I want to say that we are in complete concurrence with the statement as made by the Interstate Conference on Water Problems today.

Statement of the National Association of Attorneys General

Traditionally, water rights have been acquired, used, and transferred pursuant to State law. Even the developments which have made legislation such as S. 1275 necessary have not diminished the truth that only the States have systems for the general administration of water rights and that private persons must gener-

ally look to State law for their rights to use water. Consequently, the National Association of Attorneys General, as the organization of all State chief law officers, is vitally concerned with the bill now before you.

In the past, it has customarily been thought that the Federal-State water rights problem was a western one. This view had developed because of the association of water rights controversies with irrigation, and because of the belief that other parts of the country have so much water that a challenge to the rights of a particular water user would be remote. In actuality, clarification of the water rights issue and its settlement by the act of Congress is a nationwide necessity.

Until the Supreme Court decisions starting with *First Iowa Hydro-electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152 (1946), it seemed to be well established that State law was the determining factor in fixing water rights. This was true because the individual States had developed the only systematic and complete bodies of water law in the country. Such is still the case, but the extent to which those bodies of law may be applied is being more and more beclouded by judicial decisions such as the *Pelton Dam* case, 349 U.S. 435 (1955) and *Dugan* v. *Rank*, 83 S. Ct. 999 (1963).

These decisions have encouraged some people to contend that the Federal Government possesses an underlying ownership of most of the Nation's water. The effect of this doctrine, whether stated as a principle of outright ownership or merely as an assertion of paramountcy, is to throw the legal basis for private and public non-Federal use of water into grave doubt.

The most far-reaching assertion of Federal ownership is to be found in the concept of navigation servitude. According to this doctrine, the commerce clause of the Constitution has conferred upon the Federal Government an absolute right to enough water to make and keep streams navigable. When this idea is teamed with the broad definition of navigability now entrenched in our law, the result is truly beyond anything contemplated either by the framers of the Constitution or by Congress. The result of leaving this combination uncorrected would be to encourage the idea that no user of water, other than the Federal Government, has more than a transitory easement which can be swept away whenever the U.S. Government, or any of its agencies, chooses to exercise its underlying rights. It is not enough to say that this Federal authority would be responsibly exercised. Farmers, businessmen, municipalities, and States should not have to make investments of large capital sums and plans for their entire economic futures with such an unnecessary question mark surrounding their activities. The national welfare does not require it; considerations of elementary justice should not condone it.

The merit of S. 1275 is that it centers on the key issue: compensation for rights taken by Government. No one contends that the United States should be obstructed in its efforts to perfom its governmental functions. On the other hand, such performance is always related under our constitutional system to the protection of property rights. If the Federal Government diminishes or takes a water right belonging to someone else, it should be required to pay for it no less than if it takes other property rights. If it is said that this observation begs the question, because the doctrine of navigation servitude makes the Federal Government the real owner, the answer is clear. Ever since 1866 Congress has sought to recognize the place of State law in the acquisition and use of water rights, and there is no reason to believe that Congress has intended that law to be either secondary or transitory. If Congress has so far failed to reestablish the clarity of this principle, cast into doubt by the courts, this is merely a demonstration that it is more difficult to enact a statute than to keep one from being enacted.

We do not believe it is helpful to the committee to spend time on the involved historical and legal arguments generally rehearsed in discussions of the water rights issue. Learned analyses of the presumed rights of the United States deriving from the Treaty of Guadalupe Hidalgo in the West, the status of the United States as sovereign proprietor of federally owned lands there and elsewhere, and the nationwide operation of the commerce clause have been presented many times. Likewise, the history of the long line of Federal statutes stretching from the Desert Lands Act to the present day has been explored before this committee on many occasions. What should be determinative of the present issue is that S. 1275 would make certain that the Federal Government would pay for water rights which it acquires or ousts in the same manner that it pays for rights to dry land and structures. This is a basic proposition of equity and due process of law.

Good as S. 1275 is in its present form, there are clarifying changes which would be helpful. Paragraphs 3 and 4 of section 1 of the bill make special reference to "consumptive" use of water. The rationale of the argument presented in this statement is equally applicable to consumptive and nonconsumptive uses. While it is likely that other enumerations in these paragraphs broaden the sweep of the bill beyond irrigation and related activities, the deletion of the word "consumptive" would serve to avoid possible problems in construction.

Another word which seems to have little point in view of the purpose of S. 1275 is the word "vested" in paragraph 4 of section 1. Any right which is sufficiently a property interest in character should be compensated, if taken. It would seem unfortunate to suggest that the salutary effects of the bill might be made, in certain instances, to depend on procedural concepts of vesting.

The National Association of Attorneys General wishes to assure this committee of its wholehearted support of this legislation and its appreciation of its urgency. The association has expressed its views in a resolution adopted at its 1963 annual meeting. A copy of this resolution is attached to this statement and made part hereof.

[Enclosure]

RESOLUTION IX. WATER RIGHTS

Whereas the National Association of Attorneys General, the National Association of Counties, the Section of Mineral and Natural Resources Law of the American Bar Association, and numerous other groups concerned with water resources in the United States have recognized the increasing urgency of a resolution of the Federal-State conflict over water rights; and

Whereas there now exists considerable uncertainty as to the manner of establishing property rights in the diversion, use, or storage of surface and underground water in the several States; and

Whereas the uncertainty arises from the fact that the Congress of the United States has not clearly manifested an intention to recognize the laws of the several States as to the appropriation, diversion, and use of surface and underground waters; and

Whereas this uncertainty gives rise to a clash of interests between the citizens of the several States and the U.S. Government, its agents, and licensees as to the right to divert, use, or store the surface and underground waters within the territorial limits of the said States; and

Whereas there is need for an orderly and definite rule and supporting administrative procedure for establishing and protecting valuable property rights in the diversion, use, or storage of the surface and underground waters of the several States; and

Whereas S. 1275 in the current Congress would take a long step forward in the resolution of important aspects of this controversy: Now, therefore, be it

Resolved, That the 57th annual meeting of the National Association of Attorneys General in Seattle, Wash., July 3, 1963, urges and declares that the Congress of the United States should enact S. 1275 at its current session, and that it should further intensively study the remaining and unresolved portions of the problem, including particularly the sovereign immunity of the United States which is frequently asserted to prevent the judicial resolution of conflicts relating to water rights.

STATEMENT OF JAMES H. KRIEGER, CHAIRMAN, SOUTHERN CALIFORNIA WATER CONFERENCE

S. 1275 demands no more of Federal officials than is now required of any State or local officials seeking to acquire water rights in any particular State. The bill merely directs the United States to follow the same procedures required by each State to insure the orderly development of that State's water resources. These methods have proved workable in the past. The United States, acting through the Bureau of Reclamation, has for the most part complied with these formalities, and abided by the terms and conditions contained in State permits and licenses to appropriate water. Cooperation and coordination of the water development activities of all units of government has maximized the conservation of this valuable resource for all parties. There is no reason to believe that the United States now needs to exercise a free and independent role in the engineering, construction, and operation of these systems.

In the event State imposed conditions are too burdensome to the United States, the latter may still execute her right of eminent domain and take whatever water rights she needs by appropriate legal action. Here S. 1275 directs the United States to do what it should do in the engineering of any water project; namely, determine in advance those rights which it believes will be needed. Instead of forcing an injured party to his uncertain remedy in inverse condemnation, with the attendant risk of bringing his action either too late or too soon, the citizen's property right is either acquired by negotiation or eminent domain in advance of the damage.

The Bureau of Reclamation followed this procedure in the *Friant Dam* case, insofar as negotiated acquisitions were involved. It did not do so as to the nonnegotiated parcels. Under S. 1275 the Bureau would have had to institute condemnation proceedings as to the nonnegotiable water rights, as well. The Friant Dam project would not have been delayed, for the United States enjoys the same right of immediate possession as do almost all public agencies in such public takings of private property.

S.1275 also puts to rest those fears and misgivings of local project water users who are constantly reminded by representatives of the Department of Justice that both vested and appropriated rights to water originating on federally reserved lands in the various States may be recaptured or interfered with by Federal agencies under some claim of supremacy.

The history of water development in this country is largely one of local enterprise and initiative. Growth has necessitated bigger projects transporting water greater distances. But the projects still serve local areas. And some States, like California, have the demonstrated need for and financial ability to develop their water sources locally. Federal projects have been fitted into these plans so far with ease and harmony. If there is to be Federal regional development these same wholesome and workable principles can and will be followed.

S. 1275 has the merit of reaffirming practices found expedient and workable and consistent with the principle that local control is most responsive to the needs and desires of most people. In the interest of establishing these practices as sound guidelines for future development, this bill should be enacted into law.

AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION,
Denver, Colo., March 12, 1964.

Hon. FRANK E. MOSS,
Chairman of the Committee on Irrigation, Senate Interior and Insular Affairs Committee, Senate Office Building, Washington, D.C.

DEAR SENATOR MOSS: The American National Cattlemen's Association would like to endorse S. 1275, introduced by yourself and Kuchel, of California. This bill is in line with the resolution unanimously passed by the American National at their annual convention in Memphis in January of this year. This resolution asked for a clarification of the State's responsibilities to administer water rights, both surface and underground, within their boundaries.

We respectfully request that this endorsement and letter be made a part of the record of the hearings held March 10, 11, and 12.

Cordially,

C. W. MCMILLAN.

[Enclosure]

WATER RIGHTS

Whereas in several of the past sessions of Congress various bills have been introduced concerning clarification of the conflict of claims to water rights, both surface and underground, and uses between the Federal Government and rights created under State law; and

Whereas the security of water rights is essential to the planning, development, and maintenance of water projects on which the economy depends; and

Whereas the States have developed a cohesive and unified body of water law, the object of which is to achieve maximum certainty in the enjoyment and possession of water rights; and

Whereas the security of water rights has been challenged by assertions of Federal executive authority: Therefore be it

Resolved, That, in accordance with the resolutions of many responsible associations, we proclaim our position that Congress enact legislation which will declare unmistakably that water rights are a species of real property rights under the laws of the respective States.

SPORT FISHING INSTITUTE,
Washington, D.C., April 1, 1964.

Re S. 1275, a bill to clarify Federal-State relations in the use of waters in certain States.

CHAIRMAN,
Subcommittee on Irrigation and Reclamation, of the Senate Committee on Interior and Insular Affairs, Senate Office Building, Washington, D.C.

Mr. CHAIRMAN: The Sport Fishing Institute is the only privately supported. national, nonprofit, professionally staffed fish conservation organization in the United States. Our main objective is to encourage the rapid development and application of sound fish conservation practices in order to improve sport fishing to the fullest. We derive our operating funds from a wide representation of manufacturers of various sorts of equipment used in fishing, related industry and concerned individuals.

Mr. Chairman, while we appreciate the desirability of clarifying the respective roles of State and Federal Governments with respect to water resource development, we should like to go on record in opposition to S. 1275. We feel that the sponsors of this bill are fully aware of the far-reaching implications contained therein. Ostensibly, the bill purports to "clarify the relationship of interests of the United States and of the States in the use of waters in certain streams" with the main result being to permit the Federal Government to continue spending large sums of money, to carry out new, complex, and costly reclamation projects and other resources development programs, while subjecting related actions by the Federal Government to the veto of State laws.

We see in the enactment of S. 1275 a dangerous loss of control by the Federal Government over water rights related to national forests, national parks, grazing districts, national wildlife refuges, and other Federal lands.

It appears to be true in all too many instances, unfortunately, that special interests of narrow purview are able to control some State legislative sessions to the detriment of the broad public interest, as history has verified. Federally subsidized water projects in the Western States are often considered desirable by the Congress but the States want to control the water development. Lacking the added and presently established Federal priority of proprietorship, water rights reserved to meet public needs could considerably be dissipated in circumstances where narrowly construed private interests could possibly acquire control of the situation at times, however, remote this might seem at present.

Sport Fishing Institute urges your subcommittee, Mr. Chairman, to oppose S. 1275 and its particular approach to Federal-State relations in water resources development. We feel that the hard-won gains of the past years of constructive legislation in water resources protection, conservation, and development would be virtually eliminated by passage of this bill.

We would appreciate your making this letter a part of the written record of testimony on S. 1275. Thank you,

Sincerely,

PHILIP A. DOUGLAS, *Executive Secretary.*

STATEMENT OF IRVING O. JOHNSON, ALAMEDA, CALIF.

The purpose of this bill S. 1275 and the motivating force behind it is to advance California State water plan, this in itself is not what makes the bill bad. We must look behind both programs to see the objective and this becomes very clear.

The conflict between State and Federal law is the 160-acre limitation and public power preference.

It is common knowledge that holders of large tracts of irrigable land have worked persistently to escape the acreage limitation just as the investor-owned utilities have worked against the consumer utilities owned by the people.

Senate bill 1275 is a step by legal counsel, experienced in opposing reclamation law to escape Federal reclamation law and its coverage limitation.

In the West, time is running out for us to think small, when it comes to the problem of good pure water. Without Federal jurisdiction over the whole of our water development each State will proceed too late, and with too little to plan other than from panic as California's present plan does.

Help under law of the Federal Government, where interstate agreements must be made, can be the only answer to the problem of water in the West.

Attached to this statement is a copy of a news item from the Oakland Tribune, Sunday, March 8, 1964, that if read carefully points to many of the small problems invloved in the State water plan. These problems are small for those people who are interested only in the rewards of doubling the irrigated land in the San Joaquin Valley, most of this is in large land holdings.

Paragraph 2–17 and 18 of attached news item imply that those people and areas damaged by the flow of polluted water will be required to pay for the damage while the large landowners causing the damage expect only to benefit.

Paragraph 13: This $60 million is to protect the present Central Valley project; of course this is a Federal problem and not a subsidy to the State water plan.

Paragraph 15: This of course means that this is a local problem, and not a problem of the State or Federal agencies.

Paragraph 17: This solves the problem by forming another local government agency to handle a purely local problem.

Paragraph 3: This points out that San Francisco Bay would still be polluted but that problem could be left to an already formed local agency to handle that strictly local problem.

Paraphaphs 7 and 8: This points out the demands on the politics of California by powerful interests that seem to be able to execute their plans and objectives, at least, they have the power to stop the programs they do not like.

Paragraph 16: Implies that we have a lot of panic in California.

From the news article it is hoped some light may be brought forth relating to this, the problem of the bay area, not otherwise presented to the committee.

What would have been the progress in California without the Central Valley project, its water and power? This great project development was undertaken pursuant to Federal reclamation law, the 160 acre limitation, public power preference and all.

I ask that meetings of the Interior and Insular Affairs Committee be held in central California prior to decision on this bill; if that is not possible, I ask that the bill be defeated.

I request that the foregoing statement be printed in the record of these hearings and that a copy of printed record of the hearings be sent to me when printed.

[Enclosure]

[From the Oakland Tribune, Mar. 8, 1964. Liberty has been taken of numbering the paragraphs.]

BAY WARNED ON VALLEY SEWER

1. A big wave of polluted water will flow from the San Joaquin Valley toward San Francisco Bay in 1968, and now is the time to get ready to handle it, warns William E. Warne, director of the State department of water resources.

2. A proposed sewer pipe that would carry this water through Contra Costa County from Antioch to Rodeo would cost $93 million, and it may be necessary to establish local assessment districts to pay the cost, Warne told a State water commission meeting.

3. There is no estimate yet of what the price would be to extend the big sewer through the bay area and out to sea, as proposed by Bay Area Water Pollution District officials.

4. But, it is absolutely necessary that some kind of drainage system be constructed to get rid of the salty, pesticide-laden scum producing waste water that will be a byproduct of California water plan irrigation of the valley, he said.

5. Originally the cost of this big sewer was included in the $1.75 billion State water bonds voted in 1960, but the State department of water resources changed its mind after the election, Federal officials charged.

6. Controversy over the proposal reached a head at the water commission meeting in Pittsburg Friday.

7. Charles Bates, secretary manager of the Central California Irrigation District, demanded immediate construction of part of the big sewer system, which, under present plans would be dumped into the upper reaches of the bay system at Antioch.

8. Bates represents owners of arid land who plan large scale cultivation when State and Federal sections of the California Aqueduct start delivering water to the west side of the San Joaquin Valley in 1968.

IRRIGABLE LAND

9. Potentially, there are 8 million acres of irrigable land in the valley, Warne said. About 3.9 million acres are now irrigable to convert to crops requiring more water when aqueduct flows start.

10. Ground water flowing out of the newly irrigated fields will in many cases approach the salt level of sea water, Federal officials told the commission.

11. These waste flows will also carry pesticides and the chemical nutrients that produce algae and scum, they said.

12. If no drainage system is built, this waste water will either pour down the San Joaquin River to destroy the delta region farmlands, or else convert the San Joaquin Valley farmlands into a salt-soil desert region Warne warned.

DRAINAGE AREA

13. A proposed $60 million Federal project—the San Luis drain—would drain the region from Los Banos to Antioch; Warne favors a $79 million, 290-mile conduit flowing from Bakersfield to dump into the upper reaches of the bay at Antioch.

14. The combined flow of these sewage projects would equal the summertime flow of the Sacramento River. Extensions of the big sewer downstream to Port Chicago, Martinez and Rodeo are being studied.

15. Extension of the big sewer downstream from Antioch would add $46 million if extended to Port Chicago, $66 million to Martinez and $92 million to Rodeo on the shore of San Pablo Bay, Warne said.

16. The big sewer could be financed through the sale of California water project general obligation bonds, Warne said, but, "On the matter of repayment, general thinking has not crystallized."

ASSESSMENT PLAN

17. Warne said his department favors repayment of sewer costs by "authorizing establishment of assessment zones and subzones in the district for the purpose of levying and collecting assessments on lands served by the drain."

18. He didn't expand on the question how much of the cost would have to be borne by Contra Costa County.

GEORGETOWN, IDAHO,
February 7, 1964.

Re Senate bill 1275, a bill to clarify the relationship of interests of the United States and the States in the use of waters of certain streams.

Hon. FRANK CHURCH,
Senate Office Building,
Washington, D.C.

DEAR SENATOR CHURCH: We of the Bear River Protective Committee heartily and strongly endorse this bill, and we strongly urge that every effort be made to promote its passage through Congress and its signing by the President.

We feel that without it reclamation and conservation will be impeded to the point that the future can become very dim. Now with any proposed conservation measure, the Western States, where the water originates, are immediately on the defensive for they have no protection whatsoever under the various bureaus, commissions, and the *Pelton* decision, for protecting their water rights if it becomes a policy of one of the enumerated agencies under the various decisions to take these water rights.

With the extension of conservation and reclamation projects to the Central and particularly the Southern States, undoubtedly these areas also will become very conscious of their water rights.

With the passage of Senate bill 1275, the Bureau of Reclamation and the Department of the Interior would find a most wholesome and hearty cooperation among the various States in starting the many logjammed projects toward their accomplishment.

We of the Bear River Protective Committee are particularly well aware of the fragility of State water rights. During the past year we not only have seen a project proposed that was contrary to the Bear River compact and to State laws, but a project was proposed that openly limited water rights in good standing, and later proposals of the same project have actually filed upon water rights not only adjudicated under State decree but by Federal decree as well. This is but a matter of time before the same, if successful in Idaho, will be spread to other streams. It may be stated also that this filing upon the Bear River waters is directly contrary to provisions of the Bear River compact in which all projects had to recognize prior water rights in good standing.

The members of the Bear River Protective Committee are, Mel Lauridsen, Montpelier; J. Vivian Nye, Paris; Wawn Hogan, Grace; Harold Varley, Grace; Cecil Foster, Angus Condie and Uless Nash, all of Preston; Evan Kackley, Wayan; and Lloyd Dunn, Georgetown, Idaho. This is a duly constituted committee of a creating body.

We remain,

Respectfully,

THE BEAR RIVER PROTECTIVE COMMITTEE,
By LLOYD DUNN, *Chairman.*

STATEMENT OF REV. JAMES L. VIZZARD, S.J., DIRECTOR, WASHINGTON OFFICE, NATIONAL CATHOLIC RURAL LIFE CONFERENCE, ON S. 1275

My name is Father James L. Vizzard, S.J. I am director of the Washington office of the National Catholic Rural Life Conference at 1312 Massachusetts Avenue NW., Washington, D.C.

In this statement I want to register the opposition of the National Catholic Rural Life Conference to S. 1275, a bill which purports to clarify the relationship of the interests of the United States in the use of waters of certain streams. Careful study of the bill itself and of the arguments presented both for and against it have convinced me that the proposals contained in this bill are unsound, unnecessary, and undesirable.

I am not a lawyer, for some of the legal implications of S. 1275 escape me. But, as the members of this subcommittee know, I have closely followed land and water policy and legislation for many years. On more than one occasion, in testimony before this subcommittee and the full Committee on Interior and Insular Affairs, I have found it necessary to protest against proposals which attempted to weaken or destroy Federal reclamation policy and to open the doors wide for unscrupulous raids on the Federal Treasury and on the common heritage of land and water which belongs by tradition and law to all the people of the United States. I regret that I find it necessary to protest again.

Although the provisions of S. 1275 strike a nonspecialist like myself as being especially cloudy and confusing, their intent and probable effect are as clear as the mountain waters with which they deal. One who has been involved in the never-ending legislative battles over Federal land and water policy develops, I believe, a sharp nose for the odor of giveaway even when an attempt is made to disguise that ordor with the prefume of purported respectability. My nose tells me that S. 1275 proposes such a giveaway.

It is a surprise and disappointment, therefore, that this bill should have the sponsorship of Senators who almost without exception are respected for their hitherto stanch defense of the Federal Treasury and of public lands and water against power- and land-seeking monopolists of the Western States.

Our opposition to S. 1275 is not based solely on the acuity of our nose. Careful anlaysis of some of the bill's proposals confirms our judgment. Paragraph 1 of section 1, for instance, provide that, "the withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter made, shall not affect any right to the use of the water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation."

Now I can see the justification and necessity for specifying, as is already done in Federal law, that valid water rights will be recognized and protected when they have been acquired under State law before Federal withdrawal or reserva-

tion of the lands on which the water arises or through which it flows. But I can see no justification whatever for demanding that the Federal Government repudiate its rights and duty to protect such water from outside appropriation and exploitation after the land and water have been withdrawn or reserved.

The Federal Government is presumed to act in the interests of all of the people of the United States. Those who seek through S. 1275 to acquire these water rights are acting in their individual interests and feel that they would be freer to do so under the invariably more complaint State laws and legislatures. Their interest in S. 1275 is not the common welfare but private profit.

It seems unnecessary to analyze and expose further provisions of S. 1275. As previously stated, despite the murky language and veiled intent, the effect of S. 1275 would clearly be to weaken Federal land and water policy. It is part and parcel of the constant efforts of western land monopolists to evade or destroy the tradition al 160-acre limitation. It is part and parcel of the generations-old struggle by a few to lay predatory hands on public funds and public resources.

If the proponents of S. 1275 wish, as they claim, simply to clarify what law will prevail in case of conflict between State and Federal laws as they affect water rights, let them affirm legislatively or otherwise the position long held by the executive department and repeatedly confirmed by the courts that whenever land is withdrawn or reserved by the Federal Government there is ipso facto reserved at that time all and any water, not as yet legally appropriated, which arises on or flows through that land. Such an affirmation would set aside and set to rest any doubt or confusion which is now said to exist.

APPENDIX B

SUPPLEMENTARY MATERIAL SUBMITTED BY SENATOR KUCHEL

I. Rights in Navigable Waters

The Rivers and Harbors Act of 1899 Does Not Forbid the Appropriation of Navigable Waters

Denial of non-Federal rights in navigable water is often based on sections 9, 10, and 12 of the Rivers and Harbors Act of 1899.[1] Those provisions were modifications of provisions originally enacted in the Rivers and Harbors Act of 1890.[2] Section 9, with exceptions not applicable here, forbids any bridge, dam, dike, or causeway over or in a navigable river without the consent of Congress and approval of plans by the Chief of Engineers and the Secretary of War.[3] Section 10 forbids the creation of any obstruction, not authorized by Congress, to the navigable capacity of the waters of the United States, or the building of any structure in any navigable river except on plans recommended by the Chief of Engineers and authorized by the Secretary of War.[4] Section 12 provides for enforcement; criminal penalties and injunction initiated in a Federal district court under direction of the Attorney General.[5]

A. THE RIVERS AND HARBORS ACT OF 1899 DOES NOT SUPPLANT RIGHTS ARISING UNDER STATE LAWS TO THE USE OF NAVIGABLE WATERS

The leading case on the interpretation of the 1899 Rivers and Harbors Act with respect to its effect on State rights in navigable water is *Cummings* v. *Chicago*.[6] This was a suit brought by certain owners of lands situated on the navigable Calumet River, who held a permit under section 10 of the 1899 act from the Secretary of War, to enjoin the city of Chicago from requiring them to obtain State authorization for the construction of a dock in front of the lands. The Supreme Court stated the issue presented as follows:[7]

"Did Congress, in the execution of its power under the Constitution to regulate interstate commerce, intend by the legislation in question to supersede, for every purpose, the authority of Illinois over the erection of structures in navigable waters wholly within its limits? Did it intend to declare that the wishes of Illinois in respect of structures to be erected in such waters need not be regarded, and that the assent of the Secretary of War, proceeding under the above acts of Congress, was alone sufficient to authorize such structures?"

The Court then construed the intent of Congress:[8]

"If it had intended by the act of 1899 to assert the power to take under national control, for every purpose, and to the fullest possible extent, the erection of structures in the navigable water of the United States that were wholly within the limits of the respective States, and to supersede entirely the authority which the States, in the absence of any action by Congress, have in such matters, such a radical departure from the previous policy of the Government would have been manifested by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended."

The Court then held:[9]

"Whether Congress may, against or without the expressed will of a State, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say that the act

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[1] 30 Stat. 1121, 1151, 33 U.S.C., secs. 401, 403, 406 (1952).
[2] 26 Stat. 426, 454–455.
[3] 30 Stat. 1151 (1899), 33 U.S.C., sec. 401 (1952). (Now Secretary of the Army.)
[4] 30 Stat. 1151 (1899), 33 U.S.C., sec. 403 (1952).
[5] 30 Stat. 1151 (1899), 33 U.S.C., sec. 406 (1952).
[6] 188 U.S. 410 (1903).
[7] Id. at 428.
[8] Id. at 430.
[9] Id at 430–431.

of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the State government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies."

This case, arising but a few years after passage of the 1899 act, was uniformly followed by the Secretary of War. Permits granted under the act issued by the War Department contain the express stipulation.[10]

"NOTE.—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized. It *merely expresses the assent of the Federal Government so far as concerns the public rights of navigation.* (See *Cummings* v. *Chicago*, 188 U.S., 410.)" [Emphasis by the War Department.]

Mr. Justice Holmes, speaking for the Court in *International Bridge Co.* v. *New York*,[11] put the matter succinctly:[12]

"From an early date the State has been recognized as the source of authority, in the absence of action by Congress. * * * And this Court has been slow to interpret such action as intended to exclude the source of rights from all power in the premises. * * *

"* * * *The act* [*Rivers and Harbors Act of 1899*] *does not make Congress the source of the right to build, but assumes that the right comes from another source; that is, the State. It merely subjects the right supposed to have been obtained from there to the further condition of getting from Congress consent to action upon the grant.*" [Emphasis supplied.]

This interpretation has been consistently followed in subsequent decision.[13]

Hence, the precedents are clear that the Rivers and Harbors Act did not cut off or supersede rights to navigable waters based upon State law. All the act requires is the "assent of the Federal Government so far as concerns the public rights of navigation;" the source of title and property rights in navigable waters remains in the States.

II. PAST RECOGNITION OF STATE LAW

COMPILIATION OF FEDERAL STATUTES DIRECTING THE APPLICABILITY OF STATE LAW

1. Section 9 of the Act of July 26, 1866, 14 Stat. 253, 30 U.S.C. § 51 (1952)[1] That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That, whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

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[10] A clause of this type was included in the permits issued by the Secretary of War for the temporary weir for diversion of waters into the Imperial Valley. Calif. Exs. 162 (Tr. 7,525), 164 (Tr. 7,542) and 392A–O (Tr. 9,891).

[11] 254 U.S. 126 (1920).

[12] Ibid. at 132–133.

[13] Pigeon River Improvement, *Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. 138 (1934); *Wisconsin* v. *Illinois*, 278 U.S. 367, 412 (1929); *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S.S.M. Ry.*, 99 F. 2d 902, 908–909, 912 (8th Cir., 1938), cert. denied, 305 U.S. 660 (1939).

[1] This section is also embodied in 43 U.S.C. § 661 (1952).

2. Except from section 17 of the Act of July 9, 1870, 16 Stat. 218, 30 U.S.C. § 52 (1952) :[2]

[A]ll patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.[3]

3. Except from section 1 of the Desert Land Act of March 3, 1877, 19 Stat. 377, as amended, 43 U.S.C. § 321 (1952) :

That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *Provided however* that the right to the use of the water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all [*sic*], lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

4. Section 18 of the Act of March 3, 1891, 26 Stat. 1101, as amended, 43 U.S.C. § 946 (1952) :

That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory * * * *Provided*, That * * * the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

5. Act of February 26, 1897, 29 Stat. 599, 43 U.S.C. § 664 (1952) :

That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.

6. Act of March 2, 1897, 29 Stat. 603:

That the public land embraced in the reservoir site known as Sugar Loaf Reservoir site, numbered five, located in Lake County, Colorado, which was withdrawn from entry and settlement under the provisions of the Act making appropriations for sundry civil expenses of the Government, approved October second, eighteen hundred and eighty-eight, is hereby restored to the public domain, and the Secretary of the Interior is hereby authorized to dispose of the same at public auction after thirty days' notice by advertisement, at a price not less than two dollars and fifty cents per acre, under such regulations as he may prescribe so as to secure the early building and permanent maintenance of a reservoir for the storage of water to increase the flow of the Arkansas River as contemplated by the Government in reserving the reservoir sites of the arid region, but nothing herein shall prevent the purchasers or their assigns from using said water for mechanical, manufacturing or other purposes which does not materially lessen said contemplated increased flow: *Provided*, That nothing in this Act shall be construed to deprive the State of Colorado of the control of the water in any reservoir which may be constructed on this site by any person or corpora-

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[2] This excerpt is also embodied in 43 U.S.C. § 661 (1952).

[3] The ninth section of the amended act is item 1 *supra*.

tion or association, under the regulations provided by the State laws in such cases.

7. Excerpt from the Act of June 4, 1897, 30 Stat. 36, 16 U.S.C. § 481 (1952):

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

8. Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 372, 383 (1952):

That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

9. Excerpt from section 25 of the Act of April 21, 1904, 33 Stat. 224:

That is carrying out any irrigation enterprise which may be undertaken under the provisions of the reclamation Act of June seventeenth, nineteen hundred and two,[4] and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of all the irrigable lands on the Yuma and Colorado River Indian reservations in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain * * *.

10. Section 4 of the Act of February 1, 1905, 33 Stat. 628, 16 U.S.C. § 524 (1952):

That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purpose of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

11. Excerpt from the Act of March 3, 1905, 33 Stat. 1020, ratifying and amending an agreement of April 21, 1904, between James McLaughlin, Indian inspector, and the Shoshone and Arapahoe Indian tribes in Wyoming:

That upon the completion of the said fifty dollars cer capita payment any balance remaining in the said fund of eighty-five thousand dollars shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

12. Excerpt from the Act of June 21, 1906, 34 Stat. 375, providing an appropriation of funds for the irrigation of allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah:

That such irrigation systems shall be constructed and completed and held and operated, and water therefor appropriated under the laws of the State of Utah, and the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians, and he may sue and be sued in matters relating thereto: *And provided further*, That the ditches and canals of such irrigation systems may be used, extended, or enlarged for the purpose of conveying water by any person, association, or corpora-

[4] See § 8 of the Reclamation Act of 1902 which is item 8 *supra*.

tion under and upon compliance with the provisions of the laws of the State of Utah * * *.[5]

13. Extract from the Act of March 1, 1907, 34 Stat. 1035, providing for the disposal of surplus lands on the Blackfeet Indian Reservation:

That the Indians, and the settlers on the surplus land, in order named, shall have a preference right for one year from the date of the President's proclamation opening the reservation to settlement, to appropriate the waters of the reservation which shall be filed on and appropriated under the laws of the State of Montana, by the Commissioner of Indian Affairs on behalf of the Indians taking irrigable allotments and by the settlers under the same law. At the expiration of the one year aforesaid the irrigation system constructed and to be constructed shall be operated under the laws of the State of Montana, and the title to such systems as may be constructed under this Act, until otherwise provided by law, shall be in the Secretary of the Interior in trust for the said Indians, and he may sue and be sued in matters relating thereto: *And provided further*, That the ditches and canals of such irrigation systems may be used, extended, or enlarged for the purpose of conveying water by any person, association, or corporation under and upon compliance with the provisions of the laws of the State of Montana * * *. That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measures and the limit of the right * * *.

14. Excerpt from the Act of May 30, 1908, 35 Stat. 560, relating to the survey and allotment of lands within the Fort Peck Indian Reservation and the sale and disposal of surplus lands after allotment:

All appropriations of the waters of the reservation shall be made under the provisions of the laws of the State of Montana.

15. Excerpt from the Act of March 3, 1909, 35 Stat. 812:

To enable the Commissioner of Indian Affairs to perfect and protect the rights of the Uncompahgre, Uintah, and White River Utes in Utah in and to the waters appropriated under the laws of the State of Utah for the irrigation systems authorized by the Act of June twenty-first, nineteen hundred and six,[6] two hundred thousand dollars, or so much thereof as may be necessary, the amount expended hereunder to be reimbursed from the proceeds of the sale of lands within the former Uintah Reservation: *Provided*, That said sum, or any part thereof, shall be used only in the event of failure to procure from the State of Utah or its officers an extension of time in which to make final proof for waters appropriated for the benefit of the Indians, and any sum expended hereunder shall be reimbursed from the proceeds of the sale of the lands within the former Uintah Reservation.

16. Section 2 of the Warren Act of Februray 21, 1911, 36 Stat. 926, 43 U.S.C. § 524 (1952):

That in carrying out the provisions of said reclamation Act and Acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users associations, corporations, entrymen or water users for the construction or use of such reservoirs, canals, or ditches, as may be advantageously used by the Government and irrigation districts, water users associations, corporations, entrymen or water users for impounding, delivering and carrying water for irrigation purposes: *Provided*, That the title to and management of the works so constructed shall be subject to the provisions of section six of said Act: *Provided further*, That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres: *Provided*, That nothing contained in this Act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law to control the waters of any stream in any State.

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[5] See California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 164 n. 2 (1935), which states "[I]t is not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of state law in respect of the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards," and which cites this act as an example of such recognition.

[6] See item 12 *supra*.

17. Section 11 of the Act of December 19, 1913, 38 Stat. 250, granting to the city and county of San Francisco certain rights-of-way over public lands and lands in Yosemite National Park and Stanislaus National Forest for the construction of works to bring water and power to San Francisco for domestic purposes and uses:

> That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State.

18. Excerpts from the Federal Power Act of June 10, 1920, 41 Stat. 1068, 1077, 16 U.S.C. §§ 802(b), 821 (1952):

> SEC. 9. Each applicant for a license hereunder shall submit to the commission—
>
> * * * * * * *
>
> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.
>
> SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

19. Section 18 of the Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1065, 43 U.S.C. § 617q (1952):

> Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.

20. Excerpt from section 3 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1271, 43 U.S.C. § 315b (1952):

> That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law.

21. Section 4 of the Act of August 28, 1937, 50 Stat. 870, 16 U.S.C. § 590u (1952):

> As a condition to extending benefits under this Act to any lands not owned or controlled by the United States or any of its agencies, the Secretary of Agriculture may, insofar as he may deem necessary for the purposes of this Act, require—
>
> (1) The enactment of State and local laws providing for soil conserving land uses and practices, and the storage, conservation and equitable utilization of waters;
>
> (2) Agreements or covenants in regard to the maintenance and permanent use of such water, facilities, or lands benefited by such facilities;
>
> (3) Contributions in money, services, materials, or otherwise to any operations conferring such benefits.

22. Section 14 of the Boulder Canyon Project Adjustment Act of July 19, 1940, 54 Stat. 779, 43 U.S.C. § 618m (1952):

> Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their border or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreements.

Neither the promulgation of charges, or the basis of charges, nor anything contained in this Act, or done thereunder, shall in anywise affect, limit, or prejudice any right of any State in or to the waters of the Colorado River system under the Colorado River compact. Section 13(b), 13(c), and 13(d) of the Project Act and all other provisions of said Project Act not inconsistent with the terms of this Act shall remain in full force and effect.

23. Extract from section 3(b) of the Great Plains Water Conservation and Utilization Projects Act of October 14, 1940, 54 Stat. 1121, 16 U.S.C. § 590z–1(b) (1952):

"No actual construction of the physical features of a project, which meets the requirements of subsection (a) shall be undertaken unless and until * * * (2) the Secretary has found (i) that water rights adequate for the purposes of the project have been acquired with titles and at prices satisfactory to him, or have been initiated and can be perfected in conformity with State law and any applicable interstate agreements and in a manner satisfactory to him; and (ii) that such water rights can be utilized for the purposes of the project in conformity with State law and any applicable interstate agreements and in a manner satisfactory to him."

24. Excerpt from section 1 of the Flood Control Act of December 22, 1944, 58 Stat. 888–89, as amended, 33 U.S.C. § 701–1 (1952):

The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report. The written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War [now Secretary of the Army] shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eight meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or party west of the ninety-eight meridian, of such waters for domestic, municipal, stock water, irrigation mining, or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9(a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3(a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.[7]

25. Reservation (c) to the Mexican Water Treaty, U.S. Treaty Ser. No. 994, 59 Stat. 1265 (1945):

"(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indi-

[7] The Act of December 22, 1944, authorized two projects in the Colorado River Basin, the Alamo Reservoir on the Bill Williams River, and the project at Holbrook, Arizona, on the Little Colorado River. (58 Stat. 900.)

rectly to alter or control the distribution of water to users within the territorial limits of any of the individual States." [8]

26. Excerpt from the National Parks Act of August 7, 1946, 60 Stat. 885, 16 U.S.C. § 17j–2 (1952):

That appropriations for the National Park Service are authorized for—

* * * * * * *

(g) Investigation and establishment of water rights in accordance with local custom, laws, and decisions of courts, including the acquisition of water rights or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments.

27. Excerpt from section 2 of the Act of October 14, 1949, 63 Stat. 852, authorizing the American River Division, Central Valley Project, Calif.

Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas or origin for present and future needs.

28. Excerpt from section 208 of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. § 666 (a) and (c) (1952), authorizing suits against the United States in state courts for the adjudication of water rights:

Consent is hereby given to join the United States as a defendent in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States it not amenable hereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

* * * * * * *

Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

29. Section 3(e) of the Submerged Lands Act of May 22, 1953, 67 Stat. 31, 43 U.S.C. § 1311(e) (Supp. V 1958):

Nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth medidian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

30. Section 3(c) of the Act of July 28, 1954, 68 Stat. 577–78, authorizing the Secretary of the Interior to construct facilities for the Santa Margarita River Project, California.

For the purposes of this Act the basis, measure, and limit of all rights of the United States of American pertaining to the use of water shall be the laws of the State of California: *Provided*, That nothing in this Act shall be construed as a grant or a relinquishment by the United States of America of any of its rights to the use of water which it acquired according to the laws of the State of California either as a result of its acquisition of the lands comprising Camp Joseph H. Pendleton and adjoining naval installations, and the rights to the use of water as a part of said acquisition, or through actual use or prescription or both since the date of that acquisition, if any, or to create any legal obligation to store any water in De Luz Reservoir, to the use of which it has such rights, or to require the division under this Act of water to which it has such rights.

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[8] The Secretary of the Interior was excepted by the Senate from the effect of this reservation. For an explanation of this exception, see 91 Con,. Rec. 3373–81 (1945).

31. Excerpt from section 4 of the Act of August 4, 1964, 68 Stat. 667 (as amended by 70 Stat. 1088 (1956)), 16 U.S.C. § 1004 (Supp. V 1958), relating to watershed protection and flood prevention:

> The Secretary shall require as a condition to providing Federal assistance for the installation of works of improvement that local organizations shall—
>
> * * * * * * *
>
> (4) acquire, or provide assurance that landowners or water users have acquired, such water rights, pursuant to State law, as may be needed in the installation and operation of the work of improvement * * *.

32. Section 4(b) of the Act of July 23, 1955, 69 Stat. 368–69, 30 U.S.C. § 612(b) (Supp. V 1958), providing for multiple use of the surface of tracts of public land:

> That nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

33. Act of August 4, 1955, 69 Stat. 491:

> That the requirement of section 1 of the Desert Land Act of March 3, 1877 (19 Stat. 377), that the right to the use of water by a desert land entryman "shall depend upon bona fide prior appropriation"[9] shall be waived in case of all desert land entries which have heretofore been allowed and are subsisting on the effective date of this Act, which are dependent upon percolating waters for their reclamation, and which are situated in the State of Arizona under the laws of which the percolating waters upon which the entries are dependent are not subject to the doctrine of prior appropriation but are usable under State law for irrigation and reclamation purposes.

34. Excerpt from section 7 of the Colorado River Storage Project Act of April 11, 1956, 70 Stat. 110, 43 U.S.C. § 620f (Supp. V 1958):

> Subject to the provisions of the Colorado River Compact, neither the impounding nor the use of water for the generation of power and energy at the plants of the Colorado River storage project shall preclude or impair the appropriation of water for domestic or agricultural purposes pursuant to applicable State law.

35. Section 4 of the Act of July 2, 1956, 70 Stat. 484, 43 U.S.C. § 485h–4 (Supp. V 1958), relating to the administration of subsections (d) and (e) of section 9, of the Reclamation Act of 1939:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provision of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.[10]

36. Excerpt from section 4(b) of the Small Reclamation Projects Act of August 6, 1956, 70 Stat. 1045, 43 U.S.C. § 422d(b) (Supp. V 1958):

> Every such proposal shall include a showing that the organization already holds or can acquire all lands and interests in land (except public and other lands and interests in land owned by the United States which are within the administrative jurisdiction of the Secretary and subject to disposition by him) and rights, pursuant to applicable State law, to the use of water necessary for the successful construction, operation, and maintenance of the project and that it is ready, able, and willing to finance otherwise

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[9] This act amends the portion of the Desert Land Act which appears in this appendix as item 3. The history of this act is discussed in Volume Two of the California Opening Brief, pp. A3–20 and A3–21.

[10] This section re-enacts section 8 of the Reclamation Act of 1902, item 8 *supra*. "In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this court to such language, and made it a part of the enactment." Hecht v. Malley, 265 U.S. 144, 153 (1924), quoted with approval in Shapiro v. United States, 335 U.S. 1, 16 (1948). See also Francis v. Southern Pacific Co., 333 U.S. 445, 450 (1948).

than by loan and grant under this Act such portion of the cost of construction (which portion shall include all costs of acquiring lands, interests in land, and rights to the use of water) as the Secretary shall have advised is proper in the circumstances * * *.

37. Excerpt from section 202 of the Act of August 28, 1958, 72 Stat. 1059, setting up a United States Study Commission to formulate a comprehensive plan for the development of certain Texas river basins:

In carrying out the purposes of this title it shall be the policy of Congress to—

(1) recognize and protect the rights and interests of the State of Texas in determining the development of the watersheds of the rivers herein mentioned and its interests and rights in water utilization and control, as well as the preservation and protection of established uses * * *.

III. Administrative Practice in Regard to Federal Appropriation of Water

A. Commissioner of Reclamation Memorandum of 1950

United States Department of the Interior,
Bureau of Reclamation,
Washington 25, D.C., April 19, 1950.

Memorandum
To: Solicitor
From: Commissioner, Bureau of Reclamation
Subject: *United States* v. *Gerlach Livestock Company*

On April 4, Ralph Boyd, an attorney in the Lands Division, Department of Justice, made an oral request for information, particularly with respect to what the administrative practice has been, which may assist the Solicitor General to supply the information asked for by the Supreme Court in the following note to him:

"My dear Mr. Solicitor General:

"Re: *United States* v. *Gerlach Livestock Company*

"The Court desires to be advised whether the Secretary of the Interior in the construction of irrigation projects has construed section 8 of the Reclamation Act of 1902 to include rights in navigable as well as non-navigable streams and has proceeded under section 7 to acquire those rights.

"Mr. Boyd has been informed by telephone of the Court's request.

"Yours truly,

"Charles Elmore Cropley, *Clerk.*
"By H. B. Willey, *Deputy.*"

I note that the Court's request, referring as it does to the *Gerlach* case which involves the waters of a stream system lying wholly within one State is limited to the construction given in practice by the Department of the Interior to section 8 of the Act of June 17, 1902 (32 Stat. 388), in instances involving navigable waters and that it goes to the use by the United States of those waters for irrigation, not for power or other purposes. I point this out in order to make it clear that I do not understand the Court's inquiry to involve the somewhat different and probably broader question of rights in interstate streams or rights for purposes other than irrigation—issues which at some later date may arise under this same section of the Reclamation laws—and in order that some of the examples hereafter given may be appraised with an eye to this issue as well as to navigability.

The Department of Justice is familiar with Assistant Attorney General Campbell's opinion of February 6, 1905, in California Development Company (33 L. D. 391), which was approved by Secretary Hitchcock. In this opinion, at page 405, it was said:

"One element which the California Development Company undoubtedly considers of great importance in estimating the value of the property to be sold by it, is the claimed right to divert 10,000 cubic beet of water from the Colorado river. If the recognition of its claim as a valid right is involved in the approval of this transaction by the Secretary of the Interior, such approval should be withheld. The Congress has control over navigable streams and the waters thereof. No claim based upon appropriation of such waters for irrigation made without the sanction of Congress should be recognized by this Department as valid. Claims to the water of such

a stream asserted under the law of a State must be adjudicated in some other forum. This Department not having jurisdiction to decree the validity of such a claim as that presented here should not do that which would necessarily involve the hypothesis of its validity. It seems that claims already made under state and territorial laws cover several times over all the waters of the river. If these claims can be sustained and enforced the navigation of the river would be utterly destroyed and all plans now under consideration by the reclamation service, which involve the use of water from this stream, would necessarily have to be abandoned. The Department of Justice is of opinion, as shown by the report of April 8, 1904, on H.R. 13627, that such claims cannot be sustained. In the case of the California Development Company, however, the appropriation has been acquiesced in by the federal government and by reason thereof the claimants have secured a certain standing entitling them to equitable consideration, and, possibly, to some compensation for relinquishment of its claim. The matter is now pending before Congress which may confirm this appropriation and hence it would not be advisable to dismiss the proposed transaction from further consideration on the sole ground of the invalidity of the water right to be conveyed. * * *"

It is significant, however, that section 8 of the Reclamation Act of June 17, 1902, is not mentioned or considered in this opinion. The question as to whether the United States could assert for the benefit of a Federal project governed by the 1902 Act rights to the detriment of water rights being claimed as established under State laws was not in issue.

In the 1913 edition of the *Manual of the Reclamation Service* (the first permanent edition of this volume of instructions to the employees of the Service), the following appears under the heading "Water, Appropriation of" at page 454:

"1. Filings.—Before the filing of the first notice of appropriation of water in any State the matter of the advisability of making such filing should be submitted to the Director. Authority to act in the name of the Secretary of the Interior can be obtained by applying to the Director who is empowered by the Secretary of the Interior to designate suitable persons to act in his behalf. When the notice has been prepared copy should be promptly sent to the Director and a copy should also be submitted to the United States district attorney, calling his attention to the instructions of the Attorney General, dated September 14, 1903, providing for giving advice to the engineers of the Service concerning the preparation of such notices, and requesting any suggestions which he may have to offer in regard to the form submitted. The original notice, with evidence that it has been recorded in the proper State or Territorial office, should be promptly forwarded to the Director.

"2. Navigable streams.—Congress has control over navigable streams and the waters thereof, and no claim based on appropriation of such waters for irrigation purposes made without the sanction of Congress should be recognized by the Secretary as valid. (February 6, 1905, 33 L.D. 391)"

Substantially similar provisions are contained in the 1917 and 1927 editions.

Finally, in the 1938 edition the following appears (p. 362):

"1. In general.—It is the practice of the Government to make appropriations of water from unnavigable streams in accordance with the provisions of State law (sec. 8, act of June 17, 1902, 32 Stat. 388). In its brief in *Wyoming* v. *Colorado* (259 U.S. 419, 260 id. 1), the Department of Justice took the position that said section 8 is directory but not mandatory, and that the Government need not follow State appropriation laws, as it already is the owner of all the unappropriated water in the innavigable streams of the arid West. However, this point has not been passed upon directly by any court except the United States District Court for Nevada, which in approving the Master's report in the Truckee River water adjudication proceeding, Newlands project, upheld the theory of the Department of Justice. The decisions of the Supreme Court in *Nebraska* v. *Wyoming* (295 U.S. 40), *California Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U.S. 142), and *Fox* v. *Ickes* (300 U.S. 82), may be inconsistent with the argument advanced by the Department of Justice in the *Wyoming* v. *Colorado* case, but the United States was not represented in these three cases. Congress has control over the navigable waters of the United States and appropriations therefrom for irrigation must be approved by Congress (33 L. D. 391; sec. 25, act of April 21, 1904, 33 Stat. 189; act of March 3, 1905, 33 Stat. 1045). In some cases water for Indian lands is reserved and is not subject to State law (*Winters* v. *United States*, 207 U.S. 564).

"2. Preliminary report.—Before taking any steps toward the appropriation of water in any State, either by posting and recording notice of appropriations or filing application for permits to appropriate, full report as to the advisability of making such appropriation shall be submitted by the project superintendent to the Washington office through the Denver office. Such report shall be accompanied by opinion of district counsel as to the legal phases involved, particularly indicating the method of making appropriations of water under the State law and the obligations that will rest upon the United States with respect to the amount of and time for the construction necessary for perfecting its claims if the appropriation is made.

"3. Making of appropriations.—Upon approval by the Washington office, notice of appropriation or other application shall be filed, recorded and/or posted, as the case may require, in the name of the United States of America. The procedure shall follow the provisions of the State law and shall be approved by the district counsel."

It will be noted the making of appropriations under the 1938 Manual procedure was not delegated to field officers. Washington office clearance was required.

Subsequently, in 1944 the authority to make acquisitions under section 7 of the 1902 Act and to make appropriations under the procedure of section 8 of that Act was delegated to Regional Directors, those authorities being delegated as follows:

"To authorize the appraisal or reappraisal of lands or interests therein and water rights, by appraisers or appraisal boards, in connection with acquisitions under the Federal Reclamation Laws; to make or approve appraisals in all cases where the amounts involved do not exceed $50,000 for a property in one ownership; to contract for and effect the purchase or exchange of lands or interests therein and water rights at appraised values, * * *.

"To initiate, prosecute, acquire and perfect water rights in the name of the United States, pursuant to the provisions of state law and in conformity with applicable interstate agreements; and to file applications, notices, petitions and all other documents necessary to protect, secure and maintain such water rights in good standing."

These appear in the now issued part of the Land Acquisition Manual (Volume XVIII) and have been published in the Federal Register. See 43 CFR 3.412 (a) and (c).

No formal statement of procedure or policies which are to govern the exercise of these delegated authorities has been made though this step has been under consideration for the past two or three years and will be incorporated in a Manual revision now being processed. Pending the issuance of such statement the position of the Department and the Bureau is reflected in a variety of reports and documents, of which the Manual is only one. And the Manual, it should be noted, is but a compilation of materials for internal use by Bureau personnel. Its materials do not have the imprimatur of the Secretary and cannot, therefore, be regarded as necessarily representative of departmental positions.

An analysis of all cases in which the Bureau of Reclamation has acquired rights for its structures and works pursuant to State law or in which it has recognized existing uses and acquired the users' interest by purchase or condemnation in navigable or nonnavigable streams could not be made in the time available for preparation of this memorandum.

Upon the receipt of Mr. Boyd's request, Regional Counsel for the seven regions were requested to advise by teletype of all instances in their knowledge in which water rights have been acquired by purchase or pursuant to State law on legally navigable streams or in which rights for existing or authorized projects have not been so acquired on such streams. A résumé of their responses follows:

Region 1

(which includes the States of Washington, Idaho, the northern half of Oregon, and the western part of Montana)

The Regional Counsel made a review, in the limited time available, of practices with respect to making filings under section 8, 1902 Act, and in connection with acquisitions under section 7 of that Act. In the following tabulation the area is indicated by projects, the streams involved, and probable situation as to their

navigability, the latter being indicated by this code—1, navigable; 2, navigability not established with finality but facts appear to support conclusion of being legally navigable; and 3, probably nonnavigable:

Idaho

Boise Project, Boise River, 2
Boise Project, Payette Division, Payette River, 2
Minidoka Project, Snake River, 2
Palisades Project, Snake River, 2
Rathdrum Prairie, Post Falls Unit, Spokane River, 2
Upper Snake River Storage, Henry's Fork, 3

Montana

Bitterroot Project, Bitterroot River, 3
Frenchtown Project, Clark Fork, 2
Hungry Horse Project, South Fork Flathead River, 2
Missoula Valley, Clark Fork, 2

Oregon

Baker Project, Powder River, 3
North Unit, Deschutes Project, Deschutes River, 3
Owyhee Project, Snake and Owyhee Rivers, 3, 2, 3
Umatilla Project, Umatilla River, 3
Vale Project, Malheur River, 3

Washington

Columbia Basin Project, Columbia River 1
Okanogan Project, Okanogan River, 3
Yakima Project, Yakima River, 2

Wyoming

Minidoka Project, Jackson Lake Reservoir, Snake River, 2
Upper Snake River Project, Grassy Lake Reservoir, Grassy Creek, 3

Filings for water rights have been made with respect to all of the foregoing projects, and it can be said generally that the practice in this region has always been to make filings for reclamation projects under section 8 without regard to the question as to whether the stream being filed on was navigable. In the only instances in which filings were not made, the reason for that action was unrelated to navigability of the stream. For example, no filings were made initially as to waters of the Snake River being pumped for Owyhee Project, but the reason for not filing was unrelated to navigability and the present intention is to make corrective filings even now.

The Regional Counsel pointed out that the problem of stating with certainty whether a stream is navigable in a legal sense is extremely difficult. Several of the streams involved may be regarded as not commercially navigable now because of various obstructions and diversions of water. But under tests of navigability commonly employed in the States in this region or as laid down in the *New River* case, the Boise, Payette, Snake, and Yakima Rivers were in their original state almost certainly navigable, and, therefore, continue to be navigable in legal sense. All of these rivers were used commercially in early days for transporting saw logs. Some had other traffic. In Arrowrock Dam, for example, to meet log transportation problem a log chute was actually built into the structure. In the case of the Payette River, commercial log runs have been made even within the past ten years. In the case of the Boise, Payette, and Snake Rivers, the State has declared these to be navigable for purpose of regulating fishing to points upstream form some of the Bureau's principal projects (see section 36–907, Idaho Code). The Idaho Land Commissioner has dealt with the bed of the Boise River as owned by the State, that being on the basis of the stream being navigable. The Idaho Supreme Court has declared the Snake River to be navigable and the Corps of Engineers, in administration of Federal law requiring clearances by it as to obstructions of navigable waters, regards the Snake as navigable. There can be no question, of course, as to navigability in both legal and practical senses of the Columbia River at Grand Coulee Dam.

As a general proposition it can be said that, with respect to projects enumerated above, the United States has acquired water rights under section 7 when its proposed reclamation projects would conflict with such rights and such acquisi-

tions were made without respect to whether the stream was navigable. In no instance, except that referred to in the next paragraph, has settlement for such conflicting rights been refused because of the stream's navigability. For example, in connection with the American Falls Reservoir on the Snake River, the United States acquired lands and appurtenant water rights by purchase and condemnation for the American Falls Reservoir and acquired certain water rights (power) of Idaho Power Company under contract dated June 15, 1923. It continues to recognize those rights as evidenced by the contract of October 1, 1934, and by its operation of American Falls Reservoir in conformity with the contract of June 15, 1923, as modified by the contract of October 1, 1934. The latter two contracts dealt primarily with the Company's rights for power production and consideration involved was substantial. In connection with the Boise Project, the United States acquired at least one power right. On both the Payette and Yakima Rivers existing water rights are acquired or recognized through limiting agreements. In the case of the Columbia Basin Project, acquisitions of land for reservoir involved no water rights of any consequence. On all of the above projects, operations of Bureau have been in recognition of other existing water rights.

The only instance of which the Regional Counsel is aware that water rights have not been acquired is that as yet unsettled situation involving Washington Power Company's Little Falls plant on the Spokane River which is now in litigation and involves several novel and debatable issues of both fact and law.

Authorizations of above projects, however, except in case of Anderson Ranch (flood control), Palisades (flood control), Columbia Basin, and Hungry Horse, do not make any reference to navigation.

Region 2

Which includes the Central Valley Project, in California, the Orland Project, California, and the Klamath Project, in California and Oregon)

In region 2, section 8 of the Reclamation Act of 1902 has been construed to include rights in navigable as well as non-navigable streams and that region has proceeded under section 7, where applicable, to acquire the rights necessary for the Central Valley Project until requested to cease at the request of the Department of Justice on November 10, 1949. In the latter part of 1945, the Department of Justice recommended to the Bureau that no further steps be taken toward purchasing water rights from owners of lands similarly situated to those then in litigation. The Bureau then ceased to acquire any water rights on the San Joaquin River similarly situated to certain lands then in litigation.

Acquisitions of water rights along the San Joaquin River were started in negotiations having been in progress long before that time. Acquisitions were accomplished by contract and by appropriations under State law. The principal points on the San Joaquin River, with relation to which the Unitd States has acquired water rights, are below Friant Dam. Those acquisitions were essential to the establishment of the legal privilege to operate Friant Reservoir, the Madera Canal, and the Friant-Kern Canal in the manner planned.

For convenient reference, the points along the San Joaquin River below Friant Dam, at which water is and historically has been used, were divided into seven sections and are listed progressively downstream as follows:

A. Friant Dam to Gravelly Ford Canal;
B. Herminghaus land of Edison Securities Company;
C. Land and water rights of Miller & Lux and its affiliated companies;
D. Chowchilla Farms;
E. Kings River or Fresno Slough area;
F. Land along the east side of the San Joaquin River between Chowchilla Farms and Stevenson Colony;
G. Area below the mouth of the Merced River.

The negotiations involving the interests reflected in the above list are reviewed below in what is regarded as the order of their importance.

Rights of Miller & Lux and Affiliated Companies and the Madera Irrigation District

In 1939, after extended negotiations, the United States entered into the Miller & Lux purchase and exchange contracts and deed. Miller & Lux and its affiliates were the outstanding potential adversaries of the United States.

The Madera Irrigation District owned the Friant damsite, certain water rights and portions of the reservoir area. On May 24, 1939, the United States entered into a contract with the District, under which the United States purchased the reservoir site and agreed to deliver certain quantities of water to the District under certain conditions. The agreement provided, also, for the District to transfer to the United States its rights to the District's filings and permits to appropriate water.

Chowchilla Farms

Chowchilla Farms, Inc., owned many thousands of acres of land, which received their principal supply of water via the Chowchilla Canal, which, in turn, takes water from the right bank of the San Joaquin River. It owned certain riparian, appropriative, and prescriptive rights to water from that river. On October 2, 1939, the United States entered into a contract and deed with the Company for the purchase of these rights and secured the consent of Chowchilla Farms to operate the project as planned.

Herminghaus Land of Edison Securities Company

Report No. 8 of the Water Project Authority of the State of California shows that some 17,150 acres of the Herminghaus ranch lands, then owned by the Edison Securities Company, were adjacent to the San Joaquin River and Fresno Slough, of which 16,230 acres were claimed to be riparian to the San Joaquin River, to sloughs that take water therefrom, or to Fresno Slough. By contract dated September 5, 1944, the United States purchased the rights of the Company.

Land Along the East Side of the San Joaquin River Between Chowchilla Farms and Stevenson Colony

In this area there is a group of large ranches and the water rights of each were appraised. Contracts were entered into with a number of the landowners and the right to use of approximately 8,820 acre-feet of water per year was acquired. It is in this area that actions were filed in the Court of Claims by Gerlach and others resulting in the litigation now pending in the Supreme Court.

Friant Dam to Gravelley Ford Canal

There are about 230 small holdings in this area and in those instances where it was found that there would be an invasion of rights by reason of project operations the Bureau has attempted to contract with the landowners. Some contracts were executed and others were in process of settlement when the Department of Justice on November 10, 1949, requested the Bureau to enter into no contracts from the settlement of any water rights in the San Joaquin River or any other river in Central Valley.

Kings River or Fresno Slough Area and Area Below the Mouth of the Merced River

No settlements have been made in this area although some 17 actions have been filed in the Court of Claims on behalf of certain owners in the area.

Certain applications filed by the California State Director of Finance for appropriation of water of the San Joaquin River have been assigned to the United States and the United States has filed applications on certain tributaries.

In connection with water-right acquisitions along the Sacramento River certain applications filed by the California State Director of Finance were assigned to the United States. Other such applications have no been assigned to the United States and most of these appropriations are for unauthorized features of the Central Valley Project. Investigations are being continued by the Bureau. If such investigations disclose the necessity for making further applications for the appropriation of water, it is expected that the applications will be filed.

On the Orland and Klamath Projects filings were made in conformance with State law.

86-961—64——21

REGION 3

(Which includes southern California, Arizona, and southern Nevada and, in particular, the Boulder Canyon Project)

The Regional Counsel reports that under date of July 8, 1905, a notice of appropriation of 3,000 second-feet of water of the waters of the Colorado River was posted on the left bank of the Colorado River, under the provisions of the Act of June 17, 1902, and under date of July 8, 1905, a notice of appropriation of 6,000 second-feet of the waters of the Colorado River was posted on the right bank of the Colorado River. In both instances the source of supply was the Colorado River and the means of diversion—Laguna Dam.

In a report dated December 22, 1904, to the Secretary of the Interior, on the joint resolution passed April 23, 1904 (33 Stat. 591), the Director of the Geological Survey stated that it was generally conceded that because of the navigability of the lower part of the Colorado River its waters were not subject to appropriation, and notices filed in conformity with the customs of Arizona and California were invalid. This report was transmitted to the Congress by the Department with a letter dated January 6, 1905. The opinion of Assistant Attorney General Campbell, dated February 6, 1905 (33 L.D. 391), to which reference has been made, concurred with the above view.

Section 25 of the Act of April 21, 1904 (33 Stat. 189, 244), authorized the Secretary of the Interior to divert the waters of the Colorado River for the purpose of irrigating the land of the Yuma and Colorado River Indian Reservations in California and Arizona. Laguna Dam, on the Colorado River, was constructed pursuant to that authority.

By a deed dated March 15, 1907, the Colorado Valley Pumping and Irrigating Company for a consideration of $6,000 conveyed to the United States its canal which had its head or point of diversion on the Colorado River, and all appurtenances to said canal, including all water locations, filings, or water rights, theretofore made by the Company.

No filings have been made under State law on the lower Colorado River in connection with structures in the Colorado River authorized by the Boulder Canyon Project Act, and related works subsequently authorized. The facts relating to this project are commented upon in some detail subsequently in this memorandum (ante, p. 15).

By a deed dated February 3, 1908, the Yuma Valley Union Land and Water Company and F. L. Ingraham, assignee, for a consideration of $17,000, conveyed to the United States its canal systems and appurtenances and its water rights in the Colorado River.

REGION 4

(Which includes northern Nevada, Utah, western Wyoming, and western Colorado)

The Regional Counsel reports that all water rights for projects in this region have been acquired pursuant to State law, irrespective of whether the stream is navigable or nonnavigable. He advises further that applications have been filed for appropriation of water from Utah Lake which has been declared navigable by the Utah Supreme Court and from Green River which is undoubtedly navigable although there has been no judicial determination of its navigability. There is no distinction in the statutory water law of the States in that region between the acquisition of water rights in navigable and nonnavigable streams. With respect to the acquisition of water rights acquired by purchase, the Regional Counsel reports the purchase of land with appurtenant water rights for the Hyrum Project, Utah, on the Little Bear River; for the Ogden River Project, Utah, on the Ogden River; for the Provo River Project, Utah, on the Provo River; for the Weber River Project, Utah, on the Weber River; and for the Pine River Project, Colorado, on the Pine River. He reports also that the decreed water rights in the Humboldt River, Nevada, were purchased to provide water for storage in the Rye Patch Reservoir, Humboldt Project, Nevada, and that on the Newlands Project, Nevada, the United States exchanged project water for vested water rights on the Carson River. Also, decreed water rights were purchased on the Uncompahgre Project, Colorado, with various canals and diversion works, the source of supply being the Uncompahgre River and Cimmaron Creek. Also, the United States, acting through the Department of Agriculture, purchased water rights from the Big Sandy

Creek and Little Sandy Creek for the Eden Project, Wyoming. It is not likely that the foregoing streams are legally navigable although there has been no judicial determination to the Bureau's knowledge.

REGION 5

(Which includes Texas, New Mexico, Oklahoma, and southern Colorado)

The Regional Counsel advises that for the Rio Grande Project in Texas and New Mexico, withdrawals were made under New Mexico statutes from the Rio Grande in New Mexico, defined as nonnavigable in *United States* v. *Rio Grande Irrigation Co.* (174 U.S. 690). On that part of the Rio Grande below New Mexico, which is generally acknowledged to be navigable, no filings have been made. While the Valley Gravity Canal Project was initially authorized by the Act of June 28, 1941 (55 Stat. 303, 331), no filings have been made as of this date, the Mexican Water Treaty of February 3, 1944, having intervened before construction changing the features of the project so as to require reauthorization. In other words, there has been no occasion up to this date to make filings on navigable streams in this region.

Water rights acquired under section 7 of the Reclamation Act of 1902, for the Rio Grande, Carlsbad Project, in New Mexico, and the Palmorhea Project, in Texas, involve water on legally nonnavigable streams. The same is true of water rights from the Canadian River, a tributary to the Arkansas River, acquired under New Mexico laws for the Tucumcari Project.

REGION 6

(Which includes eastern Montana, northern Wyoming, and North and South Dakota)

On December 14, 1949, the United States entered into a compromise settlement agreement with the Montana Power Company, with departmental approval, under which the United States acquired for $950,000 the Company's Canyon Ferry power plant and appurtenances on the main stem of the Missouri River and the Company's Montana water rights for power on the Missouri River in the amount necessary to operate its Canyon Ferry plant. Other than this case, we know of no instance in which existing water rights on navigable streams have been acquired but we know of no instance in this region in which the construction of a Federal project has interfered with existing water rights on a navigable stream.

Water-right appropriations on behalf of the United States have been made pursuant to State law on navigable portions of the Yellowstone and Missouri Rivers in the case of the Huntley, Buffalo Rapids, and Lower Yellowstone, Savage, Intake, and Buford-Trenton Projects in Montana. Similar appropriations have been made from the Milk River for the Milk River Project, from the Belle Fourche River for the Belle Fourche Project, from the Big Horn River for the Boysen Project, from the Cheyenne River for the Angostura Project, and from the Grand River for the Shadehill Project, but the legal navigability for these rivers may be open to question. No filings have been made for dam structures to be constructed in the main stem of the Missouri River by the Bureau of Reclamation in connection with the Missouri River Basin Project but it is anticipated that water filings will be made for irrigation water made available by these dams.

REGION 7

(Which includes eastern Colorado, southern Wyoming, Nebraska and Kansas)

The Regional Counsel advises that the Bureau has acquired water rights in accordance with State laws under the provisions of section 8 of the Reclamation Act of 1902 without regard to whether such streams may be considered navigable or nonnavigable. Among the more important projects in that region are the Colorado-Big Thompson Project, involving the Blue and the Upper Colorado Rivers in Colorado; the Kendrick and North Platte Projects in Wyoming and Nebraska, involving the North Platte River; the Frenchman-Cambridge and Boston Projects, involving the Republican River in Nebraska and Kansas.

On the Colorado-Big Thompson, in addition to making filings under State law, the Bureau has purchased water rights on the North and South Forks of the Colorado River, Black Leg Creek, Stillwater Creek, Small Creek and the Big

Thompson River. On the Frenchman-Cambridge Project several small hydroelectric power plants on the Frenchman Creek, a tributary to the Republican River, have been purchased, together with all water rights and appurtenances. Also, water rights for a power plant on the Niobrara River, a tributary of the Platte River, were acquired in connection with the Mirage Flats Project in Nebraska. It is not likely that the foregoing streams are legally navigable although there has been no judicial determination to the Bureau's knowledge.

Based on the foregoing reports, together with the review made in this office, I have summarized the practices of the Bureau of Reclamation under two categories: (1) those involving the initiation of appropriations pursuant to State law, and (2) those involving the acquisition of existing interests under section 7.

Initiation of Appropriations Under Section 8

Appropriations have been initiated pursuant to State law on the following streams which either have been or, in the judgment of the Bureau of Reclamation, are likely to be determined to be navigable: Boise, Columbia (including Clark Fork), Flathead, Green, Missouri (in Montana), Payette, Sacramento, San Joaquin, Snake (main stem and Henry's Fork), Spokane, Yakima, and Yellowstone Rivers and Utah Lake. On the other hand, appropriations have not been initiated pursuant to State law, with one very early exception, for any project on the lower Colorado River.

It would be appropriate to examine in more detail the situation on the lower Colorado. The Bureau of Reclamation has erected in the lower Colorado River the following principal structures: Hoover Dam (authorized by section 1 of the Boulder Canyon Project Act, 45 Stat. 1057); Davis Dam (authorized pursuant to section 9 of the Reclamation Project Act of 1939, 53 Stat. 1187); Parker Dam (authorized by section 2 of the Act of August 30, 1935, 49 Stat. 1028, 1039); Imperial Dam (authorized by section 1 of the Boulder Canyon Project Act, *supra*); and Laguna Dam (authorized pursuant to section 2 of the Act of June 17, 1902, 32 Stat. 388). In doing so, it has not, so far as our search of the records indicates, attempted to comply with the laws of any of the States concerned with respect to the appropriation of water, except perhaps in the case of Laguna Dam.

It should be noted, however, with respect to the Hoover Dam (1) that the Act authorizing its construction specifically required that it be used first "for river regulation, improvement of navigation, and flood control" and only thereafter for storage of water for irrigation and domestic purposes and for the generation of power; (2) that this structure, like the others mentioned in this paragraph, straddles the river at a point where it forms the boundary between two States and that, at the time it was built, the opposition to the project in Arizona was such that, even if an appropriation under the laws of Arizona had been required, none could have been made; and (3) that an adequate water supply for this project was, for all practical purposes, guaranteed by the existence of the Colorado River Compact, Article III(d) of which committed the States of the Upper Division not to deplete the flow of the stream at Lee Ferry below 75,000,000 acre-feet every ten years and by section 5 of the Boulder Canyon Project Act which provides that "no person shall have or be entitled to have the use for any purpose of the water stored as aforsesaid [i.e., behind Hoover Dam] except by contract made as herein stated" with the United States.

Not only does Davis Dam serve an irrigation function only indirectly—its principal functions are the generation of power and the reregulation of water released from Hoover Dam for downstream uses in the United States and for delivery to Mexico under the treaty of February 3, 1944—but it also lies at a point on the river where the river forms a boundary between two States and its water supply is assured by the United States' control of Hoover Dam.

The Parker Dam authorizing act, cited above, validated a contract, dated February 10, 1933, theretofore entered into between the Secretary of the Interior, on behalf of the United States, and the Metropolitan Water District of Southern California. By article 15(II)(d) of that contract it was agreed that the United States should have "the right to connect with the Parker Dam and/or the reservoir created thereby by means of a canal . . . with lands within the Colorado River Indian Reservation, as now constituted, and with public and other lands in Arizona or California, now or hereafter included in projects constructed under the Reclamation Law and supplementary legislation, or otherwise . . . and the right to thereby divert such quantities of water as may be consistent with the Colorado River Compact and the Boulder Canyon Project Act."

Imperial Dam, by means of which water for the All-American Canal is diverted, was authorized by the Boulder Canyon Project Act, *supra*. This being only a structure supplemental to Hoover Dam and not one in connection with which any new rights were needed to be established, the situation was covered fully by the position taken with respect to Hoover Dam.

In connection with consideration of Laguna Dam, there should be noted the provision of the Act of April 21, 1904 (32 Stat. 189, 224), "that in carrying out any irrigation enterprise which may be undertaken under the provisions of the reclamation Act of June seventeenth, nineteen hundred and two, and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian reservations in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River * * *." Our records indicate that, in addition to the authority for diversion contained in this Act, notices of appropriation of 3,000 and 6,000 second-feet of water, respectively, were posted on July 8, 1905, at the Arizona and California ends of the line of the proposed Laguna Dam and were duly recorded in the Yuma County, Arizona, and Imperial (then San Diego) County, California, recorders' offices.

The Gila Project, on the lower Colorado River, reauthorized by the Act of July 30, 1947 (P.L. 272, 80th Congress), derives its water supply from that river. No attempt has been made to acquire appropriative rights under the laws of the State of Arizona for this project.

In connection with the lower Colorado River situation, records of the Bureau do not indicate that it ever acquired any rights pursuant to the provisions of section 7 in connection with any of the foregoing projects except in connection with Laguna Dam. In that case, the United States acquired, for valuable considerations, the works of the Colorado Valley Pumping and Irrigating Company and of the Yuma Valley Union Land and Water Company, together with their rights and claims of right to divert from the Colorado River. Whether the latter was purely precautionary or otherwise is not known.

On the other hand, a search of Bureau records fails to disclose any instance on that river in which the Bureau in connection with any of its projects failed or refused to recognize or make compensation for water rights validly established under State law. In this connection, the record shows that the water rights which were discussed in the *California Land Development* case, *supra*, were acquired by the Imperial Irrigation District in 1916. And the rights required for the Imperial Irrigation District were fully covered by the provisions of the Boulder Canyon Project Act of December 21, 1928, and the contracts made by the District with the United State thereunder. Whatever motivated the Congress to adopt the proviso in section 1 of the later act stating that "no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys" the important point is that by reason of that provision the Bureau's project on the river did not in fact interfere with whatever rights the District claimed.

Acquisition of Interest Under Section 7

Occasions on which resort has been had to the acquisition by purchase or condemnation of existing interests in the waters of either navigable or nonnavigable streams are, of course, far fewer than those in which appropriations have been initiated pursuant to State law. Such purchases have, however, been made on navigable streams (or these existing interests have been recognized through limiting agreements) in cases involving the Payette, Sacramento, San Joaquin, Snake, Missouri and Yakima Rivers. In response to a recent teletype inquiry, Regional Counsel from each of the seven regions advised that they knew of no instance where the United States through the Bureau of Reclamation refused to recognize or make compensation for water rights validly established under State law whether or not the stream was navigable. This is true also of the lower Colorado River, the situation there being discussed in the preceding paragraph. In but one instance of which I am aware—and that an instance which rests upon the construction of a grant of land upon which to maintain a powerplant made by the United States to the claimant's predecessor in interest and upon the assumption that the construction and maintenance of Grand Coulee Dam on the Columbia River represents an exercise by Congress of its power to improve navigation, has compensation been refused. (See Solicitor's Opinion

dated May 17, 1946, M. 33792.) The instance referred to involved flooding of a powerplant and consequent reduction of power head on the Spokane River and is now in litigation.

It appears from the foregoing that in practice the Department has generally regarded section 8 of the Reclamation Act of 1902 as directory of the course of action to be followed in its assertion of water rights for projects governed by the Federal Reclamation Laws and with respect to the recognition of rights under various State statutes and that it has followed the line marked out by that section regardless of whether the stream is navigable or nonnavigable. The notable exception with respect to the initiation of appropriations under State law is on the lower Colorado River.

As a general proposition it can be said that the United States has acquired water rights under section 7 when its proposed reclamation project would conflict with such rights and such acquisitions were made without respect to whether the stream was navigable or nonnavigable. This had been the practice, despite the statement in earlier *Manuals* based upon the *California Land Development* opinion (33 L. D. 391) that private rights being asserted as to navigable waters were without validity. In the *Gerlach* case, however, the Bureau did concur in the suggestion of the Department of Justice that the question of the necessity of making compensation for the claimed rights be raised, because the Bureau had reached a conclusion that, in any event, claimants were not entitled to compensation by reason of the status of their rights. Another seeming exception is the flooding of ther powerplant on the Spokane River discussed above.

Public statements by officials of the Department of the Interior in recent years with the approval of the Department are in conformity with this practice.

(1) Secretary Ickes' letter of June 2, 1944, to Senator Bailey, Chairman of the Senate Committee on Commerce, commenting on the Flood Control Act of 1944 in the form in which it had been passed by the House of Representatives (H.R. 4485, 78th Congress, 2d Session).

(2) Statement in the report of the Regional Director, Region 2, Bureau of Reclamation, dated December 1, 1947, in his "Report on comprehensive plan for water resource development, Central Valley Basin, California."

(3) Answers to certain questions in the so-called "Barnes Questionnaire."

(1) Secretary Ickes' letter of June 2, 1944

Pursuant to a request received from Senator Bailey, Chairman of the Senate Committee on Commerce, Secretary of the Interior Harold L. Ickes, on June 2, 1944, commented by letter on H.R. 4485, which became the Flood Control Act of 1944, in the form in which the bill had been passed by the House of Representatives on May 9, 1944. In the course of that letter Secretary Ickes stated:

> "*Fifth.* The Missouri River Basin project proposed to be authorized by the paragraph beginning at line 13 on page 12, and ending at line 10 on page 13 of this bill is not, in my opinion, truly comprehensive in character. The reasons for this conclusion were indicated in the course of the hearings had before Senator Overton's Subcommitttee in connection with the rivers and harbors bill. Accordingly, I do not recommend the adoption of this project. Should your Committee determine upon retaining it in the bill, then I urge your Committee to insert the following proviso in lieu of the less comprehensive proviso now appearing at lines 24 and 25 on page 12 and at lines 1 to 3 on page 13 of the bill:
>
> " '*Provided*, That nothing in this Act shall be construed as authorizing any demand upon the water resources of the Missouri River Basin that will adversely affect the beneficial consumptive use of such water resources for municipal, domestic, and livestock water supply, for irrigation of arid and semi-arid lands and for mining and industrial purposes.'
>
> "In the absence of any general statute affording adequate protection for the beneficial consumptive use of water in the West, a proviso such as the foregoing constitutes, in my judgment, the very minimum of protection required for the States of the upper Missouri River Basin. What is possibly the largest remaining area of undeveloped irrigable land anywhere in the United States lies in the upper drainage of the Missouri River and its tributaries within the States of Montana, North Dakota, South Dakota, and Wyoming. The present irrigated acreage of about 4,400,000 acres could be more than doubled by the construction of reservoirs and canals utilizing more fully the waters of the streams originating in that

region. There seem to me to be values which we should make every effort to safeguard. The proviso now contained in the bill, declaring that the improvements shall not 'be construed as creating below Sioux City any demand upon the water resources of the Missouri River Basin above Sioux City in excess of that now authorized by existing law', is not adequate since existing law does not specifically define the quantitative demands that may be made upon the water resources of the Missouri Basin for present or future projects on, or for the benefit of, the lower river and surrounding territory."

As adopted by the Congress, section 1 of the Flood Control Act of 1944 provides, consistent with the views thus expressed by the Secretary:

"The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

(2) *Statement in the report of the Regional Director, Region II, Bureau of Reclamation, dated December 1, 1947.*

In paragraph 70 of his report to the Commissioner of the Bureau of Reclamation dated December 1, 1947, on a comprehensive plan for water-resource development, Central Valley Basin, California, the Regional Director of Region II of the Bureau of Reclamation at Sacramento, California, stated:

"70. In conducting irrigation investigations and constructing and operating projects throughout the West, the Bureau of Reclamation fully recognizes and respects existing water rights established under State law. Not only is this a specific requirement of the Reclamation Act under which the Bureau operates, but such a course is the only fair and just method of procedure. This basin report on the Central Valley is predicated on such a policy." (Senate Document 113, 81st Cong., 1st sess., p. 39.)

The Regional Director's report was in turn recommended for approval by the Acting Commissioner of Reclamation on July 26, 1948 (*ibid.*, p. 15) and approved by Secretary of the Interior J. A. Krug on July 29, 1948 (*ibid.*, p. 17).

(3) *Answers to certain questions in the so-called "Barnes Questionnaire."*

The so-called "Barnes Questionnaire" comprised a series of questions relating to the policies and program of the Department of the Interior and the Bureau of Reclamation with regard to the Central Valley Project, California. These questions were forwarded to the then Regional Director of Region II of the Bureau of Reclamation, the late Mr. Charles E. Carey, on June 9, 1944, by Mr. Harry Barnes, Chairman of the Central Valley Project Committee of the Irrigation Districts Association of California. These questions and their answers were the subject of consultation by the Regional Director with both the Commissioner of Reclamation and the Secretary of the Interior. In replying to Mr. Barnes' questions under date of July 18, 1944, Mr. Carey stated:

"Because the answers to the questions which you have raised establish present and long-range policies of the Department of the Interior and the Bureau of Reclamation with respect to the Central Valley Project, we have consulted frequently with the offices of the Secretary of the Interior and the Commissioner of Reclamation. The attached answers therefore reflect the opinions and policies of those offices."

Under the heading "IX. Policy" the following questions were asked and answers given:

"(1) Does the Bureau of Reclamation recognize and respect existing water rights which have been initiated and perfected or in the state of being perfected under State laws?

"The Bureau of Reclamation does recognize and respect existing water rights which have been initiated and perfected or which are in the state of being perfected under State laws. The Bureau of Reclamation has been required to do so by Section 8 of the Reclamation Act of 1902 ever since the inception of the reclamation program administered by the Bureau of Reclamation. The Bureau of Reclamation has never proposed modification of that

requirement of Federal law; and on the contrary, the Bureau of Reclamation and the Secretary of the Interior have consistently, through the 42 years since the 1902 act, been zealous in maintaining compliance with Section 8 of the 1902 act. They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws. Ample demonstration of the effect of this law and policy of administration, in action, has been given in connection with the Central Valley Project. Water filings made by the State have been obtained by the Bureau of Reclamation by assignment, and vested water rights have been acquired by the United States by purchase, the considerations amounting to millions of dollars and being agreeable to the vendors—all in conformity with State laws. Further, other water rights of landowners which will or may be affected by the operations of the project are being analyzed and appropriate adjustments, giving full recognition of the rights of the landowners, are in the process of being worked out.

"(2) Do the future plans of the Bureau with respect to the C.V.P. contemplate any encroachment upon or interference with existing water rights?

"The future plans of the Bureau with respect to the Central Valley Project do not contemplate any encroachment upon or interference with existing water rights other than such as can be adjusted with the owners of the water rights in the same manner as has been followed in the making of contracts for the acquisition or exchange of San Joaquin waters, full recognition being given to the existing rights of landowners.

"(3) What are the intentions of the United States through the Bureau of Reclamation regarding water within the boundaries of the State now unappropriated? Does the United States recognize that the right to all unappropriated water is vested in the State of California?

"The question as to 'What are the intensions of the United States through the Bureau of Reclamation regarding water within the boundaries of the State now unappropriated?' is a very broad question in that it is not certain what scope is intended by those who asked it. The general intention, or policy, of the United States through the Bureau of Reclamation regarding water within the boundaries of the State now unappropriated is as follows:

"We believe that the best interests of the State of California and the best interests of the Nation will be served by such developments, regarding unappropriated waters within the State boundaries, as will lead to the greatest practicable use in California of every drop of such water. Most of the unappropriated waters are flood waters, and peak flood waters at that. They should not merely be retarded and then released in a regulated flow such as will prevent flood damage, although the maximum possible flood protection should be afforded. Such waters should be impounded and conserved so that they are not only prevented from doing flood damage, but are also put to work to serve as many multiple purposes as practicable.

"The second part of the question under (3), 'Does the United States recognize that the right to all unappropriated water is vested in the State of California?' was perhaps deliberately framed to read 'The United States' as distinguished from 'The United States through the Bureau of Reclamation.' Perhaps those who asked the question are fully aware of the legal questions pending in the original action in the Supreme Court of the United States entitled *Nebraska* v. *Wyoming* in which the State of Colorado has been impleaded as a defendant and in which the United States has intervened as a party. The questions involved in that litigation affect water rights for Federal reclamation projects in the States which are parties to the action. Intervention in the action by the United States was urged by many citizens of one or more of the States involved, citizens whose water rights on the Federal projects were, they felt, at stake. Whatever the correct theory be as to ownership of unappropriated water, the net effect as regards State laws is the same so far as the Bureau of Reclamation and its activities are concerned. This is true because of Section 8 of the 1902 act. The Bureau of Reclamation and the Secretary of the Interior are required by that law to proceed in conformity with State water laws; they do so proceed; and they would strenuously oppose any change in the Federal law which now requires them to proceed in conformity with State water laws.

"(4) If the United States desires to secure additional water supply for the C.V.P. as now or in future authorized, is it the intent to secure the rights in accordance with and through the procedure presented under State law?

"Should the United States, in connection with the development of the Central Valley Project, as now or as it may be in the future authorized, desire to obtain or develop additional water supply for the project, it is and will be the intention and the clear policy of the Bureau of Reclamation and the Secretary of the Interior to obtain or develop the additional water supply by proceeding in conformity with the State law."

Michael W. Straus

IV. Remarks by Hon. Carley Porter and Correspondence Between Him and Departments of Interior and Agriculture, 1964

California Legislature,
Assembly Committee on Water,
May 28, 1964.

Senator Thomas H. Kuchel,
Senate Office Building,
Washington, D.C.

Dear Tom: Late last month there were rumors going around in California that the Federal Government intends to stop complying with State water rights laws. In order to check this further, I wrote the enclosed letters to the Secretary of the Interior Udall, Secretary of Agriculture Freeman, and to Kent Silverthorne, chairman of the State water rights board. I am enclosing a copy of the replies I received.

I am disturbed by Secretary Udall's letter in that he did not answer my question specifically and state that the Federal Government was going to continue its present policy of compliance. It is also distressing for me to note the Secretary's comments that we should construct sound water works in lieu of controversy over water rights, which is not very reassuring to the many small users whose water rights are threatened by usurpation by the Federal Government.

The response of the U.S. Forest Service is also disturbing in that they indicate they are going to notify California rather than file for water rights. I have been privately notified by sources within the water rights board that the Forest Service has definitely adopted a policy of no longer complying with State laws by applying for permits. It is my understanding that the number of Federal filings from the Forest Service (which normally runs about 15 percent) has dropped to virtually nothing in the last few weeks.

Also enclosed is a copy of a speech which I made to the southland water committee and the board of directors of the Metropolitan Water District of Southern California on May 12 in which I comment on this matter as well as some others related to California water development, which may be of interest to you.

I appreciate the opportunity of working with you and Dick Andrews, and will keep you advised of any new developments in California which come to my attention.

Best regards.

Sincerely yours,

Carley V. Porter, *Chairman.*

Enclosures.

"Showdown at the Western Water Hole" Presented to Board of Directors of the Metropolitan Water District and the Southland Water Committee, Statler-Hilton Hotel, Los Angeles, May 12, 1964, by Assemblyman Carley V. Porter, Chairman, Assembly Water Committee, California State Legislature

It is indeed a pleasure to be with this distinguished group of my fellow Californians who share a deep interest in the development of California's water resources. I have been before you in one capacity or another for at least the 15 years that I have served in the California Legislature and always find our visits both enjoyable and beneficial.

The Metropolitan Water District is, of course, the State's largest water service contractor and probably, I suppose, the world's largest water district. Although it has been maligned at times and made a whipping boy for all sorts of personal crusades, I want you to know that you are serving southern California and the people of all of California well. The present high level of California's prosperous condition owes much to the vision and foresight of the Metropolitan Water District and the people of southern California who have supported your great planning in the field of water development.

I am also happy to pay tribute to the Southland Water Committee. Your devotion to the promotion of a broad understanding of California's water problems is one of southern California's great assets.

* * * * * * *

I would like to talk with you briefly today on three subjects—the administration of the Feather River project, Federal-State water rights, and the solution of our Pacific Southwest water problems.

I. ADMINISTRATION OF THE FEATHER RIVER PROJECT

* * * * * * *

II. FEDERAL-STATE WATER RIGHTS

Those of you here today have followed closely and supported strongly our efforts in California to obtain passage in Washington of S. 1275, or similar legislation, to clarify the relationship between the Federal and State Governments on water rights.

You will recall that for some time many of those who opposed S. 1275 pointed to the fact that the Federal Government has always cooperated with the States; and to this argument I have always answered: "Yes, we appreciate the cooperation in the past of the Federal Government and we want to make sure it continues. And the best way of making sure it continues is through adoption of Federal legislation."

During the last few weeks I have investigated rumors that the Federal Government and its many water-interested agencies is going to abandon its previous policy of compliance with State water rights laws. Parenthetically, let me mention a few of these so that we will see the many directions from which problems to California may come. These Federal agencies are the U.S. Bureau of Reclamation, the U.S. Army Corps of Engineers, the U.S. Forest Service, and the U.S. military establishments.

Although we think generally of the Bureau of Reclamation in terms of large water distribution projects, the problem of Federal-State water rights applies as well to the small appropriator—for example, the Federal agencies such as the Forest Service, who make small diversions on lesser creeks and streams of our State. In fact, the Forest Service accounts for 15 percent of the applications filed each year with the State water rights board.

I wrote to Secretary of the Interior Udall and Secretary of Agriculture Freeman and asked them to confirm or deny the rumor that the Federal Government would no longer comply with State water rights laws. From the Chief of the U.S. Forest Service I received the following, and I quote:

"It has long been the policy of the Forest Service to make filings with appropriate State agencies in accordance with procedures established by State laws on waters needed in connection with the development and administration of national forests."

And then, the letter continues:

"We plan to continue the policy of notifying States as to the use we intend to make of waters needed in connection with the development and administration of national forests."

Very plainly, the U.S. Forest Service indicates that they no longer will file applications with the State water rights board (in accordance with previously observed State water law), but will simply notify California of diversions—which they intended to take whether we like it or not.

Secretary Udall replied, in response to my letter:

"I fail to see in S. 1275 a constructive approach to Federal-State water rights relationships. That relationship, in my opinion, will not be fostered by fruitless controversy over 'water rights,' rather we should join in the planning and construction of sound waterworks."

Neither the Secretary of the Interior nor the U.S. Forest Service are willing to state that they will continue to comply with State laws. On the contrary, they rather clearly indicates that it is their intention to ignore them.

This is not a sudden change but one that has been coming for some time. Kent Silverthorne, chairman of our State water rights board, in a letter to me the other day, indicated that since the fall of 1962 there has been a tendency on the part of the U.S. Forest Service and the Bureau of Land Management to withdraw water rights applications which are protested. These protested applications, of course, are the ones in which the Federal-State water conflict is more acute because they represent Federal diversions which are in conflict with local users. Of course, after withdrawing locally contested applications, the Government goes right ahead and takes the water.

This new Federal Government policy and the Government's inability to cooperate fully with California is not "constructive," in spite of Mr. Udall's comment, and is resulting in chaos and confusion in water rights. The traditional Federal policy of cooperation with the States on water rights has been eroded. Unfortunately, our own State officials are cooperating in the demise of State water rights by such means as opposing S. 1275. Thus, the threat of confiscation of State water rights by the Federal Government is no longer a vague possibility but virtually a reality.

Californians cannot permit 100 years of State water rights to be destroyed and millions of dollars worth of State and locally constructed projects to be endangered. Federal-State cooperation over water rights can be a reality—it must be a reality. To make it so we must now push harder than ever before for S. 1275 or similar legislation.

III. PACIFIC SOUTHWEST WATER PROBLEMS

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CALIFORNIA LEGISLATURE,
ASSEMBLY COMMITTEE ON WATER,
April 3, 1964.

Mr. KENT SILVERTHORNE,
Chairman, State Water Rights Board,
Sacramento, Calif.

DEAR KENT: As you know, I have been especially interested in S. 1275, which is now pending before the U.S. Senate and which would clarify Federal-State water relationships.

It has been my impression that to date the Federal Government has complied with State water rights laws for both small local diversions and major water storage projects. I have recently received disquieting rumors that the Federal Government is or is about to institute a new policy of noncompliance with State water rights statutes. I would appreciate being advised whether or not the board is aware of any such decision and whether the number of Federal applications has declined.

I am deeply concerned as to the ramifications of such a policy on the part of the Federal Government, and would appreciate very much your keeping me advised of any developments with regard to this matter during the next few months.

Sincerely yours,

CARLEY V. PORTER, *Chairman.*

CALIFORNIA LEGISLATURE,
ASSEMBLY COMMITTEE ON WATER,
April 3, 1964.

Hon. ORVILLE L. FREEMAN,
Secretary of Agriculture,
Washington, D.C.

MY DEAR MR. SECRETARY: As you might be aware, I have been very interested in the matter of Federal-State water rights relationships, and I have recently made several comments in support of S. 1275. In so doing, I have mentioned with some pride the fine relationship between the State of California and constituent departments of yours such as the U.S. Forest Service and the Department's policy of complying with California's water rights laws.

Recently I have received disquieting rumors that your Department does not intend to continue this practice and, in fact, plans to no longer comply with State water rights laws.

It is my sincere hope that this is not the case, and I would very much appreciate your advising me of the present policy of the Department in this regard.

Sincerely yours,

CARLEY V. PORTER, *Chairman.*

CALIFORNIA LEGISLATURE,
ASSEMBLY COMMITTEE ON WATER,
April 3, 1964.

HON. STEWART L. UDALL,
Secretary of the Interior,
Washington, D.C.

MY DEAR MR. SECRETARY: As you are probably aware, I have been very interested in the matter of Federal-State water rights relationships and I have recently made several comments in support of S. 1275. In so doing, I have mentioned with some pride the fine relationship between the State of California and the Department of the Interior and the Department's policy of complying with California's water rights laws.

I have received disquieting rumors recently that your Department does not intend to continue this practice and, in fact, plans to no longer comply with State water rights laws.

It is my sincere hope that this is not the case and I would very much appreciate your advising me of the present policy of the Department in this regard.

Sincerely yours,

CARLEY V. PORTER, *Chairman.*

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., April 21, 1964.

HON. CARLEY V. PORTER,
Chairman, Assembly Committee on Water,
California Legislature, Sacramento, Calif.

DEAR MR. PORTER: The fine relationship between the State of California and the Department of the Interior in water matters, concerning which you write in your letter of April 3, has been a source of pride to the Department of the Interior and to me personally.

As has been true during the incumbencies of my predecessors, particularly during the administration of Secretary Seaton, occasions have arisen when we have had to differ with the views expressed by the California State Water Rights Board in acting upon water right matters affecting Federal projects in California. In some instances, the Department of the Interior has been of the opinion that positions taken by the State water rights board were neither required by the laws of California nor consistent with the laws made by the Congress for the construction and operation of Federal projects, notably the Central Valley project.

Notwithstanding these regrettable instances where we have been forced to express views and take positions at odds with the State water rights board, I believe it can be fairly said that the Department of the Interior and the State of California have worked closely and, in the main, harmoniously in the achievement of the common objective of the State water laws of California and of the Federal statutes—the securing for the benefit of users in California both in and out of areas of origin, for example, ample and timely supplies of water. This will continue to be the policy of the Department of the Interior under my administration.

Like Governor Brown, I fail to see in S. 1275 a constructive approach to Federal-State water rights relationships. That relationship, in my opinion, will not be fostered by fruitless controversy over "water rights," rather we should join in the planning and construction of sound water works.

Sincerely yours,

STEWART L. UDALL,
Secretary of the Interior.

STATE OF CALIFORNIA, RESOURCES AGENCY,
STATE WATER RIGHTS BOARD,
Sacramento, April 16, 1964.

Subject: Applications by Federal agencies.

Hon. CARLEY V. PORTER,
Chairman, Assembly Committee on Water,
State Capitol, Sacramento Calif.

DEAR CARLEY: Although there have been rumblings from Federal attorneys from time to time, the board has not received any clear indication of change in the policy of Federal Government agencies to secure water rights in compliance with State law, nor do the number of Federal applications appear to be declining.

Since October of 1962, there has been a tendency by the Forest Service and Bureau of Land Management to withdraw applications which are protested. However, this practice is by no means uniform. In some cases the withdrawals have been accompanied by statements that riparian rights will be relied upon; in other instances no reason has been given. The Bureau of Reclamation is continuing to file applications and to request permits, even though the applications are protested. Moreover, Secretary of the Interior Udall in a recent appearance before the water commission in Sacramento stated that it was his understanding that the Bureau is required by section 8 of the Reclamation Act of 1902 to comply with State law.

We are now in the midst of a hearing on the application of the Navy for a permit for DeLuz Reservoir on the Santa Margarita River at Camp Pendleton. The Navy is represented by David Warner of the Department of Justice. This application represents a step in the direction of greater Federal-State cooperation than has heretofore been the case where the Department of Justice has been directly involved.

I shall keep you informed of any further significant developments with regard to this matter.

Sincerely,

KENT SILVERTHORNE, *Chairman.*

U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE,
Washington, D.C., April 23, 1964.

Hon. CARLEY V. PORTER,
Chairman, Assembly Committee on Water,
California Legislature, Sacramento, Calif.

DEAR MR. PORTER: Secretary Freeman has asked us to reply to your letter of April 3. Your letter expresses appreciation of the fine relationship between the State of California and the agencies of the Department of Agriculture in the field of water rights, but concern over rumors that the Department does not intend to continue the practice of complying with State water rights laws.

We too appreciate the good relationship between the State of California and the Forest Service in water rights matters. We look forward to a continuation of this relationship.

It has long been the policy of the Forest Service to make filings with appropriate State agencies in accordance with procedures established by State laws on waters needed in connection with the development and administration of national forests. In this way we have endeavored to indicate those rights which are needed in connection with the administration of national forests so that both the State officials and those seeking to use water from the national forests would have information as to the needs of the Federal Government. We plan to continue the policy of notifying States as to the use we intend to make of waters needed in connection with the development and administration of national forests.

I am enclosing a copy of Secretary Freeman's letter of March 6, 1964, to Senator Henry M. Jackson, chairman, Committee on Interior and Insular Affairs, concerning S. 1275. This letter discussed in more detail the Department's view on water rights and desire for continued cooperative relationship with the various States.

Sincerely yours,

BOYD L. RASMUSSEN
(For Edward P. Cliff, *Chief*).

Enclosure.

DEPARTMENT OF AGRICULTURE,
Washington, D.C., March 6, 1964.

Hon. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate.

DEAR MR. CHAIRMAN: This is in response to your request for a report from this Department on S. 1275, a bill to clarify the relationship of interests of the United States and of the States in the use of waters of certain streams.

The Department of Agriculture fully recognizes the importance of the question of water rights, particularly to the people of the Western States. However, we do not recommend the enactment of this bill.

Federal-State water rights has been the subject of legislative proposals for a number of successive Congresses. S. 1275 is a modified version of a previous bill.

S. 1275 would—

(1) Provide that the withdrawal or reservation of public lands, heretofore or hereafter made, shall not affect any right to the use of water acquired under State law either before or after the withdrawal or reservation;

(2) Extend to all works constructed by or under the authority of the United States with respect to waters arising within States wholly or partly west of the 98th meridian the provisions of section 1(b) of the Flood Control Act of 1944, which provides that use of water for such works shall be only such use as does not conflict with present or future beneficial consumptive uses;

(3) Require that rights of the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with State laws;

(4) Provide that any water rights recognized under State law as compensable if taken by or under authority of the State shall not be taken by the United States without compensation and, if not acquired by agreement with the owner, such rights shall be acquired by the United States by proceedings in eminent domain either under the laws of the United States or the State.

The bill would further provide that nothing in it shall be construed as—

(1) Modifying or repealing any provision of an act of Congress requiring that rights of the United States to the use of water be acquired pursuant to State law;

(2) Permitting appropriations of water under State law which interfere with international treaties; or

(3) Affecting (*a*) the rights of the United States or any State to waters under any interstate compact or judicial decree; (*b*) any obligations of the United States to, or any claim or right owned or held by or for, Indians; (*c*) any water rights heretofore acquired by others than the United States; (*d*) any rights to water heretofore used for Governmental purposes or programs of the United States; or (*e*) any right of the United States to use water hereafter lawfully initiated in the exercise of express or implied authority when such right is initiated prior to the acquisition by others of the right to use the water under State law.

Cordial relationships and proper understanding between the Federal Government and the States in this matter of water rights are highly desirable. Many of the programs of this Department are carried out on a cooperative basis with the States, and we are proud of the harmonious relationship that exists between the various States and their agencies and this Department and its agencies.

This Department has required appropriate conformance with the provisions of State laws in the administration of its various programs and activities providing assistance for watershed protection, flood prevention, and soil and water conservation.

One of the principal activities of this Department in connection with which water rights are essential is the administration of the national forest system. This system is comprised of about 186 million acres in 154 national forests, 19 national grasslands, and other administrative units situated in 44 States and Puerto Rico.

The national forests are established and administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The Multiple Use-Sustained Yield Act of June 12, 1960 (74 Stat. 215), directs the Secretary of Agriculture to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. The same principles are applied to the national grasslands.

In the administration of lands in the national forest system under principles of multiple use, water is needed for various purposes. These include ranger stations and other headquarters sites, livestock watering developments, recreation developments, wildlife habitat developments, and the various occupancy uses by the permittees. The needs for water for all of these purposes must be met with full recognition that each of such uses of water is of significant importance. All of these uses must be recognized as beneficial uses of water.

One of the most rapidly increasing uses of the lands in the national forest system is for outdoor recreation. Camping, picnicking, hunting, fishing, and the other forms of outdoor recreation are all on the upsurge. The number of recreation visits to these lands in 1960 was 92.6 million. We expect the final tabulation of 1963 visits to show an increase to approximately 125 million. In order to accommodate the continually increasing recreation use of the national forest system there will need to be a great expansion in the number of recreation developments.

We believe that the responsibility of the Secretary of Agriculture for developing and administering the national forests, under principles of multiple use and sustained yield, requires that any establishment and recognition of rights to waters on the national forests should not be construed as limiting the Secretary's authority to regulate the use and occupancy of the national forests or to prevent injury to property of the United States. Where a beneficial use of water on the national forests is made in connection with the use and occupancy of the national forests, it should not preclude the Secretary from making discretionary determinations in accordance with rules and regulations for the use and occupancy of such lands. Thus, permits for the use and occupancy of national forest land for grazing or other purposes could be issued, modified, or terminated under the regulations of the Secretary, even though the termination of a permit might result in the permittee being unable to continue the beneficial use of water which he had previously been making in connection with the use of the land under the permit. At the same time, the Secretary must be free to authorize other appropriate uses of national forest lands under the applicable regulations.

It has long been the policy of this Department to make filings with appropriate State agencies and in accordance with the procedures established by State law on waters needed in connection with the development and administration of the national forests. In this way we have endeavored to indicate those rights which are needed in connection with the administration of the national forests so that both the State officials and those seeking to use the waters from the national forests would have information as to the needs of the Federal Government. The project of making these filings is not complete but it is proceeding as rapidly as funds and manpower permit. We plan to continue the policy of notifying the States as to the use we intend to make of water needed in connection with the development and administration of the national forests.

The Department of Agriculture is also concerned that effective multiple-purpose development of our water resources will not be inhibited by restrictions beyond those already provided by law. Although the responsibility for comprehensive river basin development is shared with other departments, we represent the interests of farm and rural people whose social and economic well-being is to a considerable extent dependent upon such development. As an example, there is the rather considerable segment of the rural population whose power needs are served by borrowers from the Rural Electrification Administration. Over 200 of these systems receive their power supply from Federal hydroelectric projects. Many of them would never have come into being but for the development of these projects and the availability of power from them. Their ability to meet consumers' power needs of the future may largely be determined by the orderly and timely development of resources yet untapped. The broad interests of these people in our natural resources development, we feel, should be recognized in the consideration of this matter of water rights.

The Bureau of the Budget advises that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

ORVILLE L. FREEMAN, *Secretary.*

EXPRESSION OF SUPPORT FOR S. 1275

RESOLUTION NO. 6 OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION

Whereas since the *Pelton Dam* decision of the U.S. Supreme Court in 1955 (*Federal Power Commission* v. *Oregon*, 349 U.S. 435), representatives of the Federal Government have asserted that the United States has, in effect, a prior right of appropriation of all of the previously unappropriated water arising on reserved or withdrawn Federal lands, said priority arising no later than at the date of the relevant withdrawal or reservation; and

Whereas such assertions raise doubt concerning the priority of water rights upon which many members of this association are dependent, as well as the water rights involved in the State water plan; and

Whereas development and financing of new water facilities based upon such water rights are in jeopardy so long as such doubt exists; and

Whereas Senate bill 1275, now before the Congress, will remove such doubt and provide the necessary assurance that State-based water rights will not be attacked: Now, therefore, be it

Resolved, That the California Municipal Utilities Association urge the Congress to adopt Senate bill 1275 to the end that existing water facilities will not be jeopardized and that much needed water development projects in the State of California may be financed and constructed economically and expeditiously; and be it further

Resolved, That the executive director be directed to send copies of this resolution to the California congressional delegation.

I, the undersigned, hereby certify that the foregoing resolution was duly and regularly introduced and unanimously adopted by the California Muncipal Utilities Association in regular annual meeting assembled on the 13th day of March 1964.

F. V. FREY, *Secretary.*

SOUTH DAKOTA COUNCIL
OF PRODUCERS, BUSINESS & INDUSTRY,
April 13, 1964.

Hon. THOMAS H. KUCHEL,
Senate Office Building,
Washington, D.C.

SIR: Enclosed is a resolution which was adopted by our Producers, Business & Industry Council at our meeting which was held on April 3, 1964.

Please observe the list of trade associations that belong. We represent approximately 35,000 people in the State of South Dakota.

We trust you will give this matter your undivided attention and we welcome any remarks you care to make.

Yours very truly,

C. F. STILGEBOUER, *President.*

[Enclosure]

RESOLUTION

The following resolution was passed unanimously by the South Dakota Council of Producers, Business & Industry.

Be it hereby

Resolved, That we urge the adoption of Senate bill 1275 which deals with the preservation of State rights insofar as the use of water of certain streams; and be it further

Resolved, That for the same reason, we urge that House bills 5914 and 7376 also be approved, since they are companion bills.

EEL RIVER FLOOD CONTROL & WATER CONSERVATION ASSOCIATION,
Santa Rosa, Calif., March 18, 1964.

Re Senate bill 1275.

Senator THOMAS H. KUCHEL,
Congress of the United States,
Senate Office Building, Washington, D.C.

DEAR SENATOR KUCHEL: At its regular quarterly meeting in January of 1964, the Eel River Flood Control & Water Conservation Association, consisting of the official delegates from the 10 north coast counties, officially endorsed your bill, S. 1275, and asked me to formally notify you concerning their support of your efforts.

The association is vitally concerned about the provision of ample water for our area of origin and is also concerned that any such reservation of water or protection of rights should not preclude the most rapid possible development of our water resources. We appreciate very much the efforts that you have made in this field and wish to emphasize again our wholehearted support.

Very truly yours,

JEROME B. GILBERT, *President.*

RESOLUTION 1 OF THE COLORADO RIVER WATER USERS ASSOCIATION

Whereas, by resolution adopted by the Colorado River Water Users Association at its 19th annual meeting in Las Vegas, Nev., on December 7, 1962, a study was to be made and submitted concerning the protection of State water rights against further encroachment by assertions of Federal executive authority; and

Whereas the States have developed a cohesive and unified body of water law which attempt to achieve maximum certainty in the enjoyment and possession of water rights, and the security of these water rights is essential to the planning, development, and maintenance of water projects on which the economy depends: Now, therefore, be it

Resolved, That the 20th annual meeting of the Colorado River Water Users Association again reiterates its position that the Congress should enact legislation which will declare unmistakably that water rights are a species of real property rights which should be acquired and maintained as other forms of real property rights under the laws of the respective States. To this end, and as a first step toward the ultimate goal this association supports the principles substantially as contained in S. 1275 as introduced and urges enactment of such legislation.

RESOLUTION OF SOUTHERN CALIFORNIA WATER CONFERENCE

Whereas S. 1275 (the text of which is attached hereto) has been introduced by Senators Kuchel of California, Moss of Utah, and Jordan of Idaho, in the 88th Congress, 1st session, to clarify in certain respects Federal-State relations in waters of the arid West; and

Whereas S. 1275, although not attempting to solve all features of the Federal-State conflict regarding water rights, does achieve certain important and desirable gains in this area of law, the major features of which are:

(1) The withdrawal or reservation of public lands shall not affect any water right acquired under State law either before or after withdrawal or reservation;

(2) In the West, consumption of water must take priority over the use of water for navigation;

(3) When the United States acquires a water right under State law, it should comply with State procedures;

(4) The United States should pay for the water rights which it acquires; and

Whereas S. 1275 does not prejudice any legitimate rights of the United States because (1) certain express safeguards are set forth in the bill; (2) Congress can at any time alter, amend, or repeal all or any part of S. 1275; and (3) Congress can with respect to any specific project provide for any exception to S. 1275 deemed necessary or desirable; and

Whereas S. 1275 should not interfere with regional planning or development under present or future legislation; and

Whereas Attorney General Stanley Mosk vigorously supports S. 1275; and

Whereas both California Senators support the principles of S. 1275: Now, therefore, be it

Resolved by the Southern California Water Conference, That—

(1) The conference's support for S. 1275, for the reasons set forth in Attorney General Mosk's letter of May 3, 1963, to California's Senators and Representatives in Congress (copy attached hereto) is reaffirmed.

(2) The conference urges Governor Brown to support S. 1275 and the principles thereof;

(3) A copy of this resolution be forwarded to Senator Kuchel and the other authors of the bills (Senators Moss and Jordan), all of the California Senators and Representatives, Governor Brown, Attorney General Mosk, Resources Administrator Hugo Fisher, director of the department of water resources William E. Warne, and all other interested Federal and State officials;

(4) The officers of the conference be directed to take steps appropriate to achieving the objectives of this resolution.

STATE OF CALIFORNIA,
COLORADO RIVER BOARD OF CALIFORNIA,
Los Angeles, January 10, 1964.

Hon. THOMAS H. KUCHEL,
Senate Office Building,
Washington, D.C.

DEAR SENATOR KUCHEL: At a meeting of the Colorado River Board of California held on January 8, 1964, the following resolution was adopted:

"The Colorado River Board of California unanimously endorses the provisions of proposed legislation Senate bill 1275 as introduced in the 88th Congress by Senators Kuchel, Jordan, and Moss, to clarify the relationship of interests of the United States and of the States in the use of waters of certain streams."

Cordially,

M. J. DOWD,
Chairman and Ex Officio, Colorado River Commissioner.

RESOLUTION OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Whereas the development of water resources of the United States requires a sound legal basis upon which water rights can be determined; and

Whereas the U.S. Department of Justice has contended (*a*) that no water right can be acquired as against the United States in the waters of a navigable stream, and (*b*) that the United States owns all water "appurtenant" to federally owned lands, reserved from the public domain, including the national forests which produce most of the runoff in arid parts of the Nation; and

Whereas these contentions have clouded the title of water rights on which whole economies depend; and

Whereas it is impossible to determine the extent of the water rights claimed by the United States, even if its contentions were upheld, because criteria of how much water is "appurtenant" to a Federal reservation do not exist; and

Whereas S. 1275, in the present Congress, authored by Senators Kuchel, Moss, Church, and Jordan, would resolve these uncertainties in a manner fair to the States, to the United States, and to the people who use water: Now, therefore, be it

Resolved by the 58th annual meeting of the National Association of Attorneys General in Honolulu, Hawaii, That this association renew its support for S. 1275, urging that Congress approve this legislation at the earliest opportunity.

RESOLUTION 6384

Whereas approximately 4 million acre-feet of water will be distributed annually through the State water facilities of the California water plan to urban centers and agricultural areas, to meet their existing needs and provide for their continued orderly development, of which the Metropolitan Water District of Southern California will use 1,500,000 acre-feet annually; and

Whereas a substantial portion of the waters which will be distributed by this immense system have their origin on federally reserved or withdraw lands within the State of California; and

Whereas it is essential to the successful completion and operation of this great project that there be no doubt cast upon the right of the State of California to divert and use the waters arising on federally reserved and withdrawn lands, such doubts having been created by assertions of the U.S. Department of Justice that such waters are Federal property; and

Whereas S. 1275 seeks to clarify the relationships between the United States and the States with respect to water rights and would be an important step in assuring the Western States that they can safely plan the development of their water resources and at the same time assure the United States full protection of its rights and legitimate interests in the development of the water resources of the United States; and

Whereas the long continued problems concerning the jurisdiction, respectively, of the United States and of the various States over the waters within the territorial jurisdiction of the States, have only served to emphasize the need for the adoption of a policy by the Congress of the United States to clarify these conflicts of interests: Therefore be it

Resolved by the board of directors of the Metropolitan Water District of Southern California, That S. 1275 represents a fair and equitable approach to the solution of some of these problems and that the Congress of the United States be urged to adopt S. 1275; and be it further

Resolved, That the executive secretary forward copies of this resolution to U.S. Senators Thomas H. Kuchel and Frank E. Moss, authors of S. 1275, and to the Members of the Congress of the United States from the State of California.

I hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by the board of directors of the Metropolitan Water District of Southern California, at its meeting held September 10, 1963.

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA,
NORTON L. NORRIS,
Executive Secretary.

RESOLUTION NO. 938 OF THE MONTANA STATE WATER CONSERVATION BOARD

Whereas the State water conservation board was created in 1934 by the Montana Legislature for the purpose of meeting a statewide need for the conservation and use of water by constructing and operating projects designed for the purpose, and since its creation has built 181 projects to store 438,017 acre-feet of water and to divert 260,563 acre-feet from streams to furnish a full supply or supplemental water to 405,582 acres, and

Whereas the board has determined that 1,275,870 additional acres of new land can be beneficially irrigated and 352,730 acres of presently irrigated land require supplemental water, and it appears to the board that the irrigation of said land would be most beneficial to the people and the economy of the State of Montana: Now, therefore, be it

Resolved, That the board adopt the following policy:

That the State of Montana, its congressional delegation, prevail upon Congress to whatever extent possible so that it shall be declared a policy of the Congress to recognize, preserve, and protect to the utmost, the primary responsibilities and rights of the States in the planning for the conservation, development, and utilization of their water and related land resources; be it further

Resolved, That any right claimed by the United States to the beneficial diversion, storage, distribution, or consumptive use of water under the laws of any State shall be initiated and perfected in accordance with the procedure established by the laws of that State; be it further

Resolved, That the Secretary be instructed to send copies of this resolution to the Montana congressional delegation; to the Honorable Henry M. Jackson, of Washington, chairman of the Committee on Interior and Insular Affairs; Senator Thomas H. Kuchel, of California; and the Honorable Stewart L. Udall, Secretary of the Interior.

MONTANA STATE WATER CONSERVATION BOARD,
C. H. RAYMOND, *Chairman.*

Attest:

A. D. MCDERMOTT,
Assistant Secretary.

COUNTY SUPERVISORS ASSOCIATION OF CALIFORNIA,
Sacramento, Calif., October 18, 1963.

Hon. THOMAS H. KUCHEL,
U.S. Senate,
Washington, D.C.

DEAR TOM: California counties are aware that the Congress is currently considering S. 1111 and S. 1275. Both are tremendously important bills in the water future of California.

We know that you are much interested in the position of California's 58 counties with respect to these two bills.

I am happy to transmit herewith the unanimous action of our 53d annual meeting in Sacramento this month. In it we pledge all-out support for S. 1275 and conditional support for S. 1111, if this latter bill is amended to include local government representation on the river basins commissions.

We stand ready to help you in any way in the furtherance of action on this proposed legislation.

Cordially yours,

WM. R. MACDOUGALL,
General Counsel and Manager.

RESOLUTION OF THE COUNTY SUPERVISORS ASSOCIATION OF CALIFORNIA

Whereas two bills have been introduced for consideration by the 88th Congress; namely,

1. S. 1111; cited as the Water Resources Planning Act of 1961, which bill, if enacted, would establish a Water Resources Council composed of the Secretaries of the Interior, Agriculture, the Army, and Health, Welfare, and Education, and river basins commissions, composed of certain Federal officials and officers, one member from each State which lies wholly or partially within a region river basin or group of river basins and certain other persons; said Council and commissions to coordinate and allocate funds in connection with broad river basin planning by Federal, State, and local interests;

2. S. 1275; a bill attempting to clarify relationship of interests of the United States and of the States in the use of the waters of certain streams, providing for recognition by the United States of "water laws" in the State, or States in which diversion, storage, distribution, or consumptive use of water is contemplated by the Federal Government, and also provides for compensation by the United States for water taken by or under the authority of the State, or States; and

Whereas the County Supervisors Association of California wholeheartedly supports water resource development on a broad basin basis providing the development is realized in accordance with planning decisions agreed upon by Federal, State, and local interests and within the appropriate laws of the State of California; and

Whereas S. 1111 does not provide for local governmental representation on river basins commissions: Now, therefore, be it

Resolved, That the County Supervisors Association of California goes on record in support of S. 1275 and S. 1111, if S. 1111 is amended to include local government representation on said commissions; and be it further

Resolved, That copies of this resolution be forwarded to the Governor of the State of Californa, all congressional representatives of the State of California, and appropriate State and Federal legislative and congressional committees, the California Water Commission, and the department of water resources.

I certify this to be a resolution adopted by the County Supervisors Association of California in annual meeting at Sacramento, Calif., on October 11, 1963.

[Seal]

WM. R. MACDOUGALL,
General Counsel and Manager.

RESOLUTION OF THE BOARD OF SUPERVISORS, COUNTY OF LOS ANGELES

On motion of Supervisor Chace for Supervisor Dorn, unanimously carried, it is ordered that following resolution be and it is hereby adopted:

Whereas the longstanding and unsolved jurisdictional dispute between the Federal Government and the 17 western irrigation States over the unappropriated waters lying in the rivers and streams of California and other States in the West demands clarification; and

Whereas during the past decade several efforts have been made to secure affirmative action by the Congress of the United States to clarify the relationship of interests of the United States and of the States in the use of waters of certain streams, but, up to the present time, no bill has been adopted; and

Whereas more than 8 years have passed since the Supreme Court of the United States decided the historic *Pelton Dam* decision in *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955), raising the serious question as to whether unappropriated water on reserved or withdrawn lands such as land in national forests, national parks, military reservations, Federal grazing lands and other categories of public land reserved for future Federal use, where subject to appropriation under State law; and

Whereas this uncertainty gives rise to a clash of interests between the citizens of the western irrigation States and the U.S. Government, its agencies and licensees as to the right to divert, use or store the surface and underground waters within the territorial limits of said States; and

Whereas the Select Committee on National Water Resources of the U.S. Senate, a bipartisan group, reported in January of 1961, after an exhaustive study, that "the broadening patern of these conflicts is conclusive proof of the urgent need for clear-cut, definitive action on the part of Congress to work out with the States a redefining of Federal-State powers and responsibilities for control, use and development of water resources"; and

Whereas the same identical position has recently been taken by both National and California agencies; such as, the National Reclamation Association, the American Bar Association, Council of State Governments, American Farm Bureau, Irrigation Districts Association of California, State chamber of commerce, Southern California Water Coordinating Conference, metropolitan water district and the department of water and power; and

Whereas Attorney General Stanley Mosk has recently urged all members of the California delegation in Congress to support S. 1275, introduced by Senator Thomas H. Kuchel, of California, a Republican, and Senator Frank E. Moss, of Utah, a Democrat; and

Whereas Attorney General Mosk has consistently sponsored such action by the Congress to uphold State water rights, and in his public statement and letter to Members of the Congress supporting S. 1275, stated: "Among those of us in the West who have worked, litigated, and negotiated about water problems, the issues are not only nonpartisan but, we believe noncontroversial"; and

Whereas this board of supervisors, upon the prior recommendation of the County Counsel Harold W. Kennedy in May of 1960, adopted a similar resolution urging the clarification of Federal-State water rights and, in the interim, has rendered financial support to the Feather River Project Association, which organization was partially organized to improve relationships between the Federal and State governments, and has permitted Country Counsel Kennedy to serve the past 2 years as chairman of the Special Federal-State Water Rights Committee: Now, therefore, be it

Resolved by the Board of Supervisors of the County of Los Angeles, in confirmation of the official action heretofore taken, That it once again urges the Congress of the United States to adopt S. 1275; that, subject to constitutional limitations imposed by the commerce, property, or treaty powers, the method of establishing property rights in the appropriation, diversion, use or storage of surface and underground waters within the limits of the respective States shall be subject to longstanding State laws; and be it further

Resolved, That copies of this resolution be forwarded by the clerk of the board to U.S. Senators Thomas H. Kuchel and Frank E. Moss, and to members of the California delegation in the Congress; and that copies be sent to the executive directors of the National and State organizations recited in this resolution.

STATEMENT BY SUPERVISOR WARREN M. DORN IN PRESENTING EXTENDED RESOLUTION PLACING THE BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES ON RECORD IN SUPPORT OF CLARIFYING LEGISLATION ON FEDERAL-STATE WATER RIGHTS

I have handed to the clerk, and will ask the clerk to read only the resolving portion of the resolution which would again put the county of Los Angeles on record in support of the need for legislation to clarify relationships between the United States and the States in the use of waters and certain streams, most of it orginating in the public domain.

This resolution is similar to the one that the board adopted in May of 1960, upon the recommendation of County Counsel Harold W. Kennedy, at a time shortly after the so-called *Pelton Dam* case, which cast doubt upon the State ownership of unappropriated waters, and at a time when the Federal Government, in litigation over waters of the San Joaquin River, filed a brief contending that the Federal Government had title to both the public domain and the water arising in it.

Senator Thomas H. Kuchel and Senator Frank E. Moss, a Democrat, of Utah, have jointly introduced S. 1275, and as the resolution recites, it has been widely endorsed by a large number of Federal and State water agencies.

Board members may recall that a week before last, Attorney General Stanley Mosk came out strongly in support of S. 1275, and personally urged every member of the California delegation in the Congress to support the bill. Attorney General Mosk in 1961, sponsored a similar resolution before the Western Association of Attorneys General, which was unanimously adopted. In his communication to Members of the Congress, Mr. Mosk recited, "Among those who have worked, litigated, and negotiated about water problems, the issues are not only nonpartisan but, we believe, noncontroversial." This program and S. 1275 has emerged partly through the activities of the Special Federal-State Water Rights Committee of the Feather River Project Association, which County Counsel Harold W. Kennedy has headed, and is in keeping with the unanimous action taken at the western water law symposium held in Los Angeles under the auspices of the National District Attorneys Association, where Mr. Kennedy served as cochairman.

This legislation has the strong support of all of the local water agencies, including Southern California Water Coordinating Conference, the Water and Power Committee of the Los Angeles Chamber of Commerce, Metropolitan Water District, and the Department of Water and Power.

RESOLUTION ADOPTED BY THE BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES

Whereas the longstanding and unsolved jurisdictional dispute between the Federal Government and the 17 western irrigation States over the unappropriated waters lying in the rivers and streams of California and other States in the West demands clarification; and

Whereas during the past decade several efforts have been made to secure affirmative action by the Congress of the United States to clarify the relationship of interests of the United States and of the States in the use of the waters of certain streams, but, up to the present time, no bill has been adopted; and

Whereas more than 8 years have passed since the Supreme Court of the United States decided the historic *Pelton Dam* decision in *Federal Power Commission* v. *Oregon* 349 U.S. 435 (1955), raising the serious question as to whether unappropriated water on reserved or withdrawn lands such as land in national forests, national parks, military reservations, Federal grazing lands, and other categories of public land reserved for future Federal use, were subject to appropriation under State law; and

Whereas this uncertainty gives rise to a clash of interests between the citizens of the western irrigation States and U.S. Government, its agencies and licensees as to the right to divert use or store the surface and underground waters within the territorial limits of said States; and

Whereas the Select Committee on National Water Resources of the U.S. Senate, a bipartisan group, reported in January of 1961, after an exhaustive study, that "the broadening pattern of these conflicts is conclusive proof of the urgent need for clear-cut definitive action on the part of Congress to work out with the States a redefining of Federal-State powers and responsibilities for control, use and development of water resources"; and

Whereas the same identical position has recently been taken by both national and California agencies, such as, the National Reclamation Association, the

American Bar Association, Council of State Governments, American Farm Bureau, Irrigation Districts Association of California, State chamber of commerce, Southern California Water Coordinating Conference, metropolitan water district, and the department of water and power; and

Whereas Attorney General Stanley Mosk has recently urged all members of the California delegation in Congress to support S. 1275, introduced by Senator Thomas H. Kuchel, of California, a Republican, and Senator Frank E. Moss, of Utah, a Democrat; and

Whereas Attorney General Mosk has consistently sponsored such action by the Congress to uphold State water rights, and in his public statement and letters to Members of the Congress supporting S. 1275, stated: "Among those of us in the West who have worked, litigated, and negotiated about water problems, the issues are not only nonpartisan but, we believe, noncontroversial"; and

Whereas this board of supervisors, upon the prior recommendation of County Counsel Harold W. Kennedy in May of 1960, adopted a similar resolution urging the clarification of Federal-State water rights and, in the interim, has rendered financial support to the Feather River Project Association, which organization was partially organized to improve relationships between the Federal and State Governments, and has permitted County Counsel Kennedy to serve the past 2 years as chairman of the Special Federal-State Water Rights Committee: Now, therefore, be it

Resolved by the Board of Supervisors of the County of Los Angeles, in confirmation of the official action heretofore taken, That it once again urges the Congress of the United States to adopt S. 1275; that, subject to constitutional limitations imposed by the commerce, property, or treaty powers, the method of establishing property rights in the appropriation, diversion, use, or storage of surface and underground waters within the limits of the respective States shall be subject to longstanding State laws; and be it further

Resolved, That copies of this resolution be forwarded by the clerk of the board to U.S. Senators Thomas H. Kuchel and Frank E. Moss, and to members of the California delegation in the Congress; and that copies be sent to the executive directors of the National and State organizations recited in this resolution.

MISSOURI RIVER STATES COMMITTEE,
April 6, 1964.

Hon. THOMAS H. KUCHEL,
U.S. Senator,
Washington, D.C.

DEAR SENATOR KUCHEL: The Missouri River States Committee, which membership is composed of the 10 Governors of the Missouri River Basin States and two other representatives from each of the basin States, has directed me to inform you of their support of S. 1275. This bill was discussed at considerable length during the meeting of committee held in Omaha, Nebr., on March 25, 1964. It was unanimously agreed by the committee to urge the 88th Congress to enact S. 1275 into law and thereby end the controversy that now exists over Federal-State water right legislation.

It was also agreed to request that the committee consider an amendment to the bill which would permit lines 5 and 6 on page 2 to read "or consumptive or other use of water." Line 10 on page 2 should be amended to read "or consumptive or other use of any water."

It would be greatly appreciated if your committee would permit these considerations.

Sincerely yours,

MILO W. HOISVEEN, *Acting Secretary.*

(Resolutions or other expressions of support for S. 1275 were also received from the following:)

State of Utah, County Commissioners of San Juan County
Nevada County (Calif.) Farm Bureau
Board of Supervisors, County of (California):
- Alameda
- Alpine
- Butte
- Contra Costa (ex officio the governing board of the Contra Costa County Water Agency)
- Del Norte
- Fresno
- Humboldt
- Inyo
- Kings
- Mendocino
- Modoc
- Mono
- Placer
- Riverside
- Sacramento
- San Mateo
- Santa Barbara (with joint resolution with board of directors of Santa Barbara County Flood Control & Water Conservation District)
- Solano
- Sonoma
- Tehama
- Tuloumne
- Ventura
- Yolo
- Yuba

Board of supervisors, Flood Control & Water Conservation District, County of (California):
- San Joaquin
- Kern County Water Agency
- Orange County Water District
- San Luis Obispo
- Siskiyou

Board of Supervisors, Flood Control and Water Conservation District, county of (California):
- Santa Clara
- Fallbrook Public Utility District
- Coachella Valley County Water District
- Bueno Colorado Municipal Water District
- San Dieguito Irrigation District
- Laguna Beach County Water District

San Diego, Calif., Chamber of Commerce

PRESS COMMENT ON S. 1275

[From the Los Angeles Times, Mar. 18, 1964]

The Governor's Lonely Water "Fight"

In California's water rights battles, Governor Brown lately seems to be a general with a staff but no troops—and often headed in the wrong direction.

The Governor has already disappointed many Californians with his lack of forceful insistence upon necessary safeguards for the State's interests in the proposed Pacific Southwest regional water plan.

Last week it happened again. This time it was Brown's response to an important bill by Senator Thomas Kuchel, of California, clarifying Federal-State water jurisdiction.

The bill, urgently needed in the present tangle of confused and conflicting water rights, was up for hearings before a Senate Interior subcommittee.

Opposition by Federal agencies was, of course, to be expected. But in support of the measure were not only Senators Kuchel and Clair Engle but both the California State Senate and Assembly, Attorney General Stanley Mosk, Los Angeles County Counsel Harold Kennedy and a long list of the State's water agencies and irrigation districts—to say nothing of the American Bar Association, the American Farm Bureau, and senators and attorneys general of other affected Western States.

All agreed that the proposed legislation established a sound basis for protecting State rights without jeopardizing proper Federal water use activities.

Governor Brown, however, decided they were all wrong. One of his advisers, B. Abbott Goldberg, carried the message to the subcommittee that the Governor felt that the bill would somehow increase water project costs.

Attorney General Mosk challenged the Governor's position and declared that the bill "is good legislation from the Federal point of view, the State's point of view, and from the point of view of all the people of the United States."

The last word was had by Assemblyman Carley Porter, chairman of the assembly water committee and coauthor of the Feather River project legislation. Mosk's view, said Porter, was shared by "the 18 million people of California, the State legislature, all the water agencies in the State, and the vast majority of water experts.

"My Governor doesn't understand the bill, or he, too, would be supporting it."

[From the Spokesman-Review, Spokane, Wash., Feb. 3, 1964]

WATER RIGHTS BILL HEARINGS ARE DUE

Ten months have passed since there was introduced in the U.S. Senate a bill (S. 1275) intended to end some bitter disputes about Federal and State powers over water rights in the Western States.

This bill is a revised version of an earlier proposal resulting from existing apprehension and confusion among western water users.

Last week one of the sponsors, Senator Thomas H. Kuchel, of California, announced that a Senate Interior Subcommittee has now scheduled hearings on the bill, to be held March 10 and 11 in Washington.

This advance notice will probably enable the committee to pry out of the executive departments some long-awaited opinions. The Department of the Interior, the Department of Justice, and the Budget Bureau have been dragging their heels on this matter.

Senator Len B. Jordan, of Idaho, has been seriously concerned over this proposed legislation which some of the Federal bureaucrats would like to see buried. The bill tends to restrict the usurpation of water rights by the Federal Government since the measure would require the Federal officials to comply with the procedure of State laws whenever they seek to establish water rights.

This whole question is a complex one. The seriousness dates back to a 1955 ruling by the Supreme Court in the so-called *Pelton* case in Oregon.

Fortunately, there is good bipartisan support for the water rights bill, and if it gets a fair hearing there is bound to be a new look at Western State rights, now being eroded.

Democratic Senators Moss of Utah and Church of Idaho are convinced, like Republican Senators Jordan and Kuchel, that new Federal legislation is needed if the present confusion over the use of waters is to be ended.

The recent move by the city of Los Angeles to divert Snake River waters to southern California adds now emphasis to the need for new Federal legislation in this respect. An even stronger protection, of course, would be the ratification of the Columbia interstate compact by the Legislatures of Washington and Oregon, to be followed by congressional consent.

In the meantime, S. 1275 ought to receive the sympathetic attention of all concerned. The forthcoming hearings are long overdue.

[From the San Diego (Calif.) Evening Tribune, May 1, 1964]

FEDERAL-STATE WATER RIGHTS IN NEED OF CLARIFICATION

The relationship between the various States and the Federal Government over water rights and public lands needs to be clarified.

For nearly 100 years the policy was that waters flowing upon and appurtenant to public lands of the United States were available for appropriation and use in accordance with "local customs, laws, and the decisions of the courts."

A Supreme Court decision in 1955, known as the *Pelton Dam* case, drastically curtailed—almost nullified—this policy of Congress.

That decision said in essence that congressional consent to the appropriation of water under local customs and laws upon public lands did not apply to that portion of the public land which had been reserved or withdrawn from public entry or sale.

(Reserved or withdrawn lands include such areas as national forests, parks, and military reservations.)

Testifying before a Senate Subcommittee on Irrigation and Reclamation, Burnham Enersen, chairman of the Statewide Water Resources Committee of the California State Chamber of Commerce said:

"The effect of this decision as construed by the Department of Justice of the United States is that all water rights acquired pursuant to local laws and customs are placed in jeopardy insofar as they depend upon water arising upon or flowing from lands of the United States which had been reserved or withdrawn from public entry prior to the vesting of the water rights. * * *

"By its decision in 1955, the Supreme Court * * * virtually canceled the congressional policy of 1866 and transferred control of the regulation and ownership of most of our water rights from our own State governments to Washington, D.C."

Enersen was testifying in favor of a bill, S. 1275, which would reaffirm the old policy and put the Federal lands back on an equal footing with private lands in the West with respect to water rights.

We believe this bill should be passed in the interest of the continuing development of the West.

This issue is of particular concern for California because about one-half of the State's 100 million acres of land is still owned by the Federal Government. Enersen told the Senators:

"All of this land except some of the 16 million acres under control of the Bureau of Land Management is reserved or withdrawn from public entry. Thus at least 33 million acres, or one-third of the entire State, fall within the category of reserved or withdrawn lands and are directly affected by the Supreme Court's decision.

"It is the waters arising upon or flowing across this one-third of our State which are involved in the issue raised by * * * the pending bill. What is even more important is that these lands are the sources of the great majority of our water supplies."

Under the old policy protection was accorded rights to water put to beneficial use. This is California law and the old "water law of the West."

But under the interpretation of the *Pelton Dam* case, the Federal Government has the final word about water flowing from public lands, regardless of prior beneficial use. This is the basic conflict between the old and new policies.

The century-old policy based on local custom and laws in acquiring water rights was the key which opened the West to the development we have today.

Restoration of this policy under S. 1275 is the key for continuing our development and prosperity.

[From the Bakersfield (Calif.) Californian, Apr. 16, 1964]

KUCHEL EXPLAINS WATER RIGHTS STAND

Since he began his distinguished career in the U.S. Senate, Thomas H. Kuchel has become known as one of the leaders in the important field of legislation regarding natural resources and water; his association with nearly every important bill dealing with water and associated subjects since his Senate debut has placed him in a position of authority and extraordinary experience in the field.

It is therefore important to emphasize what Mr. Kuchel has said regarding legislation he has recently introduced on the subject of protecting State water rights.

This legislation has won the support of scores of individuals and organizations concerned with water and the development of water resources. It holds exceptional promise as a means of adjudicating fairly the present and future disputes between the States and the Federal Government over water rights involving Federal projects.

Senator Kuchel has explained that this legislation would permit waters arising on Federal lands to be put to beneficial use by the people under State law, while protecting the State rights against Federal encroachment. This area of water rights altercation has long been in need of such specific Federal legislative action.

Mr. Kuchel refuses to concede that the Federal Government can, at will, set aside State water rights and prevent local districts from using water arising from lands under Federal jurisdiction, contending that the State rights are paramount if the use of the water is proper. Every sensible student of the water rights problem will agree with Senator Kuchel. The Feather River Project Association, the California Supervisors Association, the California Farm Bureau, the California State Chamber of Commerce, the Irrigation Districts Association and many other groups have expressed strong support for the Kuchel bill.

We agree with Senator Kuchel that "the public interest is best served by putting unused surplus water to beneficial use for people who need it, and that people may acquire a right to its use if they comply with the laws.

The effort by Senator Kuchel to clear up the murky atmosphere surrounding the conflict between State and Federal water rights should be commended and strongly supported.

[From the Madera (Calif.) Tribune, Mar. 17, 1964]

Our Rights to Our Water

The mills of Congress are now grinding on a piece of legislation of vital importance to Madera County.

The measure, now in the hearings stage, is S. 1275, introduced by California's Senator Tom Kuchel and backed by five other Western solons, including Clair Engle.

Already the subject of bitter controversy, Kuchel's bill would establish, in writing, Californians' rights to their own water, a right often threatened by the power-hungry Federal Government.

FEDERAL RIGHTS FIRST

Drafted by an American Bar Association committee, the Kuchel bill states, in essence, that the U.S. Government cannot drain off water from rivers running through Federal land in violation of water rights held by downstream users without congressional approval and payment of compensation.

The U.S. Supreme Court has ruled in two cases that the Federal Government, in setting aside vast reserved areas in the West, established its right to withdraw water for those areas before other rights were claimed downstream. The Court said it was not necessary for the Federal Government to specify its water needs at the time it established the reserved areas.

Kuchel and his supporters argue that if Uncle Sam possesses such authority, then most non-Federal interests in the West get their water only at the sufferance of Washington. Under such a doctrine, Uncle Sam could take the water away any time he pleases without compensation. And with such a cloud hanging over the scene, there will be little incentive for new water development by the "little fellows."

As Madera Irrigation District Secretary-Manager Fred Bandy points out, most of this county's water flows out of Federal land in the Sierra and, under existing law, is subject to the whims of the men in Washington.

Look at the Merced Water District, for example. The water used by the Merced Water District flows from the Merced River which emanates in Yosemite National Park.

The way the law stands now, the Federal Government could build a dam in the park and funnel off huge volumes of water without paying a cent to users in the Merced district. Kuchel's bill would force Uncle Sam to get approval from Congress and to pay compensation to district water users whose rights had been violated.

PUTTING IT IN WRITING

Bandy adds that the Kuchel bill simply spells out in detail what already is stated in principle in the Reclamation Act—that the Federal Government must operate under State water laws and observe local water rights.

He calls the Kuchel bill a reasonable one. We agree, and urge Maderans interested in their rights to let their Representatives in Washington know where they stand.

[From the Los Angeles (Calif.) Times, Apr. 10, 1964]

LETTERS TO THE TIMES—SENATOR KUCHEL ANSWERS GOVERNOR ON STATE-FEDERAL WATER RIGHTS

My bill, S. 1275, simply seeks to confirm validity of water rights as against alleged paramount Federal rights. It seeks to let waters arising on Federal lands be put to beneficial use by the people, under State law, if those waters are not presently needed by the Federal Government. It does not abridge the laws of acreage limitation or Federal power preference or the powers of eminent domain.

Governor Brown's representative, at our recent Senate committee hearings, opposed this bill, which is coauthored by Democratic and Republican Senators and endorsed by State Attorney General Stanley Mosk and the California Legislature, among many others.

The Governor's representative testified that the United States owns virtually all the water in California and the West, always has owned it, and that anybody else uses it solely at the sufferance of the National Government. What a monstrous doctrine. The U.S. Senate Select Committee on Water Resources rejected the position Governor Brown espouses and said that, under such a position "all the people are the losers."

In his letter to the Times (April 1) Governor Brown describes the policy of the bill as "dubious." The Governor is wrong.

There are dozens of examples of local water districts which, under State law, for long years, have beneficially used waters arising on Federal lands. Now, some—including the Governor's man—say that the Federal Government can, willy-nilly, legally push the local districts aside and can prevent them from continuing to use the water. If this is so, it is wretched policy and ought to be corrected.

The public interest, in my view, is best served by putting unused, surplus water to beneficial use by people who need it, and of recognizing that such people may acquire a right to its use if they comply with the laws of their State.

THOMAS H. KUCHEL,
U.S. Senator.

[From the Pomona (Calif.) Progress Bulletin, Mar. 18, 1964]

AS WE SEE IT—BY ONE OF US

U.S. Senator Thomas Kuchel has prepared a bill in an attempt to end vexing issues about procedure in acquiring water supplies. The Senator believes that the time has come for Congress to remove the cause of regrettable disagreements between Federal and non-Federal interests about water rights.

Senator Kuchel's remarks were made to the Senate Irrigation and Reclamation Subcommittee of which he is ranking minority member at an opening session to take testimony from public officials, landowner and water-user groups, representatives of agriculture and many others favoring such legislation.

We speak of his remarks as indicative of the comprehensive program Senator Kuchel is carrying on in behalf of his constituents.

A large group of prominent officials who have been working hard to secure more water for southern California were present at the hearing. One of the first persons he referred to was Harold Kennedy, county counsel of Los Angeles County. This county is fortunate in having a man of Kennedy's ability and national influence.

Senator Kuchel also referred to Rex Goodcell of the Feather River Project Association and Richard Dickeson, county counsel of San Joaquin County, who were present.

He has the support of not only such men as the few we have named but of other Senators and many prominent men of civic and governmental life. They are all urging legislation to speed up the plans for solving the California water problem.

[From the Santa Monica (Calif.) Evening Outlook, Mar. 14, 1964]

A SOUND MOVE BY LEGISLATURE

The California Legislature has gone on record as favoring passage by Congress of a bill to clarify State-Federal water rights relating to unappropriated waters. We commend this action taken in the interest of California.

The assembly and the senate, in adopting the water rights resolution, acted to protect the State's unappropriated water from being taken over by the Federal Government through withdrawal of public lands. Governor Brown seemingly abdicated this responsibility when he announced his opposition to the congressional bill, sponsored by Senators Thomas Kuchel and Clair Engle.

The legislature is in the best of legal company on this issue. The American Bar Association and Western States Attorneys General also have urged adoption of legislation to restrict Federal water rights claims.

The need for such legislation is underscored by the U.S. Supreme Court's decision in the Arizona-California water litigation. The Court held that Federal agencies need not have complied with State laws to acquire water rights for various Federal reservations, including Indian reservations, fish and wildlife refuges, national parks, and national forests.

Attorney General Stanley Mosk, of California, indicated the shape the congressional legislation should take. Mr. Mosk said when the Federal Government acquires a water right under State law, it should comply with State procedures and pay for rights acquired by condemnation.

Unless the present State-Federal water relationship is clarified in the light of justice, California's protective laws are meaningless.

[From the Stockton (Calif.) Record, Mar. 20, 1964]

BROWN BUCKS WATER RIGHTS BILL

Senator Kuchel's bill that would require the Federal Government to abide by State water rights faces tough sledding. This measure is supported by many interested counties in California, including San Joaquin. It is endorsed by State Attorney General Stanley Mosk.

A sponsor of the bill, Senator Frank E. Moss, of Utah, chairman of the Senate Reclamation Subcommittee before which the hearing was held, has noted that "the Federal bureaucracy is virtually unanimous in opposition to the bill."

And who is lined up with the Federal bureaucracy? None other than California's Governor Brown, who, differing with the attorney general, insists that the legislation would add sharply to the costs of future water resource development.

This cost, presumably, would be to the Federal Government because it would be compelled to buy water rights instead of simply taking them.

The Governor's position is altogether strange and completely out of line with the best thinking in the State on the subject.

[From the Oakland (Calif.) Tribune, Mar. 15, 1964]

CALIFORNIA'S WATER RIGHTS

Gov. Edmund G. Brown has joined the ranks of those who would have States abdicate their rights in disputes with the Federal Government over the use of water. He is on record to that effect, placed in the files of the Senate reclamation subcommittee this past week in Washington.

The Governor's position was put into the record of the subcommittee's hearings on a measure introduced by Senator Thomas Kuchel, and supported by Senator Clair Engle, which would clarify a State's rights in water disputes by making Federal control secondary to State water laws.

That measure is supported by the California legislature, and most western Governors and Senators, including Senator Frank E. Moss, Utah Democrat, chairman of the subcommittee which has been conducting the hearings. Governor Brown is opposed to that measure. He sent Abbott Goldberg, chief deputy director of the State's department of water resources, to Washington to officially record his opposition.

By so doing, Governor Brown has aligned himself with the Washington opponents of the Kuchel measure.

Senator Moss declared that "the Federal bureaucracy is virtually unanimous in opposition to the bill." That, of course, is only natural.

But it is unnatural that the Governor of a State with more at stake in the matter of water problems than any other, should place the weight of his office upon the side of those who wage a continuing effort to erode the rights of the States to protect their natural resources.

In an effort to counteract the effect the Brown affiliation with the bureaucrats might have on consideration of the Kuchel bill should it reach the Senate floor, the California Legislature, through Assemblyman Carley Porter, of Compton, introduced as evidence of support a resolution which charges the Governor and his administration with being remiss in opposing the bill.

Senator Kuchel was prompted to introduce the measure to override recent court decisions which could put California's entire water development program in jeopardy.

It deserves the support of all Californians. The opposition of the Governor of California is ill advised and unwelcome. That opposition should be knocked down.

[From the Bakersfield (Calif.) Californian, Mar. 19, 1964]

WHO'S OUT OF STEP?

Several months ago, the Feather River Project Association set up a committee headed by Rex Goodceel, Jr., to study ways of approaching the problem of safeguarding State water rights in the involvement of Federal projects. This committee was composed of some of the leading authorities on the subject of water rights on the west coast. In Washington, Senator Thomas Kuchel had also led an investigation into the subject and introduced legislation intended to accomplish this highly important objective. The bill is before the Senate Interior Subcommittee.

Endorsement of the measure, which would serve to clarify the Federal-State water rights tangle and bring about opportunities for solution, has come from practically every water authority and organization; supporting it are both Senator Kuchel and Senator Engle, whose knowledge of the subject and experience in water affairs is extensive; the California State Senate, the California State Assembly, Attorney General Mosk, the State's legal officer; the Feather River Project Association, the county supervisors association, the American Bar Association, the American Farm Bureau, the majority of irrigation and reclamation associations, and many senators and attorneys general of other States.

But not Governor Brown, who alone has decided that the legislation so well received and warmly supported by the best qualified persons and groups in the field might not be as wise as he. He has sent word to the Senate Interior Subcommittee that he believes the measure would increase the cost of water, although how this incredible conclusion came to him or how he justifies it are still unknown except to himself.

Learning of this, Attorney General Mosk declared the Kuchel measure to be "good legislation from the Federal point of view, the State's point of view, and from the point of view of the people of the United States," which somehow leaves Governor Brown very much in the minority. How much in the minority and how unwise the Governor's position is emphasized by Assemblyman Carley Porter, who observed that the Kuchel measure was supported by the "18 million people of California, the State legislature, all of the water agencies of the State, and the vast majority of water experts." The implication is clear that Governor Brown has indeed separated himself from the Kuchel bill either because he has chosen to obstruct the progress of legislation helpful to the solution of California water problems or that he does not understand what the Kuchel bill and water rights are all about, which is hard to understand in view of his interest in water development.

All of which makes the point that Governor Brown should give to the people of the State an explanation of his views and the reasons for his astonishing position on the Kuchel legislation now before Congress.

[From the Imperial (Calif.) Home Town Review, Mar. 17, 1964]

I. V. INKLINGS

(By Nettie Brown)

"UNITED WE STAND * * *"

In calling for unity among Californians in support of the Kuchel bill to protect State water rights against Federal encroachment, Attorney General Stanley Mosk, speaking before the Los Angeles Chamber of Commerce Monday gave the barest flick of recognition to the surprising stand of Gov. Pat Brown against the bill when he closed his speech with the remark that "there is all but unanimous agreement on its principles by those concerned with water development."

It was surprising that Governor Brown suddenly diverted his position from that of the Colorado River Board. Counsel Northcutt Ely, Attorney General Mosk, and California's Federal legislators not only on the Kuchel bill, but also on the Mosk amendment to the Goldwater-Hayden bill authorizing the Central Arizona project, which amendment is designed to protect California's right to 4.4 mill on acre-feet of water of the Colorado River in the event of shortages.

The Governor, of course, is concerned about Federal assistance to northern California water problems, and while many political commentators are exploring the reasons behind, and the possible result, of the apparent rift between Mosk and Brown, it is not now our purpose to explore the partisan implications of the controversy.

After listening to UD Counsel Harry Horton and Executive Officer Mike Dowd (who is also chairman of the Colorado River Board), explain what the recent Supreme Court decision means to Imperial Valley; and what the current Kuchel bill could mean, we would only like to urge our readers to think about the great importance to this valley and all of California would be the continued unity of our top State officials, lest Arizona wrest from us our remaining rights to Colorado River water.

In the past, Governor Brown has called for untiy of purpose and action, both inside and outside of the Democratic Party. We think this might be a good time for those interested in our water rights to write to the Governor agreeing with his evaluation of unity, and urging him to support the stand of the Colorado River Board on these vital and complicated issues concerning our water.

Mizpah,

NETTIE.

COMMENTS ON S. 1275 GIVEN AFTER HEARINGS ON S. 1275

[California—Magazine of Commerce, Agriculture, and Industry, June 1964]

A FIGHT FOR WATER RIGHTS

A noted water law expert and the State chamber of commerce committee which he heads have been carrying on a spirited fight, here and in Washington, D.C., to preserve California's present and future water supply.

San Francisco attorney Burnham Enersen, a director of the State chamber, and his statewide water resource committee, have for some time thoroughly studied and vigorously reacted to every move made in the direction of increasing Federal domination and control of California's precious water sources.

Enersen and his group have actively involved themselves, on the chamber's behalf, in Federal legislative proposals designed to protect States' water rights and in strong opposition moves to such actions as the Interior Department's recent arbitrary cutback of Colorado River water deliveries to southern California.

Some weeks ago Enersen, with representatives of other organizations, went to Washington, D.C., to plead a case on which, most Californians believe, hinges their State's present and future water security. Enersen testified at a hearing of the U.S. Senate Interior and Insular Affairs Subcommittee, urging enactment of S. 1275, a bipartisan measure designed to restore integrity to water rights acquired under State law.

As recently as a few weeks ago—even while the Senate subcommittee was studying results of the hearing—the Secretaries of the Interior and Agriculture Departments indicated they would not comply with State water laws.

CONFIRMATION OF 100-YEAR-OLD POLICY SOUGHT

"S. 1275," Enersen declared at the committee hearing, "is intended to confirm beyond any further judicial misinterpretation, a 100-year-old congressional policy under which the right to regulate and appropriate all waters, including those flowing from Federal withdrawn lands, have been vested in the States.

"This policy has been of enormous benefit to the agricultural and industrial economy of the West. If Congress had not established it a century ago, the development of the West would have been severely hampered."

A contravening court decision, he pointed out—the *Pelton Dam* decision (*Federal Power Commission* v. *the State of Oregon, 1955*), subsequent interpretations by the U.S. Justice Department, and other cases "have cast an ever-growing and ominous shadow over these historical water rights of the Western States." (The *Pelton Dam* decision, rendered over the protests of Oregon and 12 other States, held that rights of water appropriation, under local customs and State laws, did not apply to water from Federal lands which had been reserved or withdrawn from public domain.)

The California State chamber, Enersen declared, has urged legislation in the last two sessions of Congress to stop "the continually growing threat to the integrity of States water rights." The State chamber joined in sponsoring introduction of S. 1275 last year.

"If the contention of the U.S. Department of Justice is allowed to prevail," Enersen told the Senate committee, "all of the water falling upon and flowing from Federal withdrawn lands will belong to the United States and can be withheld from development or exported without regard to State water laws."

MOST OF STATE'S WATER RESOURCES INVOLVED

His testimony pointed out that title to over 91 percent of the State's 100 million acres was vested on the United States when California was admitted to the Union in 1850. Over the years Congress disposed of about half of these lands through sales and grants, mostly in the valleys and fertile plains, but the principal watersheds on mountain lands remained in Federal ownership. Transfer of these watersheds to private ownership was curtailed as Federal holdings were withdrawn from public entry and placed in national forest and park reserves.

Today, these withdrawn lands total over 33 million acres and include almost all of the headwaters and extensive reaches of our major streams. These include, in part the Sacramento, Feather, Yuba, American, Mokelumne, Stanislaus, Tuolumne, Merced, San Joaquin, King, Kaweah, and Kern Rivers, which drain into the Central Valley; the Eel, Mad, Van Duzen, Trinity, and Klamath Rivers draining into the Pacific Ocean on the north coast of California; and the Owens River which has been developed to serve Los Angeles.

Because some private land is intermingled with the withdrawn land, an exact figure on runoff from the Federal reserves would be difficult to obtain. It can, however, be reliably estimated from analysis of the California water plan streamflow information that about 75 percent of the total natural water runoff in California comes from the withdrawn or reserved Federal lands.

"Since our precipitation pattern differs from the Eastern States," Enersen said, "it has been necessary to impound or divert the surface water runoff from most of these streams to provide water supplies during the virtually rainless summer months and for 'carryover' storage during the drought years which also characterize our climate."

He reviewed the history of California's water development which started with diversions by miners in the gold rush days and involves major investments running into many millions of dollars including those of the city of San Francisco for water supplies from the Tuolumne River in Yosemite National Park and the Stanislaus National Forest. He pointed out that the East Bay Municipal Utility District (serving Oakland and other east bay communities) is currently completing a $300 million improvement program for supplies from the Mokelumne River flowing from the Eldorado and Stanislaus National Forests.

PAST AND FUTURE DEVELOPMENT OF WATER AT ISSUE

"The city of Los Angeles," he added, "developed the Owens River runoff from Inyo National Forest for its municipal supply several decades ago at costs running into hundreds of millions of dollars. San Joaquin Valley counties, the most productive farm counties in the Nation, are producing crops only because the waters draining the Sierra and Sequoia National Forests and Sequoia-King Canyon National Parks have been developed as sources of irrigation water. The capital expenditures for water development on these lands over the years were, of course, immense, and they were in most cases financed by loans or bonds still in large part outstanding.

"A similar pattern of development has taken place or is still underway on most of the rivers which arise in the seven national forests bordering on the Sacramento Valley in northern California, including the State's own $2 billion Feather River project which will carry water to southern California and other portions of the State that can no longer rely on diminishing ground waters or supplies presently available.

"I cannot speak on behalf of other States, but I know that in California we have a 90-year history of State concern and planning for the maximum overall development and use of our limited water resources. Almost 40 years ago, pursuant to statutes enacted for the purpose, the State of California itself filed applications to appropriate all of the unappropriated waters on our major streams so that the State could control the appropriation of the waters and make sure that they would be developed and used in a manner consistent with the best interests of the entire State."

(Undeveloped waters flowing from national forest lands constitute almost all of the State's future water supplies and about 90 percent of the still-to-be-assigned "State filings." The State water rights board permits the appropriation of water by agency or private interest only after a finding that the proposed project is consistent with the California water plan. This master plan was adopted by the legislature in 1959 after years of studies as a guide for optimum conservation and development of remaining water resources.)

"The Justice Department has construed the *Pelton Dam* decision," said Enersen, "to mean that water emanating from such lands is not subject to California law and that water rights acquired after reservation or withdrawal of these lands are not rights at all, but merely temporary privileges held at sufferance from the United States and subject to cancellation or destruction at any time by the Federal Government."

The Justice Department, he charged, is fully aware that the *Pelton Dam* decision has the ultimate effect of transferring control of most Western States' water rights to Washington, D.C., and declares this to be "in national interest."

"Apparently," said Enersen, "by forbidding or severely restricting private and local development of presently undeveloped water resources, the Federal Government believes it will be serving the best interests of future generations—until some Federal agency decides to make the waters useful by some type of Federal water development project.

"I'm sure that the interests of the public will never be served by preventing development and use of our water resources."

CALIFORNIA CAN PUT OWN WATER RESOURCES TO PROPER USE

Enersen said the Department of Justice has expressed alarm that S. 1275 would throw the waters of the West open to use, misuse or nonuse under State laws.

"U.S. Attorney General Kennedy need not fear," said Enersen, "that California is going to permit the misuse of its waters or that it is going to prevent them from being used when they are needed.

"And we, in California, do not think it is necessary to transfer control of our remaining water supplies to Washington in order to protect these precious resources from being abused."

AND NOW—A 10-PERCENT CUTBACK

Federal attempts to dominate California water supplies continued last month when the Department of the Interior decided to cut back deliveries of Colorado River water to southern California. This, according to Enerson and Milton M. Teague, president of the State chamber, would affect "not only our water for

the balance of the year but also the efficiency of power generation and Hoover Dam repayment."

Federal plans include closing the gates at the newly constructed Glen Canyon Dam upstream from Hoover Dam and Lake Mead on the Colorado River and reducing this year's deliveries to water contractors in the Lower Colorado Basin (including the agencies serving southern California) by 10 percent, to accumulate 6.1 million acre-feet of water in Lake Powell.

Acting on a resolution submitted by Enersen's committee, State chamber directors at their May 22 board meeting publicly expressed vigorous opposition to the cutback, pointing out:

The mandatory cutback ignores reductions already made at the Interior Department's request because of subnormal river flows.

The order was given for the purpose of filling Lake Powell for power generation purposes, thus giving preference to power generation over consumptive uses of water—in contravention of the Colorado River Storage Act and the Colorado River Compact—and not for the objective publicly stated, to eliminate waste of water in the face of reduced flows in the river.

The action constitutes an unwarranted change in the filling criteria for Lake Powell as established by the Secretary of the Interior in 1962. If pursued, it will result in serious detriment to the water and power users of California.

NOTE.—While Mr. Enersen and other Californians were in Washington attending the congressional hearing, the State legislature memorialized Congress to enact S. 1275. A.J.R. 2, which had the active support of the State chamber, was cosponsored by Assemblyman Carley Porter; 12 members of his assembly water committee; and Senator James Cooley, chairman of the senate water committee; and adopted on March 10.

WATER RIGHTS—URGENCY FOR SOLUTION

(By Hugh A. Shamberger[1] and Harvey O. Banks[2])

A clarification in the relationship in the field of water rights between the agencies of the Federal Government and the States has been sought since 1955 by means of congressional action during every session of Congress. Probably as many as 50 bills have been introduced in the Congress, many on which hearings were held. Not one of these bills was ever brought before either floor of the Congress. In all but one exception the Department of Justice and some other departments of the Government opposed such legislation.

The main reason of concern, especially to the Western States, was the so-called reservation doctrine that was enunciated by the Supreme Court in *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955) commonly referred to as the *Pelton Dam* case. In this case the Supreme Court held that the Federal Power Commission could license a private hydroelectric power project on a nonnavigable river in Oregon without regard to the law of that State. The Court held that because one end of the dam would be on reserved Indian lands and the other on reserved lands withdrawn many years before by the Bureau of Reclamation for power purposes Oregon State law did not apply.

The effect of this decision, as construed by the Department of Justice of the United States, is that all water rights acquired pursuant to local laws and customs are placed in jeopardy insofar as they depend upon water arising upon or flowing from lands of the United States which had been reserved or withdrawn from public entry prior to the vesting of the water rights.

In other words, under the theory of the Department of Justice any right to the use of water initiated under State law after the date of a reservation or withdrawal of public land is merely a "squatter's right." If and when the Federal Government desires to use the water for the purpose of the withdrawal or reservation, it may deprive the user of water who obtained his rights under State law without compensation therefor.

In the past, it has customarily been thought that the Federal-State water rights problem was a western one. This view had developed because of the association of water rights controversies with irrigation, and because of the belief that other parts of the country have so much water that a challenge to the rights of a particular water user would be remote. In actuality, clarification of the

[1] Chairman, Committee on Water Rights, National Watershed Congress, and president, National Reclamation Association.

[2] Vice president, Leeds, Hill & Jewett, Inc., consulting engineers, San Francisco, Calif.

water rights issue and its settlement by an act of Congress is a nationwide necessity.

Shortly after the decision in the *Pelton Dam* case was issued, in fact in a matter of days, the Navy withdrew their permits issued under Nevada law to appropriate ground water for use at the Naval Ammunition Depot at Hawthorne, Nev. This withdrawal was based on the grounds that the wells were located on reserved land. The State of Nevada instituted a suit to obtain a declaratory judgment that the Navy must comply with Nevada's water law.

The Federal district court dismissed Nevada's complaint and held that the United States need not comply with Nevada law, relying on the *Pelton* case. You can imagine the feeling in the Western States about the language the district judge used when he said:

"Both on reason and, as we shall see in a moment, on authority, this court is forced to the conclusion that there is no mandate in constitutional, statutory, or decisional law that compels the Federal Government to bend its knee to this type of State law and regulation, whether it be arbitrary or benign."

Almost 100 years ago Congress adopted a policy which provided that waters flowing upon and appurtenant to public lands of the United States shall be available for appropriation and use in accordance with "local customs, laws and the decision of courts" (act of July 26, 1866, U.S. Code 661; act of July 9, 1870, 43 U.S. Code sec. 661; Desert Land Act of 1877, 43 U.S.C. 321). Since most of the land in the Western States was at one time public land of the United States, and since the water supplies of the Western States consist in large part of rivers and underground flows originating upon public lands, the permission given in those early statutes for the acquisition of water rights upon the public lands under local custom and laws was the key which opened the gates for the development of the thriving economy we have in the Western States.

Certainly if Congress had not established this policy of permitting waters upon the public lands to be appropriated under local customs and laws as like waters upon private lands, the development of the West would have been severely retarded.

This policy of Congress was drastically curtailed, in fact almost nullified, by the decision of the Supreme Court of the United States in the *Pelton Dam* case, supra. In one brief paragraph in that decision, the Supreme Court held that public lands not open to entry for homesteading, desert land entries, and the like, were not to be considered as "public lands" within the meaning of the congressional declaration of 1866.

The uncertainties as to the ownership of much of the water resources of any State having any substantial amount of federally reserved or withdrawn land could render State water laws and the State administration of water rights largely ineffectual.

The magnitude of the problems can be illustrated by reference to the State of California. Here about 33 million acres of land, or one-third of the entire State, fall within the category of reserved or withdrawn lands. Most of the State's water supply falls on this reserved land in the form of winter precipitation. The reservations and withdrawals were in most cases made in the 1890's or the early 1900's. When it is considered that most of the development of water resources in California and the Western States has occurred after those dates, the integrity of those projects could well be placed in jeopardy under the reservation doctrine insofar as they depend upon waters which originate upon or flow across the reserved and withdrawn lands of the United States.

If permitted to travel along its present path, the logic of the Federal rights doctrine is that every drop of water which rises on or flows past or through Federal property is subject to claim by the Federal Government, at any time, without payment of compensation to present users and without reference to the State water laws in which such private and non-Federal public rights are based. In the Western States where high percentages of the total land surface are in Federal ownership, it would be hard to find a stream or underground reservoir of any significance which does not originate on or touch Federal land. In the East, South, and Midwest, Federal holdings are smaller and less numerous, but they are well enough distributed so that most major water bodies and many minor ones as well could be gathered up in this large concept of Federal preeminence without difficulty.

Until the Supreme Court decisions with *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152 (1946), it seemed to be well established that State law was the determining factor in fixing water rights. This was true because the individual States had developed the only systematic

and complete bodies of water law in the country. Such is still the case, but the extent to which those bodies of law may be applied is being more and more beclouded by judicial decisions such as the *Pelton Dam* case, supra, and *Dugan* v. *Rank*, 83 S. Ct. 999 (1963).

These decisions have encouraged some people to contend that the Federal Government possesses an underlying ownership of most of the Nation's water. The effect of this doctrine, whether stated as a principle of outright ownership or merely as an assertion of paramountcy, is to throw the legal basis for private and public non-Federal use of water into grave doubt.

The views of the Department of Justice, as expressed over the years in testimony before congressional committees, court pleadings, and addresses by various speakers, may be briefly expressed in only a few fundamental propositions.

First, they contend that the United States owns all of the unappropriated waters in all of the streams of the Western States, which were acquired from various foreign powers, principally France, Spain, Great Britain, and Mexico. They contend that the United States acquired these waters, along with the lands, by reason of the several purchases and treaties with those countries, and that there are no instruments of conveyance by which the United States has ever parted with the waters.

Second, they contend that the State constitutions of many of the Western States, which constitutions were ratified by the Congress and which provide for the ownership by the State of all of the waters within the State, are of no legal significance with reference to diminishing any of the rights of the Federal Government and are not "an instrument of conveyance" of these rights. In other words, unless there is a "deed" or specific statute of conveyance, the title of the United States has not passed.

Water right and water policy problems are not confined to the 17 Western States. In recent years, the 31 other States have been forced to take a new look at water problems and water rights policies.

In these States, the public is fast becoming aware of problems of water and the need to establish and protect rights to the use of water in a rapidly expanding economy. State legislatures and private organizations are assuming greater responsibilities for the development of adequate water legislation to meet these needs.

During recent years Eastern and Southern State legislatures have taken steps toward the improvement of water policy and the development of more adequate water rights laws. During this period the States of Mississippi, Arkansas, Louisiana, Alabama, Georgia, Florida, North Carolina, Virginia, Tennessee, Kentucky, Iowa, Wisconsin, South Carolina, Massachusetts, New York, Indiana, and others have taken formal legislative steps toward the improvement of water policy and water right laws. Some States have gone further than others; for example, Mississippi has adopted a modification of the appropriation system. Many of the States have adopted into their new laws some aspects of the western system of water rights, including the concept of reasonable beneficial use.

The latest in a long series of water right legislation is S. 1275 introduced in the 88th Congress by Senator Kuchel, of California, and cosponsored by Senators Jordan of Idaho, Moss of Utah, Church of Idaho, and Engle of California. In this bill a sincere attempt was made to weld together many different viewpoints in regard to water rights. S. 1275 is a very important but relatively uncomplicated measure. Briefly, it does four things which we believe are fundamental. It provides—

(1) That the withdrawal or reservation of public lands shall not affect any water right acquired under State law either before or after withdrawal or reservation:

(2) That consumptive uses of water shall take priority over nonconsumptive uses in States lying wholly or partly west of the 98th meridian;

(3) That when the United States claims a water right under State law, it shall comply with State procedures; and

(4) That the United States shall pay for the water right which it acquires.

In his analysis of S. 1275, Nicholas deB. Katzenbach, Deputy Attorney General, U.S. Department of Justice, stated:

"These [Supreme Court] decisions establish that the navigable waters of the United States are 'the public property of the Nation,' *Gilman* v. *Philadelphia*, 70 U.S. 713, 724 (1866); private ownership of the running water of a great navigable stream is 'inconceivable,' *United States* v. *Chandler-Dunbar Water Power Company*, 229 U.S. 53 (1913); and that the United States, in the exercise of its

powers under the commerce clause of the Constitution, can utilize these waters without paying any compensation for the impairment of alleged water rights recognized under State law, *United States* v. *Chandler-Dunbar*, supra; *United States* v. *Appalachian Electric Power Company*, 311 U.S. 377, 423 (1940); *United States* v. *Grand River Dam Authority*, 363 U.S. 229 (1960); *United States* v. *Willow River Power Company*, 324 U.S. 499 (1945); *United States* v. *Twin City Power Company*, 350 U.S. 222 (1955). If Congress so wishes, however, it may provide for payment of compensation for interference with State-recognized rights to use navigable waters, and section 8 of the Reclamation Act of 1902 and section 27 of the Federal Power Act constitute such provision with respect to such interference by projects built under authority of those acts. *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725 (1950); *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954).

"As for nonnavigable waters in the public lands States, the Supreme Court has recognized that when the United States acquired ownership of the public domain by cession from foreign sovereigns it acquired the rights to use the waters thereon within the bundle of rights which ownership of the land involves, and that absent permission of the United States no one can acquire as against its ownership of the right to use any of such waters. (See, for example, *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 235.) The Desert Land Act of March 3, 1877, 19 U.S.C. 377, 43 U.S.C. 321, constitutes such permission in the 13 States to which it applies with respect to unappropriated nonnavigable waters on the public lands. The Supreme Court has held that that act authorizes the acquisition by others of rights to use such waters by following procedures prescribed by State law. *California and Oregon Power Company* v. *Beaver Portland Cement Co.*, 295 U.S. 143 (1935). Rights to the use of nonnavigable waters acquired under authority of the Desert Land Act by following procedures prescribed by State law are, therefore, good as against the United States, and are compensable when taken. However, the Desert Land Act did not constitute a blanket conveyance of the Federal Government's rights to use the nonnavigable waters on the public domain, and the *United States retains, with respect to such waters which remain unappropriated, the power to utilize them itself and to provide for their utilization by others. Such reservation of the unappropriated rights to use the waters on such lands results from the withdrawal or reservation of public lands for a particular Federal purpose. Winters* v. *United States*, 207 U.S. 564 (1908); *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955); *Arizona* v. *California*, 373 U.S. 546 (1963)." [Emphasis added.]

The problem is made more acute, on a nationwide basis, by the powers over navigable waters vested in the United States by the Constitution. The following extracts from "Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation" by Eva H. Morreale, assistane professor of law, Rutgers University,[3] indicate the extent of the powers of Congress with respect to navigable waters, and I quote in part:

"No compensation is due where the United States destroys or impairs a State-created, consumptive water right on a navigable stream.

"No compensation is due where the United States ignores State-created priorities in the distribution of project water among intrastate users.

"Federal inaction or the issuance of a revocable Federal license most probably will not lead to an estoppel of the United States in favor of consumptive water rights.

"Federal participation in the creation of the consumptive water right could afford a basis for estoppel. However, this is not an inevitable or necessary consequence.

"The sharing of control over nonnavigable waters in the Desert Land Act affords no special grounds on which to estop the United States.

"Consumptive water rights on nonnavigable tributaries are treated in all respects like consumptive water rights on the navigable main stream. That is so where the United States expressly exercises its power over the nonnavigable tributary in order to protect the navigable capacity of the main stream.

"Consumptive water rights on nonnavigable tributaries are compensable if the exercise of the navigation power is limited to the main stream."

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[3] Natural Resources Journal, University of New Mexico School of Law, vol. 3, No. 1, May 1963.

It may well be too late in the day for the Court to develop a set of meaningful tools for dealing with navigation cases. If so, then the question of compensation rests ultimately and finally with Congress. Perhaps political checks will thus assure that the cost of multimillion-dollar projects bearing little, if any, relation to navigation will be borne by the community as a whole—or, conversely, that all arteries of commerce will then be given the same preferential treatment now limited for historical reasons to waterways. In neither event, of course, is there any interference with congressional power of (noncompensable) "regulation" of private property in the exercise of the congressional trust over the "navigable" waters of the Nation in the interest of all the people of the Union.

We may conclude then that—

1. Congress has the paramount authority to control and develop the water resources of the United States.

2. The authorization acts for Federal projects and the intent of Congress as expressed therein become the controlling enactments. Thus the political process of authorization of a specific Federal project becomes of great importance.

3. Within any limitations that may be prescribed in the authorizing act, the executive agencies of the Federal Government have wide discretionary powers in constructing and operating Federal projects and in controlling and distributing the waters affected thereby.

4. In connection with federally reserved or withdrawn lands, water necessary for the future requirements of such lands was reserved at the same time the lands were reserved or withdrawn. No formula for quantification of the amounts of water so reserved has been given although it would appear that in any particular case, the amount might be limited to that necessary to fulfill the purposes of reservation or withdrawal or the intent of Congress in making the reservation or withdrawal.

5. Comparatively large, but unknown, amounts of water have been reserved for the present and future requirements of Indian lands.

6. State water laws and State administration of water rights appear to be of secondary importance and largely ineffective.

7. Water rights on a specific stream obtained in accordance with State law after a Federal project has been authorized on that stream are in jeopardy. It is to be noted that Federal projects have already been constructed, have been authorized, or are in the process of authorization, on many of the Nation's principal streams.

8. Likewise, the status of water rights created under State law subsequent to the date of reservation or withdrawal of Federal land is uncertain.

It is to be noted that the Federal Government has no body of water law or of coherent water policy, nor have Federal procedures for the administration and allocation of water resources been established, to replace these historic State responsibilities and functions. If Congress should not act, it may become necessary to have Congress make an allocation each time a new diversion by a non-Federal interest is proposed.

It is imperative that the Federal Government act to resolve the present chaotic situation with respect to water rights and Federal-State-local relationships. To justify any substantial investment in water development, a public agency or private entity must have reasonable assurance that there is and will continue to be water available for the project. Under the reservation doctrine in its fullest implications, there can be no such assurance.

Were the United States willing to assume the full responsibility for all future water resource development, these problems would be of no consequence. However, Congress has repeatedly said that the States, local, public agencies, and private entities must continue to bear their proper share of responsibility.

It must be admitted that to this point in time, these Federal claims have not impeded water development and utilization by non-Federal interests to any great degree. However, conflicts must inevitably arise as we approach closer to full development and utilization of particular water resources originating on or flowing across federally withdrawn or reserved lands, or of navigable waters. The issues will most certainly be raised whenever and wherever litigation over water rights is instituted if Federal interests, actual or alleged, are in any way involved.

Insofar as the reservation doctrine is concerned, the problem then is threefold:

1. To assure security for those water rights that have been acquired in accordance with State laws and which involve water which originates on or flows across federally reserved or withdrawn lands.

2. To enable determination of the amount of water remaining available for development by non-Federal interests.

3. To establish a body of water law and policy, and administrative procedures under which the States and local interests can work in harmony with the Federal Government.

The report of the Select Committee on National Water Resources, pursuant to Senate Resolution 48, 86th Congress in Senate Report No. 29 of the 87th Congress, 1st session, contains the following language:

"The broadening pattern of these conflicts is conclusive proof of the urgent need for clear-cut, definitive action on the part of Congress to work out with the States a redefining of Federal-State powers and responsibilities for control, use, and development of water resources. The Federal Government should not hamstring the States in the States efforts to develop their water resources to meet the needs of their people. Neither should the States hamstring the Federal Government in its efforts to fulfill its functions within the Constitution."

There would seem to be little question but that at least a partial solution should be arrived at without delay. S. 1275 would provide such a solution. We fail to see where the Federal Government would be curtailed in its water planning and development program if such legislation is enacted into law.

There is a problem. The magnitude of such problem, still fully unknown, seems to be such that some positive action should be taken without delay.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 8, ORIGINAL

STATE OF ARIZONA, PLAINTIFF

v.

STATE OF CALIFORNIA, ET AL., DEFENDANTS

DECREE.—MARCH 9, 1964

It is ORDERED, ADJUDGED AND DECREED that

I. For purposes of this decree:

(A) "Consumptive use" means diversions from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation;

(B) "Mainstream" means the mainstream of the Colorado River downstream from Lee Ferry within the United States, including the reservoirs thereon;

(C) Consumptive use from the mainstream within a state shall include all consumptive uses of water of the mainstream including water drawn from the mainstream by underground pumping, and including but not limited to, consumptive uses made by persons, by agencies of that state, and by the United States for the benefit of Indian reservations and other federal establishments within the state;

(D) "Regulatory structures controlled by the United States" refers to Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Dam, Imperial Dam, Laguna Dam and all other dams and works on the mainstream now or hereafter controlled or operated by the United States which regulate the flow of water in the mainstream or the diversion of water from the mainstream;

(E) "Water controlled by the United States" refers to the water in Lake Mead, Lake Mohave, Lake Havasu and all other water in the mainstream below Lee Ferry and within the United States;

(F) "Tributaries" means all stream systems the waters of which naturally drain into the mainstream of the Colorado River below Lee Ferry;

(G) "Perfected right" means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;

(H) "Present perfected rights" means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act;

(I) "Domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power;

(J) "Annual" and "Year," except where the context may otherwise require, refer to calendar years;

(K) Consumptive use of water diverted in one state for consumptive use in another state shall be treated as if diverted in the state for whose benefit it is consumed.

II. The United States, its officers, attorneys, agents and employees be and they are hereby severally enjoined:

(A) From operating regulatory structures controlled by the United States and from releasing water controlled by the United States other than in accordance with the following order of priority:

(1) For river regulation, improvement of navigation, and flood control;

(2) For irrigation and domestic uses, including the satisfaction of present perfected rights; and

(3) For power;

Provided, however, that the United States may release water in satisfaction of its obligations to the United States of Mexico under the treaty dated February 3, 1944, wihout regard to the priorities specified in this subdivision (A);

(B) From releasing water controlled by the United States for irrigation and domestic use in the States of Arizona, California and Nevada, except as follows:

(1) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy 7,500,000 acre feet of annual consumptive use in the aforesaid three states, then of such 7,500,000 acre feet of consumptive use, there shall be apportioned 2,800,000 acre feet for use in Arizona, 4,400,000 acre feet for use in California, and 300,000 acre feet for use in Nevada;

(2) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use in the aforesaid states in excess of 7,500,000 acre feet, such excess consumptive use is surplus, and 50% thereof shall be apportioned for use in Arizona and 50% for use in California; provided, however, that if the United States so contracts with Nevada, then 46% of such surplus shall be apportioned for use in Arizona and 4% for use in Nevada;

(3) If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre feet in the aforesaid three states, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective states may designate, may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre feet be apportioned for use in California including all present perfected rights;

(4) Any mainstream water consumptively used within a state shall be charged to its apportionment, regardless of the purpose for which it was released;

(5) Notwithstanding the provisions of Paragraphs (1) through (4) of this subdivision (B), mainstream water shall be released or delivered to water users (including but not limited to, public and municipal corporations and other public agencies) in Arizona, California, and Nevada only pursuant to valid contracts therefor made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act or any other applicable federal statute;

(6) If, in any one year, water apportioned for consumptive use in a state will not be consumed in that state, whether for the reason that delivery contracts for the full amount of the state's apportionment are not in effect or that users cannot apply all of such water to beneficial uses, or for any other reason, nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states. No rights to the recurrent use of such water shall accrue by reason of the use thereof;

(C) From applying the provisions of Article 7(d) of the Arizona water delivery contract dated February 9, 1944, and the provisions of Article 5(a) of the Nevada water delivery contract dated March 30, 1942, as amended by the contract dated January 3, 1944, to reduce the apportionment or delivery of mainstream water to users within the States of Arizona and Nevada by reason of any uses in such states from the tributaries flowing therein;

(D) From releasing water controlled by the United States for use in the States of Arizona, California, and Nevada for the benefit of any federal establishment named in this subdivision (D) except in accordance with the allocations made herein; provided, however, that such release may be made notwithstanding the provisions of Paragraph (5) of subdivision (B) of this Article; and provided further that nothing herein shall prohibit the United States from mak-

ing future additional reservations of mainstream water for use in any of such States as may be authorized by law and subject to present perfected rights and rights under contracts theretofore made with water users in such State under Section 5 of the Boulder Canyon Project Act or any other applicable federal statute:

(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907:

(2) The Cocopah Indian Reservation in annual quantities not to exceed (i) 2,744 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrgation of 431 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of September 27, 1917;

(3) The Yuma Indian Reservation in annual quantities not to exceed (i) 51,616 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 7,743 acres and for the satisfaction of related uses, whichever of (i) or (ii), is less, with a priority date of January 9, 1884;

(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 717,148 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 107,588 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876, for lands reserved by the Excutive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date;

(5) The Fort Mohave Indian Reservation in annual quantities not to exceed (i) 122,648 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 18,974 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, and, subject to the next succeeding proviso, with priority dates of September 18, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date; provided, however, that lands conveyed to the State of California pursuant to the Swamp and Overflowed Lands Act [9 Stat. 519 (1850)] as well as any accretions thereto to which the owners of such land may be entitled, and lands patented to the Southern Pacific Railroad pursuant to the Act of July 27, 1866 (14 Stat. 292) shall not be included as irrigable acreage within the Reservation and that the above specified diversion requirement shall be reduced by 6.4 acre feet per acre of such land that is irrigable; provided that the quantities fixed in this paragraph and paragraph (4) shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined;

(6) The Lake Mead National Recreation Area in annual quantities reasonably necessary to fulfill the purposes of the Recreation Area, with priority dates of March 3, 1929, for lands reserved by the Executive Order of said date (No. 5105), and April 25, 1930, for lands reserved by the Executive Order of said date (No. 5339);

(7) The Havasu Lake National Wildlife Refuge in annual quantities reasonably necessary to fullfill the purposes of the Refuge, not to exceed (i) 41,839 acre feet of water diverted from the mainstream or (ii) 37,339 acre feet of consumptive use of mainstream water, whichever of (i) or (ii) is less, with a priority date of January 22, 1941, for lands reserved by the Executive Order of said date (No. 8647), and a priority date of February 11, 1949, for land reserved by the Public Land Order of said date (No. 559);

(8) The Imperial National Refuge in annual quantities reasonably necessary to fulfill the purposes of the Refuge not to exceed (i) 28,000 acre feet of water diverted from the mainstream or (ii) 23,000 acre feet of consumptive use of mainstream water, whichever of (i) or (ii) is less, with a priority date of February 14, 1941;

(9) Boulder City, Nevada, as authorized by the Act of September 2, 1958, 72 Stat. 1726, with a priority date of May 15, 1931;

Provided further, that consumptive uses from the mainstream for the benefit of the above-named federal establishments shall, except as necessary to satisfy present perfected rights in the order of their priority dates without regard to state lines, be satisfied only out of water available, as provided in subdivision (B) of this Article, to each state wherein such uses occur and subject to, in the case of each reservation, such rights as have been created prior to the establishment of such reservation by contracts executed under Section 5 of the Boulder Canyon Project Act or any other applicable federal statute.

III. The States of Arizona, California and Nevada, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego, and all other users of water from the mainstream in said states, their officers, attorneys, agents and employees, be and they are hereby severally enjoined:

(A) From interfering with the management and operation, in conformity with Article II of this decree, of regulatory structures controlled by the United States;

(B) From interfering with or purporting to authorize the interference with releases and deliveries, in conformity with Article II of this decree, of water controlled by the United States;

(C) From diverting or purporting to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in the respective states; and provided further that no party named in this Article and no other user of water in said states shall divert or purport to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for its particular use;

(D) From consuming or purporting to authorize the consumptive use of water from the mainstream in excess of the quantities permitted under Article II of this decree.

IV. The State of New Mexico, its officers, attorneys, agents and employees, be and they are after four years from the date of this decree hereby severally enjoined:

(A) From diverting or permitting the diversion of water from San Simon Creek, its tributaries and underground water sources for the irrigation of more than a total of 2,900 acres during any one year, and from exceeding a total consumptive use of such water, for whatever purpose, of 72,000 acre feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water, for whatever purpose, of 8,220 acre feet during any one year;

(B) From diverting or permitting the diversion of water from the San Francisco River, its tributaries and underground water sources for the irrigation within each of the following areas of more than the following number of acres during any one year:

Luna Area	225
Apache Creek-Aragon Area	316
Reserve Area	725
Glenwood Area	1,300

and from exceeding a total consumptive use of such water for whatever purpose, of 31,780 acre feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water, for whatever purpose, of 4,112 acre feet during any one year;

(C) From diverting or permitting the diversion of water from the Gila River, its tributaries (exclusive of the San Francisco River and San Simon Creek and their tributaries) and underground water sources for the irrigation within each of the following aeas of more than the following number of acres during any one year:

Upper Gila Area	287
Cliff-Gila and Buckhorn-Duck Creek Area	5,314
Red Rock Area	1,456

and from exceeding a total consumptive use of such water (exclusive of uses in Virden Valley, New Mexico), for whatever purpose, of 136,620 acre feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water (exclusive of uses in Virden Valley, New Mexico), for whatever purpose, of 15,895 acre feet during any one year;

(D) From diverting or permitting the diversion of water from the Gila River and its underground water sources in the Virden Valley, New Mexico, except for use on lands determined to have the right to the use of such water by the decree entered by the United State District Court for the District of Arizona on June 29, 1935, in *United States* v. *Gila Valley Irrigation District, et al.* (Globe Equity No. 59) (herein referred to as the Gila Decree), and except pursuant to and in accordance with the terms and provisions of the Gila Decree; provided, however, that:

(1) This decree shall not enjoin the use of underground water on any of the following lands:

Owner	Subdivision and Legal Description	Sec.	Twp.	Rng.	Acreage
Marvin Arnett and J. C. O'Dell	Part Lot 3	6	19S	21W	33.84
	Part Lot 4	6	19S	21W	52.33
	NW¼SW¼	5	19S	21W	38.36
	SW¼SW¼	5	19S	21W	30.80
	Part Lot 1	7	19S	21W	50.68
	NW¼NW¼	8	19S	21W	38.03
Hyrum M. Pace, Ray Richardson, Harry Day and N. O. Pace, Est.	SW¼NE¼	12	19S	21W	8.00
	SW¼NE¼	12	19S	21W	15.00
	SE¼NE¼	12	19S	21W	7.00
C. C. Martin	S. part SE¼SW¼SE¼	1	19S	21W	0.93
	W½W½W½NE¼NE¼	12	19S	21W	0.51
	NW¼NE¼	12	19S	21W	18.01
A. E. Jacobson	SW part Lot 1	6	19S	21W	11.58
W. LeRoss Jones	E. Central part: E½E½E½NW¼NW¼	12	19S	21W	0.70
	SW part NE¼NW¼	12	19S	21W	8.93
	N. Central part: N½N½NW¼SE¼NW¼	12	19S	21W	0.51
Conrad and James R. Donaldson	N½N½N½SE¼	18	19S	20W	8.00
James D. Freestone	Part W½NW¼	33	18S	21W	7.79
Virgil W. Jones	N¼SE¼NW¼; SE¼NE¼NW¼	12	19S	21W	7.40
Darrell Brooks	SE¼SW¼	32	18S	21W	6.15
Floyd Jones	Part N½SE¼NE¼	13	19S	21W	4.00
	Part NW¼SW¼NW¼	18	19S	20W	1.70
L. M. Hatch	SW¼SW¼	32	18S	21W	4.40
	Virden Townsite				3.90
Carl M. Donaldson	SW¼SE¼	12	19S	21W	3.40
Mack Johnson	Part NW¼NW¼NE¼	10	19S	21W	2.80
	Part NE¼NW¼NE¼	10	19S	21W	0.30
	Part N½N½S½NW¼NE¼	10	19S	21W	0.10
Chris Dotz	SE¼SE¼; SW¼SE¼	3	19S	21W	2.66
	NW¼NE¼; NE¼NE¼	10	19S	21W	
Roy A. Johnson	NE¼SE¼SE¼	4	19S	21W	1.00
Ivan and Antone Thygerson	NE¼SE¼SE¼	32	18S	21W	1.00
Jone W. Bonine	SW¼SE¼SW¼	34	18S	21W	1.00
Marion K. Mortenson	SW¼SW¼SE¼	33	18S	21W	1.00
Total					380.81

or on lands or for other uses in the Virden Valley to which such use may be transferred or substituted on retirement from irrigation of any of said specifically described lands, up to a maximum total consumptive use of such water of 838.2 acre feet per annum, unless and until such uses are adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree; and

(2) This decree shall not prohibit domestic use of water from the Gila River and its underground water sources on lands with rights confirmed by the Gila Decree, or on farmsteads located adjacent to said lands, or in the Virden Townsite, up to a total consumptive use of 265 acre feet per annum in addition to the uses confirmed by the Gila Decree, unless and until such use is adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree;

(E) Provided, however, that nothing in this Article IV shall be construed to affect rights as between individual water users in the State of New Mexico; nor shall anything in this Article be construed to affect possible superior rights of the United States asserted on behalf of National Forests, Parks, Memorials, Monuments and lands administered by the Bureau of Land Management; and provided further that in addition to the diversions authorized herein the United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the

Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used.

(F) Provided, further, that no diversion from a stream authorized in Articles IV (A) through (D) may be transferred to any of the other streams, nor may any use for irrigation purposes within any area on one of the streams be transferred for use for irrigation purposes to any other area on that stream.

V. The United States shall prepare and maintain, or provide for the preparation and maintenance of, and shall make available, annually and at such shorter intervals as the Secretary of the Interior shall deem necessary or advisable, for inspection by interested persons at all reasonable times and at a reasonable place or places, complete, detailed and accurate records of:

(A) Releases of water through regulatory structures controlled by the United States;

(B) Diversions of water from the mainstream, return flow of such water to the stream as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation, and consumptive use of such water. These quantities shall be stated separately as to each diverter from the mainstream, each point of diversion, and each of the States of Arizona, California, and Nevada;

(C) Releases of mainstream water pursuant to orders therefor but not diverted by the party ordering the same, and the quantity of such water delivered to Mexico in satisfaction of the Mexican Treaty or diverted by others in satisfaction of rights decreed herein. These quantities shall be stated separately as to each diverter from the mainstream, each point of diversion, and each of the States of Arizona, California and Nevada;

(D) Deliveries to Mexico of water in satisfaction of the obligations of Part III of the Treaty of February 3, 1944, and, separately stated, water passing to Mexico in excess of treaty requirements.

(E) Diversions of water from the mainstream of the Gila and San Francisco Rivers and the consumptive use of such water, for the benefit of the Gila National Forest.

VI. Within two years from the date of this decree, the States of Arizona, California, and Nevada shall furnish to this Court and to the Secretary of the Interior a list of the present perfected rights, with their claimed priority dates, in waters of the mainstream within each state, respectively, in terms of consumptive use, except those relating to federal establishments. Any named party to this proceeding may present its claim of present perfected rights or its opposition to the claims of others. The Secretary of the Interior shall supply similar information, within a similar period of time, with respect to the claims of the United States to present perfected rights within each state. If the parties and the Secretary of the Interior are unable at that time to agree on the present perfected rights to the use of mainstream water in each state, and their priority dates, any party may apply to the Court for the determination of such rights by the Court.

VII. The State of New Mexico shall, within four years from the date of this decree, prepare and maintain, or provide for the preparation and maintenance of, and shall annually thereafter make available for inspection at all reasonable times and at a reasonable place or places, complete, detailed and accurate records of:

(A) The acreages of all lands in New Mexico irrigated each year from the Gila River, the San Francisco River, San Simon Creek and their tributaries and all of their underground water sources, stated by legal description and component acreages and separately as to each of the areas designated in Article IV of this decree and as to each of the three streams;

(B) Annual diversions and consumptive uses of water in New Mexico, from the Gila River, the San Francisco River and San Simon Creek and their tributaries, and all their underground water sources, stated separately as to each of the three streams.

VIII. This decree shall not affect:

(A) The relative rights *inter sese* of water users within any one of the states, except as otherwise specifically provided herein;

(B) The rights or priorities to water in any of the Lower Basin tributaries of the Colorado River in the States of Arizona, California, Nevada, New Mexico and Utah except the Gila River System;

(C) The rights or priorities, except as specific provision is made herein, of any Indian Reservation, National Forest, Park, Recreation Area, Monument or Memorial, or other lands of the United States;

(D) Any issue of interpretation of the Colorado River Compact.

IX. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent to the extent that the decree conflicts with the views expressed in the dissenting opinion of MR. JUSTICE HARLAN, 373 U.S. 546, 603.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.