

6-11-1984

Developments in Federal Water Policies and Programs

Harold W. Furman II

Follow this and additional works at: <http://scholar.law.colorado.edu/federal-impact-on-state-water-rights>

 Part of the [Administrative Law Commons](#), [Animal Law Commons](#), [Biodiversity Commons](#), [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Energy Law Commons](#), [Environmental Health and Protection Commons](#), [Environmental Law Commons](#), [Indian and Aboriginal Law Commons](#), [Jurisdiction Commons](#), [Legislation Commons](#), [Litigation Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Power and Energy Commons](#), [Property Law and Real Estate Commons](#), [State and Local Government Law Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

Citation Information

Furman II, Harold W., "Developments in Federal Water Policies and Programs" (1984). *The Federal Impact on State Water Rights (Summer Conference, June 11-13)*.
<http://scholar.law.colorado.edu/federal-impact-on-state-water-rights/4>



William A. Wise Law Library
COLORADO LAW
UNIVERSITY OF COLORADO BOULDER



Getches-Wilkinson Center Collection

Harold W. Furman II, *Developments in Federal Water Policies and Programs*, in THE FEDERAL IMPACT ON STATE WATER RIGHTS (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1984).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

DEVELOPMENTS IN FEDERAL WATER
POLICIES AND PROGRAMS

Harold W. Furman II
Deputy Assistant Secretary
for Water and Science

Federal Impact on State Water Rights

Natural Resources Law Center
University of Colorado
School of Law

June 11-13, 1984

,

,

,

REMARKS OF HAROLD W. FURMAN II
DEPUTY ASSISTANT SECRETARY FOR WATER AND SCIENCE
BEFORE THE
UNIVERSITY OF COLORADO SCHOOL OF LAW NATURAL RESOURCES LAW CENTER
CONFERENCE ON THE FEDERAL IMPACT ON STATE WATER RIGHTS
BOULDER, COLORADO
JUNE 11, 1984

There are people who think that water is one of the driest subjects on earth. I, for one, don't agree. During the last 4 years I've been working on natural resources issues in Washington, I have had the opportunity to participate in formulating the Reagan Administration's water policy. Although I'll admit to a few frustrating moments, the work we've been doing has been both exciting and interesting. For those who don't have the opportunity to join in the day-to-day challenges of working with all of the different interests that have a legitimate interest in the development of water policy, it must frequently look as if nothing at all is going on. Over the past 5 months, however, all of the behind the scenes work that we have been doing has been producing results that everyone can see.

Financial issues have been central to everything we have been discussing in Washington. Money has been the focus of the Administration, the Congress, water user groups, and environmental groups for the last several years. When we discuss new starts, cost sharing, and issues of regional equity, the bottom line is almost always an issue of economics. Essentially, economic issues have created the conflict that caused the stagnant state of Federal water development and management initiatives. Resolving these economic issues has been the biggest challenge we have faced over the past several years. We have succeeded in laying the groundwork that should take care of the major issues which confront us now, as well as providing a useful measure for future development.

We have approached the financial issues from two separate but inter-related approaches, the budget process itself and cost sharing plans.

I firmly believe, as does the President, that the best way to guide and shape any undertaking, be it Federal or non-Federal, is through the budget process. President Reagan has been consistently supportive of the Bureau of Reclamation and water development programs in general. This has been reflected in the budget proposals which the Administration has made over the past 3 years. The President has consistently requested increases in the Reclamation budget, with some of the increases over the past 2 fiscal years tied to new water project construction.

Despite the fact that the budget for the Bureau of Reclamation is about one-tenth of one percent of the total Federal budget, funding for Reclamation projects has been a constant target for critics of water development programs. Congress has probably spent as much time in the past few years debating the Reclamation program and its budget as it has almost any other program within the Government.

Part of the reason for this extensive debate has been the proposals that have been made by this and past Administrations on cost sharing. The prior Administration had pushed the concept of cost sharing, but didn't support new project funding. That made the debate essentially academic. When we arrived and began promoting both new projects and new partnership arrangements in project funding, Congress began to take notice.

The Administration has been proposing new water project starts since 1982, when then Secretary Watt announced 10 for the 1983 budget. In 1983, we worked on a number of similar proposals for fiscal year 1984, as, with the exception of the small project loans, Congress failed to act on our previous new starts recommendations. Our requests have been finalized

and they are reflected in our recommended 1985 budget. The Corps of Engineers has gone through a similar process of recommending new starts to the Congress, again, since the beginning of the Administration. In their case, too, the Congress has failed to act. As the legislative year continues and debate heats up on deficit reduction measures, it appears more and more likely that Congress will again fail to address the question of new project starts. There is some indication that the leadership is pushing for an even shorter session than originally planned. If that happens, Reclamation may again have to operate under a continuing resolution, which has essentially the same result as a budget freeze. We have already faced the problem once during the past 3 years; I would hope that we don't have to face it again.

The chief excuse used by some in Congress for failing to act on new starts has been the perceived lack of a unified Administration policy on cost sharing. While some officials had promoted the concept of fixed contributions towards project construction, the Department of the Interior has consistently backed more flexibility in cost sharing. Although OMB had already advised the Congress that there were no fundamental differences between the two proposals when viewed from the broad perspective of the differing Federal water programs, there was still a good deal of Congressional concern regarding the Administration's cost sharing policy.

In response to that concern, this January President Reagan sent a letter to Paul Laxalt and 14 other western Senators who had expressed concern over the situation, outlining the Administration's cost sharing policy. Although David Stockman, former Secretary Watt, and former Assistant Secretary Gianelli were all in the position to make policy, there is only one person who can set the policy of the Reagan Administration,

and that is the President himself. The discussions which have gone on before were all preliminary. The Administration's policy has been clearly set, and we intend to follow it.

Basically, the policy which the President set has two major components. First, it requires each water development agency to negotiate non-Federal financing for every water development project it undertakes. The key word here is negotiate. The President specifically rejected fixed formulas for cost sharing.

Some of the people who support the fixed formula approach claim that project beneficiaries could prove the local support for their individual projects by meeting the required shares such a policy would require. Those of you who have looked at the cost sharing issue know that there are existing laws covering the operations of the major Federal water development agencies which already provide for a whole range of "cost sharing" programs. As some of you might know, beneficiaries of Reclamation projects are required to sign repayment contracts which ensure the return of the capital costs of their projects to the Treasury. A different mechanism is used by the Corps of Engineers for its non-flood control projects. The Soil Conservation Service requires that 50 percent of the non-flood control benefits be paid up front by their project beneficiaries. Those differences aren't the result of poor planning or accident; they reflect the different responsibilities of each agency.

Because of other differences in the laws which govern water development agencies, the non-Federal share of project construction and operations costs that is required by law may be quite different from what the Government actually receives. Trying to fit all of the different repayment regulations, covered by existing law, into one end-all fixed formula

would result in continuing whatever inequities already exist. Those who aren't already required to guarantee the return of their project costs to the Treasury would certainly have to be more responsive and provide an increased amount of money to support their project, but those who provide guaranteed repayment would be burdened with additional financial responsibilities. Clearly, that is not the fairest approach to the problem. The President's letter directed all Federal agencies to seek both consistency and equity among project purposes. That should provide a resolution to the problems which exist.

The President's policy allows us to look at the different needs and situations that exist. That is of particular importance to water development projects in the West. Many of the projects built here provide substantial benefits to our public lands. Benefits are also provided for many Indian tribes. Trying to fit requirements of a fixed non-Federal share into areas that are clearly Federal responsibilities certainly complicates the problem. The policy which was adopted allows such considerations to be taken into account.

While the President made it clear that fixed formula approaches to the problem create more problems than they solve, he also made it clear that project beneficiaries will be playing a larger role in project financing than they have in the past. That has been the goal of this Administration's cost sharing policy proposals all along.

The second major component of the President's letter was his statement regarding safety of dams work at Federal dams. The President stated that safety of dams work at Federal dams was a Federal responsibility. He also said that if additional benefits were provided through the safety work, the costs of providing those new benefits would be shared by the

project beneficiaries. Although that might seem to be a statement of the obvious, there were Congressmen and special interest groups which weren't of the same opinion. They forgot that the mandate to bring unsafe dams up to the proper level of safety didn't come as a request from western water users; it came by a decision of the Federal Government.

The safety problems at Federal dams are not results of poor operations and maintenance practices. Instead, they have been discovered as newly available hydrologic and geologic studies have revealed problems at dams previously thought to be safe. There has been some controversy in the engineering community over the spillway capacity and earthquake provision specifications which Reclamation and the Corps of Engineers use in determining the adequacy of a dam. Some people believe that the current specifications overstate the potential for failure. If that is the case, modifications need to be made which would have a major influence on design work and the costs of repair work. As a result, the President also directed that an interagency team be formed, with both Federal and non-Federal interests represented, to review the procedures that are currently in place. The National Academy of Sciences will be the lead agency in this review, which is being funded by both Reclamation and the Corps of Engineers. We have asked the Academy to study the existing criteria and prepare and analyze alternatives. We hope to have their report in hand by the end of the year.

It has been suggested in some quarters that a "cost-effective" solution to the Safety of Dams problems could consist of an artificial drawdown of the reservoirs behind problem dams. That so-called "cost-effective" solution fails to recognize the fact that there are existing contracts which provide for the delivery of water from those dams. There would

inevitably be a number of lawsuits for damages if that approach were to be adopted. Essentially, no matter what happened, both sides would lose. The United States would not only lose some of the repayment which is vital to the Reclamation program, it might also be required to pay the damages that could be assessed in breach of contract actions. The water users would lose some of their invaluable water supply.

The President also recognized that being "penny wise" when it came to safety of dams issues could well result in a "pound foolish" situation in the future. Teton Dam is an excellent example of the kinds of costs the Federal Government would likely bear in the event that one of its unsafe dams failed. It cost the Government roughly half of the \$750 million it will take to repair 53 unsafe dams throughout the West just to settle the damage claims which resulted from the failure of one dam in rural Idaho. Some of the dams we know to be unsafe sit above major cities such as Phoenix and Sacramento. The damage settlement costs to the Federal Government should one of those dams fail could be absolutely astronomical.

As some of you might already know, the House recently passed legislation which reflected the President's policy on safety of dams. Although there has been no firm date set in the Senate for consideration of this bill, we hope that it can be acted on in this session. Incorporating the President's cost sharing policy into law will be a major thrust of our efforts in the coming months.

There is another cost issue that is moving into the forefront as Interior and the States work toward continuing development of the water supply in the Upper Colorado River Basin. There are a number of complex fish and wildlife issues which need to be resolved before full operation

of the projects that are planned can be guaranteed.

Some of you might know that the U. S. Fish and Wildlife Service has issued "jeopardy opinions" on the construction of several projects in the Upper Basin, including the Delores and the Animas-La Plata in Colorado, because of possible impacts to three endangered species, the Humpback Chub, Colorado Squawfish, and Bonytail Chub. The Endangered Species Act requires that the biological opinions include a set of "reasonable and prudent" alternatives that the project could implement to avoid the jeopardy situation. As a result of that requirement, the Fish and Wildlife Service is proposing two mitigation recommendations. First, that certain minimum flows be required during specified times of the year, and second that a depletion charge be levied.

Both of these proposals have received considerable discussion at the local and regional levels and in Washington. I can appreciate the concern that such requirements might cause. There are considerable problems in implementing the instream flow recommendations because of the various water rights which have already been established and other legal constraints on the Colorado River which are in existence. The issue is under study, and it remains to be seen whether it is an appropriate answer to the problem.

As a practical matter, to ensure full operation of the projects in the Upper Basin, a one-time depletion charge may be the best answer we have to resolve the issue. We are working on a method to ensure that any such charge would be levied equitably among the beneficiaries, and that once it was levied the beneficiaries would have the legal safeguards to prevent further depletion charges from being required in the future. That may be the only way we can get on with the job of developing the waters of the Upper Basin and meeting all of the requirements of environmental

law.

I find it interesting that resolving regional and national water policy issues has become such a complex task on Capitol Hill. Nearly every single Reclamation project authorization or funding bill which is introduced faces stiff opposition from the Northeast-Midwest coalition as well as the environmental interest groups. Most of the opposition, as I have said, centers on economic issues. Yet, these same groups have talked favorably of the omnibus bills for Corps of Engineers projects that are currently being considered by both houses of Congress.

The Roe bill, which is being considered by the House, would authorize 170 port and inland navigation, flood control, shoreline protection, hydroelectric, and water supply projects at an estimated cost of \$12.4 billion, roughly the same amount of money that the Bureau of Reclamation has spent in the past 82 years. The Abdnor bill in the Senate is a little less ambitious. It authorizes only 130 projects at an estimated cost of \$8 billion.

The obvious question is why should such bills, which authorize such large expenditures and would obviously have a considerable impact on the environment, especially when taken as a whole, have the support of the environmental groups and the Congressmen who claim water development is a waste of tax money? A cynic might say that the traditionally anti-water group can see that the bills are so overloaded that passing them would be impossible. They can then point to those bills as evidence that they really aren't anti-water, without having to worry about the consequences of construction.

Personally, I don't think that is the case. I believe that Congress is telling the Nation's water users that a national water development

program is acceptable, but a regional water development program isn't. Since the Reclamation program is limited by law to the 17 western States that presents a number of problems. The challenge for western water interests will lie in coordinating and cooperating with all of the national interests to ensure that our water development programs do find a place in the national arena. We need to make a stronger case for the contributions that western water development has made to the Nation as a whole, while recognizing the legitimate water needs of other areas of the country.

The recent realignment of responsibilities within the Department of the Interior is one step that Administration has taken to craft a truly national water development program. The organization of the new office of the Assistant Secretary for Water and Science shows the importance that water is receiving within Interior.

As a result of this realignment, Robert N. Broadbent, who was the Commissioner of Reclamation, has been selected by Secretary Clark to be Interior's first Assistant Secretary for Water and Science. Both myself and Jed Christensen are assisting Mr. Broadbent as Deputies. Bob Olson, who was Assistant Commissioner of Planning and Operations, has been appointed Acting Commissioner of Reclamation. Although someone will be selected to serve as Commissioner in an official capacity, no decisions have been made at this point. Garrey Carruthers, who formerly guided Reclamation as Assistant Secretary for Land and Water, is now Assistant Secretary for Land and Minerals Management.

Although Reclamation has been a high-priority program throughout this Administration, and certainly received the support it needed from Assistant Secretary Garrey Carruthers, Interior's water-related responsibilities were not centralized. The extensive water research and data programs of

the Geological Survey, which cover the entire Nation, were under the leadership of the Assistant Secretary for Energy and Minerals. Although it is undoubtedly true that water plays an important role in our energy and minerals industries, the work of the USGS hydrology division simply wasn't getting as much attention as it deserves from Congress and the general public. It was more or less hidden away behind the equally important issues of coal leasing and strategic and critical minerals supply. Now, with the realignment Reclamation has been united with the most capable water research organization that exists anywhere, under the same Assistant Secretary. We have always enjoyed excellent cooperation between Reclamation and USGS, but now that cooperation is being coordinated from one central point. Not only is that a good managerial move, it puts Interior's national responsibilities out front where they belong.

Shortly after the Water and Science office was organized, we had the pleasure of releasing the first National Water Summary. The response to the report was excellent and we plan to continue presenting new technical information through the Summary on a yearly basis. Work is well underway for the National Water Summary for 1984. Among the areas that we plan on highlighting in the report are patterns of surface water development; the significance of fluctuating ground water levels; surface water transport patterns of dissolved solids, sediment, phosphates, and nitrates; the occurrence of nitrates in our Nation's major aquifers; and the quality of coal mine drainage. Timely, useable information is invaluable at all levels of Government. The Summary certainly is the best document I know of for both technical and non-technical people interested in a broad overview of the Nation's water problems, as well as the issues within their own States.

We expect that next year's Summary will be as well received as this year's. The 1983 Summary is already in its second printing, which is rare for a Government report. That indicates the level of interest nationwide in our water problems and concerns. I believe that will be to our benefit as we work to resolve those problems and supply the water which we all need.

The Administration believes that water development programs have proven their economic value over the past century. We will continue to encourage the construction of economically and environmentally sound water projects, and we will continue to seek and implement methods of more fully integrating the proven programs of the past into the budget realities of today. That remains our biggest challenge.