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UNIQUE LEGAL ISSUES RAISED BY LONG DISTANCE WATER TRANSFER PROPOSALS:

ETSI, THE COLUMBIA RIVER, NAWAPA

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INTRODUCTION: Water in the arid West is seldom in the "right" place. Long distance, interbasin transfers are common within states, and out of state but within basin, to bring water to the optimum location. Powerful economic and political forces now encourage marketing of water to distant, out-of-state, out-of-basin locations. Such transfer proposals raise unique legal and policy issues.

I. DO ANY OUT-OF-STATE, OUT-OF-BASIN TRANSFERS EXIST?

Interbasin transfers within states, or to states with natural access to the river of origin, are common in the West under the prior appropriation system.

But no interbasin transfer exists in the United States that carries water by aqueduct over one or more state lines for use in a state that lies entirely outside the basin of origin. Similarly I have found no interbasin transfer that carries water across a state line into a state that, while sharing some part of the basin of origin, has no natural access to the source river. Do any exist?

Interstate, interbasin transfers have been proposed at least since 1951 (Bureau of Reclamation United Western Investigation) but none have ever been built. Proposals include, diversion of Columbia River waters to Arizona and California, diversion of Canadian or Alaskan waters to the Southwestern United States, diversion of Mississippi waters to the High Plains area of Texas. The ETSI (Energy Transportation Systems Inc.) proposal to carry Missouri River waters from South Dakota to Wyoming and thence to Louisiana, Arkansas, and Texas. Louisiana is entirely within the Mississippi Basin. Texas is partly so, although it is not contiguous to the

Mississippi. None of these states is located in the Missouri basin.

II. HISTORY OF THE COLUMBIA RIVER DIVERSION PROPOSAL

The State of California lost the case of Arizona v. California 373 U.S. 546 (1963) and lost the right to waters it had claimed from the Colorado River. It wanted to obtain a new source of supply.

Southern California looked first (1964) to the Eel and Trinity Rivers in Northern California. Environmentalists blocked this proposal.

Southern California looked farther afield, to the Columbia River.

Bills were introduced in Congress to study diversion from the Columbia to the Southwest, into the Colorado River basin.

Area of Origin Protection Proposals

Three area of origin protection themes were introduced into these congressional bills.

1. Priority of right in perpetuity or right of recapture.
2. Veto Provisions
3. Financial Guarantees

III. NUMEROUS OUT-OF-STATE, OUT-OF-BASIN TRANSFERS WERE PROPOSED TO ALLEVIATE PERCEIVED SHORTAGES IN THE SOUTHWEST.

United Western Investigation. Bureau of Reclamation, 1951.

Snake-Colorado Project. 1963. Transferring Snake River water to the Colorado basin

Western Water Project. 1964. Lower Columbia River water to the Colorado basin.

Undersea Coastal Aqueduct. 1965. From mouths of Klamath, Eel, and Rogue Rivers to Southern California.

Undersea Hose. 1967. From mouth of Columbia to Southern California.

Great Plains Plan 1967. From Missouri River in Nebraska to Southwest.

Texas Water Plan. 1968. From Mississippi River to High plains area of Texas.

North America Water and Power Alliance. 1964. Yukon River water would be transported down through British Columbia to Southwest and Mexico.

Others, from Canadian sources to western U.S.

IV. DOES CONGRESS HAVE AUTHORITY TO LEGISLATE INTERBASIN TRANSFERS?

Yes. See Arizona v. California 373 U.S. 546 (1963). The Court found a congressional apportionment in the 1929 Boulder Canyon Project Act. This is the only congressional apportionment to date. It seems clear that Congress could legislatively approve the ETSI proposal if it chose to do so. The legal arguments have arisen because ETSI did not obtain legislation specifically authorizing its project. Instead ETSI relied on the 1944 Flood Control Act, the state laws of South Dakota and other states through which the slurry pipes would go, and on the common law of water rights.

Previously, based on Kansas v. Colorado, 206 U.S. 46 (1907), it was thought that Congress lacked powers to make apportionments.

THE GRAND COMPROMISE.

The Lower Colorado River Basin Project

The National Water Commission

Moratorium on studies of Columbia River diversion

V. NATIONAL WATER COMMISSION RECOMMENDATIONS (1973)

An interbasin transfer should be the least cost source of water supply to serve a given purpose.

It should be national policy to require the direct beneficiaries to pay the full reimbursable costs, including compensation to the area of origin for the present worth of the net benefits foregone as a result of the export. Water Policies for the Future. Final Report to the President and to the Congress by the National Water Commission (1973).

Similar recommendations were made in: MacDonnell, Howe, Corbridge, and Ahrens, Guidelines for Developing Area-of-Origin Compensation, a Research Report Prepared for the Colorado Water Resources Research Institute (Dec. 1985). See also Johnson, The Area of Origin and a Columbia River Diversion, 46 Wash. L. Rev. 245 (1971). Johnson and Knippa, Transbasin Diversion of Water ,43 Texas L. Rev. 1059 (1965). Corker, Save the Columbia for Posterity . . . 41 Wash. L. Rev. 838 (1966). AN ISSUE ANALYSIS ON OUT-OF-BASIN WATER TRANSFER, Paperback book published by Missouri Basin States Association, May, 1983.

VI. THE ETSI PROPOSAL

Each out-of-state, out-of-basin diversion proposal is unique. The ETSI proposal discussed below has some commonalities, and some major

differences, from the proposed Columbia River diversions.

ETSI proposed to withdraw about 20,000 acre feet of water from Oahe Reservoir on the Missouri River in South Dakota, transport it to the Powder River region of Wyoming, slurry coal there and transport the slurried coal in pipes to Louisiana, Arkansas, Texas, and possibly other states.

In 1982 ETSI signed a contract with the Secretary of Interior to carry out this proposal. South Dakota had already granted ETSI a state permit.

FOUR LAWSUITS HAVE BEEN FILED OUT OF THIS PROCESS.

1. ETSI Pipeline Project v. Missouri et al. 484 US 495 (1988). The Court held that the Secretary of Interior had no authority to issue the permit to ETSI. Under the Flood Control Act of 1944, 33 USC § 701 et seq., the permit could only be issued by the Corps of Engineers.

2. South Dakota v. Nebraska, Iowa, and Missouri, etc. This is a suit brought in the original jurisdiction of the Supreme Court for apportionment of the Missouri. The Solicitor General was invited to file a brief. 474 US 941 (1985). North Dakota was permitted to intervene. 475 US 1093 (1986). On Feb. 29, 1988 South Dakota's motion for leave to file a bill of complaint was denied without prejudice. 108 S.Ct. 1071 (1988).

3. South Dakota v. Kansas City Southern Industries, Civ. No. 83-5046. D.C. S. Dak. So. Div. (1988). Antitrust suit where plaintiff alleged that defendant and others conspired to prevent plaintiffs from selling water to ETSI, and to eliminate the coal slurry pipeline from the coal transportation market. The jury awarded plaintiff $200 million, which when trebled is $600,000,000.

4. ETSI Pipeline Project v. Burlington Northern, Inc. No. B-84-

979, D.C. E. Texas, 3/10/89. Judge directed verdict for plaintiff in antitrust suit where plaintiff alleged defendants conspired to stop the coal slurry pipeline project, and to eliminate the pipeline from the coal transportation market all in restraint of trade. The jury awarded ETSI 345 Million in damages which, when trebled, amounts to $1.035 billion. The jury verdict was against the St. Fe Railroad because others had reportedly settled out. 56 Antitrust and Trade Regulation Report 415, 3-16-89.

THE WATER ISSUES

Several novel water issues were raised in the ETSI litigation.

Congressional intent in the 1944 Act

1. **Plaintiffs argued** that the Flood Control Act of 1944 did not anticipate or provide for out-of-state, out-of-basin transfers such as ETSI proposed. Congress did not mention and did not intend to authorize such transfers in the 1944 Act. Therefore federal agencies had no authority to issue permits for this transfer. As Oahe was a federal project, the officials operating it could only do what the Flood Control Act of 1944 or other federal acts provided for.

Defendants argued the Plaintiffs position ignores the legislative history of the 1944 Act which establishes that Congress intended the Oahe Reservoir to provide water storage for the broadest possible range of purposes, including coal slurry pipelines.

Pick-Sloan plan resulted from a delicate balance

2. **Plaintiffs argued** that the Pick-Sloan plan was bitterly fought

out between the Upper and Lower Missouri basin states, that nothing was said in these plans, or the Act, about exporting water outside the basin, and that in view of the balance worked out in the Act, an ETSI type of export would have upset this delicate balance, and was clearly not anticipated or provided for by Congress.

Defendants argued that the Act's legislative history encouraged full agricultural and industrial development, and that nothing in the Act specifically limits, or even mentions, out of basin transfers, therefore they are authorized.

Water law in 1944

3. **Plaintiffs argued** that in 1944 Congress would not have intended to authorize out-of-state, out-of-basin transfers because Kansas v. Colorado, 206 U.S. 46 (1906) had said that interstate apportionments could only be accomplished by Supreme Court litigation, or Interstate Compact, and not by Congressional apportionment. Congressional apportionment was not believed possible until Arizona v. California, 373 U.S. 546 (1963).

Unilateral apportionment

4. **Plaintiffs argued** that the ETSI project would constitute a unilateral apportionment of the waters of the Missouri between South Dakota and downstream States of Iowa, Nebraska, and Missouri. The fact that only 20,000 acre feet is exported is immaterial for two reasons (a) this is still a significant export in light of drought conditions such as existed in 1988, and (b) precedent would be established authorizing a single state to decide the importance of an export. The downstream states believed the diversion

would be significant.

In any later "apportionment" case that might be brought in the Supreme Court, the use by ETSI would be considered an "existing use" and would receive special protection under Supreme Court decisions.

Defendants argue that the amount of water involved in the ETSI Project, 20,000 acre feet, is trivial compared to the quantity of water in the River and Oahe Reservoir (Oahe reservoir has a capacity in excess of 23 million acre feet.), and is well within South Dakota's legal entitlement.

Profits from the sale of water should go to the federal government, not to a state

5. **Plaintiffs argue** that the ETSI water would come from a federal project that cost a great deal to build, and which has a policy of requiring repayment from users, and that any profits to be made from the sale of water should go to the federal government, not to the State of South Dakota.

Defendants argue that when the Oahe Reservoir was built it was planned that the State of South Dakota would use large quantities of water for irrigation (much more than 20,000 acre feet). The irrigation projects were not built, but South Dakota still has a call on the water and can do as it pleases with its share, including a sale to ETSI.

No such out-of-state/out-of-basin transfers now exist.

6. **Plaintiffs argue** that no such out-of-state, out-of-basin diversions now exist in the United States, and that an act of congress would be essential to effectuate one. A non-natural-access state has no claim to

an equitable apportionment of a river. No case has ever held that such transfers are possible without an Act of Congress. This is especially true where the water comes from a federal project, and involves a navigable river.

Defendants argue that states traditionally have authority to "distribute" water from federal projects, and this is merely a distribution of water to which the state is otherwise entitled.

Section 1(b) of the 1944 Flood Control Act.

7. **Plaintiffs argue** that Sec. 1(b) of the 1944 Flood Control Act states that Oahe water is to be used for "beneficial consumptive use ... in States lying wholly or partly west of the 98th Meridian (Missouri Basin States) and for "navigation". The "beneficial use" of water for the ETSI pipeline does not occur in South Dakota, since South Dakota is only receiving money for its water and no use of the water is made there. The "use" occurs at the point of coal delivery in the States of Louisiana, Arkansas, Oklahoma and Texas. Two of these states, Louisiana and Arkansas are entirely east of the 98th meridian, and all are entirely outside the Missouri basin. Since navigation requires and consumes all remaining water after beneficial use inside the basin the use of water in the ETSI project is prohibited by Sec. 1(b). Even if the "use" is in Wyoming, this involves use in a state with no natural access to the River.

Defendants argue that ETSI would "use" the water when it slurries coal in Wyoming, which is within the Missouri basin, and that when Congress wants to prohibit an interstate, interbasin transfer it does so explicitly, as it did in the Colorado River Basin Project Act of 1968

concerning proposed Columbia River diversions studies.

VII. CONCLUSION.

Long distance transfers of water are almost certain to occur in the future. Each raises novel, and complex water law issues.