"We honestly believe the Federal Government has done an excellent and indispensable job in developing and conserving the water resources of the country. Yet, we believe that in the growth and aggrandizement of Federal agencies, and in the pursuit of their worthy objectives, they are trampling unnecessarily upon private rights, are impairing the security of water titles throughout the West, and are needlessly encroaching upon jurisdictional areas that by statute and long-established custom have been the prerogative of the states."—Clyde O. Martz, Professor of Law, University of Colorado, from his statement on "The Role of the Federal Government in State Water Law" reported in the Kansas Law Review.

Water and politics: Do they mix? They seem to ... especially at this time of year. Quite a mixture is being brewed in Washington by the 86th Congress.

At the top of the list for western water users: States' water rights legislation. There is probably no question today of greater importance to the western half of the United States than that of preserving the integrity of state water laws. The economy of the entire West is dependent upon water rights established in accordance with state law. And these water rights are in trouble.

You've heard about the trouble . . . the Pelton Dam case, the Hawthorne case and others. And you've heard about a proposed remedy . . . the ill-fated Barrett bill.

A new legislative remedy has been introduced by Senator O'Mahoney of Wyoming and others. You should know about it. Better than that, you should understand it. Why? Because if you are a Colorado water user . . . and who isn't . . . you have a vital stake in the growing federal encroachment on state water rights.

Most water problems now-a-days are like an iceberg . . . nine-tenths submerged and one-tenth exposed. The exposed part is current activity that you read about in today's news sources. The submerged part is background information on what has happened before today, the various plays on the water development chessboard.

This Newsletter proposes to show you the broad outlines of two water development icebergs that are floating in the congressional seas today. Take time for a quick look beneath the surface.

The growing controversy over federal encroachment on state water rights is one segment of a great conflict in basic political philosophy regarding the respective
rights and responsibilities of the states and the federal government. Some say that individuals are being subjected to devouring federalism ... an avalanche of federal aggression against the states ... a continuing drift toward centralization of power in Washington and subsequent erosion of state and individual rights. Others say this trend is necessary for the national welfare.

The states' water rights controversy cuts across political lines and touches directly upon individual backgrounds—where a person came from and the problems which have confronted him. The outcome will probably depend upon the social, economic and political views of the Congress ... and of the U. S. Supreme Court. Thus far, the trend has not been good for western water users who depend upon their water rights obtained under state law.

The controversy over federal encroachment on state water rights centers around interpretations of the constitutional powers which were delegated to the federal government. Congress has long affirmed, and re-affirmed, the sanctity of state water laws. Thirteen statutes have clearly expressed the intention of Congress with respect to the ownership, control and appropriation of the waters of western states.

But the U. S. Justice Department has made exaggerated claims in recent years for extensions of the federal government's constitutional powers into the field of water rights. The arguments given by the Justice Department in recent court cases, and the implications of high court decisions, have greatly alarmed western water users.

Right after World War II the somewhat dormant federal-state controversy seemed to come to life and federal encroachment in the field of water rights began its cancerous growth. There was the tidelands oil controversy in 1947. The U. S. Department of Justice asserted, and the U. S. Supreme Court agreed, that the federal government's rights were superior to the rights of states adjoining the three mile off-shore strip along their coast lines. Congress later reversed the decision.

The trend was noted in Denver's controversial Blue River case. The federal government took the position that the water belonged to the government and was not subject to normal appropriation by Denver. The issue was resolved by compromise.
The trend was evident in the Arizona v. California lawsuit. The federal government claimed the right to initiate 1.7 million acre feet of annual Indian uses at any time in the indefinite future from Colorado River supplies, with seniority over non-Indian water rights established under state law.

The trend became crystal-clear in the Pelton Dam case in Oregon. A proposed dam was located between a government reservation of public lands for a power site on one side of the river and an Indian reservation on the other. The Justice Department asserted, and the U. S. Supreme Court agreed, that the Federal Power Commission had exclusive right to grant a license for the use of this water and that the State of Oregon had no rights therein.

Terror gripped discerning water men when it was realized that hundreds of water rights acquired under state appropriation law and utilizing water coming from government reservations might be subjected to a future government use because of an over-riding federal right never before known to exist.

In one stroke of its Pelton pen, the Supreme Court deprived western states of effective control over waters on most of the public domain. Some say the Supreme Court, in its Pelton decision, reverted to the federalism evident in the first years of the Court's history.

The Department of Justice, since the Pelton decision, has maintained that water falling in the form of rain or snow on reserved lands of the United States is the property of the federal government and could be claimed as it saw fit, regardless of rights to the water established under state law.

Most of the major water rights in the West are downstream from some type of government reservation. The term government reservation appears to include millions of acres of power site withdrawals . . . 145 million acres of forest reserves . . . millions of acres of Indian lands . . . large withdrawals under the Small Tracts Act and various mineral laws . . . Taylor Grazing Act lands . . . national parks . . . wilderness areas.
If there were any doubts about implications of the Pelton decision, they were dispelled by the Hawthorne case. The U. S. District Court applied the Pelton doctrine to exempt the U. S. Navy from complying with Nevada laws regulating the appropriation and use of groundwater. It reaffirmed the principle of federal immunity from state water laws.

The Hawthorne decision implies that the federal government, as one of several property owners whose land overlies a common underground reservoir, can take all of the water from the underground basin for its own use—leaving the other property owners without water and without recourse.

In the trial of the Fallbrook case, started by the federal government in 1951 in the U. S. District Court in California, the Justice Department asserted that the United States has a paramount interest in waters of the Santa Margarita River—over and above any interest under state law—because most of the water originates on a United States forest reserve.

Two points in the Fallbrook case are significant: First, the federal government has apparently advanced claims in relation to unreserved public land that go beyond even the Pelton doctrine. Second, the government claims that its rights are neither riparian nor appropriative and that these rights are not governed by state law.

William Veeder, chief counsel for the U. S. in the Fallbrook suit, stated:

"The United States of America claims that the title to the rights to the use of water upon the reserved lands of the United States of America resides in it and has never been conveyed away. Those rights are part of the land and may be administered by the United States of America independent of the laws of the several states. They are in some regard similar to State-recognized riparian rights as use does not create them and non-use does not cause their loss, yet to the extent they are required to meet the beneficial uses for which they were reserved they are not subject to diminution by appropriative or riparian rights which vested subsequent to the reservation. They differ from appropriative rights as they exist as parcel to the land and require no act on the part of the United States of America to initiate or maintain them. These rights have been reserved by executive orders and statutes."
Senator Clair Engle of California on the Fallbrook case:

"We have always felt that the federal government held its property as a proprietor, and that it appropriated and put to use water on its property as a proprietor in the same way that any other owner did and subject to state law . . . But if there is a residual power in the federal government, especially in a state such as ours, where almost 50 percent of the total area of the state is in federal ownership of one type or another, then the power of the state to manage and program its own water utilization . . . is subject to serious question, especially when you say, as you have, that this reserve right is a nebulous and open-ended one that is not subject to any definition . . . We sat here for 100 years and thought we owned the title, and the state issued rights to private parties, who invested money and the state proceeded on the assumption of ownership for over a hundred years. Then up pops a lawsuit; no one paid any particular attention to it in the light of all those years of precedent. Then lo and behold, the Supreme Court overruled some 19 previous cases and held that the federal government held the title. What scares me is what is going to happen if this lawsuit (Fallbrook) goes to the U. S. Supreme Court."

The trial court rejected the contentions by the Justice Department in the Fallbrook Case, but the decision undoubtedly will be appealed to the U. S. Circuit Court of Appeals and then probably to the U. S. Supreme Court. If the Justice Department's contention eventually becomes the law of the land, then all of the presently undeveloped waters of the western states, and most of the already developed waters, would become the property of the federal government. Why? Because most of these waters originate in mountain areas where the federal government owns most of the land. At the very least, these claims will create doubts about the validity of private water rights during the years of litigation ensuing before the matter is finally decided.

Legislation has been pushed in recent years to straighten-out the tangle between Congress and the executive department with respect to western water rights. The Water Rights Settlement Act (S863) was reported favorably by the Senate Committee on Interior and Insular Affairs in July of 1956. The 1957 version of S863 was vigorously pursued by Senator Frank Barrett of Wyoming. It became known as the Barrett bill.

The Barrett bill met the question of federal-state relations in the field of water rights head-on. It became a rallying point for strong public expressions against the Department of Justice by major water organizations such as the National Reclamation Association. But the Barrett bill could not get through Congress, even after extensive amendment. The Departments of Justice and Defense vigorously opposed it.
In May 1958, the Secretary of the Interior submitted a substitute bill to the Senate Committee on Interior and Insular Affairs. The substitute language had been approved by the Departments of Justice, Defense and Agriculture. The resultant bill was called the Inter-Agency Water Rights Bill of 1958. It was also called the bobtailed bill.

The substitute bill did not provide that water laws of states claiming ownership or control of their waters shall be binding on the United States and all of its officers and agencies, as did the Barrett bill. As a result it received fishy eye treatment from most proponents of western states' water rights.

Sober reflection during subsequent months brought out this basic political fact: At the present time it is virtually impossible to obtain enactment of legislation along the lines of the Barrett bill. And this conclusion: A better approach would be to attempt legislation limited to one or two features which would have a chance of getting through Congress. In phase with this tactical change: The defeat of Senator Barrett at the polls last November.

The plan: One legislative step at a time . . . in the right direction.

The first step: Allay, by congressional action, the fears raised by the Pelton decision. Recognize the existence of rights under basic water laws of the western states, including the constitutional provisions approved when each state was admitted to the Union.

The hope: That hearings will reveal the intent, purpose and effect of constitutional provisions relating to water law . . . That hearings will develop facts and conditions which will justify strengthening the legislation.

Interior's substitute language was modified somewhat in the new bill (S851) introduced by Senator Joseph O'Mahoney of Wyoming and 22 other senators. S851 provides essentially that the withdrawal or reservation of public lands shall not affect any right to the use of water acquired under State law either before or after 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". (Quotes
identify the language added to the substitute bill by Senator O'Mahoney. Other changes were relatively minor.)

NRA will support S851 if a letter of clarification can be obtained from federal agencies, setting forth clearly and unequivocally that a withdrawal or reservation of public land does not affect a water right acquired pursuant to state law, and that such withdrawal or reservation is not to be construed as giving to the federal government a prior claim to the use of water as against a water right acquired under state law. NRA wants it clearly understood that its ultimate objective is enactment of much more comprehensive legislation . . . something more in line with the Barrett bill.

Interior has publicly supported states' water rights legislation all along. Under Secretary Elmer Bennett of Longmont, Colorado, has been particularly active in supporting moderate states' water rights legislation. Additional help in Interior can be expected from former Senator Arthur Watkins of Utah who has just been named Consultant to the Secretary of Interior on water and power matters. Watkins, who was defeated in the last election, has been a strong supporter of western reclamation and states' water rights.

The Department of Agriculture should be states' water rights minded with ex-Senator Barrett as their new chief counsel. The Justice Department is hedging. It feels that the O'Mahoney language changes will require a complete restudy of the matter.

A number of bills on states' water rights, besides the O'Mahoney bill (S851) have been introduced in the 86th Congress. Several of them are similar to S851. HR 5555 was introduced by Congressman Walter Rogers of Texas, Chairman of the Irrigation Subcommittee of the House Interior and Insular Affairs Committee. It's called the Farm Bureau bill. It's much tougher than S851 . . . more like the Barrett bill. The American Farm Bureau Federation plans to push hard for it. But HR 5555 hasn't much chance of getting through Congress. If it did, somehow, the Justice Department would go all out to obtain a presidential veto. Six bills similar to HR 5555 have been introduced.

The Southwest Florida Water Conservation District passed a strongly worded resolution asking Congress to take steps to protect the individual in his right to
the use of water and to prevent further encroachment by the federal agencies in the field of water resources.

If Floridans care, shouldn't you? Thirty-six percent of the total area of Colorado, amounting to almost 24 million acres, is federally owned. Most of this federal land is in the high mountain country—where Colorado's water supply originates.

On the 15-member Senate Committee on Interior and Insular Affairs: John Carroll of Colorado. On the 6-member Senate Subcommittee on Irrigation and Reclamation: Gordon Allott. No Coloradans are on the 9-member Subcommittee on Appropriations for Reclamation and Power. However, Gordon Allott is on the powerful Senate Appropriations Committee.

On the 32-member House Committee on Interior and Insular Affairs: Colorado's Wayne Aspinall (Chairman) and J. Edgar Chenoweth of Pueblo. Aspinall and Chenoweth are both members of the 22-member House Subcommittee on Irrigation and Reclamation. No Coloradans are on the 7-member House Subcommittee on Interior Appropriations.

Your Water Congress' Rules and Executive Committees have unanimously supported passage of S-851, the O'Mahoney bill. Do what you can to support it. It's the first step, in the right direction.

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Number two iceberg floating in the congressional seas: The wilderness bill! The current bill, S1123, was introduced by Senator Humphrey of Minnesota and 18 other senators. It was referred to the Senate Committee on Interior and Insular Affairs. On this Committee: Two of the wilderness bill's sponsors: Chairman Murray (Montana) and Martin (Iowa).

S1123 is a long bill. . . 18 pages. It's about the same as previous wilderness bills: S1176 and HR500 in 1957 and S4028 in 1958. Purpose: Establish a national wilderness system, designate specific areas to be included and define rules for governing these areas. Result: No water development within the wilderness areas. No rights-of-way for canals for vital water projects. No utilization of the timber, mineral, gas and oil and grazing resources.

S1123 on water rights: "Nothing in this Act shall constitute an express or implied claim or denial on the part of the federal government as to exemption from
state water laws". Remember: The Fish and Wildlife Coordination Act of 1956 was amended, prior to passage, to delete Senator Watkins' provision calling for adherence to state water laws.

S1123 is by no means the only bill currently aimed at establishing a national wilderness preservation system. There are already seven others. Also: Four bills seek to amend the 1958 Act which set up the National Outdoor Recreation Review Commission. Seven bills are aimed at evaluation of recreation benefits. Three bills attempt to facilitate the application and operation of the Fish and Wildlife Coordination Act of 1956.

Your Water Congress has been active on the wilderness issue. Through the efforts of Director John Barnard, Jr., the Colorado legislature approved a Water Congress memorial opposing the wilderness legislation. Barnard travelled to Washington, D.C., to Houston and to Seattle on wilderness business. His Houston speech before the National Association of Soil Conservation Districts led to their adoption of a strong resolution opposing wilderness legislation.

In Seattle, Barnard testified at a hearing before members of the Senate Committee on Interior and Insular Affairs. Live witnesses included 49 for and 45 against the wilderness bill. Senator Moss (Utah) was reported as saying that he did not think the Senate would pass the controversial measure.

The Senate Committee held another wilderness hearing in Phoenix. Box score: 17 witnesses for the bill and 40 against. Four field hearings were held last November. One more hearing is expected to be held in Washington, D.C., probably in May. Then the Committee is expected to vote on the bill! Let your Congressman know how you feel about the wilderness bill.

The 25-member Advisory Council to the Outdoor Recreation Resources Review Commission has been appointed. On the list: Thirteen from the East, three from the Southeast, two from the Midwest, seven from the West. Only one nationally known water man is on the Council: Harvey Banks, Director of the California Department of Water Resources. Colorado's appointee: Pat Griffin, Fort Collins businessman, member of the Colorado Game and Fish Commission.
Did you know that there is a difference between the Colorado Game and Fish Commission and the Colorado Game and Fish Department? You can see the difference if you put on your Curecanti glasses.

Curecanti is Colorado's proposed big storage and power development on the Gunnison River. A new two-dam plan would create facilities to store over a million acre feet of water and produce 100,000 kilowatts of electricity. Colorado Game and Fish Department officials have opposed Curecanti. The Colorado Game and Fish Commission has consistently approved it.

A month ago, the Secretary of Interior transmitted an economic justification report to Governor McNichols on the revised plan for Curecanti. This report cited a favorable benefit-cost ratio but included a finding against the project by the U. S. Fish and Wildlife Service, prepared in cooperation with the Colorado Game and Fish Department. The Secretary asked McNichols for Colorado's official views on Curecanti.

Note this: The duly constituted Commissioners did not authorize the adverse conclusions set forth in the Curecanti justification report. It would appear that they didn't even know their department was participating in the report. The Commission quickly adopted a resolution re-affirming its acceptance of the Curecanti plan and McNichols informed the Secretary of "unequivocal approval" of the project by the State of Colorado.

Your Water Congress moved quickly on Curecanti. The Rules and Executive Committees unanimously adopted a strong policy statement urging approval of Curecanti and submitted it to the Colorado Water Conservation Board. The Board unanimously adopted the policy statement and requested its presentation to the State Legislature. The State Legislature moved rapidly to adopt a memorial approving Curecanti.

Note Colorado's new look: Local, state and regional agencies all united in support of a Colorado water project!

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