"Here is a land where life is written in water—the West is where the water was and is. Father and son of old, mother and daughter following rivers up immensities of range and desert thirsting the Sun down in crossing a hill to climb a hill still dryer. Look to the green water within the mountain cup—Look to the prairie parched by water lack..." (Inscription on mural in rotunda of State Capitol Building, Denver.)

THE FEDERAL-STATE WATER RIGHTS CONTROVERSY is getting hotter.

And more complex. Water leaders throughout the west are deeply concerned with the problem. Coloradans should be concerned.

The problem is difficult and involved. Understanding of basic issues is hard to come by. It's all mixed up in constitutional law, plus social, economic, political views and philosophy of government. Basically, it is not a political party question. It doesn't seem to make any difference which political party is in power, or what your political views are, providing you live in the West. The problem marches on, getting bigger all the time. It is big enough now to threaten our way of water life under the hundred-year-old appropriation doctrine.

Northcutt Ely: "Until recently it was rather universally thought that Congress, in a long series of statutes, had so far approved and adopted the appropriation doctrine as to make its application to the western streams one of the
facts of life, whether viewed as state law, or as federal law incorporating the elements of the state appropriation system. This is probably still true, but a series of federal cases has served notice that state-generated water rights are fragile vessels in which to navigate past the Scylla of the federal commerce power and the Charybdis of the federal property power, with their fate dependent upon the interpretation of federal statutes rather than upon any sanctity as against federal legislative power."
("Legal Problems in Development of Water Resources", paper presented May 24, 1963.)

We call it federal encroachment on state water rights.

U.S. Justice Dep't. views the problem as state interference with federal water rights. Justice Dep't. has an alarming view of constitutional law as it relates to water in the West. And it is backing up its views with aggressive legal action that is ending up in U.S. Supreme Court decisions of vital importance to Colorado water users.

Judge Hatfield Chilson: "The position of the Federal Government was, and is, that, although those water users who have appropriated water under State law are protected in their water rights, nevertheless the Federal Government owns all unappropriated water of the public domain and, by virtue of that ownership, the Federal Government retains the ultimate right to control the use and disposition thereof. This position of the Department of Justice is not of recent origin. It is a position established and maintained over a long period of years and under many administrations." (Speech to NRA convention in Denver, October 29, 1959. Chilson, former Under-Secretary of Interior, is now Federal District Judge in Denver.)

Signs of things to come were hindsight evident as far back as 1899 in the Rio Grande suit, when the Supreme Court said, "In the absence of specific authority from Congress a State cannot by its legislation destroy the 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."

There were other signs. In 1934, Dep't. of Justice presented the question of federal ownership and control for determination by the federal courts in an action brought by Nebraska against Wyoming seeking equitable apportionment of waters of the North Platte River as between the two states.

Judge Hatfield Chilson: "In essence, the basis of the claim was that the Federal Government was originally the owner of the water resource when it obtained title to the public domain; that the Desert Land Act of 1877 and other congressional acts were not an irrevocable recognition of State's rights but were, in effect, permissive or non-mandatory in nature and that thereby the Federal Government has not relinquished its ownership and control of the unappropriated water." (10-29-59 Speech to NRA)

In 1945, U. S. Supreme Court construed the Federal Power Act as not conceding to the State of Iowa a veto power over the construction of a dam by a licensee under the Act, notwithstanding language in the statute that appears to require the licensee to obtain the concurrence of the state.

In spite of the signs that outcropped over the years, first rude awakening for many western water people to the theories and aims of the U. S. Justice Dep't. came with the Pelton Dam case, decided by U. S. Supreme Court in 1955. Federal Power Commission had licensed construction of a dam on a non-navigable stream solely
for power production with no consumptive use. State of Oregon protested, claiming interference with fish and noncompliance with Oregon water laws. On one side of the dam was land withdrawn for power purposes. On the other side: Indian reservation. Question: Did Congress, by creating the procedure for withdrawing lands for power purposes, intend to have this withdrawal include the unappropriated water? Supreme Court said yes, in effect, with Mr. Justice Douglas strongly dissenting.

Colorado Water Congress Newsletter: "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 right 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." (4-24-59)

California Attorney Burham Enerson: "It is not exaggeration to say that under the Pelton Dam decision the Federal Government claims complete and absolute control of a great portion of the unappropriated waters in the western states." ("Water Rights-State versus Federal", paper presented 12-1-60)

U. S. Justice Dep't. immediately used its Pelton muscle in the Blue River cases in Colorado. Federal government took the position that the water belonged to the government and was not subject to normal appropriation.

California Attorney Harold W. Kennedy: "The Department of Justice...asserted that when any portion of the public domain has been withdrawn or reserved by the United States for any purpose, there immediately vests in the United States as of the date of withdrawal or reservation a right
to use all water necessary to carry out the purposes of the withdrawal. As a consequence, any rights to the use of water initiated after the date of the withdrawal are subject to the rights of the Federal Government even though those Federal rights may not be exercised for many years thereafter." ("Quieting Title to Western Waters and Why the Federal-State Water Rights Problem Must Be Resolved," paper presented 11-14-62)

The Blue River cases were resolved by a compromise that resulted in the consent decree of October, 1955. In the Hawthorne case, U. S. District Court applied the Pelton doctrine to exempt 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 water reservoir, can take all the water from the underground basin for its own use--leaving the other property owners without water and without legal recourse.

It's the reservation theory that puts most of the fear into western water people. The term government reservation might be construed 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. Most of the major water rights in the West are downstream from some type of government reservation.
There also is a fearsome ownership theory. It appeared in the Friant Dam case (City of Fresno v. California Water Rights Board). Fresno appealed from a state board decision regarding certain applications for use of water on the San Joaquin River, California. U.S. became involved because it built Friant Dam on the San Joaquin. U.S. Justice Dep't. asserted that there was no unappropriated water in the stream because when the U.S. built Friant Dam it took all the unappropriated water and thereby automatically cancelled the conditional permission which Congress had given to others to take the water under local customs and laws. Shocker: U.S. contended that ever since the Treaty of Guadalupe Hidalgo in 1848, the U.S. had owned all the water in the area—including California—acquired from the Mexican government under this treaty. Furthermore, U.S. had never intended to relinquish this ownership of water rights. This same position was taken by the Justice Dep't. in Dugan V. Rank.

Dugan V. Rank (originally Krug V. Rank) is a 16-year-old injunction suit recently decided by U.S. Supreme Court. Landowners along the San Joaquin River in California claimed that Bureau of Reclamation cut off state-generated water rights by building Friant Dam, remitting the owners to suit in the Court of Claims, without requiring the Secretary of Interior to first condemn them. Supreme Court refused (8 to 0) to enjoin the Bureau against further Friant diversions or to force the Bureau to build a series of low dams to use the river flow below Friant. Instead, it told the water
users to seek financial damages from the Bureau for any deprecia-
tion in land values.

Bright spot in an otherwise dismal state v. federal water rights picture is the recent decision by U.S. District Court in the Fallbrook case. It was started by the federal government in 1951 against Fallbrook Public Utility District, in U. S. District Court in California. The controversy centered around use of water at Camp Pendleton. Justice Dep't. asserted that U.S. had a paramount interest in waters of the Santa Margarita River—over and above any interests under state law—because most of the contested water originated on a U.S. forest preserve. Justice Dep't. advanced claims regarding unreserved public land that went beyond the Pelton doctrine. U.S. also claimed that its rights were neither riparian nor appropriative and that its rights were not governed by state law.

Water Congress Newsletter: "If the Justice Department's contention (in the Fallbrook case) 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 settled."

U.S. District Court decided the Fallbrook case May 8, 1963.

It decided for the Fallbrook District and it repudiated most of the contentions of the Justice Department. It ruled that the U. S.
has no appropriative or prescriptive rights to the use of waters of the Santa Margarita River and that in acquiring appropriative rights the U.S. must comply with state law.

It is hard to know who is going to be the future boss of water rights in the West--individual states or the federal government. Most westerners want to make sure, through legislation, that the states will be boss. Some advocate extreme legislation that sounds good but has no chance of passage. Realists advocate a moderate legislative course.

Northcutt Ely: "To some, these cases have placed the Federal Government in such an overwhelmingly powerful position as to necessitate new statutory limitations upon the executive agencies. Some proposals have been extreme...It does not seem necessary to burn down the barn to roast the pig. A more modest approach is that stated in a bill recently introduced by Senators Kuchel (Calif.), Moss (Utah) and Jordon (Idaho), which concentrates on four points: (1) the effect of federal reservation on water rights originating under state law... (2) the preservation of primacy of consumptive uses over navigation... (3) a direction that where the United States claims water rights under state law, it shall follow the procedure established by the state statute in acquiring them... and (4) a direction that water rights, if recognized as compensable in the state under which they are claimed, shall be compensable if taken by the United States; and if the United States acquires them otherwise than by purchase, it shall condemn them (rather than permitting the Government to take them, without notice, remitting the owner to suit in the Court of Claims)." ("Legal Problems in Development of Water Resources", paper dated 5-24-63).

COLORADO WATER LITIGATION: Grand Junction sewage odor suit has been settled out of court. Plaintiffs: 27 property owners. They claimed noisome stench from GJ's sewage plant made their lives
unbearable, sued city for $160,000 damages. **Settlement:** $25,000 cash plus property purchases totaling $8,750. Orchard Mesa Irrigation District's manager and three of its directors have been sued by two Clifton men. Suit seeks to vacate all director seats, cancel manager's contract, review district's accounting procedures, reimburse district for work done outside its boundaries. **Baca Ditch** (east of Trinidad) has had eight suits going for over four years on administration and delivery of irrigation water. Agreement recently filed in district court continued the cases to November 15, pending compilation of data on ditch seepage and evaporation losses. **Colorado Supreme Court** ruled with **Denver Water Board** in a land condemnation case involving the Hugh Smith property in the Dillon Reservoir area. **Grand Valley underground water case** may be a headscratcher for Colorado Supreme Court.

**Grand Junction Sentinel:** "Colorado Supreme Court was rumored to be about ready to announce a decision on the Grand Valley Underground Water case, but the fact that weeks have passed since the rumor started is indication there might be so much difference of opinion that whatever decision was written will be re-written." (6-10-63)

**Fish flow claims** by Colorado River Water Conservation District on tributaries of the South Fork of the White River received another setback recently when Judge Clifford Darrow denied a motion for new trial, stating that these claims "were a good idea, but it's not the law." Judge Darrow has continued adjudication proceedings in **water district 43** at Meeker. They include conflicting claims by Rocky Mountain Power Co. for its proposed Sweetwater Hydro-electric
Project and by CRWCD for its proposed Flattops project...In water district 42 adjudication proceedings (Mesa County), Judge E. L. Dutcher is considering appointing a referee to hear the rest of the testimony and prepare a decree...Arapahoe Lodge (Loveland Pass) won a $17,300 damage suit against a company whose overturned truck spilled diesel fuel into the lodge's water supply...Elicott area water users (east of Colorado Springs) have filed suit against Cherokee Water District. Cherokee proposes to pump large amounts of ground water for delivery and sale to Colorado Springs...East Tincup's demise (pioneer village west of Denver), was due to litigation which included, among other things, alleged failure to provide an adequate water supply.

WATER PEOPLE: Harold H. Christy has retired as manager of land, water and power for Colorado Fuel & Iron Corp. He will continue as CF&I consultant on land, water and power. Christy is Colorado director for the National Reclamation Association and has long been a leader in Colorado water resource activities...Ralph Adkins is CF&I's new manager of land and water...S.T. Elliot has resigned as consulting engineer for Pueblo Water Board...Gerald L. Stapp, Denver lawyer, and Richard S. Shannon, Jr. of Shannon Oil Co. have been appointed to the Denver Water Board, replacing Hudson Moore and Thomas P. Campbell...William D. Farr, Greeley farmer and businessman, has been appointed to the Missouri River States Committee by Gov. Love...
Richard Eckles of Monte Vista, state purchasing agent, is being considered by Gov. Love for appointment as director of natural resources...C.C. Gordon, deputy water commissioner for district 48 (Laramie River), died recently...Joe Clayton, from Brighton, is the new water commissioner for district 8...Tom Platt of Boulder, water commissioner for district 6, had a heart attack recently. So did Sid Nichols of Colorado Springs utilities dep't...Clayton Hollifield of Penrose recently completed 56 years as ditch rider for Beaver Park Land Co...Carl Allen, who farms west of Rocky Ford, has received recognition for his unusual ability to utilize irrigation water with minimum losses (Pueblo Chieftain 7-1-63)...Leonard A. Wood, from Texas, has replaced Ted Moulder as top man on USGS ground water investigations in Colorado...Herbert Riesbol, chief of Bureau of Reclamation's hydrology division (Denver) has retired, will join Bechtel Corp. in San Francisco.

COLORADO CITIES: In the Denver metropolitan area, lawn watering is restricted in Aurora, Littleton, Englewood, Westminster. Thornton has raised water rates as a water conservation move. Sale of Northwest Utilities Co. water properties to Thornton is being investigated by Colorado PUC...Littleton voters rejected a proposed water rate increase. Littleton council has appointed a 19-man citizen's advisory committee on water...Broomfield council appointed a 5-man water commission for interim administration pending employment of a city manager...Aurora is contracting for purchase of 2,000 acre feet of Wellington Lake water for $130,000...Boulder has
experienced a big increase in water well construction since changeover to universal metering.

In the Arkansas Valley, lawn watering is restricted in Pueblo, Colorado Springs, Manitou, Ordway, Las Animas, Florence, Walsenburg. Pueblo has contracted for a long range study of water rates, sources and distribution. Las Animas is considering water rate increases. Florence fines for violation of water regulations are $16 each. Walsenburg water situation is critical.

On the western slope, lawn watering is restricted in Delta and Montrose. New water tank at Montrose still leaks, in spite of lining job. Grand Junction is studying the problem of free water for churches. Granby will raise water rates to finance a $130,000 well development program. Glenwood Springs is grappling with the ticklish problem, "to meter or not to meter". Steamboat Springs citizen complained recently to the Denver Post: "Denver has been stealing water from the Western Slope for years, but don't you think this is going to far?" Source of complaint was an item in the lost and found column of the Steamboat Springs Pilot which said:

Reservoir, Sunday, June 2. Reward. Dale Birkby, 5231 Leetsdale Drive, Denver 22, Colo.