It is always a pleasure to meet with water leaders of this great State of California. I have been asked to comment on the recently announced water policy for the Nation as contained in the White House message to the Congress.

May I begin by reminding you that Federal water policy has been a topic of interest to the Nation for nearly a century. Within a few years after adoption of the Constitution of the United States, the Congress began wrestling with policies and procedures for disposition of the vast public domain. Various land laws enacted during the first 100 years were largely successful in transferring from public to private ownership the public domain lands in the high rainfall areas of the country and the easily irrigated valleys.

By the 1890's, however, it was recognized that large Federal irrigation projects would be the only way to renew interest in the development of the public domain in the arid and semi-arid West. In 1894 the Congress attempted to achieve a form of irrigation by passing the Carey Act (Act of August 18, 1894, 28 Stat. 372).

Within a few years, it became evident that the Carey Act would not lead to irrigation development of large areas of public land. In 1902 the Congress passed the basic Reclamation law dated June 17, 1902. That Act was entitled "An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories to the Construction of Irrigation Works for the Reclamation of Arid Lands."

The 1902 Act has been modified and expanded by the Congress on numerous occasions, both by legislation of general applicability as well as by Acts pertinent to specific projects. Also a variety of comprehensive studies to
identify shortcomings and recommend improvements have been authorized from time to time, such as the Fact Finders Committee in the early 20's, the Hoover Commission in the early 40's, the National Water Commission in the early 70's, and the Water Policy Review Committee established by President Carter. (Major amendatory and supplementary Acts include the 1926 Omnibus Adjustment Act, the 1939 Reclamation Projects Act, 1949 Rehabilitation and Betterment Act, 1956 Small Reclamation Projects Act, and the 1958 Water Supply Act.)

The National Water Commission report, as I recall, contained about 232 recommendations, the majority of which were non-controversial and could be embraced without reservation. However, a few, perhaps less than a dozen, were highly significant to western water interests and represented substantial deviation from the prevailing law and policy which had been established by the Congress through its legislative function over the years.

Congressional authority would be prerequisite to implementation of any recommendation that is contrary to or not permissible under existing law.

Recommendations of the present administration bear some resemblance to those of the National Water Commission in that a number of them can be readily accepted or endorsed. In fact, a number in this category have long since been a part of on-going policy and procedure. Improvement, of course, where possible is always desirable.

A few of the proposals, however, would require congressional blessing prior to adoption. The President's water policy message appears to recognize that.

Of more immediate significance perhaps to western water interests are statements emanating from the Department of the Interior indicating the Secretary's intention to enforce present law as he interprets it. Development of rules and regulations to carry out the Secretary's announced intentions raises questions as to proper interpretation of the law, the authorities of the Secretary in this regard, and how national policy is really made.

The Congress of the United States by reason of its legislative functions is in fact the policy-making arm of the Government. It has dealt with issues, needs, demands, and benefits of water resource development programs ever since the Union was formed. Its continuous attention to a dynamic water resource development program in a dynamic society is both desirable and essential.
Through the legislative process, piecemeal or otherwise, over the years the Congress has established the authorities and obligations which the Executive Branch is charged to carry out.

Because basic legislative authority seldom contains detailed procedures for implementation, the administrative bureaucracy must establish rules and regulations (another name for procedures) to be followed in carrying out its authorities and obligations under the law. I should emphasize, however, that such rules and regulations must be within the law—not beyond it.

Frequently basic law lacks clarifying detail or may be read ambiguously. In such cases the appropriate Administration official usually seeks legal interpretation, which in turn frequently requires delving into legislative history in search of the intentions of Congress. Conclusions are embodied in legal opinions which then govern the procedures followed by Administration officials and their staffs as long as the pertinent opinions prevail.

As Administrations change, top legal officials usually change also and sometimes a new Solicitor will review an opinion of a predecessor and come to a different or opposite conclusion which may alter or even reverse procedures previously prevailing. (Doyle Boen experienced this in regard to the Small Reclamations Project Act.)

Differing legal interpretations of a given law by different attorneys is not uncommon. In such cases, the only sure way to get a reading on the intent or the will of the Congress is from the Congress itself. This means legislative action to clarify, modify, or modernize controversial statutes.

With that brief background let's skim over the recent water policy message of the White House.

It is divided into three main parts—I Background, II Objectives, and III Specific Reform Initiatives.

The "Background" portion of the message recognizes that water resource programs of the Federal Government have provided substantial benefits to the Nation; that Federal construction activities to provide water supplies have been and continue to be of great regional importance in the West; and that available supplies of water have diminished in relation to demands generated by growth in agriculture, energy, municipal, and industrial sectors. The need for conservation is stressed, but the message recognizes that conservation by itself will not be able to meet future demands nor achieve a balance in certain
parts of the West. And it states further that the Government should continue
to help finance water projects that are safe, economic, and environmentally
sound. These background findings are not new to you ladies and gentlemen,
nor do they differ much from numerous analyses that have been made of the
water resource development programs over the past 50 years.

The message recognizes the importance of hydroelectric power generation,
and indicates that a primary current interest is in installing additional
generating capabilities at existing dams. Not long ago, however, a Bill to
authorize such programs at a dozen or more structures in the West was the
subject of a hearing by the House Interior and Insular Affairs subcommittee
chaired by Congressman Meeds of Washington. I understand the Administration
did not support that Bill.

The President's message also recognizes that the States have a variety
of concerns in the water policy field. These relate primarily to State water
rights, State input with respect to Federal water policy, cost-sharing rules,
Federal reserved water rights doctrine, and Indian water rights. There is
strong feeling that quantification and adjudication of the latter two issues are
essential to resolution of these highly complex and controversial matters.

I will pass over other comments in the "Background" portion of the
President's message, not that they are unimportant but rather that they may
come up under discussion of Parts II and III of the message.

Part II is entitled "Objectives of the President's Water Policy."
The President's policy initiatives are intended to meet four objectives;

(1) improved planning and efficient management of Federal water resource
programs, (2) a new national emphasis on water conservation, (3) enhanced
Federal/State cooperation and improved State water resource planning, and (4)
increased attention to environmental quality.

You will notice that all four of these are in the nature of improving
planning, coordination, and cooperation in subject matter areas that have been
part-and-parcel of planning, development, and operation policies and programs
historically. Searching continuously for improvement can always be endorsed.

Part III of the water policy message is entitled "Specific Reform
Initiatives."

The Water Resources Council receives attention in the opening paragraphs
of Part III. The specific directives say, among other things, that WRC will
evaluate current agency practices for making benefit-cost calculations and will
publish in 12 months a planning manual designed to insure accuracy and consistency in applying the best current techniques to required analyses for compliance with the Principles and Standards as currently established, or as they may be modified in the future.

Seeking consistency among water development agencies in this regard is a laudable goal. Assuming consistency can and will be attained, it should apply to reviewing agencies as well as the action agencies.

The White House message states that currently no entity, other than the particular construction agency involved, effectively monitors water project planning, and that an entity is needed to provide an impartial review of all water projects to assure compliance with the Principles and Standards, related laws, and other requirements.

The President announced that such an entity for independent review of water plans is to be established in the Water Resources Council.

In recent history the final administrative review of project reports and proposals, regardless of how many reviews had been made before, has come from the Office of Management and Budget. The White House message is not clear as to whether the OMB review will be removed in favor of the WRC review, or whether the WRC review will become another layer in the process.

I am inclined to believe than an independent objective review to test accuracy and consistency of benefit-cost calculations and applications would be desirable, but layering of reviews should be reduced, not increased. For example, with respect to project planning of the Bureau of Reclamation, its studies have been reviewed at several levels within Reclamation, followed by two or more reviews at the Assistant and Under Secretarial levels, as well as final review by the Office of Management and Budget prior to submitting plans to the Congress. The review process which has prevailed in recent years can of itself cause original input to the analyses to become obsolete during the process of review. In my opinion, genuine public involvement in the planning process should be expanded, and the subsequent internal reviews should be reduced—not in terms of effectiveness, but in terms of repetitious layering.

Water Conservation

The message recognizes severe water shortages in 21 subregions of the United States, primarily in the central plains States and in the Southwest.
Potentially severe water shortages are projected for 18 additional subregions in the West. Commenting on water shortage areas, the message states that a very high percentage of water consumed is for irrigation agriculture. It implies that much of the water used in irrigated agriculture is consumed wastefully. I believe that the word "consumed" is the wrong word to be used. "Diverted" would be a better word, and more accurate. It has often been said that 30 percent or more of water diverted from a stream for use in irrigated agriculture is lost in the process of conveyance and distribution. And also that irrigation efficiency is only 50 percent or less. However, it should be noted that over-diversion of water does not necessarily mean lost water. It may, in fact, be a conservation measure in certain geologic situations. For example: (1) water lost by deep percolation may go to replenish underground water storage supplies, (2) water diverted in excess of the consumptive use requirements of crops may return to the river downstream from the point of diversion either by surface runoff or through the underground route, (3) water moving through the underground may extend and even out the runoff period of the river and reduce evaporation losses in the process.

While conservation is laudible and in certain circumstances reduction of losses in conveyance and distribution of diverted surface flows could become a new source of water, conservation alone cannot possibly meet the future water needs of society. The White House message recognizes that fact.

Concerning repayment of the reimbursable costs assigned to irrigation, the President has directed that the Secretary of the Interior continue with contract provisions that require periodic recalculation and renegotiation of water rates. The message goes on to say that under existing law the Secretary will add provisions to recover O&M costs when contracts are renegotiated. This latter statement evidently must be pointed toward the early-day water service contracts which apply primarily to the Central Valley Project of California. Those contracts as initially negotiated provide a fixed rate per acre-foot of water which was to cover both operation and maintenance, and construction cost repayment. O&M was to become a first charge against the amounts collected. Obviously nobody at that time contemplated that inflation would increase to the point that the entire amount of the collection might be required to cover O&M costs alone. Yet this has or may occur in certain portions of the Central Valley Project.
By far the predominant type of repayment contract in the West, however, is not the water service contract, but a so-called 9(d) fixed repayment contract. Such contracts are written pursuant to law which requires that the water users pay annual operation and maintenance costs in full every year in advance of water delivery for the year. The contracts, in addition to requiring advance payment of estimated O&M costs, carry fixed obligations for repayment of capital costs of construction within specified periods of time.

With regard to new water service contracts, the required procedure for about 15 years has been to separate the water service charge into its components, providing a fixed amount for repayment of capital cost and providing for adjustment of the O&M component to cover those costs currently. Thus, present policies bring the two types of contracts into reasonable conformance, with the principal difference being that the 9(d) contracts usually relate specifically to the capital costs of storage capacity in a Federal reservoir together with actual costs of a conveyance and distribution system, while the water service contracts, or so-called 9(e) contracts, relate to delivery of water on a rate per acre-foot basis.

The President's message also directs the Secretary to adopt procedures that will assure recovery of more appropriate shares of capital cost. This process has been underway for a considerable time, as some of you know. Anyone here from the San Felipe Project can testify to that fact.

Cost sharing, or more specifically cash contributions by States of a share of project construction costs, is given prominent attention in the White House policy message.

The President directs WRC to prepare rules and regulations or legislation to require that States provide a legally binding commitment to contribute a 10 percent cash share of construction costs associated with vendible outputs (irrigation and commercial power, for example) of water projects, plus 5 percent of the cost of other project purposes. He would make this mandatory on new projects and voluntary on authorized projects. The mandatory aspect would require legislative approval.

The policy message goes on to say that in determining new construction starts, expedited consideration will be given those projects for which the State has voluntarily guaranteed cost sharing contributions.
It will be interesting to see how this works out in South Dakota. The Oahe Unit of the Pick-Sloan Missouri Basin Project in South Dakota, originally authorized in 1944 and reauthorized in 1968, has faced repeated construction delays due to a series of environmental and related issues and lawsuits, even though the Unit has had strong support from the Governor, the legislature, and the Congressional delegation.

Lt. Governor Harvey Wollman, who now is chief executive following Governor Kneip's acceptance of an appointment as U.S. Ambassador to Singapore, has come out with a surprise announcement.

Taking advantage of President Carter's offer of expedited construction start consideration for projects with guaranteed up-front State money, the new governor says he will offer as much as $500,000 in State funds to revive the Oahe Unit.

I wonder if good-faith voluntary cost sharing will turn the tide for the beleaguered Oahe Unit.

Regarding repayment as it applies to municipal and industrial water, the President proposes preparation of a legislative proposal which would allow States the option of requiring conservation pricing for M&I water supplies from Federal projects provided that State revenues in excess of Federal costs would be returned to municipalities or other public water supply entities for use in water conservation or rehabilitation of water supply systems. Congressional approval will be prerequisite to implementation.

You will recall that the four objectives announced by the President indicated his intention to enhance Federal/State cooperation in water management. To accomplish this, the President proposes an expansion and extension of the Federal Grant Program, both for planning and for matching State funds to implement water conservation and technical assistance programs. The latter also will require legislative approval.
To accomplish the enhancement desired in Federal/State cooperation, the President proposes to establish a task force to work with the Governors, to examine water related problems, to help implement the water policy initiatives, and to make appropriate recommendations. Makeup of the task force is to include representatives of Federal, State, and local governments.

Two significant items included in the White House message deal with Federal reserved water rights and Indian water rights. Both are complicated, are of longstanding, and definitely need reconciliation.

Federal reserved water rights doctrine as espoused by some in the Federal establishment has been a far cry from the position that western States would accept. The President's message recognizes this in the paragraph where he directs that Federal agencies utilize a reasonable standard when asserting Federal reserved rights; one which reflects true Federal needs rather than theoretical or hypothetical needs based on the full legal extension of all possible rights. That statement opens the door to negotiated compromise between extreme positions held in the past and offers some hope for a satisfactory settlement of the issue. It is very possible, however, that the issue cannot be resolved by negotiation because of legal positions heretofore established. Therefore, it would be reasonable to assume that final resolution of this issue will require appropriate action by the Congress. Many State water right bills have been introduced in past years but none has been enacted. One of the more recent bills of this type was introduced by your former Senator Kuchel of California.

Concerning Indian water rights, the Winters Doctrine established as a result of litigation in about 1910 recognizes Indian reservation water rights in sufficient quantity to irrigate lands reasonably irrigable. While Federal projects have recognized the Winters Doctrine in reserving water for irrigable, reservation lands, there has been a wide difference of opinion as to what constitutes irrigability. Irrigable area surveys by various agencies under various classification standards and criteria have produced vastly different results in the acreages of irrigable land on Indian reservations.

Some recent demands by Indian tribes, and others in their behalf, have been extreme as compared to the Winters Doctrine as originally interpreted. They would extend Indian water rights to equal the full natural flow of streams passing through or adjacent to reservations to the extent such flows
existed at the time reservations were originally established. This issue also needs reconciliation of extreme views and early resolution.

Quantification of water rights pursuant to an agreed upon formula would be the first choice of alternatives. This may be impossible of attainment, recognizing the longstanding nature of this issue, the complication involved, and the extreme positions which have been taken. Congressional action may well be required before settlements can be reached.

The President's message recognizes that the maintenance and improvement of environmental quality is a matter of continuing national concern. The message states the belief that existing laws and administrative requirements intended to protect wildlife resources, flood plains, wetlands, and archeological sites are not now receiving adequate attention by the Federal agencies. Therefore, the President is directing that Federal agencies comply with the law. Such an admonition should not be necessary. Conforming authorized programs to the authorizing laws is the obligation of all Secretaries, agency heads, and their staffs.

The President's message deals in some detail with Federal/State cooperation regarding instream flows and groundwater problems. The issue related to instream flows is highly complicated because of the multiple functions served by surface water flows in the western river basins, and the relative priority that should be assigned among those functions during wet, normal, and dry years. Nevertheless appropriate officials approaching the issue with objectivity and balance can frequently find acceptable answers during the project planning stages of a multifunctional water resource development project.

Reconciliation of water supply issues involving use of groundwater, however, depends almost wholly upon action by the various States. The need for State groundwater laws to be modernized, strengthened, and correlated with surface water laws, has long been recognized, and several of the western States have done something about it. Others should follow.

In addition to the White House message, less formal but repeated messages from the Department of the Interior say among other things that the Secretary intends to enforce the law as he sees it with respect to acreage limitations and residency. Almost everyone, including the Secretary of the Interior and the President, believes that the 1902 Reclamation law regarding acreage limitations
should be modernized. Need for enlargement of the acreage limit is generally conceded, but the amount of enlargement justified is controversial, because of the numerous interrelated physical, climatic, agronomic, and management variables involved from place to place, from crop to crop, and from time to time.

The law as you know limits delivery of Reclamation project water to no more than 160 acres of irrigable land in the ownership of any one person. The law further provides that irrigable lands in excess of 160 irrigable acres by any one owner shall not receive water from the Federal project unless the owners thereof execute valid recordable contracts with the Secretary for the sale of such lands under terms and conditions satisfactory to the Secretary.

The law left considerable discretion in the Secretary as to the terms of the recordable contracts. Pursuant to that flexibility, the generally prevailing recordable contract terms provide among other things that the excess land will be disposed of by the landowner within a period of ten years following execution of the contract and that failing to dispose of it within that time period, power of attorney will pass to the Secretary who will make disposition of the land in behalf of the landowner. Recordable contracts also prescribe the basis for determining land values for sale purposes eliminating values attributable to the construction of the Federal project.

Viewpoints with respect to modernizing the acreage limitation of Reclamation law vary all the way from an actual reduction in the size limitation to a complete elimination of the limitation. Undoubtedly the wisdom of the Congress will be required in reconciliation of prevailing issues.

A middle course solution is indicated. One such course can be summed up briefly. Where Federal subsidy of a water project is involved, it is proper that updated acreage limitations be applied. Where no subsidy is involved; i.e., where the landowner pays full capital costs assigned to facilities to serve his lands, either lump sum in advance or with interest on such costs, including interest during construction, acreage limitations should not apply. This course applies in essence to the whole category of projects under the Small Reclamation Projects Act of 1956.

Concerning residency, it has been and continues to be a requirement on all public domain lands that have been made available for settlement under a combination of the Homestead and Reclamation laws. Residency requirements in connection with the Homestead Act were lifted after patents were issued.
Similarly, on Reclamation projects residency on private lands has not been required since passage of the 1926 Omnibus Adjustment Act. Until very recently that course has been supported by all concerned. Reinstitution today of an obligation which for 50 years was not considered required by law would impose extreme complication, hardship, and high administrative costs.

This is another issue which needs prompt attention by the Congress.

Many agricultural landowners outside Reclamation projects benefit from federally subsidized programs. Equitability should be an important consideration in reaching a congressionally approved solution.

In summary, ladies and gentlemen, in spite of allegations that we have no national water policy, we in fact do have a water policy. The Congress has created today's water policy by its legislative acts for the past 100 years or more. Today's water policy was generated not in one fell swoop, but as an evolutionary process adjusting with flexibility to changing times and changing needs. Periodically, the Congress has updated the law to catch up with interim changes that may have been authorized on a case by case basis. It is now time for another general update of Reclamation law. The Congress, even with its faults which many people like to dwell upon, is the strong stabilizing influence in our democracy. I have confidence that it will act responsibly and in the national interest.

Looking at the President's water policy message it is considerably watered down from what one might have expected based on political comments from the White House a year and a half ago.

The proposed policy recognizes the benefits of past water resource developments. Perhaps not to the full extent that economic and social benefits have accrued and will continue to accrue for generations to come, but at least the benefit recognition is on the plus side.

The four stated objectives are in the nature of improvement, enhancement, or increased attention to, coordination and cooperation in planning and management of water projects. They emphasize conservation and greater attention to environmental quality as well as the need for better enforcement of the law.

As worded in the message, all objectives are in a comparative context. This, to me, is recognition that all activities referred to in the objectives have been embodied in past and present procedures, and that the future should aim toward further improvement in the areas identified.
Seldom can mortal man devise any far-reaching, long-range course of activities that can stand the test of time without flaws, deficiencies, and oversights being revealed. The necessity to adjust our course in any undertaking, whether it be a moon shot or a water resource development program, is essential.

Your board chairman, Doyle Boen, for example has nursed the Small Reclamation Project Act through a half dozen or more legislative changes from the original Act in order to make it more responsive to needs and more effective in attaining its goals.

The specific reform initiatives of the President, as already discussed in some detail, appear to be directed primarily toward evolutionary means of accomplishment.

The President's study committee met with a wide range of experienced, grass-roots, water experts in the field. You people and your counterparts throughout the West emphatically and repeatedly laid out the facts, evidently with considerable success.

But this is not the time to relax. Congressional action is still in the future. That is where authorities, obligations, and policy are finally established. Be alert to what goes on in the nerve center of our Nation, continue to be vocal in stating your position. No one knows more about needs and consequences in the water field than you folks, collectively.

Also keep alert to what is taking place in the Department. Reversal of legal opinions and administrative actions that have prevailed for 50 years, in the case of residency for example, could adversely affect individuals, irrigation districts, and established local and regional economies in virtually every Reclamation project area.

The law relating to residency requirements either applies currently or does not apply. If it does apply, the administrators have no choice but to enforce it in full and intact. In other words, administrative rules and regulations cannot properly be adopted that deviate from the law itself or that carry out the law only in part. If the law does not apply, then the administrative branch cannot make law on its own.

The residency issue, in my opinion, must be settled by the Congress and soon. Action is needed this year, whether or not more comprehensive water reform proposals are acted upon.
In conclusion, water policy has been developed and established by the Congress in an evolutionary process. This has permitted flexibility to meet changing needs in tune with changing times. Periodic updating of water law is desirable, in fact essential in a dynamic society. Evidence would indicate that Presidential proposals are recognizing pertinent facts in the water field and also that they are recognizing the fundamental role of the Congress in this vital field.

As I have already said, it is too early to relax. Continue to hang in there, pulling for what you know to be sound and basic in the water field for the welfare of society today, as well as in the longrun future.

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