11
Water Law, policies, and Politics: Institutions for Decision Making

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A Decision Is Made

The application of the water resources of the northern great plains to the task of developing the area's energy potential must be preceded by many decisions. Many individuals and public and private organizations must resolve conflicts, undertake actions, make choices, give approvals. The institutional framework for these decisions includes not only the organizational structure of the bodies that make them but also the law that guides and shapes them.

Perhaps the best lead-in to the topic is to tell of a fairly recent decision and examine its framework and other attributes. There is a great deal of coal in the sparsely populated northeastern quadrant of Wyoming. There is a great need for electric power in the heavily populated and industrialized area of southeast Texas. Early this year, Texas Eastern Transmission Corporation sought a decision that would permit it to appropriate 20,000 acre-feet of water per year from the Little Bighorn River in northern Wyoming and use it in a coal slurry pipeline to transport 250,000,000 tons of Wyoming coal to Houston, Texas, there to be used in several steamelectric power generation plants. The Little Bighorn is a small stream rising in the Big Horn National Forest. It flows northward through a small canyon to the Montana state line and is then joined by several other tributaries as it flows fifty miles through the Crow Indian Reservation to the Custer Battlefield National Monument. No irrigable lands lie alongside it in Wyoming, and no Wyoming appropriator takes its waters. When interest in

coal mining spurred a search for water, the TR 12 Corporation filed for and obtained a permit to appropriate the water for coal development. The permit calls for intercepting part of the water almost at the state line and piping it to an offstream reservoir with a capacity of 42,580 acre-feet. Texas Eastern acquired this permit, but under the statutes of Wyoming, the legislature must approve any taking of water out of the state for use as a medium for transportation of mineral products to another state.[1] When Texas Eastern sought this permission, the legislature found too many variables and unanswered questions to allow it to act decisively, so it gave a conditional approval to be effective if the governor of Wyoming was able to work out a satisfactory contract with the company within 90 days.[2] The contract was to require Texas Eastern to undertake a feasibility study and, upon a favorable result, to give the state three options. Under the first, Texas Eastern would construct the project and the state would buy all the water in excess of 20,000 acre-feet per year for a share of costs and sell it to irrigation, municipal, and industrial users within Wyoming. Under the second option the state itself would construct the project, finance it with revenue bonds, sell Texas Eastern a firm supply of 20,000 acre-feet per annum, and sell the balance as it pleased. Under the third option Texas Eastern would finance and construct the project. No industrial use other than slurry would be made by Texas Eastern, but the state, municipalities, and water districts would have an opportunity to buy into the water pipeline at the incremental cost of enlarging it beyond 20,000 acre-foot capacity for these additional uses. Under all the options, Texas Eastern was to promise that if it did not build the coal slurry preparation plant in Wyoming it would still pay to state and local entities a sum equivalent to property taxes on the plant. Under the first and third options, the project and related water rights would be conveyed to the state without cost after the use of water for slurry pipeline transportation was permanently terminated.

The governor and Texas Eastern entered into negotiations. The governor held public hearings. He got a lot of advice—the project was vociferously opposed by several environmental groups, the railroads, the railroad brotherhoods and other labor

unions, the State Democratic Central committee, the Crow Indian Nation, and the state of Montana.

After eighty-five days the governor threw up his hands and refused to sign any contract. The legislature had put the cart before the horse, he said, and many questions ought to be resolved before, not after, the state was bound by the contract. Would it be in the best interests of the state of Wyoming "to export its precious water resources to Texas"? How much water would be available to the state after the pipeline received its 20,000 acre-feet? What were the social, economic, and environmental effects of the project? What were the chances of agreeing with the Indians?[3] He did not indicate who was to make these studies. While there is still a chance that Texas Eastern might get its water at some future date, the present decision denied permission.

This decision is unique, the process by which it was reached is most unusual. I have been teaching water law for a third of a century. Most of my students would not recognize these proceedings as having any relations to what they have been taught. This is not water law as we have known it in the past. The governor and the legislature are newcomers to the decision-making process. A short review of the traditional institutions, policies, and processes will help to identify and emphasize the change.

Traditional Institutions and Policies

Initiating Water Uses

The law of prior appropriation is said to be a western invention adapted to pioneer needs.[4] If Texas Eastern's project had occurred in the early days of western settlement, the company merely would have physically seized the water, and as the "first taker" (to translate the Latinate English into Anglo-Saxon) it would have acquired a property right to continue its use, a right that would be superior to the rights of "later takers." The right was self-initiated. If the company's hydrologist found the amount of water needed in the stream in the average year and its civil engineer found a dam site with sufficient capacity to even out the lean years and the fat years, the company would have been the only decision maker involved. True, had a neigh-

bor challenged it in court the appropriation would have had to meet one policy: it would have had to stand the test of "beneficial use." Did it fulfill some need or desire of man; did it produce wealth?[6] There seems little doubt that coal transportation could qualify. The pioneers placed no limit on the place of use, and the fact that the water would be used out of its valley and would cross a state line was of no moment.'

This era of self-created rights gave way to a second stage in the growth of the law of prior appropriation. Administrative law was superimposed upon property rights. In 1889 the territorial engineer of Wyoming, Elwood Mead, persuaded the pioneer framers of the state constitution to adopt state ownership of water as the basic rule.[8] In the following year the first session of the Wyoming legislature implemented this concept with a permit system for initiating appropriations.[9] No longer were rights to be created *ministerio legis,* no longer solely at the will of the appropriator. Now the state had to concur in the decision. The appropriator had to apply for a permit to construct the works and use the water. A government agency was to decide whether there was unappropriated water for the use, dole out the share of water needed for the use, and oversee the construction of the works. Most important, this 1890 legislation declared a new policy: the state agency was to withhold the grant of a property right, to deny the application, if to grant the permit would be "contrary to the public interest."[10]

Although there are not many cases that call the public interest limitation into play, the courts have made it into a very important policy under which water use has been controlled by employing surprisingly modern and sophisticated economic concepts. As early as 1910 the New Mexico territorial court held that it incorporated the economist's maximization or efficiency principle and required the water officials to choose from competing projects the one that would produce the greatest net benefits."[11] In 1915 and 1929, social costs were recognized as grounds for denying permits that would have very bad external effects on others.[12] In 1943 the Utah Supreme Court employed the notion of opportunity costs in preventing a single-purpose appropriation from cutting the heart out of a great multipurpose project.[13] In none of these cases did the judges use the

economic terms, but they had no difficulty in recognizing and applying the economic concepts. In recent years legislators have embroidered on these themes; the Alaska and Washington water appropriation statutes incorporate express cost-benefit formulas,[14] and several states identify specific recreational, fish, wildlife, and environmental values that must be considered or guarded.

Very recently it has been found that these ad hoc procedures do not exhaust the public interest concept. The state need not wait until activity in the private sector initiates an application for an appropriation. A modern water planning process can be integrated with the permit procedure and provide policy guidelines for determining the public interest. The proposed project may be a needed unit in the plan, but the plan can assist water officials in disposing of an individual case even though the project was not specifically contemplated by the plan. The plan can provide standards for construction of works, tests for waste and inefficient use, and narrow the range of acceptable uses. The plan's description of the resource, identification of possible uses and alternatives, analyses of conflicts and problems may reveal the externalities of a particular project, identify the choices that have to be made, and indicate the proper choice.[15] A recent case in North Dakota makes this procedure mandatory. A group called the United Plainsmen Association sought an injunction that would prevent the state water officials from issuing future water permits for coal-related power and energy production until a comprehensive plan for conservation and development of the state's natural resources was undertaken. The North Dakota Supreme Court upheld this claim and stated that since the water officials had to act in accordance with the public trust in which the state holds the water resources, planning by appropriate state agencies and officers was an essential and necessary part of the allocation of public water.[16]

The permit system and its public interest limitation was adopted in sixteen of the continental western states. Colorado still maintains common-law self-created appropriations with an overlay of judicial control.'' Montana had a somewhat similar system until **1973,** when it adopted a permit system ***without*** the public interest feature." In these states the same results

could be reached by expansion of the beneficial use concept. The cost-benefit formula could be incorporated, since if a new use were to cause more harm than good it could hardly be said to be beneficial.[19] The maximization principle could be found in a slight extension of the notion that beneficial use was to some extent a relative concept.[20] One use could be denied the beneficial tag if a competing use was found to be more beneficial. Cases like this have seldom if ever arisen, just as there have been very few cases construing "public interest." This is for a very good reason—practically all the farmers, miners, power companies, manufacturers, and cities who put to use the waters of the West had a practical, wealth-producing, "beneficial" use in mind, all advanced the development of the resources of the country, each was an increment toward maximization of the welfare of the people, the states, and the nation, and hence each was in the public interest. There was very little direct competition for water in the sense that simultaneous demands were made on the streams, and there was little need to allow some projects and deny others. The law of priority settled each right in turn. If the new user was left an insufficient or insecure supply, he could seek another source or store seasonal floods. The waters were appropriated as the land was settled, the developers made the decision, and state concurrence was seldom withheld. Today the land is quite well settled, the pioneer notion that all development is good is fading, and available waters have so dwindled that the state takes a more active interest in seeing that what little remains is really put to its highest and best use.

Reallocation of Water

As each appropriator was awarded a water right, the supply soon dwindled and newcomers found no water available for them, at least no inexpensive, easily obtainable water. Obviously the best uses of water did not always arise first and get the earliest rights, so it became necessary to reallocate the water. Since farming had taken the largest share, this meant that the use and place of use had to be changed from irrigation, often of low-value crops, to industrial and municipal uses that would produce greater wealth or command greater income.

The institutions that evolved for reallocating water were the transferable property right and the market. The decision makers were the parties to the transaction. In theory, the process was much like the reallocation of rights in land. A farmer has a fee simple title to his land, running "to him and his heirs forever," but when an encroaching city makes the land more valuable for residences than for crops, a subdivider, who will get greater value from the land than the farmer, will offer the farmer a price that will compensate him for his lost farm income and give him enough profit to induce him to sell. Although the "land right" lasts forever, the land use is flexible and can meet new and changing demands.

The process is much the same for water. A permanent, stable water right guarantees the farmer irrigation water, but if the water would be more productive in a slurry pipeline or synthetic fuel plant, a transfer of the water to the new use can be made by a sale of the right.[21] Some think that flexibility requires intervention of the state, but it can be achieved without sacrificing security. The property right insures that the gainers pay the losers; it does not prevent the reallocation of the resource.[22]

The state takes a hand in making a decision to reallocate water just as it does in the original allocation. The rule allowing an appropriator to sell his water has always been subject to the policy limitation that the transfer must not injure other appropriators. Most irrigation is quite inefficient in the engineering sense. Only a portion of the water diverted and applied to the field evaporates or is consumed by plants; the remainder seeps back into the stream where it becomes available downstream. Since the water can be used and reused, many irrigators have rights to the same molecules of water. The water right is usually phrased in terms of the diversion of a specific quantity of water, so if an irrigator sells his right to a coal developer for use out of the watershed, he will have sold some molecules of water that belong to his downstream neighbor. To avoid this type of social cost, the rule was early developed that the transferee can take only the amount consumed by the original use, not the amount diverted from the stream. The early cases announcing this rule were often decided after the fact and the sale was made. Then

if injury occurred a lawsuit was begun and the transfer was blocked or the amount reduced.[23] Nowadays all states have a procedure for making an advanced determination of whether or not sufficient injury will occur to prevent the sale, whether conditions can be imposed upon the new user that will avoid the harm, and whether the amount of water that can be transferred should be reduced.[24]

In practical fact this transfer mechanism has not always worked well. Proceedings to approve the change are cumbersome and time-consuming. The parties cannot be sure at the time of striking the bargain just what is being sold and what will be received. Defects in water titles, poor descriptions, the possibilities of abandonment and forfeiture, and other uncertainties and unknowns impede the process.[25] Yet it seems to have worked well enough. Cities have been able to expand, industry has moved west, and there are no signs that the growth of the West has been impeded because all the water is being used for irrigation.

The Politicization of Water Law

When the "coal rush" to the northern high plains started a few years ago the people seemed to lose faith in these long-used economic, judicial, and administrative mechanisms for allocating and reallocating water. The first changes came in the laws for initiating projects.

Slurry pipelines attracted particularly vigorous opposition. Some water was apparently available for them. Water for the iron horses of the first transcontinental railways had been one of the earliest uses in these states, so the transportation of coal sounded very much like a beneficial use. Cost-benefit ratios and net benefit comparisons seemed undoubtedly favorable to the pipelines. But the public reaction to slurry lines was very negative. They would take some of the last unappropriated water out of the state, and this ran counter to local claims that even unappropriated water was "our water," not to be taken away by strangers. This feeling had long ago resulted in some states placing restrictions on the appropriation of water within the state for use outside it.[26] There were also some fears that

the exporting states would be stripped of their coal resources without the production of much local wealth. In addition, these rural states had long had one strongly unionized industry, the railroads, and their present and future prosperity could be affected if coal were transported in pipelines instead of in railroad cars.

The matter was first brought to a head in Wyoming by a coal company's applications for a large number of wells into the state's largest untapped groundwater aquifer. The ultimate use was for coal development but was otherwise unspecified; steam power, synthetic fuel plants, or slurry lines were possibilities. People in the small town of Buffalo, Wyoming, saw their way of life threatened by overwhelming numbers of miners and construction workers; surrounding ranchers saw the last unappropriated water gobbled up for a new development that also threatened parts of their rangeland. Their representative in the legislature was successful in securing passage of a bill that slapped a one-year moratorium on the approval of applications to use more than 6,000 acre-feet per year of groundwater for industrial purposes and called for a study of underground water use.[27] This became combined with another bill that extended to groundwater the long-standing prohibition against the appropriation, storage, or diversion of stream water for use outside the state without prior approval of the legislature,[28] and another section that specifically prohibited the use of surface or groundwater as a medium of transportation of mineral, chemical, or other products to another state.[29] In the same statute, however, the legislature gave its approval in advance to the appropriation by Energy Transportation Systems Incorporated of 20,000 acre-feet of groundwater for use in a slurry pipeline to transport coal to a large steam electric plant in Little Rock, Arkansas.[30]

In the following year, Montana was faced with the same problem. Knowing that prohibitions on export might run into constitutional challenge as invalid restraints on interstate commerce,[31] the Montana legislature tried another tack, adding the following language to their statutory definition of beneficial use: "A use of water for slurry to export coal from Montana is not a beneficial use. Slurry is a mixture of water and insoluble matter."[32] Since water can only be appropriated for beneficial

use, this blunt instrument approach means that in Montana no appropriation for slurry for export can be made.

South Dakota was more subtle. Its legislature required the Water Rights Commission to submit all applications to appropriate more than 10,000 acre-feet per year to the legislature for approval, and denied powers of eminent domain to any common carrier that had not obtained such prior approval.[33]

Sales and transfers of water rights have been subject to politicization for a long time. The people of Wyoming have long thought unseemly the sight of appropriators bartering water and enriching themselves with the state's property. In 1909 they attempted to tie the water everlastingly to the land by the "no change statute," a much-criticized law that seemed to run counter to economic sense. It laid down the rule that water rights could not be detached from the land, place, or purpose for which they were acquired without loss of priority.[34] Recognizing, however, that cities and the Union Pacific Railroad could not take their place at the foot of the priority list on overappropriated streams, the original statute allowed water to be condemned to supply preferred domestic and transportation purposes. Over the years the legislature made many other exceptions, each time yielding to practical needs and economic pressures, almost like a court or administrative agency reacting to particular problems that needed solutions.[35] First it freed supplemental stored water from the operation of the statute, then it allowed transfers if irrigated land became seeped, salted, or flooded by a Bureau of Reclamation dam. Then water was allowed for new demands: steam power plants, development of a large iron ore deposit, highway construction, fish hatcheries and public fishing areas. In 1973 the legislature adopted a statute that at first was thought to replace this "Swiss cheese law" whose exceptions had swallowed the rule, but then it was the courts and the administrators who put on the brakes in coal-related cases and took a narrow and restricted view of the new statute, severely limiting the transferability of water to the coal industry.[36]

Montana had always allowed the sale and transfer of water rights, but in one of the state's first reactions to the "coal rush" her legislature placed a restriction on an appropriator of more

than fifteen cubic feet per second, prohibiting the change of the purpose and use of such a right from agricultural use to industrial use.[37] This avoids large transfers to the coal interests, but it could apparently be circumvented by aggregating a number of small ones.

South Dakota adopted transfer restrictions even before Wyoming did, and provided in its 1907 water code that all water use for irrigation should remain appurtenant to the land, to be severed only if it became impracticable to use the water beneficially or economically for irrigation.[38] Perhaps because South Dakota lies closer to the arid-humid boundary, this remained unchallenged until 1978, and then the only exception added by the legislature would allow the transfer or lease of water only for municipal water supply,[39] an exception that had been built into the 1909 Wyoming law. However, as in Wyoming, the statutory rigidity had no application to rights vested prior to the date of the statute, and this left the older and most desirable rights available for sale.[40]

To the extent that resistance to transfer of water rights has been increased or revised by the coal boom, it appears to be inspired not so much by anticoal resentment as by proirrigation sentiment. The people seem unwilling to switch from "irrigation law" to "energy law." Their attitude seems to be that the farmer and rancher should not have to sacrifice their water: "Let the coal companies find their own water, not take ours."

Politics and Policies

How do such political decisions measure up to the traditional policy standard of the "public interest"? It may seem anomalous to ask, for who is better equipped to declare the public interest of a state than the legislature of that state? Yet if we turn to the specifics of the public interest as worked out in the water cases, we can ask whether these political decisions meet the cost-benefit test, whether they produce the greatest net benefits from the use of the resource. We may lack data for an exact answer, but we may be able to make an educated guess.

We have seen that water administrators might find that the public interest requires the denial of a proposed project where a

better future use of the water is foreseeable. Was that the case in regard to the Texas Eastern proposal? Actually the governor ducked the decision because, he said, he did not know what need the state would have for the water. But the state has not yet had any need of the Little Bighorn's water, and no appropriation of it has ever been made. Given the very expensive means of diversion (pumps, pipeline, and offstream reservoir), it seems unlikely that agricultural users could pay for the project. Although the corporation would have gotten the lion's share of the firm supply, the state would have some agricultural water at very little cost, while now without the project it gets nothing, Texas Eastern gets nothing, and no coal is developed. Although the sincerity of the governor's doubts as to consequences of his desire for more information are not questioned, he did put a little political claptrap into his major question: "Is it in the best interests of the state of Wyoming to export its precious water resources to Texas?"[41] And yet now all the water, both the Wyoming share and the Texas share, leaves the state, exported to Montana by gravity via the bed of the Little Bighorn River, and it is likely to continue to go that way for a very long time.

We noted that the public interest also requires consideration of alternatives. One very possible alternative to the Texas Eastern slurry pipeline can be foreseen. The water could be used within the state for a coal-fired steam power plant or for a synthetic fuel plant, either of which would have a much more devastating effect on Wyoming's environment and its people's life-style than the pipeline, and either of which would prevent Wyoming's cities and farms from using the water just as effectively as if it had been shipped to Texas. Yet were the TR 12 Corporation now to turn to such a project, the state would have no political handle since the permit has already been issued.

As for the institutional question, if the state engineer had had the question of the public interest before him and there had been no necessity of seeking legislative approval for the export, would he have issued the permit for the slurry pipeline and combined state use? It seems clear he would have, since the statute giving Texas Eastern approval to take the water out of the state (conditioned on the governor signing a contract) recites that it was enacted upon the advice of the state engineer.[42]

Problems of this nature might arise also in South Dakota. The compilers of the South Dakota statute books note that after the legislature took over control of all large appropriations, the 1977 and 1978 sessions of the legislature passed resolutions approving fourteen permits for the appropriation of more than 10,000 acre-feet per year. Four of these have gone to individuals, three to cities, and the rest to irrigation projects.[43] Fine. But when will the legislature refuse its approval? What good project will be rejected because it brings up some old conflict, pits one area of the state against another, or offends the labor unions? What unsound project may be approved because of log rolling or pork barrel politics?[44] To move to Montana, what good, environmentally sound projects for use of Montana coal have been foregone because its absolutist laws barred all, the good and the bad? How much good growth and better use of water has been blocked by Wyoming's and South Dakota's antagonisms to sale and transfer of water rights?

We may also ask whether the political arena is a good mechanism for giving us the right answers. One great difference between a decision made by an administrative agency and one made by a legislature or elected chief executive lies in the type sf institutional constraints upon the decision maker. The agency is bound by law to apply statutory standards, while the legislature or governor is not. The agency must act on substantial evidence;[45] the others may react to political pressures.

Another difference between administrative and political decisions lies in the relative inflexibility of the legislative process. Decisions in individual cases would seem very difficult under absolutist statutes like Montana's that foreclose all pipelines, all large transfers. While a company with what it feels is a very good proposal could nevertheless go to the legislature and ask for repeal or amendment of the law, surely this is a more difficult process than asking for legislative approval under a prior law that prescribes that procedure. And the latter is infinitely more difficult than the more or less routine application for administrative approval of a permit or transfer.

Still another difficulty the legislature may face is the handling of complicated technical facts. When the Wyoming legislature gave its approval to the use of groundwater for the ESTI pipe-

line, it inserted some very specific physical and engineering requirements regarding the depth to which the wells were to be drilled and the manner of their construction as conditions in the permits,[46] matters that would be very difficult to correct if found inconsistent with physical facts and matters that would be far better left to administrative expertise.

State or Federal Decisions?

Let me make it clear that I do not deny to the legislatures and elected leaders of the states the right and the duty to fix policy, to order priorities, to make the ultimate determination of what is in the public interest. They may legitimately control development of mineral and water resources, prefer one type of development over another, choose to foster full employment for the state's labor force, try to preserve a traditional way of life and a congenial environment. My objection is to the attempts to reach these objectives by the misuse of water law, by distorting water law into a land use regulating tool.

I have a warning for the politicizers, the people who seek to use water law to prevent coal development in order to preserve the great open spaces and the clear air of the big sky and in order to avoid population growth—the flooding of towns with construction workers and miners, who will compete for the deer, the antelope, and the trout. My warning is, don't bust the monkey-wrench. An old friend of mine, a great law teacher now retired, used to illustrate his functional approach to law by saying that the law was like a box of tools. In the study of prior decisions, law students and law professors are prone to criticize judges for bad logic or poor choice of doctrine, even though the right result may have been reached. The old dean would point out, however, that the judge had a job to do, that he had to drive a nail, and if he picked up the monkey-wrench instead of the hammer, what difference did it make? The nail got driven. There are, however, some dangers. You may jimmy the monkey-wrench so that it won't work very well when you want to tighten a nut.

The states have been very jealous of their water laws and very resentful of federal encroachment into this area. Yet when

they deny water to a coal slurry pipeline they may be inviting exactly the federal intervention they fear. There is a real danger that the Congress will simply override their laws, that the federal government will supersede state water law with federal project law. I do not think that Congress will do what the states fear most and enact a national water law that would supplant the state's prior appropriation system. I think it highly unlikely that even the energy crisis could prevail over the united and concentrated opposition that the western states could mount against that threat. What is likely, however, is a federal project that would solve the pipeline company's problem by supplying water to it with complete disregard for state water law, state water policy, state coal development policy, and state land use plans.

We have seen that a state's legislators may, in determining the state's "public interest," make a decision that in spite of slurry pipeline's favorable cost-benefit ratio, in spite of the fact that using 20,000 acre-feet of water to move 250 million tons of coal would produce far more wealth than its use to grow more hay for cattle or crops for food—they still do not want the coal development, and they still want to keep their water within the state. They have therefore taken these decisions out of the hands of administrative agencies, and they do not want a bureaucrat to tell them that the public interest is economic efficiency and nothing else. But far away in Washington there are bureaucrats who take a broader view, who see a real need for coal in Houston, Texas, and in the Midwest, and who believe that slurry pipelines offer coal transportation on a better and cheaper basis than do the railroads. Rumors have come to me of recent statements by two highly placed federal officials in the Department of the Interior and the Department of Energy that if the states do not take the lead the federal government will step in. For instance, the federal government might solve Texas Eastern's problem in one of two ways. Wyoming has unappropriated water in the "big" Bighorn River, stored behind the federal government's Yellowtail Dam, which is located in Montana but backs water up far into Wyoming. This river is separated from the coal fields by the Big Horn Mountains, but one possible federal project is a water pipeline from Hardin, Montana,

around the northern end of the Big Horns back into Wyoming near Gillette. If Congress authorized this project, the United States could take a part of Wyoming's share of the water stored in Yellowtail, bring it back into Wyoming and sell it to coal slurry companies without Wyoming's by-your-leave.[47] A possibly better pipeline project could take water from Oahe Reservoir in South Dakota and pump it into Wyoming, there to be used to transport coal to any desired destination. Another possibility is that Congress will pass a slurry pipeline right-of-way bill. A federally authorized utility would undoubtedly have the power to condemn not only the land for the pipeline but also the water to make it work.[48] I think there is no way that a state can deny to a federal instrumentality the water needed to accomplish the federal purpose.[49]

Another warning I have is that the use or misuse of water to control coal development may not work. The monkey-wrench may not drive the nail at all. The states' attempts to block slurry pipelines may fail, even without federal intervention, because such state laws may be unconstitutional.

The Constitution of the United States gives Congress the power to regulate commerce among the several states,'' and state laws that unduly burden interstate commerce are not allowed to stand. It is beyond question that a state could not prohibit the export of the coal—states have tried this with natural gas and failed. West Virginia once had a law that tried to give its citizens a preference in the purchase and use of gas, but the Supreme Court struck the statute down.[51] Oklahoma tried to do it by indirection, by denying the power of eminent domain to pipelines that took "its" gas away. In the Supreme Court the state argued that it might reserve its resources for its own citizens. Said the Court: "The results of the contention repel its acceptance. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle?"[52] Is water different? In 1908, the Supreme Court ruled that New Jersey might prevent the Hudson County Water Company from impairing the state's resources by exporting and selling New Jersey's fresh water to New York City,[53] but a more recent case

has cast doubt upon the value of this as a precedent. When the City of Altus, Oklahoma, bought the groundwater rights under a Texas farm, the Texas legislature immediately passed a law prohibiting the withdrawal of Texas groundwater for transportation out of the state without the authority and approval of the Texas legislature. A lower federal court held this to be a burden on interstate commerce, governed by the natural gas cases rather than the New Jersey water case.[54]

The Supreme Court affirmed without written opinion, leaving the matter somewhat hazy. It could possibly be argued that since the states claim ownership of water and they can prefer one use over another within the state, similar public regulation of interstate use might sustain the statutes.[55] The United States, however, is a great nation in large part because it has had free trade over such a large, rich, and diversified area without tariffs, embargoes, or restrictions. I think it clear that a state could not keep its coal for the sole use of its citizens. I don't think it can keep its water, and I am sure that it cannot keep its coal by denying water for coal transportation.

South Dakota adds to its statute a loss of the power of eminent domain, so that a slurry pipeline might be blocked by landowners, but this is the tactic held unconstitutional in the West Virginia natural gas case. Montana's cute trick—that use of water for coal slurry export is not a beneficial use—would still allow slurry for intrastate transportation and if the Supreme Court of the United States were to find the Wyoming statute unconstitutional, I doubt that the Montana statute would fare any better. So we may find that the ultimate decisions on slurry pipelines come not from the legislatures and governors of the states, but from the federal courts.[56]

If these statutes are struck down the states have little to fall back on. In a confrontation that pits a state public interest against a national energy policy, the state is bound to come out second best. On the other hand, a real effort at planning for coal development, avoiding conflicts, easing the transition into an industrial age, and ameliorating the impact on people and the environment could find a responsive federal ear. The national government may have supreme powers, but it seldom fails to take into account the urgent

needs, the earnest plans, and the sincere desires of the states and the local people.

The Need for Integrated Policies

The burden of this paper has been that the high plains states have been using water law to implement a coal development policy with some danger to both the law and the policy. The real questions addressed by the legislators are not concerned with water use but with the social and environmental effects of the new coal age. Do the people want coal mines, coal towns, slurry pipelines, steam power plants, power lines, gasification, and synthetic fuel plants? I think they fear them. The people are afraid they cannot keep their rural, semipioneer life-style, their Marlboro Country environment. Because water is necessary to all forms of coal development, they have seized upon water law as a means of control, the method of preventing undesirable effects.

My message is that water law is a poor tool with which to do this job. Water law and water policy are not enough, they will not prevent the undesired effects, they cannot effectively control and guide development. The need is for growth controls, boom town control, rural zoning, and land use planning. The desire is to save the streams, the aquifers, and the clean air for the wide open spaces and the big sky. What is needed is effective and certain mine land reclamation measures, aid to impacted towns, plant-siting laws and procedures that can insure the minimum of disruption, the mitigation of harmful effects, and the repair of spillover dangers. Most of all, the states need an overall policy: one integrated policy for energy, land use, and water. A restrictive, obstructive water policy alone will not do the job. Effective tools must be forged to implement the integrated policy. The states need to find more direct and better ways to deal with coal development."

If we were to take the politics out of water law, would that mean that we take the politics out of coal development? I hope not; I think not. The policy must be political, it must reflect the wishes of the housewives, workers, business men and women, farmers, ranchers, and all the people who make up the popula-

tion of the state. It must of course be a part of a national policy.

When water is needed to transport or utilize coal, water policy and water law must be consistent with the coal development policy. I suggest that when decisions have been made for coal plants and pipelines, power plants and synfuel plants—with all the land use, environmental, and social safeguards taken into account—that a good water policy would be one that would give a framework for decision making that looked something like this:

1. When unappropriated water is sought by the private sector for coal-related use, state administrative controls should insure that the appropriation will be in the public interest by employing cost-benefit analysis, environmental protections, and consideration of alternatives; and
2. When the coal industry needs water that is already being put to use, the industry should find a willing seller and buy the water right at a negotiated price, subject to administrative controls to prevent harmful spillovers and externalities that affect persons not privy to the transaction.

This is the water law we used to have, and it is the policy we should return to.

Notes

1. Wyo. Stat. Sec. 41-3-115.

2. Wyo. Stat. Sec. 41-2-301.

3. Press release, State of Wyoming, Governor's Office, May 18, 1979. For a fuller account, see Myers, "Texas Pipe Dream," *Wyoming News*, vol. 4, no. 5 (July 1979), p. 29.

4. Recognition of priority of right is also widespread throughout the world. See Trelease, "New Water Legislation, Drafting for Development, Efficient Allocation and Environmental Protection," 12 *Land & Water L. Rev.* 385 (1977).

5. Irwin v. Phillips, 5 Cal. 140 (1855).

6. Trelease, "The Concept of Beneficial Use in the Law of Surface

Streams," 12 *Wyo. L. J.* 1 (1957).

7. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882); Willey v. Decker, 11 Wyo. 496, 73 P. 210 (1903).

8. Wyo. Const. Art. 8, Sec. 1 (1889).

9. Wyo. Stat. Sec. 41-4-501.

10. Wyo. Const. Art. 8, Sec. 3 (1889); Wyo. Stat. Sec. 41-4-503.

11. Young & Norton v. Hinderlider, 13 N.M. 666, 110 P. 1045 (1910).

12. Big Horn Power Co. v. State, 23 Wyo. 271, 148 P. 1110 (1915); in re Martha Lake Water Co., 152 Wash. 53,277 P. 382 (1929).

13. Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943).

14. Alaska Stat. Sec. 46.5.080; Wash. Rev. Code Sec. 90.54.020(2).

15. See Wyo. Stat. 41-2-107 to 41-2-110; Trelease, "Recommendations for Water Resources Planning and Administration, A Report to the State of Alaska," 16, 18 (1977).

16. United Plainsmen Association v. North Dakota State Water Conservation Board, 247 N.W.2d 457 (N.D. 1976).

17. See Cache La Poudre Water User's Association v. Glacier View Meadows, 550 P.2d 288 (Colo. 1976).

18. Mont. Code Secs. 85-2-301 to 85-2-310.

19. See Idaho Department of Parks v. Idaho Department of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974), opinion of McQuade, J.

20. Trelease, supra n.6.

21. 1 Hutchins, Water Rights Law in the Nineteen Western States 633 (1971).

22. Trelease, "The Model Water Code, the Wise Administration, and the Goddam Bureaucrat," 14 *Nat. Resources* J. (1974).

23. 1 Hutchins, supra, note 21, 631.

24. Ibid., 641–644.

25. Trelease, "The Changing Water Market for Energy Production," 5 J. *Contemp.* L. 85 (1978).

26. 1 Hutchins, supra, note 21, 389–396.

27. Wyo. Sess. L. 1974 Ch. 25 Sec. 3. No new legislation resulted from this study, and the moratorium expired.

28. Wyo. Stat. Sec. 41-3-105.

29. Wyo. Stat. Sec. 41-3-115(b).

30. Wyo. Stat. Sec. 41-3-115(d).

31. See text infra at note.

32. Mont. Rev. Code Sec. 85-2-102(2).

33. S. D. Comp. L. Sec. 46-5-20.1.

34. Wyo. Sess. L. 1909 Ch. 68 Sec. 1.

35. Trelease & Lee, "Priority & Progress—Case Studies in the Transfer of Water Rights," 1 *Land & Water L. Rev. 1* (1966), and Trelease, "Trans-

fer of Water Rights, Errata and Addenda," 2 ***Land & Water L. Rev.*** 321 (1967).

36. Basin Electric Power Coop. v. State Board of Control, 578 P.2d 557 (Wyo. 1978); Trelease, supra n.25.

37. Mont. Code Sec. 85-2-402(3).

38. S.D. Comp. L. Sec. 46-5-34.

39. S.D. Comp. L. Sec. 46-5-34.1.

40. Hughes v. Lincoln Land Co., 27 F. Supp. 972 (D. Wyo. 1939); Jewett v. Redwater Irrigating Association, 88 S.D. 390, 220 N.W. 2d 834 (1974).

41. Supra n.3.

42. Wyo. Stat. Sec. 41-2-301(a).

43. S.D. Comp. Laws, Vol. 13, 1978 Pocket Supp., p. 123.

44. Some Wyoming legislators reportedly voted for the ETSI slurry pipeline because Niobara County, site of the proposed installation, needed an increase in its tax base.

45. Bank of America v. State Water Resources Control Board, 42 Cal. App.3d 198, 116 Cal. Rptr. 770 (1974).

46. Wyo. Stat. Sec. 41-3-115(d).

47. Although Yellowtail Dam is a U.S. Bureau of Reclamation project and Section 8 of the Reclamation Act requires conformity to state laws, California v. United States, 438 U.S. 645 (1978) indicates that this does not apply when state law is directly inconsistent with congressional directives.

48. As an aside, there is the possibility that a federal project could be welcomed as a very satisfactory solution to the problem. A water problem, a water shortage, exists when demand exceeds supply. Water law for the most part operates on the demand side of the scale. Typically it puts limits on demand, it tailors rights to fit the supply, it parcels out rights to unappropriated water, it chooses among competitors for water by limiting withdrawals from a deficient supply to the prior appropriators, it reallocates water by allowing the substitution of one user for another if the call on the water resource remains the same. Water projects, on the other hand, are directed at the supply side, they augment the supply, store water for use when needed or bring it from an area of surplus to the place of need. Where the opposition to water for coal is inspired by the fear that irrigation water will be taken off the land and applied to coal uses, a federal project could eliminate the problem and supply the needed water without disruption of existing water rights, state water law or local patterns of water use.

49. Solicitor's Opinion no. M-36914, U.S. Department of the Interior (June 25,1979). Trelease, "Federal-State Relations in Water Law" (National

Water Commission Legal Study No. 5).

50. U.S. Const. Art. III, Sec. 8.

51. Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

52. West v. Kansas Gas Co., 221 U.S. 229 (1910).

53. Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).

54. Altus v. Carr, 255 F. Supp. 828 (1966), Aff'd per curiam, 385 U.S. 35 (1966).

55. '' 'It's Our Water'—Can Wyoming Constitutionally Prevent the *Ex*portation of State Waters?" 10 Land & *Water* L. *Rev.* 119 (1975).

56. The courts are decision-making bodies and may have much to say about these cases in other ways. For instance the quantity of water in the Little Bighorn available for coal development in Wyoming will depend upon a division of that river between Wyoming and Montana, a judicial decision interpreting the Yellowstone River Compact or doctrine of equitable apportionment, and upon a quantification of the reserved rights of the Crow Indian Nation, a purely judicial function.

57. The states do not lack for planning authority, e.g., state water plans, Mont. Code Sec. 85-1-203, S.D. Comp. L. Sec. 46-17A-101, Wyo. Stat. Sec. 41-2-106; land use planning, Wyo. Stat. Sec. 9-19-101; economic planning, S.D. Comp. L. 11-1-101, Wyo. Stat. Sec. 9-3-301; plant siting, Wyo. Stat. 35-12-101; community impact, Mont. Code Secs. 90-6-101, 90-6-201. These have few sanctions and offer few opportunities for negative decisions. They seem to have no relation to these water use restrictions.