The Public Land Law Commission Report and Its Importance to Oregon
PREFACE


BACKGROUND

Major attention in Chapter Eight, “Water Resources,” is devoted to the implied reservation doctrine of federal water rights. The doctrine and the Commission’s recommendations are of major public concern in Oregon where water is so important to the state’s established economy. Without modification and clarification, the implied reservation doctrine poses a threat to all existing water rights even though established in good faith under Oregon law. Other western states are in the same predicament.

Beginning in 1866, when federal policy stressed the disposition of public lands through the Homestead Act, sale and other means, Congress provided that federal land disposals would not carry an accompanying water right. Water on public lands was declared open to use, and rights to use water on property passing from federal ownership were to be obtained under the laws and customs of the states and territories. On land remaining in federal ownership there were then no public land management programs requiring the use of water.

By 1900, the federal government started reserving public lands from disposition for national forests, parks, wildlife refuges, and other purposes. Until the 1950’s water needs on these reserved lands were met through rights granted under state law—the same as those granted individuals, corporations, districts, and municipalities.

In a suit before the Supreme Court, Federal Power Commission v. Oregon (the Pelton Dam Decision), the Supreme Court ruled that the withdrawal or reservation of federal land for specified purposes also reserved rights to use water on such lands, even though water was not mentioned at the time of the reservation. Water right would carry a priority as of the date of the withdrawal of the land. While the limits and application of this new doctrine were uncertain, some federal agencies began to rely on the doctrine in addition to their customary compliance with state law.

In 1963 the Supreme Court in Arizona v. California further strengthened the rights of federal agencies administering reserved lands to sufficient unappropriated water to satisfy the reasonable requirements of these reservations without regard to provisions of state law. There are obvious reasons for concern. Established water rights could be distributed, possibly without compensation. There is a further threat to orderly development of non-federal lands in the future.

The Commission recognized the confusing situation created by the implied reservation doctrine with the sentence, “We recommend legislative action to dispel the uncertainty which the implied reservation doctrine has produced and to provide the basis for cooperative water resources development planning between the federal government and the public land states.”

They followed this recommendation by pointing out advantages of the doctrine to the federal government.

1. As reservation needs develop, uses under it can expand indefinitely without regard to state law requiring that water be put to beneficial use within a reasonable time.

2. Vast land reserves carry priority dates dating back 70 years.

3. The federal government need not pay any compensation for diverted non-federal rights initiated after the date of the land withdrawal.

4. The federal use need not be beneficial under state law.

The Commission also pointed out that there were problems from the federal standpoint. There is some doubt whether any use will be implied other than the use or uses expressly stated at the time of the withdrawal. If there is a change in the purpose of the withdrawal or reservation, the priority date will be the date of the use change. Without litigation or agreement it is not possible to determine what maximum permissible amount of water would be allowed for any given use. It is not clear as to whether or not a reservation right is available for land outside the natural watershed of the river system from which the water is drawn. It has not been determined whether termination of the land withdrawal or reservation terminates the reserved water right.

The comments suggest that the Commission was biased toward water uses on federal lands as compared to non-federal lands.

RECOMMENDATIONS OF COMMISSION

Limitation of Reservation Doctrine

The implied reservation doctrine of water rights of federally reserved land should be clarified and limited by Congress in at least four ways:

a. Amounts of water claimed, both surface and underground, should be formally established.

b. Procedures for testing each claim should be provided.

c. Water requirements for future reservations should be expressly reserved.

d. Compensation should be awarded where interference results with claims valid under state law before the decision in Arizona v. California.

The recommendation might clarify a confusing situation but may not remove a major threat to water resources development facing Oregon’s present and future water users.

The Commission argues that the reservation doctrine should not be abrogated because:

1. In some states important federal uses such as recreation or fish and wildlife are either not recognized under state law or have low priority.

2. In Oregon these and other uses are recognized by law and on some streams have been designated as the paramount use by the State Water Resources Board.

3. The implied reservation doctrine provides the necessary water for certain federal uses and future needs for which state law has not been complied with—to discard the doctrine puts these rights in jeopardy.

There is implication here of a superior right over the use of water on non-federal land. This is not necessarily in the best interest of the public. Irrigation is a good example. Almost insignificant areas of Oregon’s irrigable or irrigated lands remain in federal ownership.

1 (1) Within a reasonable time, federal land agencies must ascertain and give public notice of their projected water requirements for the next forty years and forbid the insertion of a reservation claim for any quantity not included in such a public notice.

This seems a logical recommendation. However, it could be logical to suggest that similar requirements be determined on non-federal lands within the same stream basin or in a location that might be benefitted from the same water. It could be advantageous to all concerned to allocate major water supplies to locations on non-federal land.

2 (2) Establish a procedure for administrative or judicial determination of the reasonableness of the quantity claimed or the validity of the proposed use under present law.

As it now stands, the possible diversion of water to satisfy federal reservation claims places holders of existing rights in jeopardy. Certainly it would be desirable to legally settle any conflict between water demands of present users and federal demands under the reservation doctrine.

The McCarran Act was an attempt to establish this legal machinery. At the time of the Commission report, the Department
of Justice was contending in a case before the U.S. Supreme Court that the McCarran Act permits adjudication by state courts only of rights held under state law and not of federal reserve rights. The case developed as an appeal from Colorado District and State Supreme Court decisions. The Colorado Court issued a notice asking all owners and claimants of water rights on certain streams to "file a statement of claim and appear." The district court's notice was dismissed because a state court had no authority. The Colorado courts ruled otherwise and the case was appealed to the U.S. Supreme Court. In a unanimous decision handed down on March 24, 1971, the Supreme Court ruled that the McCarran amendment gives state courts jurisdiction over the United States to try all of their rights and claims to the use of water including reserved rights. This could be a major step toward dissolving the dilemma of the reservation doctrine.

(3) Provide that procedures for creation of future withdrawals and reservations require as a condition to claims of reserved water rights a statement of prospective water requirements and an expressed reservation of such quantity of unappropriated water.

This recommendation deals with unappropriated water, a rare commodity in many areas. It differs from No. 1 in that it refers to future withdrawals and reservations.

(4) Require compensation to be paid where the utilization of the implied reservation doctrine interferes with uses under water rights vested under state law prior to the 1963 decision in Arizona v. California.

In justifying this recommendation, the Commission apparently assumed that the 1963 Supreme Court decision in Arizona v. California provided an adequate effect "due notice" to state agencies and non-federal water users of the existence of superior federal rights. Other recommendations of the Commission directly questioned these so-called superior rights in quantity which, in effect, questions their validity. It seems unfair to exclude those who have perfected water rights since 1963 from the protective provisions outlined in (4).

As a matter of record, there has been little or no injury to water rights vested under state law without compensation to date. The Reclamation Act of 1902 and the Federal Power Act of 1920 specify that compensation be provided to holders of water rights vested under state law when they are interfered with by projects authorized or licensed under these acts. Other federal agencies are not specifically required to provide compensation. Normally there has been and probably will be compensation, but without a specific requirement there would remain a constant threat to water right holders. The lack of a specific requirement could also be used as a club to force acceptance of inadequate compensation.

A provision for adequate compensation may not always be advantageous to holders of water rights on non-federal lands. The compensation provision could be abused if used as an authorization to construct projects on federal lands with resources bought from existing projects located on non-federal lands.

This application of the compensation principle could react favorably to individual water right holders while inflicting costly reactions on communities of varying magnitude. For example, a utility might receive a highly profitable price for a hydroelectric plant as compensation for water diverted to other uses. The cost of replacing the power could force power rates upward over a wide area. Irrigation farmers might sell their water rights at a highly attractive figure, but dependent communities might be left high and dry without compensation.

The Commission recognized the importance of watershed management in enhancing the yield and quality of water derived from federal lands. It pointed out that 96 percent of the water yielded from federal lands in the 11 western states came from land managed by the Forest Service and National Park Service. In these same 11 states 58 percent of the sediment load in major streams is contributed by public lands mostly managed by the Bureau of Land Management. The B.L.M. estimates that it would cost $298,000,000 to correct the situation, and at the present rate of expenditure, it would require 60 years to achieve the goal.

Rough estimates of expenditures by federal agencies for watershed conservation practices average 2 cents per acre per year. Federal assistance for similar practices on privately owned land also averaged 2 cents per acre per year, but with required matching funds the investment in conservation measures on private land is double that of federal. At the actual spending rate reported by the Forest Service and the National Park Service, it would require 100 to 200 years to apply the conservation needed on lands administered by these two agencies.

Watershed Protection

Congress should require the public land management agencies to submit a comprehensive report describing:

(1) the objectives of current watershed protection and management programs,
(2) the actual practices carried on under these programs, and
(3) the demonstrated effect of such practices on the program objective.

Based on such information Congress should establish specific goals for watershed protection and management, provide for preference among them, and then commit adequate funds to achieve them.

In commenting, the Commission mentioned that the Forest Service had extensive experimental research programs underway to determine means of increasing water yield largely by controlling vegetation and that the Bureau of Land Management has instituted a comprehensive watershed evaluation study. This recommendation apparently had in mind practices applied solely to reduce siltation or improve water yield. Practices were not defined, though the committee indicated that they were "diverse and of unequal application and that beneficial effects were not presently demonstrable in many cases and that the present level of expenditure is inadequate to achieve minimal objectives within a reasonable time."

It would appear that because of the lack of specific recommendations, the Commission is asking Congress to play a technicist's role and decide "where," "what," and "how" watershed management programs should be applied in addition to providing the necessary funds.

Retention and Acquisition

Watershed protection should in specified limited cases be

(1) a reason for retaining lands in federal ownership and
(2) justification for land acquisitions.

The Commission pointed out that one of the reasons for the establishment of the national forests was for the purpose of securing favorable conditions of water flow. The Weeks Act of 1911 authorized acquisition by the Secretary of Agriculture of private forested cutover or denuded lands within the watersheds of navigable streams as in his judgment may be necessary to the regulation of the flow of navigable streams. The Multi-use Sustained Yield Act of 1960 recognized that national forests were to be administered for watershed purposes, but it was not clear as to whether or not the directive was limited to watersheds of navigable streams. The Classification and Multiple Use Act of 1964 applying to the Bureau of Land Management lists watershed protection as one of the management purposes for retaining land in federal ownerships.

In establishing the above policies, Congress assumed that federal ownership would result in better management practices than were likely to be undertaken by private landowners. The Commission recognized that today almost identical watershed protection and management practices are conducted on both public and private lands.

The Commission recommended that critical watershed lands should be retained in federal ownership, but it is unnecessary to retain public land solely for watershed protection if the land is chiefly valuable for a purpose for which we recommend disposal elsewhere.

A further recommendation, "the authority conferred on the Secretary of Agriculture to acquire lands for watershed pro-
tection . . ., should be restricted to critical watershed lands within the exterior boundaries of existing national forests.”

The Commission made no recommendation on the retention or acquisition of critical watershed lands by the Bureau of Land Management or other agencies.

There are critical watershed areas in Oregon and elsewhere, lands that yield little or no return under any presently known system of management. They may be in federal or non-federal ownership. Runoff from these lands may contribute substantially to the deterioration of water quality in a watershed. The application of adequate control measures could greatly exceed the ability of the land to repay. It is possible federal acquisition of these lands by a federal land management agency could well be justified if such agency could apply effective corrective measures.

Recognition of Public Land Values

Congress should require federally authorized water development projects on public lands to be planned and managed to give due regard to other values of the public lands.

The Commission points out that scarcely a project has been proposed to Congress or the Federal Power Commission in recent years which has not generated significant controversy because of its impact upon public land values. Where Congress authorizes particular projects, as with the Bureau of Reclamation and the Corps of Engineers, it should be fully advised of public land impacts.

“Consequently, we recommend that Congress expressly provide that public land impacts be considered by the Bureau of Reclamation and the Corps of Engineers in planning and carrying out their programs, and require that project justifications submitted to Congress by those agencies clearly identify all potential project impacts on other public land values and contain express findings and recommendations with respect to such impacts.” A similar recommendation was made with regard to the Federal Power Commission.

CONCLUSION

The Commission noted that there is general good coordination between “construction agencies” and federal land management agencies and that public land values are further protected by the Fish and Wildlife Coordination Act and the National Environmental Policy Act. In Oregon there is formalized coordination through the Columbia River Basins Commission. It could be argued that the River Basins Commission’s approach is achieving better coordination than would result from the implementation of the recommendations of the Public Land Review Commission.

The Basins Commission approach provides full participation by the states involved resulting in the coordinated use of additional resources. The Basin further provides for coordinate planning for water use on both federal and non-federal land. In Chapter Eight the Public Land Review Commission somehow overlooked the fact that water arising on currently federally owned land flows by and through land that not long ago was in federal ownership.