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The Politics of Water in Arizona

By

DEAN E. MANN

Tucson: The University of Arizona Press. 1963

Pp. xiv, 317, \$6.50

The water resources field is full of writings by lawyers ignorant of economics, by economists who don't understand the law, and by scientists who apparently don't even understand each other, let alone law, politics or economics. The combined forces of these children of darkness have produced a water literature abounding in nonsense. Nothing, for example, is either so common or so disappointing as to pick up a book which talks about the need for "enlightened planning" or "basin-wide development" in terms which make it clear that the author hasn't the foggiest idea about the legal and practical barriers that must be overcome as a necessary condition precedent to any such activity. Much water literature being produced today is thus not only worthless but misleading and, therefore, pernicious.

With this background it is extremely gratifying to find a book such as *The Politics of Water in Arizona*. Dr. Mann, trained as a political scientist, has that rare ability to cross disciplinary barriers and write both knowledgeably and helpfully of water law, water politics and water economics. This means that the book deals with the real world. It is, therefore, a useful book, not merely for those interested in the embarrassingly rich history of greed, stupidity, bribery and blindness which has characterized Arizona politics, but also for those who realize that an intelligent approach to the future of Western water development depends upon a sympathetic understanding of the past.

Readers with different interests, to be sure, will see this scholarly book from many different points of view. As a water lawyer with a special concern for problems of federalism, it was the light cast on those issues which captured my interest and which, I think, typifies the author's breadth of vision. If the book contained no insight other than that which follows it would have been well worth printing:

The legal tangle of water law and water rights also presents a very real impediment to over-all planning. For planning requires and

presupposes a favorable legal structure in the framework of which necessary adjustments can be made to meet the demands of the community. It is apparent that those who desire basin-wide development programs give too little recognition to the enormous problems of adjusting the already established rights in water under state and federal laws and constitutions. It may make economic sense to argue that 'the West must soon decide whether its future must be sacrificed by its antiquated priorities system in water,' but it is quite another matter to devise a legal system acceptable to all important interests in a basin.¹

Just how accurate this insight is can be illustrated by reference to a development which began subsequent to the publication of Mann's book—the Secretary of Interior's *Pacific Southwest Water Plan*.² Designed as a starting point for implementation of the Supreme Court's decision in *Arizona v. California*,³ the *Plan* is meant to provide a basis and model for regional water resources planning. Yet it studiously ignores the central nonphysical problem of Western water development—whether state or federal law shall control. "The question is," as Humpty Dumpty said, "which is to be master." But it is a question which executive and legislative officials alike will not face.

For example, the *Plan* contains a lengthy appendix setting forth the views of eleven different federal agencies, but the Department of Justice is not among them. Indeed, it is somewhat startling to note that although the Department of Interior describes the document as "a comprehensive coordinated plan" it contains no discussion of the legal problems relating to implementation or administration of the *Plan*. And this omission is surely not explained by the absence of legal problems.

The simple fact is that legal problems abound, but there is a congenital unwillingness to face them. The proposal dealing with the California Acqueduct typifies the difficulty. One of the projects which the *Plan* recommended for early authorization was federal participation in the enlargement of the California Acqueduct from Wheeler Ridge to Cedar Springs. In the original report, issued in August, 1963, the Department merely stated that enlargement of the Acqueduct sufficient to convey an additional 1.2 million acre-feet was planned for phase I of the development program. When

1. P. 16.

2. U.S. Dep't of Interior, *Pacific Southwest Water Plan* (1964).

3. 373 U.S. 546 (1963).

California submitted its comments to the Department of Interior, one of its express concerns was that the *Plan* did not clearly show the manner and extent to which the federal government intended to participate in enlargement of the Acqueduct. California thereupon called for assurances that federal participation would be limited to financing and that the state would retain exclusive responsibility for marketing all water transported through the Acqueduct.

To anyone who has followed federal-state water litigation, these seemingly informal comments raise a bright red flag. Here are the seeds for initiation of yet another interminable struggle over who is to be master. In its modified report, prepared after consideration of state submitted comments, the Department of Interior assured California that the state would "design, construct and operate" the Acqueduct and would be "marketing agent" for water conveyed through it; but, the report continued:

The United States . . . would need to be assured through negotiated contractual arrangements that the foregoing functions would be performed properly [and] . . . would have to be furnished appropriate assurance relative to the disposition of water⁴

Rather than obtaining the guarantee of state control which it sought, California has apparently learned that its mastery is to be subjected, to an indeterminate extent, to an asserted federal right to have the final say on what is proper and what improper. Thus we have the unhappy situation of an attempt by the federal government to get state cooperation in, and approval of, a proposal on which terms are "to be negotiated" according to a federal standard of propriety which has not yet been revealed, and which very well may not even exist at present. If this is to be the model for regional planning, it looks like we are in for a long period of continued distrust, misunderstanding and litigation.

The problem is essentially one of candor at this stage. Everyone with even the slightest knowledge of water matters knows that the federal government is not going to abdicate control of federally sponsored and financed projects to the varieties and uncertainties of the Western state legislatures. The executive branch has been fighting, and winning, the battle for federal control for years and it isn't about to give up. Yet the *Southwest Pacific Water Plan* is sugared

4. U.S. Dep't of Interior, Modified Report on the Pacific Southwest Water Plan VIII-4, 5.

over with ambiguous or perhaps dishonest platitudes about deference to states' rights which will only further confuse and entangle existing problems. Thus, the introduction to the January, 1964, version of the *Plan* states that "the rights of the individual States . . . must be respected The plan has to recognize the structure of water rights law in each affected State."⁵

This can hardly help but lead to misunderstanding. Is the Department of Interior yielding up voluntarily the victories won for federal control in *Arizona v. California*⁶ and *Ivanhoe Irrigation District v. McCracken*?⁷ Is it conceding that federal projects will be administered in accordance with "the structure of water rights law in each affected State?" Or is the really important statement of federal policy the one printed several sentences later, where it is said that "the plan must conform to congressionally directed Federal policies"⁸ The answer seems pretty clearly to be that the Department of Interior is trying to be all things to everyone; it seeks to look like a sympathetic minister to the states' rights advocates and at the same time to be a protector of federal interests. This may be standard practice for political campaign oratory, but it is an intolerable impediment to rational water planning.

These failings in the executive branch are at least matched by the approach of Congress. Legislative unwillingness to meet the legal problems directly is both an old and a continuing problem. In its current form it is perhaps best exemplified by a major piece of legislation in the last Congress, the Water Resources Planning Act.⁹ This bill had as its admirable objective that the

conservation, development, and utilization of the water and related land resources of the United States shall be planned on a comprehensive and coordinated basis¹⁰

To this end it provided in a quite elaborate way for the establishment of a Water Resources Council and of River Basin Commissions. To the extent that the Commissions would engage in data collection and coordination of non-controversial cooperative projects, they would no doubt be useful. But in its more basic objective—"to pre-

5. U.S. Dep't of Interior, Pacific Southwest Water Plan 4 (1964).

6. 373 U.S. 546 (1963).

7. 357 U.S. 275 (1958).

8. U.S. Dep't of Interior, Pacific Southwest Water Plan 4 (1964).

9. S. 1111, 88th Cong., 1st Sess. (1963).

10. *Ibid.*

pare . . . a comprehensive, coordinated, joint plan for . . . development of water and related resources,"¹¹ the proposal seems doomed to failure. How, considering the background of intense competition for law-mastery among the states and between states and the federal government, can any worthwhile joint plan be executed, or even considered, until some thought is given to whether we are talking about plans to be effectuated under federal law, state law, or law to be made by agreement among the parties? And who can make this decision if Congress cannot or will not?

In the absence of willingness to meet such issues head-on and at the planning stage, the prospect is for continued misunderstanding as we have seen initiated in the *Southwest Pacific Water Plan*, and which has come to full flower in litigation such as that in the *Ivanhoe*¹² and *City of Fresno*¹³ cases and in the most recent decision in *Arizona v. California*.¹⁴ Each of those cases, it will be recalled, tested the meaning of a foolishly broad provision in the Reclamation Act¹⁵ that nothing therein should in any way interfere with state water law or administration, although of course a number of things in the Act expressly contravened state law.

Apparently these cases taught nothing, for in S. 1111 the same mistake was repeated. Section 3 of that bill specifically declared the intention of Congress to achieve the impossible:

Nothing in this Act shall be construed to expand or diminish either Federal or State jurisdiction, responsibility, or rights in the field of water resources planning, development, or control¹⁶

This is hardly the place in which to suggest how the legal problems of regional water development ought to be solved. All that can be done here is to note the problem and to commend the usefulness of Mann's book in recognizing that the failure to seek its resolution has been a principal stumbling block to regional water planning.

For those who are willing to face reality, Mann's book also provides a superb showing of why Western water law has been a subject of increasingly expansive federal authority. His analysis of the history of Arizona water law and politics is a classic study of that

11. *Ibid.*

12. *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958).

13. *City of Fresno v. California*, 372 U.S. 627 (1963).

14. 373 U.S. 546 (1963).

15. 32 Stat. 390, 43 U.S.C. § 383 (1958).

16. S. 1111, 88th Cong., 1st Sess. (1963).

state's impotence in water problems. Blocked by controlled and reactionary legislatures, a frightened judiciary and executive agencies starved into inactivity, Arizona (and it is more typical than not of Western states) has been simply incapable of solving her own problems. That Arizona and other similarly situated states are likewise unable to handle great regional developments at present seems all too obvious. Their inability to deal with ground water problems even under crisis circumstances or to deal appropriately with pollution even under the threat of broad federal intervention is plain enough evidence of state paralysis.

The insights which Mann provides both into the causes of this political pathology and into what the future now seems to hold make his a book which ought to be read.

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