



Conference of Western Attorneys General

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CONFERENCE OF WESTERN ATTORNEYS GENERAL
RESOLUTION ASSERTING STATE SOVEREIGNTY OVER THE ALLOCATION AND DISTRIBUTION OF
WATER FROM ARMY CORPS OF ENGINEERS' PROJECT RESERVOIRS FOR CONSUMPTIVE USES
2020-01

WHEREAS, the U.S. Supreme Court held in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163 (1935), that States have plenary control of the nonnavigable waters within their borders; and

WHEREAS, the U.S. Supreme Court found that Congress has a historic policy of "purposeful and continued deference to state water law . . ." *California v. United States*, 438 U.S. 645, 653 (1978); and

WHEREAS, the U.S. Supreme Court determined Congress' policy of deference to state water law was motivated principally by its concerns about "the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." *Id.* at 668-69; and

WHEREAS, and consistent with Congress' policy of deference to state water law, the first section of the Flood Control Act (FCA) of 1944, 58 Stat. 887, declares "the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control . . ." 33 U.S.C. § 701-1; and

WHEREAS, the FCA's "Declaration of Policy" states that "[t]he use for navigation" of waters arising in the States wholly or partly west of the ninety-eighth meridian "shall only be such use as does not conflict with any beneficial consumptive use, present or future, . . . of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes." 33 U.S.C. § 701-1(b); and

WHEREAS, consistent with Congress' policy of deference to state water law, Congress in the first section of the Water Supply Act (WSA) of 1958 declared it "to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes . . ." 43 U.S.C. § 390b(a); and

WHEREAS, the WSA further specifies that the Act "shall not be construed to modify the provisions" of the FCA's "Declaration of Policy," or the provisions of the Reclamation Act of

1902, which requires that the “control, appropriation, use, or distribution of water for irrigation” must “proceed in conformity with [state] law,” 33 U.S.C. § 383; and

WHEREAS, the WSA did not authorize the Army Corps of Engineers to sell water for municipal and industrial uses from its project reservoirs, but rather authorized the Corps of Engineers to enter into contracts to make storage space available for municipal and industrial water supplies; and

WHEREAS, the Senate Committee stated “that [the WSA] prescribes a sound division of water supply responsibility between the Federal Government and State and local interests by declaring it to be the policy of Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, and other purposes,” S. Rep. No. 1710 (85th Cong., 2d Sess.) (Jun. 14, 1958) at 132-33; and

WHEREAS, contracting to provide municipal and industrial storage space in Corps of Engineers reservoirs pursuant to Section 6 of the FCA and Section 301 of the WSA is distinct from the Corps’ operations to regulate flows for congressionally authorized navigation and flood control purposes; and

WHEREAS, Western States have the authority and duty to allocate and distribute the natural flows of river systems within their borders in accordance with State law, primarily the prior appropriation doctrine; and

WHEREAS, under the prior appropriation doctrine natural flow of a river system is allocated and distributed to all water rights within a river system in order of the priority date of each water right without regard to any man caused alteration of the flow of a river; and

WHEREAS, the Army Corps of Engineers has pursued water supply policies that seek to authorize water supply contracts at individual Corps project reservoirs for water it determines is not required during a specific time period to accomplish an authorized purpose or purposes of that reservoir without regard to the allocation, and distribution of water in western states under State law, primarily the prior appropriation doctrine; and

WHEREAS, the Army Corps of Engineers’ water supply policies are contrary to congressional intent, and are creating the very legal confusion Congress sought to avoid by expressly recognizing “the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control” 33 U.S.C. § 701-1; and

WHEREAS, it is in the national interest to reaffirm and clearly delineate the respective roles of the Army Corps of Engineers and States in the allocation, distribution, permitting, use, management, and control of the waters of river systems.

NOW, THEREFORE, BE IT RESOLVED, that the Conference of Western Attorneys General adopts the following policy positions regarding the allocation, distribution, permitting, use, management, and control of waters of river systems flowing through Army Corps of Engineers project reservoirs:

- 1) Any Army Corps of Engineers’ policy that seeks to authorize the consumptive use of water flow passing through or held in a project reservoir without a water right recognized under State law is a violation of the FCA, the WSA, and States’ rights to allocate, distribute, permit, use, manage, and control water within their borders; and

- 2) The Army Corps of Engineers must recognize the legal right of a State to control water development within its borders and, consistent with *California v. United States*, 438 U.S. 645(1978), the right to control appropriation, allocation, and distribution of water flowing through or held in storage space in an Army Corps of Engineer project reservoir for consumptive uses; and
- 3) In accordance with the first section of the FCA, the Secretary is required to allow access to project reservoirs located in States located wholly or partly west of the 98th meridian for purposes of appropriating water for beneficial uses pursuant to State law; and
- 4) The WSA authorizes the Army Corps of Engineers to enter into storage space contracts but does not authorize the Corps to permit or sell water stored in project storage space; and
- 5) The impoundment of water in storage space in an Army Corps of Engineers project reservoir in a State located wholly or partly west of the 98th meridian for present or anticipated future demand or need for municipal, industrial, or other beneficial uses must proceed in conformity with applicable laws of the applicable State relating to the control, appropriation, allocation, use, or distribution of water; and
- 6) The CWAG Executive Director is authorized: 1) to make these views known to the President, Congress, the Corps of Engineers, and other interested parties; 2) to work with other state associations to implement legislation consistent with this resolution; and 3) to take such other actions as are necessary to advance state sovereignty over allocation and distribution of waters in conformity with state water laws.

ADOPTED JULY 13, 2020