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TRANSMOUNTAIN WATER DIVERSIONS

By HON. LAWRENCE LEWIS, *House of Representatives,*
Washington, D. C.

Congressman Lewis' interest in and devotion to Colorado's problems, one of the most important being water, have long been recognized and have endeared him not alone to his immediate constituents, but to the State at large.

The occasion for preparing this article was a purported statement which appeared in the newspapers, alleged to have been made by an official high in the government, to the effect that before any transmountain diversion projects were approved an entire national policy in regard to this matter should be formulated. Mr. Lewis immediately called upon this official and stated to him that if he was correctly quoted he had overlooked the fact that transmountain diversions had been recognized as a well established national policy long before most of us were born. He expressed himself as greatly interested and asked if Mr. Lewis would write him a letter, setting forth the facts which had been stated to him orally, which was done, and which letter afterwards appeared in the *Congressional Record* of Monday, June 8, 1936.—*Editor's Note.*

MR. LEWIS of Colorado. Mr. Speaker, under the leave to extend my remarks in the *Record*, I include the following:

“Transmountain water diversions” have been the subject of some recent discussions. In the Congress and elsewhere questions have been raised, from time to time of late, concerning projects in the far West to divert water from one watershed to another. It has been inaccurately implied that “transmountain water diversions” are something novel and of doubtful economic soundness. It has even been erroneously suggested that a definite national policy concerning such projects has not yet been established by the Federal Government and that before any such projects can properly be approved an entire national policy should first be determined.

Any such questions, implications, or suggestions reflect a lack of familiarity with long-established “local customs, laws, and the decisions of courts” concerning waters in the far Western states and a lack of familiarity with the fact that the United States Government—always scrupulously conforming to such local customs, laws, and court decisions—has throughout many years, by repeated affirmative acts and declarations, frequently approved and aided projects to divert water from one watershed to another.

Obviously, each project involving a transmountain diversion of water must be appraised, as should every other project, upon its own individual merits based upon careful surveys to determine its engineering and economic feasibility. Furthermore, plans for every such project should, wherever necessary, provide for the construction of such compensating or replacement reservoirs as may be requisite to protect fully and adequately all existing water rights on the stream from which the water is to be diverted.

However, in the far West, such projects have long since become familiar and commonplace. Their economic soundness is established beyond question. They are the foundations for the prosperity of vast, highly productive and long-cultivated agricultural regions. They are the bases upon which rest the very existence of large cities. Even on the Atlantic seaboard, such projects have their counterparts, chiefly for supplying water to towns and cities; but, as recent doubts and queries as to national policy have all concerned projects in the far West, this discussion will be confined to the region beyond the Missouri River.

In fact, "transmountain water diversions"—that is, diverting water from one watershed to another—have long since been recognized, approved, and frequently acted upon by all three branches of the Federal Government—legislative, judicial, and executive—as part of a well-established national policy.

Inasmuch as it will presently be shown in detail hereinbelow that both the Congress and the Supreme Court of the United States have recognized, time after time, the validity and supremacy of "local customs, laws, and the decisions of courts" relating to the control, appropriation, use, and distribution of water for irrigation and other beneficial purposes, it is pertinent to inquire at the outset as to just what are such "local customs, laws, and the decisions of courts."

APPROPRIATION DOCTRINE CONCERNING WATER HAS SUPERSEDED RIPARIAN DOCTRINE IN STATES OF FAR WEST

Seventy-five or eighty years ago, when agriculture was first undertaken by American settlers in regions now included in Colorado and neighboring states where irrigation is practiced, it was realized that the common-law "doctrine of ripa-

riar rights" in regard to the waters of natural streams was not applicable to conditions in those regions. Consequently, the common-law "doctrine of riparian rights," or "riparian doctrine," that a riparian landowner was entitled to have waters of a natural stream continue to flow as they had flowed from time immemorial, subject to the reasonable uses of other riparian landowners, was rejected; and there was formulated and adopted the "doctrine of prior appropriation," or "appropriation doctrine," under which he who first diverts the water of a natural stream and applies such water to beneficial use, regardless of the locus of such application to the beneficial use, acquires a prior right or "priority" to the extent of such use against all subsequent appropriators up and down the stream.

This doctrine, sometimes called the "Colorado doctrine," enunciated by the Supreme Court of Colorado Territory, was embodied in the Constitution when Colorado was admitted to the Union. Sections 5 and 6 of article XVI of the Colorado Constitution—adopted in 1876 and never amended as to these sections—are as follows:

Sec. 5. Water, public property: The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

Sec. 6. Diverting unappropriated water—Priority: The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

This appropriation doctrine has since been fully elaborated and defined by the courts of Colorado and other neighboring states. (*Yunker v. Nichols* (1872) (1 Colo. 551); *Schilling et al. v. Rominger* (1878) (4 Colo. 100, 103); and a host of other later cases in Colorado and other far Western states.)

In order to preclude misapprehension, it should be pointed out that the so-called California doctrine—which differs from the Colorado doctrine in some respects not pertinent to this discussion, but which may be said in general to be a hybrid of the appropriation doctrine and the riparian doctrine—prevails in the states of California, Oregon, Washington, Montana, North Dakota, South Dakota, Texas, Kansas, Nebraska, and Oklahoma. The Colorado doctrine, as hereinabove outlined, is the settled law prevailing in the states of Colorado, Arizona, Idaho, New Mexico, Nevada, Utah, and Wyoming.

TRANSMOUNTAIN DIVERSIONS OF WATER RECOGNIZED AND APPROVED
BY LAWS OF ALL FAR WESTERN STATES

As a corollary to this Colorado doctrine, and very early in the development thereof, the prevailing local custom and practice that a prior appropriator had the right to divert water from one stream across an intervening "divide" to lands tributary to a different stream, or even tributary to a different river system, was "recognized, acknowledged," and approved and enunciated as a principle of law by the courts of Colorado and other states and territories where the so-called Colorado doctrine prevails.

Furthermore, this principle of law approving "transmountain water diversions" has been repeatedly reaffirmed by decisions of the courts, for example: *Coffin et al. v. Left Hand Ditch Co.* (1882) (6 Colo. 443, 449-450); *Thomas v. Guiraud* (1883) (6 Colo. 530, 532); *Hammond v. Rose* (1888) (11 Colo. 524; 19 Pac. 466); *Oppenlander v. Left Hand Ditch Co.* (1892) (18 Colo. 142, 144; 31 Pac. 854); *Wyoming v. Colorado* (1921) (259 U. S. 419, 466-467). See also *Connecticut v. Massachusetts* (1931) (282 U. S. 660, 671-672); *New Jersey v. New York* (1931) (283 U. S. 336, 342, 343).

It is, and long since has been, the settled law of Colorado and of neighboring states that "the water of a natural stream may be diverted and conveyed across an intervening 'divide' for the irrigation of lands in the valley of another stream" (*Oppenlander v. Left Hand Ditch Co., supra*).

CONGRESS AND UNITED STATES SUPREME COURT HAVE REPEATEDLY RECOGNIZED AND APPROVED THE VALIDITY OF LOCAL CUSTOMS, LAWS, AND COURT DECISIONS IN RESPECT TO APPROPRIATION, CONTROL, USE, AND DISTRIBUTION OF WATER, INCLUDING TRANSMOUNTAIN WATER DIVERSIONS

Also very early in the period of initial settlement of the region now comprised within the so-called irrigated land states of the far West, the Congress recognized and approved, as respects the public domain, "so far as the United States are concerned, the validity of the local customs, laws, and the decisions of courts" in respect to appropriation of water and to its control, use, and distribution. This recognition and approval has been repeatedly reaffirmed by subsequent acts of Congress and opinions of the United States Supreme Court: Act of Congress of July 26, 1866 (c. 262, sec. 9; 14 Stat. L. 253; Rev. Stat. 2339; U. S. Code, title 43, sec. 661); act of Congress, June 17, 1902 (32 Stat. L. 388, sec. 8; U. S. Code, title 43, sec. 383). *Gutierrez v. Albuquerque Land Co.* (1902) (188 U. S. 545, 553); *Kansas v. Colorado* (1906) (206 U. S. 46, 92-93, 94-95); *Wyoming v. Colorado* (1921) (259 U. S. 419, 465).

By way of example: The "Reclamation Act"—act of June 17, 1902, chapter 1093, section 8; 32 Statutes at Large 390; United States Code, title 43, section 383—expressly provides:

Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, *appropriation, use, or distribution* of water used in irrigation, or any vested right acquired thereunder, *and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws*, and nothing herein shall in any way affect any right of any state or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream, or the waters thereof.

TRANSMOUNTAIN WATER DIVERSIONS CONTEMPLATED BY COLORADO RIVER COMPACT AND BOULDER CANYON PROJECT ACT

Furthermore, the principle and policy of transmountain water diversions was expressly recognized in the Colorado River Compact, signed at Santa Fe, N. Mex., November 24, 1922, and approved by the Congress in the so-called Boulder

Canyon Project Act (act of Dec. 21, 1928, c. 42, sec. 13; 45 Stat. L. 1064; U. S. C., 1933 Supp., title 43, sec. 617 1).

In article II of the Colorado River Compact, subparagraph (b) is as follows:

The term "Colorado River Basin" means all of the drainage area of the Colorado River system and *all other territory* within the United States of America *to which the waters of the Colorado River system shall be beneficially applied.*

And subparagraph (f):

The term "Upper Basin" means those parts of the states of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River system above Lee Ferry, and also all parts of said states *located WITHOUT the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters DIVERTED from the system above Lee Ferry.*

Subparagraph (g) of article II of the compact is as follows:

(g) The term "Lower Basin" means those parts of the states of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry, and also all parts of said states *located WITHOUT the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters DIVERTED from the system below Lee Ferry.*

By article IV, paragraph (c) of the compact it is provided:

(c) The provisions of this article shall not apply to or interfere with the *regulation and control* by any state within its boundaries of the *appropriation, use, and distribution* of water.

(The accentuation of certain words by italics and writing in capital letters is my own.)

As required by the Constitution of the United States (art. I, sec. 10), the consent of the Congress was given in advance to the negotiation of the Colorado River compact (act of Aug. 19, 1921, 42 Stat. L. 171); and by the Boulder Canyon Project Act (act of Dec. 21, 1928, c. 42, sec. 13; 45 Stat. L. 1064; U. S. C., 1933 Supp., title 43, sec. 617 1) the Colorado River compact was expressly approved.

Furthermore, by section 18 of said Boulder Canyon

Project Act (c. 42, 45 Stat. L. 1065; U. S. C., 1933 Supp., ch. 43, sec. 617q) it is provided:

Nothing herein shall be construed as interfering with such rights as the states now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the *appropriation, control, and use* of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.

It thus appears that by repeated acts of Congress a definite national policy, from which there has never been the slightest deviation, was long since determined upon, to-wit, that the Federal Government shall proceed in conformity with "the local customs and laws and the decisions of courts" of the respective states in relation to the control, appropriation, use, and distribution of water used in irrigation; and, further and more specifically, the Congress has directed that "the Secretary of the Interior in carrying out the provisions of" the "Reclamation Act," shall "proceed in conformity with such laws * * *." As we have already seen, transmountain water diversions are valid under the "customs, laws, and the decisions of courts" in Colorado and neighboring states.

EXECUTIVE DEPARTMENTS OF FEDERAL GOVERNMENT HAVE CONSISTENTLY CONFORMED TO POLICY OF FAR WESTERN STATES WHICH APPROVE TRANSMOUNTAIN WATER DIVERSIONS

Furthermore, the Department of the Interior, of course, has at all times consistently and without question complied with this reiterated mandate of the Congress; and, acting through the Bureau of Reclamation, has uniformly and universally conformed to the policy of the respective states which permit and approve of transmountain water diversions.

The Bureau of Reclamation has completed, is now constructing, and is preparing to construct, several projects involving transmountain water diversions, and has made and is now making, and is preparing to make, surveys for other such projects.

TRANSMOUNTAIN WATER DIVERSION PROJECTS CONSTRUCTED BY RECLAMATION BUREAU

For example, the so-called Strawberry Valley project in Utah, completed many years ago by the Bureau of Reclamation, diverts water from the Strawberry River, a tributary of the Colorado River, by a tunnel to a branch of the Spanish

Fork River, which flows into Great Salt Lake, which is in a closed basin completely out of the Colorado River drainage area. In addition, the Sanpete project, also in Utah, now under construction by the Bureau of Reclamation, involves the diversion of water from the Colorado River to a branch of the Sevier River, completely out of the Colorado River drainage area. Also, the full development, not yet under construction, of the Provo River project in Utah involves boring of the Duchesne Tunnel, over 5 miles in length, to divert water from the Colorado River to the Provo River.

Among the investigations for transmountain diversions now in progress is the so-called San Juan-Rio Chama project which contemplates diverting water from the Colorado River in Colorado to the Rio Grande River in New Mexico. This is being carried on as part of the participation by the Bureau of Reclamation in a study of the Rio Grande Basin for the National Resources Committee and is being financed by a combination of Bureau of Reclamation allotments plus a contribution by the National Resources Committee.

ALL-AMERICAN CANAL

Pursuant to the authorization of the Boulder Canyon Project Act, the Bureau of Reclamation is now constructing the so-called All-American Canal, which will have a capacity to divert a maximum of approximately 10,000 cubic feet per second, being the equivalent, if operated every day throughout the year, of about 7,200,000 acre-feet of water annually, from the Colorado River, 80 miles to Imperial Valley and 130 miles to Coachella Valley and adjacent areas in California, to be distributed by 1,700 miles of canals and laterals for the irrigation of about 1,000,000 acres. Strictly speaking, this is not a "transmountain" diversion in that no ranges of mountains are to be tunneled and the lands to be irrigated are, in the largest geographical sense, within the Colorado River drainage area. Nevertheless, this project involves cutting for 10 miles through a ridge of sandhills, the deepest cut being over 100 feet. The lands to be irrigated drain not into the Colorado River, but into the so-called Salton Sea, the surface of which is 244 feet below sea level. None of the water diverted by this project can by any possibility ever find its way back by return flow to the Colorado River. Moreover, part

of the plans for the All-American Canal project involve a not unlikely extension of the canal to the Pacific Coast to supplement the municipal water supply of San Diego to the extent of 155 cubic feet of water per second.

COLORADO RIVER AQUEDUCT OF METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

The largest, most expensive, and most ambitious transmountain water diversion now being undertaken in the United States is the much-needed project to supply the Metropolitan Water District of Southern California. Under this project, water of the Colorado River will be taken, by approximately 242 miles of main aqueduct and 150 miles of feeder lines, from Parker Dam, which is located about 155 miles below Boulder Dam, to Los Angeles and 12 other cities and towns in southern California. The water will be pumped by successive stages to a total elevation of 1,617 feet and will pass through several ranges of hills and mountains by means of 29 tunnels, totaling 92 miles in length, the longest of which tunnels is 18 miles. When ultimately developed to its full capacity, this project will deliver to Los Angeles and vicinity 1,050,000 acre-feet per year, which is equivalent to about 1,500 cubic feet per second or about 1,000,000,000 gallons of water per day, completely out of and far from the Colorado River drainage area, to the Pacific coast of southern California.

SUBSIDIZED BY IMMENSE LOANS AND GRANTS FROM R. F. C. AND P. W. A.

The actual work of construction of the Colorado River aqueduct for the benefit of the metropolitan water district of southern California is being carried on by the district and not by the Bureau of Reclamation. However, of the bond issue of \$220,000,000 authorized by the district, the Reconstruction Finance Corporation has agreed to purchase \$91,000,000, of which \$69,628,000 had been taken over up to June of 1936.

Furthermore, the Public Works Administration, on or about November 2, 1934, made an allotment of \$2,000,000—of which \$1,500,000 was a purchase of bonds and \$500,000 a grant—to the metropolitan water district for the purpose of subsidizing this project so necessary for the towns and cities of southern California.

Therefore, both the Reconstruction Finance Corporation and the Public Works Administration have given their approval to transmountain water diversions by subsidizing with immense loans and grants this greatest of all such projects.

SUMMARY

To summarize: The Congress, by repeated enactments, has declared that the policy of the National Government is to comply with the laws of the respective states as to the control, appropriation, use, and distribution of water used for irrigation and other beneficial purposes; and has directed that the Secretary of the Interior shall "proceed in conformity with such laws." The principle and policy of transmountain water diversions from one watershed to another was long ago recognized and approved by the constitution, laws, and decisions of courts of Colorado and of other neighboring states; it has been repeatedly recognized by decisions of the United States Supreme Court; it is expressly recognized and approved in the Colorado River compact, which in turn was expressly consented to and approved and the policy of the respective states again expressly and carefully safeguarded in the Boulder Canyon Project Act of the Congress.

Pursuant to the mandate of the Congress to comply with the laws of the respective states, the Department of the Interior, through its Bureau of Reclamation, has constructed several transmountain water diversions and has made and is now making surveys for others. Finally, the Reconstruction Finance Corporation and the Public Works Administration, by large loans and grants of money from the Federal treasury, have subsidized the largest transmountain diversion ever undertaken in the United States.

CONCLUSION

It is therefore apparent that by affirmative action of each of the three branches of the Federal Government—legislative, judicial, and executive—an entire national policy in regard to diverting water from one watershed to another has long since been fixed and determined as approving such transmountain water diversions. Such national policy is no longer open to question by the Federal Government.