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AN APPRAISAL OF PROPOSALS FOR NATIONAL AND REGIONAL PLANNING

By L. WARD BANNISTER, *of the Denver Bar.*
Given at 26th Annual Meeting of the U. S. Chamber of Commerce, Washington, D. C., May 4, 1938.

WHEN I noticed that on the program the name of Colorado followed that of Denver as my home address, I was a little peeved. It seemed to me that Denver was well enough known not to need any identification of its statehood. Observing that the little town of Los Angeles was treated similarly did not change my feelings. It was only when I saw, in connection with other appearances upon the program, that the members of this Chamber have to be told that even the City of New York is in the State of New York, that my indignation was appeased in recognition of the ignorance common to the members of this Chamber.

"An Appraisal of Proposals for National and Regional Planning," meaning in respect to our national resources, is the subject that Jim Owens, only Director and Chairman here, but in Oklahoma a Cherokee Chief, has assigned to me, and to which I shall stick as close as do the moccasins on his own feet. That national planning is necessary to the conservation of our soil, waters, forests and minerals is clear. There are monster rivers to be held in leash, especially in the eastern half of the continent; land areas to be reforested both in the East and West, and forests to be protected; soil erosions to be checked and lands to be reclaimed through irrigation. These things we do partly for ourselves, but more that we may transmit to the coming generations a patrimony that will make their lives endurable and keep America great.

The task is often too much for the individual. It is too great for his purse, and his life expectancy is not long enough that he may calculate upon adequate reward. It is

too much for a corporation, and often for even the state. Necessity, therefore, imposes much of the duty upon the government. For its discharge there must be planning, not only on a national scale but by the nation.

National planning we have already—national planning by the Corps of Army Engineers in the control of floods in order to conserve farm lands and cities; by the Bureau of Reclamation in order to reclaim lands by the application of water rather than to allow the water to run in waste to the sea; by the Forest Service to protect existing forests and create others; by the Soil Conservation Service, to encourage fertilization and to protect from erosion that top layer of nourishing vegetable decay or humus to create a single inch of which requires a century. These various agencies not only plan but, when authorized so to do by the Congress, execute plans by constructing projects and carrying on activities.

The National Resources Committee functioning under a 1935 Executive Order, and availing itself in part of the data of other departments, but also adding the results of its own researches, has done a notable piece of work in the field of water uses. The work has been marred somewhat by the failure to recognize states as states in the planned distribution of water-uses from streams that are interstate in character, thus ignoring the legal factor, as distinguished from the engineering, in water problems. I have often thought, and when no engineers have been present, have ventured to suggest: that a water engineer and a water lawyer are alike in one respect, namely, each is only half a man, but that they differ in this: that while the water lawyer knows this, the water engineer apparently does not. I hope there are no engineers present, or if so that the rest of you will protect me.

With national planning already in existence by various agencies of the government—competent at that—what more is needed? The answer is a coordinating statutory agency.

Call it a National Resources Board if you will, the primary function of which would be: not to construct and operate projects authorized by the Congress, but rather to investigate, consider and coordinate the plans of the other federal agencies now acting more or less independently, and of states and municipalities; to coordinate these plans and present to the Congress and the President those of the plans favored by the Board, subject to the approval of the federal agencies regularly charged with the planning in the particular field concerned.

In any organized scheme of national planning we cannot put soil, water, minerals and forests in airtight compartments. Complete conservation of one of these resources involves and affects the others. Not only is this true physically but financially as well. It may be a bit old fashioned to suggest that there is any ceiling on national expenditures short of Orion and the Pleiades. Yet a limit does exist, and must be kept in mind, along with the needs of the different areas of our country, in determining the relative importance and the order of conservation plans to be put forward to the Congress and the President.

Such a Board should consist partly of representatives of the Departments of War, Interior and Agriculture, under one or the other of which most of the planning agencies referred to are now functioning, but more largely of members chosen from the various areas, to the end that the interests of the entire country may be reflected in the investigations of the Board and the plans that it would submit to the Congress and the President. These members should be appointed by the President and confirmed by the Senate.

This proposal of a federal coordinating agency is a simple one. It avoids duplicating the investigations of other existing agencies; it provides expert opinion upon the relative value of different plans scrutinized in the process of coordination; it recognizes financial limitations and the in-

terests of the country as a whole, and plans the activities accordingly.

It sets up no regions with regional agencies or satrapies to lord it over the states. It gets along with existing federal agencies but coordinates their plans, presents the best of them to the Congress and the President, and leaves to the Congress the question of adoption and appropriation.

There are pending in the Congress the Norris, Hayden, the original Mansfield and the later Mansfield bills, popularly called Regional Authority or Little T.V.A. bills. Objection does not lie to the ultimate purpose of any of these bills—conservation and development of natural resources. Decision, however, cannot be so unanimous as to the method.

Before judging the method, we must consider some preliminaries. Of the four resources—forests, minerals, soil and waters—the first two, namely, forests and minerals, are geographically fixed. The same thing is true of the soil, except for that part of it that thumbs a ride on wind or stream. The fourth, water, is an element that, because of its migratory habit, raises questions of interstate character.

In the eastern half of the continent those questions are principally of dams and levees for flood control; the acquisition of rights-of-way for these devices; the division of costs as between the government and the states and as between the states themselves; the ownership and operation of the dams and power plants, whether by the government, or the state, or private enterprise, and the extent to which settlement of these questions may be had by interstate compact. There are also in the East the questions of diverting water from one watershed into another, as, for instance, in the controversy between Connecticut and Massachusetts from the headwaters of the Connecticut River into the area surrounding the City of Boston; and in the controversy between New Jersey and New York over the diversion of waters from the drainage basin of the Delaware into that of the Hudson.

In the western half of the country water is scarce. Said the tenderfoot to the cowboy, as they rode along the banks of one of the Western streams, "There seems to be a lot of water down there."

"Yes," said the cowboy, "it looks as if there is more than there is but there ain't."

Later the tenderfoot and the cowboy came to a dug-out, on the door of which was pasted this notice: "Gone for water, back Thursday."

While this situation is not so bad by any means as the story indicates, yet the water is scarce, and it is wanted for municipal, industrial and irrigation supplies. The interstate questions are principally, how to conserve and develop this resource in such wise by location and size of project as to make a fair distribution of water-uses as between the states, and also the extent to which interstate compacts, under the leadership of the government, may be used in the accomplishment of this aim. Here, too, as in the East there are also interstate questions arising through the transfer of water from one drainage basin to another, and involving more than a single state.

In this country two systems of water law prevail—the riparian and the appropriation. Roughly speaking, the former in the states east of the Missouri and the latter west. The fundamental principle of the riparian system is that each land ownership contiguous to the stream has a legal right to a reasonable use of the waters of a stream, subject to a like right on the part of other contiguous land ownerships. All ownerships are entitled to at least some water.

The fundamental principle of the appropriation system, on the other hand, is that the use of water is not limited to land ownerships contiguous to the stream, and that water users or appropriators, as they are called, are entitled to water only in the order of their priority in point of time. Under this principle there is then little or no water for the latest appropriators. That, however, cannot be helped. The water is scarce; there is no other principle that is so workable.

Now it is evident that where water uses are desired in the East or West for industrial, municipal, recreational or irrigation purposes, government financial aid to a project in one state may well prove a detriment to another state on the same stream. The other states, therefore, should keep a watchful eye. The detriment might lie in the inability of the other states to obtain financial aid for a project of its own until the government shall first have gotten back its investment in the first state. This would be true in the East or West.

Or the detriment might lie in the possibility that the priority principle might be applied as between states, instead of merely as among appropriators within the same state. In that event the state receiving the project through the government's financial aid might acquire a water priority against the state not receiving it. The conclusion is that in the development of water uses on interstate streams, whether in the East or in the West, more attention should be paid than the government is bestowing now toward securing a fair distribution of water uses to each state upon the same stream.

The Norris Bill would divide the country into seven regions, there being a few instances where a state would be in several regions—create a federal corporate Conservation Authority for each region to plan the conservation of the four resources, recommend plans to the Congress and the President and, if authorized by the Congress, then to carry out the projects and activities authorized.

The original Mansfield Bill likewise would divide the country into the same regions for planning purposes, set up for each a Planning Agency, and, where power projects are authorized by the Congress, would commit the project or projects to a federal corporate Power Authority. Under either bill a President could transfer to the Authority other power projects now or hereafter constructed. Under both bills the supervision and control of these various agencies would be in the line of Presidents.

The objections to these bills are insuperable. The bills call for duplicating or superseding the numerous activities of existing federal agencies, such as the Corps of Army Engineers, the Reclamation Bureau, the Soil Conservation Service and the Forestry Service. They oust state courts of jurisdiction; they prohibit pollution of interstate streams in one case altogether, and require the permission of the Conservation Authority in the other, instead of leaving the general question of pollution, as now, to the states, which are the ones most interested in the industries to be fostered.

They forbid interstate compacts, except in the one case, with the consent of the Conservation Authority, and the other with that of the President of the United States, although the Federal Constitution invests Congress itself with the

authority to do the consenting where interstate compacts are involved.

The Norris Bill confers upon the Conservation Authorities the right to say when dams may be put in streams in any state, and when, therefore, uses of water may be made therefrom. Both bills ignore possible interstate water priorities and indicate no interest whatever in the question of whether each state upon an interstate stream is to receive a fair allocation of the water uses of that stream. Both bills assert a general control over the waters in states to be in the United States, whereas by law it is in the states themselves, subject only to such intervention as the Congress itself in the exercise of its wisdom may choose to direct under the commerce and national defense clauses of the Constitution.

The Norris Bill increases centralization of political and economic power in the federal government. True, the functions of the Corps of Army Engineers, the Soil Conservation Service, the Forest Service and the Reclamation Bureau become more or less parceled out among seven Conservation Authorities, but who controls these Regional Authorities? The answer is whoever happens to be President of the United States. Thus the appearances are deceiving, and there is increased centralization of even federal functions. As for state functions, the bill would supersede so many that the subtraction from the powers of the states added to the Conservation Authorities only increases in this other respect the political and economic power of a succession of Presidents.

Of the two bills, the Norris Bill is the Big Bad Wolf. The original Mansfield Bill is the camel thrusting its head under the tent—the body to enter later.

Senator Hayden is to be commended as the first to bring forward a substitute for the original Mansfield bill. The substitute would create a centralized National Resources Board that would plan for conservation and development, but would have no part in the construction or operation of the projects or the conduct of activities authorized by the Congress as the result of plans adopted and financial appropriations made. Chairman Mansfield, of the Committee on Rivers and Harbors, likewise is to be congratulated for bringing out a bill eliminating project work on the part of the

bill's central National Resources Board and confining the functions more strictly to planning.

Both the Hayden substitute and the new Mansfield Bill, however, cling to the idea of fixed regions which do not seem necessary, although the Hayden bill makes the creation of regions discretionary with the Board rather than mandatory. Both bills would permit their respective central boards to go afield in the researches and planning from the already existing planning agencies of the government, although the Mansfield bill wisely requires the approval of the appropriate federal agencies before the Board may submit its plans to the Congress. Neither bill definitely requires its Board to consult with the states affected before the presentation of plans. If there are to be regions, neither bill provides with clarity for inter-regional projects; in other words, for the diversion of water from one region into another, yet if this cannot be done human needs are being sacrificed to topography. Neither bill contains any provision looking toward a fair distribution of interstate water to each state concerned, or tending to protect one state against a priority or an advantage in water-use given by federal aid to another.

Both bills are to be commended for including as do the Reclamation Act of 1902 and the Water Power Act of 1920, clauses declaring against any intention to interfere with the "laws" and "rights" of the "states" in respect to the control of the waters within their boundaries. But this language, although the best that could be framed, does not afford adequate protection to the states, for the question at once arises, what is meant by the "laws" or "rights" of the states? If an act of the Congress is constitutional, can it be said to invade the "laws" and "rights" of the state, even though the laws of the state purport to be contrary thereto? There lies the doubt that in the words of Hamlet, "must give us pause." If the states would protect themselves they should not depend upon such language alone, but stop unwanted legislation, even though constitutional, at its very source. This means that the undesirable features of these bills should be eliminated, protective provisions added and the good preserved.

Somehow, I have the feeling, inspired by the reading of these last two bills as compared with the Norris and the

original Mansfield Bill, that Senator Hayden and Chairman Mansfield have sensed the right direction, and that deep down in their hearts there may be, after all, only the final desire to establish a single planning agency to cooperate with the other agencies, federal and state, to coordinate the work of the federal planning agencies, and, with the approval of the appropriate ones, present plans to the Congress for the latter's adoption.

Such are my appraisals of the Norris, the original Mansfield, the Hayden and the later Mansfield proposals for the development of our natural resources. As for a proposal more to my liking, it would be the one advanced in a general way at the beginning of this address. It would be a proposal for a single planning agency: to cooperate with other federal planning agencies and with the states; to coordinate the plans of the other federal agencies, conducting sufficient investigations of its own to coordinate intelligently; and then present the plans of its choice to the Congress and the President. Why could not the present National Resources Committee, existing by Executive Order, be converted into such a statutory agency? There should be no regional planning agencies until experience at least demonstrates the desirability. Members of the proposed Board should be made up partly of representatives of the Departments of War, Interior and Agriculture, but more largely from the various parts of the country, and appointed by the President and confirmed by the Senate. There would be provisions in any such bill looking toward a fair share of interstate water to each state. There would be no assertion of that hated doctrine of ownership of general control of the waters of the states, since general ownership or control is in the states and not in the government. There would be such provisions in the bill declaring the supremacy of the laws of the states as are now to be found in the Hayden and the later Mansfield bills.

Why is the doctrine of federal ownership and control of state waters so hated? The states of the East do not tolerate it nor will the states of the West, although the states in both regions recognize the authority of the federal government under the commerce and national defense clauses of the Constitution.

The eastern states imported their riparian system of water law from France as the result of the studies, decisions and writings of Storey and Kent. The appropriation or priority law of the states of the far West was invented by the people of the West. It began with the miners of California—those men of the red bandanna and gold-pan. The late Justice Field, of the United States Supreme Court, helped to develop that law when, as a judge of a miner's court, he administered justice from behind a dry-goods box. The late Moses Hallet, Federal District Judge of Colorado, having been demoted by his placer mining partners from placer miner and then to cook because he spent too much time studying Blackstone, likewise became a judge in the miners' court in Colorado, and there and later likewise put his hand to the development of the same system of water law. That system has spread from California until it is now recognized in 17 states of the West, by acts of Congress and by judicial decisions of the Supreme Court. Seven of those 17 states recognize riparian law in no particular whatsoever. The other ten recognize it to a small extent, but are escaping from it as rapidly as they know how. The government never had any rights to water in the seven states, and such as it ever had in any of the other ten, or in any of the 17, it disposed of under acts of Congress of 1866 and 1877.

If by chance the government makes an appropriation of water in one of these 17 states, it, of course, acquires an appropriation water right, but the right thus acquired is no different from that acquired by any private person and is subject to the laws of the state in which it is situated.

The appropriation system came into being because of scarcity of water, due in turn to insufficiency of rain fall. Somewhere Shakespeare tells us that it rains every day. The great Shakespeare may have known his England but he did not know the semi-arid regions of the West. Buddha attempts to comfort the faithful by saying that if there be but one righteous man, the rain will fall for his sake, but the great Buddha did not know how many unrighteous men there are beyond the Missouri.

Waters are so scarce in the sunset land that we fight for them, frequently with our fists. Murder is not usual in

the West. We are an orderly people. But when it does occur we are not surprised to find a controversy over water as one of its causes.

Nearly all of these states have declared, through the National Reclamation Association, their opposition to bills setting up regional Authorities or satrapies, telling the states how they are to operate their water systems, and how new rights are to be created and old ones administered. These are things that the states of the West will determine for themselves. They will be found opposing, as all states ought to oppose, any bill that contains an assertion of general government ownership or control.

The Corps of Army Engineers, the Bureau of Reclamation, the Forest Service are entrenched in the country's confidence and esteem. The recently created Soil Conservation Service also is coming into its own. All of these agencies should have our cooperation. Indeed, they should have also our protection against functional invasions.

The Congress alone should determine when and where on interstate streams federally-aided projects for the use of water should be located. It is only in that body that the affected states have the chance to be heard before committees, with their Senators and Congressmen as their helpers and protectors.

Allocation by Executive or Department Order, now happily discarded, should never have been inaugurated and should never be resumed. It already has done harm to several states not receiving the projects thus located, through failure to give them hearings and to insure protection as to their fair share of the interstate water.

That the Congress should determine where water projects are to be located is part of representative democracy itself. Ballots alone do not constitute democracy. There must be in addition the active participation by the legislative representatives, thus elected, in framing the laws and policies under which the people are to live. This alone is real representative Democracy—this alone the Democracy that will long endure.