"Water, The Common Denominator"

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STATEMENT OF SENATOR MAX BAUCUS

WATER, THE COMMON DENOMINATOR
GREAT FALLS, MONTANA

OCTOBER 11, 1980

AFTER ACCEPTING THE KIND INVITATION OF YOUR CONVENTION TO SPEAK ON THE SUBJECT OF STATES' RIGHTS AND FEDERAL PREEMPTION IN THE AREA OF WATER RESOURCES, I REALIZED THAT THIS WAS A BIT LIKE AN ASSIGNMENT FOR A 25-WORDS-OR-LESS ESSAY ON THE ORIGIN OF THE UNIVERSE!

DURING THE SESSION I HAVE ATTENDED TODAY, YOUR PANELISTS AND SPEAKERS HAVE UNDERSCORED THE COMPLEXITY OF THIS MASSIVE SUBJECT. THE POINT IS THAT, IN THE WEST, WATER TOUCHES AND OFTEN VIRTUALLY CONTROLS EVERY ASPECT OF OUR LIVES. IT IS, IN FACT, THE COMMON DENOMINATOR.

FROM AGRICULTURE TO ENERGY, WATER IS THE KEY TO ECONOMIC SURVIVAL. FROM FLY FISHING TO PURE DRINKING WATER, THE QUALITY OF LIFE IN MONTANA IS DEFINED BY WATER. FROM THE STATE LEGISLATURE TO THE UNITED STATES SENATE, WATER IS THE ISSUE OF THE DAY.

AS A CONSEQUENCE OF THE PERSERVIVENESS OF THE TOPIC, NARROWING MY REMARKS TONIGHT POSED NO LITTLE DIFFICULTY. I WAS IN LUCK, HOWEVER, WHEN I RECENTLY ENJOYED DINNER AT A CHINESE RESTAURANT.

SINCE MOST TERESE WISDOM IS GENERALLY CREDITED TO AN ANCIENT CHINESE SAYING, ANYWAY, I CAN HONESTLY ATTRIBUTE MY REMARKS TO A FORTUNE COOKIE! IT SAID: "A FOOL AND WATER WILL GO THE WAY THEY ARE DIVERTED."
THE MESSAGE IS SIMPLE. IF WE IN THE WEST ARE TO CONTROL OUR WATER, THEN, UNLIKE THE FOOL IN THE CHINESE PROVERB, WE MUST NOT BE DIVERTED BY FEDERAL PREEMPTION. WE MUST CHART OUR OWN COURSE... WE MUST ESTABLISH A STATE WATER POLICY.

THE SIGNIFICANCE OF THIS CONCEPT STRUCK HOME FOR ME EARLY THIS WEEK. I WAS CONFERRING WITH A GROUP OF WASHINGTON EXPERTS ON THE SUBJECT OF STATES' RIGHTS AND FEDERAL PREEMPTION IN PREPARATION FOR THIS CONFERENCE. AFTER MUCH TALK OF LEGAL PRECEDENCE IN SUPREME COURT CASES AND OF LEGISLATIVE PROPOSALS, IPOSED THIS QUESTION TO THESE EXPERTS: "WHAT SOLID CONSTITUTIONAL PROTECTION OF A STATE'S RIGHT TO CONTROL ITS WATER EXISTS AT THIS TIME?"

THE GENERAL ANSWER GIVEN BY THESE CONSTITUTIONAL SCHOLARS WAS "NONE."

UNDER THE SUPREMACY CLAUSE, THE COMMERCE CLAUSE, THE FEDERAL PROPERTY CLAUSE, POWERS RELATING TO NAVIGABILITY AND, IN GENERAL, OUR SYSTEM OF FEDERALISM, LITTLE DOUBT EXISTS THAT CONGRESS AND THE EXECUTIVE BRANCH COULD CONSTITUTIONALLY PREEMPT STATE CONTROL OF WATER.

WHAT MIGHT OCCUR AND WHAT WILL OCCUR ARE, HOWEVER, HORSES OF A DIFFERENT COLOR. AS MONTANA LOOKS TO A FUTURE OF MOUNTING PRESSURE ON WATER FOR HYDRO AND THERMAL ENERGY PRODUCTION, SYNFUELS, INTER-BASIN TRANSFERS, AND MUNICIPAL WATER SUPPLIES, I FEEL RELATIVELY CONFIDENT IN PREDICTING RESPECT FOR MONTANA'S RIGHT TO CONTROL ITS WATER.
IN SHORT, THE MOOD IN WASHINGTON, D.C. IS AWAY FROM FEDERAL PREEMPTION IN THE CONTROL OF WATER.

BY WAY OF EXAMPLE, AN AREA OF SPECIAL CONCERN TO ME IS THE SUBJECT OF FEDERAL RESERVED WATER RIGHTS.

UNRELATED AS THESE VAGUE RIGHTS ARE TO ANY BENEFICIAL USE, FEDERAL RESERVED WATER RIGHTS THROW A WILD CARD INTO THE MANAGEMENT OF THIS RESOURCE. UNFORTUNATELY, WATER MANAGEMENT INCREASINGLY DEMANDS SPECIFICITY. AS DESCRIBED BY THE SUPREME COURT, THIS DOCTRINE LIMITS THESE CLAIMS ONLY "TO THE EXTENT NEEDED TO ACCOMPLISH THE PURPOSE OF THE RESERVATION." AN AMBIGUOUS DESCRIPTION AT BEST!

WITH THIS LARGE, RELATIVELY SENIOR APPROPRIATION LYING ABOUT, WESTERN WATER USERS MIGHT RIGHTEFULLY LOOK OVER THEIR SHOULDER WITH SOME APPREHENSION. THE ANXIETY WHICH MANY OF US IN CONGRESS FELT THIS YEAR DURING THE DEBATE ON THE ENERGY MOBILIZATION BOARD IS A REFLECTION OF THIS UNCERTAINTY.

FORTUNATELY, THE EMB PROPOSAL WAS AMENDED EARLY ON TO PROVIDE A CLEAR EXEMPTION OF THE FEDERAL GOVERNMENT'S PREEMPTION POWERS IN THE AREA OF STATE WATER LAWS. EVEN MORE FORTUNATELY, THE WHOLE PROPOSAL WAS EVENTUALLY SACKED.
Yet, while EMB is off-track for the present, coal slurry, synfuels, interbasin transfers and the like are not far behind. Thus, I am pleased to observe that the Executive Branch has begun to move on the quantification of federal non-Indian water rights.

The report of the Task Force on this subject has, in fact, recommended a major change. The report urges that all "current, consumptive uses" be quantified within five years. These appropriations are to be made pursuant to state law.

I am assured that these recommendations will be implemented by Executive Order. This is a decision which I endorse as sound policy. Administration of this precious resource should be at the state level.

In particular, I am proud to note the progressive nature of Montana's water program. The Water Use Act of 1973 and subsequent amendments provide an effective mechanism for adjudication of water rights. Similarly, the Reserved Water Rights Compact Commission provides a useful forum for negotiation of federal and Indian water rights. If the work of the Commission is successful, hundreds of thousands of dollars of litigation may well be avoided.

In short, Montana's approach to water law fills the legal vacuum. In my opinion, this then reduces the threat of federal preemption.
I DO NOT, OF COURSE, MEAN TO IMPLY THAT THE FEDERAL GOVERNMENT HAS LOST ALL INTEREST IN WATER. NOR WOULD I WISH FOR THAT RESULT. SINCE THE RECLAMATION ACT OF 1902, MONTANA AND THE WEST IN GENERAL HAVE VASTLY BENEFITED FROM A GENEROUS FEDERAL WATER POLICY.

MY POINT TONIGHT IS SIMPLY THAT WE DON'T WANT TOO MUCH OF A GOOD THING. A HEALTHY BALANCE OF STATE AND FEDERAL ACTIVITY IS THE IDEAL.

INDEED, THE INTEREST IN WATER AT THE FEDERAL LEVEL REMAINS STRONG. BY WAY OF EXAMPLE, BEFORE LEAVING WASHINGTON I ASKED FOR A COMPUTER PRINTOUT OF ALL LEGISLATIVE PROPOSALS BEFORE THE 96TH CONGRESS WHICH RELATE TO WATER IN SOME RESPECT.

*(MAX, AT THIS POINT DISPLAY THE FOUR PAGE COMPUTER PRINTOUT)*

THE RESULT, AS YOU CAN SEE, IS IMPRESSIVE. OVER 600 BILLS INVOLVING WATER IN SOME FORM WERE INTRODUCED IN THIS CONGRESS.

OF COURSE, NOT ALL OF THESE PROPOSALS AFFECT US DIRECTLY. MOST, IN FACT, HAVE NEVER GOTTEN BEYOND THE INTRODUCTION STAGE.

A FEW EXAMPLES DO POINT TO THE IMPACT OF FEDERAL WATER POLICY, NONETHELESS.
Coal slurry legislation was, for example, actively considered by both the House and the Senate. Under the terms of the proposed legislation, broad eminent domain powers would be granted to the slurry industry. With this authority in hand, pipelines would soon be carrying plentiful western coal and scarce western water to distant markets.

Passage of this bill was, interestingly enough, bogged down in the Senate over the question of its impact on state water rights. The state legislature has, as you know, supported such a result by designating coal slurry as a non-beneficial use of water. Thus, I was pleased to see this legislation stagnate this year.

Nonetheless, slurry legislation will, without a doubt, be reintroduced in the 97th Congress. This again points to the need for a strong state stance on issues of this nature.

A second legislative initiative this year which underscores the critical balance between federal and state water policies is the proposal for reform of the 160-acre allocation of reclamation water. The Senate bill, S. 14, would have revised this upper limit for water allocations from federal reclamation projects to 1,280 acres. The significance and impact of this legislation is apparent. It points to the necessity of organizations such as those represented by delegates to this conference to take an active role in directing and limiting the growth and development of federal water policy.
THE RESPONSE TO FEDERAL PREEMPTION OF STATES' RIGHTS IN THIS AREA IS, IN MY VIEW, NOT A MOVEMENT ANALOGOUS TO THE SAGEBRUSH REBELLION. FRANKLY, I QUESTION WHETHER IT IS IN THE BEST INTEREST OF THE STATES TO ATTEMPT TO "EVICT" UNCLE SAM. INSTEAD, AS I HAVE INDICATED, I BELIEVE THAT WORKING TOGETHER WE CAN SEEK APPROPRIATE LIMITS.

IN SUMMARY, I BELIEVE THAT WE AS MONTANANS, TOGETHER WITH OUR FRIENDS THROUGHOUT THE COUNTRY, CAN FORGE A NEW, PROGRESSIVE STATES' RIGHTS... A STATES' RIGHTS THAT ENCOURAGES INNOVATIVE AND FARSIGHTED POLICY.

STRONG STATES WILL STRENGTHEN THE FEDERAL GOVERNMENT AS A WHOLE. THOMAS JEFFERSON WROTE: THE ONLY WAY THE STATES CAN AVOID THE ABUSE OF NATIONAL POWER IS "TO STRENGTHEN THE STATE GOVERNMENT... AND THIS MUST BE DONE BY THE STATES THEMSELVES..." WE IN MONTANA HAVE HEEDED JEFFERSON'S ADMONITIONS. WE HAVE RESPONDED TO THE CHALLENGE OF DEVELOPING STATE POLICIES THAT ARE RESPONSIBLE AND AGGRESSIVE.

BUT OUR JOB CANNOT END THERE. HARD WORK REMAINS. WATER, THE COMMON THREAT OF OUR SOCIAL FABRIC IN THE WEST, DESERVES NO LESS.

I INTEND TO JOIN YOU IN THIS EFFORT.

THANK YOU VERY MUCH.