THE PRESIDENT
James T. Lynn

Handling of Damages for Teton Dam

Issue: This memorandum presents for your decision:

(1) whether as a matter of public policy, victims of the Teton Dam failure should be paid in full for damages suffered despite the strong likelihood that the Federal Government is not legally liable for damages under present law, and if so,

(2) what mechanism should be used for any compensation in light of the adverse precedents set by any feasible approach.

Background: Estimates of damage cost still range between $200 million and $1 billion. It will be several weeks before we can expect a reasonably accurate estimate.

Interior estimates that more than half of the damage may be to public facilities covered by 100% grants under existing disaster assistance authorities.

Full restitution for damage to private property and individuals cannot be made under existing Federal disaster assistance authorities, which is appropriate in that they are designed to cover disasters in no way caused or preventable by the Federal Government.

There is continuous pressure from Idaho and their Congressional delegation to make a commitment soon to cover all damages on the assumption that the Federal Government is clearly liable.

The Department of Justice advises that we should not proceed on the assumption that the Federal Government is legally liable
for payment of damages for the following reasons:

- Existing law provides Federal immunity from suit over failures of flood control projects, which Teton Dam has been determined by the courts to be, and

- Construction of the dam is clearly a discretionary act which is specifically excepted from liability under the Federal Tort Claims Act, and

- There is small likelihood that a negligence case can be made.

Interior reinforces the last point based on the engineering reviews of the project to date, the outcome of prior litigation over plans for Teton Dam, and the fact that the actual failure cause cannot be determined for several months because of tunnelling work required for such determination.

Issue #1 - Given that the Federal Government is not liable for damages in the strict legal sense, should provision nevertheless be made to pay all damages as a matter of public policy?

Pros: It is perceived by the victims and the general public that the Federal Government must be at fault since the Dam was planned and managed by the Federal Government and there was no known act of God or nature that can be demonstrated to have caused the failure. Therefore compensation for damages should be paid by the Federal Government.

Regardless of the soundness of the Federal case from a legal standpoint, there is little likelihood of convincing the public that there was no misfeasance, malfeasance, or negligence involved in the failure. Many dams have been built without failure, and many more complex technical feats achieved successfully. Thus, maintenance of public credibility calls for payment.

There is little doubt that public sentiment strongly supports full compensation for damage and therefore little chance of successfully avoiding full compensation should it be deemed desirable to do so.
Cons: The existing claims and flood project immunity laws are soundly based and setting them aside in this case can lead to repetition of such action as standard practice. This could lead to massive outlays in cases not so clear as this e.g. where the operation of flood gates or bypasses causes damage to some in order to protect many more, or where a flood control work malfunctions under flood conditions.

Special action in this case will also be cited as precedent for expanding our disaster assistance programs in future natural disasters on either a general or a one-time basis, natural disasters that are clearly beyond the power of the Federal Government to either cause or prevent.

Issue 2: What mechanism should be used for damage payment?

Each of four identified options has disadvantages and each poses specific precedential problems. Factors common to all are:

- Legal liability should not be assumed until established in court.

- We should avoid payment for damage covered by insurance or suits against third parties.

- We should avoid double jeopardy, i.e. both a gratuitous payment and a damage assessment should Federal liability later be established in court.

- We should avoid changing general law solely to cover a unique situation.

- We should minimize potential adverse consequences of precedent.

- We should avoid compromising our ability to recover damages from contractors should they be deemed negligent.

- We should provide for prompt payment and simple administration.
Four options have been identified as follows:

1. Handle under existing Tort claims law.

2. Handle under existing Interior authority to compensate for damages without regard to liability.

3. Propose new legislation providing gratuitous payments to cover damages resulting from the Teton Dam failure.

4. Propose general amendments to existing disaster assistance legislation to cover all Teton damages.

These options are compared in detail on the attachments, but in summary -

- Option 1 may not really be feasible because it can be overturned by a court test of liability which we are very likely to win. It is also the slowest and most cumbersome.

- Option 2 appears simplest and effective, has least adverse potential precedents, and can be supported by appropriations only. It is endorsed by Interior, Justice, and OMB, and is acceptable to HUD.

- Option 3 has the same advantages as option 2, but would require both authorization and appropriation, with greater opportunity for Christmas Treeing, precedent, and possible delay. It is a close second choice of Interior, Justice, and OMB, but possibly the preferred choice of HUD.

- Option 4 - is feasible but has most undesirable precedential value. It is not supported by any Executive Branch advisers, but may be the approach selected by Congress.
Conclusion and recommendation:

Issue 1: Virtually all your advisers recommend that full damages be paid and that the Administration move quickly to gain credit for that position, most leverage on Congress, and early start on Administration in the field.

Issue 2: I recommend option 2 as the mechanism, and will provide the papers for transmitting an appropriation request to Congress today if you wish. I would suggest $200 M for residual damages not covered by disaster assistance payments, with the understanding that more may be required later.

Decision: Support reimbursement for damages without conceding liability

- Yes
- No

As mechanism, choose option

Provide for $200 M

or

$ _____ M
Comparison of Options for Damage Payment

OPTION 1

Deal with the problem of compensation under existing "Claims" law. Under this option, the Federal Government would not concede legal liability, but would settle claims out of court on the thesis that the Federal Government might be liable.

PRO

1. Would not establish legislative precedents
2. Would require only supplemental appropriations and not a substantive legislative proposal
3. Would work within established administrative and legal mechanisms

CON

1. Adjudication of claims by Interior, Justice and GAO is a time-consuming process and would not provide prompt assistance
2. The probability of an eventual court suit is high and a court is highly likely to rule that the federal government is not liable, for the reasons cited by the Department of Justice. Out of court settlements should then cease and, if it were decided that relief was to be provided anyway, other means of compensation would then have to be devised
3. Congress may wish to enact substantive legislation anyway, over which we would have little influence
OPTION 2

Deal with the problem of compensation under existing Reclamation law with supplemental appropriation. Under the present Interior appropriations act, payments of claims arising out of Reclamation projects can be made without regard to legal liability.

PRO

1. Would minimize legal and practical precedents
2. Would require only appropriations, thus, limiting possible scope of what will be enacted
3. Avoids problem of concession of liability
4. Would probably meet most public demands for equity
5. Option of litigation is left to claimants who elect to pursue that course
6. As opposed to utilizing existing claims laws, an adverse court decision would still allow payments to continue out of appropriation
7. Could be structured to work within present Interior and disaster assistance mechanisms

CON

1. Sets a practical precedent for use of this general claims provision for claims of this magnitude
2. Would require substantial coordination with other Federal departments
3. Congress may wish to enact substantive legislation anyway
4. As a primarily administrative approach, probably more susceptible to abuse through overpayment than a judicial approach
OPTION 3

New legislation specifically limited to the Teton disaster and designed so as not to specify any federal liability. The proposed legislation could provide payments for: death and non-insured physical injury; and non-insured property losses directly caused by the flooding that are not eligible for other federal grant programs (e.g. eligible for loan programs). The legislation would not provide payments for: damages for mental anguish; and opportunities foregone.

PRO

1. This option is the least risky legislative alternative and reduces the risks of having more costly general disaster relief legislation enacted

2. Avoids opening up existing disaster relief assistance legislation to "Christmas Tree" amendments

3. Would probably meet most public demands for equity

4. Avoids problem of concession of liability

5. While the legislation would be specifically targeted to the Teton Dam disaster, the existing disaster assistance program apparatus could be utilized in processing assistance

6. Legislation drafted so as to limit windfalls to claimants

7. Satisfies Congressional urge for legislative solution

CON

1. Could be treated by Congress as precedent calling for specially tailored legislation for each disaster

2. Despite specificity of legislation, legal and programmatic precedents are more likely to emerge than under options 1 or 2

3. Subject to potential "Christmas Treeing" or to conversion to general legislation
OPTION 4

Propose amendments to existing disaster assistance legislation to provide compensation by grants to make individuals "whole" (defined in legislative proposal). These amendments could include: 100% grants to those not currently eligible; partial or complete disaster loan forgiveness for individuals and businesses.

PRO

1. Would probably meet most public demands for equity
2. Additional assistance has been provided through devices such as loan forgiveness provisions in disasters before April 20, 1973—therefore has precedent
3. Works within existing program and administrative apparatus
4. Satisfies Congressional urge for legislative solution

CON

1. Additional assistance provided for this unusual disaster would have to be provided for all future natural disaster declarations
2. The longest range and most costly budgetary implications would result from this option
3. Abuses that led to the repeal of loan forgiveness probably would recur based on experience with earlier disasters, e.g., Hurricane Agnes, L.A. earthquake, etc. Loan forgiveness caused many to overestimate their disaster damage up to the maximum amount forgiven
4. Tampers with existing natural disaster assistance legislation which was strongly supported by the previous Administration and achieved only after prolonged review and considerable legislative difficulty
5. Invites "Christmas Tree" amendments, especially if another disaster occurs during congressional consideration
6. Applying these changes to all future declared disasters acknowledges that the current legislation is not sufficient: comprehensive