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Charles E. Corker

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LET THERE BE NO NAGGING DOUBTS: NOR SHALL PRIVATE PROPERTY, INCLUDING WATER RIGHTS, BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION†

*Charles E. Corker**

FRANK Trelease thinks that when the United States needs water and must acquire it by drying up a water right already in use the United States should pay for it. He says, "The only issue is who should bear the loss and pay the costs."[1] The final words of the Fifth Amendment of the United States Constitution answer his question with respect to private property generally, and I know of no reason why water rights should be different from other property; nor do I know of any proposal to repeal the Fifth Amendment; or why water flowing from national forests should be different from water flowing from private lands, state lands, federally acquired lands, or the Province of British Columbia; or why compensability for a federal taking of water rights in Wyoming, because Wyoming is a public land state, should be different from compensability for a federal taking of water rights in Massachusetts and Texas, where all federally owned lands have been acquired by the Government after statehood.

† The portion of the title after the colon might have been: "nor shall private property [, including water rights,] be taken for public use, without just compensation." It occurred to me that there may be a special criminal law, like those against using the flag for advertising, to punish those who interpolate their own language into the Constitution. Quoted words are those of the Fifth Amendment.

* Professor of Law, University of Washington School of Law; A.B., 1941, Stanford University; L.L.B., 1946, Harvard University; Member of the California Bar Association.

1. *See*, Trelease's discussion commencing at page 89 of this volume.

Arguments about "the reservation doctrine" could almost be dismissed as an absurdity, except that very earnest federal lawyers have earnestly and successfully made them in federal courts. Now that the Public Land Law Review Commission has announced that 61 per cent of the water in eleven western states comes from federal lands, and that the reservation doctrine is real, we may find that the problem is principally hydrological. We may find Congress directing the United States Geological Survey to install an analyzing station on the Green River of Wyoming to determine the percentage of the flow of that river which is federal, and the percentage which is nonfederal. Doubtless the percentages vary from year to year, depending on distribution of snowpack, and from early in the year to late in the year, depending on places the maximum rate of snow melt is seasonally taking place.

All great men—the Public Land Law Review Commission, Dean Trelease, Commissioner John A. Carver, Jr., the founding fathers who wrote the Bill of Rights, and I—agree about the principle of compensability. Perhaps our agreement should make this entire discussion unnecessary. But Trelease expresses what he calls "nagging doubts" about whether the PLLRC Report has really discovered a solution. I associate myself with his doubts. My doubts do more than nag. They relate to four proposals said by the PLLRC not to abolish the reservation doctrine, but to dispel its uncertainty.

1. The first clarification and limitation Congress is asked to make is to require federal land agencies to ascertain and give public notice of their projected water requirements for the next 40 years for reserved areas, and forbid the assertion of a reservation claim for any quantity of water not included within such public notice. Congress is unlikely, I think to do this, and if it did, it would be a questionable use of public funds.

A public notice that the Ashley National Forest may without compensation increase its use of runoff by X acre-feet per year by the year 2010 A.D., or X tenths of one per cent of the total run-off, might solve a Forest Service problem. But the problem Dean Trelease described is not that of the Forest

Service, but of a Mrs. Glenn who claimed water supplied by Bear Creek, flowing from the Ashley Forest, and who has no concern with the 362,999,999 acre-feet of run-off from public lands elsewhere in the west, including the Ashley National Forest not tributary to Bear Creek.

And if the proposed inventory is to identify future federal claims from the thousands of Bear Creeks, and Warm, Yellow, and Black Springs—as the inventory must if the inventory is at all useful—its preparation will be an absurdity. Mrs. Glenn's collision with the Forest Service could not possibly have been predicted in 1930. The future collision to take place in 2010 between the Forest Service and Mr. McGillicuddy cannot possibly be predicted in 1970. It would be wasteful to devote the time of able and devoted Forest Service people to this kind of enterprise. Its cost would be many times the cost of paying for a water right if needed 30 or 40 years from now.

2. The Commission recommends that "procedures for contesting each claim should be provided." Of course, this is true. And the need for procedures—and a definitive forum—is not confined to claims under the reservation doctrine. The principle was accepted by the *McCarran Amendment* which, in 1953, waived sovereign immunity of the United States. 43 U.S.C. § 666.

The *McCarran Amendment* doesn't work very well. This is only partly because it is badly drafted. It will take the skill and judgment of Frank Trelease—and I say this so that he will not mistake his responsibilities as a consultant to the National Water Commission to see that he gets this job done—to figure out what to do and how to do it. Elwood Mead, territorial state engineer of Wyoming, taught us what I think is the essential part of the problem—judges unspecialized in water administration are not equipped to handle water rights adjudications. The only federal judicial or quasi-judicial official now in sight is a federal judge.

3. The Commission recommends that future withdrawals and reservations of public lands be accompanied by "a statement of prospective water requirements and an express

reservation of such quantity of unappropriated water." There is nothing wrong with that recommendation. But if you go back to 1872, when Yellowstone Park was reserved from the public lands, and imagine that someone was in that year required to project Yellowstone Park's water consumption and use as of 1912 (40 years in the future) or as of 1970, you would recognize two things: First, Yellowstone Park's problems since 1872 have been manageable without intervention of the reservation doctrine, in any of its mysterious forms. Second, to handle the new National Park's water requirements by means of the reservation doctrine, with added improvements suggested by the Public Land Law Review Commission, would have been a cumbersome method recommending itself principally to the inventive genius of Rube Goldberg.

4. Finally, the Commission recommends that "compensation should be awarded where interference results with claims valid under state law before the decision in *Arizona v. California,*" which means before June 1963. Trelease has spotted the drafting problem, which is in essence that under the reservation doctrine no state water rights were valid on that date as against federal reserved claims. This one can be handled if Trelease drafts the law carefully to define "valid."

My complaint is that even if he does supply the draftsmanship, the proposal still makes little sense. The reservation doctrine, as a matter of federal constitutional power to reserve water for any valid federal purpose, was solidly established in 1908 with *Winters v. United States.*[2] Moreover, I cannot think that it serves any useful purpose to propose that Congress now establish two kinds of federal rights (and hence two kinds of state law water rights)—pre-1963 and post-1963.

Having said all this, let me say with emphasis that the PLLRC Water Report would be an improvement if acted upon; that all Trelease's strictures and all my own are quibbles about how best to achieve treatment of water rights as property rights, protected by a viable substitute for the Fifth Amendment, from the reservation doctrine. But the question

2. Winters v. United States, 207 U.S. 564 (1908).

of how best to do the job is the very one which has prevented doing anything but talk about the reservation doctrine since the *Pelton Dam* decision in 1955.[3]

Let me pay respects to the *Pelton Dam* decision. It was a poor decision I think, but primarily because it did violence to express terms of the Federal Power Act. But in that respect, it was not significantly worse than *First Iowa*[4] before it, which related to navigable waters. Senator Neuberger of Oregon proposed an amendment to the Federal Power Act which would correct the Court's error, but his amendment captured no enthusiasm at all.[5] Congress having acquiesced in the construction of the statute for 15 years, *Pelton Dam* is now good law.

But with respect to what the Supreme Court decided in that case, or even what it clearly said, *Pelton Dam* stands only for the proposition that Oregon has no interest in its unappropriated waters which would give the state power to prevent federal licensing and construction of Pelton Dam by Portland General Electric. Oregon as a state has no power to exact compensation for unappropriated waters, but not even that question was involved in *Pelton Dam* or in *Arizona v. California.*[6] In both cases, no compensation was sought.

3. F.P.C. v. Oregon, 349 U.S. 435 (1955). Debate over the "reservation doctrine" with Department of Justice lawyers really amounts, I think, to swapping "fears and doubts" about what may happen, but hasn't happened yet. The "navigation servitude," is a topic where examples can be discovered by state law enthusiasts of bad things which have already happened. This fear swapping is a dangerous game on both sides, because someone's horrible example can become tomorrow's reality.

   The federal lawyer's best "horible example" of almost raiding the treasury in the name of water rights in the name of state law, is Grand River Dam Authority v. United States, 175 F. Supp. 153 (Ct. Cl. 1959) (3-2 decision, *rev'd.*, 363 U.S. 229 (1960). The lawyer who both solves, and then sells his solution to the federal-state controversy must not risk reversing the result (as distinguished from the doctrine) of the Supreme Court's decision. Suggested possible solution: No water right shall be compensable except to the extent of present beneficial use (which can be federally defined) plus the presently discounted value of the right under state law to make a future use within a reasonable (or a defined) time, and under generally applicable state law which does not discriminate against federal projects.

4. First Iowa Hydro-Elec. Cooperative v. F.P.C. 328 U.S. 152 (1946).

5. Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604, 624, n. 70 (1957).

6. Arizona v. California, 373 U.S. 546 (1963). The Special Master expressly left open the question, not argued, if compensation might be due from the United States as a result of the Mexican Treaty. Master's Report, p. 296 (1960).

I will, however, pay my respects to the Federal Power Commission, because it is my particular honor and pleasure to share a platform with John A. Carver, Jr. It is the first time since John and I walked across a platform together in 1935 when we graduated from Boise High School. This, although we have been college roommates and closest life-long friends.

Here are my two questions to Commissioner Carver which he can think of as my law school examination:

1. Does Portland General Electric, licensee of Pelton Dam on the Deschutes River, have a water right by reason of its FPC license? (If his answer is *no,* I am sure Portland General Electric Co. may hear of it, and its counsel will be nervous. Furthermore, Pelton Dam is a very large hydroelectric investment not to have any kind of water right.)

2. The second is a question reached only if the answer to the first is either *yes,* or *maybe.* Suppose that the unappropriated water above Pelton Dam, in addition to the water required for the dam, is sufficient to supply two, but not three new projects. The Oregon State Engineer authorizes appropriations of water for all three projects.

In some forum—maybe the Federal Power Commission, maybe an Oregon administrative agency, maybe a state court, or maybe a federal court—a decision must be made which of the three new projects (or even on old project?) on the Deschutes River above Pelton Dam must be sacrificed to keep Pelton Dam generating kilowatts. Who shall make that decision, and where is the body of law that determines how that decision shall be made?

I shall give you the right answers but not less than six months after both Carver and Trelease have answered. But I hope they will not reply too quickly. These questions are really prepared for the next occasion when I find a lawyer for Uncle Sam who weasels his statement of the reservation doctrine or the navigation servitude as limiting water rights of private parties only "against the United States."

If no right to 363 million acre-feet of water from federal public lands in 11 western states is good "against the United States," the power of some decision maker to allocate the cost and damage from federal projects becomes completely arbitrary, however benignly it may be exercised. And both the principle and terms of the Fifth Amendment of the United States Constitution, that private property shall not be taken without just compensation, are directed first and primarily against the United States.