

Land & Water Law Review

Volume 6
Issue 1 *Symposium: An Analysis of the Public
Land Law Review Commission Report*

Article 13

1970

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Recommended Citation

Carver, Jr., John A. (1970) "The Implied Reservation Doctrine: Policy or Law," *Land & Water Law Review*. Vol. 6 : Iss. 1 , pp. 117 - 122.
Available at: https://scholarship.law.uwyo.edu/land_water/vol6/iss1/13

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VOLUME VI

1970

NUMBER 1

THE IMPLIED RESERVATION DOCTRINE: POLICY OR LAW

*John A. Carver, Jr.**

I WILL first comment on Professor Corker's questions, because my answers add a dimension to the title of Frank Trelease's paper. Dean Trelease discusses "problems" created by the reservation doctrine; Mr. Corker's questions and my answers add up to a "solution" created by the reservation doctrine. It is not a good solution, but I am confident that if the situation he posits should ever arise, the implied reservation doctrine would be called upon to keep the licensee of *Pelton Dam* in business.

The Federal Power Commission does not purport to grant water rights to its licensees. Section 9 of the Federal Power Act specifically requires that an applicant for a license submit evidence of compliance with state laws "with respect to bed and banks and to the appropriation, diversion, and use of water."¹ Section 27 specifies that Congress had no intention of interfering with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."² Section 14, which deals with recapture of projects after license expiration, contemplates that water rights shall have been acquired other than by grant of the FPC.³

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1. 16 U.S.C. § 802 (1964).

2. *Id.* at § 821.

3. *Id.* at § 807.

It may be significant to note that the licensee of *Pelton Dam* was denied the right to intervene in the proceedings after certiorari had been granted by the Supreme Court to the Ninth Circuit's decision reversing the Commission's order granting the license.⁴ The real party in interest was the Oregon Fish Commission, and water rights questions were seemingly not in issue. The Federal Power Commission's General Counsel had occasion in 1962 to give his version of the case in testimony before the Senate Committee on Interior and Insular Affairs, and he strongly emphasized that no water rights question was intended to be litigated.

As Professor Corker seems to suggest, however, the rationale of *Pelton Dam*⁵ would permit the Federal Power Commission, if necessary, to determine that the licensee could proceed to build without a certificate of an Oregon agency and that it was validly the owner of the requisite water rights. If this were the case, there is little doubt in my mind that a court would refuse to rule that the federal licensee could *now* be deprived of its water by Oregon action. Such a conclusion is inconsistent with the language of the Federal Power Act, but not fatally so.

The second question suggests a latter-day *First Iowa* proceeding,⁶ in which the underlying assumption is that some forum would take jurisdiction of a case predicated upon an assertion by the sovereign state of Oregon that without *its* certificate, the licensee has no water right, and so must give way to an appropriator who possesses the necessary Oregon certificate. Alternatively, it might be argued that the failure of the licensee to secure a state certificate initially left the company exposed to the obligation to recompense a subsequent would-be appropriator for the value of the water which the late-comer presumably could have had free if the dam had not been built.

The assumption is unlikely, but the question merits discussion in the context of our discussion today because of the

4. *Portland Gen. Elec. Co. v. F.P.C.*, 328 F.2d 169 (9th Cir. 1964), *rev'g*, *Portland Gen. Elec. Co.*, 28 F.P.C. 924 (1962).

5. *F.P.C. v. Oregon*, 349 U.S. 435 (1955).

6. *First Iowa Hydro-Elec. Co-op. v. F.P.C.*, 328 U.S. 152 (1946).

extreme likelihood that the lawyers of both the company and the government would rely on the implied reservation doctrine, and not *First Iowa*.

This brings me back to Dean Trelease's able paper. He has pointed out the difficulties generated when federal water needs encounter private rights, while Professor Corker has opened the question of the difficulties generated when private rights encounter water needs of federal licensees. As Dean Trelease says, "anyone who has read any Supreme Court water cases since *First Iowa* will start giving odds on the outcome without waiting for further details."

I agree with Frank and Charley both on the matter of the efficacy of quantification, and on how the problem will be approached by government lawyers. To the extent Charley takes a more extreme view, I agree with him, about the uselessness of the exercise looking 40 years ahead.

As Mr. Trelease notes, I agree that a sensible system of water rights ought to include security, and it ought to eschew uncompensated transfers from one user to another as a matter of policy. In this, my biases are public. I did my best to have the Department of the Interior support the Kuchel-Moss bills. I have plowed the same ground that we are presently discussing (with a sincere acknowledgement then and now to Charley Corker) in a paper in the *Rocky Mountain Mineral Law Review*.⁷ And my public career has been devoted to the effort or trying to persuade the United States as a landowner to subject itself as a matter of sound policy, not Constitutional requirement, to the same rules that govern private landowners.

Frank Trelease's assessment of the strength of the bureaucratic instinct to avoid the charge of having given away federal rights is correct. Congress therefore must be explicit, and the whole Public Land Law Review Commission Report is dedicated to the very proposition that guidelines should be specified.

7. Carver, *A Federal Policy for Development of Western Water*, 14 *Rocky Mt. Min. L. Inst.* 473 (1968).

It is paradoxical therefore that in this particular chapter of the Commission's Report, there is a lapse from that standard. To illustrate, I post two hypothetical questions. Since I am the last speaker on this panel, I cannot address them to my colleagues.

A. If the implied reservation doctrine were translated into legislative language, and *Pelton Dam* and *Arizona v California*⁸ did not exist, would the Public Land Law Review Commission recommend its enactment as a sound policy, consistent with the Commission's overall consensus?

B. Suppose the Congress had, in fact, enacted a statutory equivalent of the implied reservation doctrine in the middle of the last century; suppose further that the statute had not been utilized by the federal government until the time the *Glenn* case⁹ came up, at which time the long forgotten statute was discovered and successfully pleaded in the Utah federal court: would the Public Land Law Review Commission have taken a different view about an old and almost unused statement of Congressional intent, than it has now taken about the implied reservation doctrine?

I am suggesting that the Commission regards court-made law less susceptible to Congressional amendment than statutory law. Of course, we do not have here the situation of *Miranda*,¹⁰ where the Congress was effectively blocked from disagreeing with the Court by any means short of the process of amending the Constitution. Both the Commission and Dean Trelease (the latter more clearly than the former) avoid the trap of saying that the Constitution mandates the implied reservation doctrine. One would gather from reading the Commission Report, however, that all of us ought to be more deferential to a judicial "doctrine" than to a statutory law.

This point can be illustrated by considering a variation of the second hypothetical question. If, instead of discovering in 1963 that the Congress had all the time intended in this policy, we had found that the Congress had in fact explicitly stated

8. 378 U.S. 546 (1963).

9. *Glenn v. United States*, Civil No. C-153-61 (D. Utah, Mar. 16, 1963).

10. *Miranda v. Arizona*, 384 U.S. 436 (1966).

the policy, but for one reason or another it had never been applied, I venture to say that we would find the Commission spending little time with the policy implications. By removing the unused statute from the books, only one concrete situation which actually relied upon it would be affected, the *Glenn* situation, and as both Frank and Charley have said, the factual situation there would disclose an absence of a real issue.

Several students of the Public Land Law Review Commission's Report have suggested that it would have been useful for some of the suggestions to be framed in legislative language. In the matter of federal-state water rights, I believe that job has already been done well by Northcutt Ely, and I will close my comments on this subject by reading language on this subject which he suggested to the Senate Interior Committee in 1961.¹¹ Mr. Elys' handiwork begins with a subsection as follows:

"The provisions of section 1(b) of the Flood Control Act of 1944 . . . shall apply to all works hereafter constructed by or under the authority of the United States west of the ninety-eighth meridian." By footnote to his discussion of this language, he explains that this section subordinates uses of water for navigation to uses for irrigation and domestic purposes, in areas west of the 98th meridian. He says it does not affect the authority of the United States or its licensees to construct works, and does not touch conflicts between navigation or power functions and other nonconsumptive functions such as preservation of fish and wildlife.

"Any right to the consumptive use of water claimed by the United States under the laws of any State shall be initiated and perfected in accordance with the procedure established by the laws of that State." This, Mr. Ely explains, is derived from sections 7 and 8 of the Reclamation Act of 1902. The proposed language applies only where the United States claims an appropriate right under State law, but in such a

11. *Hearings on Problems Arising from Relationships Between the States and the Federal Government with Respect to the Development and Control of Water Resources, Before the Senate Comm. on Interior and Insular Affairs*, 87th Cong., 1st Sess., at 123 (1961).

case requires the United States to conform to the administrative procedure established by the State for the establishment of such a right. It negatives the asserted "right of self-help."

"No vested right to the beneficial consumptive use of any waters, navigable or nonnavigable, which is recognized by the laws of the State in which such use is made, shall be taken by or under authority of the United States without compensation." This language, according to Mr. Ely, does not deny the supremacy of the Federal commerce power, but does recognize the existence and compensable character of rights generated under State law which may be taken in the exercise of the plenary Federal Commerce power.