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LAND AND WATER LAW REVIEW

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DISCUSSION: WATER RESOURCES

Background of the Pelton Dam case.

**Discussion of the Implied Reservation Doctrine
as it affects future use and disposal
of public lands.**

Circumvention of the reservation doctrine.

MR. CORKER: (*Oral remarks supplementing his paper*) In 1955, the United States Supreme Court upheld, against the objections of the State of Oregon, the licensing of a hydro-electric project of Portland General Electric Company on a river. It was probably a navigable river, but the general counsel of the Federal Power Commission wanted to make a little law and so did not present any findings that it was navigable, and so based his case solely on the predicate federal power under the statutes, which became applicable on the basis of the abutment of the dam on federally reserved lands. My work for the Public Land Law Review Commission permitted an examination of the briefs and the arguments in that case, and I would like to say to you that I think Oregon's argument was very unfortunate. In essence, the argument was that a constitutional power was vested in the State of Oregon which prevented Congress from doing what the Court said the Federal Power Commission had been authorized by Congress to do; namely, to build a dam under federal license. To this grant of power the State of Oregon objected. There were no vested water rights asserted. There was no compensation asked for. There was no compensation that could have been awarded even if it had been asked for. The decision I think was one that is subject of criticism. I join in criticizing it. The decision was a matter of construction under the Federal Power Act which Congress was free to amend. Senator Richard Neuberger of

Oregon proposed amendments. Congress had no enthusiasm for those amendments. After 15 years, I think that the decision, but only as an example of statutory construction, is pretty sound law.

MR. BARRY: I had something to do with the reservation doctrine when I was with the Department of Interior. There is a very large amount of confusion involved in the reservation doctrine. Now, I do think, and this is something I say with deference and respect, that the *Pelton Dam* case is a case involving the reservation doctrine. My theory is that the Federal Power Act gives to the Federal Power Commission the authority to license dams on public lands, reservations, navigable waters of the United States and waters that affect the navigable waters of the United States. Now, if that is a constitutional law, and I am fully convinced that it is, and I am sure that John Carver will agree with me, the doctrine has been in operation long enough to be tested. If that is a constitutional act of the United States, then no law of any state can interfere with it. It is a supremacy case. The *Pelton Dam* case simply says there were no private rights involved. Nobody claiming a private right sought intervention. The only one who tried to intervene was Portland General Electric. It was solely a contest between the United States and the State of Oregon as to who had the jurisdiction to decide what was going to happen to that river. All the court held was that the United States law was supreme. The Act of the Federal Power Commission, who licensed the dam, was valid.

I realize that there could be a question of reservation rights in the *Pelton Dam* case. However, I am sure that the water rights used by Portland General Electric had been acquired by them. I do not think they got their rights by virtue of the license. I am quite sure that in the *First Iowa* case and the *Grand River Dam* case that the water rights of the downstream appropriators and users, which were lost when the areas were flooded, would have to be paid for under the Federal Power Act. Likewise, in the *Pelton Dam* case the water rights would have to be paid for.

I do not want to express so much my own views on this subject, which happen to be generally in support of the reservation doctrine as expressed in *Arizona v. California* and in the *Winters* case, but I do want to point out that I do not really think that the reservation doctrine means all the things that people say it does. For example, some people contend that just because 60 per cent of the water falls upon the national forest, the United States owns that water. The United States only owns sufficient water to carry out the purposes of the reservation. One of the reasons forests were set aside was to preserve water for all kinds of downstream users. If someone has a pre-reservation right that they acquired for the use of water under state law, the 1886 Act makes that right a property right which cannot be terminated without compensation. Do I agree with you on that, Mr. Trelease?

MR. TRELEASE: Yes. As a matter of fact I left a sentence out when I presented my paper. The chiller, this idea of the 61 per cent, seems based on the utmost extension of the doctrine to reservation of all water "arising on" reserved lands (the *de minimis* refresher on the reservation of water only for "intended reservation purposes").

MR. BARRY: The source of this misconception can be found in the brief that Bill Peters filed in the case out in California where he implied that all the water that falls upon reserved lands belongs to the United States. This has never been the claim of the Department of Interior.

Now there are questions that involve the navigational servitude, but these are different cases too; for example, the *Gerlach* and the *Kansas City Life Insurance Company* cases. I quite agree with John Carver that west of the 98th meridian it would be appropriate to subordinate the navigational servitude to all these other uses of the land. There really is not much navigation on the rivers west of the 98th meridian. The O'Mahoney-Milligan Amendment which was introduced in Section 1 of the Flood Control Act of 1944 provided that west of the 98th meridian the federal navigation servitude is waived in favor of all these other uses. I would say that that would be an appropriate thing to do under the circumstances. Even in

Gerlach where the court was dealing with a non-navigable part of the San Joaquin River, it was decided there would be no compensation for some people although water was taken from them and given to someone else.

There is no statute that really covers this reservation doctrine. I think it is important that we should give some consideration to it. There should be a statute that leaves it up to more than the whim of Congress to take care of people in the *Gerlach* situation. The Central Valley Project Act relied heavily on the legislative history in the *Gerlach* case to find compensation or compensable rights for these people.

Now, there is one other thing about these cases. First of all, I want to say this about what the reservation doctrine is. The reservation doctrine is what was spelled out in the *Winters* case. Certain Indians on the Milk River Reservation in Montana had made a treaty with the United States, and had given up a great deal of their land, and as a result were confined to a smaller area. The Supreme Court reasoned that we could have suggested that these people give up their nomadic hunting life and go to agriculture. This would have meant that they would get this little parcel of land with no water rights with which to conduct their agriculture enterprise. This is the rationale of the *Winters* case. Now that is a far cry from the *Pelton Dam* case, but it is not a far cry from the reservation doctrine of the *Arizona v. California* case, where the federal government said the United States has a reservation for a wildlife refuge. You need water for a wildlife refuge. The government has a water right for so much water *as of* the date the refuge was established. This is what these two cases held. Strictly speaking that is what we are talking about in the reservation doctrine.

It would be important if Congress were to spell out something like an articulated statement which must be made at the time the reservation is established. I do not believe, however, that we ought to compensate people for the past, that is, to pay them for rights they never had.

I would like to point out one thing more. There is something that they call county of origin and state of origin. I come from Arizona. I am now recently from Oregon. I have written to my friends, including Bob Clark in Arizona, and told them to keep their "cotton picking hands" off the Columbia River. But in what sense is the water in Oregon private property? I do not think there was any private property involved in the issues, but in what respect does the Fifth Amendment apply to any water in Oregon that is not yet appropriated and might be taken to Arizona? The question is: will there be a county of origin doctrine recognized by the United States? It is now recognized in policy. The bills that are considered in Congress which intend to import water from one area to another always provide that there will be a fund established that will bring water to that area if the area ever needs it, but apparently it appears that it will be considered surplus now, and that Congress can take it, if it needs it, now. This concept is also different from the reservation doctrine. It might be well to spell out in some statute that whenever water is taken away from a county or a state under the state of origin doctrine, that there will be some provision in the act to compensate the states for what they have lost.

I think that most of the cases that are cited, including the *Rio Grande* case, did not deal with reservation doctrine, but they did suggest something that Congress never considered again. The *Rio Grande* case said that all of the public lands were held under the riparian doctrine, and that Congress did not intend, in the 1866 Act when they let people acquire lands and water rights, to take away the riparian right on the public lands which are not reservations. Congress has not carried that doctrine over. If they had, the doctrine might be much more onerous than it is now.

I would think that much of this is a tempest in a teapot. Mr. Carver indicated in one particular instance that it would not be worth a study. Nobody has, of course, been hurt by the reservation doctrine. When the courts get down to deciding the issue, all they say is so much water is reserved for any federal reservation as is required for that reservation. How

much do you need for a park? Not much. How much do you need for a forest or wildlife refuge? Quite a bit. You need to fix the quantity as of the date of acquisition. We suggested in the Department of Interior that a bill be passed requiring us to give notice of how much water would be taken in the event we had to take someone else's appropriated water. We always took the view that we would pay for it, because they had valid rights under state law. This takes care of the compensation aspect of it. I have always found the problem to be very simple. Maybe it is because I am too dense to notice the subtleties, but I really think that it is very simple.

MR. MARTZ: Let me take a couple of minutes to respond. First, philosophically, it seems to me that the government, whether it be federal or state, exists for the people. It does not exist as an entity for itself. Its interest should be the people's interests, as this is so well stated in the preliminary chapters of the Public Land Law Review Commission's *Report*.

Water is wasted if it is not used. It is in the national interest that water be effectively used. Water reserved for some potential or future use is lost to our economy. It cannot be used unless substantial investments are made. It is not, therefore, in the interest of the United States as a federal entity to do anything that impairs the utilization of the non-renewable resources of the United States.

To make water resources useable, we have to have the title to water secured in the user. This requires knowing what the burdens on the stream may be. It also requires a uniform system of administration. It may be a nit of water or a magnitude of water that is not used. I know for a fact that it is a matter of great concern to the oil shale industry on the Colorado River and in the White River Basin in making their plans for the development of reservoirs and water supplies for future uses. This is so because of the uncertainty as to what the federal load on the stream may be, because of the open-ended reservation doctrine. Now if it is a simple thing and if it does not require sacrifice of much in the way of potential future uses of the United States, then it seems to me this is all the more reason that we should have quantification and uni-

form administration. Quantification, as practiced in the federal departments, is self serving because of the concern that every man in government has about claiming too little under laws and court decisions which give a property interest to the United States in water. This is why the Commission has suggested administrative positions must be subject to accountability.

In the recommendations that we made to the Commission a year and one-half ago in urging quantification and adjudication under state laws we did two things. One, we required initiation by the appropriate agency in determining what the present and foreseeable needs for water on the various sources of supply might be. Rather than to simply allow a statement of quantities without review of it, we would require an indication and accountability for the present and potential needs for the water. The Commission has recommended state and local government participation in an advisory way, but has reserved to itself all of the decision-making authority. I have serious reservations about this statement of policy. I can see no justification for the existence of a federal entity that is going to act as an entity, separate and apart from the region of the users, unless there is a defined and independent federal interest to protect. In the area of water administration, I do not see that any such interest exists. It is in the interest of the United States to have the water put to beneficial use. The states have fairly well-established systems for the allocation of water. Some work more efficiently than others, others do not work too efficiently at this time, but, nevertheless, they exist. For the United States to say we have an unquantified amount of water that is not going to be subject to administration by the state, is a burden upon the utilization of water, and a burden upon private rights.

On the constitutional question, I think it is a boot strap argument to say that if the water is reserved to the United States, it belongs to the United States, and obviously compensation does not have to be paid for its later use. But, if we have a regimen upon a stream administered both by the federal and state authorities that not only permits but encourages

the investment of capital for the development and utilization of water resources, I think that there is an economic interest that deserves protection in the national interest; and that compensation should be made for changing the regimen because of possible later use of the reserve water.

MR. BARRY: There is just one question that I do not understand that I think needs some clarification. We did a lot of planning in respect to the development of the oil shale resources in the Colorado plateau. We always assumed, and I have never heard it said at any time that this assumption is not correct, that if an oil shale industry was to develop there and needed water that they would have to buy that water from downstream users and pay for it. Now, is there any change? If there has been, I have not heard of it.

MR. TRELEASE: That was just a suggestion that the reservation might have the water there.

MR. BARRY: Maybe it is only a suggestion, but it is typical of the misconceptions that people have. This is comparable to the idea that maybe all the water that falls on the forest is reserved to the government. We have had days and days of hearings that reiterated that this is not what the reservation doctrine is about.

MR. TRELEASE: Well, Frank, you state exactly what the reservation doctrine means and you say its effect is *de minimis*. Government lawyers do not speak of it in exactly the same way. If you would have stopped after your first couple of paragraphs, you would have dictated a wonderful opinion for the *Pelton Dam* case, and it was too bad that you were not clerking for the Supreme Court when the *Pelton Dam* case was decided. I think that it was Winston Churchill who wrote a history of the United States based on the proposition that the South had won the Civil War. In the same light, I think it would be worthwhile speculating, and as a matter of fact I think you were doing it in part, what would have happened if your opinion would have prevailed in the *Pelton Dam* case?

MR. BARRY: All I am saying is that there is not a word about water rights in that opinion.

MR. MARTZ: Isn't it fair to say that the problem with the *Pelton Dam* case is not in the holding but in the dictum. The Supreme Court did say, did it not, that the reservation of land reserves the water?

MR. CLARK: I would like to say something that relates to the nature of this chapter, particularly in regard to the brevity of the chapter. First of all, it is kind of repetitious. You must be aware of the fact that a new commission, the National Water Commission, has been established. The Public Land Law Review Commission knew that the National Water Commission was mandated to take up these particular problems. We tried to narrow the question as much as we could in order to be clear about what little we could be clear about.

We had long and serious arguments about what the reservation doctrine meant. A lot of it was real nonsense. One of the things that was overlooked was that the California court in the *Portland Cement* case did not say that the United States in the previous years had given up all interest in water on the public land. It never said that, although lawyers have been saying for 50 years that the court said that. Now the same things apply to the *Pelton Dam* case. People have been saying what the *Pelton Dam* case said, but the *Pelton Dam* case does not involve water rights and that is an accurate statement. This *Report* that we have in front of us says some things that many of you are going to say that it does not say. However, we are being very clear about what the *Pelton Dam* case does not say. This is important because the *Pelton Dam* case is the case that got everyone upset about what it did not say.

MR. CARMICHAEL: I am very bothered by the phrase that I have heard mentioned throughout this discussion. This is the concept that a resource is wasted if it is not used. That is the way my five year old son looks at a cookie jar. It strikes me to some extent that that is the philosophy that is underlying the Commission's *Report* and certainly some of the thinking that has been expressed here. "Wasted if not used" makes

some sense if it is applied to a flow resource, such as water. But, in "use," presently, you are talking about pollution and certainly about fixing allocation by virtue of massive capital investment.

MR. MARTZ: I certainly did not exclude non-economic uses, that is non-business uses, from the category of beneficial use. Water that is available for a use that is not practically susceptible to use because of some government rule or policy I say is waste. If you can satisfy us that there are non-economic, non-business uses being made, environment aesthetics and all that, then these are uses. They are values. They are in the cost-benefit ratio analysis.

MR. CARMICHAEL: In some senses I am also talking about the fixity of patterns of resource allocations which, in essence, conceive only short term ends.

MR. CLYDE: I think that you have to break this problem down into two things. I think all of you know where we have been and I think we are a little bit concerned about where we are going. I think that almost all the water projects that are yet to be built are going to be quite expensive and will require a rather large capital outlay. Anyone who embarks on such a project will want to know that he has an assured water right. I do not think that he will care so much if it is governed under a federal or state statute as long as he has some method by which he can determine what he is entitled to use and how he can protect the water rights for the future.

The statement that no one has been hurt by reservation doctrine is probably only partially true. We have circumvented it in a multitude of ways. In the Central Utah project we have a river called the Duchene River. Farmers around that river now have an adequate water right without building storage. There are about 30,000 acres of Indian land not yet developed, which, under the Winter's doctrine, can be. If the Indians develop this other 30,000 acres of land, they could require the water. The farmers who settled on this reservation about 1900 would be without water. One of the reasons we are building the Central Utah project is to store water so that the

white settlers will have water when the Indians develop their use. The Indians have agreed to defer their use until about the year 2000, by which time another phase of the project will replace it. This is a case where a very heavy portion of the cost is being funded by the federal government. In the future I certainly think that Congress ought to remove the impediments to the state control on the solution of these problems. I basically favor that simply because the water that is outstanding was acquired there. We have a very viable state system. To impose a dual system on it would present problems that we would equally want to avoid. If there is going to be a federally imposed statute or solution, I think we, at least, need definiteness. The method must insure that what is already done can be quantified; and that water rights can be acquired in the future free of the implied reservation doctrine, free of the navigational servitude, and the other clouds that make development impossible.

The farmer or the industrialist who wants to develop does not care where the ultimate power lies, whether it be in the federal government or the state. He wants it resolved as a matter of policy so that he has a reasonable definiteness and certainty in the future. He wants to know what he can do to protect the water right in the future. Anything less than that leaves these two competing dual systems in competition with each other, which leaves so many voids and uncertainties that needed projects could not get off the ground.