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THE ORIGIN, GROWTH AND FUNCTION OF THE LAW OF WATER USE

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Water use in America in its modern setting of storm and fury is but a chapter in the story of water—a story seemingly without end, but a story that in the telling teaches that calm follows understanding.

In the simple rural life of early America the use of water was considered a community right to be enjoyed by all for the satisfaction of the natural wants of man and beast. As America developed, the rural life became blended with an urban life. A status as a nation was achieved and land passed from royal, chartered, and proprietary colonies to private ownership and to Federal ownership.

The right to use water, while it did not lose its community aspect, did acquire some standing as an individual right. Thus there developed the conflict between the community interest and the individual right that, to a greater or less extent, has lasted even to this day.

As the inhabitants of colonial America and of the original states were predominately English, they either brought with them the established principles and rules of the common law, unmodified by English statutes, or succeeded in supplanting the principles and rules of the civil law, wherever they were in force, with those of the common law. The supplanting of Mexican law by the common law in the State of Utah is a classic example. It was natural that the conflict between the community interest and the individual right to the use of water should be resolved by the common law, and so it was resolved by the application of the doctrine of riparian rights, which is based on the ownership of land contiguous to a stream without regard to the time of use or to any actual use at all. This gave to the owners of the lands contiguous to the stream a full measure of control of the use of the stream to be enjoyed in common, but conflicts developed among the riparian owners, as some of them built mill-dams in the stream to obtain waterpower for manufacturing purposes, and others of them diverted the stream for irrigation. This conflict among riparian owners was resolved by legislation, or judicial decision, or both, by modifying the pure common law riparian doctrine to the extent of limiting the enjoyment of the riparian right to a reasonable use of the water, such reasonable use to be measured by the quantity of water used regardless of the purpose of use.

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The use of water under the riparian doctrine to satisfy the natural wants of man and beast came to have a companionate use to satisfy the artificial wants of man in a growing industrial society. With the growth of an industrial society, urban life began to assert its influence on water use to satisfy both the natural and artificial wants of man in such a society. This influence resulted in the activities of private persons acting either as individuals or collectively to acquire the right to take flowing water for sale to those who had natural or artificial needs for water.

Thus, there again came into conflict the community interest in water with the individual right to the water. This conflict was resolved, in part, by the purchase of the lands contiguous to the stream so as to acquire the riparian water right, and, in part, by legislation that gave to such water enterprises the right of eminent domain against the riparian rights. So, the community interest to water, in prevailing over the individual right to water, changed water from being part and parcel of the land to a vendible commodity. This change was necessary in order that the natural and artificial wants of man for water in the organized community life of an industrial society could be supplied by collective action, either public or private.

During the time that there were being developed in the original States of the Union the laws in respect of private rights to the use of water, both those vested in individuals and in individuals working collectively as a legal entity, the movement of expansion westward was under way. The use of water in this movement at first was largely, if not entirely, that of satisfying the natural wants of man and beast. The economic life was predominantly founded on agriculture in a humid area. Water supplies were plentiful but, at times, destructive. Because of the abundance of water, there were few conflicts over its use, but those that arose were resolved by the principle and modified rules of the common law riparian doctrine that had been established as the basic law in the original States.

As the expansion of the Nation continued westward, new conditions were encountered. The climate varied from humid to semi-arid to arid. While there were opportunities for agriculture under humid and semi-arid climates both of the farm and the ranch type, there were found greater opportunities in the gold of the streams and the minerals of the mountains, and there was found a new opportunity for agriculture if the fertile soils could be irrigated with the available waters.

The common law riparian doctrine, even as it had been modified in the States to the East, was not adaptable to the water needs of the miner and of the irrigation farmer. It was fortunate to the need of the time that it is the fundamental of American civil government that where private rights are dealt with each of the States in the American Union is a legal, not a political, unit; its law is territorial; its law has actual existence; and its law can create and enforce rights. So in the area out of which were to

come the Western and Pacific States, custom developed that gave to the first appropriator of water in the streams the better right than others to use the waters. Thus, there became recognized the rule that the acquisition of water by prior appropriation for a beneficial use was entitled to protection. This rule, first evidenced by local and customary law and usage, finally was recognized by the statute and case laws of the Western and Pacific States. The doctrine of prior appropriation was created and enforced by state law. It is based on time of use and actual use without regard to the ownership of land contiguous to the watercourse. The appropriative right, like the riparian right, is a substantial right in flowing waters, and it is real property.

With the completion of westward expansion, the development of the country was to take place under two systems of water law—that based on the modified riparian doctrine and that based on the appropriative doctrine.

In some of the 17 western states the appropriative doctrine is the single system of water law. In others it is effective with the riparian doctrine in a dual system of law. The riparian doctrine exists in the so-called 31 eastern states, but it is to be noted in passing that there is a trend in these states toward the dual system of the riparian and the appropriative doctrines.

The development potential of the country that was exposed by the westward movement created new problems of water use. The early migration of people to and within the country, and the necessity for the movement of goods that were being produced by a fast-budding manufacturer, brought to the fore the navigation possibilities of the country, both on the coastal waters and on the inland waterways. While the use of water for navigation did not at first cause any conflicts with the then prevailing natural and artificial needs of man, it did cause a jurisdictional conflict between the Federal and State governments, which conflict was litigated in the great case of *Gibbons v. Ogden*.[1] In this case the courts of New York held that the use of the waters within the geographical limits of their state concerned only the internal affairs of the state or the internal commerce of the state, and that the state had exclusive control of their use. The Supreme Court of the United States held, Marshall delivering the opinion, that "commerce" includes navigation and the exclusive power of Congress in the sense of power superior to the State power was established.

It did not follow, however, that the improvement of navigable waters is an exclusive Federal function. On the contrary, in a later case[2] the Supreme Court held that the improvement of navigable waters within a state, though used by interstate vessels, is a local phase of commerce as distinguished from a national phase, admitting of only one uniform regulation for the whole country.

1. 9 Wheat. 1, 22, U.S. 1, 6 L.Ed. 23 (1824).
2. Escanaba Company v. Chicago, 107 U.S. 678, 2 S.Ct. 185, 27 L.Ed. 442 (1882).

Recognition of the improvement of navigable waters as a local phase of commerce, to be accomplished by either the Federal or the State government, coupled with the recognition of an exclusive power in the sense of the superior power of Congress to do so, made important the distinction between navigable and non-navigable waters, and this distinction gave rise to the public rights in navigable waters to use them for transportation, the preservation and propagation of fish, and for recreational purposes. Consequently, there developed in those states where there are navigable waters statute law prohibiting the obstruction of navigable streams and preventing the free passage of fish; also statute law permitting improvement companies to improve navigation, but usually with provisions protective to health and fish; also statute law for the development of water power, but again with provisions protective of fish. The existence of public rights and private rights to use navigable waters did create conflicting interests, but the protection of the public right was accomplished by statute law, both Federal and State, that placed the burden on the owner of the private right to provide the physical solution necessary to accommodate the two interests.

The development of inland waterways gave impetus to the development of manufacture, particularly in the Mississippi Valley States and eastward. As a result, water development projects, both in aid of transportation and to provide water supplies for industries and the attendant communities, were undertaken by the Federal and State governments. Out of these activities, particularly of the states, came an important decision of the Supreme Court of the United States in the case of *Huse v. Glover*,[3] a decision that, in the first instance, was of more significance to the States and their subdivisions than it was to the Federal Government, but a decision that, in principle, was to become of great significance to the Federal Government in its water development programs. The substance of the decision is that a State, or one of its subdivisions, can raise public revenues or defray the expenses of its undertakings by selling to the public or to its own inhabitants a commercial commodity, either as a matter of general convenience and to supply a demand which cannot readily be met by private enterprise, or to dispose of some by-product of the public works or some property no longer needed by it for public use.

There developed, also, within the States in the Mississippi Valley and eastward statute law which authorized private investors to acquire corporate status for the purpose of building and operating water development projects and to gain income by selling water or charging for the services made available by the water facility. Thus, the vendible product theory of water, which made its appearance in the early history of the country when water was changed to a vendible commodity from being part and parcel of the land in order to resolve the conflict that developed between the community interest in water and the individual right to water

3. 119 U.S. 543, 7 S.Ct. 313, 30 L.Ed. 487 (1886).

in the same stream, was given further emphasis by the industrial development in the States of the Mississippi Valley and eastward.

Shortly before the turn of the century, events were taking place in the development of the country that were to have a pronounced effect on the use of water. Chief among these were a growing use of electricity; the growth of industries along the inland waterways and in the vicinity of raw materials; the slowing of the development of the semi-arid and arid western part of the country, in part because the streams of the area were yielding high flows in the spring and early summer, and low or no flows during the remainder of the year; and the developing monopolistic control of the available water supplies in the semi-arid and arid part of the country by persons who contemplated no beneficial use of the water but who sought to exploit it.

These events brought about a quickened national interest in the development of the Nation's waters, particularly to provide better transportation for such bulk products as coal, oil, and iron ore to centers of steel-making and other manufacture, and of generation of electricity, and to provide the needed storage reservoirs for the irrigation of the semi-arid and arid area, and in the enactment by the territories and states of the semi-arid and arid area of constitutional and statutory provisions declaring public ownership and control of the waters flowing and standing within the territorial limits of each of the territories or states and the strengthening of territorial and state water codes based on the doctrine of appropriation of water to insure that the waters would be appropriated only by those who intended to and who could make beneficial use of it.

To provide the better transportation of the inland waterways, there was more Federal activity, particularly in the Mississippi Valley and in the Sacramento Valley of California, all of this activity finding its support in the commerce clause of the Constitution. In the case of the Sacramento River, pollution of the stream by hydraulic mining was a major problem.

To quicken the settlement of the semi-arid and arid regions, provision was made by the Congress as early as 1875, 1877, and 1891 for sales of public lands at nominal prices to settlers who would undertake their reclamation. In the Carey Act of 1894, Congress attempted to promote the settlement of the arid lands under a plan of turning them over to the states for reclamation by any means which the states might choose to adopt. Other legislation by the Congress to encourage the irrigation of the semi-arid and arid lands was in the form of grants of rights-of-way over the public domain for canals and ditches. Finally, in 1902 Congress enacted the Reclamation Act, and the Department of the Interior undertook irrigation projects on an extensive scale. The Courts held this Act valid under the property clause of the Constitution as a means of improving the public domain to make it marketable.

In the period of 1906 to 1917, the Congress showed a growing interest

in the generation of hydroelectric power, as a feature of Federal water developments, to compensate the Government for expenditures made in the interest of navigation and irrigation. Additionally, in connection with the examination and service of projects relating to flood control—this activity not yet having been accepted as a Federal responsibility, the Congress in 1917 directed that the report give such data as it would be practicable to secure in regard to the possible economic development and utilization of water power.

The foregoing synopsis, covering generally the period from colonial times to World War I, points to certain conclusions in respect of the law of water rights. These conclusions are necessarily generalizations. In the so-called 31 eastern states, while the basic law is the modified common law riparian doctrine, the law in its growth and function has tended to make water a vendible product, to the end that both the natural and artificial needs of man could be better served. This has been accomplished largely by the acquisition of the lands contiguous to the watercourse and by making the riparian rights in the water subject to eminent domain. Thus, the emphasis has been placed on the broader concept of the economic use rather than on the narrower concept of beneficial or beneficial consumptive use. The reason for this, probably, is that it is within the area of the 31 eastern states that the greatest industrialization has taken place with the necessity of freeing water from any legal mold as to its use so that the compelling economic need, with its attendant community need, could be served with a minimum of harrassment and expense.

In the 17 western states the basic law is that of the doctrine of appropriation, with its rule of first in time is first in right—sometimes called the "law of the barbershop," and its rule that the water right is appurtenant to the land if an irrigation right, or to the means of use if for purposes other than irrigation. In the 17 western states there had not yet developed the trend toward the concept of water as a vendible product, as is the case in the 31 eastern states. As a consequence, the law of the 17 western states does not make the water as free to serve the general economic need, but, rather, is molded to serve the economic need as represented by irrigated agriculture. The reason for this probably is that in the past there has not been such a growth of industrialization as to make it necessary to free water from a legal mold as to its use, a situation, however, that is changing and that might well change radically in the immediate future. There are in the laws of the 17 western states instances where the use of water is a vendible product. These instances are in the storage of water to provide a supplemental supply for irrigation in that part of the season when the unregulated natural stream flow would be little or nothing, and when diversions are made from the surface streams for municipal water supplies, although in this connection it is probably true that a large part of the municipal supplies are from ground water, a situation which is also changing throughout the Nation.

Looking forward from World War I and into the future, the problem of water use is that of determining whether or not the law of water rights in its function and growth in the 31 eastern states and the 17 western states will continue in evolution and, if so, what concept of water use will emerge. It is in this determination that the Federal water development programs have exerted, and will continue to exert, a dominant influence. It is presently in order then to examine the enabling legislation for the various Federal water development programs and to examine the State laws as to any perceptible trend in those laws with respect to their future growth and function to better serve to increase the gross national product with adequate safeguards for the general health.

Perhaps in the post-World War I period the most significant piece of Federal enabling legislation for Federal water programs is the Boulder Canyon Project Act of 1928. This Act has instant importance because the Congress took advantage of the opportunity to generate hydroelectric energy as a feature of a Federal multi-purpose project to help compensate for the expenditure of the Government made in the interest of flood control, navigation, river regulation, water storage, and the reclamation of public lands. This action of the Congress was in line with the decision of the Supreme Court of the United States in the case of *Huse v. Glover*,[4] that a State, or one of its political subdivisions, can defray the expenses of public works by selling a by-product of such works to the public.

Another interesting observation that can be made of the Boulder Canyon Act of 1928 is that, while it did not treat water as a vendible commodity, it did treat the service that the dam and reservoir provides as a vendible product. Thus, in effect, the water users were not to be charged for the water, but, rather, for the use of the facilities to better utilize their State-law rights. On the question of water use, the Boulder Canyon Act of 1928 did not declare any preferences but simply declared that the dam and reservoir shall be used first, for river regulation and improvement of navigation and flood control; second, for irrigation and domestic uses and satisfaction of present perfecting rights in pursuance of the Colorado River compact; and third, for power. But the Colorado River compact, which was made a part of the Boulder Canyon Project Act by reference, did make the use of the impounded water for the generation of electrical power subservient to the use and consumption of such water for agricultural and domestic purposes.

The pattern set by the Boulder Canyon Project Act of 1928, that is the generation of electric power as a means of financially aiding and assisting the Federal water programs, and the declaring of preference as to the purpose of the Federal structures, rather than the declaring of any preference of use of the water, has been followed generally in all of the enabling legislation for Federal water development programs of the multi-purpose type subsequent to 1928. To this general pattern there are the

4. 119 U.S. 543, 7 S.Ct. 313, 30 L.Ed. 487 (1886).

exceptions of the authority of the Secretary of the Interior, under Section 9(e) of the Reclamation Project Act of 1939, to sell water under term contracts, and the authority of the Secretary of the Army (Secretary of War), under Section 6 of the Flood Control Act of 1944, to sell water for domestic and industrial uses out of surplus water in any reservoir under the control of the Secretary of the Army. In these two instances water is treated as a vendible product, which is in line with the growth and function of the State law in the 31 eastern states as these laws evolved up to World War I.

At this point it is well to look back over the growth period of the Federal Reclamation laws as first enacted in 1902, and to take note of how that body of Federal law gave recognition to the securing of revenue from hydroelectric power as a by-product of a reclamation project and of securing revenue from the sale of water that was surplus to the needs of a particular reclamation project as a vendible product. It was in 1906 that Congress, for the direct benefit of the water users, reached for the revenue from the sale of hydroelectric power generated at a reclamation project dam, and in 1911 for the revenue from the sale of surplus storage water as a vendible product. Thus, the Federal reclamation laws were keeping pace in the pre-World War I period with the evolution of the law of water in the 31 eastern states. This pace is simply maintained in the Reclamation Project Act of 1939 by the provisions for the sale of power to aid financially a reclamation project and by authorizing the Secretary of the Interior to sell water under term contracts, and to sell water for miscellaneous and municipal purposes for a term not to exceed 40 years.

Mention has been made earlier in this paper about the clash that developed over the jurisdiction of navigable waters between the State of New York and the Federal Government, and which was resolved by the opinion of Marshall in the case of *Gibbons v. Ogden*.[5] A similar clash developed at the time that the Congress had under consideration the Flood Control Act of 1944, and it was resolved by Congressional declaration of policy in the Flood Control Act of 1944.

The declaration of Congressional policy in the Flood Control Act of 1944 prompts one to look back and view the cautious steps that were taken by the Congress to accept flood control as a Federal responsibility. While Congress, in 1917, showed concern, because of the flooding of the Nation's rivers, in directing the examination and survey of projects relating to flood control, it was not until 1928 that Congress proclaimed that flood control was a national problem, and not until 1936 that Congress for the first time adopted a national policy for flood control.

The flood control project is more concerned with the problem of making water behave itself than it is with the problem of putting water to work, but when flood control, as a purpose, is blended with the working

5. 9 Wheat. 1, 22 U.S. 1, 6 L.Ed. 23 (1824).

purposes of water, such as navigation, irrigation, and the generation of hydroelectric energy, it does become an important factor in putting water to work, particularly since flood control has been given recognition by the Supreme Court of the United States as a part of commerce and, hence, within the Federal power to provide it.

This is the declaration of policy:

> "In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.
>
> "In conformity with this policy:
>
> . . .
>
> "(b) the use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in states lying wholly or party west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in states lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

A similar declaration of policy has been declared in subsequent flood control and river and harbors acts.

The most significant current trend in the water law of the 31 eastern states is that of the legislative declaration of State control over the appropriation or use of both surface and underground waters. The statute law of the following states is illustrative: Maryland, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Virginia and West Virginia. In line with the trend to the declaration of State control of water, there is also the trend toward the adoption of the doctrine of appropriation in many of the 31 eastern states, at least to the extent of requiring that persons desiring to divert the water shall secure permission to do so from some agency of the State. This trend in the eastern states does not evidence any purpose to put the use of water in any fixed legal mold but, rather, to free the water from the strict riparian doctrine without doing violence to the existing enjoyment of the riparian rights, to the end that water can be treated as a vendible product, and also to the end that the use shall not result in the creation of unhealthful conditions because of pollution.

As a generalization, it can be said that in the 31 eastern states the trend of the water law since World War I is the freeing of the water, insofar as legally possible, to a broader economic use of it, as evidenced by such phrasing in the statutes as "productive use," "economic use," and "optimum use." There is also a developing trend companionate with State control of water that permits the sale of water as a vendible product by both public and private agencies, but prohibiting such sales on a permanent right basis and limiting them to a term basis. The State that seems to have gone the farthest in this direction is Ohio, and it is interesting to observe that in water development projects under the jurisdiction of the Ohio Water Resources Board the term of the water contract for agricultural, commercial, manufacturing, or other lawful purposes shall not exceed 50 years, and the rates for the sale of water and for the lease of water power shall be such as to give financial integrity to the bonds that are isssued and sold in connection with any project. Also of interest, are provisions of the Conservancy District Act of Ohio which empowers the Board of Directors of such a district to prescribe the permissible uses of water supplies provided by the district and the manner of its distribution and to prevent the pollution or unnecessary waste of such water supplies; also the provision that for the use of a conservancy district water supply preference shall be given to domestic and municipal water users and that no charge shall be made for the use of water taken by private persons for home and farmyard use or for water for watering stock; also for the second preference in favor of manufacture, production of steam, refrigerating, cooling, condensing, and the maintenance of sanitary conditions; and a third preference for irrigation, power, recreation, fisheries, and other uses. Contracts for water supplies from an Ohio conservancy district are authorized for a term not greater than 14 years and, while they can be renewed for a reasonable period not to exceed 14 years, such renewal privilege is subject to the condition that other applications on file for the water would not result in filling a greater need or a more reasonable use and, if so, such applications shall have preference over the renewing applicant.

The trend of the water law in the 31 eastern states is further disclosed by the scrutiny that is being given in the State of Virginia by far-sighted men in respect of the need for freeing water from the riparian right doctrine, to the end that a broader economic use of the water can be made.

In 1954 the General Assembly of Virginia enacted a bill which states as a matter of policy that water is a natural resource that should be regulated by the State. As a program of the present session of the General Assembly, the Virginia Advisory Legislative Council Committee is holding a series of public hearings on the State's water resources. The purpose of these hearings is to draft new legislation for the 1956 General Assembly that will implement the declaration of policy made by the 1954 General Assembly. So in one of the first of the settled areas of the Nation and in

one of the original States we see the law of water rights growing and functioning to better serve the needs of man in a dynamic society.

What concept of water use is emerging in the 17 western states? It has been shown that in these states the law, generally, is molded to serve the economic need as represented by irrigated agriculture. Seemingly, Oregon and Utah have legislated on the problem of water use with more certainty than any of the other 17 western states and, perhaps, with more consideration of the objective of attaining the optimum use of the water resource within those states. The reason for this probably is that these states have been hit more recently with the impact of industrialization growing out of war and defense.

Under the law of Oregon, the State Reclamation Commissioner on reference from the State Engineer is authorized to determine the question of public interest in terms of highest public benefit, giving due regard to conserving the highest use of water for any and all purposes, including irrigation, domestic, mining, power development, public recreation, and protection of commercial and game fishing, or any other use for which the water may have a special value to the public. An appeal to the Circuit Court is permitted.

Under the law of Utah, in case of insufficient stream flow, priority of right gives the better right as between uses for the same purpose. The use for domestic purposes has preference over use for all other purposes, and the use for agricultural purposes has preference over use for any other purpose except domestic use. Upon the filing of an application to appropriate water, action is suspended pending an investigation if it appears that the use of the water applied for would interfere with more beneficial use for irrigation, domestic, or cullinary purposes, stock-watering, power, or mining developments, or manufacture, and would prove detrimental to the public welfare.

As a generalization, the law in the 17 western states still has not developed the trend toward the concept of water as a vendible product, as in the case of the 31 eastern states. The law is still molded to serve the economic need as represented by irrigated agriculture, with a preference wherever preference is specified for the domestic use of water.

Considering the legal mold in which the water law of the 17 western states has been cast, and considering that the Federal water development programs have as their pattern the treatment of the water, and the water power made available by the programs, as vendible products to help compensate for the expenditure of the Government made in the interest of flood control, navigation, river regulation, water storage, and the reclamation of public lands, it is to be expected that out of such opposing basic philosophies there would develop disputes and controversies because of the Federal programs. These disputes and controversies have developed a mass, but not necessarily a majority, opinion that there is a contest between

the Federal and the State governments in respect of the ownership and control of the water resource within the country and, particularly, within the 17 western states. It is in order then to examine the reasons for this Federal-State controversy.

The use of water for navigation is not a property right in the Federal Government. It is simply a transportation easement in the public which can be developed to better serve the public by either the State or the Federal Governments with a superior, but not an exclusive power, in the Federal Government to do so. This phase of the Federal-State conflict can be resolved in the planning process under the congressional policy of 1944. A substantive property right in the water resource on the public domain can exist and, in fact, does exist in the Federal Government by virtue of the Federal ownership of the public domain, which carries with it the riparian rights in the waters and which rights can only be extinguished by the Congress in the exercise of its power under the property clause of the Constitution, but this instance does not warm the Federal-State controversy. The reason is that the public domain that remains is largely valuable for grazing purposes, and a majority of those who desire to use the public domain for such purpose prefer Federal ownership and control of the land and water resource because, under this system, they have the chance to enjoy a more equitable distribution of the public domain and its water resource for grazing purposes. Another reason is that to a large extent the water that is on the public domain is diffused surface water, which, legally, is a part of the land, little or any of which finds its way to natural watercourses to augment the flow of the surface streams, and if it is not conserved by a number of small ponds under the Federal soil conservation program, it is apt to be dissipated by evaporation and percolation.

To the extent that the water on the public domain is not diffused surface water, but rather a part of the supply of the surface streams, in part on the public domain, the proprietary right of the Federal Government to the waters on the public domain does cause some friction between Federal and State officials over the application of the State water codes. In a recent Utah case[6] the Supreme Court of Utah sustained the contention of the Department of Justice that Federal water rights on the public domain were not within the jurisdiction of the State in a proceeding to adjudicate the water rights in surface waters that were flowing partly on the public domain, is an example of the type of conflict that develops between Federal-State jurisdiction over public domain waters.

Modern interpretations of the Constitution seem to leave no doubt that the Federal Government can engage in water development programs in the exercise of its welfare, defense and commerce powers, and in the exercise of the power to dispose of the territory and property of the United States. It would seem to follow, then, that private property can be impressed with

6. In re Bear River Drainage Area, 2 Utah 2d 208, 271 P.2d 846 (1954).

a defense and welfare servitude to the same extent that it is now impressed, under Supreme Court decisions, with a commerce servitude when the commerce power is exercised. Unless the Congress restricts and limits, and even waives, these servitudes when exercising its powers of welfare, defense, and commerce for Federal water development programs, the private property rights that are in conflict with such programs can be not only impaired but destroyed, and the ultimate of an absolute use by the Congress of these Federal powers would be the destruction of the whole system of private property. It is important then that in all of the enabling legislation for Federal water development programs that there be provisions to free the private property that might be in conflict with such programs from any of the servitudes that might be impressed on it because of the exercise by Congress of its Constiutional powers, to the end that all such private property shall have the protection of due process of law.

In this regard the Federal reclamation laws have set the pattern for the protection of private property rights that might come in conflict with a Federal water development program, particularly Section 8 of the Organic Act of 1902, which requires that the Secretary of the Interior conform to the State law in the appropriation and use of the water for irrigation, and in Setcion 14 of the Reclamation Project Act of 1939, which, in effect, requires the Secretary of the Interior in the administration of the Federal reclamation laws to pay just compensation, either by negotiated agreements or by condemnation proceedings for private property that might be impaired or taken in connection with the reclamation program.

It is not always necessary, and in most instances it is not desirable, that the private property in the form of water rights that have been acquired under State law for irrigation, or for any other purpose, should be taken by the Federal Government in connection with its development program of a stream in which water rights in the private parties exist, but rather that the private rights that have been acquired under the State laws and the Federal program shall be accommodated by an agreement for the exchange of the private right in the undeveloped stream for an equal right in the developed stream and without the payment of consideration therefor. In this connection, Section 14 of the Reclamation Project Act of 1939, permitting exchange or replacement of water or water rights, is a salutary provision of Federal policy.

While the restricting, limiting, or waiving of the servitudes that can be impressed on private property when the Congress exercises any one of its Constitutional powers in connection with a Federal water development program will serve to protect the private property rights in water uses that have been acquired and enjoyed under State laws prior to the advent of the Federal program, such action by the Congress will not serve to make State laws controlling as to the water rights that will be acquired out of the water that is made available for use by the Federal program. It is this

aspect of the Federal-State powers over the water resource that causes the friction.

The States must recognize two propositions if they are to have the benefit of Federal multi-purpose water development programs. They are:

1. When the Congress, in the exercise of any of its Constitutional powers, be they welfare, defense, or commerce, enacts enabling legislation for Federal water development programs, such enabling legislation is superior to State law and it can override any State law enacted under the police power of the State in respect of the construction, operation, and maintenance of the physical features of the Federal program.
2. Congress has the power to adopt the vendible product theory of water, and it has adopted this theory, to help compensate the Government for the expenditure made in the construction, operation, and maintenance of Federal multi-purpose programs.

Thus, unless Congress changes its policy, the right to use water made available by Federal water programs will not be a right created by State law but a right created by contract between the Federal Government and its contracting entity. Considering the magnitude of the investments that must be made by the Federal Government in the Federal water development programs, it is doubtful if Congress will change its policy, or that it should be asked to do so.

Perhaps the most pointed reason for the Federal-State controversy over the control and use of water is the policy of the Federal Government to rely upon the doctrine of Federal immunity from suit. If the Federal Government is to engage in joint ventures with States, their political subdivisions, and their corporate creatures, for the development of the water resource, then it would seem that the asserting of the immunity from suit doctrine is wholly incompatible with the policy of the joint venture. If justiciable issues should arise between the Federal Government and its non-Federal associates, then such associates are at a decided disadvantage because they have no remedy to insure the enjoyment or the protection of their rights. The same observation can be made as to justiciable issues that might arise between the members of the joint venture and third parties with the added vice that the non-Federal members of the venture would have the benefit of the Federal immunity from suit by imputation. Thus, not only State law in respect of water rights would be overridden, but the judicial process would be denied. There should be an act of Congress of unmistakable clarity that waives the Federal immunity from suit in all instances of programs for the conservation and use of water participated in or carried out by the Federal Government, either as a joint venture or as an independent Federal action.

The necessity for mainaining the fundamental of American civil government that State law is territorial law and that it only can create

and protect rights in private property cannot be emphasized too strongly if the Nation-old fundamental of Federal policy to preserve and protect the rights of the States is to continue to be honored.

In this regard the decisions of the Supreme Court in *Devine v. Los Angles,*[7] and *Los Angeles Farming & Milling Co. v. Los Angeles,*[8] are affirmatively persuasive of the supremacy, subject to the Constitutional clauses of due process and equal protection of the law, of State laws in the creation and protection of private property. In substance, these decisions state the principle that a question of property right in water asserted after a State has been created out of territory surrendered by a foreign power to the control of the United States, even where such right emerges from acts of the local government under the foreign power, is not a Federal question, in the American Constitutional sense, but a question of general public law, as to which the decision by the State court is final.

A procedure that it is believed would contribute greatly to the resolving of the Federal-State controversy over the development of the water resource would be for the plan that is developed by Federal-State participation to receive the approval of the Congress and of the legislatures of the affected States. Under the present procedure, State officials clear the plan before it is submitted to the Congress for approval, but the observation made by a Federal Judge in one of the Western States several years ago that promises given in aid of public improvements are lightly given and lightly regarded, is still true if cynical.

It is sincerely believed that the requirement for Federal-State legislative approval of the over-all plan, coupled with a waiver by the Congress of the Federal immunity from suit defense, would do more to further sound planning than an independent board of review, or any other device to that end.

As matters now stand, the vice of the Federal water programs is that they are treated as political questions, which puts the administrators outside of the scope of the judicial process, with the consequence that the principle of the civil law that public officials are not responsible to the courts is supplanting the principle of the common law, first declared in the Magna Carta, that public officials are subject to the judicial process. This trend of public law in the United States ought to be reversed, particularly with respect to the development of the water resources within the country.

Throughout the national life the Federal and the State governments, prompted, no doubt, by the popular demand, because of changing conditions, have been alert to the need for a growing and functioning law of waters. The foreseeable change in the national pattern of water requirements in comparison with the slowly evolving changes of the past is startling.

7. 202 U.S. 313, 26 S.Ct. 652, 50 L.Ed. 1046 (1906).
8. 217 U.S. 217, 30 S.Ct. 452, 54 L.Ed. 736 (1910).

Domestic and municipal use of water is increasing rapidly as the result of two principal contributing factors: (1) Population of the United States has increased approximately 3.6 million per year during the past eight years with 75% of the increase occurring in the urban areas which now contain 65% of the Nation's people; (2) Per capita consumption, estimated at 127 gallons per capita in 1945, has now increased to 145 gallons per capita. The overlapping of these factors has produced an estimated increase of from 4 to 5% per year since 1946.

Industrial expansion has also been spectacular, with production increasing 700% since 1900; the greater portion of this coming up with and since World War II. Industrial water consumption has been particularly great in the chemical industry which has been expanding at a rate even greater than the over-all average. The volume of water used in 1950 to serve the needs of 105,000,000 people in 16,450 municipalities and 250,000 industrial establishments exceeded 91 billion gallons daily.

Present trends indicate that industrial water demands will increase 170% and municipal demands 50% by 1975.

The first three decades of this century placed little strain on the water resources of the Nation. Water for domestic, municipal and industrial purposes was plentiful and usually accessibly close to the place of use. The pinch of the drought during the 1930's made many municipalities and industrial establishments painfully aware of the water problem for the first time. This, coupled with the expansion of industry engendered by the needs of national defense, and the rapid urbanization of the population brought water supply problems into a sphere of national interest. Growth, prosperity, and even the existence of some communities and industries depend upon an adequate quantity and quality of water. The anticipated needs of municipalities and industries should be fully investigated in order to safeguard water supplies from dangerous depletion or destruction by pollution.

Where water problems exist, they can be traced primarily to lack of adequate planning and construction of facilities to collect, treat and distribute water and non-usability of available supplies due to pollution. Enough moisture falls on the Nation to meet all foreseeable demands, but its distribution in time and place is by no means even. Therefore to make the best use of the available water supply we must (1) store excess water for regulated release and (2) treat the used waters of cities and industries prior to their return to streams for downstream reuse. These are not mutually exclusive methods, since pollution in impounded waters can make them non-usable also. For most areas, dependence must be placed on cleansed waters being available for reuse. The growing pollution of surface and ground waters is of major concern in planning to meet the changing pattern of water requirements. The development of rational, basin-wide pollution control plans, geared to water use, supported by

equitable and common legislative principles throughout the States, will do much to stimulate pollution abatement.

Additional or alternate sources of municipal or industrial water supplies cannot be obtained easily or quickly except in rare cases. An adequate and safe domestic and municipal water supply is essential to the sanitary environment required to protect the health of the Nation's people. To meet the changing—and challenging—pattern of water requirements, it is necessary that local, State and Federal governments be aware of their responsibility for the protection of the public health as it relates to water use. The compounding rate of increase in water demands during recent years indicates that municipal water supply problems will become increasingly critical, unless we adopt forward-looking, long-range planning with implementing steps now. By 1975 fifty million additional Americans will be at the mercy of the decisions now being made.