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LAW, WATER AND PEOPLE:

THE ROLE OF WATER LAW IN CONSERVING AND DEVELOPING NATURAL RESOURCES IN THE WEST

FRANK J. TRELEASE*

The title of this paper is an attempt to carry out the major theme of this conference,¹ Land, Water and People. The sub-title is the topic assigned, phrased exactly as drafted by the program committee. The phrasing is apt and perceptive, because it is a recognition that the law is an active, positive force in our lives. Too often people think of law as a negative force, a barrier to action, a series of "thou shalt nots." Often, the beginning law student is quite a little like Moliere's Bourgeois Gentilhomme—the man who hired a tutor to teach him to write poetry. The tutor soon gave that up as a bad job and taught him prose instead. The gentleman was pleased as punch to find that he had been writing and speaking prose all his life. Sooner or later the law student makes the same discovery, that law is not something new and strange that he has never heard of before, but that he has been "living law" all of his life. As we drive an automobile down the street, or pay our bills before the 10th of the month, we are governed by law and are applying law we know to the common situations of our private lives. The bank that honors our checks was set up under law. It is this kind of law with which we are here concerned, law as a helping hand, as a mechanism for getting things done.

The function of law is to regulate the relations between men or groups of men. In playing this role the law serves essentially a dual purpose. It provides a mechanism, the law suit, for the solution of conflicts after they have arisen, and it furnishes a guide, the rule of law, for the ordering of future conduct. The general goal of all law has been stated by John Dewey, the philosopher, who describes the law as ". . . a plan for organizing otherwise independent and potentially conflicting energies into a scheme which avoids waste, a scheme allowing a maximum utilization of energy."² Roscoe Pound, the great student of jurisprudence, expressed much the same thought in this way:

What we are seeking to do and must do in a civilized society is to adjust relations and order conduct in a world in which the goods of existence, the scope for free activity, and the objects on which to exercise free activity are limited, and the demands on these goods and these objects are infinite. To order the activities of men in their endeavor to satisfy their demands so

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1. This article is a slightly altered version of an address given at the Eighteenth Annual Meeting of the Soil Conservation Society of America, Logan, Utah, August 28, 1963. Reprinted with the permission of the Society.
2. Dewey, *Human Nature and Conduct* (1922).

as to enable satisfaction of as much of the whole scheme of demands with the least friction and waste has . . . been what law makers and tribunals and purists have been striving for . . .³

By and large, the law at any particular time and place represents the will of the majority for encouraging action deemed desirable by them and for discouraging or forbidding action thought to be in conflict with the public interest. By encouraging some actions, but discouraging others, a state may use the actions of individuals to reach its own desired goal. There are few laws that are self-executing in the sense that they control all conduct and leave no choice of action to the individual. Much law does not literally regulate conduct in the sense of requiring or forbidding certain action, it instead provides an area of free choice, setting outside limits within which a person may act as he chooses. Many of these laws, such as those relating to property and contracts, unobtrusely form the basic framework of our society.⁴

Western water law follows this pattern. The goal of the state, in adopting the law governing the use of water, is to obtain the maximum benefits, both social and economic, from the use of the resource. The law is designed to permit people to do some things that will advance this aim, and to prevent people from doing things that would be contrary to the maximization ideal.

There are two types of water law in the United States, riparian rights and appropriations. Riparian doctrines were developed for the green countrysides of England and eastern America.⁵ The major feature of the modern doctrine of riparian rights is that under it the law gives equal rights to the use of water to the owners of land which borders upon a stream. Another important principle is that a riparian right to the use of water exists whether the use is made or not, hence a riparian owner can initiate a use at any time and insist that his rights be accommodated with other uses or that a share of the water be allotted to him. Riparian law seems to be based upon the unspoken premise that if rights to the use of water are restricted to those persons who have access to it through the ownership of the banks, and if those persons will restrict their demands on the water to reasonable uses, there will be enough for all.

An entirely different form of water law is dominant in the western continental states.⁶ This is the doctrine of prior appropriation, and its two cardinal principles are that beneficial use of water, not land ownership, is the basis of the right to use water, and that priority of use, not

3. My Philosophy of Law, 251 (1941).

4. Commons, *The Legal Foundations of Capitalism* (1921).

5. Farnham, *Waters and Water Right*, chs. V and XIX (1904).

6. Prior appropriation is the sole law for obtaining private water rights in Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming. It is the modern law of Kansas, Nebraska, Oregon, South Dakota and Washington, where riparian rights are of primarily historical importance, and shares the stage with riparian law in California, North Dakota, Oklahoma and Texas.

equality of right, is the basis of the division of water between appropriators when there is not enough for all.

The history of this doctrine is a fascinating chapter in the story of the growth of American laws and institutions. At the mid-point of the 19th century the common law of waters had definitely crystallized into the law of riparian rights. At this same time, the doctrine of prior appropriation spontaneously developed in the west to meet the needs of pioneers who came to the vast open spaces in search of gold, land and homes. Although it has sometimes been attempted, by doubtful analogies, to trace the doctrine from rather obscure early pre-riparian English law,⁷ or from the early Massachusetts Mill Acts,⁸ or from Spanish law,⁹ the people who originated the doctrine were not versed in these by-laws of legal learning. They were miners who crowded into the gold fields of California in 1849. Swarming over lands previously uninhabited, they took the gold with the tacit permission of the true owner, the United States. After a lawless period, the miners, essentially law-abiding people from the eastern and mid-western states, organized "mining districts" to create some semblance of order on the then ungoverned public domain. These *de facto* governments promulgated rules and adopted customs regulating mining claims, and of equal importance, the right to use water to wash the gold from the gravels in which it was found.¹⁰ They established essentially the same rule for ownership of mining claims and for the right to use water. The discoverer of a mine was protected against all who tried to jump his claim. The first user of water was protected against later takers. This rule was known as prior appropriation—the law of the first taker. This law was soon adopted by the courts. In 1855 the holders of claims that lay far from a stream diverted the stream over to their diggings. The owners of later claims lower on the now-dry stream bed sued to require the stream to flow down in its natural channel. The Supreme Court of California, in deciding the case of *Irwin v. Phillips*,¹¹ rejected the common law rule of riparian rights, since neither party had any title to the land. The court, taking notice of the existing political and social conditions, held that customs of the miners which had become firmly fixed should be followed. Among the most important of these, it was said, was that of protecting the right of miners who by prior appropriation had taken the water from its natural beds and by costly artificial works had conducted it for miles over mountains and ravines to supply the needs of gold diggers. The court quoted no precedents; there were none.

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7. See Maas and Zobel, *Anglo-American Water Law: Who Appropriated the Riparian Doctrine?* 10 *Public Policy* 109 (1960).
 8. Under these acts, priority protected the earlier mill dams. See *Smith v. Agawam Canal Co.*, 2 Allen 355 (Mass. 1861).
 9. See *Hagerman Irrigation Co. v. McMurray*, 16 N.M. 172, 113 Pac. 823 (1911).
 10. *McCowen, The Development of Political Institutions on the Public Domain*, 11 *Wyo. L.J.* 1 (1956).
 11. 5 Cal. 140, 63 Am. Dec. 113 (1855).

When permanent settlers took up land for agricultural purposes and recognized the need for irrigation, they adapted to their purposes the water law evolved by the miners. It was a doctrine especially well suited for pioneering economy based upon the settlement of vacant lands. The first settler to come into a valley chose his land. If irrigation water was needed, he dug a ditch from the stream to his land. Whether his land was located on the stream or not was immaterial, since there was no one to object to his use of the water. The second settler to follow him into the valley had to respect the first settler's homestead and take second choice of the land, and he had to respect the first appropriator's right to the water and irrigate his lands out of what was left.

The federal government, the owner, in a sense, of nearly all the land and water in the vast western public domain, recognized and approved this law. When Congress first spoke on the subject, in the Mining Act of 1866,¹² it confirmed vested rights obtained by appropriations under these laws and customs, and approved the system as a method of obtaining future water rights on the public lands. The Desert Land Act of 1877¹³ encouraged the settlement of irrigable lands by making large tracts available to those who would declaim them, and declared that all non-navigable sources of water on the public lands were held free for appropriation by the people. This act, the Supreme Court held, severed all these waters from the land and reserved them for the use of the public under the laws of the states and territories.¹⁴ The Reclamation Act of 1902¹⁵ marked the first active steps of the federal government in building and financing large projects. Section 8 of this Act directed the Secretary of the Interior to proceed in conformity with the laws of the states and territories relating to the control, appropriation, use or distribution of water used in irrigation.

This is the system of water law upon which westerners have built their irrigated agriculture, industries, and cities. While there are minor differences in each state, and much of the law is now statutory, these state statutes have a common origin and are fairly uniformly construed. Other uses of water, in addition to mining and irrigation, were recognized as useful and beneficial by courts and legislatures.¹⁶ Appropriations may be made for domestic use, since water is necessary to sustain the life and health of man. Cities and towns may appropriate water for municipal purposes, to supply the municipality and its inhabitants with water for domestic uses, irrigation of lawns and gardens, sanitary purposes and for use in shops, business establishments and factories. The use of water for sawmills and ore reduction mills were purposes for which early appropriations were allowed in connection with mining, and today water may be appropriated for any form of manufacturing or industrial use. The use

12. 14 Stat. 262 (1866), 43 U.S.C. § 661.

13. 19 Stat. 377 (1877), 43 U.S.C. § 322.

14. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

15. 32 Stat. 388 (1902), 43 U.S.C. §§ 371-615.

16. *Trelease, The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 Wyo. L.J. 1(1957).

of water for the production of electricity is everywhere recognized as useful and beneficial. Water has been put to many other uses, such as railway use, the production of steam, refrigeration, cooling, the manufacture of ice, and for fish hatcheries. In modern times, a new beneficial use, recreation, has come to the forefront.

Other aspects of the law of prior appropriation should be noted. The amount or size of the right does not vary with the amount in the stream. An appropriation is always stated in terms of the right to take a definite quantity of water. Direct flow rights are stated in terms of the maximum current or flow that may be diverted from the stream,¹⁷ storage rights are expressed in terms of the total volume of water that may be stored.¹⁸ In general, the amount of water that an appropriator is entitled to divert or store is measured by the beneficial use to be served, by the need for sufficient water to accomplish the object of the appropriation.¹⁹

The place of the use is not limited to the streambank, as in riparian law. With few exceptions, an appropriation can be made to use the water at any place where it is needed. Diversions out of the watershed have been permitted and protected from the beginnings of the doctrine of prior appropriation.²⁰ Diversions have been made in one state for use in another.²¹

The allocation of water among appropriators according to priority may need some explanation. On a typical western stream where there are many irrigators with water rights initiated at different times, there may be water for all while the mountain snowpacks melt and the stream is high. As the quantity of water decreases, during the dry summer, the diversion works of the appropriators are shut off in inverse order of priority. The last ditch is the first closed, and the earliest is never closed. The right of the senior appropriator extends both upstream and downstream. He may take water needed by a junior appropriator below him, while the junior appropriator upstream must permit the water to go past his point of diversion when it is needed to supply the senior rights. The burden of shortage thus falls on those with the later rights; there is no proration in times of scarcity.²² The amount that each appropriator is entitled to receive remains fixed, if there is sufficient flow in the stream to supply it, and the senior rights are supplied in full while the junior rights are shut off completely. But juniors do have rights. Junior appropriators who take water from a source that has already been partially appropriated receive the right to use such water as is not needed by the prior appropriators. The downstream junior is entitled to insist that the senior take

17. See Wyo. Stat. § 41-181 (1957); *Farmers Highline Canal Co. v. Golden*, 129 Colo. 575, 272 P.2d 629 (1954).

18. *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 44 Colo. 214, 98 Pac. 729 (1908).

19. *Smith v. Duff*, 39 Mont. 374, 102 Pac. 981 (1909).

20. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

21. *Willey v. Decker*, 11 Wyo. 496, 73 Pac. 210 (1903).

22. *Muir v. Allison*, 33 Idaho 146, 191 Pac. 206 (1920).

no more than his appropriation allows.²³ An upstream junior may divert water for his own use so long as he releases the quantity needed by the senior,²⁴ and he may make substantial changes in the regimen of the stream so long as he observes the senior's fundamental right to the use of the water. For instance, he may use the water to produce power, or in some other nonconsumptive manner,²⁵ and he may even take the direct flow of the stream to which the senior is entitled if he replaces it with stored water or substitutes water imported from another source.²⁶

An appropriation is private property, and in most states it can be sold or used by its owner at any place to which the water can be transported.²⁷ Changes can be made not only in the place of use, but also in the point of diversion, type of use, time of use, or place of storage. But the privilege of making such changes is subject to the rule that a change must not injure the vested rights of other appropriators.²⁸

An appropriation is a property right subject to ownership, and like land, is usually held in perpetuity.²⁹ However, the right may be terminated if it is not used. It may be abandoned if the appropriator ceases to use it with the intent not to resume the use,³⁰ and most of the western states have statutes which provide for a forfeiture of the right if the water is not used for a specified period, which varies in different states from three to ten years.³¹

This thumbnail sketch, should be enough to enable us to see what part this law has played in conserving and developing the resources of the West. We may characterize it by saying that the states have worked out a law under which a person by his own action may carve out for himself a private property right from a publicly owned asset. Let us see whether the West has attained the goal of maximum benefits stated earlier, whether this give-away of natural resources has in fact conserved and developed western water resources.

In the water rights field, the goal of maximum benefits could conceivably be reached by complete and autocratic state control of all water resources, but this would mean that all water users would be regulated at every step by state officials, a situation generally regarded as distasteful by Americans. It would mean that all decisions on who could use water, what purpose it could be used for, when it could be used, would be made by a bureaucracy acting in the best interests of the state, with only secondary attention to the interests of the individual. It would not allow for

23. *Clausen v. Armington*, 123 Mont. 1, 212 P.2d 440 (1949).

24. *Knutson v. Huggins*, 62 Idaho 662, 115 P.2d 421 (1941).

25. *Salt Lake City v. Salt Lake City Water & Power Co.*, 24 Utah 249, 67 Pac. 672 (1902).

26. *Dry Gulch Ditch Co. v. Hutton*, 170 Ore. 656, 133 P.2d 601 (1943).

27. *Trelease, Severance of Water Rights from Wyoming Lands*, Wyo. Leg. Com. Rep. No. 2 (1960).

28. *Ibid.*

29. *Arizona v. California*, 283 U.S. 423 (1931).

30. *Utt v. Fry*, 106 Cal. 392, 39 Pac. 807 (1895).

31. E.g., Wyo. Stat. § 41-47 (1957)(5 years).

nor make use of the tendency of the individual to act in his own best interest. It would not fit into our Anglo-American background, traditions and institutions.

American institutions are for the most part based upon the theory that individuals with a wide range of free choice can make their own decisions within limits set by governments, that each will attempt to achieve the largest possible benefit for himself, and that the total result of all this individual action will tend to produce maximum welfare for the state or nation. In essence, we in the West have treated water like land. The nation gave away its land also, yet who will say that the Homestead Act, under which the mid-western prairie and the "Great American Desert" have been turned into fertile farms, was a mistake?

In the western states the aridity of the climate and the scarcity of water were limiting factors on development from the start. There was not water enough to satisfy all demands that could be made upon it. Yet no planners prepared blue prints for its best use. Instead the water was simply given to any and all who would put it to a beneficial use. The miner used it to unlock the coffers containing the mineral wealth of the mountains and streams, the farmers turned the desert into rich croplands, the rancher took the water for stock water and to irrigate the hay with which he could feed his cattle through the winter, cities brought in supplies that enabled them to grow, railroads, power companies, manufacturers and other industries received the water that enabled them to operate. The pioneer westerners recognized that development in their private interests could also be development in the public interest. Water was used to produce wealth. The increase in the wealth of the citizens, the secondary effects of the resulting increases in their purchasing power in spending in the community, in employment, tax revenues, and in goods made available for use by others, increased the wealth of, and developed the resources of, the western states and of the nation.

Some observers, but not practitioners of water law have questioned one feature of this law. That is the definiteness of the water right in terms of priority and of quantity, which enables the appropriator to build a figurative fence around his water right, much as he fences his land to keep off trespassers. This is the feature that throws all of the burden of shortage upon the junior appropriator. Some have questioned this as undesirable, and asked whether the equal sharing of the riparian doctrine might not be better. Yet in a unique fashion this rule has led to maximization of benefits. In the West it was early seen that an equal share of water that was insufficient for all would lead to parceling out the waters in shares that were sufficient for no one.³² The rule of priority is not as harsh as it sounds. It guarantees a firm supply to all those for whom the supply is sufficient; and these people have been able to build an agri-

32. Note, State Claims in Texas Stream Waters, 28 Tex. L.R. 931 (1950).

culture unmatched in stability in places where dependence is placed on natural rainfall. What of the poor junior appropriators? This law has encouraged them to develop water resources as no other rule would have. If the law were based on the concept of reasonable sharing of a common supply, and that supply was not sufficient for all demands, legal competition, not economic competition, would occur for the available free supply. The "owners" would fight in court for "equal" or "reasonable" shares of the same water. But where the rights of the claimants can be described so as to differentiate the water to which each is entitled, and one water user is given a superior right that can be protected, the later users will have to spend money to develop water from alternate sources, instead of trying to persuade a court that they should be given some of the water covered by the earlier right. In the west this is what is done by describing the right in terms of priority and quantity of diversion. When senior appropriators had taken all of the dependable flow of the western streams, further development was inaugurated by junior appropriators who built dams to store spring floods, built larger dams that would store the supply of good years against future droughts, or brought water from long distances across or through mountain ranges from other basins where the supply exceeded the local demands. Although some over-development did take place, and some junior appropriators today have only "flood water rights", they adjust to this just as does the owner of marginal land. The junior appropriator who does face a risk of shortage is like a farmer in a sub-humid area who must take his chances on rain. The value of his enterprise and the worthwhileness of venturing into it will depend upon the forecast he can make of receiving a supply. If the risk is great, he may use the land almost as dry land, so that water, when it comes, is a bonus. But for the most part, state and federal laws have provided organization and capital to firm up the supply, to reduce the physical insecurity of the junior right, and to give all water users a firm right in a firm supply.

Another question sometimes asked by observers of western water law is whether it was a mistake to give the rights in perpetuity. Suppose, they ask, that while irrigation agriculture may have been the best use of water in pioneer days, today the water is needed by industry or a city? Should not the water be reallocated so as to produce the greater benefits today?

Of course it should. But this does not mean that the industry or the city should be allowed to go to some official or board and persuade him or it that they could make better use of the water, and that therefore the water should be taken away from the farmer and given to them. Again, consider the analogy to land. Suppose today a farm on the outskirts of the city could be better used as a factory site or as an airport. Do we run the farmer off the land, on the grounds that he is making an inefficient and wasteful use of a natural resource? Not at all. The industrialist

simply offers to buy the land, tendering enough money to make it attractive to the farmer to leave. The city does the same, though it has the additional power to condemn the land to insure its transfer at a fair price, if the farmer holds out for an exorbitant sum. This same process holds true for transfers of western water rights currently held by irrigators, when industrial or municipal uses are more valuable. If the industrialist or the city cannot pay the price, then by definition the transfer of the water to them would not produce greater benefits. If in fact it will produce greater benefits, the value to the purchaser is greater than the value to the seller, and the transfer can be made as in the case of the purchase of land. There is no reason to take the water without compensation, and impoverish the farmer, by destroying his investment and his expectation built on the farm as a going concern. In a few of the western states, there are some restrictions on the transfer of water rights,³³ but for the most part it is a property right which can be sold like any other. The movement of water to its highest beneficial use is insured by economic forces, not by governmental intervention.

We should not mislead ourselves into thinking that the modern western water law is 100% pure laissez-faire. Although the economic forces of self interest that lead man to get the most out of his environment, and of the market where relative values can be compared, are the basic operative mechanisms of prior appropriation, as long ago as 1890 the State of Wyoming, under the leadership of its first state engineer, Elwood Mead (for whom Lake Mead behind Boulder Dam is named) recognized that there could be exploitation of water resources that benefited the individual but were not desirable for society as a whole. Mead invented the permit system of appropriation, under which an intending appropriator must go to a state official and receive a permit, which will be granted only if there is unappropriated water in the source, if the proposed use will not interfere with the vested rights of others, or if the use does not threaten to prove detrimental to the public interest.³⁴ Fourteen states now impose this public interest limitation on appropriators, and while these powers have been seldom used (since as we have seen most appropriations of water have been in the public interest) state officials have chosen from competing projects the one which promises the greater benefits,³⁵ and have denied a permit for a small single purpose project that would make infeasible a large multi-purpose project,³⁶ or applications for projects that would have harmful side effects upon other water users or upon the public, or have issued the permits subject to conditions that will prevent such harm.³⁷

33. See Trelease, *supra* n. 27. Though Wyoming has a "general rule" that water rights cannot be detached from the lands, place or purpose for which they are acquired, Wyo. Stat. § 41-2 (1957), exceptions are made for cities, railroads, steam power plants, industrial uses and highway purposes, and of reservoir rights, rights for submerged lands and rights on seeped or other unfit lands where the owner has other irrigable lands.

34. Wyo. Stat. § 41-203 (1957).

35. *Young & Morton v. Hinderlider*, 15 N.M. 666, 110 Pac. 1045 (1910).

36. *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943).

37. See *Big Horn Power Co. v. State*, 23 Wyo. 271, 148 Pac. 1110 (1915).

Not everyone is convinced that this has been a pretty good system of law. In particular, certain federal officials and federal lawyers would prefer a very different system. They seek a reversal of the national policy that has existed since 1866 and before. And they have won their argument in two very important cases before the United States Supreme Court. In 1955, the Court decided what has come to be called the *Pelton Dam* case,³⁸ which held that the United States owns water rights, independent of state law, in connection with reservations it had made on the public domain. The nature of these rights are uncertain, they seem to be riparian-like claims to whatever water can be used in connection with the reserved lands. These apparently expandable claims to water, superior to any state water rights, have been seen as a threat to the existence of appropriations.³⁹ If the federal government can by the exercise of these claims take water away from appropriators, then the property basis of state water rights is gone, their stability has ceased to exist, their value is substantially diminished. Now, no one doubts the power or the right of the federal government to take and use the water it needs for its federal purposes. No western state, for instance, desires to impede the Department of Defense in obtaining all of the water it can use for installations that it deems necessary for the national security. But the security of western water rights, upon which depends the security of western land values, should not be sacrificed without compensation. It does not seem unreasonable to ask that the United States show a decent regard for valuable property rights, long held and long deemed secure. As the Supreme Court said in an earlier case, a federal public interest in the waters of western streams may require appropriation by the government, but it does not require expropriation.⁴⁰ A number of bills to correct the situation have been introduced in recent sessions of Congress.⁴¹ Most of them would simply guarantee that if the government takes water from an irrigator, it will pay him for it.⁴² But none of these bills have passed the Congress; administrative opposition to them has been too strong.

The second case that has more recently disturbed westerners is the long awaited decision in *Arizona v. California*,⁴³ finally handed down on June 3rd of this year. That case does more than divide the waters of the lower Colorado Basin among Arizona, California and Nevada. It substitutes federal administrative control of those waters for the appropriation system.

The basis for the decision is not very explicit. In part it seems to rest upon the navigability of the river, and the supremacy the federal government has always held over its navigable waters. In part the reason-

38. Federal Power Commission v. Oregon, 349 U.S. 435 (1955).

39. Munro, The Pelton Decision: A New Riparianism? 37 Ore. L.R. 221 (1957).

40. U.S. v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

41. See Corker Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957, 45 Cal. L.R. 604 (1957); Sato, Water Resources—Comments on the Federal State Relationship, 48 Cal. L.R. 43 (1960).

42. S. 1275, 88th Cong., 1st Sess. (1962).

43. 83 S. Ct. 1468 (U.S. 1963).

ing of the Court is based on the construction of the words of the Boulder Canyon Project Act,⁴⁴ and in part on cases construing Reclamation law. The Project Act is a supplement to the Reclamation law, and in it Reclamation law is expressly made to "govern the construction, operation and management of the works authorized." Further, Reclamation law is expressly defined to include Section 8, the provision that the Secretary of the Interior is to proceed in conformity with state laws relating to the control, appropriation, use or distribution of water. Yet all of this is ignored or explained away. The power of the Secretary to contract for delivery of the water is said to give him the power to control the allocation of water among the holders of the contracts. On most reclamation projects the United States delivers stored or diverted water to users who are represented by irrigation districts. The district enters into a contract, commonly called a repayment contract, under which it agrees to collect from the water users and to pay to the United States annual charges representing reimbursement to the government of the costs allocated to improvement of the land. Up to now the water user has always been regarded as having a permanent water right, an appropriation. The government stored and diverted the water, but the irrigator applied it to beneficial use.⁴⁵ The contracts called for by the Project Act are not dissimilar from the contracts generally entered into under Reclamation law. But the Supreme Court decided that the power to enter into those contracts, and to withhold water unless there is a contract, gives to the Secretary the power to allocate water among the water users in each state in times of shortage. And, said the Court, the Secretary, in choosing between users with each state, and in setting the terms of these contracts, is not bound to follow state law.

A part of the Court's reasoning depends upon a quotation from *Ivanhoe Irrigation District v. McCracken*,⁴⁶ a previous Reclamation case: "We read nothing in Section 8 that compels the United States to deliver water on conditions imposed by the State." All that case decided was that where the federal government has limited its bounty of water to 160 acres held by any one person, a state could not force the government to give water for more than this much land. The federal government, perfectly consistent with state water law, could place a limit on how much federally supplied water could be appropriated by one person. Now, the case is read to mean that the water user has no appropriation at all.

Three Justices dissented, saying that when the Boulder Canyon Project Act was passed, the law of appropriation, basic to western water law, was greatly respected, that it is inconceivable that Congress expected to grant the sweeping federal power which the Court says it did, and that the sponsors and authors of the Act would be surprised to learn how their words have been twisted and misinterpreted.

44. 45 Stat. 1057 (1928), 43 U.S.C. § 617.

45. *Ickes v. Fox*, 300 U.S. 82 (1937); *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

46. 357 U.S. 275 (1958).

We may hope that Mr. Justice Douglas' cynical prediction, in his dissenting opinion, will not come true: "Now one can receive his priority because he is the most worthy Democrat or Republican, as the case may be." But the Secretary is an executive official appointed by the incumbent president. The other two dissenting judges, Harlan and Stewart, said "Indeed, the political pressures that will doubtless be brought to bear on the Secretary . . . are disturbing to contemplate."

Even absent these considerations, even supposing a sincere, unbiased, dedicated man in the office, one above reproach, one with the wisdom of Solomon, he has almost life and death powers over the livelihood of many farmers and the prosperity of many communities. Solomon was an oriental potentate with just such powers over his subjects. We have moved away from this type of government, we are trying to impress emerging nations with "the rule of law," but here we turn our back on law and give our water rights over to naked executive power.

Under state law, appropriators receive their water in accordance with their property rights. The senior appropriator gets water, the junior appropriator receives what the law allows him, grumbling, if at all, against a not-so-bountiful Nature. Short-term predictions of available supply can tell him whether to plant crops with high or low water requirements, or no crops at all. Cities and industries needing a sure supply can adjust their water rights accordingly by economic measures. But this system of priority and property will have no application if federal administrative control of the water is substituted for the appropriation system. If there is not enough water for all, the Secretary can distribute it to those irrigators and districts producing certain crops, or to those producing the highest cash value of crops, to those located in certain areas, to those following certain government sponsored practices. He can split it according to parity, or priority, or according to his notions of preferential uses. He can reallocate water from irrigators to cities and industries whose use will be more productive. Whether compensation will be paid, or the farmer will be impoverished and his investment and going concern destroyed, will depend upon the Secretary's views of the permanent or temporary nature of the ideal water right. The person without water will of a certainty grumble at the bureaucrat who withholds it.

The case actually holds only that the users of stored Colorado River water in California, Arizona and Nevada are subject to the Secretary's power. But the case may, as a precedent, have implications that reach beyond the lower Colorado River Basin. Many a special project, including the Colorado River Storage Project⁴⁷ calling for subprojects in Arizona, Colorado, New Mexico, Utah and Wyoming, has been authorized by Congress in a special act which incorporate the Reclamation laws in much the same language as does the Boulder Canyon Act. If the statements and arguments in *Arizona v. California* can be read to apply to other special

47. 70 Stat. 105 (1956), 43 U.S.C. § 620.

project acts, or to reclamation projects in general, then the water rights of thousands of western irrigators, and many western cities and industries have ceased to exist. The case thus presents a substantial threat to the western water laws that have served the states, the west, and the nation well.

The threat may never be carried out. For one thing, the incumbent Secretary, Stewart L. Udall, has not conformed to Mr. Justice Douglas' portrait of a power-hungry bureaucrat. The Secretary, enthroned over the river, may abdicate. He has stated that he does not want the responsibility of dividing the river in dry years, and has invited the governors of the three states to meet with him to try to work out a permanent formula for the interstate allocation of shortages.⁴⁸ And while he was given the power to allocate the water within a state according to vague federal standards, he does not intend to do so. Existing contracts with California water users already incorporate the rule of priority among the users. The Secretary has presented the Pacific Southwest Water Plan for ultimate development of all the lower Colorado's water. Under this plan, he has said, the water right laws of the states involved will be recognized.⁴⁹

Secondly, even the Supreme Court hedged a little on their decision. They said, "Finally, . . . Congress still has broad powers over this navigable international stream. Congress can undoubtedly reduce or enlarge the Secretary's power if it wishes." This open invitation to Congress should certainly be followed up. Perhaps Congress should by general act rewrite Section 8, clarifying its intent and overruling the effect of *Arizona v. California* as a precedent. If a bill to accomplish the purpose was to meet the fate of the bills to overturn the *Pelton Dam* case, then certainly Western Congressmen and Senators should be explicit, in legislation authorizing new projects, that Section 8 of the Reclamation laws will apply.

A century of experience has shown that conservation and development of water resources has been fostered by Western water laws. The law has not stood still, it has grown and developed with the times. Under it, the west has prospered and grown. Those who would destroy a system that has worked so well for so long should hesitate. Those who would substitute the judgement of an official for rules of law and property should remember that the difference between a wise administrator and an arbitrary bureaucrat is only in the point of view. Those who see imperfections in rules of law and in the operation of economic forces might well ponder the imperfections of bureaucracy and of political processes.

Our western pioneer ancestors had faith that given land, water and law, the people could develop and conserve (in the sense of wise use) the West's natural resources. Looking over the west today, that faith seems justified. Congress has had that faith in the past, and Congress

48. U.P.I. dispatch, July 26, 1963.

49. U.P.I. dispatch, August 22, 1963.

today should set the record straight, and pass legislation directing that vested western water rights should be protected from federal encroachment, and restoring Reclamation law and state water law to its traditional and proper place in the construction and operation of federal projects. The money for such projects may be federal, but much of it is to be repaid, repaid by *people*, whose land, livelihood and lives are to be affected. Those people are entitled to the protection of law for their water rights.