

December 2019

Water Rights of Various Levels of Government - States' Rights vs. National Powers

Frank J. Trelease

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlj>

Recommended Citation

Frank J. Trelease, *Water Rights of Various Levels of Government - States' Rights vs. National Powers*, 19 Wyo. L.J. 189 (1965)

Available at: <https://scholarship.law.uwyo.edu/wlj/vol19/iss3/1>

This Article is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Journal by an authorized editor of Law Archive of Wyoming Scholarship.

WATER RIGHTS OF VARIOUS LEVELS OF GOVERNMENT— STATES' RIGHTS vs. NATIONAL POWERS†

*Frank J. Trelease**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

—*U. S. Constitution, Article VI*

“If you can't lick 'em, join 'em.”

—*Unknown politician*

Inevitably, a discussion of the power of one level of government over water resources involves a comparison with the powers of other levels. A catalogue of national powers, followed by a list of state powers, would be a meaningless exercise. The only reason for a paper such as this at a conference such as this is that in recent years, much talk and political activity has been focused upon the problem of states' rights to water as contrasted with federal power over water.

At the same time, the doctrine of states' rights has been much mooted in a very different context—that of racial segregation. Yet there are some parallels between the two controversies. One aspect, common to both, is the unrelenting nature of the arguments of proponents of states' rights, the unwillingness of those proponents to concede that the national government has any case other than a bald usurpation of power. Reviewing the segregation controversy, a Northern law professor analyzed the writing of Southern lawyers in ten years of a leading southern publication.¹ He found nothing but unmitigated blasts at the United States Supreme Court's “communistic, atheistic, nihilistic destruction of the Constitution.” No writer in that journal so much as attempted to spell out the other side of the argument, or to analyze the strength of the federal position. This is a wide departure from traditional legal method, for “the lawyer who cannot see his opponent's side or the difficulties in his own case gropes in a blindness that is often fatal.”

Much the same one-sided quality has pervaded the writings and statements of the proponents of states' rights to water, going back to the brief for “Preservation of Integrity of State Water Laws,” promulgated by the National Reclamation Association in 1942, through the long series of hearings of Senate and House committees on the Barrett bill and its successors, in-

† A paper delivered at 1965 Western Interstate Water Conference held at Oregon State University, Corvallis, Oregon, Aug. 5-6, 1965.

* Dean and Professor of Law, University of Wyoming.

1. Frankel, *Alabama Lawyer, 1954-1964: Has the Official Organ Atrophied?*, 64 COLUM. L. REV. 1243 (1964).

cluding today's Kuchel bill.² Only a few non-federal voices raised in the hearings have conceded any validity to the national position or any legitimate national purposes to be served by national supremacy in the water field.³ Practically all state representatives see the question of state versus federal supremacy over Western water as a conflict, a struggle, a fight. Such an approach is futile, and there is danger in inviting a battle to the finish. The Western states cannot win such a battle. Despite the plausible arguments made in one-sided briefs, and the seemingly impeccable logic derived from state premises of "ownership" of water, they cannot win a lawsuit.⁴ Subliminally, they realize this, for the battle has been shifted to the legislative arena. But they cannot win in Congress. Nine years and fifty bills after the original Barrett bill the states stand in no better position than they did in 1956, when the first attempts to overthrow the *Pelton* doctrine were made.⁵ The time has come to take a realistic approach to the subject and a realistic attitude toward the relations of the states and the nation in the water resources field.

A realist does not seek an abstraction, but an objective. The doctrine of states' rights is no more than a tool that may accomplish a desired result. Too often, the doctrine of states' rights in water, like that of states' rights in the segregation field, has been something considerably less than a noble political principle. It has been called upon to protect or advance some special advantage, as when large landowners seek exemption from the policy of the 160 acre limitation,⁶ or when one state seeks an advantage over another, as in the early days when equitable apportionment was being fought out⁷ or when Arizona sought to block the Boulder Canyon Project.⁸ All such attempts to use the doctrine of states' rights to stymie the national government or to put a single state's interest above those of the nation or of a sister state, as a matter of right, as a rule of law, have failed.

On the other hand, the Western states have tried to assert the doctrine of states' rights in water in order to further or to preserve some very legitimate state interests. The desire to preserve property rights of citizens, the desire to see their state develop and prosper, the desire to plan and shape the future of states' rights in water in order to further or to preserve some very legitimate that these objectives may be lost if the battle is fought out on the wrong field.

-
2. *Hearings on S. 863 Before the Senate Subcommittee on Irrigation and Reclamation*, 84th Cong., 2d Sess. (1956); *Hearings Before the House Committee on Interior and Insular Affairs*, 84th Cong., 2d Sess., ser. 31 (1956); *Hearings Before the House Subcommittee on Irrigation and Reclamation*, 86th Cong., 1st Sess., ser. 9 (1959). *Hearings on Problems Arising from Relationships between the States and the Federal Government Before the Senate Committee on Interior and Insular Affairs*, 87th Cong., 1st Sess. (1961); *Hearings on S. 1275 Before a Subcommittee of the Senate Committee on Interior and Insular Affairs*, 88th Cong., 2d Sess. (1964).
 3. See remarks of Goldberg, Clark and Ely, 1964 *Senate Hearings*, *supra* note 2, at 120, 148, 243.
 4. Goldberg, *Interposition—Wild West Water Style*, 17 *STAN. L. REV.* 1 (1964).
 5. Note, *Federal Water Rights Legislation and the Reserved Lands Controversy*, 53 *GEO. L. J.* 750 (1965).
 6. *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958).
 7. *Kansas v. Colorado*, 206 U.S. 46 (1907); *Wyoming v. Colorado*, 259 U.S. 419 (1922).
 8. *Arizona v. California*, 283 U.S. 423 (1931).

If the decision is cast in terms of power, the result may be winner-take-all. But if the question is not the existence of power but the desirability of its exercise, compromise and accommodation are more likely to be achieved.

FEDERAL POWERS

If the United States is regarded as an opponent by the Western states, it is a formidable one indeed. It has a number of powerful weapons at its command. Though some of them look disarmingly simple, many are flexible and sophisticated, suitable for use in a wide variety of situations.

The federal government derives its authority from the Constitution of the United States. It has only such powers as are delegated to it by that instrument. But the founding fathers provided for a strong nation. Powers that permit the national government to take action on water resources or to regulate their use are found in the authority given by the Constitution to control commerce, to provide for the common defense, to enter into treaties, to control interstate relations, to manage federal property, and to provide for the general welfare of the country. Freedom to perform these functions without let or hindrance from the states is given by the supremacy clause.

The most highly developed body of federal water law is in relation to navigable waters. The Constitution gives Congress the power to regulate interstate commerce,⁹ which includes navigation as a part of transportation. The federal power over navigable waters has been exercised in three ways—affirmatively, negatively, and permissively. Affirmatively, the United States may improve navigation channels, or build dams to provide a flow for navigable streams or protect the navigability of waters from floods or prevent the waters from doing flood damage to land.¹⁰ Negatively, the United States may prohibit anyone else from interfering with the navigable capacity of the water.¹¹ Permissively, it may license others to do that which it might do or might prevent.¹² Since the national powers are supreme, the United States' action in reference to a navigable river is not subject to state laws which on their face seem to apply to all waters.¹³ If a state-authorized project affects navigable waters in a way inconsistent with federal law, the non-federal project must give way.¹⁴ If a state-created right, or a state-authorized project, exists on a navigable river, and Congress decides to build a federal project that destroys the state right or project, the national government is under no obligation to pay compensation for the loss of the right or even for the destruction of a going business.¹⁵ As far as the federal government is concerned, whatever rights a state may attempt to create in these waters are subject to the navigation servitude, an easement that is a defect in the title to such

9. U. S. CONST. art. 1, §8.

10. *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945); *Oklahoma v. Atkinson*, 313 U.S. 508 (1941).

11. *United States v. Rio Grande Irr. Co.*, 174 U.S. 690 (1899).

12. *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940).

13. *Arizona v. California*, *supra* note 8.

14. See *Rio Grande* and *Appalachian*, *supra* notes 11 and 12.

15. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913).

rights. Though at one time there was hope that this servitude did not weaken the title to Western appropriative rights,¹⁶ there seems to be nothing to distinguish Western consumptive uses from the riparian rights that have been destroyed or taken without compensation.¹⁷ In the area of planning, the federal government may overrule a state plan for water resources by building a federal project that is inconsistent with the plan.¹⁸ Finally, in *Arizona v. California*,¹⁹ the Supreme Court has now said that the power to dam and store the water of a navigable stream gives the power to distribute the water to states in such shares as Congress or its delegate may determine. Equitable apportionment—the legal claim of a state to a share in the benefits of a river—played no part in the decision.

The war and treaty powers²⁰ give additional authority to the United States to build projects that will strengthen the national defense or comply with a treaty. The exercise of the war power has not been undertaken in such a way as to bring its resource development projects into direct conflict with state water laws or water rights. Normally, property taken for national defense purposes is condemned under the power of eminent domain. However, when it was coupled with the power to control the property of the United States, in the famous *Hawthorne* case,²¹ the court said that if the United States needs water for a national defense installation on the public domain, it need not “bend its knee” and comply with a state water law that might interfere with the management of property in the best interests of national defense. But the treaty power is like that over navigable waters, and states have conceded their duty to meet a national obligation such as the agreement to deliver annually a specific quantity of the water of the Colorado River to Mexico,²² even though this might require state uses of water to be curtailed.

While interstate lawsuits and compacts may operate as a restriction on state law or state-created rights, the most important power of the federal government over interstate relations is the power to refuse Congressional consent. Congress has refused to approve a compact, and one was killed when the President vetoed the act consenting to it on the ground that it would interfere with the jurisdiction and authority of the United States over the water.²³

The proprietary power is less well developed than the power over navigable waters, but in recent years has given rise to the most controversy, in

16. “[W]e need not ponder whether by virtue of a highly fictional navigation purpose, the government could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of them. We have never held that or anything like it. . . .” *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 737 (1950). Mr. Justice Douglas, concurring, thought the constitutional power to do so was clear. *Id.* at 756-62.

17. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1 (1963).

18. *Oklahoma v. Atkinson*, *supra* note 10.

19. 373 U.S. 546 (1963).

20. U.S. CONST. art. I, §8; art. II, §2.

21. *Nevada v. United States*, 165 F. Supp. 600 (D. Nev. 1958).

22. 59 Stat. 1219 (1944); COLO. RIV. COMPACT art. III(c) (1922).

23. Consent to the Connecticut and Merrimac Rivers Compact (1937) failed of passage; the President's veto message in H. R. Doc. 690, 77th Cong. 2d Sess. (1942).

the political arena if not in the courts. The property clause of the Constitution²⁴ reads as follows: "The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

In the Western states, the most important national property is land, the public domain, the vast areas of public land, national forests, national parks and Indian, military and other reservations. Whether or not the United States "owns" the waters on these lands, it is now clear that it has the power to use the water on the reserved lands to further the purposes for which the reservation was made.

The reservation of the water may be exercised and the water put to use without regard to state law, and in a manner inconsistent with it. The reservation may be exercised by taking the water for the reserved purpose even though this means taking it without compensation from persons who hold state rights to the water and who have put it to beneficial use. The *Pelton Dam* case,²⁵ *Federal Power Comm'n v. Oregon*, established the first proposition and *Arizona v. California*²⁶ realized the Western irrigators' worst fears as to the second. Implementation of the decree in that case will take water away from California irrigators and cities and put it to use on Indian reservations, national forests, recreational areas and wildlife refuges.²⁷

Yet this should not have come as a surprise. The rule as to Indian reservations was established in 1908,²⁸ and in 1899 the Supreme Court warned that a state could not, without Congressional consent, "destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the governmental property."²⁹

There are other national proprietary interests, not connected with land, that affect water and its use. When in the exercise of one of its powers the United States controls the flow of a river by storing water, it owns the power potential in the stored water, it may produce electric energy with that potential, and the electric energy thus produced is property of the United States which the government may sell or lease upon its own terms.³⁰ Nebraska once had a policy, based on its claims to ownership of the water in its streams, that hydro-electric power generated in Nebraska could not be transmitted or used beyond the confines of the state.³¹ Obviously, this policy could not restrict the out-of-state disposition of power produced at a federal dam.

Article I, Section 8 of the Constitution gives Congress the power to levy taxes and to appropriate funds to provide for the general welfare of the United

24. U.S. CONST. art. IV, §3.

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

26. *Arizona v. California*, *supra* note 19.

27. *Ibid.*

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

29. *United States v. Rio Grande*, *supra* note 11, at 703.

30. *Ashwander v. T.V.A.*, 297 U.S. 288 (1936).

31. *Kirk v. State Board of Irr.*, 90 Neb. 627, 134 N.W. 167 (1912).

States.³² In the famous case of *United States v. Gerlach Livestock Company*, the Court said that one of the largest federal basin-wide development projects—the Central Valley Project in California—could be sustained under this power. “Congress has a substantive power to tax and appropriate money for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose. . . . Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, and other internal improvement is now . . . clear. . . .”³³

This is the power of the purse. It broadens considerably the power of the United States to take action, to spend money for the construction of projects—and to withhold funds and limit its bounty if a state should be recalcitrant.³⁴ In addition, the spending power can provide a new ground for control of local activities. In the *Ivanhoe Irr. Dist. v. McCracken* case, on the 160-acre limitation,³⁵ the Court said, “It is hardly lack of due process for the Government to regulate that which it subsidizes.” By tying enough strings to its money, by imposing conditions upon those who receive the benefits, the government may impose upon them rules and regulations over and above those required by state law.

STATE POWERS

The powers of the states in the field of water resources stem not from express delegations in state constitutions, but from the general residuum of sovereignty and imperium left to the states after the grant of specific powers to the United States. These include the power to create property rights and the police power to regulate property rights and the conduct of citizens in the public interest. State water laws have been traditionally directed to allocating water rights to individuals as property, in order to further the economic gain of the individuals. In the West, this has primarily taken the form of the law of prior appropriation.

The invention of prior appropriation was a master stroke in which the Western states justifiably take pride. 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 blueprints for its best use. Instead, the water was given to any and all who would put it to beneficial use. The miner used it to obtain the mineral wealth of the mountains and streams; the farmers turned the desert into rich crop lands free from drought; the rancher took the water for his stock and to irrigate hay for winter feed; cities brought in supplies that enabled them to grow; railroads, power companies, manufacturers and other industries received the water they needed to operate. The Western pioneers recognized that development by an individual in his private interest could also

32. U.S. CONST. art. I, §8.

33. *United States v. Gerlach Livestock Co.*, *supra* note 16, at 738.

34. *Cf.* Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d-d-3 (1964).

35. *Ivanhoe Irr. Dist. v. McCracken*, *supra* note 6.

be development in the public interest. Water was used to produce wealth. The increase in the wealth of the citizens, from these property interests carved out of the public domain, increased the wealth of, and developed the resources of, the Western states and the nation.

Giving the best water rights to senior appropriators encouraged junior appropriators to build dams to store spring floods, to build larger dams that would store the supply of good years against future droughts, or to bring water from long distances across or through mountain ranges from other basins where the supply exceeded the local demands. When it became obvious that completely unregulated appropriation might not always be in the public interest, the states invented administrative controls to prevent would-be appropriators from injuring the vested rights of others or doing acts that would be detrimental to the public interest. Agencies and officers administered the water laws and distributed the water to those entitled to it.

These property rights do not freeze development. If needs change, the water right can be changed to the new need. As the economy matures, as cities and industries need water from already fully appropriated sources, Western water law provides for the reallocation of water rights by economic forces. No administrator reallocates the water to the higher use. The city or the industrialist simply offers to buy the water, tendering enough money to make it attractive to the farmer to cease irrigating. The process is the same as if the farmer's land were needed for an airport or a factory site. The city has the additional power to condemn the water right to insure its transfer at a fair price. This is the system of firm property rights in water upon which Westerners have built their irrigated agriculture and their modern cities and industries.

States also have powers to take action. Absent a self-imposed restriction against a state engaging in works of internal improvement or borrowing money or lending its credit, states have power to use their own tax money and bonding capacity for water resources development. California's State Water Plan is the outstanding example in this area. And all states may create agencies to construct water control works up to river basin size, such as the Texas river authorities. Most commonly, these are some variant of the irrigation district or conservancy district and bring into the picture a third level, of local government. Today's great cities, and districts created as quasi-municipal corporations, armed with some delegated powers of government, may borrow money, construct projects, and tax, assess, or charge tolls to pay off the bonds. If one state may not act alone on an interstate stream, it may join with others in a fourth level of government, and by interstate compact jointly construct works without federal aid, as Texas and Louisiana are doing in the Toledo Bend project on the Sabine river.

All of these state powers, laws, private property rights and future plans based upon them, must, as we have seen, give way when the United States chooses to enforce a national policy that does not coincide with the state policy. This does not mean that the United States has taken over the state

water law, that water law is now federal law, or that state agencies have been put out of business. On the contrary, the day to day administration of existing rights and current appropriation goes on much as usual, litigants in state courts continue to call on state statutes or decisions in arguing their cases, and state officials and agencies busily plan future developments. The fact is that while the national government may be omnipotent, it is not omnipresent. Since the federal jurisdiction is a conditional one, it may be ignored when the federal interest is not present or is not being exercised. The Supreme Court of the United States has recognized the vital interest of the states in the control of water resources, and has specifically conceded the powers of the states to exercise control over navigable waters for the interests of their citizens. The states were said to have "traditional jurisdiction," not subject to challenge until Congress in some way asserts its superior power.³⁶

The state is part of the nation, and its representatives in Congress help to shape national policy. Many local and national interests coincide. The states often seek the aid of the federal government in the form of projects promising local as well as national benefits.

In many national laws Congress has chosen to waive federal powers and has written into the legislation provisions for the recognition and even use by the federal government of state water laws. In several instances Congress has chosen to use less than all of its powers, and has elected to recognize state-created rights even though it was under no constitutional obligation to do so. The Central Valley Project could have been undertaken as an exercise of the commerce power, and water rights for the project could have been taken under the navigation servitude, without compensation. Instead, Congress made reclamation law applicable, which requires condemnation of and payment for any water rights taken in aid of a reclamation project.³⁷ In the Federal Power Act, Congress did not delegate to its licensees the government's powers to destroy the riparian rights of others, and provided that if the government grants a license under the Power Act and then recaptures the plant, it will pay an amount that includes the investment of the licensee in state water rights.³⁸ Indeed, Congress has gone further and reversed the servitude in relation to certain Western streams. The O'Mahoney-Milliken amendment to the Flood Control Act of 1944³⁹ provides that in the operation of the Pick-Sloan projects the use of water for navigation will be subordinate to present and future beneficial consumptive uses—in other words, irrigation ditches will never be closed to supply water to float barges.

In practically every piece of legislation establishing federal water agencies and authorizing them to prosecute projects, there are procedures for consultation with state and local authorities and for reconciling conflicts with state

36. *First Iowa Hydro-Electric Corp. v. F.P.C.*, 328 U.S. 152 (1946).

37. *United States v. Gerlach*, *supra* note 16.

38. *Niagara-Mohawk Power Co. v. F.P.C.*, 347 U.S. 239 (1954).

39. 33 U.S.C. 701-1 (1964).

and local interests. In every major water development field, Congress has established mechanisms for obtaining a local voice in planning.⁴⁰

CONFLICTS OF INTERESTS

If the law of national supremacy is so clear, if these lines of communication exist, what is all the shooting about? Why have the states so loudly proclaimed their ownership of water while at the same time so long petitioned Congress for an act to subordinate national water activity to state law? Some writers have ascribed cynical and less pure motives to the present proponents of states' rights. It is suggested that some of the states are back doing business at the old stand, that some seek to gain an advantage over others by shackling the federal government's present and future plans for regional development.⁴¹ It is hinted that some interests hope to overthrow the *Ivanhoe* ruling on the 160-acre limitation.⁴² No purer motives are ascribed to their federal opponents, who are accused of being power-hungry bureaucrats,⁴³ seeking to freeze out state and private enterprise and create a federal monopoly in water resources development.⁴⁴ Yet both levels of government have honorable and valid motives.

The national interests are those inherent in the word "nation." The United States is a single nation, not a congeries of states. As a unified nation, it has an interest in all parts of its territory. It must take a broad view, and consider each part in relation to the whole. It must manage its resources for the benefit of all of its people, not only for the benefit of those who live in the locality of the resources. The funds it spends in one area are gathered from all of its citizens, and it therefore has some responsibility for seeing that benefits go to all the people. In providing for the general welfare, it may make local improvements, but it does so only when the collective good is thereby increased. It must develop itself as a nation, and in so doing it may often perform acts in one state in order to receive benefits in another. It must manage its property not for local benefit but for the national benefit. It sometimes must use its overriding powers to settle rivalries and conflicts between states. It must apply national policies nation-wide, though it may do so with variants suitable to different locales.

Although the states take a more parochial view, they have many legitimate interests in water development within their borders, regardless of who does the developing. They represent their citizens who live in the area, whose lives and whose children's lives are affected, who own much of the property involved, who may be called upon to pay for much of the development. One of the most important state interests is the preservation of the property rights of its citizens. The difference between irrigated crop land and desert pasture

40. These are detailed in Trelease, *Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 399 (1961).

41. Goldberg, *supra* note 4, at 4.

42. Clark, Statement, 1964 Senate Hearings, *supra* note 2.

43. Martz, *Water for Mushrooming Populations*, 62 W. VA. L. REV. 1 (1959).

44. Note *Federal Water Rights Legislation and the Reserved Lands Controversy*, *supra* note 5.

represents most of the value of Western farms. Firm water rights are required to encourage investment in industrial development, and to permit the growth of cities. The states have undertaken the orderly administration of water rights, and they need to know what those rights are.

Over and above the preservation of the status quo, the states have an interest in the future development of their territory. They believe that the choice between growth and stagnation should not be made elsewhere, that they should have a voice in whether their resources are developed or set on the shelf. Federal water resources programs in the Western states affect those states' people, their prosperity, their institutions. The states have a knowledge of local needs and problems, they have plans to solve them. They desire their plans for water to be integrated and coordinated with other state resources and interests. They therefore wish a voice in the plans of the United States.

The states' interests in the future development of the waters stem in part from the promise of the national government that they will share in the benefits of the waters within their borders. The enforceability of this promise is a matter of doubt, but the United States Supreme Court has said that few public interests are more obvious and indisputable than the interest of a state to maintain its rivers, which were described as great foundations of public welfare.⁴⁵ Each is said to have an interest above that of its individual citizens and above its individual property rights, and each state was said to be entitled to an equitable apportionment of the benefits resulting from the flow of the rivers.⁴⁶ Some states have had specific portions of the waters of interstate rivers allotted to them by the Supreme Court, or by Congress, or by compact approved by Congress. Even though a river is not yet apportioned, the states have very real though unidentified claims in it. This is a national policy, giving to each state the power and the hope of some degree of self-determination and self-development, by allocating to each a share in its rivers, to be held as a local asset, held in reserve perhaps, but offering the promise of future wealth.

When all of these interests are sifted, two core issues emerge. First, should the United States, for its own purposes, take water from present users without compensation? Second, should the United States initiate projects for unappropriated water without reference to the wishes of the states in which the project is located?

On the first issue, the navigation servitude, the reservation of water for use on reserved lands and the other federal possibilities of uncompensated destruction of state water rights, all strike at the very heart of state water law. They make the state-created property right insecure. This not only creates fear in the hearts of present appropriators, but it has a tendency to discourage investment in water-based activities and to hinder the growth of the states by restricting the activity of the private sector. Another effect is to throw a

45. *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908).

46. *Kansas v. Colorado*, *supra* note 7.

monkey wrench into state planning activities and to disturb the state machinery for the orderly administration of water rights and for water distribution. On the second issue, the ability of the United States to proceed with projects without reference to state law leads to fears that, in the federal planning, local benefits will be sacrificed and local costs will be discounted.

The position of the United States on the first issue is that negation of the reserved waters doctrine would defeat the purposes for which the reservation of land were made, and that when the water was needed for the national purpose, the government would be forced to buy back the very water it gave away, possibly at a prohibitive cost.⁴⁷ On the second issue the United States has very valid reasons for not wishing "to bend its knee" to state officials, to have national projects subjected to a state veto, or limited to purposes recognized by a state. National policies might not be uniformly applied throughout the nation. For example, the storage of water for future release to ease the pollution burden of streams in periods of low flow is now a national policy,⁴⁸ and while this is clearly a beneficial use in Oregon,⁴⁹ it is argued that it is not beneficial in Colorado.⁵⁰ Is wildlife management for recreation a beneficial use in Utah as it seems to be in Texas?⁵¹ A fragmented national policy does not appeal to national officials.

SOLUTIONS

If the only solution to this clash of interests is a legal decision on states' rights, the Western states are lost. The law is on the nation's side. Whatever is meant by the proud phrase: "The waters of all natural streams . . . are hereby declared to be the property of the state,"⁵² in giving power to the states to regulate its citizens, it does not mean that it gives power to regulate the national government. The United States Constitution and laws are the supreme law of the land.

The time has come for the Western states to learn to live with the national government. If national powers are capable of overriding state powers, if national interests are superior to state interests, the states must seek protection of their interests by some means other than asserting a rule of law that does not exist, or attempting to create that rule of law by Congress. The Western states must recognize the federal authority, but they must use it, they must mold federal policy. They must convince the national government of the intrinsic worth of state interests as national interests, and as worthy of consideration and fair treatment by the national government. Actually a great deal of this has been done in the past. National policies for Western develop-

47. Statement of Ramsey Clark, *1961 Senate Hearings, supra* note 2, at 35; Statement of Senator Clinton P. Anderson, *1964 Senate Hearings, supra* note 2, at 39.

48. 33 U.S.C. 466a (b) (1) (1964).

49. ORE. REV. STAT. §537.170 (1963).

50. See Note, *Water Pollution Control in Colorado*, 36 U. COLO. L. REV. 413 (1964).

51. *Compare* Lake Shore Duck Club v. Lake View Duck Club, 50 Utah 76, 166 Pac. 309 (1917), *with* Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441 (1935).

52. WYO. CONST. art. 8, §1 (1889). Similar provisions in other state constitutions and laws are detailed in Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638, 641 (1957).

ment gave us reclamation and multi-purpose projects that were in the public interest of both the nation and the states.

On the issue of the states' interests in water projects, the answer lies not in subordinating the national government to state water law. It simply will not happen. It is not the law today, for Congress did not pass the Barrett bill, and it would not pass the original Kuchel bill⁵³ with such a clause in it. The United States government could not live with it. But a state could live with a "federal" water right for dilution of pollution, or for recreation, or one that gave a farmer less water than the state would, or water for less land, or even one that could not be used for growing certain crops.

What is really needed is not state control over federal water rights but a stronger state voice in the planning and operation of federal projects. Last year a thoughtful state official said:

The real answer to federal encroachment is the assumption of greater responsibilities by the states, not the head-on collision of forces. In such a collision the states are bound to come out second best. It is possible for a state and the United States to develop a reasonable *modus vivendi*. . . Problems of regional development cannot be solved by the simple application of . . . concepts of water rights.⁵⁴

He echoed a thought expressed in 1957 by one of this conference's planners, who suggested that if the states wish a stronger voice in the national water development area, they will get it in proportion to the amount they increase their financial contributions, and as fast as they devise responsible state agencies capable of policy formulation and project management, free from undue pressures from local special interests.⁵⁵ Perhaps the voices of the states may be strengthened if they are raised in chorus in the newly-proposed Western States Water Council.

In addition to a strong voice, the states and the United States need better lines of communication. Perhaps a fourth level of government is needed, a federal-state compact commission like that of the Delaware River Compact,⁵⁶ or the once-proposed Missouri Basin Compact.⁵⁷ Perhaps the new River Basin Commissions created by the Water Resources Planning Act of 1965 will fill the need. Perhaps improved communications could clear up the remaining issue—that of compensation for impairment of security of state-granted water rights.

On this issue of a state desire for secure water rights versus federal reluctance to buy back what it has given away, the solution seems a simple one, yet one that is somehow just beyond our grasp. All that is needed is for fed-

53. S. 1275, 88th Cong., 1st Sess. (1963).

54. Goldberg, *supra* note 4, at 37.

55. Englebert, *Federalism and Water Resources Development*, 22 LAW & CONTEMP. PROB. 325 (1957).

56. 75 Stat. 688 (1961).

57. Trelease, *A Federal-State Compact for Missouri Basin Development*, 7 WYO. L. J. 161 (1953).

eral officials on the policy-making level to understand an economic principle that is intuitively known by the Western water user and that has been officially adopted—on paper—as the policy of the Department of the Army, the Department of the Interior, the Department of Agriculture, and the Department of Health, Education and Welfare, and approved by the President. That is, that in developing water resources the goal is “to provide the maximum net benefits,” and that in counting costs against those benefits the government should include “losses . . . and induced adverse effects . . . whether or not compensation is involved.” This quotation is worth more than a footnote citation; it is from “Policies, Standards, and Procedures in the Formulation, Evaluation, and Review of Plans for the Use and Development of Water and Land Resources,” prepared under the direction of the President’s Water Resources Council in 1962.⁵⁸ What does it mean? It means that if the government initiates a water use for a military purpose on reserved land, and thereby deprives a farmer of water used for irrigation, the loss of the irrigation is a cost of the new military use. It is a cost whether or not the government pays the farmer. If, in addition to reserved land, the Defense Department needs the farmer’s land, it will pay him for it. But the land, too, was “given away”—it was homesteaded by the farmer’s grandfather. For years the land and the water have increased the gross national product and the national welfare. This productive quality has given each a value. Now, if either land or water must be used for military purposes, that gross product and that welfare will be decreased, and that value will be destroyed. The only issue is who should bear the loss and pay the cost. Should it be paid from the national treasury and borne by all those in the nation who get the benefit of the military post, or should the farmer be required to lay his costly sacrifice on the altar of the public good?

If the reservation of water, or the navigation servitude, acts as a “sword of Damocles” that may fall at any moment,⁵⁹ or as a “floating mortgage in the sky” that may be foreclosed at any time for any amount,⁶⁰ and this discourages development, this too is a cost of the ultimate national use of the water. Costs of “induced adverse effects” and “foregone benefits” include “opportunity costs,” the loss of values that could be produced and added to national wealth, but that are foregone because the insecurity of the water right has frightened away the potential water user.

But suppose, as has been argued, that the compensation paid to the water user, the “buy-back” price, were “prohibitive,” so great that the government project for the water was economically infeasible. Then, the government’s water policy statement tells us, the government does not want this project. It would be a step in the wrong direction, a step away from maximum use. The costs of the government use (including the loss to the farmer) would exceed the benefits gained. An illustration from the private sector might demonstrate

58. S. Doc. No. 97, 87th Cong., 2d Sess. (1962).

59. Sen. Frank A. Barrett, 1956 Senate Hearings, *supra* note 2.

60. Northcutt Ely, 1964 Senate Hearings, *supra* note 2.

this more clearly. Suppose we have a water source divided between an irrigator and a manufacturer, each of whom could increase his use. Because the manufactured goods are worth more than the crops, the manufacturer can buy water from the farmer, paying him more than the crops are worth. But if we had a policy of preferring agriculture, so that the farmer could take the water without paying for it, the added crops would be worth less than the lost goods. Welfare would be decreased, the country would be less rich.

So at the very least the states must continue to fight for the compensability of water rights on the floor of Congress as the basic principle of the most recent Kuchel bill,⁶¹ in presenting the views of the states on each future federal project, and in the planning sessions of inter-agency and river basin commissions. The compensation principle is needed not because it sets states' rights above the national powers, or private interests above national interests, but because it *is* in the national interest and *is* in accord with the very policy officially adopted by the agencies of the United States and approved by the President of the United States.

61. S. 1636, 89th Cong., 1st Sess. (1965).