

# Water Resources—Comments Upon the Federal-State Relationship

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WHEN the Supreme Court of the United States rendered its decision in *FPC v. Oregon*,<sup>1</sup> popularly known as *The Pelton Dam Case*, the hue and cry of States' rights were loudly voiced in a new setting. That case signalled the start of much speculation and controversy, even raising doubts in many as to the security of our water rights which we had cherished as vested property.<sup>2</sup> To some, it has created the spectre of unlimited control by the federal government over water resources. To us in California who may be embarking upon a 1¾-billion dollar venture it is especially important to know whether any control or latent right inconsistent with the project might be asserted by the federal government in the future. *The Pelton Dam Case* has compelled us to turn our attention to the complex problems of federalism as applied to water resources, and demands are being made upon Congress to resolve the difficulties by legislation.

It is the purpose of this Article to review and to explore briefly two delegated powers of Congress which have served as the principal basis of its jurisdiction over water resources, namely, the power to regulate interstate commerce<sup>3</sup> and the authority to regulate and dispose of the property of the United States.<sup>4</sup> The exercise of the treaty, war, and appropriation powers of the federal government have had a significant impact on the development of water resources, and although they present interesting problems, only the existence of such constitutional bases can be mentioned at this time. The second objective is to discuss the various proposals<sup>5</sup> to resolve these problems.

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<sup>1</sup> 349 U.S. 435 (1955).

<sup>2</sup> Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604 (1957); Munro, *The Pelton Decision: A New Riparianism?*, 36 ORE. L. REV. 221 (1957); Address, *State vs. Federal Control of Water*, by Prof. Trelease, Conference of Western Law Schools, Seattle, Wash., April 3, 1959. For a general discussion of the problems discussed herein, see King, *Federal-State Relations in the Control of Water Resources*, 37 U. DET. L.J. 1 (1959).

<sup>3</sup> U.S. CONST. art. I, § 8.

<sup>4</sup> U.S. CONST. art. IV, § 3.

<sup>5</sup> See notes 61, 65, 69, 72 *infra*.

## I

## THE COMMERCE CLAUSE

The Constitution provides that Congress shall have the power "... to regulate Commerce . . . among the several States . . . ."<sup>6</sup> These few words, abstract in meaning and elastic in application, have been the justification for the various economic and social legislation by Congress. Federal control over labor practices,<sup>7</sup> farm production,<sup>8</sup> and gambling,<sup>9</sup> to name a few, have received judicial blessings when such activities affect interstate commerce. From a very early period it had been determined that the power to regulate commerce included control over navigation.<sup>10</sup> While it would be interesting to trace the modest beginnings of "navigation," as a springboard to congressional action, to the present scope of the commerce power over water resources, it is enough to indicate here that the earlier exercises of this power dealt with the use and preservation of navigable waters for navigation purposes.<sup>11</sup> And the classic definition of navigable waters was that which was navigable in fact.<sup>12</sup> In 1899, however, in *United States v. Rio Grande Dam & Irr. Co.*,<sup>13</sup> federal jurisdiction over nonnavigable waters in order to protect navigability downstream was sustained. This was an extension of jurisdiction to nonnavigable portions, but the older concept of navigability was still in order and the preservation of that navigability was still the theme.

Another significant development occurred in 1940, when *United States v. Appalachian Elec. Power Co.*<sup>14</sup> indicated a marked change in attitude as to what constitutes a navigable stream. The Court stated, "To appraise the evidence of navigability on the natural condition only of waterways is erroneous. Its availability for navigation must also be considered."<sup>15</sup>

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<sup>6</sup> U.S. Const. art. I, § 8.

<sup>7</sup> E.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>8</sup> E.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>9</sup> E.g., *Lottery Case (Champion v. Ames)*, 188 U.S. 321 (1903).

<sup>10</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>11</sup> See Starr, *Navigable Waters of the United States—State and National Control*, 35 HARV. L. REV. 154, 169-73 (1921); Comment, 39 MICH. L. REV. 976, 977 (1941).

<sup>12</sup> *The Montello*, 87 U.S. (20 Wall.) 430 (1874); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). In reviewing the test which has been applied, the Court in *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-22 (1921) states: "[T]he test [is] whether the river, in its natural state, is used, or capable of being used as a highway for commerce, over which trade and travel is or may be conducted in the customary modes of trade and travel on water. Navigability, in the sense of the law, is not destroyed because the water-course is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water."

<sup>13</sup> 174 U.S. 690 (1899). For a later case, see *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

<sup>14</sup> 311 U.S. 377 (1940).

<sup>15</sup> *Id.* at 407.

It then proceeded to hold that navigability may be determined by the improvements which can be made to make the water course navigable in fact, even though no improvement might be contemplated by Congress.<sup>16</sup> It would appear from this that if any portion of a river system can be made navigable by reasonable improvements, federal jurisdiction attaches to that portion and also to upper stretches and tributaries, under the *Rio Grande* doctrine, even though they cannot be made navigable.<sup>17</sup>

Another point of importance in the *Appalachian* case is the Court's conclusion that federal jurisdiction over navigable waters is not limited to control for purposes of navigation only—rather, federal authority “is as broad as the needs of commerce.”<sup>18</sup> Thus, licensing of power projects requiring compliance with terms unrelated to preservation of the river for navigation was deemed valid.<sup>19</sup> Subsequently, a lower court has held that the Federal Power Commission may deny a license to construct a dam on a navigable river in order to preserve its recreational use.<sup>20</sup>

Logically, the ultimate extension of these principles would result in the authority of Congress to regulate the use of waters in nonnavigable streams, although such control may be unrelated to navigation, so long as such non-navigable streams flow into water courses which can be made navigable by improvement. Whether this logical extreme will be reached remains to be seen.

Hitherto, the expanse of the power granted under the commerce clause has been discussed only in terms of congressional power to regulate as such. There is, however, one very important corollary of this regulatory power over navigation which directly affects existing uses of water and needs to be particularly underlined to give full meaning to the problems discussed. This corollary may be introduced in the form of the issue it presents—namely, whether the “plenary power of Congress” over navigable streams permits interference and even destruction of existing water uses with respect to watercourses within the scope of that power *without compensation*.

Congress, under the commerce power, may provide for a system of national highways, but in establishing such system, undoubtedly Congress

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<sup>16</sup> *Id.* at 407–08. In *Montana Power Co. v. FPC*, 185 F.2d 491 (D.C. Cir. 1950), it was held that Congress does not lose jurisdiction over streams that were once navigable even though later artificial obstructions make them nonnavigable.

<sup>17</sup> *Georgia Power Co. v. FPC*, 152 F.2d 908 (5th Cir. 1946), seems to sustain jurisdiction of the FPC on nonnavigable portions of a stream where the downstream can be made navigable by reasonable improvement.

<sup>18</sup> *United States vs. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940).

<sup>19</sup> *Id.* at 426–27. The Supreme Court, however, has not completely broken away from navigation as the basis for jurisdiction over a nonnavigable tributary. See *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508, 522–25 (1941).

<sup>20</sup> *Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954).

must, in the absence of purchase or gift, condemn and pay just compensation whenever private land is to be used for the project.<sup>21</sup> When Congress exerts its power over navigable streams, however, a significant contrast is to be noted. As an original proposition, it might have been argued that even though Congress has regulatory power over navigable bodies of water, such authority must be exercised with due regard to and consistent with private usufructuary rights attaching to such water; thus, while such private rights might be restricted in their enjoyment under proper police-power regulation, there should be compensation where such rights are "taken" for positive public benefit. At an early date, however, a contrary approach was taken. The commerce power was deemed to include control over navigation; that control is complete; the people and the State alike are subject to the Constitution which has granted such complete dominion to the federal government; thus, any private usufructuary rights are acquired subject to such control.<sup>22</sup> This dominant federal control has found a shorthand expression: it is the "navigation servitude" or "easement." Although there is some confine on the breadth of this servitude, the limitation is not presently subject to precise definition.

It has been held that a riparian owner is not entitled to compensation when his access to the navigable water is impeded by piers constructed in the river;<sup>23</sup> that a riparian owner may not be compensated for the loss of water power in the navigable stream;<sup>24</sup> and that the destruction of an oyster bed when the channel of a navigable body was deepened was a loss to be borne by the private party.<sup>25</sup> It is to be noted that these cases are concerned with the use in or the right to the navigable water or bed thereunder. It would seem clear that, in the absence of any statute, water diversion from a navigable stream for beneficial uses by a riparian or an appropriator would suffer the same fate, *i.e.*, the water use would be subject to the servitude, and thus interference would not be a compensable taking.

Greater difficulty is encountered when rights in nonnavigable streams are affected or when the value of the fast lands are dependent upon their proximity to navigable waters.

Initially the navigation servitude was restricted to interference operating upon and within the ordinary and natural condition of the stream; thus, where a mill, run by water power, on a nonnavigable tributary could no longer be operated because the federal government had constructed a dam

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<sup>21</sup> *Cf. Phelps v. United States*, 274 U.S. 341 (1927).

<sup>22</sup> *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *Scranton v. Wheeler*, 179 U.S. 141 (1900).

<sup>23</sup> *Scranton v. Wheeler*, note 22 *supra*. See also *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945).

<sup>24</sup> *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913).

<sup>25</sup> *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82 (1913).

on the navigable main stream which raised the level of the nonnavigable tributary, the mill owner was allowed compensation.<sup>26</sup> Subsequently, the servitude was said to exist up to the ordinary high-water mark so that, despite a dam which altered the natural condition of stream flow, no compensation was allowed for injury to the embankment of a navigable river up to the ordinary high-water mark.<sup>27</sup> Likewise, a claim for compensation for the loss of power head when the level of the river was raised was rejected.<sup>28</sup> This test was later qualified so as to restrict the servitude only upon the bed of the stream, the high-water mark designating the bed for servitude purposes; thus, compensation was required for an injury to the land abutting a nonnavigable tributary when the water plane was raised by a dam in the navigable mainstream.<sup>29</sup> Finally, it has been held that compensation need not include the value of the condemned land attributable to its suitability for a damsite.<sup>30</sup>

One may wonder whether the navigation servitude underlies water withdrawals for beneficial uses from nonnavigable tributaries of a navigable mainstream.<sup>31</sup> The conclusion that the servitude does extend so far upstream can rationally be supported by the argument that the servitude is co-extensive with the commerce power.<sup>31a</sup> If this argument is correct, a servitude would exist with respect to consumptive uses of nonnavigable tributaries flowing into navigable bodies of water.

## II

### THE PROPERTY CLAUSE

The second major constitutional basis for congressional control over water resources stems from article IV, section 3 of the Constitution which

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<sup>26</sup> *United States v. Cress*, 243 U.S. 316 (1917).

<sup>27</sup> *United States v. Chicago, M., St. P. & P.R.R.*, 312 U.S. 592 (1941).

<sup>28</sup> *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).

<sup>29</sup> *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950).

<sup>30</sup> *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). *But cf.* *United States v. River Rouge Improvement Co.*, 269 U.S. 411 (1926) (in computing severance damages in eminent domain, benefit accruing to riparian owner, despite navigation servitude, held not to be negligible).

<sup>31</sup> The contention that the navigation servitude does not extend to nonnavigable portions was advanced in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 736-39 (1950), but there the Court sidestepped the issue by declaring the project involved to be controlled by the Reclamation Act of 1902, § 7 of which, 32 Stat. 389, 43 U.S.C. § 421, (1958), requires compensation for the "taking" of private rights.

<sup>31a</sup> The Court in *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 806 (1950), was careful in referring to the servitude as being limited to the "bed of the navigable river." There is also found the statement, "It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases." *Id.* at 808. See also *Grand River Dam Authority v. United States*, 175 F. Supp. 153 (Ct. Cl. 1959), *cert. granted*, 80 Sup. Ct. 292 (1960) (No. 503) (*United States*, acting under the commerce power, required to compensate a state agency for the latter's water rights in a nonnavigable stream flowing into a navigable river).

provides that Congress shall have power to dispose of and make all needful rules and regulations respecting territory or other property belonging to the United States. The exercise of this power is easily defined when applied to parcels of real property. Nor is there difficulty when the federal government seeks to dispose of surplus power generated at its plants. These situations invite the application of traditional concepts of ownership. When the realm of public domain with its streams, rivers, and tidewaters is entered, a fog enshrouds the congressional dispositive power.

Vast territory, where availability of water was critical to economic development and progress, was acquired by the United States from France, Mexico, and other nations.<sup>32</sup> So long as the public domain and the settlers thereon remained under the sole political guidance of Congress, it mattered little whether the central government was vested only with regulatory powers as a sovereign or more broadly with ownership interests in the water resources of the public domain. It was a matter of indifference that Congress dictates the conditions under which the land and water may be used by individuals pursuant to one theoretical basis or the other—the control is effective in either case. As soon as additional political organs intruded, the symmetry was destroyed. After the Western States were admitted into the Union, did the sovereign control of water resources in the public domain pass to the States? Of course, even after admission the States cannot exercise dispositive power over lands remaining in the public domain, unless Congress has acquiesced, because the Constitution expressly vests such control in Congress. But the question remains whether water resources fall within a like category—more specifically, whether any water rights are appurtenant to land within the public domain, and if there are, the nature of such water rights. That such a fundamental and important question should be unresolved even today can be understood only in the light of the fascinating history of the development of the West and the judicial and congressional response from time to time to the then existing conditions.<sup>33</sup>

The early history of the West reveals an influx of miners dependent upon water for hydraulic mining, trespassing upon federal land with no rights of ownership—relying on mere possessory title to protect their interests against other intruders. With them came the custom which recognized priority in time as superiority in right.<sup>34</sup> Rather than evicting these squatters, Congress encouraged their presence in the development of the West and enacted three statutes which gave recognition to the alleged claims of

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<sup>32</sup> U.S. PRESIDENT'S WATER RESOURCES POLICY COMM'N REPORT, VOL. 3, WATER RESOURCES LAW 33 (1950).

<sup>33</sup> See Bannister, *The Question of Federal Disposition of State Waters in the Priority States*, 28 HARV. L. REV. 270 (1915).

<sup>34</sup> *Broder v. Water Co.*, 101 U.S. 274 (1879); *Jennison v. Kirk*, 98 U.S. 453 (1878); *Cave v. Tyler*, 133 Cal. 566, 65 Pac. 1089 (1901); *Irwin v. Phillips*, 5 Cal. 140 (1855).

the squatters. Section 9 of the Act of July 26, 1866,<sup>35</sup> was a recognition of the custom of priority just mentioned, the effect of which was to promote the rights of the squatters to a greater dignity. Section 17 of the Act of July 9, 1870,<sup>36</sup> provided that patents should be subject to vested water rights. Finally the mandate of the Desert Land Act of 1877<sup>37</sup> was that the right to use water shall depend upon prior appropriation and that surplus waters of nonnavigable waters shall remain free for appropriation. With the possible exception of the act of 1866, there is no indication on the face of the statutes that Congress had intended to transfer to the States the responsibility of defining the acquisition of water rights. To the contrary, it would appear from the then-current conditions that Congress, pursuant to its dispositive power, had adopted the appropriation system as to public lands. At any rate, the States that adopted the appropriation system as part of their common law and believed in their own sovereign authority over water resources were unaffected by these statutes.<sup>38</sup> But in California, which had embraced the riparian law, a curious development occurred. Implicit in the decisions of the California Supreme Court was the notion that lands within the public domain were vested with riparian rights so that a patentee succeeded to such rights as the federal government possessed in the land.<sup>39</sup> The outcome of this was a recognition of appropriative rights from public domain only when acquired after 1866 and before the patent of riparian lands to individuals.<sup>40</sup> On the other hand, Oregon decided that the Desert Land Act of 1877 resulted in the severance of water rights from the public land so that riparian rights did not inhere in a patent of riparian land.<sup>41</sup>

These theories are poles apart. When the United States Supreme Court was faced with the resolution of this conflict in *California Oregon Power Co. v. Beaver Portland Cement Co.*,<sup>42</sup> the Court maintained a neutral position by concluding:

What we hold is that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.

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<sup>35</sup> REV. STAT. § 2339 (1875), 30 U.S.C. § 51 (1958).

<sup>36</sup> REV. STAT. § 2340 (1875), 43 U.S.C. § 661 (1958).

<sup>37</sup> Section 1, 19 Stat. 377, as amended, 43 U.S.C. § 321 (1958).

<sup>38</sup> Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

<sup>39</sup> E.g., Lux v. Haggin, 69 Cal. 255, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

<sup>40</sup> E.g., Cave v. Tyler, 133 Cal. 566, 65 Pac. 1089 (1901); San Joaquin & Kings River Canal & Irr. Co. v. Worswick, 187 Cal. 674, 203 Pac. 999 (1922); Cory v. Smith, 206 Cal. 508, 274 Pac. 969 (1929).

<sup>41</sup> Hough v. Porter, 51 Ore. 318, 388, 399, 95 Pac. 732 (1908), 98 Pac. 1083, 1095 (1909).

<sup>42</sup> 295 U.S. 142, 163-64 (1935).

Although this case confirmed the existing state practices, thus maintaining a status quo with respect to private water rights derived from ownership of what were previously public lands, there have been expressions in dicta that the lands in public domain, prior to being patented to private parties, were vested with water rights. In *United States v. Rio Grande Dam & Irr. Co.*,<sup>43</sup> the Court stated:

Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy a 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 government property.

And in *California Oregon Power Co. v. Beaver Portland Cement Co.*<sup>44</sup> are found the remarks:

The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, insofar as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation.

Such was the inconclusive situation of the law in 1955, when the case was decided which caused the battle flags of the Western States to be unfurled and the call to arms for preservation of States' rights to be sounded. The case was *FPC v. Oregon*,<sup>45</sup> allusion to which was made at the outset of this Article. The issue in that case simply stated was whether the Federal Power Commission could license the construction of a power project on reserved lands of the United States, which would use water of a non-navigable river flowing past<sup>45a</sup> without regard to the requirements imposed by the State of Oregon. The Court found ample constitutional authority in article IV, section 3 of the Constitution, *i.e.*, the property clause, for Congress to regulate the use of the reserved land and the river in question under the Federal Power Act.<sup>45b</sup> Having cleared the constitutional hurdle, the Court construed the Federal Power Act as prohibiting dual regulatory control. It was asserted on behalf of Oregon, however, that the act of 1866,

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<sup>43</sup> 174 U.S. 690, 703 (1899).

<sup>44</sup> 295 U.S. 142, 164 (1935).

<sup>45</sup> 349 U.S. 435 (1955).

<sup>45a</sup> Reserved lands are those lands owned by the United States but withheld from private appropriation under the public-land laws. In the principal case, the bed and one bank of the river were owned by the United States; the opposite bank was within an Indian reservation, consent having been given to the power project.

<sup>45b</sup> Federal Power Act §§ 4(e), 23(b), as amended, 49 Stat. 840, 846 (1935), 16 U.S.C. §§ 797(e), 817 (1958). The constitutional issue in *FPC v. Oregon* is discussed in 349 U.S. at 441-46.

act of 1870, and Desert Land Act of 1877 were "delegation or conveyance to the State of the power to regulate the use of nonnavigable waters." The response of the Court was that those acts applied only to public lands subject to private appropriation and did not apply to reserved lands—lands withdrawn from disposition or sale.

Justice Douglas dissented on the ground that the Federal Power Act relates to use of public lands and reservations and does not provide for water rights; consequently, use of water for the power projects must be obtained pursuant to state law.

Many evils have been conjured from this case. It has been suggested that implicit in the decision is the recognition of riparian rights in federal lands.<sup>46</sup> From this premise, it is argued that appropriative rights on a stream system where reserved lands are located might be subject to the latent riparian rights of the reserved land.<sup>47</sup> And the extreme was bound to be fancied: thus, if the federal government should condemn any riparian land in a State exclusively following the appropriation doctrine, the assertion is made that riparian rights to surplus waters would suddenly come into being in the condemned land.<sup>48</sup> Another difficulty foreseen arising from the decision is the administrative problem of apportioning the water among the federal licensees and those claiming by virtue of state laws.<sup>49</sup>

Does *The Pelton Dam Case* open the floodgates to all these results? First of all, let us analyze the actual holding of the case. This was a case in which two sovereigns, each subject to the respective constitutional limitations, were asserting conflicting authority to regulate the use of non-navigable waters. There would be difficulty in holding as a matter of constitutional law that Congress lacked the authority to license power projects on its land and the use of nonnavigable waters flowing past. This is especially so where the lands owned by the federal government were part of the original public domain.

The question then reduces itself to a construction of various congressional acts to determine whether Congress has in fact relinquished its conceded supremacy. The Supreme Court was not without reason for its conclusion in *The Pelton Dam Case* that the acts of 1866, 1870 and 1877 were addressed to individuals locating on public domain or receiving patents to public property. In short, there is nothing to indicate a complete abandonment of federal authority in favor of state control.

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<sup>46</sup> Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604, 609 (1957); Address, *State vs. Federal Control of Water*, by Prof. Trelease, Conference of Western Law Schools, Seattle, Wash., April 3, 1959.

<sup>47</sup> Corker, *supra* note 46, at 609. But see Munro, *The Pelton Decision: A New Riparianism?*, 36 ORE. L. REV. 221 (1957), who argues that water has been dedicated to the public, and the federal government can secure water rights only as a proprietor under state law.

<sup>48</sup> Corker, *supra* note 46, at 612.

<sup>49</sup> Munro, *supra* note 47, at 250-51.

Although these acts do represent a congressional policy that the state system of water law should suffer as little dislocation as possible by imposing conformity with state laws upon individuals seeking the acquisition of public property,<sup>50</sup> Congress can change that policy in favor of one where, despite conflict with state law, certain activity relating to water courses within its constitutional grant of control should be subject to a national policy. In essence, this is what the Supreme Court has said Congress has done with respect to power projects on the reserved lands by the enactment of the Federal Power Act. So far as the fundamental question of state control is concerned, the breach in the congressional policy of conformity had already been declared in *First Iowa Coop. v. FPC*.<sup>51</sup> Does the decision really extend further than this? Are present appropriative rights subject to latent riparian rights of reserved lands? *The Pelton Dam Case* certainly does not so hold.

The case of *Nevada v. United States*<sup>52</sup> might be interpreted as so holding. In that case Nevada claimed that the United States, in order to withdraw underground percolating waters by wells dug on federal property, must secure a state permit. The federal district court relied upon the property clause fortified by the decision in *The Pelton Dam Case*, and also upon the fact that national defense activity was involved, to assert freedom for the United States from any state supervision with respect to such use.<sup>53</sup> But here again, the issue is one of regulation; there was no interference by the United States with any prior water users.

The cases, and in particular *The Pelton Dam Case*, the subject of this Article, which would have created the consternation in this complex relationship between the States and the federal government are not too alarming when confined to precisely what was decided in each. The cases do, however, leave unanswered the very vital question of the kind of water right which may be secured in the future under state law in waters where there is an existing federal, or federally licensed, project. Thus, in *The Pelton Dam Case* the question remains whether Oregon might issue permits to appropriate water which would interfere with the power project. And in *Nevada v. United States*, one wonders what will happen when pri-

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<sup>50</sup> See *California Ore. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164-65 (1935), wherein the Court states: "The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation . . . . The public interest in such state control in the arid-land states is definite and substantial."

<sup>51</sup> 328 U.S. 152 (1946) (where licensee under the Federal Power Act was permitted to divert nearly all the water of Cedar River, which was navigable, to the Mississippi River although prohibited by Iowa law).

<sup>52</sup> 165 F. Supp. 600 (D. Nev. 1958).

<sup>53</sup> But see *United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806 (S.D. Cal. 1958).

vate appropriations are made from the same basin under the state law and the naval installation faces expanded need in the future.

The forebodings and further forebodings stemming from these cases and contentions now being asserted on behalf of the executive branch of the United States, such as alleged federal ownership of unappropriated waters in nonnavigable waters,<sup>54</sup> or claim of riparian rights upon purchase or condemnation of riparian lands,<sup>55</sup> prove to be discomforting.

### III

#### THE DEMAND FOR NEW LEGISLATION

This then is the history behind the clamor for new legislation by Congress. In response to this fervent demand, several bills are presently under consideration. But before a discussion of these bills is launched, the picture must be completed by alluding to the instances in which Congress has expressly directed the officers and agencies of the federal government to comply with state water law.<sup>56</sup> Most notable, of course, is section 8 of the Reclamation Act of 1902.<sup>57</sup> And under section 1 of the Flood Control Act of 1944<sup>58</sup> Congress has expressly given preference to beneficial uses existing on navigable waters of the Western States over navigation. Section 27 of the Federal Power Act provides that the act is not to affect the state law controlling the distribution of water for irrigation, municipal or other uses.<sup>59</sup> Moreover, licensees under the Federal Power Act have not been permitted to rely upon the navigation servitude to cause injury to existing rights without compensation.<sup>60</sup>

In the light of this background, the next logical inquiry is with respect to the action required in the present instance. In any consideration of the current problems it is necessary to divorce the issue relating to the proper political organ to develop water resources from the issue regarding the desirability of giving security to water users.

The bills, dealing with problems discussed herein and presently before Congress, may be classified into four groups, each with difficult constitutional questions involved.

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<sup>54</sup> See *Nebraska v. Wyoming*, 325 U.S. 589, 611 (1945).

<sup>55</sup> See note 48 *supra*.

<sup>56</sup> See *Corker*, *supra* note 46 n. 27, for a list of federal acts which have given recognition to state water laws.

<sup>57</sup> 32 Stat. 390, 43 U.S.C. §§ 372, 383 (1958).

<sup>58</sup> 58 Stat. 887, 33 U.S.C. § 701-1 (1958).

<sup>59</sup> 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1958). See *First Iowa Coop. v. FPC*, 328 U.S. 152 (1946), on the effect of this section.

<sup>60</sup> *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *Henry Ford & Sons, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369 (1930).

Within the first group is a bill<sup>61</sup> under which all western waters, navigable or not, would be freed for appropriation and would be subject to state control for all beneficial uses.<sup>62</sup> The federal government would be required to proceed in conformity with state laws in the appropriation and use of the water.<sup>63</sup> In terms, the provisions of the bill are so broad, at least with respect to unappropriated waters, that, if enacted, there would be little federal control over any western water resources.<sup>64</sup> The Federal Power Commission would no longer be able to license power projects without previous approval of the State with respect to the use of water. But the broad provisions might be construed as relating only to acquisition of water rights and not applicable to the operation of federal projects; thus, such provisions as the "160-acre limitation" found in the reclamation laws<sup>64a</sup> might be unaffected.

The bills<sup>65</sup> within the second group embody a comprehensive provision whereby state control over water resources, including water on public lands of the United States, is recognized.<sup>66</sup> These bills would require the federal government and its licensees to appropriate and use water in compliance with state laws.<sup>67</sup> An exception, however, to these requirements is provided "where water is available for acquisition upon proper application to a State for a right to water to be used for any purpose when certified as necessary to the conduct of an authorized Federal program."<sup>68</sup> The effect of this exception is not clear.

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<sup>61</sup> H.R. 2363, 86th Cong., 1st Sess. (1959). An identical earlier bill was S. 863, 85th Cong., 1st Sess. (1957). See *Hearings on S. 863 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs*, 84th Cong., 2d Sess. (1956). See also *Hearings on H.R. 4567, H.R. 4604, H.R. 4607, H.R. 6140, H.R. 5555, H.R. 5587, H.R. 5618, H.R. 5718, H.R. 5748, H.R. 1234, H.R. 2363, Before the Subcommittee on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs*, 86th Cong., 1st Sess. (1959).

<sup>62</sup> H.R. 2363, *supra* note 61, § 6.

<sup>63</sup> *Ibid.* Exceptions are provided for flood control and for storage and diversion in national parks and monuments.

<sup>64</sup> "Federal agencies and permittees, licensees, and employees of the Government, in the use of water for any purpose in connection with Federal programs, projects, activities, licenses, or permits, shall acquire rights to the use thereof in conformity with State laws and procedures relating to the control, appropriation, use or distribution of such water: . . . *Provided further*, That the United States may acquire such rights, when authorized under Federal law, by purchase, exchange, gift, or eminent domain . . ." *Ibid.* It is not clear whether rights acquired by purchase or condemnation would be subject in their use to state law.

<sup>64a</sup> *E.g.*, Reclamation Act of 1902, § 5, 32 Stat. 389, 43 U.S.C. § 431 (1958); Omnibus Adjustment Act of May 25, 1926, 44 Stat. 649, as amended, 43 U.S.C. § 423e (1958). See *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958).

<sup>65</sup> The following bills are identical: S. 1416, H.R. 5748, H.R. 5718, H.R. 5618, H.R. 5587, H.R. 5555, 86th Cong., 1st Sess. (1959).

<sup>66</sup> *E.g.*, H.R. 5555, *supra* note 65, § 1.

<sup>67</sup> *E.g.*, H.R. 5555, *supra* note 65, § 2.

<sup>68</sup> *E.g.*, *ibid.*

The third group includes a bill<sup>69</sup> which appears self-contradictory. On the one hand, it requires the federal government to act in accordance with the "same procedures as provided by the laws of the several States for the control, appropriation, use, and distribution of water by private persons," and, on the other hand, it refers to acquisition of water by the federal government "pursuant to Federal law."<sup>70</sup> Perhaps the bill is to be harmonized by interpreting the first clause as requiring compliance with the state laws in the acquisition of unappropriated waters, whereas, state law is not to be controlling when water rights are condemned. The unique feature of this bill, compared to others here discussed, is the provision waiving sovereign immunity from jurisdiction in state judicial and administrative agencies concerning the acquisition, determination, and exercise of rights to the use of water or the administration of such rights.<sup>71</sup>

The bills<sup>72</sup> in the fourth group appear to be less pervasive than the others. First, they provide that withdrawal or reservation of public lands shall not affect any right to use of water acquired pursuant to state law either before or after the establishment of such withdrawal or reservation.<sup>73</sup> These provisions undoubtedly are intended to quiet the fears that arose after *The Pelton Dam Case* as to the possible existence of latent riparian rights appurtenant to lands from the date of reservation. The other bills contain a similar provision or would have the same effect by protecting rights acquired under state laws. Second, the bills in the fourth group provide that the withdrawal or reservation of public land is not to affect state jurisdiction over water rights as conferred by the act admitting such State into the Union or such State's constitution.<sup>74</sup> This is ambiguous at best. If this is an implicit recognition of the doctrine that sovereign powers over water reside in the States, the United States may have no jurisdiction over nonnavigable streams except as embraced by the commerce power and except as the United States might acquire ownership of water rights by condemnation.<sup>75</sup> Aside from the above vague provision, there is nothing in these bills that would require the federal government to comply with the state laws in acquiring unappropriated water. Finally, there is a provision which appears to give security to water rights acquired under state law, even from navigable streams.<sup>76</sup>

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<sup>69</sup> H.R. 1234, 86th Cong., 1st Sess. (1959).

<sup>70</sup> H.R. 1234, *supra* note 69, § 1.

<sup>71</sup> H.R. 1234, *supra* note 69, §§ 2, 3.

<sup>72</sup> These bills are identical: S. 851, H.R. 6140, H.R. 4607, H.R. 4604, H.R. 4567, 86th Cong., 1st Sess. (1959).

<sup>73</sup> *E.g.*, H.R. 4567, *supra* note 72, § 1.

<sup>74</sup> *E.g.*, *ibid.*

<sup>75</sup> See Address of Prof. Trelease, *supra* note 46.

<sup>76</sup> *E.g.*, H.R. 4567, *supra* note 72, § 2(3).

In all the bills, except that in the third group, are found clauses safeguarding rights existing under interstate compacts and judicial decrees, rights of Indians, and provisions of international treaties.

With respect to the basic policies, it appears unwise to repose the development of water resources in the States exclusively. Congress has been delegated certain powers in order that it may legislate on behalf of all the States in the national interest. To deny the necessity of the federal government's exercising its judgment in the conduct of foreign affairs or in the preparation of national defense is to deny the existence of a Union. A denial of the necessity of a national policy might have a similar effect in this area. The broad powers of the United States might be the only effective method of dealing with river-basin development that transcend state boundaries. Perhaps there may come a time when extensive federal powers to reallocate our water resources among States must be relied on—when seawater conversion becomes economically feasible.

On the other hand, States are realizing that water allocation can no longer rest on a *laissez-faire* basis. California, for example, may be undertaking a multi-billion dollar project pursuant to a preconceived water plan.<sup>77</sup> There will be a need for a state master plan under which land-use patterns, communications, transportation, and water use may be coordinated in the near future. But projections and plans, in turn, rest upon a dependable future water supply.<sup>78</sup>

To coordinate the conflicting demands upon a limited resource is not easy. It does seem, however, that the solution does not lie in an uncompromising grant to either the State or the federal government for the development of water resources. Each can serve a very needed and useful task within its respective jurisdiction. Maximum utilization of water resources is neither a static nor a local concept, and a constant re-examination of our policies is necessary. It should be recognized that the primary administration of water resources has been developed within the context of state laws, and therefore that the dislocation of state law, with its resultant disruption of the security of existing or future water rights, should be avoided wherever possible.

In order to accomplish this objective and to give recognition to congressional execution of a national policy or program, the federal government should be permitted to appropriate unappropriated waters when within its scope of constitutional power. But because of the impact upon state plans, such action should be taken only when Congress has authorized

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<sup>77</sup> See Cal. Stat. 1959, ch. 1762 (CAL. WATER CODE § 12930).

<sup>78</sup> See Statement of Harvey O. Banks, then California State Engineer, in *Hearings on S. 863 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs*, 84th Cong., 2d Sess. 218 (1956).

or expressly delegated such action after due consideration has been given to any established state water plan or other state interest.<sup>79</sup> Congress should, however, even when claiming unappropriated water, recognize the necessity of state interest in proper supervision and, consequently, should report the quantity claimed and the use therefor to the state administrator.<sup>80</sup> Where future projects are contemplated, Congress should be permitted to reserve in a clear and unambiguous manner the quantity of water required but to allow temporary uses under state control.<sup>81</sup> This would mean that navigation servitude or any latent riparian right of federal land should be subordinated to existing use.

The development of the economy based upon water resources can occur only when the users can be secure in the future availability of water. Thus, the federal government should be required to compensate for injury caused to any existing private rights recognized under state law in navigable or nonnavigable waters. Moreover, even when temporary uses for reserved waters are allowed, some scheme of compensation that would not give any value to the water right as such but would reimburse the user for obsolescence of unamortized capital improvements constructed in dependence upon the temporary use, should be considered.<sup>82</sup> This latter suggestion requires further refinement, of course.

The proposals in this Article are offered not as definitive solutions but as suggestions which may warrant further examination.

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<sup>79</sup> See the Flood Control Act of 1944, § 1, 58 Stat. 887, 33 U.S.C. § 701-1 (1958), which provides for notice to and consultation with state officials in the planning of navigation and flood control projects in the Western States.

<sup>80</sup> In this connection, consideration should be given to a more liberal joinder of United States in water rights adjudication or litigation. See the "McCarran Amendment," 66 Stat. 560 (1952), 43 U.S.C. § 666 (1958).

<sup>81</sup> Compare CAL. WATER CODE §§ 1460-64.

<sup>82</sup> See *ibid.*