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FEDERAL WATER RIGHTS LEGISLATION

THREE PAPERS

BY

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STATEMENT OF THE CHAIRMAN

MARCH 1960.

To the Members of the House Committee on Interior and Insular Affairs:

Subsequent to the hearings before the Irrigation and Reclamation Subcommittee last July and August on the numerous bills involving Federal-State relations in the field of water rights, I asked our committee counsel, Mr. T. Richard Witmer, to make a background study of the problems involved in this legislation and to determine, if possible, how far the Congress could go in providing for administration by the States of our Nation's water resources without endangering our national needs with respect to such resources. In other words, it is clear that our problems arise principally because we have a system of dual control of the Nation's streams and I wanted to know if there was some way we could develop a reasonable accommodation of our divergent State and National needs with respect to the administration of our streams.

Mr. Witmer devoted much time during the adjournment period to this assignment and has prepared the report and the suggested legislation which are included herein. His discussion of the background and the problems involved in current water rights legislation is the most understandable treatment of this subject I have seen and I believe his report will be helpful to members of the committee. I believe also that the suggested language for inclusion in a bill merits the studied consideration of the committee along with its consideration of the bills presently before it together with the testimony on these bills heard last year and printed as Serial No. 9.

In addition to Mr. Witmer's report, there are also included in this document two carefully prepared papers on the subject of Federal-State relations on water rights which were presented at the 1959 annual meeting of the National Reclamation Association. One is by Hon. Perry W. Morton, Assistant Attorney General of the United States, and the other is by Federal District Judge Hatfield Chilson, former Under Secretary of the Interior. These two papers were prepared for the specific purpose of setting out two different points of view on the administration of our water resources.

As you know, the Irrigation and Reclamation Subcommittee has completed hearings on the water rights legislation. The subcommittee is now in a position to consider and develop language for inclusion in a bill. The material in this document is furnished you with the thought that you will want to study it, along with the printed hearings, prior to the time the subcommittee, and subsequently the full committee, schedules action on the legislation.

WAYNE N. ASPINALL,
Chairman, House Committee on Interior and Insular Affairs.

FEDERAL WATER RIGHTS LEGISLATION

FEDERAL WATER RIGHTS LEGISLATION—THE PROBLEMS AND THEIR BACKGROUND

(By T. Richard Witmer*)

INTRODUCTION

For a number of years, bills have been introduced in Congress to declare, reform, clarify, amend, modify, confirm, or restate various propositions of law having to do with the use of the inland waters of the United States by the Federal Government and its licensees and wards. The House bills that have been introduced include the following:

82d Congress: H.R. 5735 (Engle), H.R. 5736 (Budge), H.R. 7691 (Budge).

83d Congress: H.R. 997 (Budge), H.R. 8624 (D'Ewart).

84th Congress: H.R. 741, H.R. 3404, H.R. 6147 and H.R. 8325 (Budge), H.R. 8347 (Engle), H.R. 8560 (Young), H.R. 9489 (Thomson of Wyoming), H.R. 9505 (Dawson of Utah), H.R. 10873 (Coon).

85th Congress: H.R. 2211 (Budge), H.R. 5871 (Dixon).

86th Congress: H.R. 1234 (Budge), H.R. 2363 (Thomson of Wyoming), H.R. 4567 (Aspinall), H.R. 4604 (Pfost), H.R. 4607 (Saylor), H.R. 5555 (Rogers of Texas), H.R. 5587 (King of Utah), H.R. 5618 (Dixon), H.R. 5718 (Morris of New Mexico), H.R. 5748 (Grant), H.R. 6140 (Udall).

These bills have taken many forms. Some have been based on the premise that the law as it is presently administered is an unconstitutional invasion of the rights of the States; others on the assumption that, though constitutional, it ought to be different from what it is; still others on the belief that it is in a state of confusion and that what is needed is clarification.

Many of the bills have been written to apply to the entire United States;[1] others have been written to apply only to the Western States.[2] Many have been written broadly in terms of compliance with local substantive water law and would require all Federal officers and agencies to "proceed in conformity with the laws of [the] States or Territories with regard to the control, appropriation, use, or distribution of water" or words to that effect;[3] others stress the procedural side

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[1] H.R. 5735 (as reported) and H.R. 7691, 82d Cong.; H.R. 997, 83d Cong.; H.R. 741, 84th Cong.; H.R. 2211, 85th Cong.; H.R. 1234, H.R. 5555, H.R. 5587, H.R. 5618, H.R. 5718, and H.R. 5748, 86th Cong.

[2] H.R. 5735 (as introduced) and H.R. 5736, 82d Cong.; H.R. 8624, 83d Cong.; H.R. 3404, H.R. 6147, H.R. 8325, H.R. 8347, H.R. 8560, H.R. 9489, H.R. 9505, and H.R. 10873, 84th Cong.; H.R. 5871, 85th Cong.; H.R. 2363, H.R. 4567, H.R. 4604, H.R. 4607, and H.R. 6140, 86th Cong.

[3] H.R. 5735 and H.R. 5736, 82d Cong.; H.R. 8624, 83d Cong.; H.R. 3404, 84th Cong.

and would require resort to State administrative and judicial bodies for determinations of rights.[4] Some include Federal Power Commission licensees in the list of those required to conform to State law;[5] others single out defense installations for special mention;[6] still others omit these provisions or make exceptions in favor of Indians and Indian tribes,[7] Federal flood control operations,[8] treaty obligations with Canada and Mexico,[9] or other types of operation.[10] Some are written with an eye specifically to subordinating the use of water for navigation to its other uses;[11] others make no express mention of this problem. Some are drawn primarily to eliminate claims of right based on reservations of public lands for Federal purposes;[12] others bypass this question or cover it by their broader terms and do not mention it specifically. Some make compliance with State laws nonmandatory where the United States is not treated at least on a par with other applicants;[13] others fail to deal with this problem.

FOUR SUPREME COURT DECISIONS

As is evident, there is great diversity in the scope and content of these bills. The one factor that they have in common is restriction of the powers of the Federal administrative agencies and a corresponding enlargement of the powers of the States over what they now are. Whatever their terms, all or nearly all of them are indicative of dissatisfaction on the part of their authors with the conclusions arrived at in one or more of four landmark decisions rendered by the Supreme Court over the past 60 years. These four decisions, to name them in chronological order, are those in the cases of *United States* v. *Rio Grande Dam and Irrigation Co.*,[14] *Winters* v. *United States*,[15] *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*,[16] and *Federal Power Commission* v. *Oregon*, commonly referred to as the *Pelton Dam* case.[17]

[4] H.R. 7691, 82d Cong.; H.R. 997, 83d Cong.; H.R. 741, H.R. 8325, H.R. 8347, H.R. 8560, H.R. 9489, H.R. 9505, and H.R. 10873, 84th Cong.; H.R. 2211 and H.R. 5871, 85th Cong.; H.R. 1234, H.R. 2363, H.R. 5555, H.R. 5587, H.R. 5618, H.R. 5718, and H.R. 5748, 86th Cong.. In H.R. 8325, H.R. 8347, H.R. 8560, H.R. 9489, H.R. 9505, and H.R. 10873, 84th Cong., there is specific provision for removal of suits to Federal courts where the United States is a party; the other bills are either silent on this question or prohibit removal.

[5] H.R. 8325, H.R. 8347, H.R. 8560, H.R. 9489, H.R. 9505, and H.R. 10873, 84th Cong.; H.R. 5871, 85th Cong.; H.R. 2363, 86th Cong.

[6] H.R. 5735, H.R. 5736, and H.R. 7691, 82d Cong.; H.R. 997, 83d Cong.; H.R. 741, 84th Cong.; H.R. 2211, 85th Cong.; H.R. 1234, 86th Cong.

[7] H.R. 5871, 85th Cong.; H.R. 2363, H.R. 4567, H.R. 4604, H.R. 4607, H.R. 5555, H.R. 5587, H.R. 5618, H.R. 5718, H.R. 5748, and H.R. 6140, 86th Cong.

[8] H.R. 8325, H.R. 8347, H.R. 8560, H.R. 9489, H.R. 9505, and H.R. 10873, 84th Cong.; H.R. 5871, 85th Cong.; H.R. 2363, 86th Cong.

[9] H.R. 8325, H.R. 8347, H.R. 8560, H.R. 9489, H.R. 9505, and H.R. 10873, 84th Cong.; H.R. 5871, 85th Cong.; H.R. 2363, H.R. 4567, H.R. 4604, H.R. 4607, H.R. 5555, H.R. 5587, H.R. 5618, H.R. 5718, H.R. 5748, and H.R. 6140, 86th Cong.

[10] H.R. 5871, 85th Cong., and H.R. 2363, 86th Cong. (Federal reclamation projects in certain circumstances); H.R. 4567, H.R. 4604, H.R. 4607, and H.R. 6140 ("any right [of the United States] to any quantity of water used for governmental purposes or programs at any time from January 1, 1940 to the effective date of this Act" and "any right of the United States to use water which is hereafter lawfully initiated in the exercise of the express or necessarily implied authority of any present or future Act of Congress or State law when such right is initiated prior to the acquisition by others of any right to use water pursuant to State law.")

[11] H.R. 8624, 83d Cong.; H.R. 3404, H.R. 6147, H.R. 8325, H.R. 8347, H.R. 8560, H.R. 9489, H.R. 9505, and H.R. 10873, 84th Cong.; H.R. 5871, 85th Cong.; H.R. 2363, 86th Cong.

[12] H.R. 5871, 85th Cong.; H.R. 2363, H.R. 4567, H.R. 4604, H.R. 4607, and H.R. 6140, 86th Cong.

[13] H.R. 8325, H.R. 8347, H.R. 8560, H.R. 9489, H.R. 9505, and H.R. 10873, 84th Cong.; H.R. 5871, 85th Cong.

[14] 174 U.S. 690 (1899).

[15] 207 U.S. 564 (1908).

[16] 328 U.S. 152 (1946).

[17] 340 U.S. 435 (1955).

The first of these four—the *Rio Grande* suit—was instituted by the Department of Justice to enjoin construction of a dam across the Rio Grande in what was then the Territory of New Mexico and to restrain the defendants from appropriating waters of that stream for irrigation.[18] It was alleged that the impounding, diversion, and use of the water would—

> so deplete and prevent the flow of water through the channel of said river below said dam * * * as to seriously obstruct the navigable capacity of the said river throughout its entire course from said point at Elephant Butte to its mouth."

The lower courts found that the Rio Grande in New Mexico was nonnavigable and dismissed the suit. The Supreme Court reversed with instructions to determine whether the defendants' proposed construction and appropriation would—

> substantially diminish the navigability of [the Rio Grande] within the limits of present navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish.[20]

In the course of his opinion, Mr. Justice Brewer, speaking for the Court, said that, while each State could adopt or modify the prevailing rule of continuous flow to suit its own needs, its power to do so was subject to two limitations:

> First, * * * in the absence of specific authority from Congress a State cannot by its legislation 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 government property. Second, * * * it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.[21]

He then pointed out that Congress had, on various occasions, sanctioned the appropriation of water for agricultural, mining, and other purposes in accordance with local law and custom. Referring to the acts of July 26, 1866,[22] March 3, 1877,[23] and March 3, 1891,[24] and their relation to the navigation problem, he said:

> Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. This

[18] The suit was actually commenced by the Department of Justice acting at the request of the State Department "upon complaint of the Mexican authorities" (1 Hackworth, *Digest of International Law* (1940) 584).

[19] 174 U.S. at 692.

[20] Ibid. at 710.

[21] Ibid. at 703.

[22] 14 Stat. 253, sec. 9, Rev. Stat. 2339, 43 U.S.C. 661. The text of this act is set out *infra*, at pp. 13 f.

[23] 18 Stat. 377, sec. 1, 43 U.S.C. 321, commonly known as the Desert Land Act: "* * * the right to the use of water by the person so conducting the same, on or to any tract of desert land * * * shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

[24] 26 Stat. 1101, sec. 18, 43 U.S.C. 946: "The right-of-way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory * * *: *Provided*, That * * * the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

legislation must be interpreted in the light of existing facts—that all through this mining region in the West were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all those cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention of the common law rule, which permitted the appropriation of those waters for legitimate industries. To hold that Congress, by these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress.[26]

Finally, he pointed to the prohibition in section 10 of the act of September 19, 1890,[26] against "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction * * *." This, he said, "is a later declaration of Congress" than the statutes relied on by the defendants and "so far as it modifies any privileges or rights conferred by prior statutes * * * must be held controlling * * *."[27] It was enacted by Congress as "an exercise * * * of the power, oftentimes declared by this court to belong to it, of national control over navigable streams * * *." Though it is "urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream," this is not so:

The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition. Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to destroy that navigability without the explicit assent of the National Government, enacted the statute in question. And it would be to improperly ignore the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream.[28]

Winters v. *United States* is the second of the four cases mentioned above. The principal concern of the parties to the case was whether the creation of the Fort Belknap Indian Reservation, in accordance with an agreement with the Gros Ventre and Assiniboine Tribes in Montana,[29] entitled the latter to the use of water from the Milk River,

[26] 174 U.S. at 706 f.
[26] 26 Stat. 454. For further discussion see *infra*, pp. 8 f.
[27] 174 U.S. at 707.
[28] Ibid. at 708.
[29] Ratified by the act of May 1, 1888, 25 Stat. 113, 133. Most of the Indian water rights cases have revolved around treaty provisions. For examples, see *United States* v. *Powers*, 305 U.S. 527 (1939); *Conrad Investment Company* v. *United States*, 161 Fed. 829 (C.C.A. 9th, 1908); *Skeem* v. *United States*, 273 Fed. 93 (C.C.A. 9th, 1921); *United States* v. *McIntire*, 101 F. 2d 650 (C.C.A. 9th, 1939); *United States* v. *Hibner*, 27 F. 2d 909 (D.C.D. Idaho, 1928). In *United States* v. *Walker River Irrigation District*, 104 F. 2d 334, 336 (C.C.A. 9th, 1939), however, it was held that "A statute or an Executive order setting apart the reservation [in this case, the Walker River Indian Reservation, created Nov. 29, 1859, by departmental action] may be equally indicative of the intent" to reserve water and equally efficacious in doing so. See also *United States* v. *Big Bend Transit Co.*, 42 F. Supp. 459, 467 (D.C.E.D. Wash., 1941), dealing with the Spokane Indian Reservation, created by Executive order of Jan. 18, 1881, to the same effect. With these cases, compare *United States* v. *Wightman*, 230 Fed. 277, 283 (D.C.D. Ariz., 1916), dealing with the San Carlos Indian Reservation, to the effect that the *Winters* case "is not an authority that the mere creation [of a reservation] ex vi termini reserves to the Indians, or to the United States for their benefit, the beneficial use of all waters flowing within the reservation. There is no treaty right of the Indians involved in this case"; *Byers* v. *Wa-Wa-Ne*, 86 Oreg. 617, 169 Pac. 121 (1917), to the same effect. For a full discussion of the *Winters* doctrine and its ramifications, consult *Federal Indian Law*, edited Horne (U.S. Department of the Interior, 1958), 662 ff.

The Wyoming court has expressed the view in *Merrill* v. *Bishop*, 74 Wyo. 298, 310 ff., 287 Pac. 2d 629, 621 (1955), that the usual *Winters* rule is not applicable in that State because Congress, when Wyoming was admitted to the Union, went further than "merely [to] admit it on an equal footing with the remainder of the States" by approving a constitution which declared all waters to be "the property of the State." The court went on to say, however, that "The Federal Government being in absolute control thereof [i.e., of the Indian reservation], the Federal courts may hold that the water rights were impliedly reserved notwithstanding the broad language contained in the act of admission * * *." The case, it should be noted, dealt with the water rights of a white owner of lands that were originally an Indian allotment.

[30] 207 U.S. at 576. How much water is reserved for a reservation is frequently an important question. In the *Conrad Investment Company* case, *supra*, note 29, the court, after saying (at 831 f.) that the *Winters* case "determines the paramount right of the Indians * * * to the use of the waters * * * to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes" and that "the policy of the Government [is] to reserve whatever water * * * may be reasonably necessary, not only for present uses, but for future requirements," affirmed the lower court's decree, which had enjoined the defendants from depleting the flow of the stream in question below 33⅓ second-feet, and provided that "whenever the needs and requirements of the complainant for the use of the waters of Birch Creek * * * upon the reservation exceed the amount of water reserved by the decree * * *, the complainant may apply to the court for a modification of the decree." See also the *Skeem* and *Hibner* cases, cited in note 29, to the same effect. In the *Walker River* case, *supra*, note 29, however, the court, although holding (at 339 f.) that "there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians" and that "the area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water received," went on to make a firm determination of the quantity to which they were entitled and decreed to the Government for this purpose 26.25 second-feet. On the power of Congress to open reserved waters to private appropriation under State law and of the Secretary of the Interior to agree to limitations on the amount of water the Indian reservation will use, see *United States* v. *Big Bend Transit Co.*, *supra*, note 29; *Byers* v. *Wa-Wa-ne*, *supra*, note 29; and *United States* v. *Ahtanum Irrigation District*, 236 F. 2d 321 (C.A. 9th, 1956).

[31] 207 U.S. at 577.

on which the reservation bordered, to the exclusion of white settlers on other lands in the vicinity which had formerly been occupied by the Indians. The parties were at odds with respect to whether the major part of the use of water by the Indians had commenced earlier or later than that of the white settlers, but no attention was paid to this in the opinion of the Court. It rested its decision, written by Mr. Justice McKenna, on the circumstances surrounding the making of the agreement:

The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government.[30]

This contention the Court rejected. It accepted the contrary contention that the circumstances surrounding the making of the agreement indicated an intention to preserve for the Indians the means of accomplishing the purpose of the agreement. It rejected, also, the contention that the admission of Montana to the Union subsequent to the agreement and "upon an equal footing with the original States" destroyed the implied reservation of water for the Indians:

The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States* v. *The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States* v. *Winans*, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.[31]

The basic issue in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, the third of the cases noted above, was whether a diversion of water from the Cedar River, a navigable stream in Iowa, could be effected under a Federal Power Commission license without a permit from the State. This in turn involved the question of the meaning and effect of section 9 of the Federal Power Act, the pertinent part of which reads thus:

> * * * each applicant for a license hereunder shall submit to the commission—
>
> * * * * * * *
>
> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to * * * the appropriation, diversion, and use of water for power purposes * * *.[32]

The Commission dismissed an application for a license on the ground that the applicant had not presented the evidence required, explaining that it did so because the validity of the Iowa laws was in question and should be judicially settled before it proceeded further.[33] The applicant took the case to the Court of Appeals for the District of Columbia which sustained the Commission's decision. The Supreme Court reversed.

The Iowa laws in question not only forbade the construction of any dam without a permit from the State's Executive Council but provided, in effect, that the council should issue a permit only if it found, among other things, that "any water taken from the stream in connection with the project [will be] returned thereto at the nearest practicable place * * *."

In substance, the Court held that this provision in particular, and other provisions of Iowa law to which it alluded more generally, were incompatible with various provisions of the Federal Power Act, especially that providing that licensed projects—

> shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes [34]—

and were therefore superseded by the Federal law: that to the extent that they were superseded section 9(b) of the Federal Power Act did not require a showing of compliance with them; and that therefore the Commission should have proceeded to determine the merits of the cooperative's application for a license.

Mr. Justice Burton, writing the majority opinion of the Court, said:

> To require the petitioner to secure the actual grant to it of a State permit * * * as a condition precedent to securing a Federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the Federal project. Such a veto power easily could destroy the effectiveness of the Federal act. It would subordinate to the control of the State the "comprehensive" planning which the act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.[35]
>
> * * * * * * *
>
> If a State permit is not required, there is no justification for requiring the petitioner, as a condition of securing its Federal permit, to present evidence of

[32] Act of June 10, 1920, 41 Stat. 1068, 16 U.S.C. 802.
[33] 328 U.S. at 162.
[34] Act of June 10, 1920, sec. 10(a), 41 Stat. 1068, as amended, 16 U.S.C. 803(a).
[35] 328 U.S. at 164.

> the petitioner's compliance with the requirements of the State code for a State permit. Compliance with State requirements that are in conflict with Federal requirements may well block the Federal license. For example, compliance with the State requirement * * * that the water of the Cedar River all be returned to it at the nearest practicable place would reduce the project to the small one which is classified by the Federal Power Commission as "neither desirable nor adequate." Similarly, compliance with the engineering requirements of the State Executive Council, if additional to or different from the Federal requirements, may well result in duplications of expenditures that would handicap the financial success of the project. Compliance with requirements for a permit that is not to be issued is a procedure so futile that it cannot be imputed to Congress in the absence of an express provision for it.[36]

The authors of the Federal Power Act, he went on, knew how to distinguish between those matters which they were leaving to the State and those which they were turning over to the Commission. In section 27 of the act, for instance, they distinctly provided:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein [37]—

thus employing language similar to that of section 8 of the Reclamation Act of 1902:

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use, or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. * * * There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." Those words, however, are confined to rights of the same nature as that relating to the use of water in irrigation or for municipal purposes. This was so held in an early decision by a district court * * * where it was stated that "a proper construction of the act requires that the words 'other uses' shall be construed ejusdem generis with the words 'irrigation' and 'municipal'" (*Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606, 619).[38]

Section 9, on the other hand, "does not itself require compliance with any State laws":

> Its reference to State laws is by way of suggestion to the Federal Power Commission of subjects as to which the Commission may wish some proof submitted to it of the applicant's progress. The evidence required is described merely as that which shall be "satisfactory" to the Commission. The need for compliance with applicable State laws, if any, arises not from this Federal statute but from the effectiveness of the State statutes themselves.[39]

In *Federal Power Commission* v. *Oregon* there was again conflict between the Commission's and the State's licensing authorities. This time, however, a nonnavigable stream, rather than a navigable stream, was involved and the question arose concerning the effectiveness of a State prohibition against construction of a dam which would interfere with the movement of anadromous fish without the approval of and a license from the State. The case did not involve water rights as such, but the basic argument of the State, as summarized by the Court, was that the acts of July 26, 1866, July 9, 1870, and the Desert Land Act of 1877 "constitute an express congressional delegation or conveyance to the State of the power to regulate the use" of the waters

[36] Ibid. at 166 f.
[37] 41 Stat. 1077, 16 U.S.C. 821.
[38] 328 U.S. at 175 f. The latter part of this holding was considerably qualified in *Federal Power Commission* v. *Niagara-Mohawk Power Corporation*, 347 U.S. 239, 256 (1954), where the Court said that the provision of section 27 relating to vested rights "is applicable to proprietary water rights for power purposes as well as those for other proprietary uses."
[39] Ibid. at 177 f.

in question and that "these acts preclude or restrict the scope of the jurisdiction, otherwise apparent on the face of the Federal Power Act, and require the consent of the State to a project such as the one before us."[40]

To this the Court's answer was, first, that the Federal Power Act specifically covers not only projects which involve the use of navigable waters of the United States but also projects which utilize lands owned by the Federal Government[41] and, secondly, that the 1866, 1870, and 1877 acts are not concerned with reserved lands (such as were here involved) but only with public lands and the waters thereon:

> The nature and effect of these acts have been discussed previously by this Court. The purpose of the acts of 1866 and 1870 was governmental recognition and sanction of possessory rights on public lands asserted under local laws and customs. *Jennison* v. *Kirk*, 98 U.S. 453. The Desert Land Act severed, for purpose of private acquisition, soil and water rights on public lands, and provided that such water rights were to be acquired in the manner provided by the law of the State of location. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142. See also, *Nebraska* v. *Wyoming*, 325 U.S. 589, 611–616.
>
> It is not necessary for us, in the instant case, to pass upon the question whether this legislation constitutes the express delegation or conveyance of power that is claimed by the State,[42] because these acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers "sources of water supply upon the public lands * * *." The lands before us in this case are not "public lands" but "reservations." Even without that express restriction of the Desert Land Act to sources of water supply on public lands, these acts would not apply to reserved lands [citing *United States* v. *O'Donnell*, 303 U.S. 501, 510, and *United States* v. *Minnesota*, 270 U.S. 181, 206].[43]

The Court also reaffirmed the doctrine of the *First Iowa* case, saying:

> There * * * remains no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, provided that, as required by the Act, the use of water does not conflict with vested rights of others. To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision.[44]

AND FIVE ACTS OF CONGRESS

As the foregoing outline of these four cases indicates, Congress has not been inactive in the enactment of legislation affecting, directly or indirectly, the laws of the States dealing with the use of water. At least five major pieces of legislation—in addition to a proliferation of minor acts and of acts dealing with individual projects to be undertaken by Federal agencies—have been enacted during the period with which we are concerned.

The first of these five is the section 10 of the act of September 19, 1890,[45] on which the *Rio Grande* case turned. This section, after providing, as the Court pointed out, that—

> The creation of any obstruction, not affirmatively authorized by law,[46] to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited—

went on to make the continuance of any such obstruction, with certain exceptions, a misdemeanor and provided further that the obstruction might be enjoined or ordered removed by a proceeding in equity brought by the United States.

The significance of this enactment lay not only in its use of the broad phraseology "creation of any obstruction * * * to the navigable capacity of any waters" in contrast to the somewhat narrower wording used elsewhere in the same act ("obstructions to navigation," etc.) but in the assertion by Congress of its intention to make the subject its own instead, as formerly, of leaving it to the States and the courts to determine, under the rule of *Willson* v. *Black-bird Creek Marsh Co.*[47] and *Cooley* v. *Board of Port Wardens*,[48] whether any given obstruction was or was not permissible.

A second major piece of legislation during this period was the Reclamation Act of 1902.[49] Here Congress, initiating a program of Federal construction of irrigation works, took a different tack. The first part of section 8 of this act harks back to the 1866, 1870, and 1877 acts and read as follows:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *.[50]

But this is immediately followed by a clause which makes it clear that Congress, while directing the Secretary of the Interior to proceed in conformity with local law in acquiring rights to the use of water for irrigation, was not waiving certain basic rights which the United States might claim:

> * * * and nothing herein shall in any way affect any right of any State or of

[40] 349 U.S. at 447.
[41] Ibid. at 441 f.
[42] Cf. Douglas, J., dissenting: "I assume that the United States could have recalled its grant of jurisdiction over water rights, saving, of course, all vested rights. But the United States has not expressly done so; and we should not construe any law as achieving that result unless the purpose of Congress is clear." Ibid. at 456.
[43] Ibid. at 447 f.
[44] Ibid. at 444 f.
[45] *Supra*, note 26.

[46] In the act of Mar. 3, 1899, sec. 10, 30 Stat. 1151, 33 U.S.C. 403, the phrase "not affirmatively authorized by law" was changed to "not affirmatively authorized by Congress."
[47] 2 Pet. 245 (1829).
[48] 12 How. 299 (1851).
[49] Act of June 17, 1902, 32 Stat. 388, 43 U.S.C., ch. 12, *passim*.
[50] It has never been entirely clear whether a failure of the Secretary to follow this direction would result in nonacquisition of a water right for a project under his control or whether it would be at most nonfeasance of duty. The question has probably never come up in serious fashion since the practice of the Interior Department has been, with few exceptions, to adhere closely to the apparent requirements of the section. (See the dissenting opinion in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 760n (1950), summarizing a memorandum from the Commissioner of Reclamation with respect to Bureau of Reclamation practices.) Indeed, although the section speaks only of "laws * * * relating to the control, appropriation, use, or distribution of water used in irrigation" and has not been amended to cover other uses of water under Federal reclamation projects—e.g., uses for municipal and domestic purposes, power production, and the like—which were authorized subsequent to the 1902 act, it is Interior's usual, though not universal, practice to make filings for these purposes as well.
In *Nebraska* v. *Wyoming*, 295 U.S. 40, 43 (1935), where one issue was whether the Secretary of the Interior was an indispensable party to the cause, the Court said: "The bill alleges, and we know as matter of law, that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the State law. His rights can rise no higher than those of Wyoming * * *." When, however, the same case came before the Court a second time, the United States having been granted leave to intervene (325 U.S. 589, 611f (1945)), the Court said: "The United States claims that it owns all the unappropriated water in the river. * * * Its basic rights are * * * said to derive not from appropriation but from its underlying ownership which entitles it to an apportionment in this suit free from State control. * * * But we do not stop to determine what rights to unappropriated water of the river the United States may have. For the water rights on which the North Platte project and the Kendrick project rest have been obtained in compliance with State law. Whether they might have been obtained by Federal reservation is not important."

the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof * * *[51]

and by a still further clause treating the water rights of individual irrigators under Federal reclamation projects as derived from those of the United States[52] and, in language which is consonant with the law prevailing in most, though not all, of the Western States,[53] laying down Federal rules of appurtenancy and beneficial use:

Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of that right.

The Federal Power Act of 1920 was the third of this series of major enactments. Many of its main provisions which are of present concern have already been outlined in connection with the *First Iowa* and *Pelton Dam* cases—i.e., its emphasis on being sure that individual developments licensed under it fit into a scheme of comprehensive plans for river basin development, its assertion of Federal authority over various aspects of the engineering and financing of power developments, and its saving of the water laws of the States insofar as they deal with irrigation and other similar consumptive uses. These need not be reiterated here. But the broad definition of "navigable

[51] In *Wyoming* v. *Colorado*, 259 U.S. 419, 463 (1922), the Court examined this passage and said: "The words which we have italicized [i.e., the whole passage quoted in the text] constitute the only instance, so far as we are advised, in which the legislation of Congress relating to the appropriation of water in the arid land region has contained any distinct mention of interstate streams. The explanation of this exceptional mention is to be found in the pendency in this court at that time of the case of *Kansas* v. *Colorado* [185 U.S. 125 (1902), 206 U.S. 46 (1907)] wherein the relative rights of the two States, the United States, certain riparians and certain Colorado appropriators and users in and to the waters of the Arkansas River, an interstate stream, were thought to be involved. Congress was solicitous that all questions respecting interstate streams thought to be involved in that litigation should be left to judicial determination unaffected by the act—in other words, that the matter be left just as it was before. The words aptly reflect that purpose." *Without doubting the validity of this explanation of the genesis of the provision*, it may be pointed out (1) that the words chosen were a good deal broader than necessary for that single purpose, and (2) that sec. 4 of the act of July 2, 1956 (70 Stat. 483, 43 U.S.C. 485b–4) repeated exactly the same language in a completely different historical setting. *In other words, though the pendency of Kansas* v. *Colorado may have* been the occasion for the inclusion of this provision, it is doubtful that the conclusion of the case exhausted its force.

[52] The original Reclamation Act set up a system under which the Government dealt directly with individual entrymen and private landowners. *This was supplemented by* a system of water users' association contracts and was supplanted, under the acts of May 15, 1922 (42 Stat. 541, 43 U.S.C. 511), and May 25, 1926 (44 Stat. 649, 43 U.S.C. 423e), by provisions for contracts with irrigation districts and similar bodies. The concept of individual applications to the Government for a water right runs *through the* whole of early reclamation law. See, for examples, the acts of June 17, 1902, sec. 5 (32 Stat. 389, 43 U.S.C. 431) ("No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres * * *"); Aug. 9, 1912, sec. 1 (37 Stat. 265, 43 U.S.C. 541) ("* * * all purchasers of water right *certificates* on *reclamation projects* * * *"); Aug. 13, 1914, sec. 3 (38 Stat. 687, 43 U.S.C. 480) ("If any water right applicant or entryman shall * * * be 1 year in default in the payment of the construction charges and penalties * * * his water right application * * * shall be subject to cancellation * * *"); May 15, 1922, sec. 1 (42 Stat. 541, 43 U.S.C. 511) ("the Secretary of the Interior may enter into contract with any legally organized irrigation district * * * and in such event water right applications on the part of landowners and entrymen * * * may be dispensed with.") Cf. *Ickes* v. *Fox*, 300 U.S. 82, 94 (1937), in which the Court, discussing the merits of a motion to dismiss for lack of joinder of the United States, an allegedly indispensable party, as a defendant said: "Although the Government diverted, stored, and distributed the water, the contention of the petitioner [Secretary of the Interior] that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the Government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water rights became the property of the land owners, wholly distinct from the property of the Government in the irrigation works."

[53] For a summary of the appurtenancy rule and variations therein under the laws of the State, see Hutchins, *Selected Problems in the Law of Water Rights in the Western States* (1942), 381 f., 385 f. On the beneficial use rule, see ibid, 314 ff.

waters" which the Congress adopted in section 3 of this act is worth noting:

"navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the *navigable* parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including all such *interrupting falls*, shallows, or rapids, together with such other parts of streams as shall have been authorized for improvement by the United States or shall have been recommended to Congress for such improvement after *investigation* under its authority.[54]

It should also be noted that the authority of the Federal Power Commission is not limited to navigable streams. It extends to licensing projects utilizing public lands and reservations of the United States[55] and projects on nonnavigable streams if, in the latter case, it finds that "the interests of interstate and foreign commerce would be affected by such construction."[56]

Finally it is worth noting that the Federal Power Act was, in effect, an outgrowth of the 1890 act to which reference has already been made, of the system of congressional licensing of power projects which the words "not affirmatively authorized by law" which were embodied in that act made necessary,[57] and of two acts (1906 and 1910)[58] in which the first steps were taken to require not only congressional but also administrative review of power projects proposed for construction under license from the United States.

The expanding Federal interest in flood control is evidenced in the fourth of the major enactments of this period. Interest in this subject was sufficiently advanced by 1917 for the enactment of legislation regularizing the investigating and reporting procedure to be followed by the Corps of Engineers.[59] But the great declaration of policy came with the Flood Control Act of 1936:[60]

It is recognized that destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government in cooperation with States, their political subdivisions and localities thereof; that investigations and improvements of rivers and other waterways, including watersheds thereof, for flood control purposes are in the interest of the general welfare; that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected.

[54] 41 Stat. 1063, 16 U.S.C. 796.
[55] 41 Stat. 1065, sec. 4(e), 16 U.S.C. 797(e).
[56] 41 Stat. 1075, sec. 23, 16 U.S.C. 817.
[57] A hasty check of the statute books from the 53d through the 61st Congs. shows a plethora of congressional licenses for dams. The peak seems to have been reached in the 59th Cong. when there were at least 33 such enactments. Instances before the 1890 act became law were comparatively rare but not nonexistent.
[58] Acts of June 21, 1906, 34 Stat. 386, and June 23, 1910, 36 Stat. 593.
[59] Act of Mar. 1, 1917, sec. 3, 39 Stat. 950, 33 U.S.C. 701.
[60] Act of June 22, 1936, sec. 1, 49 Stat. 1570, 33 U.S.C. 701a.

Both of these acts link flood control with "other uses" and "allied purposes" *for purposes of determining* what should be done.[61] For our purposes, the most significant aspect of the act is its omission of any reference, *affirmative or negative, to compliance* with State laws in connection either with flood control itself or with the "allied purposes" which have become, *in practice, hydropower, irrigation, municipal* water supply, etc. Even the Flood Control Act of 1944 did not go so far as to require such *compliance*, but *limited itself to an* admonition that—

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is declared to be *the policy of the Congress to* recognize the interests and rights of the States in determining the development *of the watersheds* within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers—

and to implementing this policy declaration with a plan for State review of proposals made by the Corps of Engineers and the Bureau of Reclamation before their submission to Congress.[62]

Finally, the 1948 Water Pollution Control Act,[63] particularly as it was *amended* in 1956,[64] should be noted. While declaring it to be the policy of Congress "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution" and disclaiming any intent to impair or *to affect in any manner* "any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States," *the act went on to* lay a foundation for Federal participation in developing and carrying out plans "for eliminating or reducing the *pollution of interstate waters and tributaries* thereof and improving the sanitary condition of surface and underground waters" and, more *important for our purposes*, for Federal suits to secure abatement of "pollution of interstate waters in or adjacent to any State * * * which endangers the health *or* welfare of persons in a State other than that in which the discharge originates * * *."[65] Under the 1948 version of the act, *such a suit could* be brought only with the written consent of the State in which the pollution originates; under the 1956 version it can be brought with the consent either of that State or of the State where "the health or welfare of persons is endangered by such pollution." *In either case*, however, it is a Federal suit that is to be brought and a suit brought upon a Federal cause of action. The act, moreover, is not *limited to navigable waters or to* the protection of navigation, as previous acts were,[66] but extends to

[61] Thus, in the 1917 act: "All examinations and surveys of projects relating to flood control shall include a comprehensive survey of the watershed * * *, and the report thereon * * * shall give such *data as it may be practicable* to secure in regard to * * * (c) the possible economical development and utilization of water power; and (d) such other uses as may be properly related to or coordinated with the project." So, too, in section 2 *of the 1936 act*: "* * * Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of the * * * the War Department * * *."

[62] Act of Dec. 22, 1944, sec. 1, 58 Stat. 887, 33 U.S.C. 701-1.

[63] Act of June 30, 1948, 62 Stat. 1155, 33 U.S.C. 466 et seq.

[64] Act of July 9, 1956, 70 Stat. 498.

[65] Act of June 30, 1948, sec. 8, 62 Stat. 1150; act of July 9, 1956, sec. 1, 70 Stat. 504, 33 U.S.C. 466g.

[66] For examples, see acts of Mar. 3, 1899, sec. 13, 30 Stat. 1152, 33 U.S.C. 407; Mar. 3, 1905, sec. 4, 33 Stat. 1147, 33 U.S.C. 419; June 7, 1924, 43 Stat. 604, 33 U.S.C. 431 et seq. The last of these three acts is confined to "*coastal* navigable waters" which term, by definition in sec. 2, extends to "all inland waters navigable in fact in which the tide ebbs

"interstate waters" at large. Finally, it at least supplements, and *may* well for practical purposes come to supersede, interstate suits for the abatement of pollution such as we have had in the past.[67]

OUR PRE-1809 LEGACY: THE NAVIGATION SERVITUDE

This bare outline of major enactments and judicial decisions is enough *to indicate that, during* the past 60 or 70 years, the Federal Government—whether speaking through its legislative branch or through *its judicial branch*—has asserted interests in the Nation's water resources with which any doctrine that those resources are exclusively the concern of the States cannot be squared. Whether we are talking of navigation, or hydropower, or Indians, or public *lands, or irrigation*, or flood control, or (to add to the list one that has not already been mentioned) foreign relations,[68] we are talking *of areas* of announced Federal concern which inevitably impinge upon, affect, and to some extent limit the powers which *many like to think* of the States as having and which, to a large extent, they did have before 1890.

For, during the first century of our existence as a Nation, water policy and water law were largely matters that were *left to the* States. If Michigan was free to adopt one rule of riparian rights, New Hampshire was free to adopt another and New York was free to adopt still a third.[69] Each State could have its own rule respecting the construction and maintenance of *mill dams*.[70] Each could, if it so chose, engage in internal improvements for navigation and divert or use water for this purpose almost ad *libitum*. The country was not so crowded and the demands for water were not so great or so conflicting that they could not all be met. This was so even when the first arid States were admitted to the Union and it remained so for many years thereafter. It is not *surprising*, then, that the Congress was willing in 1866[71] to leave it to the Western States and Territories to determine their own *rule of water use*:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, *manufacturing*, or other purposes have accrued, and the same

[67] For examples, consult *Missouri* v. *Illinois*, 180 U.S. 208 (1901), 200 U.S. 496 (1906); *New York* v. *New Jersey*, 256 U.S. 296 (1921).

[68] For examples, consult the treaties of Jan. 11, 1909 (36 Stat. 2448), Feb. 24, 1925 (44 Stat. 2108, Treaty Series No. 721), and Feb. 27, 1950 (1 U.S. Treaties and Other International Acts 695), all with Canada; *and May 21, 1906* (34 Stat. 2953, Treaty Series No. 455) and Nov. 14, 1944 (59 Stat. 1219, Treaty Series No. 994) with Mexico. See also *Sanitary District of Chicago* v. *United States*, 266 U.S. 405, 425 (1925): "This is not a contest between equals. The United States is *asserting its sovereign* power to regulate *commerce and to control* the navigable waters within its jurisdiction. It has a standing in this suit not only to remove obstruction to interstate and foreign commerce * * * but also to carry out our treaty obligations to a foreign power *bordering on some* of the lakes concerned, *and, it may be*, also on the footing of an ultimate sovereign interest in the lakes."

[69] For examples, see *Dumont* v. *Kellogg*, 29 Mich. 420, 18 Am. Rep. 102 (1874) (*error to* instruct jury that the *defendant could* not diminish the quantity of water flowing in the stream by erection of a dam or that "he must so use water as not materially to affect the application of the water below, or materially to diminish its quantity"); *Clinton* v. *Myers*, 46 N.Y. 511, 7 Am. Rep. 373 (1871) ("*This right*, claimed by the plaintiff, to detain such *surplus* water of the stream as he may not require for present use until wanted in a dry season, has no foundation in the law, and is in direct conflict with the maxim *aqua currit*, etc.," even though the detention does no material injury *to another party*); *Gillis* v. *Chase*, 67 *N.H. 161, 31 Atl. 18* (1891) (a riparian owner of land may make any reasonable use of the stream he chooses to, including the sale of water impounded by him to nonriparians; whether a particular use is reasonable in the circumstances is a *question for the jury*).

[70] The *development is* canvassed in Bohlen, "The Rule in *Rylands* v. *Fletcher*" (1911), 59 *U. of Pa. L. Rev.* 373.

[71] Act of July 26, 1866, sec. 9, 14 Stat. 253, Rev. Stat. 2339, 43 U.S.C. 661. To the material quoted in the text, the act of July 9, 1870, sec. 17, 16 Stat. 218, Rev. Stat. 2340, 43 U.S.C. 661, added: "All patents granted, or preemptions or homesteads allowed, shall be subject to any vested and accrued water rights * * * as may have been acquired under or recognized by" the 1866 act.

are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same * * *.

Whatever other more particular background this and subsequent like enactments [72] may have had, the general background is clear enough—it is that of an era in which, to repeat, the States were pretty much free to do with their available water supplies as they pleased.

But the Federal interest was not entirely dormant even before 1890. The value of our great river systems as arteries of commerce had already been recognized by the time the Constitution was adopted. In the Northwest Ordinance of 1787, care was taken to provide that—

The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Subsequent enactments,[73] and the conditions written into the acts admitting various States to the Union,[74] reaffirmed this same doctrine with respect to other streams.[75]

The general Federal interest thus evidenced was fortified by the enactment in 1826 [76] of what became the first of the series of omnibus rivers and harbors acts that has continued to this day. This act appropriated sums for specific navigation projects in the States of Maine, Massachusetts, Connecticut, New York, Pennsylvania, Delaware, North Carolina, Alabama, and Ohio, and the Territory of Michigan. Even before that time, however, Federal contributions had been made to similar developments that were being undertaken privately or under State auspices.[77]

Such enactments as these, though not directly involved in the great cases of *Gibbons* v. *Ogden* [78] and *The Genessee Chief* v. *Fitzhugh*,[79]

[72] For example, the Desert Land Act, *supra*, note 23.

[73] For examples, see the acts of May 18, 1796, sec. 9 (1 Stat. 468); June 1, 1796, sec. 6 (1 Stat. 491); Mar. 3, 1803, sec. 17 (2 Stat. 235); and Mar. 26, 1804, sec. 6 (2 Stat. 279); Revised Statutes, sec. 2476 (1873).

[74] For examples, see the admission acts of Louisiana (Feb. 20, 1811, sec. 3, 2 Stat. 642); Alabama (Mar. 2, 1819, sec. 6, 3 Stat. 492); California (Sept. 9, 1850, sec. 3, 9 Stat. 453); Minnesota (Feb. 26, 1857, sec. 2, 11 Stat. 166); and Oregon (Feb. 14, 1859, sec. 2, 11 Stat. 383).

[75] Most, if not all, the punch was taken out of these enactments by a series of Supreme Court decisions in the latter part of the 19th century holding that they did not prevent the States from licensing obstructions to navigation in the absence of more specific congressional regulation of the matter and intimating very strongly, if not actually holding, that in any event the admission of a State to the Union on an equal footing with the older States deprived the Federal law of its effectiveness unless it was adopted by the State concerned. For examples, see *Escanaba and Lake Michigan Transportation Co.* v. *Chicago*, 107 U.S. 678 (1883); *Cardwell* v. *American River Bridge Co.*, 113 U.S. 205 (1885); *Hamilton* v. *Vicksburg, Shreveport and Pacific Railroad Co.*, 119 U.S. 280 (1886); *Huse* v. *Glover*, 119 U.S. 543 (1886); *Sands* v. *Manistee River Improvement Co.*, 123 U.S. 288 (1887); *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1 (1888). The Court thus, in effect, left the matter to be regulated by Congress under its commerce clause power if it saw fit to use it. Many of these cases, it may be noted, arose out of State authorizations for the construction of bridges across navigable waters and thus posed the problem whether the National Government wished, as contended, to favor one method of transportation to the exclusion of another. In earlier cases, the Court had been much more cautious in its approach to the matter. For examples, see *Pollard* v. *Hagan*, 3 How. 212 (1845), holding that the provision in the Alabama Admission Act that "all navigable waters within the said State shall forever remain public highways," etc., was not unconstitutional but was, in effect, an exercise by Congress of its commerce clause power; *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 13 How. 518, 565 (1851), holding unlawful a bridge over the Ohio built under authority of the Legislature of Virginia as contrary to the act of Feb. 4, 1791, 1 Stat. 189, by which Congress gave its consent to what the Court construed as a compact between Virginia and Kentucky at the time of the latter's admission to the Union declaring the Ohio to be navigable and open to the free use of all.

[76] Act of May 20, 1826, 4 Stat. 175.

[77] Cf. 3 *Report* of the President's Water Resources Policy Commission (1950), 75 f.

[78] 9 Wheat. 1 (1824).

[79] 12 How. 443 (1852).

raised two of the same constitutional questions on which the disposition of these cases hinged and on which further Federal development and regulation of navigable streams was largely to turn.

The first of these questions was whether the regulation of commerce which the Constitution entrusted to Congress embraced the regulation of navigation. We take it so much for granted today that it does that we are apt to forget that there was a time when this question was one which could be argued seriously and strenuously. But it was not until *Gibbons* v. *Ogden* was decided in 1824 that it was put to rest.

The second was the extent to which the English definition of navigable streams would be applicable to the Federal admiralty jurisdiction and to Congress' powers under the commerce clause. If the American courts and legislatures had adopted the "ebb and flow of the tide" test which was familiar to the common law, much of our water resources development would not have taken place. But they did not do so. Before the time was ripe for the Federal courts to speak on the matter, Congress had in effect adopted a broader definition by such enactments as the passage in the Northwest Ordinance which has already been quoted and by the inclusion in section 9 of the Judiciary Act of 1789 [80] of a provision vesting exclusive jurisdiction in the U.S. district courts over—

all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen * * *.

Both of these represented a clear break from the English rule.

The first judicial steps toward the abandonment of the "ebb and flow" rule and the adoption of the "navigable in fact" rule were taken by the State courts.[81] It was not until 1852 that the Supreme Court settled the matter for Federal purposes in the *Genessee Chief* v. *Fitzhugh* in the admiralty field and until the 1870's and 1880's in *The Daniel Ball* [82] and *Escanaba Company* v. *Chicago* [83] for commerce clause purposes.

Those rivers must be regarded as public navigable rivers in law which are navigable in fact—

the Court wrote in *The Daniel Ball*.

And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade

[80] 1 Stat. 77.

[81] For examples, consult *Scott* v. *Willson*, 3 N.H. 321, 325 (1825) ("Connecticut River cannot, by the rules of the common law, be considered as navigable in this State, being above the ebb and flow of the sea; but it has been so long used by the public, for the purpose of boating and rafting, that it must now, without question, be considered as a public highway"); *Shrunk* v. *Schuylkill Navigation Co.*, 14 S. & R. (Pa.) 71, 79 (1826) ("The great rivers of America are so different from those of England, that in the opinion of many, the same definition of a navigable river cannot properly be applied to both. Many of our rivers, such as the Mississippi, Ohio, Alleghany, and Susquehanna, are navigable, even in their natural state by vessels of considerable burden, and whether if such rivers had existed in England, the rule of the common law might not have been different, may certainly admit of question." The court also notes, at 80, that if the narrower definition of "navigable" were adopted, though this would not prevent the Commonwealth from providing for the improvement of such rivers as these, "compensation must have been made to the owners, the amount of which might have been so enormous as to have frustrated, or at least checked these noble undertakings"); *Gates* v. *Watlington*, 1 McCord (S.C.) 580, 582 (1822) ("In England it appears that by the rules of the common law, no river is considered navigable, except where the tide ebbs and flows * * *. But that rule will not do in this State, where our rivers are navigable several hundred miles above the flowing of the tide.")

[82] 10 Wall. 557 (1872).

[83] 107 U.S. 678, 682 (1883).

or travel are or may be conducted in the customary modes of trade or travel on water.[84]

The relevance of this adoption by Congress and the courts of a broad definition of navigable waters to an understanding of our present problems of Federal-State relations in the water rights field is obvious. Equally clear is the relevance of two other doctrines which were very much to the fore during this same period. The first of these is the doctrine, originally set forth in *Willson* v. *Black-bird Creek Marsh Company*,[85] that until Congress should act to prohibit or regulate physical impediments to navigation the matter would be governed by State law—in other words, the doctrine that, in this type of case, the bare existence of power in Congress to regulate under the commerce clause does not itself foreclose the States from acting. The second is the caveat that occurs time and again in these cases and in cases determining the ownership of land underlying navigable water that, regardless of who owns the land, it may be used by the United States whenever Congress should choose to exercise its powers to improve navigation.[86]

Except for its reference to the Federal Government, this latter doctrine dates back much further than the commerce clause. Mr. Justice Gray, writing the opinion of the Supreme Court in *Shively* v. *Bowlby*,[87] summarized the background of the general rule and its reason thus:

> By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark * * * are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands * * * belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit.

His review of the law in the Thirteen Original States indicates, moreover, that although there were wide variations in the ownership of the soil beneath navigable streams, there was virtual unanimity that this ownership is subject to a servitude in favor of navigation.

From this doctrine have emerged two corollary doctrines, viz, that the owner of the soil is not entitled to compensation if it is used for improvements for navigation[88] and that no one can acquire such an interest in diverting the waters of navigable streams as will substan-

[84] 10 Wall. at 563. Cf. *Economy Light and Power Co.* v. *United States*, 256 U.S. 113 (1921) where the Court took a position approximating that of "once navigable in fact, forever navigable in law" and *United States* v. *Appalachian Power Co., infra*, note 91, where it pointed out (at 407) that—

> A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.

[85] *Supra*, note 47.

[86] For example see *Willson* v. *Black-bird Creek Marsh Co., supra*, note 47; *Martin* v. *Waddell's Lessee*, 16 Pet. 367, 410 (1842); *Pennsylvania* v. *Wheeling and Belmont Bridge Co., supra*, note 75 at 564; *Gilman* v. *Philadelphia*, 3 Wall. 713, 729 (1866); *Mumford* v. *Wardwell*, 6 Wall. 423, 436 (1867); *Weber* v. *Board of Harbor Commissioners*, 18 Wall. 57, 65 f (1873); *McCready* v. *Virginia*, 94 U.S. 392, 394 f (1877); *Pound* v. *Turck*, 95 U.S. 459, 464 (1878); *Hamilton* v. *Vicksburg, Shreveport and Pacific Railroad Co., supra*, note 75 at 281; *Hoboken* v. *Pennsylvania Railroad Co.*, 124 U.S. 656, 688 (1888); *Illinois Central Railroad Co.* v. *Illinois*, 146 U.S. 387, 435 (1892); *Gibson* v. *United States*, 166 U.S. 269, 272 (1897). The last of these cases appears to be the first in which the term "servitude" is used.

[87] *152 U.S. 1, 11 (1894).*

[88] *Gibson* v. *United States, supra*, note 86.

tially lessen their use for traffic.[89] It is this congeries of doctrines, all of them implicit in the basic doctrine that navigable streams are public highways, that comprises what we today refer to as the navigation servitude which played so prominent a role in the discussions before the committee of the bills which it is considering. The point to be emphasized at present is that the navigation servitude was originally a rule of property law and not a product of the Constitution.[90]

The questions, judicial and legislative alike, which this line of development raises are knotty when they are stated in terms of the situation and needs of the year 1960. The navigation servitude was born and grew up when water was not the scarce and costly article that it is becoming today and when the supply was, in virtually every instance, ample both for navigation and for other permissible uses as well. Likewise, Federal control over navigable streams was then concerned almost solely with navigation as such, but it now extends to flood control, the construction and regulation of hydroelectric works, and pollution abatement.[91] Permissible uses of water under local law

[89] *United States* v. *Rio Grande Dam and Irrigation Co., supra*, note 14; *Wisconsin* v. *Illinois, infra*, note 95; *New Jersey* v. *New York, infra*, note 96.

[90] In the cases, however, the commerce clause is frequently spoken of as if it were the fount and origin of the doctrine. See, for examples, *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224f (1956) ("the interest of the United States in the flow of a navigable stream originates in the commerce clause. That clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant servitude' * * * or 'a superior navigation easement'"); *United States* v. *Kansas City Life Insurance Co., 339 U.S. 799, 808 (1950) ("It is not the broad constitutional power to* regulate commerce, but rather the servitude derived from that power and narrower in scope, that saves the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone.")

This explanation is unsatisfactory for two reasons: First, the commerce clause does not itself exempt from the requirement of the fifth amendment that just compensation be paid for a taking. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 336 (1893) ("like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment * * *. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it * * * can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just *compensation therefor.") Second, the navigation servitude is a State servitude as well as* a Federal one. See, for examples, the Colonial and early State cases and statutes collected in *Shively* v. *Bowlby, supra*, note 87, at 18 ff. See also, *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421, 432 (1856): "A class of cases that have frequently occurred in the State courts contain principles analogous to those involved in the present case. The purely internal streams of a State which are navigable belong to the riparian owners to the thread of the stream, and, as such, they have a right to use the waters and bed beneath, for their own private emolument, subject only to the public right of navigation. *They may construct wharves or dams or canals for the purpose of subjecting the stream to* the various uses to which it may be applied, subject to this public easement. But, if these structures materially interfere with the public right, the obstruction may be removed or abated as a public nuisance."

[91] This is not the place to discuss in detail the constitutional foundations on which these developments rest. It may be pointed out, however, that the constitutionality of Federal hydroelectric development, hydroelectric regulation, and flood control activities has in most cases been based on their relation to navigation. *Arizona* v. *California*, 283 U.S. 423 (1931); *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940); *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *United States* v. *Twin City Power Co., supra*, note 90. (The Tennessee Valley Authority, on the other hand, got its primary constitutional start in the war power clause. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936).) In at least some instances this approach leaves the impression of a navigation tail wagging a hydroelectric dog. Wider and probably more satisfactory bases can be found, in the case of Federal developments, in the general welfare clause approach which the Court took with respect to irrigation in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950) and *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 294 (1958), and, in the case of Federal regulation, in a full application of the suggestion in Mr. Justice Reed's opinion in the *Appalachian Power Co.* case, *supra*, at 426, that "it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation" and that "in truth, the authority of the United States is the regulation of commerce on [better, 'in and on'?] its waters" of which flood protection, watershed development, the utilization of power, etc., are merely parts. See, also, Frankfurter, J., dissenting, in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission, supra*, note 16 at 188: "We are all agreed that Congress has the constitu-

have also been expanding. Municipal diversions were not a problem during the first half of the 19th century, irrigation was virtually unknown, pollution was not the problem it now is, and small mill dams did not compare with the giant hydroplants of today. We have, in some fashion, to relate all of these factors and the navigation servitude to each other as best we can, with full awareness that the broadened definition of navigable streams has carried with it a widened application of the servitude and with inquiry into whether the benefits of the servitude extend to the newer Federal uses of water.

One of the first questions that arises is that of the legality of diversions made from navigable streams for irrigation, municipal water supply, and the like. Here we have to reckon not only with the navigation servitude itself but also with the implication of the Desert Land Act's language ("and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of supply upon the public lands *and not navigable*, shall remain and be held free for the appropriation and use of the public"),[92] and ultimately with the prohibition against impediments to navigable capacity found in the 1890 and 1899 acts.[93]

A distinction, such as the Desert Land Act makes, between the navigable and nonnavigable portions of a stream system is understandable historically for the purpose of determining the title to land underlying the water[94] and it makes sense when the question is one of prohibiting or regulating the erection of structures which are physical impediments to navigation. But the distinction becomes an attempt to separate the inseparable and, as the *Rio Grande* case makes clear, cannot be maintained when the problem is one of preserving a proper flow of water to serve navigation needs. The authors of the Federal Power Act were aware of this fact and the Pollution Control Act is not based on any such distinction. Its retention in the case of diversions can only lead to misunderstanding and trouble. If it is navigation that is to be protected, the proper distinction is in terms of the effect of any proposed diversion on navigation, not in terms of the place where the diversion is made. If, vice versa, diversions for consumptive use are to be permitted or encouraged, there is little sense in requiring that they be made in the nonnavigable portions of a stream system and forbidding them to be made elsewhere.

But this, of course, raises the second and broader question—that of the legality of diversions, wherever made, that impair the navigable capacity of our streams. The *Rio Grande* case made clear that the 1866 and 1877 acts do not protect against the 1890 and 1899 acts. *Wisconsin* v. *Illinois*[95] added to this the warning that even the Secretary of the Army has no authority to license a permanent diversion of water for other than navigation purposes:

> * * * complainants urge that the diversion here is for purposes of sanitation and development of power only, and therefore that it lies outside the power confided by Congress to the Secretary of War. The Master says:
>
> "There is no doubt that the diversion is primarily for the purposes of sanitation. Whatever may be said as to the service of the diverted water in relation to a waterway to the Mississippi, or as to the possible benefit of its contribution to the navigation of that river at low water stages, it remains true that the disposition of Chicago's sewage has been the dominant factor in the promotion, maintenance and development of the enterprise by the State of Illinois and the Sanitary District. * * *"
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> * * * * * * *
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> The normal power of the Secretary of War under section 10 of the act of March 3, 1899, is to maintain the navigable capacity of Lake Michigan and not to restrict it or destroy it by diversions. This is what the Secretaries of War and the Chiefs of Engineers were trying to do in the interval between 1896 and 1907 and 1913 when the applications for 10,000 cubic feet a second were denied by the successive Secretaries and in 1908 [when] a suit was brought by the United States to enjoin a flow beyond 4,167 cubic feet a second.
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> * * * * * * *
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> * * * It may be that some flow from the lake is necessary to keep up navigation in the Chicago River, which really is part of the port of Chicago, but that amount is negligible as compared with 8,500 second-feet now being diverted. Hence, beyond that negligible quantity, the validity of the Secretary's [1925] permit derives its support entirely from a situation produced by the Sanitary District in violation of the complainants' rights; and but for that support complainants might properly press for an immediate shutting down by injunction of the diversion, save any small part needed to maintain navigation in the river. In these circumstances we think they are entitled to a decree which will be effective in bringing that violation and the unwarranted part of the diversion to an end. * * *"[96]

The policy question which is thus raised is not a new one, but it is a large one. The economic value of our streams for navigation, as the annual statistical reports of the Chief of Engineers make abundantly clear, is not negligible. Even in the States west of the Mississippi, the amount of freight that is carried on a Sacramento, a Columbia, and the lower reaches of a Missouri cannot be brushed

tional power to promote a comprehensive development of the Nation's water resources and that it has exercised its authority by the Federal Water Power Act." See, in addition, the following colloquy on the floor of the House, reported in 95 *Congressional Record*, 9408 (1949):

"Mr. HALE. Mr. Chairman, will the gentleman yield?

"Mr. D'EWART. I yield to the gentleman from Maine.

"Mr. HALE. I happen to be particularly interested in the constitutional question where a hydroelectric project is constructed without any element of flood control or navigation or anything of that kind. Did the gentleman's committee give any particular consideration to that point?

"Mr. D'EWART. We did not give particular consideration to that point. * * *

"As to the constitutional question of a hydroelectric plant on a navigable stream, may I say that this is not a navigable stream. It is a lake above the ocean about 1,000 feet. A stream comes down from the lake, but it is only a small one, and I doubt, therefore, since it is not a navigable stream, that the constitutional question that the gentleman has in mind would apply.

"Mr. HALE. I think that very extensive projects * * * have been justified on the ground of flood control and navigation, the hydroelectric features being regarded as incidental. That would not be the case with this project.

"Mr. D'EWART. That is true. There you had navigable streams. In this case it is not a navigable stream. There is that distinction between the two projects.

* * * * * * *

"Mr. D'EWART. It is my opinion, because the stream is not navigable, that that provision of the Constitution does not apply. However, I admit that the gentleman is over my head."

[92] *Supra*, note 23. As the memorandum from the Commissioner of Reclamation referred to in the *Gerlach* case, *supra*, note 50, makes clear, the Bureau of Reclamation generally draws no distinction between navigable and nonnavigable streams when making appropriations under State laws. The distinction is also, with few exceptions, not expressed in those laws.

[93] *Supra*, notes 26, 46.

[94] For example, *United States* v. *Utah*, 283 U.S. 64 (1931), and *United States* v. *Oregon*, 295 U.S. 1 (1935), on this question as between the States and the United States. *Packer* v. *Bird*, 137 U.S. 661 (1891), deals with the rules governing the construction of grants by the United States and points out the variances in the laws of the various States with respect to private versus State ownership of land underlying navigable waters.

[95] 278 U.S. 367 (1929).

[96] Ibid. at 415, 417 f. See also *New Jersey* v. *New York*, 283 U.S. 336, 344 (1931), a suit to enjoin New York's diversion of water from tributaries of the Delaware River: "The master finds that the above-named tributaries of the Delaware are not navigable waters of the United States * * *. Assuming that relief by injunction still might be proper if a substantial diminution within the limits of navigability was threatened * * * he called as a witness Gen. George B. Pillsbury, Assistant Chief of Engineers of the U.S. Army * * * who, although not speaking officially for the War Department, satisfied the master's mind that the navigable capacity of the river would not be impaired. Of course in that particular as in some others New York takes the risk of the future. If the War Department should in future change its present disinclination to interfere, New York would have to yield to its decision * * *. This will be provided for in the decree."

off lightly.[97] But it is doubtful whether data are available or could be readily assembled which would give us a sufficiently uniform outcome, when the navigation values of our streams are compared with their values for other purposes, to warrant even a rough judgment that, in all circumstances, navigation is or is not to be preferred to other uses. It is likewise doubtful that data are available or could be readily assembled on which to base an estimate of how rapidly the navigable capacity of our streams would be exhausted if all restraints were removed by an appropriate modification of the 1877 and 1899 acts or even of the extent to which these and other similar acts have, in fact, proved to be a deterrent to diversions. But there is no question that a survey of existing diversions would show that many of them rest upon a slippery legal foundation and that there is merit, in law if not in practice, to the complaint that a sword of Damocles hangs over them, due allowance being made for the exaggeration in any such statement as this.

The problem is not fundamentally, as it has sometimes been stated, that of disseisin of vested water rights by the Federal Government without just compensation. Such a statement of the case begs the question of what "vested" means and how far these rights are "vested." Whatever else the term may mean, the law is well established that these rights are subject to an exercise of the Federal servitude and are, therefore, subject to divestment without compensation.

Nor is the problem solely one of the Federal Government or a Federal agency versus the owners of rights to divert. There are recognizable financial interests, even though they may not be legally protected rights, that ship and barge owners and the proprietors of wharves, docks, warehouses, and the like have in the continued navigability of streams. If diversions destroy navigability, with or without Congress' consent, these interests will go as fully uncompensated as the rights of diverters will go if the Federal servitude is exercised. Whichever way Congress acts, in other words, it cannot avoid favoring one use of water over another, one type of water user against another.

In short, the congressional problem is a political one, in the highest sense of that word—that of distribution, or setting the standards by which distribution is to be made, of the available water supply among the various uses to which it can be put.

In the absence of the sort of data referred to above, it is doubtful whether the time is ripe for an attempt at a full permanent legislative solution of the problem. But it is worth noting that every Rivers and Harbors Act and every Flood Control Act that has been enacted since 1944 [98] includes, in terms or by reference, a provision reading thus:

> The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

This furnishes a partial solution to the problem and, as far as new Federal works are concerned, a continuation of this legislative practice, with appropriate exceptions if they prove necessary, may well be all that is called for.

With respect to existing beneficial consumptive uses of water by private parties, including municipalities, however—particularly those uses that are of long standing—the assumption can probably be safely indulged that their effects on navigation have already been fully realized. On this assumption, there would be merit to confirmation by Congress of the rights to use on which they now rest insofar as they do not infringe on any other rights or interests of the United States.

Finally, there is the problem of new and enlarged diversions of water by private parties, including municipalities, which may or may not affect navigability. No assurance can be given by any administrative officer to one who proposes such a diversion that it will not be subject to attack. Yet the diversion may require a large investment and a whole local economy may become dependent upon it. It is not hard to appreciate the feeling that this is an unsatisfactory situation and that there is no need for Congress to keep as tight a rein on it as now exists. It would not be out of order, I believe, for consideration to be given to legislation authorizing the Secretary of the Army to license, either permanently or for a reasonably long period of years, diversions of water which, in his judgment, will not affect the navigable capacity of streams or which, if they do, will yield public benefits greater than those anticipated from the continued availability of the water for navigation purposes. Such an enactment would have at least the merit of enabling diverters to know where they stand before the diversion investment is made.

A third question that needs consideration is whether and, if so, how far the benefits of the navigation servitude are available to the Federal Government in connection with its newer uses of navigable streams.[99] In substance the question is whether the existence of the servitude and its benefits depend upon the nature of the stream (in which case any navigable stream may be used by the Federal Government for any of its constitutional functions without compensation) or upon the nature of the use (in which case it is only a navigation use or, at most, a use cognizable under the commerce clause of the

[97] The Corps of Engineers' annual statistical report entitled "Waterborne Commerce of the United States" shows about 1,500 million ton-miles of freight being carried in 1957 on the Columbia and Willamette Rivers below Vancouver and Portland, about 136 million ton-miles on the Columbia between Vancouver and The Dalles, about 112 million ton-miles between The Dalles and McNary, about 27 million ton-miles between McNary and Kennewick, and about 70 million ton-miles on the Willamette and Yamhill Rivers above Portland. In the same year, about 153 million ton-miles were carried on the Sacramento below Red Bluff and about 137 million ton-miles on the San Joaquin below Stockton. In 1958, about 267 million ton-miles moved on the Missouri, the great bulk of this being between Kansas City and the mouth of the river.

[98] The earliest of these acts is that of Dec. 22, 1944, 58 Stat. 887; the latest that of July 3, 1958, 72 Stat. 297.

[99] The Submerged Lands Act of 1953 (67 Stat. 29, 43 U.S.C. 1301 et seq.) specifically excepted "waterpower, or the use of water for the production of power" from the relinquishment which it made to the States (sec. 2(e)). It also provided that nothing contained in it should "affect the use, development, improvement, or control by or under the constitutional authority of the United States of said [relinquished] lands and waters for the purpose of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power" (sec. 3(d) and expressly retained for the United States "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership * * *" (sec. 6(a)). The relation between these provisions and those of section 3(e) that "Nothing in this Act shall be construed as affecting or intended to affect * * * the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States" is not clear.

Constitution which carries with it the right to use without compensation).

The constitutional question has not been settled by the Supreme Court.[100] It was specifically left open, in the case of irrigation, by the majority in *United States* v. *Gerlach Livestock Company*[101]. Referring to congressional acts declaring that "the entire Central Valley project * * * is * * * for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof," etc.,[102] the Court said:

> The Government contends that the overall declaration of purpose is applicable to Friant Dam and related irrigation facilities * * *. [It] relies on the rule that it does not have to compensate for destruction of riparian interests over which at the point of conflict it has a superior navigation interest the exercise of which occasions the damage * * *.
>
> Claimants, on the other hand, urge that at least the Friant Dam project was wholly unrelated to navigation ends and could not be controlled by the general congressional declaration of purpose. They point out that * * * in every instance in which this Court has denied compensation for deprivation of riparian rights it has specifically noted that the Federal undertaking bore some positive relation to control of navigation * * * [and] that this Court has never permitted the Government to pervert its navigation servitude into a right to destroy riparian interests without reimbursement where no navigation purpose existed.
>
> Since we do not agree that Congress intended to invoke its navigation servitude as to each and every one of this group of coordinated projects [i.e., the various units of the Central Valley project], we do not reach the constitutional * * * issues thus posed. Accordingly * * * we 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 provide interests without compensation to those deprived of them. We have never held that or anything like it * * *.[103]

The case going furthest in the direction of the first alternative set out above is *United States* v. *Twin City Power Company*.[104] The Chief of Engineers, reporting to Congress on construction of the project involved in this case—the Clark Hill project on the Savannah River—had said that "if suitably constructed and operated primarily for hydroelectric-power development, [it] would incidentally reduce downstream flood damages and improve low-water flows for navigation"; Congress had authorized its construction as part of "the comprehensive development of the Savannah River Basin for flood control and other purposes"; and the Court of Appeals for the Fourth Circuit had "concluded that the improvement of navigation was not the purpose of the taking but that the Clark Hill project was designed to serve flood control and waterpower development." Even so, the Supreme Court found that it had been the "decision of Congress that this project will serve the interests of navigation," that this decision must be respected by the courts "until and unless it is shown 'to involve an impossibility'," and that "If the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced."[105]

The Court thus left open the question with which we are now concerned. How it will ultimately be settled will depend on, among other things, the weight and meaning given to the oft-quoted words in *United States* v. *Chandler-Dunbar Company*:[106]

> Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable.

For this and other similar statements[107] in the opinions of the Court can, depending upon how closely confined they are to the special facts of the case in connection with which they were said, well lead to the

[100] Cf., however, *Stockton* v. *Baltimore and New York Railroad Co.*, 32 Fed. 9, 17 ff (C.C.D.N.J., 1887) in which the court had before it the question whether Congress could constitutionally empower a corporation to build an interstate bridge and, in so doing, to use submerged lands belonging to the State of New Jersey without payment of compensation therefor. The court, speaking through Mr. Justice Bradley, sitting at circuit, said:

> "The most strenuous objection * * * to the exercise of the power in this case * * * is based on the fact that the piers of the bridge are to rest, and the bridge is to stand, *on land* which belongs to the State, and that no compensation is proposed to be made for the taking thereof. * * *
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> * * * * * * *
>
> "The information rightly states that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the King of Great Britain as part of the *jura regalia* of the crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that, after the conquest, the said lands were held by the State, as they were by the king, *in trust* for the public uses of navigation and fishery, and the erection thereon of * * * facilities of navigation and commerce. Being subject to this trust, they were *publici juris*: in other words, they were held for the use of the people at large. * * *
>
> "Such being the character of the State's ownership of the land under water—an opportunity held, not for the purpose of emolument, but for public use especially the public use of navigation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the Constitution. * * * It is not so considered when * * * structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when * * * erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself * * *? It is commerce, and not navigation, which is the great object of constitutional care.
>
> "The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the power of Congress * * * that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. * * * So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress * * *. And all this power is derived from the power 'to regulate commerce.' Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the States extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient."

[101] *Supra*, note 91.

[102] Acts of Aug. 26, 1937, sec. 2 (50 Stat. 850) and Oct. 17, 1940 (54 Stat. 1199).

[103] 339 U.S. at 736 f. Compare *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 419 (1926) ("The right of the United States in the navigable waters within the several States is, however, 'limited to the control thereof for the purposes of navigation.' * * * And while Congress, in the exercise of this power, may adopt * * * any means having some positive relation to the control of navigation * * * it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end") with *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958) ("It is no longer open to question that the Federal Government under the commerce clause of the Constitution * * * has dominion, to the exclusion of the States, over navigable waters of the United States * * *. Congress has elected to exercise this power under the detailed and comprehensive plan for development of the Nation's water resources, which it prescribed in the Federal Power Act * * *.").

[104] *Supra*, note 90.

[105] 350 U.S. at 223 f.

[106] 229 U.S. 53, 69 (1913). For our purposes it is worth noting that neither the majority nor the minority in the *Twin City* case, *supra*, note 90, rested its conclusion with respect to the main point at issue on which they differed—viz., whether the *Chandler-Dunbar* rule precludes a recognition of special power site value in lands being taken or whether it merely precludes payment for the waterpower itself—on the existence or nonexistence of "vested" rights under State law. Indeed, though the minority thought it worth mentioning (at 234) that "there are no vested water rights claimed here under State law," it concluded that the condemnees were entitled to compensation for the power site value of their fast land. The majority, on the other hand, seem to have thought that such rights were claimed but reached the conclusion that power site value need not be paid whether they existed or not: "It is no answer to say that these private owners had interests in the water that were recognized by State law. We deal here with the Federal domain, an area which Congress can completely preempt, leaving no vested private claims that constitute 'private property' within the meaning of the fifth amendment" (at 227).

[107] For example, *United States* v. *Twin City Power Co.*, *supra*, note 90 at 226 ff.

conclusion that, at least with respect to the navigable portions[108] of streams, the United States has such full control that no private rights can be acquired in them which are good against it and that, therefore, compensation is not constitutionally required to be paid regardless of the purpose for which they are taken.

It should be noted, however, that in what we may refer to as the off-brand cases—viz, those in which navigation is found to play a very remote part at best—there has been a strong tendency in the Court to find that Congress did not intend to claim the benefits of the servitude or to deny the landowner or water rights owner full compensation for what was taken from him even though it might perhaps have done so.[109] Such, in substance, were the holdings in *Ford* v. *Little Falls Fibre Company*,[110] where the question was whether the Federal Power Act authorizes a licensee to enlarge its production by installing flash boards which diminish the effective head of an upstream power plant without payment of compensation; *International Paper Company* v. *United States*,[111] where the Government had in effect requisitioned the plaintiff's water rights in order to increase power production for wartime needs; *United States* v. *Gerlach Live Stock Company*,[112] where the question was one of compensation for riparian rights, good under State law, which were destroyed by the construction of Friant Dam, a feature of the Central Valley Federal reclamation project; and *Federal Power Commission* v. *Niagara Mohawk Power Corporation*,[113] where the question was whether the Federal Power Act forbade the company to take account of the costs incurred by it in connection with the use of another's water rights when computing its amortization reserve.

Hence, though a holding of noncompensability is always a possibility, it seems so remote that, considering the state of confusion and the controversial nature of the closely related power site valuation question[114] and the protection which is already given to established consumptive uses by such provisions as section 27 of the Federal Power Act and section 8 of the Reclamation Act of 1902, it is doubtful whether any overall attempt to solve it in the sort of legislation that is now being considered is necessary and whether it would not be more of an impediment than a help in dealing with the more immediate problems with which that legislation is concerned.[114a]

[108] Cf. Douglas, J., dissenting, in *Grand River Dam Authority* v. *Grand Hydro*, 335 U.S. 359, 375n (1948): "The exclusive control which the United States has in the water-power of a navigable stream * * * extends to the waterpower of a nonnavigable stream where private command over it is inconsistent with the Federal program of control over navigation. *United States* v. *Willow River Co.*, 324 U.S. 499, 509. Federal regulation and control has the same effect in each case. *Oklahoma* v. *Atchison Co.*, 313 U.S. 508, 525." Compare *United States ex rel. Tennessee Valley Authority* v. *Powelson*, 319 U.S. 266, 273 (1943) where the Court, speaking through Mr. Justice Douglas, had left this question open:

"It is argued on behalf of petitioner that even though the Hiwassee River is nonnavigable throughout this part of its course, compensation for the loss of any supposed power value is no more permissible than in case of a navigable stream. It is pointed out that *United States* v. *Chandler-Dunbar Co.* * * * held that there is 'no private property in the flow' of a navigable stream. * * * And it is contended that although the Hiwassee River is nonnavigable at the points in question, the flow at those places has such a direct and immediate effect upon the navigable portion of the river farther downstream as to give the United States the same plenary control over both the navigable and nonnavigable portions of the river * * *, thereby bringing into play the rule of the *Chandler-Dunbar* case. Cf. *United States* v. *Kelly*, 243 U.S. 316. But we do not stop to consider that question. For if we assume, without deciding, that rights in the 'flow' of a nonnavigable stream created by local law are property for which the United States must pay compensation when it condemns the lands of the riparian owner, the waterpower value which respondent sought to establish [still] cannot be allowed."

[109] *See United States* v. *Twin City Power Co.*, *supra*, note 90 at 225: "The legislative history and construction of particular enactments may lead to the conclusion that Congress exercised less than its constitutional power, fell short of appropriating the flow of the river to the public domain, and provided that private rights existing under State law should be compensable or otherwise recognized. Such were *United States* v. *Gerlach Live Stock Co.* * * * and *Federal Power Commission* v. *Niagara Mohawk Power Corporation* * * *."

[110] 280 U.S. 369 (1930).

[111] 282 U.S. 309 (1931).

[112] *Supra*, note 91.

[113] 347 U.S. 239 (1954). With this case, compare *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787 (C.C.A. 2d, 1943), cert. den. 320 U.S. 792 (1943).

CONTROL OVER UNAPPROPRIATED WATERS

The length of the foregoing discussion is not intended to indicate a belief that the navigable streams doctrine is the source of all problems in the Federal-State water rights field. Other problems—problems which probably provoke even more invective than those in the first group—are those which are often spoken of as if their answers turned on the answer to the further question, as it is sometimes put, of who "owns" the unappropriated waters of the Western States.

This question is virtually unanswerable. It is unfortunate that the terms "property" and "ownership" ever crept into the English language as descriptions of any governmental interest in or power over the waters of its streams, whether the government in question be the Federal Government or a State. It is only by a species of poetic license that we apply such terms as these to fugitive stuff like water before it is reduced to possession.[115] The "more or less attenuated residuum of title that the State may be said to possess," was Mr. Jus-

[114] This problem, in brief, is whether allowance is to be made in condemnation actions and in administrative determinations of a utility's rate base and amortization reserve under the Federal Power Act for the value of its water rights or for a special value attaching to its land because of its usefulness for a hydroelectric plant. This has been a matter of quite heated dispute between the majorities and the minorities of the Court in each of the three cases that have been before it in recent years. *Grand River Dam Authority* v. *Grand Hydro*, *supra*, note 108; *Federal Power Commission* v. *Niagara Mohawk Power Corporation*, *supra*, note 113, and *United States* v. *Twin City Power Co.*, *supra*, note 90. In the first of these, it was held that the Federal Power Act does not preclude a State court from admitting evidence of power site value in a condemnation action brought by a Federal licensee where the licensee did not rely on Federal eminent domain authority. In the second, it was held that the act did not wipe out the value of pre-existing water rights and that allowance for payments made for the use of such rights had to be permitted by the Federal Power Commission in the accounting record of the licensee. In the third, the holding was that the *Chandler-Dunbar* rule precludes the special value when the United States itself is the condemnor. These three cases illustrate, but do not exhaust, the range of questions involved in the power site valuation problem. The differences in result in these cases are such that one is tempted to say, with the late Prof. Thomas Reed Powell, if I remember his dictum correctly, that "Between any two cases there is always enough of a difference to make a difference if the Court wants to see the difference." It may be noted, however, that of the four members of the Court who participated in all three cases two (Burton and Frankfurter, JJ.) voted consistently to allow the special value and two (Douglas and Black, JJ.) voted consistently to disallow it. Four other members participated only in the first of these three cases: Chief Justice Vinson and Mr. Justice Jackson there voted to allow the special value, Mr. Justice Murphy and Mr. Justice Rutledge to exclude it. Mr. Justice Reed participated in the first and third cases; he voted to allow in the first, to exclude in the third. The same change of votes is recorded for Chief Justice Warren and Mr. Justice Clark who participated in the second and third cases. Mr. Justice Minton, on the other hand, voted to exclude in the second and to include in the third. Mr. Justice Harlan voted to include in the third, the only one of the three cases in which he participated.

[114a] It should be noted, however, that the suggestions made hereafter in sec. 2(b) of the draft of bill appended to this memorandum have considerable relation to the problem without attempting to furnish an entire solution.

[115] Cf. the argument of counsel for California as summarized by the reporter in *Arizona* v. *California*, *supra* 91, at 433:

"Arizona does not claim to own the running water, nor could she do so. Only such water as is taken into possession and control is subject to ownership. Control of these waters is an exercise of the police power, which is another term for the power of government. * * * It is an exercise of political power.

"The right of the United States to exercise control over the Colorado River for improvement of navigation or otherwise is also the exercise of political power * * *. It is thus a conflict between the political power of the State and the political power of the Nation."

mit their plans for structures to a State officer for approval before beginning construction.[126] They need not require their employees who drive Federal trucks to have State drivers' licenses.[127]

But, to return to the narrower problem of Federal-State relations in the water rights field:

It has been suggested that there are constitutional infirmities in the proposals that have been made to require all Federal agencies to abide by the laws of the States dealing with the appropriation, control, use and distribution of water. Were it not for the official standing of those by whom this suggestion has been advanced, it would have a rather hollow ring to it, particularly since the proposals are largely modeled on a statute as venerable as section 8 of the Reclamation Act of 1902. Fortunately, the often interrupted and rather unsystematic exposition of the supposed infirmities by Assistant Attorney General (as he then was) Rankin in 1956 [128] has recently been refurbished and made more lucid in what is evidently a carefully prepared paper by Assistant Attorney General Morton.[129] The notion that there may be some constitutional prerogative in the executive departments to proceed without regard to State law that would be infringed by a congressional requirement to the contrary appears to have dropped by the wayside. It is admitted, the premise being that the United States has a proprietary interest in the unappropriated waters of our streams, that Congress could "give away" this interest to the States with the presumable consequence (though this is left unsaid) that reacquisition would have to be in accordance with the laws of the donee. It is admitted also that it is "competent for Congress to say to Federal officers that they shall conform to State law *as far as they can* without defeating the Federal purpose in the acquisition of water rights" [emphasis in original] with the caveat added that "When Congress authorizes or directs a Federal department or officer to construct and operate a project within its own sphere of delegated powers, the Constitution does not permit a construction which subjects that direction to the choice of consent or veto by any State or State official." Finally, it appears to be admitted that, though there has been "some very loose talk about the so-called 'delegation' of the power to State legislatures" which is objectionable, the same results might be reached on a theory of "adoption" of State laws by Congress for the guidance of Federal officials and, in view of the *Sharpnack* case,[130] that this "adoption" can be such a "continuing adoption" that it includes State laws enacted after the Federal act becomes effective.

[126] *Arizona* v. *California*, *supra*, note 91 at 451 f.
[127] *Johnson* v. *Maryland*, 254 U.S. 51 (1920). Cf. sec. 211(j) of the Federal Property and Administrative Services Act of 1949, as amended by sec. 2 of the act of Sept. 1, 1954, 68 Stat. 1126, 40 U.S.C. 491(j): "The United States Civil Service Commission shall issue regulations to govern executive agencies in authorizing civilian personnel to operate Government-owned motor vehicles for official purposes * * *. Such regulations * * * may require operators and prospective operators to obtain such State and local licenses or permits as would be required for the operation by them of similar vehicles for other than official purposes."
[128] Hearings on H.R. 8325, etc., 84th Cong., pp. 23, 25 f., 38, 43 ff., 53.
[129] Mr. Morton's paper is reprinted *infra*, pp. 51 ff.
[130] *United States* v. *Sharpnack*, 355 U.S. 286 (1958). Mr. Morton's comments on this case, which had to do with the Assimilative Crimes Act, could readily be adapted to the problem before the committee by substituting the words shown in brackets for those in the original statement which precede them: "There is nothing in the case which sanctions *delegation* of legislative power. The *adoption* of certain State criminal [water] laws simply made them a part of the body of *Federal* law to be enforced [observed] by *Federal* officials in the administration of *Federal* justice [water development programs]." [Emphasis in original.]

The case against constitutionality thus boils down to little more than a choice of words in the argument about "delegation" as against "adoption" and to a considerable lack of common understanding in the case of the limitation which Mr. Morton imposes on Congress' competence "to say to Federal officers that they shall conform to State law."

The lack of common understanding to which I refer has to do, first, with the meaning of the phrase "laws of the several States relating to the appropriation, control, use, and distribution of water" and, secondly, with the meaning of a congressional authorization to a Federal agency to construct a project in accordance with such laws.

"Appropriation, control, use, and distribution of water" must be read, of course, with *Arizona* v. *California* and the *Ivanhoe* case in mind. *Arizona* v. *California*[131] makes it reasonably clear that the phrase is not broad enough to cover State laws giving State officials supervisory authority over Federal construction plans and specifications. The *Ivanhoe* case not only added to this the holding that the direction to the Secretary of the Interior, as spelled out in the Reclamation Act of 1902, to comply with such laws is not broad enough to allow the States to add conditions to their permits or licenses which run contrary to other provisions of Federal law—in the instant case, the excess land provisions of the Federal reclamation laws—but gave us this affirmative statement of its construction of the section in which the phrase in question occurs:

> As we read section 8, it merely requires the United States to comply with State law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of Federal projects. As the Court said in *Nebraska* v. *Wyoming* * * *: "We do not suggest that where Congress has provided a system of regulation for Federal projects it must give way before an inconsistent State system." * * * We read nothing in section 8 that compels the United States to deliver water on conditions imposed by the State.[132]

The meaning of a congressional authorization or direction to construct a project seems also to be a subject of misunderstanding. In the first place, Mr. Morton equates two things—authorization and direction—which may be very different. In the second place, he attempts to turn what is basically a problem of statutory construction into a constitutional problem. It may be admitted that it would be incongruous for men in Congress to include mutually contradictory provisions in an act, but the reconciliation of such provisions or the determination of which shall prevail over the other hardly rises to the dignity of an exercise in constitutional law. It would clearly not be unreasonable for a court which found itself faced with a direction or even an authorization to construct and a conflicting direction to proceed in compliance with State laws which would render the first direction or authorization nugatory to hold that it was not Congress' intent to frustrate the former by insisting on the latter and to fortify its conclusion with a reference to the supremacy clause of the Constitution. Such is, after all, a permissible reading of the *First Iowa* case.[133] But this is a far cry from saying that, if Congress

[131] *Supra*, notes 91, 126.
[132] *Supra*, note 91, at 29 f.
[133] *Supra*, note 16.

chooses to make itself sufficiently clear on the subject, its project authorizations cannot constitutionally be read as saying, in effect, that the Secretary of the Interior, the Secretary of Agriculture, or the Secretary of the Army, as the case may be, is authorized to construct if, but only if, he assures himself that he can obtain the necessary water rights in accordance with State law. The problem, to repeat, is not one of the constitutionality of such a limitation on executive authority but of the proper construction of such authority and direction as may be given.

To say, however, as the above indicates that there is no observable substance to the supposed constitutional argument is not to say that there are no policy questions to be decided before proceeding with a wholesale adoption of State laws on the subject. It is these that now need to be looked at.

There are on the Federal statute books today only three general acts of major importance which specifically refer to observance by Federal agencies of State water laws.[134] The first is the Reclamation Act of 1902 which, as has already been pointed out, is restricted to projects constructed under the Federal reclamation laws and, even within that limit, refers only to "laws * * * relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder." The second is the Federal Power Act of 1920 which goes to noninterference with "the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." And the third is the Watershed Protection and Flood Prevention Act of 1954 which requires the Secretary of Agriculture either to acquire or to satisfy himself that the beneficiaries of any project undertaken pursuant to that act have acquired or will acquire such valid rights to the use of water under State law as are called for in the circumstances.[135]

No survey is available to show how far these requirements are supplemented by voluntary adherence by agency heads to a practice of following State procedure, but it is clear that the statutes leave great areas uncovered—all operations, for instance, of the Corps of Engineers, the largest of Federal constructing agencies in the water resources field; many agencies of the Department of the Interior which utilize water (for example, the Bureau of Indian Affairs, the National Park Service, the Fish and Wildlife Service, and even the Bureau of

[134] There are, of course, many other Federal acts which refer to State water laws. Senator O'Mahoney's statement at the committee's hearings on H.R. 4567, etc., 86th Cong., listed 30 (pp. 58 ff.), Congressman Hosmer's 36 (pp. 65 ff.), and the Farm Bureau Federation's 25 (pp. 171 ff.). These compilations include various acts which refer to local water laws generally which have been discussed or mentioned elsewhere in this memorandum (for example, the 1866, 1870, 1877, and 1891 acts, and the Submerged Lands Act). Others that are listed concern projects under the Bureau of Reclamation which do not come wholly within the general reclamation laws (for examples, the Warren Act and the Small Projects Act) or concern similar projects undertaken by others (for example, the Water Conservation Act of 1939). Still others deal only with individual named reclamation projects (for example, the Boulder Canyon project and the Santa Margarita project) or specific Indian projects (for example, the acts of June 21, 1906, Mar. 1, 1907, and May 30, 1908). Others appear to be largely in the nature of caveats (for example, the Taylor Grazing Act and the act of Dec. 24, 1942). There are one or two the meaning and effect of which is not clear (for example, sec. 208 of the act of July 10, 1952, and the act of Aug. 8, 1946). It is interesting to note that sec. 1 of the act of June 4, 1897 (30 Stat. 36, 16 U.S.C. 481), which is among those listed, provided that rights to the use of waters found on national forest lands might be established "under the laws of the State wherein such national forests are situated, or *under the laws of the United States* and the rules and regulations established thereunder." [Emphasis added.] No compilation is available showing the instances in which Congress has refused or failed to include provisions of the sort here in question in circumstances where they might have been thought appropriate.

[135] Act of Aug. 4, 1954, sec. 4, 68 Stat. 667, 16 U.S.C. 1004.

Reclamation in everything except its irrigation operations); the Department of Agriculture, except so far as it operates under the Watershed Protection and Flood Prevention Act; and the military establishments—and the fact that statutes similar to the three which have just been mentioned have not been made applicable in these other areas could readily lead to the inference that it is Congress' intent that there shall not be compliance in these cases.

Whether this is good, bad, or indifferent is, of course, another question. One of the great difficulties in discussing it is the lack of any systematic survey or even of a good collection of concrete examples on the basis of which to appraise the practical effects of the present system and the probable effects of any proposed system.[136] We do not know, in anything even approximating tangible terms, in what ways the exercise of Federal powers in this field, whether by the creation of reservations or otherwise, actually interferes with the work of State engineers who have the job of administering water resources and we do not know, on the other hand, the extent to which a requirement that Federal administrators follow State laws in this respect would hamper them in carrying out the jobs that Congress gives them to do. The argument thus far has been couched largely in terms of the "rights" of the States and the "rights" of the Federal Government without sufficient attention being paid to the merits and demerits either of the present system or of any proposed system as they involve both routine daily operating problems and great, substantial conflicts of interest.

About the most that can be said is that prima facie the present diversity in Federal statutory provisions makes little sense and that, insofar as there has been experience under the Reclamation Act of 1902, there has been little or no serious complaint about the outcome.

There has been, moreover, little or no systematic attempt to analyze the blanket proposals to require compliance into their constituent parts and to assess the effects and the relative importance of requiring compliance, on the one hand, and of permitting noncompliance, on the other, to the Federal Government and the States on an example-by-example basis.

Is it, for instance, just as important to the States for the Federal legislation to cover nonconsumptive uses of water as it is for it to cover consumptive uses? Is it just as important to the operations of the Federal Government for it to retain freedom for an agency whose task is primarily to serve local people who, if they were serving themselves, would be bound by the laws of their State as it is to preserve freedom for an agency which is serving an urgent national need? Is the situation the same, and are the demands of the States equally persuasive, where the water development is an isolated one and where it is part and parcel of a multistate undertaking which might be frustrated if there were a requirement that the laws of any or all the States con-

[136] The Presidential Advisory Committee on Water Resources Policy, composed of the Secretaries of Agriculture, Defense and the Interior, recommended in its report of Dec. 22, 1955 (H. Doc. No. 315, 84th Cong.), that "a study be made by the Federal Government in collaboration with State and local entities to determine the relationships between property rights to water and the social and economic development of the Nation and the area, and of the principles and criteria which should be incorporated into Federal, State, and local laws regarding rights to the appropriation and use of water that would assure its best and most effective use and at the same time encourage maximum participation by all parties concerned." This study has not been made. If it had, answers might be available for many of the presently unanswered questions with which we are faced today.

cerned be complied with? Does it make any difference, either to the States or to the Federal Government, whether the congressional act makes clear that the intent behind it is to promote comity with the States[137] or whether it is couched in language which may lend force to a contention that it is an irrevocable quitclaim of whatever rights the United States now has?

Numerous other questions of this nature could be asked,[138] but those that have just been set out are enough to make clear that the problem is susceptible to something other than an all-or-nothing answer. Indeed, there are signs that all but the most ardent Federalists and the most ardent advocates of State control are beginning to realize this. The Administration's preparation of and its willingness to back most of H.R. 4567 is evidence of this on the Federal side and the exceptions contained in various of the other bills that go a lot further than H.R. 4567 are a sufficiently far cry from the days of H.R. 5735 of the 82d Congress to indicate a willingness on the part of State advocates to compromise a bit.

If this is so and if I am right in believing that the problem should be looked at primarily as one of working out a rational system for administering the water supplies which are available to us from river systems that pay little or no attention to State boundaries and of reconciling conflicting interests in a governmental system which includes both the Nation and the States, the task of framing appropriate legislation boils down to that of balancing the equities of both and the needs of both against each other and thus of attempting to arrive at a workable and not too controversial solution. The outcome may be legislation which is not completely satisfactory to anyone but which will, nevertheless, provide a more rational approach than we have at present.

There appears to be reasonably general agreement that the legislation need not or should not touch Federal activities which arise out of the United States' relations with Canada and Mexico and that, in spite of the wide implications of the *Winters* doctrine, the Indian activities of the United States can also be left uncovered. There would probably also be fairly general agreement that the improvement of navigation and the control of floods do not involve a use of water within any usual understanding of the word when it is used in the phrase "appropriation, control, use, or distribution of water" and that any requirement with respect to proceeding in accordance with State law for these purposes—except, perhaps, insofar as their fulfillment touches on the "vested rights" problem discussed earlier in this paper—can be omitted.

It is beyond these relatively noncontroversial areas that the dispute begins. Subject, however, to correction from those whose practical experience may cause them to arrive at a different conclusion, I believe that legislation can be drafted which will go a long way toward meeting the day-by-day needs of State administrators and will serve to make more nearly uniform the practices required of

[137] "In the interest of comity between the United States of America and the State of California" is the phrase that was used in sec. 2 of the act of July 28, 1954 (68 Stat. 570) relating to the Santa Margarita project.

[138] One that may be very important is this: Ought a distinction to be made, so far as requiring Federal officers' compliance goes, between those State laws which vest merely ministerial powers in the local officers and those that permit them to exercise considerable discretion?

Federal agencies which serve the public without interfering with their work in other cases where the advantages of preserving Federal freedom of action may outweigh the advantages of requiring compliance with State law or in which the need of the latter is not fully demonstrated.

Such legislation can begin with acceptance of nearly all[139] the provisions of H.R. 4567. It can recognize that there are rights to the use of water which are sufficiently "vested" that they ought to be paid for if they are taken. It can proceed on the assumption that the answers to the first three questions stated above are in the negative and that the answer to the fourth is in the affirmative. And, in order to overcome the obviously legitimate complaint on the part of the States and their administrators that they frequently do not know what Federal claims there are or what their extent is and thus are not in a position to advise would-be appropriators, it can supplement all of the above by providing for the maintenance of a public catalog of all claims of right to store, divert or use water on the part of Federal agencies whether they are required by other parts of the legislation to follow State law or not.[140]

Such legislation would, of course, have to be coupled with an understanding that it is not the last word, that exceptions may have to be grafted onto it from time to time by the Congress, and that it may also have to be supplemented by acts dealing with specific projects in cases where the need becomes apparent or even by general laws dealing with areas of concern which it leaves uncovered if, as, and when the picture is clearer than it now is. But with such an understanding, legislation along the lines just set out ought, as has already been said, to go a long way toward providing a practical reconciliation of the presently conflicting claims of the States and the Federal agencies in a field for which it is impossible to provide a panacea. This, at least, is the spirit in which these suggestions are made.

[139] The doubtful phrase here is "nor shall it affect the right of any State to exercise jurisdiction over water rights conferred by the Act admitting such State into the Union or such State's constitution, as accepted and ratified by such Act of admission." On this, see Assistant Attorney General Morton's remarks, *infra*, pp. 56 f. See also *Shannon* v. *United States*, 160 Fed. 870, 874 (C.C.A. 9th, 1908), in which the court, faced with the argument that the provision of the Montana admission act and the State constitution by which Montana was required to agree, and did agree, that all Indian lands should remain under the "absolute jurisdiction and control of the Congress of the United States" was an implied admission that other public lands were not so strictly governed, said: "* * * It is wholly unnecessary to enter into a discussion of the construction of this provision of the Constitution of the State of Montana. Congress had not the power to relinquish any of its jurisdiction over the public domain by any compact with that State, nor had that State the power to reserve any such control."

[140] Such a provision was included in S. 18, 82d Cong., as reported by the Senate Judiciary Committee. When the main portion of this bill was picked up and incorporated in sec. 208 of the Justice Department Appropriation Act, 1953 (66 Stat. 560, 43 U.S.C. 666), the provision was dropped. In its report on S. 18 (S. Rept. No. 755, 82d Cong.), the committee spoke of this provision as follows:

"Senator Magnuson also submitted an amendment to the bill which appears as sec. 2 of the bill. It requires the head of each department or agency of the United States and every corporation which is wholly owned by the United States to submit within a 2-year period of time to the Secretary of the Interior a complete list of all claims of right to use any stream or body of surface water in the United States. This list shall be supplemented properly as new claims and rights are made or other claims are abandoned or otherwise disposed of. A catalog of such claims is to be maintained by the Secretary, which shall be open to the public inspection, except when they may be barred from such inspection by reason of secrecy required by national defense.

"The committee is of the opinion that development of a catalog of this nature would be most salutary and that there should be a single depository where the water rights claims of the United States should be available for whatever purpose may be needed. This provision is not only helpful to all of the landowners who may be interested in the water rights of a particular stream but is exceedingly helpful to the United States in knowing where and how it can, on short notice, determine its holdings in this respect. This is a provision the committee believes should have been in force and effect long before now and believes that it will prove most helpful in the future administration and adjudication on questions of water rights, to say nothing of the incidental uses to which such a catalog may be made."

SUMMARY

It has been emphasized at various places above that we have a system of dual control of the Nation's streams and that it is this that gives rise to many of the problems with which the bills now before the committee are concerned. Though the points that this dual system is not new and that it is, indeed, virtually inherent in the structure of our Government—a Government which is neither, on the one hand, a mere confederation of States nor, on the other, completely centralized—need be no more than stated, they are, of course, well taken. Running through the discussion, moreover, are two sets of problems which, though the distinction between them was frequently blurred in the testimony before the committee, need to be kept separate: (1) those which involve consideration of the relations between individual water users' rights on the one hand and the rights or claims of the Federal Government on the other; (2) those which involve consideration of the relations between the States on the one hand and the Federal Government and its agencies on the other. The first is essentially a problem of deciding how fully "vested" the rights to the use of water which individuals have shall be treated as being. The second is essentially a problem of deciding how fully the administration of water resources, particularly of those water resources which are not now in use, shall be continued in or restored to the States.[141] The strength of the argument in favor of a Federal yielding or refusal to yield may well be greater in one case than it is in the other and it may well vary from instance to instance depending on what Federal activity is in question at the moment.

What is now called for, with these remarks as background, is an outline and summary of the kind of problems that we have and of why we have them:

(1) We have, on the one hand, the facts that, with few exceptions, our stream systems are interstate stream systems and that the sum of all the interests in any such stream system transcend those of any one State through which it passes and even, in some cases, those of all the States through which it passes.

[141] A common factor in both of these is the open-endedness of the Federal claims. Certainly life would be much simpler for State administrators and a tidier conceptual framework would be available to them and to State legislators if the *Winters* doctrine were not law, if Federal Power Commission licensees were obliged to secure permission to store and divert water as other users in accordance with State law, if there were no Federal navigation servitude, and if all Federal agencies which make use of the waters of any stream or of underground sources had to act in the same manner as private appropriators. Likewise, for the individual water user. He thinks of himself as having, and, he is commonly referred to as having, a "vested" right. The term carries with it a connotation of permanence and indefeasibility as long as he continues to put the water to beneficial use. But the open-endedness of Federal claims involves questions which bother him, too. How fully vested is a water right which may be set aside to satisfy navigation requirements? How fully protected is it against claims made on behalf of an expanding Indian use? What are its owner's rights as against those of others who derive their water supply from, say, a Federal project built for flood control and allied purposes?

To ask these questions is not to answer them or to suggest that there are not countervailing considerations on the Federal side of the picture. It is merely to say that they are serious questions which deserve serious consideration. In any event, however, it must also be noted that, even if all Federal claims could become close-ended, this would not furnish complete protection either to the individual States, subject as they are to the rule of equitable apportionment (*Kansas* v. *Colorado*, 206 U.S. 46 (1907); *Wyoming* v. *Colorado*, 259 U.S. 419 (1922); *Nebraska* v. *Wyoming*, *supra* note 119), or to the individual water users, subject as they are to the same rule as applied between the States and as embodied in interstate compacts (*Hinderlider* v. *La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)) and, at least in some Western States, to such hazards as those that rise from the pueblo rights doctrine (*San Diego* v. *Cuyamaca Water Co.*, 209 Calif. 105, 287 Pac. 475 (1930); *Cartwright* v. *Public Service Co. of New Mexico*, 66 N. Mex. 64, 343 Pac. 2d 654 (1958)).

(2) We have, again, the fact that our streams are being called on to furnish water for diverse and conflicting purposes. For instance, the full use of the flow of a stream, regulated or unregulated, to supply navigation requirements is (or, at least in many instances, may be) inconsistent with its use for irrigation. In most cases, these uses are uses by private interests and, though our problem is frequently phrased as though it were one of the Federal Government or of a Federal agency versus the States, it will more frequently be that of private interests operating under Federal auspices versus private interests operating under State auspices.

(3) We have a substantial body of law and doctrine under which the United States and its agencies exercise the power to control the streams for at least some purposes. Vast expenditures of Federal money have been made to accomplish certain of these purposes. In other instances, substantial non-Federal expenditures have been made in reliance on the Federal power and willingness to control.

(4) We have, on the other hand, the basic assumption that, to the extent that the United States does not act, the States may act to control these streams and we have, in addition, the fact that it has been left to the States, for the most part, to prescribe the rules by which private rights to the use of water may be acquired and, where such rights require administration, to provide the same. It is also a fact that, quite apart from any constitutional issue that may be involved, there is no inclination on the part of the Federal Government to disturb this arrangement in any wholesale fashion.

(5) We have, as a complement to and confirmation of this practice, the facts that Congress in 1866, 1870, and 1877 consented to the Western States' exercising the power to prescribe the rule by which local uses of water are to be governed and that it has never withdrawn this consent in terms. We have, as a further fact, the clear implication in the 1877 act that this rule is applicable only to the nonnavigable portions of any stream system.

(6) We have, as a fact, the existence of many rights to the use of water in the hands of private parties. Most of these originated in State law and practice. Some, however, depend on Federal law. The extent to which the former are fully "vested" also depends, to some extent, on Federal law.

(7) We have, as history, the fact that control, both Federal and State, over the use of water has grown enormously during the past 100 years and we have the probability that it will continue to grow during the next 100 years as demands increase. We have, therefore, the probability of greater and greater involvement as the years go on.

(8) We have, finally, the fact that in some instances Congress has required Federal agencies to conform to State law with respect to the appropriation, control, use and distribution of water and that in other instances it has not done so. Contrary implications can be drawn from this practice. It can be said, on the one hand, that it has been the Congress' historic policy to require such conformity in many instances and that, therefore, conformity should be the rule even when it is not required by law. It can be said, on the other hand, that the inclusion of the requirement in some cases and its omission in others is significant and that any Federal agency which goes out of its road to con-

form is taking an unauthorized step and, perhaps, casting a cloud on legitimate Federal rights which it ought not to cast.

All of these points need to be borne in mind in framing Federal legislation. Their consideration and a full discussion of the merits of the fears expressed by spokesmen for the States and for private water users would involve a thorough study of the relative benefits of the various uses to which water is being put and of the relative advantages of local control, central control, and dual control in achieving that complete use of the Nation's resources which is becoming more and more urgent. Unfortunately, the materials are not available for such a treatment and the problems, therefore, have to be assessed at this time as best they can be without the benefit of such a treatment. The suggestions that have been made above with respect to legislation that may be appropriate at this time, and the draft of bill that is attached to illustrate a way in which these suggestions may be implemented, are submitted both with this weakness very much in mind and with a realization that any solution that is proposed is likely to be somewhat controversial.

APPENDIX: DRAFT OF BILL

A BILL To promote comity between the United States and the States of the Union with respect to the administration of water, to strengthen rights to the use of water acquired under State law, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the purposes of this Act are to promote harmony between the United States and the States of the Union in the administration by the latter of their laws relating to the appropriation, use and distribution of water and to strengthen rights to the use of water acquired and exercised under those laws.

SEC. 2. (a) No withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter established, shall affect any right to the use of water acquired pursuant to State law either before or after the establishment of the withdrawal or reservation.

(b) No law of the United States under authority of which water is stored, diverted or developed by an agency of the United States for consumptive use or for the production of hydroelectric power shall be deemed to authorize the taking, without the consent of the owner of the right or, alternatively, payment of just compensation therefor, of a right to the use of water which was acquired and exercised for consumptive use in accordance with State or Federal law prior to enactment of the law of the United States and which was exercised with reasonable continuity thereafter in accordance with the law governing it.

(c) The head of any agency of the United States hereafter initiating a project which involves the storage, diversion, or development of water for the benefit of and consumptive use by persons who, if they were themselves undertaking the project, would be subject to State laws relating to the appropriation, use, and distribution of such water shall, to the extent that the project is for said purpose, proceed or require the beneficiaries of the project to proceed in conformity with those laws. The State laws referred to in this subsection, as they now exist or as they may hereafter be amended, are hereby adopted as laws of the United States to the extent necessary to carry out this subsection.

(d) Nothing contained in this section shall be construed as—

(i) affecting, impairing, diminishing, subordinating or enlarging (A) the rights of the United States or any State to waters under any interstate compact or existing judicial decree, (B) any right to the use of water heretofore acquired and maintained under Federal or State law by any person, (C) any right to any quantity of water used for governmental purposes or programs of the United States at any time after January 1, 1940 to the effective date of this Act, or (D) any right of the United States to the use of water lawfully initiated in the exercise of the express or necessarily implied authority of any present or future Act of Congress of State law to the extent that such right is senior to the rights of others acquired under State law; or

(ii) requiring compliance by an officer or agency of the United States with any State law the effect of which is to treat the United States less favorably than it treats any person subject to the jurisdiction of the State or to prohibit or unduly burden the storage, diversion or development of the waters of an interstate stream or stream system in one State for the benefit of persons in another State; or

(iii) permitting appropriations of water under State law which interfere with the provisions of international treaties of the United States.

SEC. 3. The head of any agency of the United States which constructs, operates, or maintains any project for the storage, diversion or development of water for consumptive use, for the protection or cultivation of fish and wildlife, or for the production of hydroelectric power shall file or cause to be filed with the Secretary of the Interior, in such form and detail as he may prescribe, a complete list of its claims of right with respect thereto. A like report shall be filed, as the Secretary may require, by or for every licensee, permittee

or ward of the United States whose claim of right is not based solely upon State law. Said list shall be supplemented and revised promptly as new claims are made and existing claims are abandoned or otherwise disposed of. A catalogue of such claims shall be maintained by the Secretary and, except for items therein which are certified by the head of a claimant agency to be of such importance to the national defense as to require secrecy, shall be open to public inspection, and copies thereof and of items therein shall, subject to the same exception, be furnished by the Secretary to any person who applies therefor and pays the cost of preparing the same.

SEC. 4. (a) Notwithstanding its rights with respect to the maintenance and improvement of navigation and of the navigable capacity of the streams of the United States, the United States hereby consents to the continued storage and diversion of water for consumptive use from any stream or stream system to which its jurisdiction extends by any person whose right so to store or divert (i) was established in accordance with the law of the State or States concerned not less than ten years before the enactment of this Act, (ii) has been exercised in accordance with those laws during said ten years and continues to be exercised with reasonable continuity hereafter, and (iii) is not in conflict with any right of the United States other than its right to use that water for the maintenance and improvement of navigation. This consent extends to storage and diversion in an amount equal to the average amount lawfully and beneficially stored and diverted during the ten-year period aforesaid, and in any contest with respect thereto or to other matters set forth in this subsection the burden of proof shall be on the person claiming the benefit of this consent.

(b) Any person to whom the consent given by subsection (a) of this section is not applicable or who wishes to store or divert water for consumptive use in an amount greater than that provided in said subsection may apply to the Secretary of the Army for a license so to do for a stated number of years and said Secretary shall grant such license unless he finds that the storage or diversion will interfere with the probable navigation requirements of the United States during said period and, in the case of storage or diversion in any State lying wholly or partially west of the 98th meridian for beneficial consumptive use in the same or another such State, that the use of said water for navigation will produce benefits substantially in excess of those which will probably arise from the use to which the stored or diverted water will be put. The grant or refusal of a license under this subsection shall be subject to review under the Administrative Procedure Act (60 Stat. 237), as amended (5 U.S.C. 1001 et seq.). Any such license shall be without prejudice to any right of the United States or, as provided by law, of its agencies to store or divert for any purpose (including the control of floods) other than navigation. No failure to apply for and secure a license as aforesaid shall, of its own force, render the storage or diversion unlawful, but such unlicensed storage or diversion shall be subject to abatement only upon proof that it, by itself or in combination with other storage and diversions, licensed or unlicensed, substantially adversely affects the use of the stream system in question, or some part of it, for navigation.

(c) Nothing contained in this section and no license issued pursuant to subsection (b) of this section shall be construed as (i) affecting the rights of any third party, or (ii) depriving any State of its right to the use of an equitable portion of the flow of any interstate stream or stream system, or (iii) precluding any agency of the United States, duly authorized thereunto, from requiring the release of stored water or the cessation of diversions when necessary for the maintenance or improvement of navigation upon payment of just compensation therefor, or (iv) requiring any agency of the United States to cease the storage or diversion of water or to release water which it stores for the maintenance or improvement of navigation except as provided by other laws of the United States, or (v) affecting any provision of the Federal Power Act (41 Stat. 1077), as amended (16 U.S.C., ch. 12), or the rights of any licensee thereunder.

SEC. 5. The inclusion in or omission from sections 2 and 4 of this Act of any matter shall not be construed—

(a) as a determination of, or a limitation upon, the rights, powers or privileges of the States under the Constitution of the United States with respect to the appropriation, use and distribution of waters within their borders or with respect to the adoption of such policies and the enactment of such laws relating thereto as they may deem necessary;

(b) except as specifically provided in said sections so long as they remain in force, as a waiver by the United States of its rights, powers, privileges or immunities under its Constitution with respect to the waters of any commercially valuable interstate stream or stream system or any other waters of the United States or of any rights to which Indians and Indian reservations are entitled under the laws and treaties of the United States.

SEC. 6. (a) Section 1 of the Act of March 3, 1877 (19 Stat. 377, 43 U.S.C. 321) is hereby amended by deleting the words "and not navigable,".

(b) Section 8 of the Act of June 17, 1902 (32 Stat. 390, 43 U.S.C. 383), and section 4 of the Act of July 3, 1956 (70 Stat. 484, 43 U.S.C. 485h–4) except the provisos thereto, are hereby repealed, but this repeal shall not affect their continued applicability to irrigation projects heretofore initiated by the Secretary of the Interior under the Federal reclamation laws.

SEC. 7. As used in this Act, the term "consumptive use" includes the use of water for municipal, domestic, agricultural, silvicultural, horticultural, stockwater, industrial and mining purposes; the term "person" includes any State of the United States and any political subdivision or agency thereof; and the term "State" includes the District of Columbia and any territory which has become a State.

SEC. 8. If any provision of this Act or the application thereof in any circumstances is held invalid, the remainder of this Act and its application in other circumstances shall not be affected thereby.

FEDERAL-STATE RELATIONS IN THE FIELD OF WATER RIGHTS [1]

(By the Honorable Hatfield Chilson [2])

President Eisenhower, in his 1957 state of the Union message, said: "Water, rapidly becoming our Nation's most precious natural resource * * *." Thereby recognition was again given to the fact that the conservation and development of the water resource is no longer a matter of concern solely to the arid and semiarid States of the West, but is a national problem.

And because it is a national problem, we can expect that it will progressively receive more and more attention by the Federal Government.

But the fact that it is a national problem does not in the least make it any less a State problem.

As we are well aware, conflicts exist between the Federal and State Governments concerning the respective rights and responsibilities of the Federal Government on the one hand and the State and local governments on the other in the water resource. Because of the increasing attention which will be given by the Federal Government to the water resource, we can expect the conflicts between the Federal and State Governments to become more acute.

To say the least, conflict and controversy is not conducive to that coordination of effort between the States and Federal Government which is so necessary if the Nation is to meet its rapidly expanding water needs.

There is now pending before the Congress proposed legislation to attempt to settle those areas of conflict which are creating the more serious rifts in Federal-State relationships in the water resource field. This legislation is of nationwide importance, but to the West it is vital and therefore justifies full, free and frank discussion.

I am highly pleased that the Department of Justice recognizes the great importance of this problem by sending one of its most able men, the Honorable Perry W. Morton, to participate in this discussion.

That the Federal Government has certain responsibilities and rights in the water resource and its use and development is admitted. For example, under the Federal Constitution,[3] the judicial branch of the Federal Government, the U.S. Supreme Court, has jurisdiction over controversies between two or more States and, thereby, that Court has the right in cases of controversy between two or more States to apportion the use of the water of an interstate stream among the affected States, as it did in the dispute between Kansas and Colorado over the use of the waters of the Arkansas River.[4]

[1] Address before the National Reclamation Association at its annual meeting, Oct. 29, 1959.

[2] Mr. Chilson is a member of the Colorado bar and former Under Secretary of the Interior. Since the delivery of this address Mr. Chilson has been nominated and confirmed as judge of the U.S. District Court for the District of Colorado.

[3] Art. III, sec. 2, Federal Constitution.

[4] *Kansas* v. *Colorado*, 206 U.S. 46.

Under the supremacy clause of the Federal Constitution,[5] all treaties are declared to be the supreme law of the land. Thereby the Federal Government has the responsibility and power to agree by treaty with foreign nations on a division of the water of international rivers.

Both of the foregoing powers supersede and override the rights of States to determine for themselves what use and disposition shall be made of the water flowing within their respective boundaries, and necessarily so. I mention them merely to demonstrate that there are areas of conflict between Federal rights and responsibilities and States' rights wherein the rights of the Federal Government are necessarily paramount, for most certainly the Federal Government must have the power to settle disputes between States and to enter into treaties on behalf of the Nation which are binding on all of the States. The only alternative is anarchy and chaos.

Let me now turn to another area of conflict between the rights of the Federal Government and States' rights. I refer to the so-called "navigation servitude."

The commerce clause of the Federal Constitution[6] states: "The Congress shall have power * * * to regulate commerce * * * among the several States * * * ."

By virtue of this power as construed by the U.S. Supreme Court, there can be no unqualified vested rights under State law in the appropriation and use of water of a navigable stream. Such rights are always subject to the overriding power of the Federal Government under the commerce clause to impair or destroy those rights for navigational purposes and without any compensation for such damage or destruction.[7]

This is a vast power, the extent of which can only be realized by remembering that the U.S. Supreme Court has applied the navigation servitude, not only to those streams presently used for navigation, but also to a stream which might be made navigable,[8] and a tributary nonnavigable in itself which flows into a navigable stream and which might affect the navigation thereof.[9]

Fortunately for the water users of the Nation, the exercise of the navigation servitude is not mandatory but is discretionary—the discretion residing in the Congress. Thus Congress may or may not exercise this right or may exercise it only in part. In addition, and this is most important, the Congress in exercising the navigation servitude may or may not provide for compensation for rights damaged or destroyed.[10]

And so again we have an area of Federal responsibility and right which conflicts with the States' rights and which, if improperly exercised, could have grave and far-reaching consequences.

We in the West have been cognizant of this sword of Damocles which has hung over the heads of water users who have established their rights under State law, and it was the western Congressmen and Senators who led the fight which resulted in a declaration of policy by the Congress in the 1944 Flood Control Act,[11] as follows:

[5] Art. VI, sec. 2, Federal Constitution.
[6] Art. I, sec. 8, subsec. 3, Federal Constitution.
[7] *U.S. v. Twin City Power Co.*, 350 U.S. 222.
[8] *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377.
[9] *First Iowa Hydro Electric Cooperative v. F.P.C.*, 328 U.S. 152.
[10] *U.S. v. Twin City Power Co., supra; U.S. v. Appalachian Electric Power Co., supra.*
[11] 58 Stat. 887.

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement for navigation or flood control as herein authorized, it is declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized, to preserve and protect to the fullest possible extent established and potential uses for *all* purposes of the waters of the Nation's rivers * * * .

In addition, the O'Mahoney-Milliken amendment to the 1944 Flood Control Act states:

> The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of water arising in States lying wholly or partly west of the 98th meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the 98th meridian of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes * * *.

Until recently the battle of the Western States for the preservation of water rights acquired under State law from the threat of the navigation servitude has been fought in the face of indifference and often opposition from other parts of the Nation. We are now gaining allies. As the consumptive uses of water in the States of the Middle West, East, and South have increased, these States began to realize the impact of the navigation servitude on their use of water for future growth and development.

Evidence of this interest was shown at congressional hearings in July and August of this year on western water legislation by the appearance at these hearings of representatives from Tennessee, Virginia, Arkansas, Mississippi, and Florida, all expressing interest in States' rights legislation nationwide in application and expressing concern over the power of the Federal Government to usurp and override water rights established under State law.[12]

I assume we shall have to live with the navigation servitude, at least for the foreseeable future, for I cannot conceive of any change in the commerce clause. We in the West have in the past and must continue in the future to look to the Congress for protection of our water rights, acquired under State law, from damage or destruction by the exercise of the navigation servitude. However, in this cause I am sure that we now have many allies among the States of the Middle West, East, and South.

So far we have discussed those rights and responsibilities of the Federal Government which are, or at least should be of interest nationwide.

Let us now turn to those conflicts which are of particular interest to the West. These conflicts center around rights claimed by the Federal Government by virtue of its ownership of the public lands.

To intelligently discuss these conflicts requires a review of some history and background.

Early in the western water development the issue arose of whether the ultimate control of the use and disposition of the water resource was in the States or the Federal Government. This issue raised questions, such as—who owns the water—the States or the Federal Government? Are the uses by the Federal Government governed by State

[12] Hearings before Subcommittee on Irrigation and Reclamation of the House Interior and Insular Affairs Committee on "Federal-State Relations in the Field of Water Rights," 86th Cong., 1st sess.

law or is there a dual set of laws—one applying to the Federal Government and another apply to other users?

These questions arose because the area west of the 98th meridian, with the exception of Texas, was largely acquired by the United States by cession from other countries and thereby the Federal Government became the sole owner and acquired full control over all property rights of every kind in that territory, subject only to previously existing rights of ownership. This property thus acquired by the Federal Government included, of course, the water resources. How, then, did the States acquire any rights therein?

At the time of discovery of gold in California in 1848, no statutory provision had yet been enacted by the Federal Government for the acquisition and enforcement of titles to the lands and water of the federally owned public domain. There was little civil government for handling civil controversies between the settlers.

As a natural result of these conditions, the miners developed their own rules, regulations, and customs governing their mining rights, and enforced them by community action.

Since early mining in California consisted of the working of surface gravels by hydraulic or placer methods, water was essential and, as a consequence, miners also adopted certain customs or principles governing the use of water for mining purposes.

Basically the principles adopted were those which we now recognize as the doctrine of appropriation—that the one first using the water has the prior right to the use of it to the extent of his needs, and diligence in the construction of a diversion system and continued use were required to hold title to the water use, just as similar standards in working the mine were required to hold title to it.

These basic principles were recognized by local court decisions and later were extended to other beneficial uses of water.

These customs governing the use of water had been in effect some time before Congress passed any legislation on the subject.

The first congressional act of July 26, 1866, resulted from insistence on the part of the western Members of Congress that rights of miners, including their right to the use of water, be recognized and confirmed by the Federal Government.

Other congressional acts followed, including the Desert Land Act of March 3, 1877. Among the court decisions construing the Desert Land Act is a decision of the U.S. Supreme Court rendered in 1935 stating that the Government, as the owner of the public domain, possessed the power to dispose of the public domain land and water, together or separately; that the intention of Congress, by the Desert Land Act of 1877, was to establish the rule that, for the future, the land should be patented separately and that all nonnavigable waters on the public domain should be reserved for the use of the public under the laws of the States and Territories.[13]

Between 1866 and 1954 some 16 different acts of Congress were enacted recognizing in one way or another the application of State law in governing the use of the water resource in the public land States.[14] Among these were the Reclamation Act of 1902 which directed the

[13] *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142.

[14] A list of these various acts is found at pp. 295 to 299 of the hearings before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 84th Cong., 2d sess., on S. 863.

Secretary of Interior to comply with State water laws in carrying out the program.

The Western States point to these statutes as their right and authority to control the use and disposition of the water resources, and various court decisions appear to confirm their position.

But the legal department of the Federal Government, the Department of Justice, did not and does not acquiesce in the States' claim of control. The position of the Federal Government was, and is, that, although those water users who have appropriated water under State law are protected in their water rights, nevertheless the Federal Government owns all unappropriated water of the public domain and, by virtue of that ownership, the Federal Government retains the ultimate right to control the use and disposition thereof. This position of the Department of Justice is not of recent origin. It is a position established and maintained over a long period of years and under many administrations.

In 1934 the Department of Justice presented this question of ownership and control for determination by the Federal courts in an action brought by the State of Nebraska against the State of Wyoming seeking an equitable apportionment of the waters of the North Platte River as between the two States.[15]

Time does not permit a recitation in detail of the arguments in support of the position of the Federal Government in that action. In essence, the basis of the claim was that the Federal Government was originally the owner of the water resource when it obtained title to the public domain; that the Desert Land Act of 1877 and other congressional acts were not an irrevocable recognition of States' rights but were, in effect, permissive or nonmandatory in nature and that thereby the Federal Government has not relinquished its ownership and control of the unappropriated water.

The Supreme Court did not determine these questions, pointing out that the Federal Government in that litigation was not an appropriator or user of water and that it was not necessary to determine the ownership of the unappropriated waters. The question has not yet been determined by the U.S. Supreme Court and the position of the States and the Federal Government remain essentially the same as set forth in the *North Platte* case and this unsettled question continues to be a sore spot in Federal-State relations.

This sore spot developed into a malignant cancer when the U.S. Supreme Court, in 1955, handed down a decision commonly known as the *Pelton Dam* decision.[16] This decision in itself did not create widespread alarm in the West because the question of water rights was not involved. The Court held in that case that a power company which desired to construct a power dam on the Deschutes River in Oregon did not have to obtain permission for this construction from the State of Oregon. The State of Oregon contended that the congressional acts of 1866, 1870, and the Desert Land Act of 1877 gave Oregon the power to regulate the use of the water of the Deschutes River.

The Court, in arriving at its conclusion, held that these congressional acts apply only to the "public lands" and that the lands upon which the dam was to be built were not "public lands" because they

[15] *Nebraska* v. *Wyoming*, 325 U.S. 589.

[16] *Federal Power Commission* v. *Oregon*, 349 U.S. 435.

had been reserved by the Federal Government for power site purposes. The Court reasoned that the Desert Land Act, providing for disposal of the public domain, is inapplicable to lands which are unqualifiedly subject to sale and disposition because they had, by reservation of the Federal Government, been appropriated for some other purposes.

Although this decision did not involve water rights, it was immediately used by the Department of Justice in the *Hawthorne* case in Nevada and the *Blue River* cases in Colorado to assert that, when any portion of the public domain has been withdrawn or reserved by the Federal Government for any purpose, there immediately vests in the Federal Government as of the date of withdrawal or reservation a right to use all water necessary to carry out the purposes of the withdrawal. As a consequence any rights to the use of water initiated after the date of the withdrawal are subject to the rights of the Federal Government even though those rights may not be exercised for many years thereafter.[17]

In other words, under the theory of the Department of Justice any right to the use of water initiated under State law after the date of a reservation or withdrawal of public land is merely a squatter's right. If and when the Federal Government desires to use the water for the purpose of the withdrawal or reservation, it may deprive the user of water who obtained his rights under State law without compensation therefor. Since statutes of limitation do not run against the Federal Government, the squatter's right can never ripen into a title superior to the rights of the Federal Government.[18] As soon as the word spread of this position of the Department of Justice, consternation reigned among water circles in the West and the reaction was immediate.

The reason for this reaction was well stated by Mr. Justice Douglas in his dissenting opinion in the *Pelton Dam* decision wherein he stated his reasons for such dissent in the following words:

> The reason is that the rule adopted by the Court profoundly affects the economy of many States, 10 of whom are here in protest. In the West, the United States owns a vast amount of land—in some States, over 50 percent of all the land. If by mere executive action the Federal lands may be reserved and all the water rights appurtenant to them returned to the United States, vast dislocations in the economies of the Western States may follow. For the right of withdrawal of public lands granted by the 1910 act is not only for "waterpower sites" but for a host of public projects—"irrigation, classification of lands, or other public purposes." Federal officials have long sought that authority. It has been consistently denied them. We should deny it again. Certainly the United States could not appropriate the water rights in defiance of Oregon law, if it built the dam. It should have no greater authority when it makes a grant to a private power group.

After this decision there was introduced into the Congress of the United States the so-called Barrett water bill[19] which proposed to settle once and for all, by congressional act, not only the claimed effect of the *Pelton Dam* decision, but also the longstanding claim of Federal ownership and control of the unappropriated water of the public domain.

[17] *State of Nevada* v. *U.S.*, case No. 1247, U.S. District Court for the District of Nevada (*Hawthorne* case); Actions 5016 and 5017 in the U.S. District Court for the District of Colorado (*Blue River* cases).
[18] See hearings before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 84th Cong., 2d sess., on S. 863, pp. 252 and 253.
[19] S. 863, 84th Cong.

This legislation was primarily designed to require the use of water in the Western States including uses by the Federal Government to be acquired in accordance with State law. The Department of Justice takes the position, with regard to this legislation, that to require the Federal Government to obtain its rights to the use of water under State law would be unconstitutional. The Department points to the property clause of the Federal Constitution,[20] which states:

> Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States * * *.

The Department of Justice, as I understand its position, freely admits that Congress has the power to convey to the States all of its interest in the unappropriated water which the Federal Government claims to own, with the exception of its rights under the commerce clause. But, says the Justice Department, Congress has never done so and until it does the unappropriated waters are still property of the Federal Government, and for the Congress to provide that the use of that property shall be in accordance with State law is an unconstitutional delegation of congressional authority and that Congress and Congress alone must prescribe the rules of use.[21]

It may be trite to say that water is the lifeblood of the Western States, yet without it the economy would wither and die. Consequently, the interest of these States in the water resource is probably paramount and superior to any other.

The Federal Government also has a great stake in the water resource development of the West. It has an interest in water development for the use or its own properties, including the public lands. It has constructed great dams, reservoirs, and irrigation systems to provide water for private and public users other than the Federal Government. The national interest and the Federal investment in the West justify a great interest on the part of the Federal Government in the conservation and development of the water resource.

But the sad fact is that both the States and the Federal Government must look to the same water resources for their water supply.

It seems obvious that the use of two systems of water law—one for the States and their citizens and one for the Federal Government—all pertaining to the same water supply, is impractical and can lead only to controversy, confusion, and chaos.

It is also obvious that if the Federal Government has vested water rights as a result of the withdrawal or reservation of public land from sale and entry, there is little if any water left in most of the Western States to which title to the use thereof can be established for future development by appropriation under State law. The title has already vested in the Federal Government. The millions of acres of land that are in a withdrawn or reserved status includes the national forest, the national parks, power site withdrawals, oil shale withdrawals, military withdrawals, and many others. As of June 30, 1955, 23,243,000 acres of land in Colorado alone were in a withdrawn or reserved status.

The States, their political subdivisions and their citizens are in a difficult position indeed when they initiate water projects in the face

[20] Art. IV, sec. 3, Federal Constitution.
[21] Hearings on S. 863, 84th Cong., supra, p. 255.

of the claim that the Federal Government can, at any time in the future when it desires water for the use of withdrawn or reserved lands, deprive these prior appropriators of their water rights.

What is the solution?

The importance of proper water conservation and development, particularly in the Western States, dictates that these basic controversial conflicts between the States and Federal Government should be determined as a matter of policy by the Congress and not by piecemeal litigation. The *Pelton Dam* decision is a good example of the confusion which can result by attempting to determine these questions by the judicial process.

This matter has been before Congress since 1956, when S. 863 (the Barrett water bill) was introduced in the U.S. Senate. The matter is still before Congress in the form of several bills, and considerable progress has been made.

One bill which was proposed by the Department of Interior is designed to eliminate the claims of the Federal Government under the *Pelton Dam* decision to the vesting of water rights by virtue of withdrawals or reservations of public land. This proposal has the support of the administration, including the support of the Department of Justice. It would appear highly advisable to press for the passage of this legislation while it has full administration support.

There is also pending in the Congress legislation similar to the Barrett water bill which is designed not only to eliminate claims of the Federal Government based on the theory of withdrawal or reservation of land, but designed also to make it clear that all rights to the use of water, whether by the Federal Government, private appropriators, or political subdivisions, shall be obtained in conformity with State laws. Some of the Federal departments and agencies support this legislation; others believe that the Federal Government cannot and should not be required to obtain its rights to the use of water in accordance with State law.

To us in the West it seems only reasonable that the Federal Government should be bound by the same rules of priority of water use as are its citizens. To the extent that Federal needs may be overriding, the necessary water supply may be obtained by the power of eminent domain.

As I have previously stated, we are gaining support in other parts of the Nation for our comprehensive water legislation. As an indication of the support which might be expected is a recent statement of Senator James O. Eastland of Mississippi who said with reference to the pending water legislation:

> I believe that this proposed legislation is of such importance that a comprehensive bill should be reported and passed at this session of the Congress. This is a propitious time for us to unite and enact adequate and comprehensive legislation to protect the water resources of all the States, the arid as well as the humid, against further encroachments by the Federal Government.

In conclusion, I repeat my opinion that a dual system of water rights and water control and use, one set of rules applying to the Federal Government and another set of rules applying to other water users, can only result in confusion and chaos.

Future development of the water resources in the West will require more and more the cooperation of the States and the Federal Government. As time goes on, water development becomes more complex and more expensive. If the supply is to keep pace with the demand, it will require the cooperation, coordination, and best efforts of Federal, State, and local governments and public and private institutions, and private citizens.

So long as the conflict between the Western States and the Federal Government exists over what law and what rules and regulations shall govern the control, use and distribution of the waters of the Western States, so long will the ill will, mistrust, and fear engendered by this conflict continue to hamstring and hinder the close and harmonious Federal-State relationship in the water resource field which is so essential for the welfare of the West and the Nation.

FEDERAL-STATE RELATIONS IN THE FIELD OF WATER RIGHTS[1]

(By the Honorable Perry W. Morton[2])

You have honored me by your invitation to appear on this program of your annual convention. There are several reasons, apart from my official status, why I found this opportunity personally attractive.

For one thing, I am delighted to be again in Denver, Colo., where I first set foot 47 years ago and where I have spent so many happy days of my life. The earlier trips from my hometown of Lincoln, Nebr., were in the years before the Moffat tunnel, when access to Granby was by rail over Corona and the trip to Grand Lake had to be completed by stage coach. I hope I don't look that old, but I am. I remind those who may not be as well acquainted with local geography that Grand Lake is the high point of one of the largest and most useful of the reclamation projects in the United States. I know almost every foot of it on the ground.

Then, too, this association is identified, in my mind, with a fellow townsman, C. Petrus Peterson, one of your highly honored past presidents. This affectionate acquaintance goes back much more than a generation to when Senator Peterson was city attorney and my maternal grandfather was for nearly 40 years the water commissioner in Lincoln. Senator Peterson's office today is in exactly the same room which was my private office when I left Lincoln in 1953 to assume my present duty in Washington.

Finally, it is a real personal pleasure for me to have this part in a discussion with my good friend Hatfield Chilson, former Under Secretary of Interior, who rendered distinguished public service and earned the respect of all who worked with him while he was in Washington. If I fall into the habit of calling him "Chilly," it is because that is his nickname, and not because it has any reference to some of the remarks he has made here about the views of the Department of Justice.

Beyond these expressions of my personal pleasure in being here, I want to emphasize on behalf of the Department of Justice my appreciation of your invitation. To the best of my knowledge, this is the first time a representative of the Department has ever appeared on your platform.

Having accorded me the courtesy of your invitation, I trust that you may also believe that I am—both personally and officially—just as much interested as you are in a national policy for the sound, comprehensive development and conservation of our country's water resources. I should like to overcome as far as I am able, any idea which may be held that there is something sinister about performing

[1] Address before the National Reclamation Association at its annual meeting, Oct. 29, 1959.

[2] Mr. Morton is Assistant Attorney General of the United States in charge of the Lands Division of the Department of Justice.

the duties incumbent upon the Department of Justice in representing the interests of all the people who compose the United States.

I am reminded of the hearings held about 3 months ago before a committee of Congress on several pending bills related to the general subject of water rights.[3] Witness after witness appeared before the committee making extravagant statements about actions and positions of the Department of Justice. A pile of legislative resolutions was offered for the record. From the similarity of their language it was perfectly apparent that carbon copies had been peddled around from one State to another by the same lobbyist. To your credit, it was not a representative of this association. Practically all of these resolutions contained a "Whereas" which, with minor variations, said that:

> * * * recent decisions of the Federal courts and recent rulings of the U.S. Department of Justice have deprived States and individual persons of rights which said States and persons previously enjoyed in the regulation and control of the use of water in their respective States; * * *.

Yet, time and again several of these same witnesses were asked by members of the committee, especially two of the distinguished Congressmen from this State, Mr. Aspinall and Mr. Chenoweth, whether they could give the committee a single example of a pending case in which "rulings" of the Department of Justice or the positions which it had asserted had deprived anyone of property without just compensation. And the answer in more than a dozen such instances, without exception to the contrary, was that the witness did not in fact know of any such case.

I am keenly aware that there are controversies. While we live in this world, I don't suppose that anyone will ever invent a way to avoid controversies. I was impressed during the recent visit of Mr. Khrushchev with the fact that controversies are one of the luxuries of our way of life. One of our most priceless heritages is our freedom to disagree. There would not be such a great body of court decisions in the field of water law if individuals did not have controversies between themselves, or individuals with their State governments, or municipalities with their States. And so forth.

Multi-purpose development of our water resources by its very nature involves serious competition between the various interests affected. For limited illustration, flood control and navigational factors may be the functional antithesis of irrigation or power factors, and, depending on geography, irrigation, and power develpoment may themselves be in conflict. These functional conflicts are the breeding grounds of legal conflicts. But I suggest that it is a mistake to keep the glare of a spotlight focused always on the idea of conflict. I submit that we will get ahead much better if we can orient our thinking to emphasize the very substantial areas of agreement and the possibilities of cooperation.

In tune with this thesis, I should like to associate myself with the remarks of the distinguished gentleman from Colorado, Congressman Aspinall, who said at the opening of the recent committee hearings:

> The problem is too complex to be settled in any such summary fashion as saying no more, on the one hand, than "States rights" or, on the other, "supremacy clause of the Constitution." Neither of these settles any questions, however attractive it may be as a rallying cry.[4]

[3] Hearings on "Federal-State Relations in the Field of Water Rights," before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, House of Representatives, 86th Cong., 1st sess. Government Printing Office, 1959.

Notwithstanding natural differences in points of view, I would hope that all may recognize as an ultimate goal the establishment of programs which will look to the best interests of the Nation as a whole, which will give recognition to the legitimate interests of the States and the people directly affected by water development, and which likewise recognize the proper and necessary concerns of the National Government.

I have no difficulty in accepting, without substantial amendment, a great deal of what my brother Chilson has had to say to you. He has, for example, made passing references to certain provisions of the U.S. Constitution, such as the judicial power under article III,[5] the supremacy clause in article VI,[6] the property clause in article IV,[7] and the commerce clause in article I.[8] My own remarks will soon narrow down to a discussion of some of the matters most directly related to the property clause. But I wish first to summarize some thoughts about the commerce power as to which I think we are in complete agreement notwithstanding some of the less than objective discussions we sometimes hear.

From the standpoint of governmental *power*, the interest of the United States in the flow of a navigable stream originates in the commerce clause. That clause speaks in terms of governmental power, not of property. There may be vested property interests in the use of navigable water, but those interests are held, and since 1789 have been held, subject to the exercise of the commerce power. Congress may by inaction allow the power to remain dormant, or it may exercise the power in a variety of ways to less than its full extent. But it cannot surrender the power itself. If it expressly decides to exercise the power to its fullest extent all competing interests are displaced and the flow of the river is appropriated for the declared public purpose.[9] No matter how solemnly one Congress may declare a policy against the exercise of the power, it cannot bind a future Congress to the same decision. It cannot even bind itself against contrary action in the next 5 minutes. On the other hand, for so long as it does not change its mind either particularly or generally, it can provide compensation for the infringement of private rights existing under state law. This is the result reached in the *Gerlach*,[10] *Niagara-Mohawk*,[11] and other such cases, and must be accepted as the law.

Passing reference was made in the previous paper to the "vast" extent of the commerce power extending to any stream which might be

[4] Ibid., p. 21.

[5] Art. III, sec. 2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to Controversies to which the United States shall be a Party; to Controversies between two or more States; * * *."

[6] Art. VI (second par.): "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."

[7] Art IV, sec. 3, clause 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *."

[8] Art. I, sec. 8, clause 3: [The Congress shall have Power] "to regulate Commerce * * * among the several States, * * *".

[9] *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956); *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1913).

[10] *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

[11] *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954).

made navigable, and to nonnavigable tributaries the flow of which may affect navigation. This is, of course, an epitome of the holding in the famous *New River* case[12] in 1940. I agree with my brother Chilson that we probably aren't going to have any change in the commerce clause in the foreseeable future. And I would also be curious to know what harm this has done in our 170 years of constitutional history. I do not read the *New River* case as permitting absurdities. In the very same opinion I find this:[13]

> The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful.

In all the talk about it, have you ever heard that before? It's there. Does that sound to you like a disposition toward irresponsibility?

But I submit that altogether too much of the *difficulty* which has confounded discussions of the general subject has resulted from a failure to distinguish between concepts of governmental power—which means control—on the one hand, and concepts of property, on the other hand. The two ideas have a way of getting all mixed up together in the same sentence.

Water rights are property rights if they are water rights at all. No thoughtful lawyer could have a different opinion. To hear and read some of the discussions however—and I do not now refer to the discussion by my brother Chilson because I know he knows better—one would suppose that the United States has no property rights in the use of water. In this view, by some strange performance of metaphysics, semantics or rationalization, everybody else has property rights but the United States has none.

The fact is that while the United States has a bundle of constitutional powers it also has a big bundle of property rights. This fact presents great opportunities as well as responsibilities, but it is also at the root of some of the problems. The 17 reclamation States contain 61 percent of the entire area of the first 48 States, and in those 17 States nearly one-third of the land is federally owned.[14] The significance of this figure is emphasized when I add that in Texas there is no "public land," as distinguished from "acquired land," belonging to the United States. Much of the public domain in the Western States has been set aside by congressional or executive action down through our history for various present or anticipated future Government use, and the legal effect of such withdrawals or reservations has been to remove such lands from private entry or acquisition under the various "public land" laws.

This is the background on which the much discussed *Pelton Dam* case[15] rests. A digest of it was given in Mr. Chilson's paper and I will not repeat. I have no hesitancy saying that I think the case was correctly decided. But that is beside the point. The decision stands as a fact of life. We don't solve anything by just wishing that the

[12] *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940).
[13] 311 U.S. at p. 407.
[14] Computed from tables in "Inventory Report on Real Property Owned by the United States," as of June 30, 1958, prepared by General Services Administration. Exact percentage is 32.2 instead of "one-third" as to federally owned land in these 17 States. But this is an average from a low of 0.7 percent in Kansas to a high of 86.2 percent in Nevada. In Texas the percentage is 1.6, but all of that is "acquired" land, not "public domain." It should also be noted that so-called "trust properties" (including many Indian reservations held in "trust" status) are not included in any of these statistics.
[15] *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955).

problem would go away. Nor do I understand those who seem to think that the Department of Justice can do other than follow and support what it believes to be the law. The only real questions are what should be and then can be done about it, if anything.

So, without the decision itself being at any fault in legal principle, in my opinion, I think it may fairly be said that some of the inferences which may be drawn out of the case have given rise to substantial anxieties about the security of western water rights where so much of the available water rises on or flows across the reserved lands of the United States. Note this: In the case of a licensee, the Power Act requires the protection of vested rights. But what if the Government itself in the near or distant future decides to develop and use these water resources on its own reserved lands? That is the haunting question. This is a sword of Damocles which some have considered to be hanging over their heads.

The solution of the problem is not simple. Several different kinds of bills have appeared in recent sessions of the Congress on this and related matters. As to many of such bills I will make a few general observations later. But at this point I refer to one kind of proposal[16] now under serious consideration which I think would lay to rest the anxieties which have been attributed to the *Pelton* case while at the same time reasonably protecting legitimate Federal interests and vital Federal programs. Mr. Chilson referred to this as a proposal of the Department of the Interior and, indeed, he should know because he is the very same Hatfield Chilson who, as Acting Secretary of Interior, signed the letters which submitted this proposal to Congress in May 1958. I trust it may not be entirely irrelevant for me to add that this proposal as then submitted was actually composed by Elmer Bennett and me in a course of personal meetings extending through almost a year. Mr. Bennett was then Solicitor and is now Under Secretary of Interior. I have seen the endorsement given to this proposal by your association, and one of the many reasons I wanted to come here was to thank you for it. Subject to certain saving clauses which we do not have the time to consider, this proposal would provide, very simply, that the withdrawal or reservation of public lands heretofore or hereafter established shall not affect any right to the use of water acquired pursuant to State law either before or after the establishment of such withdrawal or reservation.

Let no one suppose that such legislation would not involve costs in terms of some future Federal developments. It would. It might even make some possible Federal projects fiscally infeasible. On balance, however, I believe that this particular proposal is one which deserves the prompt consideration of the Congress as a possible means of encouraging State, local, and private development of our western water resources.

I turn my attention now for the remaining minutes to the rather extensive discussion in the previous paper of the question related to

[16] This refers to a proposal set out in letters of the Secretary of the Interior to the chairmen of the Senate and House Committees on Interior and Insular Affairs in May 1958. The submission of this proposal had the concurrence of the Departments of Defense, Justice, Interior, and Agriculture, and the Bureau of the Budget. The text of that proposal is attached as annex A [omitted in this reprint of Mr. Morton's address]. Certain bills now pending in Congress, S. 851, H.R. 4567, and several identical House bills, have been largely patterned upon the proposal mentioned. These identical bills are objectionable to the extent of an extraneous addition to sec. 1, not contained in the May 1959 proposal; and it has been strongly recommended that such addition be deleted.

the so-called ownership of unappropriated water. In this short space, precision of statement must be sacrificed to broad generalities. I don't think it is a question which can be satisfactorily or accurately discussed until it is related to the facts of particular cases. But even so—with this warning and for today's purposes only—I will undertake a little of it.

It is not surprising to me that my brother Chilson takes the views which he has expressed. They are the natural consequence of his Colorado origins and practice. But as I understand them, they represent the minority view of the reclamation States by their own court decisions. As I am sure many of you already know there are 17 bodies of water law—not one—in the 17 reclamation States. But, with some variations, there are two primary, historic theories as to the source of title to the use of water acquired by appropriators. One is the so-called Colorado doctrine which Mr. Chilson has advanced. The other is the so-called California doctrine, which text writers have classified as the majority, historic, and correct view. I would like to claim credit for the invention of the California doctrine, because I think it is basically and logically correct. But the fact is that it existed as a result of *State* court decisions several decades before I was born. It certainly was not an invention of the Department of Justice.

Under the California doctrine, the right acquired by prior appropriation on the public domain is considered to be founded on a grant from the U.S. Government as the original, sole owner of the land and water. This is the only doctrine which can possibly explain the coexistence of riparian rights and appropriative rights in a majority of the Western States. This doctrine does not ignore the existence of the acts of 1866,[17] 1870,[18] and 1877,[19] to which Mr. Chilson has referred. Rather it recognizes them for what they are: Acts of Congress, and thus *Federal* law. True, appropriative rights are obtained under this doctrine "in the manner provided by" local law and custom, but the rights themselves—that is the title—are deraigned from the United States.

The Colorado doctrine, on the other hand, argues that in some way, the title to the use of water was surrendered by the General Government to the respective Western States, and that at least from then on title to the use of water is deraigned from the State, and not the United States. It is sometimes said that this transfer from the National Government to the States was accomplished as an incident of statehood. This stems from the idea that States are admitted on an "equal footing."[20] But that argument does not hold water—if I may use a pun—because that is not what "equal footing" means, as shown by numerous decided cases.[21]

Another argument proceeds on the theory that the transfer of ownership resulted from some kind of contractual consequence of the congressional acceptance of the State constitutions containing some reference to water. But if that is sound, how did the title pass in at least 13 of the 17 reclamation States, which either had no constitution

[17] Act of July 26, 1866, 14 Stat. 253, see 43 U.S.C. 661, and also 30 U.S.C. 51.
[18] Act of July 9, 1870, 16 Stat. 218, see 43 U.S.C. 661.
[19] The Desert Land Act of Mar. 3, 1877, 19 Stat. 377, 43 U.S.C. 321.
[20] The expression does not appear in the Constitution itself, art. IV, sec. 3, clause 1; but is frequently used in court decisions and acts of Congress relating to the admission of States.
[21] E.g., *United States* v. *Texas*, 339 U.S. 707 (1950.)

yet in existence or had a constitution that made no pertinent mention of water when Congress acted with respect to their admission?[22] And how could it even be true today in about half of the 17 reclamation States whose constitutions still contain no pertinent reference to the subject?

The next contention is that this transfer of title took place somehow as a result of the Desert Land Act.[23] I have already commented on the Desert Land Act in respect to the California doctrine. But how could the Desert Land Act have accomplished this at all in those of the 17 reclamation States to which the Desert Land Act has never extended?[24]

I would ask next how, under any of the foregoing arguments, the theory of State ownership, explicit in the Colorado doctrine, can be reconciled with numerous Supreme Court decisions in this field? I agree that the question was not decided in *Nebraska* v. *Wyoming*,[25] or in the *Ivanhoe* cases[26] last year. That simply means that it was not in those cases decided either way. But what about the so-called reservation cases?[27] If the title has passed to the State how can the United States reserve it for the use of anybody?

Finally, why, if the title is already in the State, is Federal legislation now sought? Certainly Congress has no power to act with respect to property, the title to which has already vested in the State.

It seems to me that this series of questions exposes the fallacy of the so-called Colorado doctrine, and shows the logical necessity of thinking in terms of the historic California doctrine if we are to arrive at any realistic conclusions.

This does not at all mean that States are incapable of legislating within their own proper spheres. I doubt that the rationale of these relationships has ever been better summarized than it was by these words in the 1899 opinion of the Supreme Court in the *Rio Grande* case:[28]

> 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

[22] The exceptions are:
Texas: The Texas situation differs from all other States because of its immediately prior independence and its retention of "all the vacant and unappropriated lands lying within its limits. * * *." The United States never owned any "public land," as distinguished from "acquired land," in Texas.
Idaho: The Idaho constitution of 1889, art. I, sec. 14, and art. XV, contained extensive provisions related to water. Idaho was admitted by the act of July 3, 1890, which "accepted, ratified and confirmed" this constitution.
Wyoming: The Wyoming constitution of 1889, art. I, sec. 31, and art. VIII, contained extensive provisions related to water. Wyoming was admitted by the act of July 11, 1890, which "*accepted, ratified and confirmed*" *this constitution.*
New Mexico: The situation here is less clear. The New Mexico constitution of Jan. 21, 1911, art. XVI, declared, inter alia, that the "unappropriated water" belonged "to the public * * *" subject to appropriation "in accordance with the laws of the State." That is not, of course, equivalent to any declaration of State ownership, and in no sense tantamount to a grant from the United States. This was followed by the congressional J. Res. of Aug. 21, 1911, 37 Stat. 39, which required certain amendments to the New Mexico constitution, but the amendments did not involve anything on the subject of water. Following the adoption of such amendments the President proclaimed the admission on Jan. 6, 1912, 37 Stat. 1723.
[23] See footnotes 19 and 20.
[24] The situation cannot, of course, be present in Texas because Texas was never a "public land" State, as previously noted. But the Desert Land Act was never extended to Kansas, Nebraska, New Mexico, and Oklahoma.
[25] 325 U.S. 589 (1945).
[26] Four cases, 357 U.S. 275, June 23, 1958: *The Ivanhoe Irrigation District and the State of California* v. *McCracken, et al.*: *The Madera Irrigation District and the State of California* v. *Steiner, et al.*: *The Madera Irrigation District* v. *Albonico*: and *The Santa Barbara County Water Agency* v. *Balaam, et al.*
[27] Example: *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955).
[28] *United States* v. *Rio Grande Irrigation Company*, 174 U.S. 690 (1899).

State cannot by its legislation 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 Government property."

(The "Second" point relates to the navigation servitude, not here apposite.)

Some of the legislative proposals have been devised in terms of requiring the United States and its officers to submit to State law not only in the acquisition of any necessary water rights for all Federal projects but also in the administration and operation of the projects themselves. Here is where we get all mixed up—as I said before—between the concept of governmental power, on the one hand, and property, on the other hand. From the standpoint of property rights, while anyone might question the prudence of it, I doubt that anyone could question the power of Congress to give away property. I think it is also competent for Congress to say to Federal officers that they shall conform to State law *as far as they can* without defeating the Federal purpose in the acquisition of water rights.

But the rub comes when State law either does not make adequate provision for the needs of a particular Federal project or program or when it makes provision incompatible with the accomplishment of the Federal purpose. The Interior Department itself has pointed out, in its reports on some of the pending bills, that some State laws do not even recognize some of its own programs as beneficial purposes. And if this is true of the Interior Department, it is a fortiori true of many programs administered by other departments. I think that my brother Chilson misses the mark when he argues that there should not be two bodies of so-called water law—one Federal and one State. No one that I know of proposes that there should be any general body of Federal water law. The fact is that there are 17 bodies of State water law in the reclamation States. When Congress authorizes and directs a Federal department or officer to construct and operate a project or conduct a program within its own sphere of delegated powers, the Constitution does not permit a construction which subjects that direction to the choice of consent or veto by any State or State official. And that has been the organic law since at least 1789. Never has this been more succinctly stated than in the 1931 decision of *Arizona* v. *California*, in 283 U.S.,[29] where the Court said: "The United States may perform its functions without conforming to the police regulations of a State." On any issue of control, whether it be water resources development, or the construction and operation of a post office, or anything else within the sphere of delegated powers, that is the law; and after 170 years we may just as well get used to it. Because I don't think we are going to change it. Else, we would go back to the Articles of Confederation in place of the Constitution.

There has been some very loose talk about the so-called delegation of the power of Congress to State legislatures. The argument seems to be based on some kind of an agency theory—that Congress, as principal, can give a sort of power of attorney to the State legislature as its agents. Now this may well be true, in a manner of speaking, as to

[29] *Arizona* v. *California*, 283 U.S. 423, 451 (1931).

the acquisition of private, third party rights. And, in that sense, it may be true of the acts of 1866, 1870, and 1877.[30] But who ever heard of an agent telling his principal whether or not he—the principal—could or could not do thus and so—and get away with it.

The old *Butte City Water Co.* case,[31] of 1905, has been cited as authority for the proposition that Congress can provide for the application of "local customs or rules of miners" in determining a part of the criteria for the disposal of mineral land. The Court held that "* * * Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands." But the point which seems always to be missed, in the references to this case, is that the "minor matters" thus left to determination by the content of State law and custom became *Federal* law, by adoption—not by delegation. The case is no authority whatever for a contention that local custom or State law can be effective to control the performance of the constitutionally authorized functions of the United States itself.

Similarly, the recent case of *United States* v. *Sharpnack*,[32] 1958, has been cited. That case had to do with the Assimilative Crimes Act[33] which make State criminal statutes applicable within Federal enclaves. But, here again, that act was sustained on the ground that it was a "deliberate continuing adoption" of State law regarding criminal offenses. There is nothing in the case which sanctions *delegation* of legislative power. The *adoption* of certain State criminal laws simply made them a part of the body of *Federal* law to be enforced by *Federal* officials in the administration of *Federal* justice. Thus, this case, too, has to do with the *exercise* of Federal legislative power—not the delegation or *abdication* of it. It is no authority whatever for a contention that State law, *as* State law, can control, regulate, or veto the exercise of the constitutionally authorized functions of the United States.

So in closing, I return to the quotation from *Arizona* v. *California*,[34] that "The United States may perform its functions without conforming to the police regulations of a State." You may remember that is the case in which Arizona sought to prevent the construction of Boulder Dam on the ground that the Secretary of the Interior had not submitted the plans and specifications to the State engineer for approval. I should think it might be enough, to this audience, for me to point out that if the law were different—as I do not think it can be—we would not today have the complex and highly beneficial development of the lower Colorado Basin. We would not today have the Central Valley development in California—if the recently overruled decision of the California Supreme Court were controlling in

[30] In *Federal Power Commission* v. *Oregon*, 349 U.S. 435, the Court emphasized that these acts did not operate as a grant to the State, but were effective only "for purposes of private acquisition." The pertinent sentences are: "The purpose of the acts of 1866 and 1870 was governmental recognition and sanction of possessory rights on public lands asserted under local laws and customs. *Jennison* v. *Kirk*, 98 U.S. 453. The Desert Land Act severed, for purposes of private acquisition, soil and water rights on public lands, and provided that such water rights were to be acquired in the manner provided by the law of the State of location. *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142. See also, *Nebraska* v. *Wyoming*, 325 U.S. 589, 611–616."

[31] *Butte City Water Co.* v. *Baker*, 196 U.S. 119 (1905).

[32] 355 U.S. 286 (1958).

[33] 18 U.S.C. 13 (1948).

[34] 283 U.S. 423, 451 (1931).

the *Ivanhoe* cases.[35] We would not today have the Colorado-Big Thompson project in Colorado—if Senate Document No. 80 and the act of Congress incorporating it were not controlling. In fact we might not have much of a reclamation program at all if State laws, as such, were made to *control* the activities and functions of the United States.

[35] The U.S. Supreme Court citation and case names are given in footnote 26. The California Supreme Court opinions are 47 Cal. 2d 597, 681, 695, 699; 306 R. 2d 824, 886, 894, 875.

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