CONFlicts Respecting Control of Waters
In Western States

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CONFLICTS RESPECTING CONTROL OF WATERS
IN WESTERN STATES

The preservation of the Nation is in the preservation of the states. Our Nation is one of limited powers granted by the states, in which remain all other attributes of inherent sovereignty. Preservation of this sovereignty is paramount. Any policy which interferes with the legitimate exercise of sovereignty by the Nation, within its limited constitutional sphere, is to be avoided. Any policy which strikes at state sovereignty and undermines the whole structure of state government is equally abhorrent. Whether the pursuit or enforcement of such a policy be by forceful occupation or by the silent and prolonged processes of systematic pressure of legal principles, the effect is the same. Open armed occupation is to be preferred to sinister methods of slow legal strangulation.

The use of the natural elements is imperative to the health, prosperity and existence of mankind and of states and the state has an interest over and above that of its citizens in all the earth and the air within its domain. Air and water are the most vital natural elements. In an arid region, water is as important as was air to the soldiers in the Black Hole of Calcutta. History of our West is replete with wars for control of desert water holes and of bitter and
destructive contests for control of limited flows of streams. Regulation and control of uses of water always has been and always will be a first essential to government with each Territory and State of the arid region. Such problems are intensely local and require constant state control of the most intelligent and progressive character, varying with each locality and State and with differences in climate, soil and other natural conditions. They require the utmost freedom from external control or interference. Administration is imperative. Without administration, all would be chaos and so-called "private rights" to such uses (priority of appropriation etc.) would be useless legal fiction. Private rights must be constantly administered by local authority ever responsive to changing local conditions, in order to be of any value at all.

Any interference with this local control and regulation of uses of waters, is an interference with exercise of state sovereignty to the same degree as tempering with the blood supply is an interference with human life. The State is protected by the Constitution against forceful seizure of control of the natural elements imperative to its existence. It is entitled to equal protection from permanent occupation and deprivation through enforcement of principles destructive of state autonomy.
No factor has been more disturbing with cooperative efforts by the States and the United States in the matter of national reclamation, than the policy of attempting to establish a system of permanent federal administration over western streams, to supersede local control by the States. The first attempt in this regard, promptly followed enactment of the Reclamation Act by intervention by the United States in the then pending suit of Kansas vs. Colorado, wherein the Attorney General advocated a system of national control. The Supreme Court rejected the theory advanced by the United States and held that the Western States own the waters of their streams and are as much entitled to control their use and disposition as are the original States. Counsel for the United States Reclamation Service next sought to accomplish the same end by advancing the theory that by enactment of the National Reclamation Act, Congress had set apart and dedicated to the United States all unappropriated water in western rivers, had removed such waters from state jurisdiction and that every subsequent appropriator took subject to a perpetual preferred right in the United States to use such waters for its purposes. This destructive theory was advanced before the state courts at Grand Junction, Colorado, and elsewhere but was rejected. It was in direct opposition to the decision in Kansas vs. Colorado (306 U. S. 46) and fundamentally unsound. Other similar theories were advanced.
only to be later abandoned in favor of the present theory for securing ultimate national control of western rivers adopted in 1914, and since hitherto advanced by the Attorney General. This is commonly known as the "Ward Theory." Its principal danger lies in the fact that it is advanced purely as a theory of water titles and fails to state frankly that its ultimate objective is that of displacing and superseding state control by permanent federal administration through the agency of federal district courts. Its apparent innocence increases the danger. The nature and importance of this doctrine, particularly in view of its injury to national reclamation, calls for extended consideration prefaced by brief discussion of our states and of the doctrine which obtains respecting state jurisdiction over waters.

"STATES OF THE UNITED STATES"

The sovereignty of the States constitutes the foundation of any theory of water control. A State is an independent nation acknowledging no external authority and possessing complete dominion and sovereignty over its territory regardless of the form of the local government. It is a nation standing unshackled and free before the nations of the world. At the conclusion of the American Revolution, each of the thirteen Colonies was such a State. Such they are to this day save for self-imposed limitations and the States of the United States, old and new alike, are independent nations possessing every attribute of sovereignty not voluntarily granted by all of them to the United
States by the Constitution. Each State is equal with every other in jurisdiction, power and sovereignty. Ours is a Federal Union of equal States, none of which are servient to the others or to the Nation created by all of them for their common welfare. In effect, every one of the forty-eight States was in being at the formation of the Union and was a party signatory to the Constitution. Each new State, irrespective of date of admission, came into its own sovereignty as of the time of the original thirteen and possessed of the same powers and sovereignty. This must be true for each was admitted "on equal footing with the original States in all respects whatsoever" and with every other State, irrespective of any provisions to the contrary in the acts of admission. Upon admission, the new States simply came into possession of the powers and sovereignty which were always theirs and which heretofore had been held in trust for them. Limitations upon their powers of government, while territories, ceased to exist. As with the ordinance of July 13, 1787, for the government of the territory northwest of the Ohio River, in its effect upon the State of Illinois after her admission, the Supreme Court observed:— "Its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and
possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted and could be admitted, only on the same footing with them. The language of the resolution admitting her is "on an equal footing with the original states in all respects whatever." 3 Stat. 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River." (Escomba Co. v. Chicago, 107 U.S. 678) Each new state came into possession of its own sovereignty not as a supplicant but as a rightful owner claiming its own place in the family of states and no more servient to the national government than are the original thirteen. This status of equality obtains in every respect as regards control of territory and of those natural elements necessary for the preservation of the lives and for promotion of health, prosperity and the general welfare. "The state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." (Ge. v. Tenn., Copper Co., 206 U.S. 230, 237). The States retain every shred of inherent sovereignty, power and dominion not granted to the United States by the Constitution and it is incumbent upon those asserting a power in the United States to point out the grant of any such power. If there is no grant, the power remains in the States.
STATE CONTROL

The states of the arid region always have proceeded with the administration and control of their limited water supplies under the often announced fundamental principles: That, subject to the exceptions hereinafter noted, each state in its sovereign capacity, owns and may control the waters of the streams within its borders, both navigable and non-navigable, and may establish for itself such rules of property as it may deem expedient with respect thereto; that it may prohibit, permit, regulate, administer and otherwise control uses of its waters and may change its laws and regulations according to its sovereign will; that laws respecting the usufructuary rights of water users are but rules of administration by which the state permits and regulates the use of its natural resource by a limited number of classes of its citizens; that such rights of use by citizens are subject always to state control and must conform to the ever changing necessities of the state and its people; that the laws regulating uses and permitting the acquisition of usufructuary rights by water users vary with the states according to climate, soil and other natural conditions and to local needs; that in some states the riparian doctrine, partaking of the common law of England, obtains because it is best suited to local conditions.
that in other states uses are permitted under the doctrine of prior appropriation and in still others uses are permitted and regulated under laws partaking in part of the riparian doctrine and in part of the doctrine of prior appropriation; that in each state, the laws thus founded depart to a greater or lesser degree from the fundamental doctrine to conform with local necessities, so that in no two states are the laws the same even though founded upon the same fundamental principles; that no one of these states recognizes external or foreign servitudes, upon its streams; and that all projects constructed within the states by the United States are controlled by the laws of the state wherein the project lies and, if in more than one state, according to the law determined by the states. Furthermore, that upon admission to the Union, each Western state came into possession of its own sovereignty respecting its streams of water in like degree to that possessed by each of the original states and that admission to the Union was not a grant from the United States but a turning over to the state the powers and sovereignty which always existed and which had been held in trust for her; that the United States is to be considered a grantee of the new state of those rights respecting use of water set forth in the Constitution and not otherwise; and that the states of the
United States, old and new alike, possess full sovereignty and plenary power over the waters of their streams, navigable and non-navigable, subject to the exception next noted, and that whatever rights the users have they derive from their respective states and not from the United States.

The rights of the States are subject (1) in the case of navigable streams, to the paramount authority of Congress to control navigation as far as may be necessary for the regulation of commerce among the States and with foreign nations and (2) to determination of the respective rights of two or more states to the use of water of streams common to them, by interstate compacts or by decisions of the Supreme Court in original suits between them.

The western states have been peopled and their territories developed in full reliance upon the foregoing fundamental principles. These principles are not merely topics for academic discussion. They are the foundation of states and of property rights of untold billions in valuation. As water alone gives value and substance in an arid country and as western development has been made through the use of water under laws predicated upon these fundamental principles, it may be truly said that they constitute the basic law of the development, growth, civilization
and government of each of the western states. With
some of them, these principles were expressed in their
Constitutions at the time of admission. In others,
they were later adopted either as statutes, constitution-
al provisions or by court decisions.

The laws of each state are complete within them-
selves. The laws of no two are the same. Each state
regulates and administers its own water resources in its
own way free from external influence, except as above
noted. The laws of the states have been and will continue
to be in a constant state of flux while keeping pace
with the ever changing local conditions and necessities.
They must be responsive at all times to these local
changes and can only be responsive under local self
government. Administration of the use of water is an
intensely local subject and distant authority is confusing
and inadequate.
The federal theory is that the United States originally owned the waters of the non-navigable western streams and still owns the same save as granted by the United States directly to water users; that the states do not and never did own such waters but merely possess a right of regulation, under police power, of those water rights which have passed from the United States to the water user; that the State merely has the same control over "vested rights" to uses of water that it has over real property and has no greater control over them than it has over vested rights in land; all interests in water not heretofore granted by the United States to water users, necessarily remain in the United States and the States have no interest therein; water rights have vested in water users under Acts of Congress, such acts grant nothing to the States and ratification of State Constitutions asserting state ownership of water does not divest the United States of its property rights therein; that the only manner by which a state could acquire water rights in the non-navigable streams within its borders would be through Acts of Congress and none such exist; that the unappropriated waters of non-navigable western streams belong to the United States and are not subject to state
control; and that the rights of the appropriator which 
are derived from the United States through acts of Congress 
are subject to protection by federal government.

The academic phases of the theory were argued by 
the Solicitor General before the Supreme Court in the re-
argument of the case of Wyoming vs. Colorado but he failed 
to call the court's attention to the ultimate application of 
the theory. Adopted during the administration of Attorney 
General Gregory, it has since been promulgated as the theory 
of the United States respecting the waters of the Western 
States by the Department of Justice, the Department of the 
Interior and other government departments and bureaus and is 
now the official position and theory of the United States.

We have never had the opportunity to read a statement 
of the plan for practical application of the federal theory. 
We are informed that, predicated upon the hypothesis that 
each appropriator derives his title directly from the United 
States (not from his State) through acts of Congress and the 
construction of his rights and the rights of other approp-
riators upon the stream, a federal action, it is proposed 
to adjudicate the rights of appropriators on one stream at a 
time by proceeding before federal courts, regardless of the 
States through which the stream flows and regardless of 
previous local state adjudication or determination of the 
rights to the use of water from the streams in that State.
The federal court is then to retain permanent jurisdiction and control of diversions under its decrees which are to be perpetually enforced, not by state officials but by federal court appointees or water masters at least until Congress shall set up some federal machinery for enforcing these decrees. The process of adjudication shall be gradual, proceeding with one stream after another until all streams in the said region have been adjudicated and brought under the federal system, at least to the extent desired by federal agencies. Where a stream flows through two or more states, the proceedings will be brought in the court selected by the attorneys for the United States.

From the viewpoint of bureaucratic development and administration, the federal theory and the plans for its enforcement may be desirable.

It would rid the field of the laws of the states and bring all the western territory under one theory and it is said to be best adapted to govern the construction and administration of federal reclamation projects. While it is directly contrary to the announced fundamental principle that "the states, by entering the Union did not sink to the position of private ownership, subject to one system of private law" (Ga. vs. Tenn., C. Co., 206, U. S. 18 A.)
230, 231), it so completely exempts federal bureaus from compliance with state laws as required by the Federal Reclamation Act, and so completely ignores state lines as to be very desirable to federal bureaus. These factors, coupled with an evident ignorance of irrigation as a practical science, by those working out the theory in the first instance, doubtless led to its acceptance by the Department of Justice at a time of threatened international war, when every tendency was toward centralized authority. While the Supreme Court ignored the theory in deciding the case of Wyoming vs. Colorado, it has been persistently advanced in cases now pending before the Federal District Court of Nevada and was the basis of a proposed suit before the United States District Court at Omaha, to involve the waters of the North Platte River in Colorado, Wyoming and Nebraska but which was postponed at the request of Secretary Work. It is the underlying theory with other suits pending or threatened and of various rulings, opinions and regulation by federal departments. Through this process, it is intended to build up a series of precedents which will be very persuasive with the Supreme Court when next considered.
Although generally argued and advanced in its academic form, the ultimate effect of the application of the theory had not been frankly stated. Its purpose is ultimately to bring all administration of western streams under one system of law and under one central authority located at Washington. It is intended to supersede and render nugatory all state water laws and systems of administration. Its original purpose was to remove federal reclamation projects from the operation of state laws and soon after its promulgation, those in charge of such projects frankly informed various state officials that the government representatives complied with Section 8 of the National Reclamation Act as a matter of courtesy and not of necessity. But it was found that the theory could not be applied to federal projects without at the same time including other projects within its scope of operation. Then were evolved certain suits before Federal District Courts, involving the rights of every appropriator upon certain streams, regardless of state authority. When decrees are entered in these suits, they must be actively and perpetually enforced for the reason that the distribution of water is an administrative function, constant and perpetual in its nature. As already stated, the state authorities cannot enforce these proposed Federal Court decrees and the court will retain perpetual administrative jurisdiction through its marshals, bailiffs or "federal water masters". Such federal court administration will ignore all state authorities and will proceed upon authority of its own, at least until Congress
creates a federal agency to take over administration of streams under these district court decrees. The advocates of this theory for centralized national control, refuse to admit that each system of western water laws is but a plan by which the states administer uses by those recognized by the states, that such administration must be of a daily and hourly character because of fluctuation in the stream flow and other causes; that the so-called "vested rights" of water users are but usufructuary rights granted by the states and that such rights would be worthless without administration. They contend that the states have no inherent sovereignty over the waters of non-navigable streams and that the only authority they have is derived from the United States through acts of Congress. They fail to state frankly that diversions must be controlled, regulated and administered by some authority, that two authorities cannot operate concurrently in the same field, that one must give way to the other and that, in this case, it is the intent that state authority shall yield to federal control.

When this destructive federal theory was first advanced, control of interstate rivers by compacts had not been considered but the fact that federal authorities still cling to the theory and press it for recognition and approval by the courts is indicative of a desire to adhere to the doctrine regardless of the more practical method of solution of interstate water problems.
The wrong may be speedily remedied by a change of policy by the administrator. Any theory or program which must result in certain injury to the states and, ultimately, to the United States, should be immediately abandoned as abhorrent. Surely, we cannot be deliberately engaged in a systematic plan of self destruction.

Here are two fundamental theories of law directly opposed. The theory of the states has its roots in the fundamental principles of our plan of government. It changes nothing, sets up no new order of things, creates no new machinery, conforms to our most cherished ideals, is sustained by a wealth of judicial decision, conforms to a desired status of freedom of state government from federal interference, leaves state affairs for local determination, permits constant improvement in uses of limited water supply under intensive pressure of local needs, and above all, preserves state autonomy.

The federal theory has its roots in principles of private property law, necessitates abandonment of long established principles and proposes to set up a new scheme. It must fail or finally occupy the entire field. It is more a plan of what its authors conceive should have been our plan of government in the first instance than it is an effort to conform to what has been and is. It completely
ignores the whole field of judicial determination of the fundamental principles of our government upon which western water laws are founded and would substitute therefor a new plan, based entirely upon a superstructure of private property law. In its enforcement and subsequent administration, through gradual processes of encroachment, it would put to one side and crowd out state control and administration and would substitute therefor federal court jurisdiction with permanent administration. It would create a mixed jurisdiction within each state during the gradual process of encroachment and absorption of authority, for the reason that some streams would come under federal control while others would remain under state control awaiting the evil hour of complete displacement. Regardless of its tempting features from the standpoint of employees of National Reclamation and other federal bureaus, as providing uniformity of legal theory and physical control by federal agencies over the field of western reclamation, its promulgation and later adoption can lead to no other conclusions than that of conflict with state authority, confusion of water titles, confusion of court decisions, conflict of administrative authority with final complete federal usurpation, and destruction of state autonomy in every phase where use of water directly or indirectly controls.
In short, the doctrine of state control preserves state autonomy and the theory of federal control destroys state autonomy.

The Supreme Court long since decided: "It may be not unreasonably said that the preservation of the states and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States". (Tex. v White, 7 Wall 700, 725). This has been the great underlying principle of our government since the formation of the Union and should now control. Here are two fundamental theories of law either of which must form not only the basis for private property rights, but must control the destiny of states occupying a great portion of our national territory. The one theory upholds, sustains and preserves state autonomy in full force and vigor. The other undermines, weakens and finally destroys state autonomy. No other argument would seem necessary to justify the conclusion that the federal theory should be immediately abandoned and that all pending litigation founded upon it should be settled, dismissed or otherwise disposed of forthwith. Every day such litigation in pending but aggravates the situation, irritates those
state officials and citizens who were affected and, above all, lends support to the doctrine and endangers the future. Irrespective of the academic merits of the two theories, the federal theory is certain to lead to increasing friction, dissatisfaction and finally to positive action in necessary self-defense by the states. The western states, when awakened to the dangers of the situation, will arise in united resistance to the enforcement of doctrines destructive of their self-government in matters so vital to their peace, prosperity and very existence. It would seem unnecessary to undergo the pains, penalties and uncertainties of prolonged, bitter and unsatisfactory litigation in order to dispose of this unfortunate theory. Its announced abandonment by the federal authorities followed by disposition of pending litigation and destruction or correction of literature, published under federal authority, which approves the new theory as the official federal doctrine, would seem to meet the requirements of the situation. The whole matter may be disposed of as a matter of policy without awakening a ruling upon the merits.

We look forward with confident expectation to prompt decisive and effective action by the national administration whose views are known to be not in accord with the federal theory now recognized and in process of enforcement.