

CONTROL OF WESTERN WATERS

Lathrop 35  
v.1

APPENDIX I - Testimony of J. Lee Rankin, Department of  
Justice before House Interior Committee  
Hearing - Federal v. State Water Rights in  
Western States - February 22, 1956

II - C.B.I.A.C. - Control of Western Waters - 3/7/56  
(excerpts and annotations)

Summaries of State Water Laws - Oregon

III - Control of Western Waters - 3/7/56

Appendix A - Control of Nonnavigable Western Waters

B - Summaries of State Water Laws

Idaho  
Montana  
Nevada  
Oregon  
Washington  
Wyoming

IV - C.B.I.A.C. - Minutes & Six Exhibits of  
84th Meeting - 11/16/55

March, 1958

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(1 copy only)

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BEFORE HOUSE INTERIOR COMMITTEE HEARING

FEDERAL V. STATE WATER RIGHTS IN WESTERN STATES - Annotated

FEBRUARY 22, 1956

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1 MEMORANDUM RE: TESTIMONY OF J. LEE RANKIN, DEPARTMENT  
 2 OF JUSTICE BEFORE HOUSE INTERIOR COMMITTEE HEARINGS ON  
 3 FEDERAL V. STATE WATER RIGHTS IN THE WESTERN STATES.

4 Before the Committee were the Budge, Engle and Young  
 5 bills relating to a declaration of water rights for waters  
 6 of the Western States (H.R. 8325, 8347, 8560 -- all Barrett  
 7 identical with Senator Barrett's S. 863). Those present Bill S. 863  
 8 for the Justice Department were Messrs. Rankin, Morton,  
 9 Warner, and Veeder. Rankin alone testified at the hear- Hearing  
 10 ings on February 22-23, 1956. Feb. 22, 1956

11 Mr. Rankin stated that the Federal Government had  
 12 not yet taken an executive position on the bills before  
 13 the Committee. He explained that his office had prepared Executive  
 14 a preliminary statement which was now under consideration position  
 15 in the Deputy's office of the Department. From this released  
 16 office the matter would have to be referred to the Bureau by  
 17 of the Budget before a Government position could be offi- Director of  
 18 cially taken. Mr. Rankin stated however that he could Budget  
 19 answer any questions of the Committee concerning the  
 20 present status of the law. Several Committee members Legal  
 21 expressed dissatisfaction at the length of time that had status  
 22 elapsed since the Government was requested to state its  
 23 views on these bills (over three years). Mr. Rankin Responsibility  
 24 wanted Mr. Morton (Assistant Attorney General in charge water right  
 25 of public lands) excused as Morton had no responsibility Federal  
 26 for water rights on the Federal lands, but would accept lands



1 the position laid down by the water resources section of Justice  
2 the Justice Department. Department

3 Mr. Engle opened by stating that as the House Com-  
4 mittee interprets the Pelton Dam case, it has a disas- Pelton  
5 trous effect on western water law. He said the decision case  
6 appears to mean the Federal Government can use all water  
7 on any Federal reservation without adherence to State  
8 law. Engle said this is serious because of the long  
9 distance it is necessary to move water in the Western  
10 States in order to develop water projects. Engle asked  
11 Rankin if this view of the Pelton Dam case was correct.  
12 Rankin replied that Engle's statement was correct except Vested  
13 for vested rights. Vested rights under state laws are rights  
14 protected under the Pelton case, but if not vested, that respected  
15 is as to all unappropriated waters, then the Pelton Unappropriated  
16 decision applies. Rankin says that in Justice's view, waters  
17 the military cannot affect vested rights under state  
18 laws, and can only take those rights upon payment of Compensation  
19 just compensation.

20 Rankin stated that the problem arises because many  
21 state laws concerning water projects are not designed to Large  
22 accommodate the large scale Federal projects which Con- Bureau  
23 gress has directed the Secretary of the Interior to con- Projects  
24 struct and operate. Rankin asked, "who is going to con-  
25 trol--the State engineer or the Secretary of the Interior?"  
26 The dilemma is, as he sees it, that the Federal acts give

|    |                                                                  |               |
|----|------------------------------------------------------------------|---------------|
| 1  | authority to the Secretary of the Interior to carry out          |               |
| 2  | certain Congressional objectives, and yet specify at the         | Congressional |
| 3  | same time that the Secretary of the Interior should              | mandates      |
| 4  | comply with state laws. At certain points conflicts              |               |
| 5  | have arisen between the basic Congressional objectives           | Federal       |
| 6  | and conditions imposed by the States. When this impasse          | v.            |
| 7  | is reached, Rankin says that the Federal Government, <u>i.e.</u> | State         |
| 8  | the Secretary of the Interior, must proceed in accordance        |               |
| 9  | with the superior purpose, namely adherence to the Con-          | Superior      |
| 10 | gressional mandate for the fulfillment of the project's          | purpose       |
| 11 | Federal purpose. Rankin gave three examples where the            |               |
| 12 | adherence to state procedures would completely thwart            |               |
| 13 | Federal projects.                                                |               |
| 14 | Mr. Engle stated that he saw the problem arising                 | Engle         |
| 15 | from the diverse state laws, but suggested that in the           | proposes      |
| 16 | West the only practical solution was one uniform law.            | uniform       |
| 17 | Engle proposed as an answer a requirement that before            | law           |
| 18 | the Federal projects which are highly beneficial to the          |               |
| 19 | area and individual state can go in, the Federal Govern-         |               |
| 20 | ment must have its water rights from the State in hand.          | State         |
| 21 | In many instances, he states the Federal Government has          | assignment    |
| 22 | moved in and constructed projects without an effective           | for           |
| 23 | assignment of water rights from the State governments            | Federal       |
| 24 | necessary for the project. Engle concluded that if it            | project       |
| 25 | were made a rule that the Federal Government must have           |               |
| 26 | its water rights in hand under state law before proceed-         |               |



1 ing with a project, then many of the problems that have  
 2 arisen involving a State-Federal conflict would be cleared  
 3 up, and States with burdensome procedures would change  
 4 them in order to obtain the Federal projects.

5 Rankin stated that the objection to this was that Water  
 6 water rights cannot be perfected until the project is rights  
 7 built and water actually put to beneficial consumptive perfected  
 8 use. Hence, while the Federal Government may at the when  
 9 start of a project have its water filings in hand, these projects  
 10 filings are worthless as a final perfected right, until completed and  
 11 the project is built and water is applied to the land. water applied

12 Rankin gave as an example a situation in New Mexico  
 13 where several extensions of time were granted to the  
 14 Federal Government by the State authorities due to delays  
 15 in project construction, but that after the project was  
 16 complete the Federal Government was met with the con-  
 17 tention, successfully maintained in the local New Mexico New Mexico  
 18 courts, that the extensions had been improper, and that case  
 19 intervening private water rights had acquired priority.

20 Budge and Engle referred to Section 8 of the 1902 Rec. Act  
 21 Reclamation Act, as well as the proviso in the Submerged 1902  
 22 Lands Act, both of which proclaim state law as governing Sec. 8  
 23 water rights in the Western States, and asked whether  
 24 these did not make it clear that the state law should  
 25 govern the Federal Government. Budge asked further  
 26 whether his bill would not make the matter even more

1 definite. Rankin stated that Budge's bill would not alter  
 2 the Government's position for the Federal Government  
 3 would continue to act to carry out Federal purposes ex-  
 4 pressed in legislation, which must be overriding. Rankin  
 5 did not view the Budge bill as ceding the retained Federal  
 6 property right in western waters to the States, but as  
 7 merely giving the control to the States of Federal  
 8 property. Rankin said it was a question of whether the Secy. of  
 9 Secretary of the Interior should govern or should a State Interior  
 10 engineer govern. In his view where the State law would v.  
 11 prevent what Congress has directed in a project, a Con- State  
 12 stitutional problem arises, even though Congress has Engineer  
 13 directed that the state law be followed.

14 Engle asked if this problem was one of Constitutional Constitution  
 15 law or a problem of conflict of statutes. Rankin replied v.  
 16 that the control and direction of Federal property under Statutes  
 17 the Constitution must be in the hands of the President  
 18 of the United States, stating that constitutionally the  
 19 States could not be given control over Federal property.

20 Budge asked, "What if my bill were passed and then Federal  
 21 the Hell's Canyon bill were passed, would this abrogate law  
 22 State laws on the Snake River?" Rankin replied that if prevail  
 23 the State laws would interfere with the Congressional over  
 24 purpose in the operation of the project, then the Federal State  
 25 law would have to govern, assuming the project is pro- law  
 26 perly authorized by Congress under its Constitutional



|    |                                                           |              |
|----|-----------------------------------------------------------|--------------|
| 1  | powers. If properly authorized, this result follows be-   | Constitution |
| 2  | cause the Constitution is supreme over state laws.        | supreme.     |
| 3  | Aspinall asked who owns the water, either appropriated    | Who          |
| 4  | or unappropriated, on state or Federal or private lands.  | owns         |
| 5  | Rankin replied that he conceives the question of          | the          |
| 6  | ownership as a property matter. He stated that he had     | water.       |
| 7  | never found any statute which cedes or gives to the       |              |
| 8  | States the Federal property right in the water. The       | Property     |
| 9  | Desert Land Act he views as only giving the right to      | right in     |
| 10 | appropriate under state law. Congress in that act simply  | water        |
| 11 | separated the water from the land. Before that statute    | Separation   |
| 12 | the two were together as a "bundle of rights". Rankin     | of water     |
| 13 | stated that there were no words of conveyance, in any     | from land.   |
| 14 | Federal statute known to him, of the initial Federal      |              |
| 15 | ownership of the water rights, and the mere fact that     |              |
| 16 | the Desert Land Act prescribed State procedure for the    | Desert       |
| 17 | perfecting of water rights in individuals did not mean    | Act          |
| 18 | that the State is the source of the water rights. Rankin  |              |
| 19 | stated further that the fact that "beneficial consumptive | Beneficial   |
| 20 | use" is the measure of right in the Western States does   | consumptive  |
| 21 | not change his analysis as the Federal Government has     | use          |
| 22 | simply retained the property right or power to "use"      |              |
| 23 | the water.                                                |              |
| 24 | Mr. Budge asked if the Federal Government had not         | ?            |
| 25 | relinquished sovereignty in the Western States and there- | Relinquished |
| 26 | by lost its right over the waters. Rankin replied in      |              |



|    |                                                                  |                |
|----|------------------------------------------------------------------|----------------|
| 1  | the negative and said this was a property question.              | Effect of      |
| 2  | Budge asked what the result would be if Congress passed          | Quit           |
| 3  | some sort of a quit-claim deed to these water rights.            | Claim          |
| 4  | Rankin replied that this would put the Federal Government        | Deed           |
| 5  | out of the reclamation business.                                 |                |
| 6  | Mr. Budge asked if a compact between States, ratified            | Interstate     |
| 7  | by Congress, would bind the United States in its deter-          | Compact        |
| 8  | mination of water rights. Rankin replied that the Supreme        | does           |
| 9  | Court has held that an interstate compact does not bind          | not            |
| 10 | the United States unless the United States expressly so          | bind           |
| 11 | agrees. He gave as an example the Colorado River Com-            | Gov't.         |
| 12 | pact. He stated that with respect to the Colorado River,         |                |
| 13 | Arizona asserted in the Supreme Court that the Federal           |                |
| 14 | Government had no permission to proceed with Boulder Dam         |                |
| 15 | without the permission of the State engineer. The                | Colorado       |
| 16 | Supreme Court threw out this position and held the Pro-          |                |
| 17 | ject could proceed without Arizona. Rankin stated that           |                |
| 18 | if a law like the present proposed bills had been in             |                |
| 19 | effect at that time, there might possibly be no Colorado         |                |
| 20 | River development as we presently have it today. ( <u>i.e.</u>   | Hoover         |
| 21 | Hoover Dam and All-American Canal)                               | Dam            |
| 22 | Mr. Rankin was asked specifically if there was any               | Objection      |
| 23 | Constitutional objection to the proposals contained in           | to bills       |
| 24 | the bills. Rankin replied that there could be if they            | on             |
| 25 | were construed so as to delegate control of Federal              | Constitutional |
| 26 | property to the States, and cited the <u>Knickerbocker</u> case, | grounds        |



|   |                                                              |                |
|---|--------------------------------------------------------------|----------------|
| 1 | where the Supreme Court held that Congress could not         | Congress       |
| 2 | delegate its exclusive Constitutional powers. Rankin         | cannot         |
| 3 | admitted that Congress could quit claim away its             | delegate       |
| 4 | Western water rights by language similar to that in the      | exclusive      |
| 5 | Tide Lands Legislation, but he insisted that the present     | Constitutional |
| 6 | bills only hand over control to the States and hence         | powers         |
| 7 | raise serious constitutional questions, <u>i.e. Knicker-</u> |                |
| 8 | <u>bocker.</u>                                               |                |

|    |                                                          |               |
|----|----------------------------------------------------------|---------------|
| 9  | With respect to Federal reservations, Rankin stated      | Federal       |
| 10 | that it is not the date of the reservation, but the date | reservations  |
| 11 | of the Federal appropriation of water on the reservation | v.            |
| 12 | that the Government is relying on. (That is with respect | date of       |
| 13 | to water flowing from the reservation) Rankin admitted   | appropriation |
| 14 | that prior appropriations of water flowing from Federal  |               |
| 15 | reservations will take priority over subsequent Federal  |               |
| 16 | uses on the reservation. Subject to prior vested appro-  | Prior         |
| 17 | priative rights however, the Federal Government has the  | vested        |
| 18 | right to make any beneficial use of reservation waters   | rights        |
| 19 | that it deems proper. The validity of these Federal      | validity      |
| 20 | rights will rest on the theory of prior appropriation.   | rests on      |

|    |                                                           |                |
|----|-----------------------------------------------------------|----------------|
| 21 | Concerning unappropriated or flood waters caught by       | prior          |
| 22 | the Federal Government in its structures, Rankin asserted | appropriation. |
| 23 | the United States has the right, through Congressional    | States have    |
| 24 | direction, to do whatever it wants with them. Congress    | no control     |
| 25 | has the final determination and the States have no con-   | over           |
| 26 | trol over their distribution. Many Federal Projects,      | distribution   |



|   |                                                        |               |
|---|--------------------------------------------------------|---------------|
| 1 | Mr. Rankin said have the distribution of this water as | Justification |
| 2 | the justification for their authorization.             | for the       |

|    |                                                         |               |
|----|---------------------------------------------------------|---------------|
| 3  | On the issue of "vested rights" Young of Nevada         | authorization |
| 4  | asked Rankin if the Government would recognize as       |               |
| 5  | "vested" a Nevada law which appropriated to the State   | ?             |
| 6  | all of the unappropriated water in the State. Rankin    | Nevada law    |
| 7  | replied no because that would not be a "valid appro-    | appropriating |
| 8  | priation" in that it departs from the customary western | to State      |
| 9  | view of how a vested right can be acquired. Rankin      | all unappro-  |
| 10 | stated that "vested right" criteria comes from "tradi-  | priated       |
| 11 | tional criteria throughout the West."                   | would not     |

|    |                                                         |               |
|----|---------------------------------------------------------|---------------|
| 12 | Rankin concluded that in his opinion the proposed       | be a valid    |
| 13 | legislation is (1) unnecessary and (2) if passed, might | appropriation |
| 14 | hinder proper control of existing projects and block    |               |
| 15 | future projects.                                        |               |

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What Constitutes Vested Rights?

42-52

Upstream damages  
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43-53

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SUMMARY OF STATE WATER LAWS - OREGON

44-54

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C O N T R O L   O F   W E S T E R N   W A T E R S

COLUMBIA BASIN INTER-AGENCY COMMITTEE

Office of the Chairman - Portland, Oregon

November 16, 1955

RESOLUTION OF THE EXECUTIVE COMMITTEE

That the Executive Committee

Prepare a Concise Statement of

The Issues Involved

Summarize Current Practices

by Federal Agencies

Future Implications of these Practices

with respect to observance of State Water Law

Enumerate the Points of Conflict

Epitomize the Reasoning

Supporting the Various Views



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March 7, 1956

CONTROL OF WESTERN WATERS

1. The Constitutional Issues. The Federal Power Act

|                                                            |                |
|------------------------------------------------------------|----------------|
| derives its validity from three principal sources: (1)     | Three          |
| the Federal commerce power which applies, per se, to       | sources        |
| activities on navigable waters; (2) the comparable         | of             |
| commerce authority over activities on nonnavigable waters  | validity       |
| which affect navigable waters; and (3) the proprietary     | commerce       |
| power of the Federal Government over its property,         | proprietary    |
| including the public lands. The rather sweeping power of   |                |
| the Federal Government under the commerce clause of the    |                |
| constitution seems to be generally recognized; but the     |                |
| recent decision of the Supreme Court based upon the third, | Pelton         |
| or proprietary, power in the case of "The Federal Power    | Dam case       |
| Commission v. the State of Oregon, et al" (349 U. S. 435)  | (349 U.S. 435) |
| has raised questions concerning legislative control of     |                |
| the exercise of the latter (proprietary) power. The        |                |
| cited decision, generally referred to as the Pelton Dam    | F.P.C.         |
| decision, upheld the validity of a license issued by the   | license        |
| Federal Power Commission to construct a hydroelectric      |                |
| project on lands of the United States, withdrawn for       |                |
| power purposes, on a nonnavigable stream, wholly within    | Over           |
| the State of Oregon without the consent of the State, in   | State          |
| fact over the strenuous objections of the State, in effect | objections     |
| asserting that the proprietary interest of the United      | Proprietary    |
| States, arising from its ownership of the power site,      | Power Site     |

6/24/58  
all the water  
belong to all people

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hence - state  
should withdraw  
from any efforts  
all mixed water  
to be used only  
in accordance with  
state law -



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THIS MAP COMPLIES WITH NATIONAL  
**FOR SALE BY U. S. GEOLOGICAL SURVEY, DENVER**  
**A FOLDER DESCRIBING TOPOGRAPHIC MAPS A**

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| 1  | enabled it to grant its licensee immunity from the            | Immunity     |
| 2  | requirements of State regulatory law. The Federal             | to           |
| 3  | Government owns much of the land in the Pacific North-        | licensee     |
| 4  | west states. Many of the remaining power sites in the         |              |
| 5  | region are on streams flowing through Federal lands.          | Other        |
| 6  | These power sites have been reserved. There are other         | Federal      |
| 7  | Federal reservations in the area, including military,         | reservations |
| 8  | Indian, public, etc., which may fall within the purview       |              |
| 9  | of the Pelton Decision. Accordingly, State officials          |              |
| 10 | feel that for practical purposes they have lost control       |              |
| 11 | of the use and appropriation of their waters insofar as       | Legal        |
| 12 | the Federal Government and its licensees are concerned        | issues       |
| 13 | and desire to regain control by legislative enactment.        |              |
| 14 | As to other than the Federal Government and its licensees,    |              |
| 15 | the State still retains its authority. A more elaborate       |              |
| 16 | and detailed discussion of the legal issues involved is       |              |
| 17 | attached as Appendix A hereto.                                |              |
| 18 | 2. <u>Laws of the States Relative to Appropriation and</u>    | Water        |
| 19 | <u>Use of Waters.</u> The water laws of the Pacific Northwest | laws         |
| 20 | states generally provide that: the ownership of water is      | provide      |
| 21 | in the public; the beneficial use of water is a public        | water        |
| 22 | use; water rights can be obtained only by observance of       | ownership    |
| 23 | prescribed procedures; and priorities of use are those        | in public    |
| 24 | prescribed. Appendix B summarizes briefly the State           |              |
| 25 | water law doctrines pertinent to this discussion. It is       | Doctrines    |
| 26 | the consensus of the State officials primarily concerned      | Appendix B   |



1 with water conservation and use that all Federal agencies, Federal  
 2 and their licensees, should observe and comply with State responsibilities  
 3 laws in carrying out Federal responsibilities or exer-  
 4 cising the rights conferred by Federal license. This Navigable  
 5 opinion extends to navigable as well as nonnavigable and  
 6 streams, flood control generally excepted. The laws nonnavigable  
 7 which the Federal agencies and their licensees should  
 8 observe are not only those directly related to the appro-  
 9 priation, use and control of waters for domestic uses, Uses  
 10 stock watering, agriculture, industry, and power develop-  
 11 ment, but also include those relating to fish sanctuaries,  
 12 recreation areas, pollution abatement and the like.

13 3. Practices of Federal Agencies. The Federal Practices  
 14 agencies in the Pacific Northwest primarily concerned of  
 15 with water use and control include the Bureau of Reclama- Federal  
 16 tion, Corps of Engineers, Federal Power Commission, Agencies  
 17 Department of Agriculture, and to a lesser extent certain  
 18 other agencies. Practices of the Federal agencies may  
 19 be summarized as follows:

20 a. Department of Interior

21 (1) Bureau of Reclamation. The Bureau of Bureau  
 22 Reclamation's activities with respect to compliance with compliance  
 23 State water laws are governed by Section 8 of the under  
 24 Reclamation Project Act of 1902. That Act specifically Rec. Act  
 25 requires the Bureau to conform to its activities to 1902  
 26 State water laws, and this has and will continue to be

1 the practice in this region. The Pelton Dam decision  
2 will in no wise modify this policy.

3 (2) Bureau of Indian Affairs. The water Indians  
4 rights for Indian lands are based primarily upon a  
5 Supreme Court decision in 1908 commonly referred to as  
6 the Winters Decision (Winters v. U. S. 207 U. S. 564  
7 (1908) with the result that in most cases no reference  
8 is made to state water laws. There are some exceptions  
9 to this procedure, one of which is on the Fort Hall  
10 Project in Idaho where water rights were established  
11 through partial procedures under state law. It is not  
12 anticipated that any instructions will be issued or any  
13 modifications of existing procedures made as the result  
14 of the Pelton Dam decision.

15 (3) National Park Service. The Park Service Parks  
16 follows no uniform policy with respect to the observance  
17 of State laws in the consumptive use of water although  
18 on occasion follows State procedures in perfecting rights  
19 for water use in connection with National Park facilities.  
20 No change in existing practices is contemplated as a  
21 result of the Pelton decision.

22 (4) Bureau of Mines. The work of the Bureau Mines  
23 is so remotely connected with the consumptive use of water  
24 that application of State water law to its activities is  
25 largely academic.

26



|    |                                                            |            |
|----|------------------------------------------------------------|------------|
| 1  | (5) <u>Bonneville Power Administration.</u> With           | Bonneville |
| 2  | certain exceptions this agency files for and obtains water | Power      |
| 3  | rights under applicable State law for the water consump-   |            |
| 4  | tively used in connection with its activities and          |            |
| 5  | installations. It is contemplated that the practice of     |            |
| 6  | following State law will be applied uniformly in the       |            |
| 7  | future.                                                    |            |
| 8  | (6) <u>Bureau of Land Management.</u> It is the            | B.L.M.     |
| 9  | policy of the Bureau of Land Management to file under the  |            |
| 10 | various State water laws on water developments on which    |            |
| 11 | Government funds are or have been expended, and which      |            |
| 12 | are constructed on public lands, or on other lands under   | Public     |
| 13 | an easement to the United States. The current practice     | lands      |
| 14 | with respect to water filings varies with the States,      |            |
| 15 | with the nature of the water developments, and with the    |            |
| 16 | fees to be paid. In Idaho where the filing fee is          | Idaho      |
| 17 | nominal and where the informational requirements can       |            |
| 18 | usually be satisfied without detailed surveys, filings     |            |
| 19 | have been made and are currently being made. In Oregon     | Oregon     |
| 20 | a Bureau program to secure the benefits of filing with     |            |
| 21 | the State was initiated but not carried into practice;     |            |
| 22 | this was due chiefly to Bureau reorganization and          |            |
| 23 | changes in personnel; resumption of work on this program   |            |
| 24 | is under consideration. In Washington and Nevada filing    | Washington |
| 25 | fees are a deterrent, but there are also other reasons     |            |
| 26 | for not filing. In Washington there are no grazing         |            |



1 districts, and the comparatively few developments are on  
 2 Section 15 leased lands. In Nevada the viewpoint is Nevada  
 3 held that because of water appropriations already made  
 4 to others little benefit would accrue to the Bureau by  
 5 further filings with the State. Current practices and  
 6 policies will not be changed because of the Pelton Dam  
 7 decision.

8 (7) Fish and Wildlife Service. It is the Wildlife  
 9 policy of the Fish and Wildlife Service to comply in Service  
 10 full detail with the water laws of the respective States.  
 11 No change in that policy is contemplated because of the  
 12 Pelton Dam decision.

13 b. Department of Commerce. While activities of Commerce  
 14 the Department of Commerce relating to water resources  
 15 may not be entirely harmonious with existing State laws,  
 16 there have been no conflicts apparent. No change in  
 17 existing practices is contemplated.

18 c. Department of Health, Education and Welfare. Welfare  
 19 While no formal instructions have been issued, it is the  
 20 policy of the Department to comply with all State water  
 21 laws which apply to the activities of the Department.  
 22 No change in this policy is contemplated by reason of  
 23 the Pelton Dam decision.

24 d. Department of Agriculture. All bureaus of Forest  
 25 the Department have and will continue to comply with Service  
 26 State water laws in carrying out their pertinent activities.



1 No modification of this policy is contemplated as a  
 2 result of the Pelton Dam decision.

3 e. Corps of Engineers, Department of the Army.

Army

4 The Corps of Engineers does comply with State water law  
 5 in establishing water rights for those small and occa-  
 6 sional beneficial consumptive uses required at its  
 7 various facilities. It does not comply with procedures  
 8 prescribed by State water law in carrying out its major  
 9 responsibilities for flood control and navigation al-  
 10 though it attempts and will continue to conduct its  
 11 activities in harmony therewith. The Pelton Dam decision  
 12 will have no effect on this policy.

Engineers

Flood

Control

Navigation

13 f. Federal Power Commission. Applicants for

Power

14 licenses are required to submit evidence satisfactory to  
 15 the Commission of compliance with State laws and, insofar  
 16 as water rights are concerned, this is in the form of a  
 17 copy of a State water permit or a statement or evidence  
 18 as to what steps have been taken to obtain a State permit  
 19 if required. Licenses have been issued where State per-  
 20 mits have not been obtained but applications therefor  
 21 have been made. The Commission assures that each licensee  
 22 will be required to comply with all State laws which are  
 23 not in conflict with the provisions of the Federal Power  
 24 Act. Where both Federal and State authority are required  
 25 for construction, one or the other agency must act first  
 26 and in some cases a State will not act until a Federal

Commission

1 Power Commission license has been obtained.

|   |                                                      |            |
|---|------------------------------------------------------|------------|
| 2 | Section 27 of the Federal Power Act expressly        | Section 27 |
| 3 | saves from interference vested water rights acquired | Power Act  |
| 4 | under State law for irrigation, water supply, and    | Vested     |
| 5 | similar uses.                                        | rights     |

6 The Commission's practice has not been  
7 changed by reason of the Pelton Dam decision.

|    |                                                           |               |
|----|-----------------------------------------------------------|---------------|
| 8  | 4. <u>Problems of Change through Legislation.</u> It      | State         |
| 9  | appears that State interests desire as a minimum that     | desire        |
| 10 | Federal agencies and licensees comply with State statutes | legislation   |
| 11 | relating to the control, appropriation, use and distri-   | over          |
| 12 | bution of water applied to beneficial consumptive uses,   | control       |
| 13 | including power, although the latter is usually not       | appropriation |
| 14 | classified as a consumptive use. The difficult problem    | use and       |
| 15 | is presented, however, of determining which State laws    | distribution  |
| 16 | are to receive Federal compliance. Are purely regulatory  |               |
| 17 | statutes which represent the exercise of State police     | Police power  |
| 18 | power to be applied to the Federal Government?            |               |

|    |                                                                |               |
|----|----------------------------------------------------------------|---------------|
| 19 | There is the historical precedent of Federal                   | Rec. Law      |
| 20 | reclamation law, which since 1902 has required that the        | 1902          |
| 21 | U. S. Bureau of Reclamation observe state laws governing       | precedent     |
| 22 | "the control, appropriation, use, or distribution of           | State created |
| 23 | <u>water used in irrigation * * * .</u> " It might be proposed | property      |
| 24 | that this pattern be adopted and applied to all Federal        | rights        |
| 25 | agencies and licensees; but reclamation law recognizes         | flowing       |
| 26 | only state-created property rights in flowing waters and       | waters        |



|    |                                                                  |              |
|----|------------------------------------------------------------------|--------------|
| 1  | does not treat with the question of State police power.          | Encroachment |
| 2  | It is improbable that the Reclamation Act gives the              | vested       |
| 3  | individual states a veto over any or all Federal reclama-        | property     |
| 4  | tion projects within the State. Section 27 of the                | rights       |
| 5  | Federal Power Act already gives equivalent protection            |              |
| 6  | against encroachment on <u>vested</u> property rights by Federal |              |
| 7  | licensees, and the Flood Control Act of 1944 adopts the          | Flood        |
| 8  | spirit of state water law by subordinating navigation            | Control      |
| 9  | uses to beneficial consumptive uses.                             | Act, 1944    |
| 10 | If legislation should be enacted providing for                   |              |
| 11 | Federal compliance with all State laws, including those          | ?            |
| 12 | promulgated in the exercise of State police power and            | Effect of    |
| 13 | extending to navigable as well as nonnavigable waters,           | Legislative  |
| 14 | questions of constitutionality would be raised, since            | remedies     |
| 15 | what would follow from such legislation would not be a           |              |
| 16 | partial and considered withholding of Federal authority          |              |
| 17 | under the commerce and property clauses of the Constitu-         | Might        |
| 18 | tion, but a total abandonment of such authority. Addi-           | unsettle     |
| 19 | tionally, such legislation might unsettle a large body           | large body   |
| 20 | of law relating to Federal-State relationships and               | of law       |
| 21 | require many years of litigation to clarify its terms            | Implications |
| 22 | and determine its limitations. Assuming, arguendo, its           |              |
| 23 | validity from a constitutional point of view, its passage        |              |
| 24 | would have far-reaching implications. It would sweep             |              |
| 25 | away the Federal supremacy flowing from the commerce             |              |
| 26 | and property clauses and substitute therefor numerous            |              |

1 local statutes, policies and procedures; and it would  
 2 substitute all State laws, not merely that body of local  
 3 rules concerning property rights in flowing waters such  
 4 as are incorporated in reclamation law at present. Compre-  
 5 hensive development of the region's resources would then  
 6 become subject to the provisions, frequently conflicting,  
 7 of the laws of the several states in the region. Compre-  
 8 hensive development under those conditions would be most  
 9 complex and impose acute administrative problems. Crea-  
 10 tion of an interstate body with authority to harmonize  
 11 differences might become a necessity. Consequently, if States  
 12 it is the Pelton Dam decision which is to be set aside by authority  
 13 legislation, such legislation should be specifically must be  
 14 worded to make its intent abundantly clear that Congress defined  
 15 places in the States authority over the control, use and specifically  
 16 appropriation of water in nonnavigable streams flowing  
 17 over or through public lands whether or not power reser-  
 18 vations or other reservations have been made thereon.

19  
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## 2 Attachments

1. Appendix A
2. Appendix B



APPENDIX A  
to Memorandum of  
March 7, 1956

CONTROL OF NONNAVIGABLE WESTERN WATERS  
CONSTITUTIONAL POWER AND LEGISLATIVE RESTRAINT

|    |                                                                  |             |
|----|------------------------------------------------------------------|-------------|
| 9  | <u>Introduction</u>                                              | <u>Page</u> |
| 10 | I The Federal Power Act and the Constitutional Issue             | 3           |
| 11 | II The Division of Federal-State Authority Over the Public Lands | 7           |
| 12 | III Water Right Theories and the Effect of the Desert Land Act   | 14          |
| 13 |                                                                  |             |
| 14 | IV The Supreme Court Decision in the Pelton Case                 | 24          |
| 15 | V Problems of Change Through Legislation                         | 35          |



CONTROL OF NONNAVIGABLE WESTERN WATERS:

CONSTITUTIONAL POWER AND LEGISLATIVE RESTRAINT

When the State of Oregon appealed to the courts the  
<sup>1</sup>  
 Federal Power Commission's decision, granting over the Dam  
 State's objections, a license to the Portland General Deschutes  
 Electric Company to construct a power dam at the Pelton River  
 site on the nonnavigable Deschutes River in Oregon, the  
 possibility arose that the long mooted question concern-  
 ing the extent of Federal authority over western non-  
 navigable waters would at least be decided. While the U. S.  
 controversy reached and was disposed of on its merits by Supreme  
<sup>2</sup>  
 the highest court of the land, it is debatable whether Court  
 the practical statutory as well as the theoretical  
 Constitutional issues were fully settled as the result  
 of this decision. The purpose of this article is to  
 inquire into the developments in Constitutional law repre-  
 sented by this decision and the practical results thereof,  
 including some of the clamor for change by legislative  
 intervention. The issue is not unimportant practically,  
 nor the case a rarity, however, despite the statements  
<sup>3</sup>  
 of some writers.

1 Portland General Electric Co., 10 F.P.C. 445, 92 P.U.R.  
(N.S.) 247 (1951).

2 Federal Power Commission v. Oregon, \_\_\_ U.S. \_\_\_, 99 L.Ed.  
(Advance p. 738, 1955).

3 e.g. Schwartz, Federalism and Anadromous Fish, 23 Geo. Washington Law  
Review 535, 547 (1955); Note, 68 Harvard Law Review 382, 383 (1954).



1        Practically every potential power site in Oregon,        Federal  
2 where the United States owns 51% of the land, has been        ownership  
3 federally reserved and falls under the Supreme Court's        Oregon 51%  
4 decision. Every principal power site in Washington is        Washington  
5 similarly covered, and every major stream in that state  
6 is affected because of the many Indian reservations,  
7 army installations, national forests and Atomic Energy  
8 Commission reservations within the state. A specific  
9 controversy pursuant to this decision has already risen  
10 between state and federal authorities in Nevada where        Nevada  
11 approximately 85% of the state's land area belongs to        85%  
12 the federal government. The Commanding Officer of the  
13 Naval Ammunition Depot at Hawthorne, Nevada, served  
14 notice on the State Engineer that applications under  
15 state law for rights to appropriate water from wells  
16 were being dropped as unnecessary following the Supreme  
17 Court's decision.<sup>4</sup> The state-federal controversy is a        Statutory  
18 real and vital one, accordingly, intensified by the        and  
19 failure of the parties to agree even on the nature of        constitutional  
20 the issues involved. A brief statement of the statutory        provisions  
21 and Constitutional provisions involved should serve to  
22 outline the area of this controversy to be explored.

23 \_\_\_\_\_  
24 <sup>4</sup> See statements of the state engineers of Oregon,  
25 Washington, and Nevada, filed with the Columbia Basin  
26 InterAgency Committee at its 84th meeting on  
November 16, 1955.

1     THE FEDERAL POWER ACT AND THE CONSTITUTIONAL ISSUE

2     The Federal Power Act derives its Constitutional     3 Sources  
3     regulatory authority from three sources: (1) The federal     of  
4     commerce power which applies per se to activities on     Authority  
5     navigable waters, (2) the comparable commerce authority  
6     over activities on nonnavigable waters which affect  
7     navigable waters, and (3) the proprietary power of the  
8     federal government over the public lands. The sweeping  
9     power of the national government acting under the commerce  
10    authority has been declared on innumerable occasions by  
11    the Supreme Court. Its exercise has been upheld even     Basis of  
12    though attended by the same incidents which attend the     Oregon's  
13    exercise of state police power. It is the regulation     challenge  
14    based on the third source, the proprietary power, however,  
15    which was challenged by the State of Oregon, and is the  
16    subject of inquiry here. The Supreme Court had hereto-  
17    fore meticulously avoided deciding the boundary between  
18    state and federal authority in cases where the federal

19     \_\_\_\_\_

20    5    These sources of power are set forth in the Act,  
21        16 U.S.C.A. 797 (e), 817.

22    6    e. g. United States v. Rio Grande Irrigation Co.,  
23        174 U.S. 690 (1899); Oklahoma v. Atkinson, 313 U.S. 508  
24        (1941); Ashwander v. Tennessee Valley Authority, 297  
25        U.S. 288 (1935).

26    7    United States v. Appalachian Electric Power Co.,  
      311 U.S. 377 (1940).



1 government has sought to invoke this power with respect  
 2 to nonnavigable waters on the public lands. But the  
 3 issue was presented expressly in the contest between  
 4 Oregon and the Federal Power Commission, the former  
 5 asserting the state power to protect its fish resources  
 6 against injury by a federal water-power licensee, the  
 7 latter asserting that the proprietary interest of the  
 8 United States, arising from its original ownership of  
 9 the power site in Oregon, enables it to grant its  
 10 licensee immunity from state police power.

11 Strict logical analysis is made difficult at the  
 12 outset since the proprietary power as a basis for the  
 13 jurisdiction of the Federal Power Commission is some-  
 14 thing of an anomaly when compared with the regulatory  
 15 purposes of the Federal Power Act. So much of the Act  
 16 as rests on the commerce power of the federal government  
 17 seems a logical regulatory expression of this power; in  
 18 such cases the power to regulate would appear to be as  
 19 great as the sweeping power of Congress over commerce,  
 20 and of like character. But the ownership by the federal  
 21 government of the public land in the several states does  
 22 not necessarily imply the same grant of extensive regula-  
 23 tory authority. Nevertheless, this conceptual distinction

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 25 8 See discussion and citations *infra*, at page  
 26

1 was not considered by the Supreme Court in a recent case Deschutes  
 2 approving a Federal Power Commission license involving decision  
 3 far reaching regulatory requirements.<sup>9</sup> On the other hand, insulates  
 4 it must still be noted that regulatory action approved licensee  
 5 under the property power in that case was regulatory from  
 6 action affecting only the licensee and conditioned on police powers  
 7 acceptance of a license. The regulation proposed by the of State  
 8 Federal Power Commission on the Deschutes would affect  
 9 third parties, however, subordinating their interests to  
 10 that of the licensee who is to be insulated from the  
 11 police power and the sovereign policies of Oregon as  
 12 expressed in its laws. This is clearly a new departure  
 13 in regulatory action under a proprietary jurisdiction.  
 14 And although the facts indicate that there might have  
 15 been grounds for asserting the applicability of commerce  
 16 authority to the Deschutes River,<sup>10</sup> the Federal Power  
 17 Commission chose to rest its case entirely upon the  
 18 property power of the United States over its public  
 19 lands.

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 22 9 Federal Power Commission v. Idaho Power Company,  
 23 344 U.S. 17 (1952).

24 10 See the argument contained in Schwartz, op. cit.,  
 25 note 3, at p. 542-544.  
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1        Thus, it is not surprising to note the majority hold-        U. S.  
2        ing of the Court of Appeals for the Ninth Circuit that        Court of  
3        the Federal Power Commission could issue only a permis-        Appeals  
4        sive license under these facts, that as the owner and        could  
5        proprietor of the land where the dam was to be built,        issue  
6        the United States could impose conditions upon a licensee        permissive  
7        or even deny a license, but that the United States could        license only.  
8        not clothe its licensee with immunity to State law. But        Could not  
9        before discussing the Constitutional implications of the        clothe  
10       Supreme Court's reversal of the Ninth Circuit's holding,        licensee  
11       it may prove worth while to review some of the general        with  
12       federal and Constitutional law relating to the division        immunity  
13       of state and federal authority over the public lands,  
14       before proceeding to the specific question of the divi-  
15       sion of that authority as it relates to waters on the  
16       public domain.

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THE DIVISION OF  
FEDERAL-STATE AUTHORITY OVER THE PUBLIC LANDS

Full, complete, and unshared sovereignty by the Federal Government over defined land area within the United States is enjoyed only in those cases which fall within Art I, Sec. 8, Clause 17 of the Constitution, which provides that the Congress shall have power:

Congress  
shall have  
power:-  
exercise  
exclusive  
Legislation

"to exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;"

This Constitutional provision has been construed as inapplicable to acquisition of State land, even with State consent, unless there has been express cession of legislative authority. It is clear that this exclusive jurisdiction provision does not govern the state-federal relationship with respect to the public

Does not  
govern  
State  
Federal  
public lands

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11 Silas Mason Co. v. Tax Commission of State of Washington, 302 U.S. 186 (1937); James V. Dravo Construction Co., 302 U.S. 134 (1937); Atkinson v. State Tax Commission of Oregon, 303 U.S. 20 (1938).



12

1 lands. Cf. Wilson v. Cook, where the Court stated:

2 "Upon admission of Arkansas to statehood in Arkansas  
3 1836 upon an equal footing with the original  
4 states, (Act of June 15, 1836, c 100, 5 Stat.  
5 50) the legislative authority of the state  
6 extended over the federally owned lands with-  
in the state, to the same extent as over  
similar property held by private owners, save  
that the state could enact no law which would  
conflict with the powers reserved to the  
United States by the Constitution." 13

7 But it is the exception referred to in the foregoing  
8 statement that is presently of interest. The power Power  
9 reserved to the United States, with respect to the reserved  
10 federally owned lands within the States is expressed to U.S.  
11 in the Constitution as the power: Constitution

12 "to dispose of and make all needful Rules Art. IV  
13 and Regulations respecting the territory or  
14 other property belonging to the United Sec. 3  
States." 14 Clause 2

15 It is the nature and extent of this property power,  
16 lesser than full sovereignty but something more than the  
17 mere incidental powers of landlordship, that this paper  
18 purports to make the object of inquiry. And it was this  
19 same question, it is submitted, which was the critical,  
20 though largely undiscussed, issue decided by the Supreme  
21 Court in Federal Power Commission v. Oregon. Whether the  
22 question was, for practical purposes, fully decided, or

23  
24 12 327 U.S. 474 (1946).

25 13 327 U.S. 474, 487.

26 14 U. S. Const., Art. IV, Sec. 3, Clause 2.

1 whether its decision leaves the area of controversy  
2 substantially undiminished, will be further commented on  
3 below.

|    |                                                          |               |
|----|----------------------------------------------------------|---------------|
| 4  | The United States' original ownership of the public      | Power         |
| 5  | lands in the Western States arises from the treaties and | over          |
| 6  | agreements of cession made by the United States with the | original      |
| 7  | former sovereign owners or claimants. Such ownership     | domain        |
| 8  | was recognized by the various enabling acts admitting    | recognized    |
| 9  | these states to membership in the Union. Cases appealed  | in            |
| 10 | to the Supreme Court of the United States early estab-   | enabling acts |
| 11 | lished the principle that as proprietor of the public    | and greater   |
| 12 | lands the United States had powers under the Property    | than          |
| 13 | Clause far greater than those incident to ordinary       | ownership     |
| 14 | ownership.                                               |               |

15 Thus in 1871 it was established in Gibson v Chauteau<sup>16</sup>  
16 that a state statute of limitations could not apply  
17 against land owned by the United States. There the court  
18

19 15 See, for example, Mann v. Tacoma Land Co., 153 U.S.  
20 273 (1894), where the Court says: "in the Act provid-  
21 ing for the admission of Washington, Montana, and the  
22 Two Dakotas, into the Union (25 Stat. at L. 677)  
23 among the conditions imposed was this: 'That the  
24 people inhabiting said proposed states do agree and  
25 declare that they forever disclaim all rights and  
26 title to the unappropriated public lands lying within  
the boundaries thereof'. Conditions of like legal  
effect were included in the Oregon admission act  
(11 Stat. 383 (1859), and the admission acts of the  
other Western States.

16 13 Wall. 92 (1871).



1 first announced the broad dimensions of the Property  
 2 Clause in language which was to be repeated many times  
 3 over in succeeding years:

4 "With respect to the public domain, the  
 5 Constitution vests in Congress the power of  
 6 disposition and of making all needful rules  
 7 and regulations. That power is subject to  
 8 no limitations."

9 The Court continued with language which presages the  
 10 present Supreme Court's decision in Federal Power Commis-  
 11 sion v. Oregon:

12 "Congress has the absolute right to prescribe  
 13 the times, the conditions and the mode of  
 14 transferring this property, or any part of  
 15 it, and to designate the persons to whom the  
 16 transfer shall be made. No state legislation  
 17 can interfere with this right or embarrass  
 18 its exercise."

19 Similarly, the Ninth Circuit Court of Appeals held  
 20 that Western fence laws, which reverse the common-law  
 21 rule requiring owners of animals to fence them against  
 22 escape to adjoining lands, do not apply against the  
 23 United States as proprietor of the public lands. Rather,  
 24 the United States has sufficient legislative authority  
 25 over such lands to prescribe federal rules best suited  
 26 to their protection. The Supreme Court has gone even  
 27 further in declaring that federal statutes prohibiting

28 17 13 Wall. 92, 99.

29 18 ibid.

30 19 Shannon v. United States, 160 F. 870 (9th Cir. 1908).



1 the inclosure of public lands may extend to fences which  
2 are located on private lands adjoining the public lands. 20

3 In this case the court recognized that in adopting a  
4 federal nuisance doctrine, even though limited, it was  
5 exercising a form of police power, affecting both the  
6 public lands and private land. 21

7 Regulation of grazing on federal land by means of a 22 Grazing  
8 permit system has been approved by the Supreme Court. permit

9 On the other hand, concurrent exercise of state  
10 power over the public lands has been traditionally  
11 recognized. In 1881, the Supreme Court held that a  
12 federal court did not have jurisdiction over the crime  
13 of murder committed on a Colorado Indian reservation,  
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15  
16 20 Camfield v. United States, 167 U. S. 519 (1897).

17 21 The Court treated this point explicitly. Justice  
18 Brown stated that: "While we do not undertake to  
19 say that Congress has the unlimited power to  
20 legislate against nuisances within a state, which  
21 it would have within a territory, we do not think  
22 the admission of a territory as a state deprives  
23 it of the power of legislating for the protection  
24 of the public lands, though it may thereby involve  
25 the exercise of what is ordinarily known as the  
26 police power, so long as such power is directed  
solely to its own protection. A different rule  
would place the public domain of the United States  
completely at the mercy of state legislation."

22 Light v. United States, 220 U.S. 523 (1911).



23

1 but that this was a matter for the State Courts. A  
 2 forcible entry and detainer statute of the State of  
 3 Washington was upheld as dealing only with possessory Possessory  
 4 interests and not conflicting with federal statutes con- interest  
 5 trolling entry or prohibiting unlawful enclosures of  
 6 public lands. <sup>24</sup> State regulation of grazing on the public  
 7 lands was permitted in Omaechevarria v. Idaho, <sup>25</sup> where the  
 8 Idaho "Two-Mile Limit Law", prohibiting the grazing of  
 9 sheep on cattle ranges, was attacked as in conflict with  
 10 the federal interest. There Justice Brandeis stated  
 11 what may be a major rationalizing principle for this State  
 12 group of cases in saying that: "The police power of the police  
 13 state extends over the federal public domain; at least, power  
 14 when there is no legislation by Congress on the sub- extends over  
 15 ject." <sup>26</sup> Although there are inevitably some cases which public domain  
 16 cannot be thus reconciled, <sup>27</sup> the general pattern of the  
 17 \_\_\_\_\_

18 23 United States v. McBratney, 104 U.S. 621 (1881), but  
 19 note that this followed from Congressional policy,  
 20 not Constitutional mandate--the statute provided for  
 21 federal jurisdiction only in any "place or district  
 22 of the country under the exclusive jurisdiction of  
 23 the United States."  
 24 24 Denee v. Ridpath, 246 U.S. 208 (1918).  
 25 246 U.S. 343 (1918).  
 26 246 U.S. 343, 346.  
 27 e.g. Ward V. Race Horse, 163 U.S. 504 (1895), intimat-  
 ing that the power to regulate the killing of game is  
 a necessary and exclusive police power of the states.  
 It is doubtful that this decision retains any force  
 at the present time.

1 Property Clause as establishing paramount federal authority,  
 2 subject however to state sovereignty where the national  
 3 power is not fully exercised, seems firmly established  
 4 by the great majority of Supreme Court decisions. This  
 5 property power does not, however, constitute general  
 6 sovereignty over the public lands, and may be exercised  
 7 only within its proper scope. The exercise must be  
 8 appropriate according to the nature of the property, it  
 9 must be "consistent with the foundation principles of  
 10 our dual system of government and must not be contrived  
 11 to govern the concerns reserved to the States." That  
 12 the proper scope of this power is very great, however,  
 13 and approaches in character the scope of the Commerce  
 14 Power is indicated by such cases as United States v. City  
 15 and County of San Francisco, upholding a statutory  
 16 requirement that power generated from private facilities  
 17 located on public lands be publicly distributed, and  
 18 Idaho Power Co. v. Federal Power Commission, upholding  
 19 the Commission acting under the Property Clause in  
 20 requiring a licensee to interconnect its project with  
 21 projects of the United States and to transmit electric

U. S.  
 v.  
 City of  
 San Francisco  
 restricted  
 license

28 Ashwander v. Tennessee Valley Authority, 297 U.S.  
 288, 338 (1936).  
 29 310 U.S. 16 (1939).  
 30 344 U.S. 17 (1952)



1 power of the United States to the extent of the unused  
 2 capacity in its transmission lines. While the latter  
 3 case extends regulation to affect not only federal  
 4 property but in addition separate property of the licensee  
 5 which bears no immediate relation to the federal property,  
 6 note that both of these cases, unlike Federal Power  
 7 Commission v. Oregon, affect only licensee and not third Conditioned  
 8 parties, and impose regulation only through conditions license  
 9 contained in a license which the applicant is free to  
 10 accept or reject. Perhaps the most comprehensive single  
 11 statement characterizing the nature of the property power  
 12 is that contained in Utah Power and Light Co. v. United  
 13 States,<sup>31</sup> where Justice Van Devanter said:  
 14 "True, for many purposes a state has civil and Full  
 15 criminal jurisdiction over lands within its power to  
 16 limits belonging to the United States, but this protect  
 17 jurisdiction does not extend to any matter that control  
 18 is not consistent with full power in the United their  
 19 States to protect its lands, to control their use  
 20 use, and to prescribe in what manner others may use  
 21 require (sic) rights in them. Thus, while the  
 22 State may punish public offenses, such as murder  
 23 or larceny, committed on such lands, and may tax  
 24 private property, such as live stock, located  
 25 thereon, it may not tax the lands themselves,  
 26 or invest others with any right whatsoever in them."

The foregoing cases on the general nature of the  
 property power are too general to point a clear direction Water  
 in the analysis of the water rights problem of Federal rights

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31 243 U.S. 389, 404 (1917).

1 Power Commission v. Oregon. They do dispell beyond all  
 2 question, however, any possibility of contention that the Property  
 3 property power is the mere equivalent of the power of a power  
 4 private landlord over property "owned" under a unitary as it  
 5 sovereignty. An attempt to define more strictly the affects  
 6 scope of the property power as it affects waterrights in water rights  
 7 streams on the public lands will be made in the follow-  
 8 ing section, with special attention devoted to those  
 9 federal statutes which withhold the full impact of the  
 10 property power.

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1 WATER RIGHT THEORIES AND THE EFFECT OF THE DESERT LAND ACT

2 A century of development of Western water law has seen Two  
 3 the early emergence and continuous reference to two irre- theories  
 4 concilable theories concerning the fundamental source of concerning  
 5 <sup>32</sup> watterights authority. One theory has asserted that the fundamental  
 6 United States controls all nonnavigable streams and source of  
 7 whatever rights might or did exist therein as an incident watterights  
 8 of its ownership of the public lands, and that this authority  
 9 federal control was not surrendered upon the admission incident to  
 10 of a state into the union. The other asserted original ownership  
 11 ownership and control in the states on the basis that a  
 12 riparian system was not appropriate to and had never  
 13 <sup>33</sup> existed in the west. The practical conflicts which  
 14 resulted in judicial decision only seldom involved a

- 15 \_\_\_\_\_
- 16 32 These two theories are sometimes referred to as the California  
 17 "California Doctrine" and the "Colorado Doctrine", Doctrine  
 18 respectively, although more often in a context where  
 19 33 For a classical exposition of this approach, see Colorado  
 20 Bannister, "The Question of Federal Disposition of Doctrine  
 21 State Waters in the Priority States, 28 Harvard Law in which  
 22 Review 270 (1915), where the author correctly argues sovereign state  
 23 that what is involved is state power, not property. or federal  
 24 This is a distinction that has too often been power reside  
 25 unrecognized or confused by subsequent commentators  
 26 as well as the courts. Unfortunately, the author  
 dogmatically and without argument assumes in favor  
 of the states the answer to the basic question: in  
 which sovereign, state or federal, does this power  
 reside?

1 direct clash between the two theories, however. Because  
 2 of federal statutes which purport to withhold the full Desert  
 3 exercise of federal authority, the arguments have centered Land  
 4 primarily about the effect of these statutes, particularly Act  
 5 the Desert Land Act. The first among these statutes was 1866  
 6 the Act of 1866, as modified by the Act of 1870, which 1870  
 7 declared mining lands free and open to preemption, and  
 8 provided that:<sup>34</sup>

9 "Whenever, by priority of possession, rights to U.S.  
 10 the use of water for mining, agriculture, manu- patents  
 11 facturing, or other purposes, have vested and  
 12 accrued, and the same are recognized and acknow- protected  
 13 ledged by the local customs, laws, and the deci-  
 14 sions of courts, the possessors and owners of such  
 15 vested rights shall be maintained and protected in vested  
 16 the same; and the right of way for the construc-  
 17 tion of ditches and canals for the purposes here-  
 18 in specified is acknowledged and confirmed; but  
 19 whenever any person, in the construction of any  
 20 ditch or canal, injures or damages the possession  
 21 of any settler on the public domain, the party  
 22 committing such injury or damage shall be liable  
 23 to the party injured for such injury or damage.  
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27 All patents granted, or preemption or home-  
 28 steads allowed, shall be subject to any vested  
 29 and accrued water rights, or rights to ditches  
 30 and reservoirs used in connection with such  
 31 water rights, as may have been acquired under or  
 32 recognized by this section."

33 In numerous cases the Supreme Court recognized these  
 34 statutes as permitting, if in accordance with local law

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35 <sup>34</sup> Act of July 26, 1866, Sec. 9, 14 Stat. 251, 253;  
 36 Act of July 9, 1870, Sec. 17, 16 Stat. 217, 218.  
 37 These statutes are codified as two unnumbered  
 38 paragraphs in 43 U.S.C. 661.



|    |                                                                                      |              |
|----|--------------------------------------------------------------------------------------|--------------|
| 1  | and custom, the acquisition of water rights against the                              | Acquisition  |
| 2  | <sup>35</sup> federal interest in the public lands. Such permission                  | of           |
| 3  | does not create affirmative authority, however, such as                              | waterrights  |
| 4  | the right to trespass on private property, to perfect                                | against      |
| 5  | <sup>36</sup> such rights. It is interesting to note that at an early                | Federal      |
| 6  | date the Supreme Court found occasion to criticize the                               | interest in  |
| 7  | <sup>37</sup> language used in the Act of 1866. Both the Act of 1866                 | public lands |
| 8  | and the Act of 1877 were declared "obviously primitive                               |              |
| 9  | legislation" in <u>Utah Power and Light Co. v. United</u>                            |              |
| 10 | <sup>38</sup> <u>States</u> . Of greater significance than these earlier             |              |
| 11 | statutes is the Desert Land Act of 1877, which permitted                             |              |
| 12 | <sup>39</sup> desert land entries subject to the proviso:                            |              |
| 13 | "That the right to the use of water by the person                                    | Provisions   |
| 14 | so conducting the same, on or to any tract of                                        | of           |
| 15 | desert land of three hundred and twenty acres                                        | Desert Land  |
| 16 | shall depend upon bona fide prior appropriation;                                     | Act of       |
| 17 | and such right shall not exceed the amount of                                        | 1877         |
| 18 | water actually appropriated, and necessarily                                         |              |
| 19 | used for the purpose of irrigation and reclama-                                      |              |
| 20 | tion; and all surplus water over and above such                                      |              |
| 21 | actual appropriation and use, together with the                                      |              |
| 22 | water of all lakes, rivers, and other sources of                                     |              |
| 23 | water supply upon the public lands and not navi-                                     |              |
| 24 | gable, shall remain and be held free for the                                         |              |
| 25 | appropriation and use of the public for irriga-                                      |              |
| 26 | tion, mining and manufacturing purposes subject                                      |              |
|    | to existing rights."                                                                 |              |
| 22 | <sup>35</sup> e.g. <u>Jennison v. Kirk</u> , 98 U.S. 453 (1878).                     |              |
| 23 | <sup>36</sup> <u>Sturr v. Beck</u> , 133 U.S. 541 (1890).                            |              |
| 24 | <sup>37</sup> <u>Basey v. Gallagher</u> , 20 Wall. 670, 683-4 (1874).                |              |
| 25 | <sup>38</sup> 243 U.S. 389, 405 (1917).                                              |              |
| 26 | <sup>39</sup> Act of March 3, 1877, Sec. 1; 19 Stat. 377, as amended; 43 U.S.C. 321. |              |

1 The terms of this proviso contain no reference to state  
 2 law and custom, but appear to establish the doctrine or  
 3 prior appropriation as federal law. It is possible to  
 4 argue as a matter of statutory construction that since  
 5 the statute contains no definition of prior appropriation,  
 6 Congress intended that the method of appropriation pro-  
 7 vided for by state law was to be followed in making a  
 8 federal appropriation, but that Congress intended to  
 9 leave unchanged federal power as the primary source of  
 10 law permitting the acquisition of property rights in  
 11 running waters on the public domain. This analysis  
 12 would beyond question permit federal change or withdrawal  
 13 of appropriation privileges on the public lands. An  
 14 actual result somewhat similar to this hypothesis was  
 15 obtained following the Act of June 4, 1897, regulating  
 16 the use of water within national forests. The Supreme  
 17 Court held that compliance with State law alone was not  
 18 sufficient to permit entry where a federal permit system  
 19 had been established. But in the course of judicial

Act of  
 1897  
 regulating  
 use of  
 Water  
 within  
 National  
 Forests

20 \_\_\_\_\_  
 21 40 30 Stat. 11, 36, 16 U.S.C. 481.

22 41 Utah Power and Light Co. v. United States, 243 U.S.  
 23 389 (1917), but note that the Court stated that the  
 24 controversy was not one over water rights but over  
 25 rights of way through lands of the United States,  
 26 thereby avoiding the issue of sovereignty over  
 nonnavigable streams.



1 decision the Desert Land Act was not analyzed in terms of  
2 its effect upon the source of power to create rights in Copco  
3 flowing waters, until the leading case of California v.  
4 Oregon Power Co. v. Beaver Portland Cement Co. Among Beaver Cement  
5 other things this case held that the Acts of 1866, 1870,  
6 and the Desert Land Act were to be read together, and  
7 applied to all the public lands, not the desert lands Appeals  
8 only. The court then announced the combined effect of Court  
9 these statutes on the federal-state relationship in the decision  
10 broad language which was to be incorporated by the Ninth  
11 Circuit Court of Appeals as the foundation for its deci-  
12 sion in favor of Oregon against the Federal Power Commis-  
13 sion in the Deschutes River controversy: 45 Government  
14 "As the owner of the public domain, the Govern- as owner  
15 ment possessed the power to dispose of land and of land  
16 separately. Howell v. Johnson, C. C., 89 F. 556, and water  
17 558. The fair construction of (The Desert Land power to  
18 Act of 1877) is that Congress intended to establish dispose of  
19 the rule that for the future the land should be together or  
20 42 Gutierrez v. Albuquerque Land & Irrigation Co., separately  
21 188 U.S. 545 (1903), where a state interest was  
22 recognized, by construing the statute to permit the  
23 acquisition of water rights for others by a state  
24 created corporation having the power of eminent  
25 domain.  
26 43 295 U.S. 142 (1935).  
44 295 U.S. 142, 162.  
45 295 U.S. 142, 162 (1935), quoted in 211 F. 2d at 353.



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the public under the laws of the states and territories named. The words that the water of all 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' are not susceptible of any other construction."

And at a later point the Supreme Court stated, and the Court of Appeals again quoted:

"Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states."

This is the famous separation of the land and the water concept which must be analyzed to understand this controversy and the Supreme Court's reversal of the Court of Appeals. It is also central to an understanding of the underlying Constitutional issue involved. Unfortunately, this apparently simple concept masks rather than clarifies the competing Constitutional doctrines which have been advanced by the respective advocates of state and federal supremacy in this area. The Court of Appeal's concept of the nature of the rights in, or power over water separated by the Desert Land Act must necessarily have referred to a full,

Supreme  
Court  
held  
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Separation  
of land  
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water  
concept

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46 295 U.S. 142, 163, quoted in 211 F. 2d at 353.



1 complete, and, most important, irrevocable transfer of Power site  
 2 sovereignty over such water. In no other way could the no longer  
 3 Court have accepted, as it clearly did,<sup>47</sup> the fact that part of  
 4 the power site in question was no longer a part of the public lands  
 5 "public lands", having been withdrawn pursuant to law,<sup>48</sup>  
 6 yet treat such withdrawal with indifference, finding no  
 7 necessity even to discuss the point. The Court could  
 8 only have reasoned that, with the complete separation Interpretation  
 9 of land and water rights, a withdrawal order has opera- of the  
 10 tional effect only upon the parcel of land denominated effect of  
 11 in the order, and that the water, having been dedicated withdrawal  
 12 to public use, is unaffected. Accepting the court's order  
 13 premises, it would indeed be difficult to conclude  
 14 otherwise, without raising troublesome questions con-  
 15 cerning the amount and nature of the water rights which  
 16 would adhere to the reserved land parcel if such separa-  
 17 tion did not continue.

18  
 19 <sup>47</sup> See note 7 at page 350 of the court's opinion; also  
 20 see the dissenting opinion.

21 <sup>48</sup> Act of June 25, 1910, 36 Stat. 855, 858, 43 U.S.C.  
 22 141, 142, provides as follows: "The President may,  
 23 at any time in his discretion, temporarily withdraw  
 24 from settlement, location, sale, or entry any of the  
 25 public lands of the United States, including Alaska,  
 26 and reserve the same for water-power sites, irrigation,  
 classification of lands, or other public purposes to be  
 specified in the orders of withdrawals, and such with-  
 drawals or reservations shall remain in force until re-  
 voked by him or by an Act of Congress." Also see:  
 Federal Power Act, Sec. 24, 41 Stat. 1075, 1076, 16  
 U.S.C. 818.

President  
 may  
 withdraw  
 temporarily  
 until  
 revoked  
 by President  
 or  
 Congress

1 Likewise it is clear that the Court of Appeals did  
2 not rely upon Sec. 9 (b) of the Federal Power Act as re-  
3 quiring compliance with state law. In discussing this  
4 provision of the Federal Power Act the court adopts  
5 language from the leading case on this point. First  
6 Iowa Hydro-Electric Co-op. v. Federal Power Commission,  
7 stating that:

50

8 "The need for compliance with applicable state  
9 laws, if any, arises not from this federal  
statute but from the effectiveness of the state  
statutes themselves."

Need for  
compliance  
with  
State laws

10 Perhaps the Court of Appeals best reveals its concept  
11 of the crucial point in its next comment:

52

12 "Our conclusion as to the meaning and effect of  
13 Sec. 9 (b) does not, however, destroy the objector's  
14 case, for they rely upon the more fundamental claim  
15 that the Deschutes River is a state stream and that  
the State of Oregon has sovereign power over it  
and its waters." (emphasis added)

Deschutes  
River  
a state  
stream

17 49 Providing that: "Each applicant for a license under  
18 this chapter shall submit to the commission--(b)  
19 'Satisfactory evidence that the applicant has complied  
20 with the requirements of the laws of the State or  
21 States within which the proposed project is to be  
22 located with respect to bed and banks and to the  
23 appropriation, diversion, and use of water for power  
purposes and with respect to the right to engage in  
the business of developing, transmitting, and dis-  
tributing power, and in any other business necessary  
to effect the purposes of a license under this  
chapter.'" 16 U.S.C. 802.

evidence  
applicant  
has complied  
State laws

24 50 328 U.S. 152 (1946).

25 51 328 U.S. 152, 178.

26 52 211 F. 2d at 351.



1 The underscored words constitute the fundamental  
 2 position taken by the Court of Appeals on the state-  
 3 federal question of sovereignty over nonnavigable waters.  
 4 The Court by this statement took a positive stand on this  
 5 long undecided question of sovereignty. Perhaps it would  
 6 not be too rash to suggest that the court would have taken  
 7 this stand even without the Desert Land Act to rely upon,  
 8 stating after the fashion of Pollard's Lessee v. Hagan<sup>53</sup>  
 9 that control over nonnavigable waters is a natural inci-  
 10 dent of state sovereignty.

|    |                                                                 |                |
|----|-----------------------------------------------------------------|----------------|
| 11 | And apart from the specific support which it found              | Supreme        |
| 12 | in the <u>Beaver Cement</u> case, it is probable that the court | Court          |
| 13 | was influenced to no inconsiderable extent by the con-          | refuses        |
| 14 | sistent refusal of the Supreme Court to decide the Con-         | to decide      |
| 15 | stitutional issue, despite strong urging by Government          | Constitutional |
| 16 | attorneys that full resolution of state and federal con-        | issue          |
| 17 | flict in this area could not be obtained without decision       |                |
| 18 | on this question. This was the result as early as 1916          |                |

|    |                                                              |           |
|----|--------------------------------------------------------------|-----------|
| 20 | 53 3 How. 212 (1885), the leading case establishing          | Sovereign |
| 21 | that title to the bed and banks of navigable streams         | title in  |
| 22 | is in the states as a natural incident of sovereignty.       | States to |
| 23 | This case is also the departure point for the tide           | bed and   |
| 24 | land cases. See <u>United States v. California</u> , 332     | banks of  |
| 25 | U.S. 19 (1947); <u>United States v. Texas</u> , 339 U.S. 707 | navigable |
| 26 | (1950); <u>United States v. Louisiana</u> , 339 U.S. 699     | waters    |
|    | (1950) and <u>Alabama v. Texas</u> , 347 U.S. 272 (1954).    |           |

1 in Utah Power and Light Co. v. United States.<sup>54</sup> In Wyoming  
2 v. Colorado<sup>55</sup> the court bypassed the question on the basis  
3 that the United States was not attempting in that case to  
4 enforce a paramount right, saying that: "whether its Paramount  
5 public land holdings would enable it to go further we rights  
6 need not consider."<sup>56</sup> Another refusal to decide followed  
7 in United States v. Appalachian Electric Power Co.,<sup>57</sup> and  
8 the decision in Nebraska v. Wyoming<sup>58</sup>, although again re-  
9 fusing a direct ruling on the Constitutional issue, must  
10 have provided encouragement to the proponents of state Unappropriated  
11 sovereignty. In this case the Supreme Court permitted waters  
12 the states to stand as parens patriae for their citizens also  
13 in claiming not only appropriated waters but also the surplus  
14 surplus unappropriated waters flowing over public lands. Unappropriated  
15 It is hard to reconcile this action by the court with waters  
16 its statement that "the question of the ownership by the flowing over  
17 United States of unappropriated water is largely academic public lands  
18 so far as the narrow issues of this case are concerned."<sup>59</sup>  
19 \_\_\_\_\_  
20 54 243 U.S. 389 (1917).  
21 55 159 U.S. 419 (1921).  
22 56 259 U.S. 419, 465.  
23 57 311 U.S. 377 (1940).  
24 58 325 U.S. 589 (1945).  
25 59 325 U.S. 589, 616.  
26



1 In view of this historical record and recognizing the in-  
2 fluence as a precedent of the Beaver Cement case with its Beaver  
3 somewhat superficial oversimplification of the issue, 60 Cement  
4 it is not difficult to see how the Court of Appeals was case  
5 able to involve a theory resolving the Constitutional  
6 issue entirely in favor of state sovereignty. This  
7 raises the question of what, if anything, remains of this  
8 Constitutional theory after the Supreme Court's reversal  
9 of the Court of Appeals.

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10  
11  
12  
13 60 It should be noted in defense of the opinion, however, Conflicting  
14 that that case dealt with conflicting claims of individuals claims  
15 and not governments. Thus it was immaterial to that of  
16 decision which sovereign possessed law making authority individual  
17 to create water rights in the Rogue River; equally not  
18 immaterial was the question whether the separation of Governments  
19 land and water transferred sovereignty over water in  
20 whole or in part from one government to another. The  
21 references to plenary state control are therefore  
22 dictum.  
23  
24  
25  
26

1        THE SUPREME COURT DECISION IN THE PELTON CASE

2        The Supreme Court in its decision of the Pelton con-        Pelton  
3        troversy refused to decide the issue whether the Desert        decision  
4        Land Act and related acts transferred sovereignty to the  
5        States over all nonnavigable waters within their borders.<sup>61</sup>  
6        But this is not the equivalent of saying that the Supreme  
7        Court left totally undecided the Constitutional issue, as  
8        it had on earlier occasions. In resting its decision on        inapplicability  
9        the inapplicability of the Act because of withdrawals,        of  
10       the Supreme Court was in effect rejecting the Court of        Desert Act  
11       Appeals' reading of the Beaver Cement case and that        because of  
12       court's position that an irrevocable grant of power over        withdrawal  
13       water had been made to the states. A fortiori, the  
14       Supreme Court's decision lays to rest any contention  
15       that, in the absence of the Desert Land Act, sovereign  
16       power over water rests with the states as a natural  
17       incident of statehood.

18       While the Supreme Court's decision rests principally  
19       on the grounds of the non-applicability of the Desert  
20       Land Act, its reference to the First Iowa case is signi-  
21       ficant to indicate the views of the Court concerning the

22       \_\_\_\_\_  
23       61 99 L.Ed. (Advance p. 738, 746). In the words of  
24       Justice Burton: "It is not necessary for us, in the  
25       instant case, to pass upon the question whether this  
26       legislation constitutes the express delegation or  
     conveyance of power that is claimed by the State,  
     because these Acts are not applicable to the reserved  
     lands and waters involved."



1 affirmative powers of the United States where unrestrained  
 2 by voluntary conformity to state statutes. In making the  
 3 following statement concerning the Deschutes River con-  
 4 troversy:

5 "As in First Iowa Hydro-Electric Co-op. v. Federal  
 6 Power Commission, 328 U.S. 152, 90 L.Ed. 1143, 66  
 7 S.Ct. 906, this case illustrates the integration  
 8 of the federal and state jurisdictions in licens-  
 9 ing water power projects under the Federal Power  
 10 Act. In the First Iowa case we sustained the  
 11 authority of the Commission to license a power  
 12 project to use navigable waters of the United  
 13 States located in Iowa. Here, without finding  
 14 that the waters are navigable, the Commission has  
 15 issued a comparable license for a power project  
 16 to use waters on lands constituting reservations  
 17 of the United States located in Oregon. The State  
 18 of Oregon questions the authority of the Commission  
 19 to do this....For the reasons hereafter stated, we  
 20 sustain the Commission.....To allow Oregon to veto  
 21 such use, by requiring the State's additional per-  
 22 mission, would result in the very duplication of  
 23 regulatory control precluded by the First Iowa  
 24 decision."

Comparison  
 of  
 legal  
 issues  
  
 Oregon  
  
 Iowa

16 the court seems to be equating the property power involved  
 17 here with the commerce power involved in the First Iowa  
 18 case as of identical scope and effect. If so, and the  
 19 language appears to permit no other conclusion, the  
 20 Supreme Court has as a practical matter at least, finally  
 21 decided the Constitutional issue of sovereignty over  
 22 Western nonnavigable waters.

Supreme Court  
 decided the  
 Constitutional  
 issue of  
 sovereignty  
 over Western  
 nonnavigable  
 waters

23 For ever if the Desert Land Act were construed to  
 24 transfer sovereignty in accordance with the opinion of

25 \_\_\_\_\_  
 26 62 99 L.Ed. (Advance p. 738, 740 and 744).

1 the Court of Appeals, it is a simple administrative  
 2 matter in any particular case to suspend the effect of  
 3 the Act. Thus it is of little practical importance to  
 4 debate the probable effect of the Desert Land Act under Unlimited  
 5 the Supreme Court's view of the Constitutional issue, federal  
 6 although a number of theories are possible. <sup>63</sup> The import- power can  
 7 ant point to the decision is that unlimited federal be exercised  
 8 power can be exercised over Western nonnavigable waters over Western  
 9 by unilateral action on the part of the executive branch nonnavigable  
 10 of the federal government. waters

11 The foregoing statement is subject to one important by Executive  
 12 qualification, however, which was clearly recognized in  
 13 the Supreme Court's decision although it had no immediate  
 14 practical effect upon the outcome of the Pelton Project  
 15 controversy. This is the provision of the Federal Power

16  
 17 63 It may be argued that where it applies, the Act  
 18 transfers full sovereignty to the states, but this  
 19 is both theoretically and practically unworkable,  
 20 since it would be difficult to conceive of, much  
 21 less administer, a sovereignty which ebbs and flows  
 22 in proportion to minor changes in the geographical  
 23 boundaries of the public lands. It is also question-  
 24 able whether sovereignty, once granted, is revocable.  
 25 More reasonable is the theory that the Desert Land  
 26 Act is a very limited grant of power to the states  
 to make property rules governing the vesting of  
 water rights. Also possible is the theory that the  
 federal government has merely incorporated by  
 reference certain state water laws in its own federal  
 appropriation system without transferring any of its  
 sovereignty.



1 Act itself, in derogation of the paramount Constitutional Limit  
2 power, which limits the exercise of federal power by federal  
3 providing: power

4 "That nothing herein contained shall be construed  
5 as affecting or intending to affect or in any way Proviso  
6 to interfere with the laws of the respective  
7 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."

8 Although the Court does not purport to construe in  
9 Federal Power Commission v. Oregon this statutory with-  
10 holding of federal power, it does refer to the require-  
11 ments thereof as falling within the category of "vested Vested  
12 rights." But even if only "vested rights," rather than rights

13  
14 64 Federal Power Act, Sec. 27, 41 Stat. 1077, 16 U.S.C. 821.

15 65 The Court cites Sec. 27 after making the following  
16 statement: "There remains no question as to the con-  
17 stitutional and statutory authority of the Federal Power  
18 Commission to grant a valid license for a power project  
19 on reserved land of the United States, provided that, as  
20 required by the Act, the use of the water does not con-  
21 flict with vested rights of others." 99 L.Ed. (Advance Review of  
22 p. 738, 744). In First Iowa Hydro-Electric Co-op. v. Congressional  
23 Federal Power Commission, 328 U.S. 152, 175, 176 (1946), history  
24 the court indicates without firmly declaring that Section  
25 27 applies only to property rights. Compare Grand River  
26 Dam Authority v. Grand-Hydro, 335 U.S. 359 (1948); United  
States v. Central Stockholders Corp., 52 F.2d 322 (9th Cir.  
(1931). Also see Schwartz, Niagara Mohawk v. Federal Power  
Commission, Have Private Water Rights Been Destroyed By  
the Federal Power Act, 102 U. of Pa. L. Rev. 31, 51 (1953),  
where a review of the Congressional history of Section 27  
leads the author to conclude that this section was probably  
intended to protect only irrigation rights not rights to  
diversions for power generation.



1 the possibly broader rights encompassed by the "control,  
2 appropriation, use, or distribution" laws referred to in What  
3 Section 27, are protected from the effect of paramount constitutes  
4 federal authority, still there remains the question of vested  
5 what are "vested rights." The Supreme Court cases con- rights  
6 struing Section 27 have been primarily concerned with its  
7 effect on the exercise of paramount federal commerce  
8 power. Thus, Ford and Son V. Little Falls Fibre Company 66  
9 held that a federal licensee under this section was not Upstream  
10 clothed with authority to inflict damages on an upstream damages  
11 owner of state water rights, at least not without being  
12 required to respond in damages. Recent decisions in the U. S.  
13 fourth and fifth circuits not involving the Federal condemning  
14 Power Act, have held that in condemning for a federal power site  
15 power site land bordering on navigable waters the United bordering on  
16 States must pay the value of the land as a potential navigable  
17 power site, even though it could be used for this purpose must pay  
18 only through the permission of the United States. The damages  
19

20 66 280 U.S. 369 (1930); Compare International Paper Co. v.  
21 United States, 282 U.S. 399 (1930);

22 67 United States v. Twin City Power Co., 215 F.2d 592, (4th Cir. 1954);  
23 United States v. Twin City Power Co., 221 F.2d 299 (5th Cir. 1955).

24 68 The value for agricultural or forest purposes was esti-  
25 mated at \$37 per acre, the value as a power site at  
26 \$267.02 per acre. For a criticism of these decisions  
see Note, 64 Yale L. Journal 96 (1955).



68a

1 Supreme Court has just reversed the circuit courts.  
2 The leading case is the recently decided Federal Power  
3 Commission v. Niagara Mohawk Power Corporation where the  
4 court said of the Federal Power Act:

5 "The Act treats usufructuary water rights like  
6 other property rights. While leaving the way  
7 open for the exercise of the federal servitude  
8 and of federal rights of purchase or condemnation,  
there is no purpose expressed to seize, abolish  
or eliminate water rights without compensation  
merely by force of the Act itself."

Usufructuary  
water  
rights

9

10

11

12 68a United States v. Twin City Power Co., U.S. \_\_\_\_\_,  
13 100 L.Ed. (Advance p. 223, 1956); United States v.  
14 Twin City Power Co., U.S. \_\_\_\_\_, 100 L.Ed.  
(Advance p. 249, 1956) (Memorandum decision).

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69 347 U.S. 239 (1954).

70 347 U.S. at 251. The actual decision turned on a  
very narrow issue, the court holding that in comput-  
ing a federal licensee's amortization reserve, the  
Federal Power Commission was not justified in dis-  
allowing expenses paid for state created water rights  
in navigable waters.

Measure  
of  
value

S U M M A R Y   O F   S T A T E   W A T E R   L A W S

O R E G O N

All water from all sources of water supply is declared by statute to belong to the public and, subject to existing rights, to be available for appropriation for beneficial use under the exclusive procedure provided in the statute.<sup>1/</sup> However, certain waters of the State have been withdrawn from appropriation in a series of enactments, chiefly to preserve the natural flow for scenic and recreational purposes and the protection of fishlife. It is provided by statute that the laws relating to priorities of right to utilize the waters of running streams shall apply likewise to waste, spring, or seepage waters, but that the person on whose lands the seepage or spring waters first arise shall have the right to the use of such waters.<sup>2/</sup> The preference thus accorded to the landowner has been upheld by the Oregon Supreme Court in cases in which the flow from the spring did not pass from the land on which the spring was located or did not form a natural stream.<sup>3/</sup> However, if the flow

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<sup>1/</sup> Oreg. Comp. Laws Ann., secs. 116-401 and 116-402.  
<sup>2/</sup> Oreg. Comp. Laws Ann., sec. 116-701  
<sup>3/</sup> Morrison v. Officer, 48 Oreg. 569, 570, 87 Pac. 896 (1906); David v. Brokaw, 121 Oreg. 591, 601, 256 Pac. 186 (1927); Henrici v. Paulson, 134 Oreg. 222, 224-225, 293 Pac. 424 (1930); Klamath Development Co. v. Lewis, 136 Oreg. 445, 450, 299 Pac. 705 (1931); Skinner v. Silver, 158 Oreg. 81, 96-98, 75 Pac. (2d) 21 (1938); Messinger v. Woodcock, 159 Oreg. 435, 443-444, 80 Pac. (2d) 895 (1938).



1 from the spring constitutes or discharges into a natural  
2 stream, it is subject to the law of watercourses.4/

3 The appropriative right for most uses of water is  
4 initiated by making application to the State Engineer  
5 for a permit to appropriate the water; and upon per-  
6 fection of the appropriation, a certificate is issued.5/  
7 Appropriations of water for the generation of electricity,  
8 however, are governed by the hydroelectric act, except  
9 in the case of developments by the United States or by  
10 cities, towns, municipal corporations, or utility  
11 districts.6/ The needs of municipalities for water are  
12 provided for by declaring that applications for municipal  
13 water supplies may be approved by the State Engineer to  
14 the exclusion of all subsequent appropriations, if the  
15 exigencies of the case so demand;7/ that water may be  
16 appropriated for such future reasonable and usual muni-  
17 cipal purposes as may be reasonably anticipated;8/ and  
18

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19 4/ Low v. Schaffer, 24 Oreg. 239, 244, 33 Pac. 678  
20 (1893); Low v. Rizer, 25 Oreg. 551, 559, 37 Pac. 82 (1894);  
21 Boyce v. Cupper, 37 Oreg. 256, 261, 61 Pac. 642 (1900);  
22 Brosnan v. Harris, 39 Oreg. 148, 150-151, 65 Pac. 867  
23 (1901); Morrison v. Officer, 48 Oreg. 569, 570, 87 Pac.  
24 896 (1906); Hildebrandt v. Montgomery, 113 Oreg. 687, 690,  
25 693-694, 234 Pac. 267 (1925); Minton v. Coast Property  
26 Corp., 151 Oreg. 208, 217, 46 Pac. (2d) 1029 (1935).  
5/ Oreg. Comp. Laws Ann., secs. 116-419 to 116-427.  
6/ Oreg. Comp. Laws Ann., secs. 119-101 to 119-302.  
7/ Oreg. Comp. Laws Ann., sec. 116-421.  
8/ Oreg. Comp. Laws Ann., sec. 116-437.

1 that the State Engineer shall reject, or grant subject  
2 to municipal uses, all applications where in his judgment  
3 the appropriation of the waters applied for would impair  
4 a municipal water supply.9/ An early statute provides  
5 that when the waters of a natural stream are inadequate  
6 for all users, first preference shall be given to domes-  
7 tic purposes, subject to such limitations as may be  
8 prescribed by law, and that agricultural purposes shall  
9 have preference over manufacturing purposes.10/ Appar-  
10 ently this statute has not been interpreted by the  
11 supreme court; but that court, in referring to the  
12 statute providing that applications for the appropria-  
13 tion of municipal water supplies may be approved to the  
14 exclusion of subsequent appropriations,11/ noted that no  
15 precedence was thereby given to a municipal corporation  
16 as such, as against prior claimants, and that priori-  
17 ties of appropriation constitute a species of property  
18 which cannot be taken from the holder without compensa-  
19 tion.12/ If the owner of a perfected and developed  
20 water right fails to use the appropriated water for a  
21 period of five successive years, abandonment of the

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22  
23 9/ Oreg. Comp. Laws Ann., sec. 116-1021.  
24 10/ Oreg. Comp. Laws Ann., sec. 116-601.  
25 11/ See supra, n. 7.  
26 12/ In re Schollmeyer, 69 Oreg. 210, 215, 138 Pac.  
211 (1914).



1 water right is conclusively presumed; but the water  
2 rights of cities and towns for all reasonable and usual  
3 municipal purposes are exempted from this provision.13/

4 As a result of legislation and judicial decisions,  
5 Oregon has become essentially an appropriation-doctrine  
6 State notwithstanding cases in which the riparian doc-  
7 trine, to some extent at least, was considered to be a  
8 part of the State water law. In various decisions up to  
9 and including the first decade of the present century,  
10 the supreme court recognized that riparian owners had  
11 certain rights to the use of water,14/ but also recog-  
12 nized the applicability of the appropriation doctrine to  
13 rights acquired on the public domain pursuant to authority  
14 contained in acts of Congress, as against riparian claims  
15 incident to lands subsequently passing to private posses-  
16 sion,15/ and the resulting modification of the common-

17  
18 13/ Oreg. Comp. Laws Ann., sec. 116-437.  
19 14/ Taylor v. Welch, 6 Oreg. 198, 200 (1876); Coffman  
20 v. Robbins, 8 Oreg. 278, 282 (1880); Shivley v. Hume, 10  
21 Oreg. 76, 77 (1881); Shook v. Colohan, 12 Oreg. 239, 244,  
22 6 Pac. 503 (1885); Weiss v. Oregon Iron & Steel Co., 13  
23 Oreg. 496, 498-502, 11 Pac. 255 (1886); Low v. Schaffer,  
24 24 Oreg. 239, 245-246, 33 Pac. 678 (1893); Jones v. Conn,  
25 39 Oreg. 30, 34, 36-37, 39-41, 44-46, 64 Pac. 855, 65 Pac.  
26 1068 (1901); Cox v. Bernard, 39 Oreg. 53, 61, 64 Pac. 860  
(1901); Bauers v. Bull, 46 Oreg. 60, 66, 78 Pac. 757 (1904);  
Brown v. Gold Coin Min. Co., 48 Oreg. 277, 286, 86 Pac. 361 (1906).  
15/ Lewis v. McClure, 8 Oreg. 273, 274-275 (1880);  
Tolman v. Casey, 15 Oreg. 83, 88, 13 Pac. 669 (1887); Curtis  
v. LaGrande Water Co., 20 Oreg. 34, 42, 23 Pac. 808 (1890);  
Speake v. Hamilton, 21 Oreg. 3, 6, 8, 26 Pac. 855 (1890);  
Simmons v. Winters, 21 Oreg. 35, 42, 27 Pac. 7 (1891); Brown v. Baker,  
39 Oreg. 66, 68-69, 65 Pac. 799, 66 Pac. 193 (1901); Morgan v. Shaw,  
47 Oreg. 333, 337, 83 Pac. 534 (1906); Porter v. Pettengill, 57 Oreg.  
247, 249, 110 Pac. 393 (1910).

1 law doctrine.<sup>16/</sup> The incompatibility of the riparian  
2 and appropriation doctrines was acknowledged, and there  
3 became established the principle that a settler upon  
4 public land contiguous to a stream could elect to make a  
5 prior appropriation of the water, or to insist upon his  
6 riparian right, but that he could not do both.<sup>17/</sup> In  
7 the leading case of Hough v. Porter,<sup>18/</sup> the supreme court  
8 held that the effect of the Desert Land Act of 1877<sup>19/</sup>  
9 was to abrogate the modified common-law doctrine of  
10 riparian rights, except for domestic use and the water-  
11 ing of stock essential to the sustenance of riparian  
12 landowners, so far as public lands entered after the  
13 date of that act were concerned. The water appropria-  
14 tion statute of 1909 contained provisions defining and  
15 limiting vested riparian rights to the extent of the  
16 actual application of water to beneficial use prior to  
17 the passage of the act, or within a reasonable time

18  
19 <sup>16/</sup> Carson v. Gentner, 33 Oreg. 512, 515-516, 52  
Pac. 506 (1898).

20 <sup>17/</sup> North Powder Mill. Co. v. Coughanour, 34 Oreg.  
9, 22, 54 Pac. 223 (1898); Brown v. Baker, 39 Oreg. 66  
21 70, 65 Pac. 799, 66 Pac. 193 (1901); Davis v. Chamberlain,  
51 Oreg. 304, 311, 98 Pac. 154 (1908). See Low v. Schaffer,  
22 24 Oreg. 239, 245-246, 33 Pac. 678 (1893). See also footnote 23.

23 <sup>18/</sup> Hough v. Porter, 51 Oreg. 318, 383-406, 95 Pac. 732  
(1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909). Approved  
and applied in Hedges v. Riddle, 63 Oreg. 257, 259-260, 127  
24 Pac. 548 (1912). Norris v. Eastern Oregon Land Co., 112 Oreg.  
106, 109-112, 227 Pac. 1111 (1924).

25 <sup>19/</sup> 19 Stat. L. 377 (March 3, 1877).

26



1 thereafter by means of works then under construction,  
 2 all such rights to be adjudicated under the statutory  
 3 procedure therein provided;20/ and the supreme court up-  
 4 held the validity of this legislative definition of  
 5 vested riparian rights, stating that it was within the  
 6 province of the legislature, by that act, to define a  
 7 vested riparian right or to establish a rule governing  
 8 the conditions under which it should be deemed to be  
 9 created.21/ In the development of the principle that  
 10 one cannot claim both riparian and appropriative rights  
 11 for the same use of water,22/ the court has held repeat-  
 12 edly that the election of one of these two claims is in  
 13 substance a waiver of the other, and that to claim a  
 14 right to use a specified quantity of water from a speci-  
 15 fied date, to the exclusion of use by others, is to  
 16 waive one's riparian right for the purpose of the pro-  
 17 ceeding in which the claim is made and to assume the

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 19  
 20 20/ Oreg. Laws 1909, ch. 216, sec. 70; Comp. Laws  
 21 Ann., sec. 116-403.  
 22 21/ In re Hood River, 114 Oreg. 112, 174-182, 227  
 23 Pac. 1065 (1924). California-Oregon Power Co. v.  
 24 Beaver Portland Cement Co., 73 Fed. (2d) 555, 567-569  
 25 (C.C.A. 9th, 1934). California Oregon Power Co. v.  
 26 Beaver Portland Cement Co., 295 U.S. 142, 153, 165 (1935).  
22/ See supra, n. 17.

1 character of an appropriator.<sup>23/</sup> No right can be adju-  
2 dicated under the statutory procedure except for the use  
3 of a specific quantity of water and with a fixed date of  
4 priority--in other words, on an appropriative basis.<sup>24/</sup>  
5 The measure of the vested right of a riparian landowner  
6 is beneficial use of the water,<sup>25/</sup> which right, to have  
7 an enforceable priority, must be adjudicated with the  
8 elements of an appropriative right. The net result of  
9 the Oregon legislation and court decisions has been a  
10 virtual abrogation of the substance of the riparian doc-  
11 trine except as a certain vested rights chiefly for  
12 domestic and stock-watering purposes. That is to say,  
13 the riparian doctrine in Oregon appears to be little  
14 more than a legal fiction.

15 \_\_\_\_\_  
16  
17 <sup>23/</sup> Caviness v. LaGrande Irr. Co., 60 Oreg. 410,  
18 421-423, 119 Pac. 731 (1911); Little Walla Walla Irr.  
19 Union v. Finis Irr. Co., 62 Oreg. 348, 358, 124 Pac.  
20 666, 125 Pac. 270 (1912); Bowen v. Spaulding, 63 Oreg.  
21 392, 395, 128 Pac. 37 (1912); In re Schollmeyer, 69 Oreg.  
22 210, 212, 138 Pac. 211 (1914); In re Sucker Creek, 83  
23 Oreg. 228, 234-237, 163 Pac. 430 (1917); Norwood v.  
24 Eastern Oregon Land Co., 112 Oreg. 106, 111-112, 227  
25 Pac. 1111 (1924); In re Deschutes River and Tributaries,  
26 134 Oreg. 623, 692, 703-706, 286 Pac. 563, 294 Pac. 1049  
(1930).

<sup>24/</sup> In re Deschutes River and Tributaries, 134 Oreg.  
623, 704, 705, 286 Pac. 563, 294 Pac. 1049 (1930).

<sup>25/</sup> Concurring opinion, Justice Coshow: In re Hood  
River, 114 Oreg. 112, 207, 227 Pac. 1065 (1924).





C O N T E N T S

## CONTROL OF WESTERN WATERS - MARCH 7, 1956

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## Appendix A - To Memo of March 7, 1956

69

"Control of Non-Navigable Western  
Waters"

Constitutional Power and  
Legislative Restraint

## Appendix B - Summaries of State Water Laws

113

Idaho  
Montana  
Nevada  
Oregon  
Washington  
Wyoming



Memo

8/13/57

my marginal <sup>comments</sup> remarks  
on these pages I made to  
use or arguments on  
2nd responsibility or  
proportion of

the entire concept of disposal & diffusion  
has been abrogated in  
11 weeks later

*I sent for 7/20/57  
see my letter on Resolution  
of Nov 16-1955*

*8/1/57 61  
read and marked  
u/D*

March 7, 1956

## CONTROL OF WESTERN WATERS

1. The Constitutional Issues. The Federal Power Act derives its validity from three principal sources: (1) the Federal commerce power which applies, per se, to activities on navigable waters; (2) the comparable commerce authority over activities on nonnavigable waters which affect navigable waters; and (3) the proprietary power of the Federal Government over its property, including the public lands. The rather sweeping power of the Federal Government under the commerce clause of the constitution seems to be generally recognized; but the recent decision of the Supreme Court based upon the third, or proprietary, power in the case of "The Federal Power Commission v. the State of Oregon, et al" (349 U. S. 435) has raised questions concerning legislative control of the exercise of the latter (proprietary) power. The cited decision, generally referred to as the Pelton Dam decision, upheld the validity of a license issued by the Federal Power Commission to construct a hydroelectric project on lands of the United States, withdrawn for power purposes, on a nonnavigable stream, wholly within the State of Oregon without the consent of the State, in fact over the strenuous objections of the State, in effect asserting that the proprietary interest of the United States, arising from its ownership of the power site, enabled it to grant its licensee immunity from the requirements of State regulatory law. The Federal Government owns much of the land in the Pacific Northwest states. Many of the remaining

*proprietary power  
Pelton case*

*lower site owner*

*extreme example*



power sites

power sites in the region are on streams flowing through Federal lands.

These power sites have been reserved. There are other Federal reservations in the area, including military, Indian, public, etc., which may fall within the purview of the Pelton Decision. Accordingly, State officials feel that for practical purposes they have lost control of the use and appropriation of their waters insofar as the Federal Government and its licensees are concerned and desire to regain control by legislative enactment. As to other than the Federal Government and its licensees, the State still retains its authority. A more elaborate and detailed discussion of the legal issues involved is attached as Appendix A hereto.

other Fed Indian

## 2. Laws of the States Relative to Appropriation and Use of Waters.

The water laws of the Pacific Northwest states generally provide that: the ownership of water is in the public; the beneficial use of water is a public use; water rights can be obtained only by observance of prescribed procedures; and priorities of use are those prescribed. Appendix B summarizes briefly the State water law doctrines pertinent to this discussion. It is the consensus of the State officials primarily concerned with water conservation and use that all Federal agencies, and their licensees, should observe and comply with State laws in carrying out Federal responsibilities or exercising the rights conferred by Federal license. This opinion extends to navigable as well as nonnavigable streams, flood control generally excepted. The laws which the Federal agencies and their licensees should observe are not only those directly related to the appropriation, use and control of waters for domestic uses, stock watering, agriculture, industry, and power development, but also include those relating to fish sanctuaries, recreation areas, pollution abatement and the like.

Appendix B - State law

Fed responsibility

uses

Fed



3. Practices of Federal Agencies. The Federal agencies in the Pacific Northwest primarily concerned with water use and control include the Bureau of Reclamation, Corps of Engineers, Federal Power Commission, Department of Agriculture, <sup>FS</sup> and to a lesser extent certain other agencies. Practices of the Federal agencies may be summarized as follows:

a. Department of Interior

(1) Bureau of Reclamation. The Bureau of Reclamation's activities with respect to compliance with State water laws are governed by Section 8 of the Reclamation Project Act of 1902. That Act specifically requires the Bureau to conform its activities to State water laws, and this has and will continue to be the practice in this region. The Pelton Dam decision will in no wise modify this policy. *Bureau act 1902*

(2) Bureau of Indian Affairs. The water rights for Indian lands are based primarily upon a Supreme Court decision in 1908 commonly referred to as the Winters Decision (Winters v. U. S. 207 U. S. 564 (1908) with the result that in most cases no reference is made to state water laws. There are some exceptions to this procedure, one of which is on the Fort Hall Project in Idaho where water rights were established through partial procedures under state law. It is not anticipated that any instructions will be issued or any modifications of existing procedures made as the result of the Pelton Dam decision. *Indian*

(3) National Park Service. The Park Service follows no uniform policy with respect to the observance of State laws in the consumptive use of water although on occasion follows State procedures in perfecting rights for water use in connection with National Park *N.P.*



facilities. No change in existing practices is contemplated as a result of the Pelton decision.

(4) Bureau of Mines. The work of the Bureau is so remotely connected with the consumptive use of water that application of State water law to its activities is largely academic.

(5) Bonneville Power Administration. With certain exceptions *Bonneville* this agency files for and obtains water rights under applicable State law for the water consumptively used in connection with its activities and installations. It is contemplated that the practice of following State law will be applied uniformly in the future.

(6) Bureau of Land Management. It is the policy of the *B L M* Bureau of Land Management to file under the various State water laws on water developments on which Government funds are or have been expended, and which are constructed on public lands, or on other lands under an easement to the United States. The current practice with respect to water filings varies with the States, with the nature of the water developments, and with the fees to be paid. In Idaho where the filing fee is nominal and where the informational requirements can usually be satisfied without detailed surveys, filings have been made and are currently being made. In Oregon a Bureau program to secure the benefits of filing with the State was initiated but not carried into practice; this was due chiefly to Bureau reorganization and changes in personnel; resumption of work on this program is under consideration. In Washington and Nevada filing fees are a deterrent, but there are also other reasons for not filing. In Washington there are no grazing districts, and the

65

comparatively few developments are on Section 15 leased lands. In Nevada the viewpoint is held that because of water appropriations already made to others little benefit would accrue to the Bureau by further filings with the State. Current practices and policies will not be changed because of the Pelton Dam decision.

(7) Fish and Wildlife Service. It is the policy of the Fish and Wildlife Service to comply in full detail with the water laws of the respective States. No change in that policy is contemplated because of the Pelton Dam decision. *wildlife*

b. Department of Commerce. While activities of the Department of Commerce relating to water resources may not be entirely harmonious with existing State laws, there have been no conflicts apparent. No change in existing practices is contemplated. *Commerce*

c. Department of Health, Education and Welfare. While no formal instructions have been issued, it is the policy of the Department to comply with all State water laws which apply to the activities of the Department. No change in this policy is contemplated by reason of the Pelton Dam decision.

d. Department of Agriculture. All bureaus of the Department have and will continue to comply with State water laws in carrying out their pertinent activities. No modification of this policy is contemplated as a result of the Pelton Dam decision. *U.S.F.S.*

e. Corps of Engineers, Department of the Army. The Corps of Engineers does comply with State water law in establishing water rights for those small and occasional beneficial consumptive uses required at *Engineers*



its various facilities. It does not comply with procedures prescribed by State water law in carrying out its major responsibilities for flood control and navigation although it attempts and will continue to conduct its activities in harmony therewith. The Pelton Dam decision will have no effect on this policy.

not on  
flood  
control  
or  
navigation

f. Federal Power Commission. Applicants for licenses are required to submit evidence satisfactory to the Commission of compliance with State laws and, insofar as water rights are concerned, this is in the form of a copy of a State water permit or a statement or evidence as to what steps have been taken to obtain a State permit if required. Licenses have been issued where State permits have not been obtained but applications therefor have been made. The Commission assumes that each licensee will be required to comply with all State laws which are not in conflict with the provisions of the Federal Power Act. Where both Federal and State authority are required for construction, one or the other agency must act first and in some cases a State will not act until a Federal Power Commission license has been obtained.

F.P.C.

Section 27 of the Federal Power Act expressly saves from interference vested water rights acquired under State law for irrigation, water supply, and similar uses.

The Commission's practice has not been changed by reason of the Pelton Dam decision.

4. Problems of Change through Legislation. It appears that State interests desire as a minimum that Federal agencies and licensees comply with State statutes relating to the control, appropriation, use and distribution

Legislation

of water applied to beneficial consumptive uses, including power, although the latter is usually not classified as a consumptive use. The difficult problem is presented, however, of determining which State laws are to receive Federal compliance. Are purely regulatory statutes which represent the exercise of State police power to be applied to the Federal Government?

*police power*  
?

There is the historical precedent of Federal reclamation law, which since 1902 has required that the U. S. Bureau of Reclamation observe state laws governing "the control, appropriation, use, or distribution of water used in irrigation \* \* \* ." It might be proposed that this pattern be adopted and applied to all Federal agencies and licensees; but reclamation law recognizes only state-created property rights in flowing waters and does not treat with the question of State police power. It is improbable that the Reclamation Act gives the individual states a veto over any or all Federal reclamation projects within the State. Section 27 of the Federal Power Act already gives equivalent protection against encroachment on vested property rights by Federal licensees, and the Flood Control Act of 1944 adopts the spirit of state water law by subordinating navigation uses to beneficial consumptive uses.

*see act compliance*

*analysis*

If legislation should be enacted providing for Federal compliance with all State laws, including those promulgated in the exercise of State police power and extending to navigable as well as nonnavigable waters, questions of constitutionality would be raised, since what would follow from such legislation would not be a partial and considered withholding of Federal authority under the commerce and property clauses of the

*State is proprietor of all land beneath navigable waters*



Constitution, but a total abandonment of such authority. Additionally, such legislation might unsettle a large body of law relating to Federal-State relationships and require many years of litigation to clarify its terms and determine its limitations. Assuming, arguendo, its validity from a constitutional point of view, its passage would have far-reaching implications. It would sweep away the Federal supremacy flowing from the commerce and property clauses and substitute therefor numerous local statutes, policies and procedures; and it would substitute (all) State laws, not merely that body of local rules concerning property rights in flowing waters such as are incorporated in reclamation law at present. Comprehensive development of the region's resources would then become subject to the provisions, frequently conflicting, of the laws of the several states in the region. Comprehensive development under those conditions would be most complex and impose acute administrative problems. Creation of an interstate body with authority to harmonize differences might become a necessity. Consequently, if it is the Pelton Dam decision which is to be set aside by legislation, such legislation should be specifically worded to make its intent abundantly clear that Congress places in the States authority over the control, use and appropriation of water in nonnavigable streams flowing over or through public lands whether or not power reservations or other reservations have been made thereon.

*fed  
state*

*property  
rights  
in  
flowing  
water*

*imp/act*

- 2 Attachments  
1. Appendix A  
2. Appendix B





CONTROL OF NONNAVIGABLE WESTERN WATERS  
CONSTITUTIONAL POWER AND LEGISLATIVE RESTRAINT

Introduction

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CONTROL OF NONNAVIGABLE WESTERN WATERS: CONSTITUTIONAL  
POWER AND LEGISLATIVE RESTRAINT

When the State of Oregon appealed to the courts the Federal Power  
<sup>1</sup>  
Commission's decision, granting over the State's objections, a license  
to the Portland General Electric Company to construct a power dam at the  
Pelton site on the nonnavigable Deschutes River in Oregon, the possi-  
bility arose that the long mooted question concerning the extent of  
Federal authority over western nonnavigable waters would at last be  
decided. While the controversy reached and was disposed of on its  
<sup>2</sup>  
merits by the highest court of the land, it is debatable whether the  
practical statutory as well as the theoretical Constitutional issues  
were fully settled as the result of this decision. The purpose of this  
article is to inquire into the developments in Constitutional law repre-  
sented by this decision and the practical results thereof, including  
some of the clamor for change by legislative intervention. The issue  
is not unimportant practically, nor the case a rarity, however, despite  
<sup>3</sup>  
the statements of some writers.

US  
Supreme  
Court

3

- 
- 1 Portland General Electric Co., 10 F.P.C. 445, 92 P.U.R. (N.S.) 247 (1951).
  - 2 Federal Power Commission v. Oregon, \_\_\_ U.S. \_\_\_, 99 L.Ed. (Advance  
p. 738, 1955).
  - 3 e.g. Schwartz, Federalism and Anadromous Fish, 23 Geo. Washington Law  
Review 535, 547 (1955); Note, 68 Harvard Law Review 382, 383 (1954).



④ note: The original withdrawal order was for purpose of holding <sup>all sites</sup> secure under condition of study and classification - and released if not qualified <sup>more</sup> 51% 71

Practically every potential power site in Oregon, where the United States owns 51% of the land, has been federally reserved and falls under the Supreme Court's decision. Every principal power site in Washington is similarly covered, and every major stream in that state is affected because of the many Indian reservations, army installations, national forests and Atomic Energy Commission reservations within the state. A specific controversy pursuant to this decision has already risen between state and federal authorities in Nevada where approximately 85% of the state's land area belongs to the federal government. The Commanding Officer of the Naval Ammunition Depot at Hawthorne, Nevada, served notice on the State Engineer that applications under state law for rights to appropriate water from wells were being dropped as unnecessary following the Supreme Court's decision. The state-federal controversy is a real and vital one, accordingly, intensified by the failure of the parties to agree even on the nature of the issues involved. A brief statement of the statutory and Constitutional provisions involved should serve to outline the area of this controversy to be explored.

~~the~~ the fundamental issue must be interpreted on the origin of proprietary lands - continued Cong. 1789 - how acquired how held - trust concept the equality clause 19 state also 7th ownership 41 11 11 11 (11 x covering)

- 4 See statements of the state engineers of Oregon, Washington, and Nevada, filed with the Columbia Basin InterAgency Committee at its 84th meeting on November 16, 1955.

see P 73  
original  
ownership

3 - if not attached

Shore from other sources

the basic law is applicable only to original domain not to acquired lands - purchase - exchange - condemnation

THE FEDERAL POWER ACT AND THE CONSTITUTIONAL ISSUE

The Federal Power Act derives its Constitutional regulatory authority from three sources: (1) The federal commerce power which applies per se to activities on navigable waters, (2) the comparable commerce authority over activities on nonnavigable waters which affect navigable waters, and (3) the proprietary power of the federal government over the public lands.<sup>5</sup> The sweeping power of the national government acting under the commerce authority has been declared on innumerable occasions by the Supreme Court. Its exercise has been upheld even though attended by the same incidents which attend the exercise of state police power.<sup>7</sup> It is the regulation based on the third source, the proprietary power, however, which was challenged by the State of Oregon, and is the subject of inquiry here. The Supreme Court had heretofore meticulously avoided deciding the boundary between state and federal authority in

*navigation*  
*navigable*  
*non-navigable*  
*see my notes on pg 1*

5 These sources of power are set forth in the Act, 16 U.S.C.A. 797 (e), 817.

6 e. g. United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899); Oklahoma v. Atkinson, 313 U.S. 508 (1941); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1935).

7 United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).



cases where the federal government has sought to invoke this power with respect to nonnavigable waters on the public lands. But the issue was presented expressly in the contest between Oregon and the Federal Power Commission, the former asserting the state power to protect its fish resources against injury by a federal water-power licensee, the latter asserting that the proprietary interest of the United States, arising from its original ownership of the power site in Oregon, enables it to grant its licensee immunity from state police power.

domain

(\*) See my notes P 31

---

8 See discussion and citations infra, at page 22.

74

Strict logical analysis is made difficult at the outset since the proprietary power as a basis for the jurisdiction of the Federal Power Commission is something of an anomaly when compared with the regulatory purposes of the Federal Power Act. So much of the Act as rests on the commerce power of the federal government seems a logical regulatory expression of this power; in such cases the power to regulate would appear to be as great as the sweeping power of Congress over commerce, and of like character. But the ownership by the federal government of the public land in the several states does not necessarily imply the same grant of extensive regulatory authority. Nevertheless, this conceptual distinction was not considered by the Supreme Court in a recent case approving a Federal Power Commission license involving far reaching regulatory requirements. On the other hand, it must still be noted that regulatory action approved under the property power in that case was regulatory action affecting only the licensee and conditioned on acceptance of a license. The regulation proposed by the Federal Power Commission on the Deschutes would affect third parties however, subordinating their interests to that of the licensee who is to be insulated from the police power and the sovereign policies of Oregon as expressed in its laws. This is clearly a new departure in regulatory action under a proprietary jurisdiction. And although the facts indicate that there

---

9 Federal Power Commission v. Idaho Power Company, 344 U.S. 17 (1952).



75  
might have been grounds for asserting the applicability of commerce  
10  
authority to the Deschutes River, the Federal Power Commission chose  
to rest its case entirely upon the property power of the United States  
over its public lands. *Fed proprietor*

Thus, it is not surprising to note the majority holding of the  
Court of Appeals for the Ninth Circuit that the Federal Power Commission  
could issue only a permissive license under these facts, that as the  
owner and proprietor of the land where the dam was to be built, the  
United States could impose conditions upon a licensee or even deny a  
license, but that the United States could not clothe its licensee with  
immunity to State law. But before discussing the Constitutional implica-  
tions of the Supreme Court's reversal of the Ninth Circuit's holding, it  
may prove worth while to review some of the general federal and Constitu-  
tional law relating to the division of state and federal authority over  
the public lands, before proceeding to the specific question of the divi-  
sion of that authority as it relates to waters on the public domain.  
*must be original - not acquired*

10 See the argument contained in Schwartz, op. cit., note 3, at  
p. 542-544.

THE DIVISION OF  
FEDERAL-STATE AUTHORITY OVER THE PUBLIC LANDS

Full, complete, and unshared sovereignty by the Federal Government over defined land area within the United States is enjoyed only in those cases which fall within Art I, Sec. 8, Clause 17 of the Constitution, which provides that the Congress shall have power:

"to exercise exclusive Legislation in all cases whatso ver, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;"

*Seat of Govt = jurisdiction not proprietary*

This Constitutional provision has been construed as inapplicable to acquisition of State land, even with State consent, unless there has been express cession of legislative authority.<sup>11</sup> It is clear that this exclusive jurisdiction provision does not govern the state-federal relationship with respect to the public lands.<sup>12</sup> Cf. Wilson v. Cook, where the Court stated:

"Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states, (Act of June 15, 1836, c 100, 5 Stat. 50) the legislative authority of the state extended over the federally owned lands within the state, to the same extent as over similar property held by private owners, save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution." <sup>13</sup>

*Arkansas*

*related to disposal as well*

11 Silas Mason Co. v. Tax Commission of State of Washington, 302 U.S. 186 (1937); James V. Dravo Construction Co., 302 U.S. 134 (1937); Atkinson v. State Tax Commission of Oregon, 303 U.S. 20 (1938).

12 327 U.S. 474 (1946).

13 327 U.S. 474, 487.



But it is the exception referred to in the foregoing statement that is presently of interest. The power reserved to the United States, with respect to the federally owned lands within the States is expressed in the Constitution as the power:

"to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States." 14

at this point  
all Fed lands  
were subject to  
disposition - a  
definite land  
policy of  
disposal

It is the nature and extent of this property power, less than full sovereignty but something more than the mere incidental powers of land-lordship, that this paper purports to make the object of inquiry. And it was this same question, it is submitted, which was the critical, though largely undiscussed, issue decided by the Supreme Court in Federal Power Commission v. Oregon. Whether the question was, for practical purposes, fully decided, or whether its decision leaves the area of controversy substantially undiminished, will be further commented on below.

Belton  
core

The United States' original ownership of the public lands in the Western States arises from the treaties and agreements of cession made by the United States with the former sovereign owners or claimants. Such ownership was recognized by the various enabling acts admitting these <sup>15</sup> states to membership in the Union. Cases appealed to the Supreme Court of the United States early established the principle that as proprietor of the public lands the United States had powers under the Property Clause far greater than those incident to ordinary ownership.

compact then  
my lands held in  
trust for collective  
interest of all the people

14 (U. S. Const., Art. IV, Sec. 3, Clause 2.)

15 Next page.

my brief - increment  
of Fed lands in west in virgin state - and state  
had not been developed by private # - there would be  
no need for or value to Fed lands over



Thus in 1871 it was established in Gibson v. Chauteau that a state statute of limitations could not apply against land owned by the United States. There the court first announced the broad dimensions of the Property Clause in language which was to be repeated many times over in succeeding years:

*Property Clause*

"With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations."

The Court continued with language which presages the present Supreme

Court's decision in Federal Power Commission v. Oregon:

"Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise."

*this fails to recognize the force that has created the opportunity for such use -*

15 See, for example, Mann v. Tacoma Land Co., 153 U.S. 273 (1894), where the Court says: "in the Act providing for the admission of Washington, Montana, and the Two Dakotas, into the Union (25 Stat. at L. 677) among the conditions imposed was this: 'That the people inhabiting said proposed states do agree and declare that they forever disclaim all rights and title to the unappropriated public lands laying within the boundaries thereof'. Conditions of like legal effect were included in the Oregon admission acts (11 Stat. 383 (1859), and the admission acts of the other Western States.

16 13 Wall. 92 (1871).

17 13 Wall. 92, 99.

18 *ibid.*

*Gov should not participate in benefits and values  
Gov never should in creating the value or for taxes for protecting & making accessible  
ever freerholder of land, private state, Fed must have well defined responsibility to share in process of creating wealth - the values & uses involved in Helton case are there by reason of private enterprise & Govt has not contributed thereto but been a deterrent to private dev-*

*book  
use my  
old manuscript  
on - Concept  
of Fed ownership*



29

again on  
sell grazing right  
instead of disposing  
of cost of fencing  
prohibitory  
again sell  
legitly  
private  
land

Similarly, the Ninth Circuit Court of Appeals held that Western fence  
laws, which reverse the common-law rule requiring owners of animals to  
fence them against escape to adjoining lands, do not apply against the United  
States as proprietor of the public lands. Rather, the United States has  
sufficient legislative authority over such lands to prescribe federal rules  
best suited to their protection. The Supreme Court has gone even further  
in declaring that federal statutes prohibiting the inclosure of public lands  
may extend to fences which are located on private lands adjoining the public  
lands. In this case the court recognized that in adopting a federal nuisance  
doctrine, even though limited, it was exercising a form of police power,  
affecting both the public lands and private land.

protection  
was not  
philosophy  
of public  
land  
policy

19 Shannon v. United States, 160 F. 870 (9th Cir. 1908).

20 Canfield v. United States, 167 U.S. 519 (1897).

21 The Court treated this point explicitly. Justice Brown stated that:  
"While we do not undertake to say that Congress has the unlimited  
power to legislate against nuisances within a state, which it would  
have within a territory, we do not think the admission of a territory  
as a state deprives it of the power of legislating for the protection  
of the public lands, though it may thereby involve the exercise of  
what is ordinarily known as the police power, so long as such power  
is directed solely to its own protection. A different rule would  
place the public domain of the United States completely at the mercy  
of state legislation."

private abutting owner must fence out Govt females or the  
Govt female cattle would eat private grass all of  
I know from experience

*BLM now-a-days fence in federal land a political subsidy to only few*

Regulation of grazing on federal land by means of a permit system has been approved by the Supreme Court.

On the other hand, concurrent exercise of state power over the public lands has been traditionally recognized. In 1881, the Supreme Court held that a federal court did not have jurisdiction over the crime of murder committed on a Colorado Indian reservation, but that this was a matter for the State Courts.

A forcible entry and detainer statute of the State of Washington was upheld as dealing only with possessory interests and not conflicting with federal statutes controlling entry or prohibiting unlaw-

ful enclosures of public lands. State regulation of grazing on the public lands was permitted in Omaechevarria v. Idaho, where the Idaho "Two-Mile Limit Law", prohibiting the grazing of sheep on cattle ranges, was attacked as in conflict with the federal interest. There Justice Brandeis stated what may be a major rationalizing principle for this group of cases in saying that: "The police power of the state extends over the federal public domain; at least, when there is no legislation by Congress on the subject." Although there are inevitably some cases which cannot be thus

*Responsibility in re fencing Reclamation 28 death H Project*

*Fellows who must carry responsibility of ownership equal to most of not greater.*

22 Light v. United States, 220 U.S. 523 (1911).

23 United States v. McBratney, 104 U.S. 621 (1881), but note that this followed from Congressional policy, not Constitutional mandate--the statute provided for federal jurisdiction only in any "place or district of the country under the exclusive jurisdiction of the United States."

24 Denee v. Ridpath, 246 U.S. 208 (1918).

25 246 U.S. 343 (1918).

26 246 U.S. 343, 346.



81

27  
reconciled, the general pattern of the Property Clause as establishing  
paramount federal authority, subject however to state sovereignty where  
the national power is not fully exercised, seems firmly established by  
the great majority of Supreme Court decisions. This property power does  
not, however, constitute general sovereignty over the public lands, and  
may be exercised only within its proper scope. The exercise must be ap-  
propriate according to the nature of the property, it must be "consistent  
with the foundation principles of our dual system of government and must  
not be contrived to govern the concerns reserved to the States." That the  
proper scope of this power is very great, however, and approaches in char-  
acter the scope of the Commerce Power is indicated by such cases as United  
States v. City and County of San Francisco,<sup>29</sup> upholding a statutory require-  
ment that power generated from private facilities located on public lands  
be publicly distributed, and Idaho Power Co. v. Federal Power Commission,<sup>30</sup>  
upholding the Commission acting under the Property Clause in requiring a  
licensee to interconnect its project with projects of the United States  
and to transmit electric power of the United States to the extent of the

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27 e. g. Ward v. Race Horse, 163 U.S. 504 (1895), intimating that the  
power to regulate the killing of game is a necessary and exclusive  
police power of the states. It is doubtful that this decision re-  
tains any force at the present time.

28 Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 338 (1936).

29 310 U.S. 16 (1939).

30 344 U.S. 17 (1952)



82

unused capacity in its transmission lines. While the latter case extends regulation to affect not only federal property but in addition separate property of the licensee which bears no immediate relation to the federal property, note that both of these cases, unlike Federal Power Commission v. Oregon, affect only licensees and not third parties, and impose regulation only through conditions contained in a license which the applicant is free to accept or reject. Perhaps the most comprehensive single statement characterizing the nature of the property power is that contained in Utah  
31  
Power and Light Co. v. United States, where Justice Van Devanter said:

tot "True, for many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may require (sic) rights in them. Thus, while the State may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves, or invest others with any right whatsoever in them."

The foregoing cases on the general nature of the property power are too general to point a clear direction in the analysis of the water rights problem of Federal Power Commission v. Oregon. They do dispell beyond all question, however, any possibility of contention that the property power is the mere equivalent of the power of a private landlord over property "owned" under a unitary sovereignty. An attempt to define more strictly the scope of the property power as it affects water rights in streams on the public lands will be made in the following section, with special attention devoted to those federal statutes which withhold the full impact of the property power.



## WATER RIGHT THEORIES AND THE EFFECT OF THE DESERT LAND ACT

A century of development of Western water law has seen the early emergence and continuous reference to two irreconcilable theories concerning the fundamental source of watterights authority.<sup>32</sup> One theory has asserted that the United States controls all nonnavigable streams and whatever rights might or did exist therein as an incident of its ownership of the public lands, and that this federal control was not surrendered upon the admission of a state into the union. The other asserted original ownership and control in the states on the basis that a riparian system was not appropriate to and had never existed in the west.<sup>33</sup> The practical conflicts which resulted in judicial decision only seldom involved a direct clash between the two theories, however. Because of federal statutes which purport to withhold the full exercise of federal authority, the arguments have centered primarily about the effect of these statutes, particularly the Desert Land Act. The first among these statutes was the Act of 1866, as modified by the Act of 1870, which declared mining lands free

32 These two theories are sometimes referred to as the "California Doctrine" and the "Colorado Doctrine", respectively, although more often in a context where local rather than federal questions are involved.

33 For a classical exposition of this approach, see Bannister, "The Question of Federal Disposition of State Waters in the Priority States," 28 Harvard Law Review 270 (1915), where the author correctly argues that what is involved is state power, not property. This is a distinction that has too often been unrecognized or confused by subsequent commentators as well as the courts. Unfortunately, the author dogmatically and without argument assumes in favor of the states the answer to the basic question: in which sovereign, state or federal, does this power reside?

and open to preemption, and provided that:

"Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same 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; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section."

In numerous cases the Supreme Court recognized these statutes as permitting, if in accordance with local law and custom, the acquisition of water rights against the federal interest in the public lands. Such permission does not create affirmative authority, however, such as the right to trespass on private property, to perfect such rights. It is interesting to note that at an early date the Supreme Court found occasion to criticize the language used in the Act of 1866. Both the Act of 1866 and the Act of 1877 were declared "obviously primitive legislation" in Utah Power and Light Co. v. United States. Of greater significance than

34 Act of July 26, 1866, Sec. 9, 14 Stat. 251, 253; Act of July 9, 1870, Sec. 17, 16 Stat. 217, 218. These statutes are codified as two un-numbered paragraphs in 43 U.S.C. 661.

35 e.g. Jennison v. Kirk, 98 U.S. 453 (1878).

36 Sturr v. Beck, 133 U.S. 541 (1890).

37 Basey v. Gallagher, 20 Wall. 670, 683-4 (1874).

38 243 U.S. 389, 405 (1917).



85

these earlier statutes is the Desert Land Act of 1877, which permitted  
39  
desert land entries subject to the proviso:

"That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres 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."

The terms of this proviso contain no reference to state law and custom, but appear to establish the doctrine of prior appropriation as federal law. It is possible to argue as a matter of statutory construction that since the statute contains no definition of prior appropriation, Congress intended that the method of appropriation provided for by state law was to be followed in making a federal appropriation, but that Congress intended to leave unchanged federal power as the primary source of law permitting the acquisition of property rights in running waters on the public domain. This analysis would beyond question permit federal change or withdrawal of appropriation privileges on the public lands. An actual result somewhat similar to this hypothesis was obtained following the

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39 Act of March 3, 1877, Sec. 1; 19 Stat. 377, as amended; 43 U.S.C. 321.

86  
water  
N.F

Act of June 4, 1897, <sup>40</sup> regulating the use of water within national  
forests. The Supreme Court held that compliance with State law alone  
was not sufficient to permit entry where a federal permit system had  
<sup>41</sup>  
been established. But in the course of judicial decision the Desert  
Land Act was not analyzed in terms of its effect upon the source of  
<sup>42</sup>  
power to create rights in flowing waters, until the leading case of  
<sup>43</sup>  
California Oregon Power Co. v. Beaver Portland Cement Co. Among other  
<sup>44</sup>  
things this case held that the Acts of 1866, 1870, and the Desert Land  
Act were to be read together, and applied to all the public lands, not  
the desert lands only. The court then announced the combined effect of  
these statutes on the federal-state relationship in the broad language

co/ee  
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<sup>40</sup> 30 Stat. 11, 36, 16 U.S.C. 481.

<sup>41</sup> Utah Power and Light Co. v. United States, 243 U.S. 389 (1917),  
but note that the Court stated that the controversy was not one  
over water rights but over rights of way through lands of the  
United States, thereby avoiding the issue of sovereignty over  
nonnavigable streams.

<sup>42</sup> Gutierrez v. Albuquerque Land & Irrigation Co., 188 U.S. 545 (1903),  
where a state interest was recognized, by construing the statute to  
permit the acquisition of water rights for others by a state created  
corporation having the power of eminent domain.

<sup>43</sup> 295 U.S. 142 (1935).

<sup>44</sup> 295 U.S. 142, 162.



which was to be incorporated by the Ninth Circuit Court of Appeals as the foundation for its decision in favor of Oregon against the Federal Power Commission in the Deschutes River controversy:

"As the owner of the public domain, the Government possessed the power to dispose of land and water thereon together, or to dispose of them separately. Howell v. Johnson, C. C., 89 F. 556, 558. The fair construction of (The Desert Land Act of 1877) is that Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all 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' are not susceptible of any other construction."

And at a later point the Supreme Court stated, and the Court of Appeals again quoted:

"Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states."

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45 295 U.S. 142, 162 (1935), quoted in 211 F. 2d at 353.

46 295 U.S. 142, 163, quoted in 211 F. 2d at 353.

88  
land  
water  
separate

This is the famous separation of the land and the water concept which must be analyzed to understand this controversy and the Supreme Court's reversal of the Court of Appeals. It is also central to an understanding of the underlying Constitutional issue involved. Unfortunately, this apparently simple concept masks rather than clarifies the competing Constitutional doctrines which have been advanced by the respective advocates of state and federal supremacy in this area. The Court of Appeal's concept of the nature of the rights in, or power over water separated by the Desert Land Act must necessarily have referred to a full, complete, and, most important, irrevocable transfer of sovereignty over such water. In no other way could the Court have accepted, as it clearly did, the fact that the power site in question was no longer a part of the "public lands", having been withdrawn pursuant to law, yet treat such withdrawal with indifference, finding no necessity even to

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47 See note 7 at page 350 of the court's opinion; also see the dissenting opinion.

48 Act of June 25, 1910, 36 Stat. 855, 858, 43 U.S.C. 141, 142, provides as follows: "The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." Also see: Federal Power Act, Sec. 24, 41 Stat. 1075, 1076, 16 U.S.C. 818.



*dam site  
reservoir site have inherent  
value whether on a water course  
or not & the value in land  
separate from water*

discuss the point. The Court could only have reasoned that, with the complete separation of land and water rights, a withdrawal order has operational effect only upon the parcel of land denominated in the order, and that the water, having been dedicated to public use, is unaffected. Accepting the court's premises, it would indeed be difficult to conclude otherwise, without raising troublesome questions concerning the amount and nature of the water rights which would adhere to the reserved land parcel if such separation did not continue.

Likewise it is clear that the Court of Appeals did not rely upon  
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Sec. 9 (b) of the Federal Power Act as requiring compliance with state law. In discussing this provision of the Federal Power Act the court adopts language from the leading case on this point, First Iowa Hydro-  
50 51  
Electric Co-op. v. Federal Power Commission, stating that:

"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."

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49 Providing that: "Each applicant for a license under this chapter 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 bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.'" 16 U.S.C. 802.

50 328 U.S. 152 (1946).

51 328 U.S. 152, 178.

Perhaps the Court of Appeals best reveals its concept of the crucial  
52  
point in its next comment:

"Our conclusion as to the meaning and effect of Sec. 9 (b) does not, however, destroy the objector's case, for they rely upon the more fundamental claim that the Deschutes River is a state stream and that the State of Oregon has sovereign power over it and its waters." (emphasis added)

*not material*

The underscored words constitute the fundamental position taken by the Court of Appeals on the state-federal question of sovereignty over nonnavigable waters. The Court by this statement took a positive stand on this long undecided question of sovereignty. Perhaps it would not be too rash to suggest that the court would have taken this stand even without the Desert Land Act to rely upon, stating after the fashion of Pollard's Lessee v. Hagan that control over nonnavigable waters is a natural incident of state sovereignty.

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And apart from the specific support which it found in the Beaver Cement case, it is probable that the court was influenced to no

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52 211 F. 2d at 351.

53 3 How. 212 (1885), the leading case establishing that title to the bed and banks of navigable streams is in the states as a natural incident of sovereignty. This case is also the departure point for the tide land cases. See United States v. California, 332 U.S. 19 (1947); United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950) and Alabama v. Texas, 347 U.S. 272 (1954).



inconsiderable extent by the consistent refusal of the Supreme Court to decide the Constitutional issue, despite strong urging by Government attorneys that full resolution of state and federal conflict in this area could not be obtained without decision on this question.

This was the result as early as 1916 in Utah Power and Light Co. v. United States.<sup>54</sup> In Wyoming v. Colorado<sup>55</sup> the court bypassed the question on the basis that the United States was not attempting in that case to enforce a paramount right, saying that: "whether its public land holdings would enable it to go further we need not consider."<sup>56</sup> Another refusal to decide followed in United States v. Appalachian Electric Power Co.,<sup>57</sup> and the decision in Nebraska v. Wyoming,<sup>58</sup> although again refusing a direct ruling on the Constitutional issue, must have provided encouragement to the proponents of state sovereignty. In this case the Supreme Court permitted the states to stand as parens patriae for their citizens in claiming not only appropriated waters but also the surplus unappropriated waters.

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54 243 U.S. 389 (1917).

55 159 U.S. 419 (1921).

56 259 U.S. 419, 465.

57 311 U.S. 377 (1940).

58 325 U.S. 589 (1945).

92

flowing over public lands. It is hard to reconcile this action by the court with its statement that "the question of the ownership by the United States of unappropriated water is largely academic so far as the narrow issues of this case are concerned." In view of this historical record and recognizing the influence as a precedent of the Beaver Cement case with its somewhat superficial oversimplification of the issue, it is not difficult to see how the Court of Appeals was able to evolve a theory resolving the Constitutional issue entirely in favor of state sovereignty. This raises the question of what, if anything, remains of this Constitutional theory after the Supreme Court's reversal of the Court of Appeals.

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59 325 U.S. 589, 616.

60 It should be noted in defense of the opinion, however, that that case dealt with conflicting claims of individuals and not governments. Thus it was immaterial to that decision which sovereign possessed law making authority to create water rights in the Rogue River; equally immaterial was the question whether the separation of land and water transferred sovereignty over water in whole or in part from one government to another. The references to plenary state control are therefore dictum.



THE SUPREME COURT DECISION IN THE PELTON CASE

The Supreme Court in its decision of the Pelton controversy refused to decide the issue whether the Desert Land Act and related acts transferred sovereignty to the States over all nonnavigable waters within their borders. But this is not the equivalent of saying that the Supreme Court left totally undecided the Constitutional issue, as it had on earlier occasions. In resting its decision on the inapplicability of the Act because of withdrawals, the Supreme Court was in effect rejecting the Court of Appeals' reading of the Beaver Cement case and that court's position that an irrevocable grant of power over water had been made to the states. A fortiori, the Supreme Court's decision lays to rest any contention that, in the absence of the Desert Land Act, sovereign power over water rests with the states as a natural incident of statehood.

61 99 L.Ed. (Advance p. 738, 746). In the words of Justice Burton, "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, because these Acts are not applicable to the reserved lands and waters involved."

*named*  
 } what states were desert act  
 } when did colif - oregon - come under act

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While the Supreme Court's decision rests principally on the grounds of the non-applicability of the Desert Land Act, its reference to the First Iowa case is significant to indicate the views of the Court concerning the affirmative powers of the United States where unrestrained by voluntary conformity to state statutes. In making the following statement concerning the Deschutes River controversy:

"As in First Iowa Hydro-Electric Co-op. v. Federal Power Commission, 328 U.S. 152, 90 L.Ed. 1143, 66 S.Ct. 906, this case illustrates the integration of the federal and state jurisdictions in licensing water power projects under the Federal Power Act. In the First Iowa case we sustained the authority of the Commission to license a power project to use navigable waters of the United States located in Iowa. Here, without finding that the waters are navigable, the Commission has issued a comparable license for a power project to use waters on lands constituting reservations of the United States located in Oregon. The State of Oregon questions the authority of the Commission to do this....For the reasons hereafter stated, we sustain the Commission.....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."

the court seems to be equating the property power involved here with the commerce power involved in the First Iowa case as of identical scope and effect. If so, and the language appears to permit no other conclusion, the Supreme Court has as a practical matter at least, finally decided the Constitutional issue of sovereignty over Western nonnavigable waters.

For even if the Desert Land Act were construed to transfer sovereignty in accordance with the opinion of the Court of Appeals, it is a simple



administrative matter in any particular case to suspend the effect of the Act. Thus it is of little practical importance to debate the probable effect of the Desert Land Act under the Supreme Court's view of the Constitutional issue, although a number of theories are possible. 63

(X) The important point to the decision is that unlimited federal power can be exercised over Western nonnavigable waters by unilateral action on the part of the executive branch of the federal government.

The foregoing statement is subject to one important qualification, however, which was clearly recognized in the Supreme Court's decision although it had no immediate practical effect upon the outcome of the Pelton Project controversy. This is the provision in the Federal Power Act itself, in derogation of the paramount Constitutional power, which

63 It may be argued that where it applies, the Act transfers full sovereignty to the states, but this is both theoretically and practically unworkable, since it would be difficult to conceive of, much less administer, a sovereignty which ebbs and flows in proportion to minor changes in the geographical boundaries of the public lands. It is also questionable whether sovereignty, once granted, is revocable. More reasonable is the theory that the Desert Land Act is a very limited grant of power to the states to make property rules governing the vesting of water rights. Also possible is the theory that the federal government has merely incorporated by reference certain state water laws in its own federal appropriation system without transferring any of its sovereignty.

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limits the exercise of federal power by providing:

"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."

Although the Court does not purport to construe in Federal Power Commission v. Oregon this statutory withholding of federal power, it does refer to the requirements thereof as falling within the category of "vested rights."<sup>65</sup> But even if only "vested rights," rather than the possibly broader rights encompassed by the "control, appropriation, use, or distribution" laws referred to in Section 27, are protected from the effect of paramount federal authority, still there remains the question of what are "vested rights." The Supreme Court cases construing Section 27 have been primarily concerned with its effect on the exercise of

64 Federal Power Act, Sec. 27, 41 Stat. 1077, 16 U.S.C. 821.

65 The Court cites Sec. 27 after making the following statement: "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 land of the United States, provided that, as required by the Act, the use of the water does not conflict with vested rights of others." 99 L.Ed. (Advance p. 738, 744). In First Iowa Hydro-Electric Co-op. v. Federal Power Commission, 328 U.S. 152, 175, 176 (1946), the court indicates without firmly declaring that Section 27 applies only to property rights. Compare Grand River Dam Authority v. Grand-Hydro, 335 U.S. 359 (1948); United States v. Central Stockholders Corp., 52 F.2d 322 (9th Cir. 1931). Also see Schwartz, Niagara Mohawk v. Federal Power Commission, Have Private Water Rights Been Destroyed By the Federal Power Act, 102 U. of Pa. L. Rev. 31, 51 (1953), where a review of the Congressional history of Section 27 leads the author to conclude that this section was probably intended to protect only irrigation rights (not rights to diversions for power generation).



S.F. 2/2/57

# Land Costs for U. S. Projects Skyrocketing

By THOMAS J. FOLEY

WASHINGTON, Aug. 1. — (INS)—The General Accounting Office reported today the cost of land for Government flood control projects has skyrocketed by as much as 730 per cent above early estimates.

United States Comptroller General Joseph Campbell submitted the special survey to Congress with a strong recommendation for a "critical review" of the policies used in developing such estimates.

The GAO chief said a study of 18 reservoir projects showed that costs have risen an average of 143.1 per cent between initial surveys and completion.

The surveys are made by the Army Corps of Engineers and are submitted to Congress for action. According to the GAO these cost estimates have been at the very least 36.8 per cent and as much as 730 per cent too low.

The Government's accounting chief said a field

audit "shows that the actual acreage acquisitions and land costs were significantly higher than those presented in the survey reports."

Campbell urged the corps to be more "realistic" in submitting estimated costs to Congress.

The GAO official said some of the cost increases are due to higher prices and some are a result of a 1952 law requiring the Government to pay landowners resettlement expenses.

However, it was pointed out that "Many of the changes between estimated and actual costs are due to increases in actual acreage acquisitions"—ranging from 12.9 to 207.4 per cent above estimates.

## Jet Pilot Killed

ALBUQUERQUE (N. M.), t Aug. 1. — (AP)—A T-33 jet a trainer crashed at Kirtland F Air Force Base here this v morning and the pilot was s killed. i

argument — Fed Ownership

Power with dam

value of dam site

11 of reservoir site

Reference pg 28 — CBIAC mch 7 - 1956

u/d

Mike Pelton CBIAC



paramount federal commerce power. Thus, Ford and Son V. Little Falls  
 66  
 Fibre Company held that a federal licensee under this section was not  
 clothed with authority to inflict damages on an upstream owner of state  
water rights, at least not without being required to respond in damages.

*cd/co*  
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*th*

Recent decisions in the fourth and fifth circuits not involving the Federal  
 Power Act, have held that in condemning for a federal power site land bor-  
dering on navigable waters the United States must pay the value of the land  
as a potential power site, even though it could be used for this purpose

*specific value*

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 only through the permission of the United States. The Supreme Court has  
 68a  
 just reversed the circuit courts. The leading case is the recently de-  
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 cided Federal Power Commission v. Niagara Mohawk Power Corporation where

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 the court said of the Federal Power Act:

"The Act treats usufructuary water rights like other pro-  
 perty rights. While leaving the way open for the exercise  
 of the federal servitude and of federal rights of purchase  
 or condemnation, there is no purpose expressed to seize,  
abolish or eliminate water rights without compensation  
merely by force of the Act itself."

66 280 U.S. 369 (1930); Compare International Paper Co. v. United States, 282 U.S. 399 (1930);

67 United States v. Twin City Power Co., 215 F.2d 592, (4th Cir. 1954); United States v. Twin City Power Co., 221 F.2d 299 (5th Cir. 1955).

68 The value for agricultural or forest purposes was estimated at \$37 per acre, the value as a power site at \$267.02 per acre. For a criticism of these decisions see Note, 64 Yale L. Journal 96 (1955).

68a United States v. Twin City Power Co., \_\_\_ U.S. \_\_\_, 100 L.Ed. (Advance p. 223, 1956); United States v. Twin City Power Co., \_\_\_ U.S. \_\_\_, 100 L.Ed. (Advance p. 249, 1956) (Memorandum decision).

69 347 U.S. 239 (1954).

70 347 U.S. at 251. The actual decision turned on a very narrow issue, the court holding that in computing a federal licensee's amortization reserve, the Federal Power Commission was not justified in disallowing expenses paid for state created water rights in navigable waters.

*See summary of 8/2/54*  
*cost of land*  
*army -*  
*control*  
*control*



One possible line of argument suggested by these decisions is that the "vested rights" protected by Section 27 of the Federal Power Act are only those which would otherwise be abrogated by exercise of the federal servitude over navigable waters. This servitude or easement is a unique product of Constitutional development. Ordinarily the existence of a power in the federal government does not carry with it the right to destroy property rights without compensation. The Fifth Amendment is a bar to exercise of power in such a manner. Perhaps the exception in the case of commerce authority over navigable waters arises from traditionally recognized federal interest long preceding and thus preventing the acquisition of private rights.<sup>71</sup> Since no comparable servitude attaches to the property power, it could be argued therefore that Section 27 gives no independent protection to "vested rights" other than those protected by the Fifth Amendment, in cases where the Federal Power Commission has granted a license for a project located on the public domain.

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71 This is the explanation suggested in United States v. Kansas City Life Insurance Co., 339 U.S. 799, 808 (1950), where the Court said: "It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power, and narrower in scope, that frees the Government from liability in these cases. 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. . . There thus has been ample notice over the years that such property is subject to a dominant public interest. The right of the public has crystallized in terms of a servitude over the bed of the stream." Cf. United States v. Central Stockholders' Corporation, 52 F.2d 322 (9th Cir. 1931).



At the other extreme it might be suggested that "vested ights" subsume all rights other than those granted under purely regulatory state statutes. In the case of Oregon this would have the effect of requiring compliance with all water appropriation laws except the hydro-<sup>72</sup>electric act. But the question may be raised whether appropriations for all reasonable and usual municipal purposes, and for such "future<sup>73</sup> reasonable and usual municipal purposes as may reasonably be anticipated" would be considered as constituting "vested rights" in a conflict with the federal government or its licensees. This question would be particularly difficult under a quasi-riparian system as in California where the amount of the future use would not be specified in advance or in any formal filing with administrative officials. Similarly difficult in application to a conflicting federal claim would be the reasonableness of use requirement in California which constitutionally limits every water<sup>74</sup> right in that state. The source of difficulty is found, of course, in the fact that the regulatory process has permeated the property rights

*present  
vested  
and prospective*

72 ORS 543.140 to 543.990.

73 ORS 540.610 (3)

74 California Const., Art. XIV, section 3. For a discussion of expanding requirements of water for domestic use in a highly controversial situation see Judge Yankwich's second opinion in the Fallbrook case, 108 F. Supp. 72 (1952).

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system as a matter of necessity. Thus absolute "vested rights" in the conceptual sense of the term no longer exist. <sup>75a</sup> It becomes a matter of degree then, rather than of identification, to determine how far state regulatory policy will be recognized where it conflicts with federal purpose. <sup>76</sup> A recent resolution of one such conflict by the Supreme Court charts a middle course. There federal deference to state property rights was required even though the "vested rights" had been in part divested of practical value by state law. In that case the California constitutional requirement of reasonableness of use <sup>77</sup> reduced such rights to a right to damages with no right to actual use enforceable by injunction. <sup>78</sup>

*this writer found to note that basic reason there never been any fed domain Texas retained state sovereignty over every or interstate union*

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Note that in Texas even a right to divert irrigation water, which is much more in the nature of property than a right, for example, to impound water for power generation, may be entirely divested by the regulatory process. Regulation No. 520.2(g), Texas Board of Water Engineers, states: "It has been the attitude of the Board that during a period of water shortage or drouth, the use of water for irrigation is an unreasonable use. Such a conclusion is inevitable when forty years of experience, study, observation and surveys by this Board indicate that downstream humans and animals will suffer during a drouth if upstream irrigation is practiced. Therefore, in determining the amount of water available for appropriation, the Board has followed a policy of recognizing that a riparian right is limited to the use of State waters for only domestic and stock raising purposes."

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On the other hand it has been pointed out by Schwartz in his article cited in note 65, supra, that even pure property rights may be diminished to some extent by the exercise of federal power, as in the application of the "original cost" concept of the Power Act to conventional property interests under state law. For a comparable example of the impact of federal power on state property see Regent of the University System of Georgia v. Carroll, 338 U.S. 586 (1950).

76

United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950). Although federal Reclamation law was involved in this case, it may be concluded that the question of local law would be the same under the Federal Power Act.

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See Note 74, supra.

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See next page.



Another series of difficulties arises when inquiry is directed to the question when, as against the federal government, do water rights vest. At least three general possibilities exist. <sup>1</sup> Rights of appropriators may continue to vest in a given stream until the time an application is filed with the Federal Power Commission which preempts all or a part of the remaining unappropriated water. <sup>2</sup> Or further vesting of water rights against the federal interest may be cut off at the time a power site is withdrawn or other action taken removing from a parcel of federal land the status of "public lands." <sup>3</sup> A third possibility, more extreme but supported by the case of United States v. Rio Grande Irrigation Co., is that the

78 It might be suggested that a dividing line be established by recognizing the standing of individual water right owners to claim against the federal interest but refusing standing to the states themselves. While this might appear permissible from Federal Power Commission v. Oregon, difficulty would be encountered from the decision in Nebraska v. Wyoming, supra, permitting representation by a state as parens patriae of its citizens' interest in unappropriated waters.

78a Variants are: the time of filing for a preliminary permit, the time of issuance of a license. Many years may separate these steps in the administrative process.

K 79 174 U.S. 690 (1899), where the court makes the frequently quoted remark: "That 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 streams to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of government property."

*preempt  
could might do  
in mixed riparian*



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United States has a riparian interest in waters on federal land in diminution of which no private rights can be acquired without the consent of the United States. And it is hard to find such consent under the Supreme Court's view in Federal Power Commission v. Oregon of the <sup>80</sup> Desert Land Act and the withdrawal statutes. Moreover, under all these possibilities it would be also necessary to determine by how much the available supply of unappropriated waters of the stream would be reduced to provide for possible water power development of the site.

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80 Although in a proper case the Court might be persuaded that Section 27 of the Federal Power Act gave this consent.

From the foregoing discussion, which does not purport to exhaust all the possibilities of controversy which may arise, it is clear that at most the decision in Federal Power Commission v. Oregon may establish *Pelton* a somewhat theoretical principle of Constitutional federal supremacy and strike down the exercise against the United States of state police power where it is not disguised by incorporation in a system of quasi-property rights. A vast number of practical legal problems remain, however, involving the extent to which Congress may be construed to have consented to quasi-regulatory state law governing the acquisition, transfer or divestiture of water rights in derogation of federal supremacy. Whether these uncertainties and conflicts in the present law can be effectively resolved by legislation is the final topic of inquiry. ?



PROBLEMS OF CHANGE THROUGH LEGISLATION

That the problem of clarifying and redefining the boundaries between state and federal jurisdiction in this area is one peculiarly appropriate for legislative rather than judicial resolution needs little argument. The issues partake largely of a political and governmental character<sup>81</sup> and hence are by nature for determination by Congress. Moreover, questions of law are inextricably combined both with broad issues of social and economic policy and with highly specialized problems of engineering and technology. How much more appropriate, therefore, are the facilities of the national law making body for detailing the allocation of jurisdiction over water resources than reliance on a tedious accretion of legal rules by<sup>82</sup> episodic adjudication of narrow and bitter individual controversies.

It should be pointed out initially that it is not the purpose of this paper to advocate, or even to speculate upon, the exact points where the division of state and federal authority should be drawn. It is a purpose, however, to draw attention to the difficult technical problem of charting such a dividing line in meaningful and unambiguous statutory

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81 Pacific States Telephone & Telegraph Company v. State of Oregon, 223 U.S. 118 (1912).

82 For a brilliant statement of the case for restraint in judicial review of Constitutional questions, which would appear to have a large measure of applicability to the present mixture of Constitutional and statutory questions, see the opening address by Justice Frankfurter at the Conference on "Government Under Law" held on September 22, 23 and 24, 1955, under the auspices of the Harvard Law School, reported in 69 Harv. L. Rev. 219 (1955).



language fully reflecting the real intentions of the lawmakers. To date this technical nature of the problem has been considerably overlooked.

A drafting possibility which immediately invites consideration is a provision to the effect that federal interests and instrumentalities shall follow state law. But such a provision would add little in the way of substance to <sup>83</sup>existing law, for, as seen before, the Supreme Court has construed a requirement of this nature to mean compliance only with state laws which do not conflict with federal policy. The real and underlying problem, therefore, is to draft a forthright and unambiguous statement of the extent to which federal power shall be withheld and state legislation permitted to operate unfettered even though in conflict with traditionally accepted federal policy.

*Stianes*

It might be suggested that federal restraint in all cases and federal compliance with all state law be required, including purely regulatory law promulgated in exercise of state police power. This would immediately <sup>84</sup>raise questions of Constitutionality, since what would follow would not be

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83 Note 51, supra, and text following.

84 There is a line of Supreme Court decisions culminating in International Shoe Co. v. State of Washington, 326 U.S. 310, (1945), which hold that "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it." But it is debatable whether Congress can go so far as would happen here. A limit is indicated by cases such as Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). The Supreme Court has stated that "Congress cannot transfer its legislative power to the states--by nature this is non-delegable." Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1920). Also see memorandum to Congressman Budge of Idaho by Frank B. Horne, Legislative Reference Service, Library of Congress, (published in part in Western Water News, February 1955) where the author concludes that by virtue of the



a partial and considered withholding of federal commerce and proprietary authority over water resources, but a total abandonment thereof over this subject matter. The fact that, once construed to permit overriding state supremacy, such a statute would contain no protection to the federal government against unreasonable claims such as were made in Hudspeth<sup>86</sup> County Conservation and Reclamation District v. Robbins, or as actually

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- 84 (Continued) past decisions of the Supreme Court it would require a constitutional amendment to divest the federal government of its power over navigable waters. To proposed legislation of this character in 1952 the Federal Power Commission expressed concern that plans for comprehensive development would be adversely affected. The Navy foresaw an extension of state police power over "all Government establishments, military or otherwise." House Report No. 1452, 82nd Congress, dated February 29, 1952.
- 85 It is assumed that legislation of this nature must deal both with navigable and nonnavigable waters; there are too few practical instances in which navigation or some phase of interstate commerce is totally unaffected by a water development project to avoid the conclusion that federal restraint must be imposed equally whether commerce or proprietary power is the source of federal action.
- 86 213 F. 2d 425 (5th Cir. 1954), where it was necessary in order to develop water for power purposes to construct two reservoirs rather than one, as would have sufficed without power development. The claim was made that power development should not be allowed since "the spreading out of impounded waters over the area of two reservoirs causes much greater losses through evaporation and seepage than would result if the water were impounded in only one reservoir" thereby reducing the amount of water available to the claimants. The merits of this contention were not passed upon, the cause being dismissed for defect of parties.

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prevailed in the "horrible example" of the Herminghaus case, until set aside by amendment of the California Constitution, would alone jeopardize its survival in the courts.

Similar problems of unintended result might follow from the effect on flood control and power generation. Under state law the use of flood flows may be considered a beneficial use and require acquisition of a water right.<sup>88</sup> In the case of storage for power generation the range of

87 Herminghaus v. Southern California Edison Co., 200 Calif. 81, 252 Pac. 607 (1926), cert. den. 275 U.S. 486 (1927). The expression is that of Professor Trelease in his article Coordination of Riparian Rights to the Use of Water, 33 Texas L. Rev. 24, 68 (1954). In this case a lower riparian owner was held to be entitled to the full flow of the stream equal to 1,800,000 acre feet per year in order to overflow his crop land. By reasonable methods of diversion and distribution he could have obtained the same results from the use of only 180 cu. ft. per second during the growing season. The rule of this case was reversed by constitutional amendment. See Note 74, supra.

88 See, for example, such cases as Meridian v. San Francisco, 13 Calif. 2d 424, 90 P. 2d 537 (1939); Still v. Palouse Irrigation and Power Co., 64 Wash. 606, 117 Pac. 406 (1911); East Side Canal and Irrigation Co. v. United States, 111 Ct. Cls. 124, 76 F. Supp. 836 (1948). Note the questions raised by the statement in Selected Problems in the Law of Water Rights in the West, U. S. Department of Agriculture, Misc. Pub. No. 418, 1942, p. 416, that: "Whether or not in a given jurisdiction the operation of a detention or retardation dam for the temporary slowing down of the flow of a stream is held to be the exercise of a water right, or a beneficial use of water for which an appropriation must be made, the actual operation of such a structure may have a bearing upon the exercise of downstream water rights, and particularly upon the value of flood-water rights." Under riparian doctrine flood waters are not subject to claim but the test for determining what are flood waters is not free from dispute. It has been criticized as vague and illusive, 22 Calif. L. Rev. 251 (1934).



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contingencies is even greater and the effect of state law more uncertain.

On the other hand, adopting the pattern established by Sec. 8 of the Reclamation Act,<sup>90</sup> provision might be made that the state laws which are to be observed shall be limited to those which permit the creation and vesting by appropriation of property-type rights in flowing waters. Such a provision would be without question on firm constitutional ground. But outside of adding a certain desired symmetry to the law, it would contribute little of real substance. Section 27 of the Federal Power Act, as construed by the Supreme Court,<sup>91</sup> already provides such protection of state-created property

89 In the case of multiple-purpose projects it is possible that each purpose would have to be assessed independently under applicable state law and its position on the waterrights priority scale determined. What effect this might have on operation of the project is highly conjectural.

90 *Recast* Act of June 17, 1902, as amended, 32 Stat. 390, 43 U.S.C. 383, containing the proviso that: "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, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or use of water in, to, or from any interstate stream or the waters thereof: 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 the right."

91 See case cited at Note 69, supra.



rights against federal licensees. And under the Flood Control Act of 1944<sup>92</sup> the use of water for navigation is subordinated to beneficial consumptive use.<sup>93</sup> Moreover, the principle established in Federal Power Commission v. Oregon would remain untouched by such a statutory provision. The decision in that case turned on a question of the right to exercise governmental power rather than a question of property rights, and it follows that in most of the controversial cases concerning waters flowing over the public lands the United States already possesses whatever property rights are necessary for development of such resources either directly or through licensees. *? don't it not carry a responsibility to use rather than hold*

It might at first appear that a midpoint between the foregoing extremes in legislative drafting might be attained simply by terminating the power of the executive branch of the government to withdraw potential power generating sites from the effect of the Desert Land Act. But such a course would revitalize the separation of land and water concept of the Beaver Cement case and would again raise the question which the Supreme Court declined to review in Federal Power Commission v. Oregon of the

92 Act of Dec. 22, 1944, 58 Stat. 887, 889, 33 U.S.C. 701-1 (b).

93 It is uncertain, however, whether this provision of the Act would be construed as a waiver of the navigation servitude to the extent of recognizing against the federal government all state created property rights in navigable streams, as is the case under Sec. 27 of the Federal Power Act. On the other hand, the terms of the statute seem to require federal deference not only to vested rights to beneficial consumptive use but also to uses which may arise and increase in the future.

94 Note 61, supra.



effect of the Desert Land Act on the federal-state division of sovereignty. Such a course would not only invite but would require constitutional litigation to decide this question.<sup>95</sup> It would compel the Supreme Court to set forth on the unpromising path of inquiry into the intent of Congressional legislators in 1877 on a question whose present day merits center on technological conditions unimagined in that earlier day. Such an approach would have the additional unfortunate effect of preserving a legal dichotomy between navigable and nonnavigable streams. Since only the proprietary authority of the federal government would be restrained by such a provision, the question would invariably arise in the case of each project on the public lands whether the stream flowing at that point is navigable, or has an effect on navigation, or even has an effect on some other commerce interest of the federal government. It is arguable, for example, that the presence of anadromous fish<sup>96</sup> brings a stream within the orbit of federal commerce authority.

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95 Compare the possible interpretations of the Desert Land Act suggested in Note 63, supra.

96 See Note 10, supra, and preceding text.

The primary inadequacy of the law drafting approaches considered in the foregoing pages is that in every case they incorporate existing constitutional and statutory concepts which are too broad and sweeping to permit other than an all-or-nothing formula, one which in its excess of generality either accomplishes nothing or goes to unwanted extremes. What is needed, however, is legislation framed in terms of specifics, providing clear statutory guideposts to the division of regulatory power at each point of impact of state and federal interest. Perhaps this means consideration and determination of the proper state and federal role, respectively, with relation to each of the functions which contribute to water resource development, flood control, navigation, irrigation, fish and wildlife conservation, power generation, pollution control, recreation development, and all other related functions. Admittedly this would be a formidable task. But it is a happy alternative to the enactment of a glittering generality which could only further confuse the true issues, invite litigation

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97 There are also a number of secondary technical problems which merit closer study. For example, statutes in many states provide special procedures and privileges for the United States in acquiring water rights and carrying out reclamation developments. See, for example, 90. 40. 030 R. C. W. It is important in drafting the legislation being considered that federal capacity to make use of such procedures is not inadvertently denied. This is especially true where distinction between the United States and private individuals is the result of court decision rather than specific state statutes. See United States v. Humboldt Lovelock Irrigation Light and Power Co., 97 F. 2d 38 (9th Cir. 1938) cert. den., 305 U. S. 630 (1938), holding that Nevada law providing that water rights cannot be owned independently of the land does not apply to the United States. For a discussion of the problems of fitting a federal military use of water to a state priority of beneficial use system see Federal Ownership of Inland Waters. The Fallbrook Case, 31 Texas L. Rev. 404 (1953).



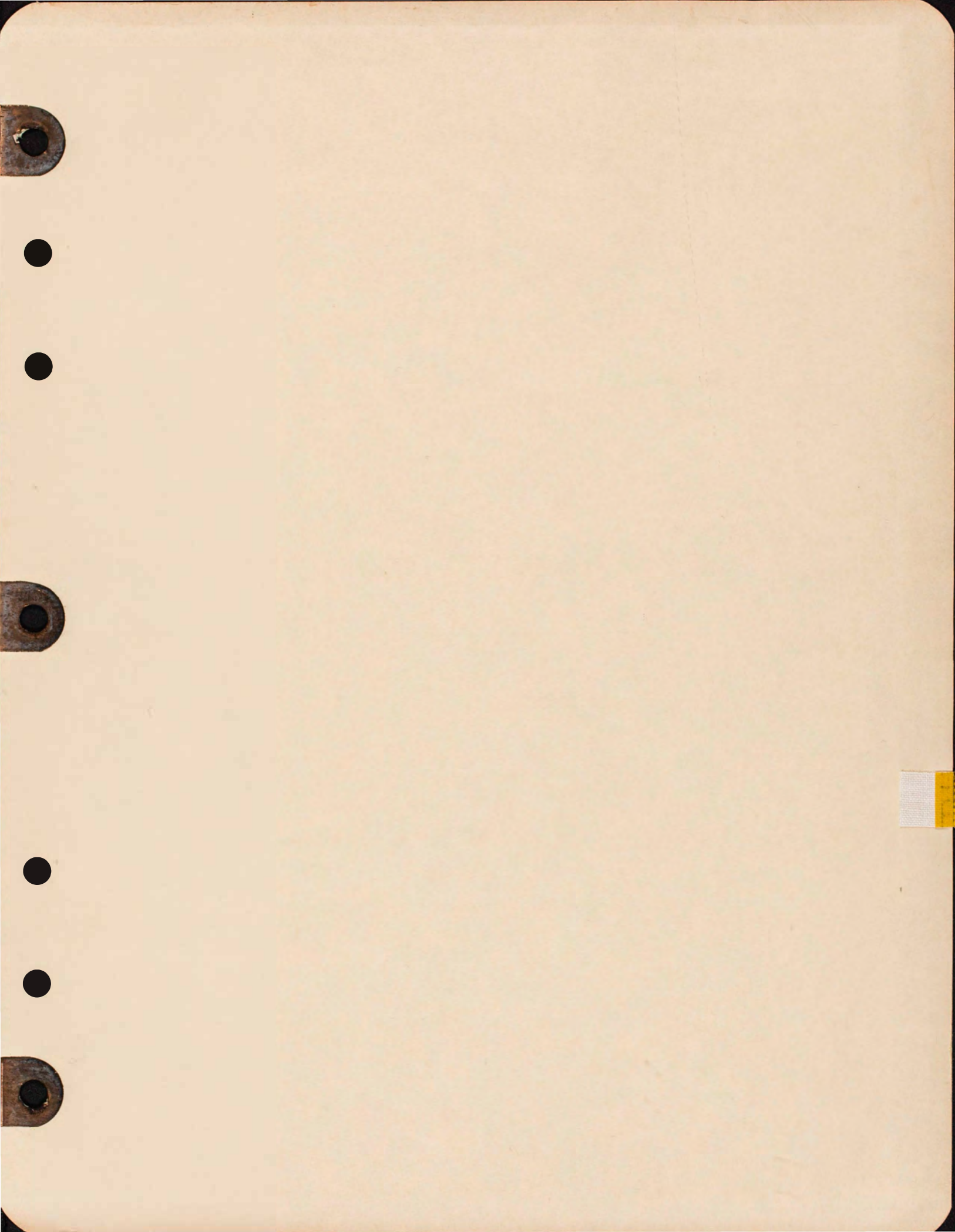
and indefinitely prolong a permanent resolution of the problem.

*when*

In undertaking to draft legislation clarifying the boundaries of state and federal power, the draftsmen might well borrow from the example in another field of federal-state conflict where legislation softening the full impact of federal power has been proposed: the field of federal tax immunity. Here no attempt has been made to unsettle the group of state-federal relationships developed in the past and to reverse in its entirety the rule of immunity. Rather, to the extent that immunity has been thought undesirable, bills have been drafted specifying the exact extent of federal retreat from immunity through in-lieu payments. This example might well be followed in the present state-federal conflict of interest in water resource control. What is needed is not new legislation to sweep aside the law as it exists but rather a bill dealing specifically and exactly with the precise change in the federal-state division of power and jurisdiction which will not only satisfy state aspirations but will also codify them in a form substantially immune from further conflict and litigation.

February 24, 1956

*in lieu tax*





APPENDIX B  
to Memorandum of  
March 7, 1956

SUMMARIES OF STATE WATER LAWS

|                              |     |
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| ✓ Idaho                      | 114 |
| Montana                      | 117 |
| ✓ <del>Nebraska</del> Nevada | 120 |
| Oregon                       | 122 |
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| Wyoming                      | 128 |

Why not Calif. }

not a Columbia River Basin State

IDAHO

The constitution of Idaho declares that the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied, except that the State may regulate and limit the use thereof for power purposes.<sup>1</sup> Other provisions of the same section of the constitution are: Priority of appropriation gives the better right; but when the waters of a stream are not sufficient for all who desire to use them, domestic purposes (subject to such limitations as may be prescribed by law) have the first preference, and agricultural purposes have preference over manufacturing. In any organized mining district, mining purposes or milling purposes connected with mining have preference over manufacturing or agricultural purposes.

The statute relating to the appropriation of water declares that all waters when flowing in their natural channels, including the waters of natural springs and lakes, are the property of the State, and that the right to the use of the waters of "rivers, streams, lakes, springs, and of subterranean waters" may be acquired by appropriation.<sup>2</sup> The statute also provides that all rights to the use of water shall be "lost and abandoned" by failure for a period of five years to make the beneficial use for which the water was appropriated; such loss of right being stated by the supreme court to be in fact a statutory forfeiture as distinguished from a true abandonment.<sup>3</sup>

As a result of the constitutional prohibition against the denial of appropriations of water, there are two methods of appropriating water in Idaho, of equal validity. One method is the procedure provided by statute, under which the right originally was initiated by posting and recording a notice of appropriation, but now is initiated by filing with the State Department of Reclamation an application for a permit to make the appropriation. The Department issues a certificate to the water user upon completion of construction of the works; and upon application of the water to beneficial use and a showing that the law has been fully complied with, the Department issues to the water user a license confirming

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1 Idaho Const., art XV, sec 3.

2 Idaho Code, secs 42-101 and 42-103.

3 Idaho Code, sec 42-222. In Carrington v. Crandall, 65 Idaho 525, 532, 147 Pac. (2d) 1009 (1944), the court pointed out that while the statute designates the loss as "abandonment," it is in fact a statutory forfeiture; that there is another kind of abandonment that is actual, not dependent upon length of time, the essential element of which is intent to relinquish the right.



such use.<sup>4/</sup> The extant water appropriation statute declares that all rights to divert and use the waters of the State for beneficial purposes shall be acquired and confirmed under the provisions of the statute.<sup>2/</sup> Notwithstanding this declaration, it is well settled in Idaho that the statutory procedure in effect at the time of making a particular appropriation (initiation by posting and recording notice, or by applying to the State for a permit, as the case may be) has not been and is not now the exclusive method of appropriating water, and that equally valid rights may be acquired by diverting water and applying it to beneficial use without pursuing the statutory method.<sup>6/</sup> The method of appropriating water by mere diversion and use is often referred to as the "constitutional" method, as distinguished from the "statutory" method.<sup>7/</sup> The advantage of following the statutory method lies in the application of the doctrine of relation, or "relation back" as it sometimes is termed. That is, the priority of a right acquired by the so-called "constitutional" method dates from the completion of the appropriation, which takes place upon the application of the water to beneficial use; whereas the priority of a right perfected by strict compliance with the statute relates back to, and therefore dates from, the time of filing the application with the State agency, the statutory procedure being the exclusive method by which the right can relate back to the initiation of the appropriation.<sup>8/</sup>

*Idaho* The riparian doctrine is not recognized in Idaho with respect to the use of water of streams.

The appropriation statute, as noted above, includes "subterranean waters" in the classes of waters named as subject to appropriation. The supreme court has rendered several decisions with respect to rights to the use of ground waters which, while not uniform in the development of principles, with one exception have tended toward the doctrine of appropriation and finally have embraced that doctrine completely. <sup>9/</sup>

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<sup>4/</sup> Idaho Code, secs. 42-202 to 42-311. The license is only prima facie evidence of the water right: *Basinger v. Taylor*, 36 Idaho 591, 597-598, 211 Pac. 1085 (1922).

<sup>5/</sup> Idaho Code, sec. 42-201.

<sup>6/</sup> *Sand Point Water & Light Co. v. Panhandle Development Co.*, 11 Idaho 405, 413, 83 Pac. 347 (1905); *Nielson v. Parker*, 19 Idaho 727, 730-731, 733, 115 Pac. 488 (1911); *Youngs v. Regan*, 20 Idaho 275, 279, 118 Pac. 499 (1911); *Furey v. Taylor*, 22 Idaho 605, 611, 612, 127 Pac. 676 (1912); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 38, 147 Pac. 1073 (1915); *Bachman v. Reynolds Irr. Dist.*, 56 Idaho 507, 514, 55 Pac. (2d) 1314 (1936).

<sup>7/</sup> *Pioneer Irr. Dist. v. American Ditch Assn.*, 50 Idaho 732, 737, 1 Pac. (2d) 196 (1931).

<sup>8/</sup> *Crane Falls Power & Irr. Co. v. Snake River Irr. Co.*, 24 Idaho 63, 81-82, 133 Pac. 655 (1913); *Reno v. Richards*, 32 Idaho 1, 10-11, 178 Pac. 81 (1918); *Silkey v. Tiegs*, 51 Idaho 344, 353, 5 Pac. (2d) 1049 (1931). *Rabido v. Furey*, 33 Idaho 56, 63, 190 Pac. 73 (1920); *Bachman v. Reynolds Irr. Dist.*, 56 Idaho 507, 520, 55 Pac. (2d) 1314 (1936).

<sup>9/</sup> *Hinton v. Little*, 50 Idaho 371, 379-380, 296 Pac. 582 (1931); *Noh v. Stoner*, 53 Idaho 651, 652-653, 26 Pac. (2d) 1112 (1933).

Percolating waters, like waters of surface streams, may be appropriated either by the statutory permit method or by actual diversion and application to a beneficial use; and "a valid appropriation first made under either method will have priority over a subsequent valid appropriation however made." 10/

Water rights in Idaho may be adjudicated only in proceedings initiated by claimants of rights to the use of water. The water-rights statute originally provided for the bringing of suits by State water commissioners for the adjudication of water rights, but the sections in question were declared unconstitutional by the State supreme court. 11/ However, the supreme court has upheld the validity of a section authorizing the judge, if a suit is brought for the purpose of adjudicating water rights, to request the State Department of Reclamation to make and furnish a hydrographic survey of the stream in litigation. 12/ The statutes provide for the distribution of water under the immediate direction and control of the Department of Reclamation; for the creation by the Department of water districts to include stream systems or independent sources of supply the rights of use of which have been adjudicated; for the election of watermasters by holders of adjudicated rights; and for the powers and duties of the watermasters and the responsibilities of the water users. 13/

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10/ Silkey v. Tiegs, 51 Idaho 344, 351-353, 5 Pac. (2d) 1049 (1931).

11/ Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. 614 (1904).

12/ Idaho Code, sec 42-1401. The section states that the judge "shall" request the Department to make the examination. The supreme court, in Boise City Irr. & Land Co. v. Stewart, 10 Idaho 38, 57, 77 Pac. 25, 321 (1904), held that this legislative declaration was directory, the question of making the request being left to the sound discretion of the judge. See Blaine County Investment Co. v. Gallet, 35 Idaho 102, 204 Pac. 1066 (1922), for a construction of the legislative provision for payment of costs.

13/ Idaho Code, secs 42-601 to 42-802.



# MONTANA

The statutes provide that "the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply" may be appropriated. Also, "an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same." <sup>1/</sup>

Montana has no centralized State administrative procedure for the acquisition of appropriative water rights. A statutory procedure governs the appropriation of water from adjudicated streams, and a separate procedure provided by statute applies to unadjudicated streams but apparently is optional with the intending appropriator; but the State Engineer has no control in any case. The procedures are as follows:

With respect to unadjudicated waters, the statute provides that the appropriator shall post a notice at the point of intended diversion, file a notice of appropriation in the county records and begin construction within prescribed periods of time, and prosecute the appropriation diligently to completion. It is further provided that failure to comply with the statutory requirements deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith, and that by compliance, the right of use relates back to the date of posting notice, the first step in the procedure. <sup>2/</sup> Prior to that enactment, no notice or record of appropriation was required; "A person acquired a right to the use of water by digging a ditch, tapping a stream, and turning water into it, and applying the water so diverted to a beneficial use. This constituted a valid appropriation of water." <sup>3/</sup> In such cases, if the appropriator exercised reasonable diligence in completing his appropriation, the priority of his right related back to the date of commencement of the work. <sup>4/</sup> The Montana Supreme Court has held that the legislature, by the law of 1885, did not abolish the preexisting method of appropriating water by diversion and use; it provided an additional and alternative method of making an appropriation which controlled exclusively the doctrine of relation with respect to appropriations thereafter made. <sup>5/</sup> That is, only by compliance with the statute could the benefits of the doctrine of relation be claimed with respect to an appropriation made after the enactment. <sup>6/</sup> But, in the view of the supreme court, the legislature did not intend that one who failed to comply with

<sup>1/</sup> Mont. Rev. Codes 1947, Ann., sec 89-801.

<sup>2/</sup> Mont. Rev. Codes 1947, Ann. secs 89-810 to 89-812.

<sup>3/</sup> Murray v. Tingley, 20 Mont. 260, 268, 50 Pac. 723 (1897).

<sup>4/</sup> Wollman v. Garringer, 1 Mont. 535, 544 (1872); Murray v. Tingley, 20 Mont. 260, 268, 50 Pac. 723 (1897); Wright v. Cruse, 37 Mont. 177, 181-183, 95 Pac. 370 (1908); Bailey v. Tintinger, 45 Mont. 154, 171, 122 Pac. 575 (1912); Maynard v. Watkins, 55 Mont. 54, 56, 173 Pac. 551 (1918).

<sup>5/</sup> Murray v. Tingley, 20 Mont. 260, 268-269, 50 Pac. 723 (1897); Bailey v. Tintinger, 45 Mont. 154, 171-172, 122 Pac. 575 (1912).

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the statute, but who nevertheless actually diverted water, could be deprived of it by another who complied with the statute at a time subsequent to the former's completed appropriation. 7/ It seems to be settled that with regard to unadjudicated waters, a valid appropriation of water can be made even where there is no compliance with the statute, where water actually is diverted and applied to beneficial use; that "compliance is important only with regard to the doctrine of 'relation back' \* \* \* on due compliance." 8/

With respect to adjudicated waters, the appropriator must employ an engineer to make a survey of the diversion works, and must file a petition with the county court containing a declaration that the water rights sought to be acquired shall be subject to the terms of any adjudication decree. Parties who may be affected are made defendants; and on conclusion of the trial the court may enter an interlocutory or permanent decree allowing the appropriation subject to prior adjudicated rights. Failure to comply with the statutory provisions deprives the appropriator of the right to use water as against a subsequent appropriator mentioned in or bound by a decree of the court. 2/ The procedure under the present law, originally enacted in 1921, replaced a procedure provided for in 1907 which included posting of notice, prosecuting the work to completion with reasonable diligence, filing of application with the court to have the ditch capacity determined, examination by an engineer, and order by the court after hearing of objections if any should be filed. 10/ The supreme court held that insofar as the act of 1907 was concerned, the legislature did not intend to declare that one who failed to comply with the terms of the statute, but who in the absence of any conflicting adverse right nevertheless had actually impounded, diverted, and put the water to a beneficial use, should acquire no title thereto; 11/ but that

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6/ Murray v. Tingley, 20 Mont. 260, 269, 50 Pac. 723 (1897); Bailey v. Tintinger, 45 Mont. 154, 168-170, 122 Pac. 575 (1912); Maynard v. Watkins, 55 Mont. 54, 56, 173 Pac. 551 (1918); Allen v. Petrick, 69 Mont. 373, 384, 222 Pac. 451 (1924). Necessity of diligence in completing a statutory appropriation: Anaconda National Bank v. Johnson, 75 Mont. 401, 408-410, 244 Pac. 141 (1926); Anderson v. Spear-Morgan Livestock Co., 107 Mont. 18, 29, 79 Pac (2d) 667 (1938).

7/ Murray v. Tingley, 20 Mont. 260, 269, 50 Pac. 723 (1897).

8/ Vidal v. Kensler, 100 Mont. 592, 594-595, 51 Pac. (2d) 235 (1935).

9/ Mont. Rev. Codes 1947, Ann., secs 89-829 to 89-844; Mont. Laws 1921, ch. 228.

10/ Mont. Laws 1907, ch. 185.

11/ Donich v. Johnson, 77 Mont. 229, 246, 250 Pac. 963 (1926).



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the 1921 legislature unquestionably intended that an appropriation of the waters of an adjudicated stream should not be made thereafter without a substantial compliance with the requirements of the statute then enacted, and that the method prescribed therein must be held to be exclusive. <sup>12/</sup> One who thus appropriates water from an adjudicated stream is simply a junior appropriator, with the rights and disabilities of an appropriator whose right is junior to the rights adjudicated in the original decree. <sup>13/</sup> The riparian doctrine has been repudiated in Montana.

<sup>12/</sup> Anaconda National Bank v. Johnson, 75 Mont. 401, 411, 244 Pac. 141 (1926); Donich v. Johnson, 77 Mont. 229, 246, 250 Pac. 963 (1926).

<sup>13/</sup> Quigley v. McIntosh, 88 Mont. 103, 109, 290 Pac. 266 (1930).

NEVADA

The water of all sources of water supply, whether above or below the surface of the ground, is declared by statute to belong to the public and, subject to existing rights, to be available for appropriation for beneficial use. 1/ An exclusive procedure for the appropriation of water is provided, the first step being an application to the State Engineer for a permit; the applicant being entitled to the issuance of a certificate upon making satisfactory proof that the appropriation has been completed in accordance with the requirements of the statute. 2/ Appropriations of water for watering range livestock are subject to special procedure, which includes applications to the State Engineer, and which protects subsisting rights to water range livestock at particular places. 3/ In case of failure to make beneficial use of water during five successive years, the right is forfeited and the water so formerly appropriated may be appropriated again by any qualified person. 4/

The Nevada Supreme Court had for decision in 1949 5/ the question as to whether a water right could be acquired by prescription against the owner of a right vested by diversion and beneficial use prior to 1903, 6/ the adverse use beginning in 1933. The court cited an early decision 7/ as authority for the settled principle that prior to the enactment of the water law, a water right already in existence might be acquired by another by adverse use, and stated that it was not then prepared to overrule that decision nor to read into the water law something not found there even by implication. However, this conclusion was reached reluctantly; the court believed "that adverse use is wholly unwarranted, unnecessary and clearly dangerous to the appropriation and distribution of public property" and expressly invited the attention of the legislature to the problem. The legislature, then in session, amended the water appropriation statute to provide that no prescriptive right to the use of any public water whether appropriated or unappropriated could be acquired by adverse use or adverse possession for any period of time whatsoever; that any such right to appropriate any water must be initiated by making application to the State Engineer for a permit and not otherwise. 8/

The riparian doctrine, although at one time recognized in Nevada, was repudiated in 1885. 9/

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1/ Nev. Comp. Laws 1929, secs. 7890 and 7891.

2/ Nev. Comp. Laws 1929, secs. 7944 to 7962.

3/ Nev. Comp. Laws 1929, secs. 7979 to 7985.

4/ Nev. Comp. Laws 1949 Supp., sec. 7897 (amendment by Sess. Laws 1949, ch. 83). In re Manse Spring and Its Tributaries, 60 Nev. 280, 289-291, 108 Pac. (2d) 311 (1940).

5/ Application of Filippini, --Nev.--, 202 Pac. (2d) 535, 539-541 (1949).



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6/ The office of State Engineer was created by Nev. Sess. Laws 1903, p. 18; and the procedure of initiating appropriations of water by making application to the State Engineer was provided by Sess. Laws 1905, p. 66.

7/ Authors v. Bryant, 22 Nev. 242, 38 Pac. 439 (1894).

8/ Nev. Sess. Laws 1949, ch. 83 amending Comp. Laws 1929, sec. 7897; Comp. Laws 1949 Supp., sec. 7897.

9/ Jones v. Adams, 19 Nev. 78, 84-88, 6 Pac. 442 (1885). Lobdell v. Simpson, 2 Nev. 274, 276-278 (1866); Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534, 543 (1869); Covington v. Becker, 5 Nev. 281, 282-283 (1869).

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OREGON

(X) All water from all sources of water supply is declared by statute to belong to the public and, subject to existing rights, to be available for appropriation for beneficial use under the exclusive procedure provided in the statute.<sup>1/</sup> However, certain waters of the State have been withdrawn from appropriation in a series of enactments, chiefly to preserve the natural flow for scenic and recreational purposes and the protection of fishlife. It is provided by statute that the laws relating to priorities of right to utilize the waters of running streams shall apply likewise to waste, spring, or seepage waters, but that the person on whose lands the seepage or spring waters first arise shall have the right to the use of such waters.<sup>2/</sup> The preference thus accorded to the landowner has been upheld by the Oregon Supreme Court in cases in which the flow from the spring did not pass from the land on which the spring was located or did not form a natural stream.<sup>3/</sup> However, if the flow from the spring constitutes or discharges into a natural stream, it is subject to the law of watercourses.<sup>4/</sup>

The appropriative right for most uses of water is initiated by making application to the State Engineer for a permit to appropriate the water; and upon perfection of the appropriation, a certificate is issued.<sup>5/</sup> Appropriations of water for the generation of electricity, however, are governed by the hydroelectric act, except in the case of developments by the United States or by cities, towns, municipal corporations, or utility districts.<sup>6/</sup> The needs of municipalities for water are provided for by declaring that applications for municipal water supplies may be approved by the State Engineer to the exclusion of all subsequent appropriations, if the exigencies of the case so demand;<sup>7/</sup> that water may be appropriated

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1/ Oreg. Comp. Laws Ann., secs. 116-401 and 116-402.

2/ Oreg. Comp. Laws Ann., sec. 116-701.

3/ Morrison v. Officer, 48 Oreg. 569, 570, 87 Pac. 896 (1906); David v. Brokaw, 121 Oreg. 591, 601, 256 Pac. 186 (1927); Henrici v. Paulson, 134 Oreg. 222, 224-225, 293 Pac. 424 (1930); Klamath Development Co. v. Lewis, 136 Oreg. 445, 450, 299 Pac. 705 (1931); Sinner v. Silver, 158 Oreg. 81, 96-98, 75 Pac. (2d) 21 (1938); Messinger v. Woodcock, 159 Oreg. 435, 443-444, 80 Pac. (2d) 895 (1938).

4/ Low v. Schaffer, 24 Oreg. 239, 244, 33 Pac. 678 (1893); Low v. Rizer, 25 Oreg. 551, 559, 37 Pac. 82 (1894); Boyce v. Cupper, 37 Oreg. 256, 261, 61 Pac. 642 (1900); Brosnan v. Harris, 39 Oreg. 148, 150-151, 65 Pac. 867 (1901); Morrison v. Officer, 48 Oreg. 569, 570, 87 Pac. 896 (1906); Hildebrandt v. Montgomery, 113 Oreg. 687, 690, 693-694, 234 Pac. 267 (1925); Minton v. Coast Property Corp., 151 Oreg. 208, 217, 46 Pac. (2d) 1029 (1935).

5/ Oreg. Comp. Laws Ann., secs. 116-419 to 116-427.

6/ Oreg. Comp. Laws Ann., secs. 119-101 to 119-302.

7/ Oreg. Comp. Laws Ann., sec. 116-421.



for such future reasonable and usual municipal purposes as may be reasonably anticipated;<sup>8/</sup> and that the State Engineer shall reject, or grant subject to municipal uses, all applications where in his judgment the appropriation of the waters applied for would impair a municipal water supply.<sup>9/</sup> An early statute provides that when the waters of a natural stream are inadequate for all users, first preference shall be given to domestic purposes, subject to such limitations as may be prescribed by law, and that agricultural purposes shall have preference over manufacturing purposes.<sup>10/</sup> Apparently this statute has not been interpreted by the supreme court; but that court, in referring to the statute providing that applications for the appropriation of municipal water supplies may be approved to the exclusion of subsequent appropriations,<sup>11/</sup> noted that no precedence was thereby given to a municipal corporation as such, as against prior claimants, and that priorities of appropriation constitute a species of property which cannot be taken from the holder without compensation.<sup>12/</sup> If the owner of a perfected and developed water right fails to use the appropriated water for a period of five successive years, abandonment of the water right is conclusively presumed; but the water rights of cities and towns for all reasonable and usual municipal purposes are exempted from this provision.<sup>13/</sup>

As a result of legislation and judicial decisions, Oregon has become essentially an appropriation-doctrine State notwithstanding cases in which the riparian doctrine, to some extent at least, was considered to be a part of the State water law. In various decisions up to and including the first decade of the present century, the supreme court recognized that riparian owners had certain rights to the use of water,<sup>14/</sup> but also recognized the applicability of the appropriation doctrine to rights acquired on the public domain pursuant to authority contained in acts of

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- <sup>8/</sup> Oreg. Comp. Laws Ann., sec. 116-437.  
<sup>9/</sup> Oreg. Comp. Laws Ann., sec. 116-1021.  
<sup>10/</sup> Oreg. Comp. Laws Ann., sec. 116-601.  
<sup>11/</sup> See supra, n. 7.  
<sup>12/</sup> In re Schollmeyer, 69 Oreg. 210, 215, 138 Pac. 211 (1914).  
<sup>13/</sup> Oreg. Comp. Laws Ann., sec. 116-437.  
<sup>14/</sup> Taylor v. Welch, 6 Oreg. 198, 200 (1876); Coffman v. Robbins, 8 Oreg. 278, 282 (1880); Shivley v. Hume, 10 Oreg. 76, 77 (1881); Shook v. Colohan, 12 Oreg. 239, 244, 6 Pac. 503 (1885); Weiss v. Oregon Iron & Steel Co., 13 Oreg. 496, 498-502, 11 Pac. 255 (1886); Low v. Schaffer, 24 Oreg. 239, 245-246, 33 Pac. 678 (1893); Jones v. Conn, 39 Oreg. 30, 34, 36-37, 39-41, 44-46, 64 Pac. 855, 65 Pac. 1068 (1901); Cox v. Bernard, 39 Oreg. 53, 61, 64 Pac. 860 (1901); Bauers v. Bull, 46 Oreg. 60, 66, 78 Pac. 757 (1904); Brown v. Gold Coin Min. Co., 48 Oreg. 277, 286, 86 Pac. 361 (1906).



Congress, as against riparian claims incident to lands subsequently passing to private possession,<sup>15/</sup> and the resulting modification of the common-law doctrine.<sup>16/</sup> The incompatibility of the riparian and appropriation doctrines was acknowledged, and there became established the principle that a settler upon public land contiguous to a stream could elect to make a prior appropriation of the water, or to insist upon his riparian right, but that he could not do both.<sup>17/</sup> In the leading case of Hough v. Porter,<sup>18/</sup> the supreme court held that the effect of the Desert Land Act of 1877<sup>19/</sup> was to abrogate the modified common-law doctrine of riparian rights, except for domestic use and the watering of stock essential to the sustenance of riparian landowners, so far as public lands entered after the date of that act were concerned. The water appropriation statute of 1909 contained provisions defining and limiting vested riparian rights to the extent of the actual application of water to beneficial use prior to the passage of the act, or within a reasonable time thereafter by means of works then under construction, all such rights to be adjudicated under the statutory procedure therein provided;<sup>20/</sup> and the supreme court upheld the validity of this legislative definition of vested riparian rights, stating that it was within the province of the legislature, by that act, to define a vested riparian right or to establish a rule governing the conditions under which it should be deemed to be created.<sup>21/</sup> In the development of the principle that one cannot claim both riparian and appropriative rights for the same use of water,<sup>22/</sup> the court has held repeatedly that the election of one of these two claims is in substance a waiver of the other, and that to claim a right to use a specified

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<sup>15/</sup> Lewis v. McClure, 8 Oreg. 273, 274-275 (1880); Tolman v. Casey, 15 Oreg. 83, 88, 13 Pac. 669 (1887); Curtis v. LaGrande Water Co., 20 Oreg. 34, 42, 23 Pac. 808 (1890); Speake v. Hamilton, 21 Oreg. 3, 6, 8, 26 Pac. 855 (1890); Simmons v. Winters, 21 Oreg. 35, 42, 27 Pac. 7 (1891); Brown v. Baker, 39 Oreg. 66, 68-69, 65 Pac. 799, 66 Pac. 193 (1901); Morgan v. Shaw, 47 Oreg. 333, 337, 83 Pac. 534 (1906); Porter v. Pettengill, 57 Oreg. 247, 249, 110 Pac. 393 (1910).

<sup>16/</sup> Carson v. Gentner, 33 Oreg. 512, 515-516, 52 Pac. 506 (1898).

<sup>17/</sup> North Powder Mill. Co. v. Coughanour, 34 Oreg. 9, 22, 54 Pac. 223 (1898); Brown v. Baker, 39 Oreg. 66, 70, 65 Pac. 799, 66 Pac. 193 (1901); Davis v. Chamberlain, 51 Oreg. 304, 311, 98 Pac. 154 (1908). See Low v. Schaffer, 24 Oreg. 239, 245-246, 33 Pac. 678 (1893). See also footnote 23.

<sup>18/</sup> Hough v. Porter, 51 Oreg. 318, 383-406, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909). Approved and applied in Hedges v. Riddle, 63 Oreg. 257, 259-260, 127 Pac. 548 (1912). Norris v. Eastern Oregon Land Co., 112 Oreg. 106, 109-112, 227 Pac. 1111 (1924).

<sup>19/</sup> 19 Stat. L. 377 (March 3, 1877).

<sup>20/</sup> Oreg. Laws 1909, ch. 216, sec. 70; Comp. Laws Ann., sec. 116-403.

<sup>21/</sup> In re Hood River, 111 Oreg. 112, 174-182, 227 Pac. 1065 (1924). California-Oregon Power Co. v. Beaver Portland Cement Co., 73 Fed. (2d) 555, 567-569 (C.C.A. 9th, 1934). California Oregon P wer Co. v. Beaver Portland Cement Co., 295 U. S. 142, 153, 165 (1935).

<sup>22/</sup> See supra, n. 17.

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riparian rights*



quantity of water from a specified date, to the exclusion of use by others, is to waive one's riparian right for the purpose of the proceeding in which the claim is made and to assume the character of an appropriator.<sup>23/</sup> No right can be adjudicated under the statutory procedure except for the use of a specific quantity of water and with a fixed date of priority--in other words, on an appropriative basis.<sup>24/</sup> The measure of the vested right of a riparian landowner is beneficial use of the water,<sup>25/</sup> which right, to have an enforceable priority, must be adjudicated with the elements of an appropriative right. The net result of the Oregon legislation and court decisions has been a virtual abrogation of the substance of the riparian doctrine except as to certain vested rights chiefly for domestic and stock-watering purposes. That is to say, the riparian doctrine in Oregon appears to be little more than a legal fiction.

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<sup>23/</sup> Caviness V. LaGrande Irr. Co., 60 Oreg. 410, 421-423, 119 Pac. 731 (1911); Little Walla Walla Irr. Union v. Finis Irr. Co., 62 Oreg. 348, 358, 124 Pac. 666, 125 Pac. 270 (1912); Bowen v. Spaulding, 63 Oreg. 392, 395, 128 Pac. 37 (1912); In re Schollmeyer, 69 Oreg. 210, 212, 138 Pac. 211 (1914); In re Sucker Creek, 83 Oreg. 228, 234-237, 163 Pac. 430 (1917); Norwood v. Eastern Oregon Land Co., 112 Oreg. 106, 111-112, 227 Pac. 1111 (1924); In re Deschutes River and Tributaries, 134 Oreg. 623, 692, 703-706, 286 Pac. 563, 294 Pac. 1049 (1930).

<sup>24/</sup> In re Deschutes River and Tributaries, 134 Oreg. 623, 704, 705, 286 Pac. 563, 294 Pac. 1049 (1930).

<sup>25/</sup> Concurring opinion, Justice Coshov: In re Hood River, 114 Oreg. 112, 207, 227 Pac. 1065 (1924).

WASHINGTON

The law regulating the appropriation of water provides that subject to existing rights, all waters within the State belong to the public, and that any right to the use thereof may be acquired by appropriation in the manner provided in the statute and not otherwise.<sup>1/</sup> The administration of the act is vested in an engineer designated as the State Supervisor of Hydraulics,<sup>2/</sup> who is an assistant director in the Department of Conservation and Development. An intending appropriator must apply to the State Supervisor of Hydraulics for a permit to make the appropriation; and when the permittee has made a satisfactory showing that his appropriation has been perfected, he receives a certificate of appropriation.<sup>3/</sup>

Any person may condemn an inferior use of water for a superior use.<sup>4/</sup> The court in the condemnation proceedings is to determine what use will be for the greatest public benefit, and that use is to be deemed a superior one. However, the statute further provides that no person may be deprived of the use of water reasonably necessary for the irrigation of his land then under irrigation, by the most economical method of artificial irrigation, in favor of another irrigation use, the court to determine the most economical method. The Supreme Court of Washington allowed the condemnation, primarily for domestic purposes, of a water supply on another's land not then being used by the landowner, pursuant to this statute, holding that the use of water for domestic purposes is a public purpose when the domestic use desired is the foundation of an agricultural enterprise.<sup>5/</sup>

The riparian doctrine has been recognized repeatedly in the court decisions of Washington. Very early decisions of the supreme court acknowledged the validity of appropriations of water on public lands of the United States pursuant to local laws and customs, under authority granted by Acts of Congress;<sup>6/</sup> and in a number of subsequent cases the supreme court, in stating the appropriative principle, carefully restricted its applicability to the public domain.<sup>7/</sup> Adoption of the

*riparian doctrine*

1/ Wash. Rem. Rev. Stats., sec. 7351.  
2/ Wash. Rem. Rev. Stats., sec. 7355.  
3/ Wash. Rem. Rev. Stats., secs. 7378 to 7387, 7390.  
4/ Wash. Rem. Rev. Stats., sec. 7354.  
5/ State ex rel. Andersen v. Superior Court, 119 Wash. 406, 410-411, 205 Pac. 1051 (1922).  
6/ Thorpe v. Tenam Ditch Co., 1 Wash. 566, 569-570, 20 Pac. 588 (1899); Geddis v. Parrish, 1 Wash. 587, 589-592, 21 Pac. 314 (1889); Isaacs v. Barber, 10 Wash. 124, 128-132, 38 Pac. 871 (1894).  
7/ See Benton v. Johncox, 17 Wash. 277, 289, 49 Pac. 495 (1897); Sander v. Bull, 76 Wash. 1, 5, 135 Pac. 489 (1913); Hough v. Taylor, 110 Wash. 361, 364-365, 188 Pac. 458 (1920); in re Doan Creek, 125 Wash. 14, 20, 215 Pac. 343 (1923).



riparian principle likewise appeared in early cases,<sup>8/</sup> qualified by the recognition of prior appropriations on public lands.<sup>9/</sup> In 1897 the Washington Supreme Court held that riparian rights existed in the arid as well as the humid portions of the State, and that such rights attached to lands passing to private ownership at the inception of title thereto and would be protected as against subsequent appropriations.<sup>10/</sup> But the time element works in favor of appropriative rights likewise; that is, an appropriation of water, validly acquired, is superior to riparian rights of lands entered after the date of the appropriation.<sup>11/</sup> The common-law doctrine has been modified by imposing upon the riparian claimant the necessity of beneficial use of the water, and by subjecting to appropriation for use on nonriparian land the waters of nonnavigable streams in excess of the quantity that can be used beneficially, either directly or prospectively, within a reasonable time, on or in connection with riparian lands.<sup>12/</sup> The supreme court has stated that "The common-law rule of riparian rights has been stripped of some of its rigors \* \* \*" <sup>13/</sup> and that "For years past, the trend of our decisions and the tenor of our legislation have been to restrict and narrow the common law of riparian rights \* \* \*".<sup>14/</sup> As a result, the advantage of position of riparian lands with reference to water rights has been materially reduced.

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<sup>8/</sup> Crook v. Hewitt, 4 Wash. 749, 750, 754, 31 Pac. 28 (1892); Shotwell v. Dodge, 8 Wash. 337, 339, 36 Pac. 254 (1894); Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 582-583, 38 Pac. 147 (1894).

<sup>9/</sup> Isaacs v. Barber, 10 Wash. 124, 128-129, 38 Pac. 871 (1894).

<sup>10/</sup> Benton v. Johncox, 17 Wash. 277, 279-283, 288-290, 49 Pac. 495 (1897). Reaffirmed in Nesalhaus v. Walker, 45 Wash. 621, 623-624, 88 Wash. 1032 (1907). See In re Doan Creek, 125 Wash. 14, 20, 215 Pac. 343 (1923).

<sup>11/</sup> In re Doan Creek, 125 Wash. 14, 20, 215 Pac. 343 (1923); Weitensteiner v. Engdahl, 125 Wash. 106, 108-116, 215 Pac. 378 (1923); In re Alpowa Creek, 129 Wash. 9, 13, 224 Pac. 29 (1924); Hunter Land Co. v. Laugenour, 140 Wash. 558, 569-571, 250 Pac. 41 (1926); In re Sinlahekin Creek, 162 Wash. 635, 642-643, 299 Pac. 649 (1931).

<sup>12/</sup> Brown v. Chase, 125 Wash. 542, 549, 553, 217 Pac. 23 (1923). See also Proctor v. Sim, 134 Wash. 606, 616-619, 236 Pac. 114 (1925); State v. American Fruit Growers, 135 Wash. 156, 161, 237 Pac. 498 (1925); Hunter Land Co. v. Laugenour, 140 Wash. 558, 569-571, 250 Pac. 41 (1926).

<sup>13/</sup> In re Alpowa Creek, 129 Wash. 9, 13, 224 Pac. 29 (1924).

<sup>14/</sup> Proctor v. Sim, 134 Wash. 606, 616, 236 Pac. 114 (1925)



WYOMING

The constitution of Wyoming declares that the control of water must be in the State, which in providing for its use shall guard equally all the various interests involved.<sup>1/</sup> It declares also that the water of all natural streams, springs, lakes or other collections of still water within the State are the property of the State; that priority of appropriation for beneficial uses shall give the better right; and that no appropriation shall be denied except when such denial is demanded by the public interests.<sup>2/</sup> The constitution provides for the appointment of a State Engineer; for the division of the State by the legislature into four water divisions and the appointment of superintendents thereof; and for a Board of Control to be composed of the State Engineer and superintendents of the water divisions, the State Engineer being president.<sup>3/</sup> The supervision of the waters of the State and of their appropriation, distribution, and diversion is vested by the constitution in the Board of Control, its decisions being made subject to review by the courts.<sup>4/</sup>

An appropriative right is initiated by making application to the State Engineer for a permit to make the appropriation; and the final step, after the appropriation has been perfected in accordance with the permit, is the adjudication of the right by the Board of Control and the issuance by the Board of a certificate of appropriation.<sup>5/</sup> Since the adoption of the present water-appropriation statute in 1890, at the first session of the State legislature, compliance with the procedure so provided for the acquisition of water rights is a condition precedent to the making of a valid appropriation.<sup>6/</sup> Failure to make use of appropriated waters for five successive years is to be considered an abandonment of the same, and works a forfeiture of the water right.<sup>7/</sup> Procedure is provided for the declaration of such abandonment by the Board of Control after a hearing, on the initiative of any water user who might be affected thereby. The declaration is filed in court; if no objection is filed, judgment affirming the Board's order is issued; if there is objection,

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1/ Wyo. Const., art. I, sec. 31.  
2/ Wyo. Const., art. VIII, secs. 1 and 3.  
3/ Wyo. Const., art. VIII, secs. 2, 4, and 5.  
4/ Wyo. Const., art. VIII, sec. 2.  
5/ Wyo. Comp. Stats., 1945, secs. 71-238 to 71-250.  
6/ Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 30-38, 236 Pac. 764 (1925). See Campbell v. Wyoming Development Co., 55 Wyo. 347, 388, 395, 100 Pac. (2d) 124 (1940). Laramie Rivers Co. v. LeVasseu, 65 Wyo. 414, 431, 202 Pac. (2d) 680 (1949).  
7/ Wyo. Comp. Stats., 1945, sec. 71-701.



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the water user who initiated the proceeding becomes plaintiff and the objector defendant, and the issue is tried as to whether or not the water right has in fact been abandoned.<sup>8/</sup>

The water appropriation statute defines preferred uses as including rights for domestic and transportation purposes, and these include: First, drinking; second, municipal; third, steam engines and general railway use; and fourth, culinary, laundry, bathing, refrigeration, and heating plants. Likewise, the use of water for irrigation is to be preferred to any use through "turbine or impulse water wheels" for power purposes. Existing rights that are not preferred may be condemned to supply water for preferred uses.<sup>9/</sup> Procedure is provided for changing a use to a preferred use under the direction of the Board of Control, just compensation to be paid if the change of use is approved.<sup>10/</sup> *over power*

Riparian rights never have been recognized in Wyoming.

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<sup>8/</sup> Wyo. Comp. Stats., 1945, secs. 71-702 to 71-707. Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 23-27, 236 Pac. 764 (1925); V n Tassel Real Estate & Livestock Co. v. Cheyenne, 49 Wyo. 333, 349-355, 54 Pac. (2d) 906 (1936); Horse Creek Conservation Dist. v. Lincoln Land Co., 54 Wyo. 320, 329-345, 92 Pac. (2d) 572 (1939); Campbell v. Wyoming Development Co., 55 Wyo. 347, 400-404, 100 Pac. (2d) 124 (1940). Ramsay v. Gottsche, 51 Wyo. 516, 529-530, 69 Pac. (2d) 535 (1937). See Laramie Rivers Co. v. LeVasseur, 65 Wyo. 444, 449, 202 Pac. (2d) 680 (1949). Ramsay v. Gottsche, supra, at 51 Wyo. 532; Scherck v. Nichols, 55 Wyo. 4, 23-24, 95 Pac. (2d) 74 (1939).

<sup>9/</sup> Wyo. Comp. Stats., 1945, sec. 71-402.

<sup>10/</sup> Wyo. Comp. Stats., 1945, sec. 71-403. Newcastle v. Smith, 28 Wyo. 371, 205 Pac. 302 (1922).





C O N T E N T SC.B.I.A.C.

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# State of California

## CALIFORNIA KLAMATH RIVER COMMISSION

CHAPTER 1473, STATS. 1953

WILLIAM G. HAGELSTEIN, CHAIRMAN  
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January 9, 1956

Mr. W. A. Galbraith, Director  
Department of Conservation and Development  
406 Transportation Building  
Olympia, Washington

Dear Mr. Galbraith:

I have just finished reading the minutes and the exhibits of the Eighty-Fourth Meeting of the Columbia Basin Inter-Agency Committee of November 16, 1955.

I would appreciate very much your sending me three additional sets of this complete record, as we are very much interested in the issues involved in the Pelton case.

Sincerely yours,

F. L. Lathrop, Consultant

*See my memo attached  
to follow up on*



1/8/56

to do

wrote for 3 additional copies

1 - Regan - 1 - Collier - 1 - Bank  
or Hill

Master

Exhibit I - II - III - IV - V - VI

as soon as possible - studying my old Public Law  
act (photo copies) - I read text - also

studying notes - Stanford Berk  
on legislative history - concept on  
these legal references & can discuss

follow up on my own conclusion on latter items

try to find support between - domain - (self/such  
agreedly)

Y/N F & Park created out of domain - same or reaction  
for classification - study any monographs to accept & release  
from blanket reservation.



Office of the Chairman  
P. O. Box 4137  
Portland, Oregon

FOR ADMINISTRATIVE USE ONLY

COLUMBIA BASIN INTER-AGENCY COMMITTEE  
Minutes of Eighty-Fourth Meeting  
Portland, Oregon  
November 16, 1955

The Committee convened at 9:45 a.m., Wednesday, November 16, 1955, in Room 36, State Office Building, Ellis L. Hatt, Chairman, presiding. Members or alternates attending included:

Mr. Ellis L. Hatt, Department of Agriculture, Chairman  
Honorable Paul L. Patterson, Governor of Oregon  
Brig. Gen. L. H. Foote, Corps of Engineers  
Mr. C. H. Raymond, for Governor Aronson, State of Montana  
Mr. Robert B. Porter, for Governor Lee, State of Utah  
Mr. Leshner S. Wing, Federal Power Commission  
Mr. Mark R. Kulp, for Governor Smylie, State of Idaho  
Mr. W. A. Galbraith, for Governor Langlie, State of Washington  
Mr. C. E. Mohler, for Dr. Pearl, Department of Interior  
Mr. H. A. Shamberger, for Governor Russell, State of Nevada  
Mr. H. C. Clare, Department of Health, Education and Welfare  
Mr. D. S. Goldy, Department of Labor  
Mr. Eckley S. Ellison, Department of Commerce  
Mr. Roy W. Scheufele, Corps of Engineers, Executive Secretary, pro tem

Names of others present are made a matter of record in the Committee files.

The first item of new business included the fixing of the time, place and agenda for the next meeting. After considerable discussion it was agreed that that meeting would be held on Monday, January 16, 1956, in the Multnomah Hotel to hear the report of the Fisheries Steering Committee, which will include outline of the proposed Research and Upper Columbia Basin fisheries programs. The Pacific Northwest Governors' Power Policy Committee plans to meet on the same day following adjournment of the Inter-Agency meeting. The local Chamber of Commerce will sponsor a luncheon for the groups.

The second item considered was a report of the Power Planning Subcommittee. It was agreed that the question of reopening the membership of the Subcommittee would be referred to the Executive Subcommittee for handling and that the Power Planning Subcommittee should proceed with its work in the manner and as outlined in its report of November 9, 1955.

The Chairman called upon Mr. Roy W. Scheufele for the Summary of Activities - Constituent Agencies of the Columbia Basin Inter-Agency Committee. This summary is attached as Exhibit I.

The Committee then directed its attention to Item III of the agenda, The Columbia River Review Report - Progress and Problems. Brig. Gen. L. H. Foote, Division Engineer, North Pacific Division, Corps of Engineers,



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introduced his Chief Engineer, Mr. F. S. Brown, who reported to the Committee. Summary of that report is attached as Exhibit II.

*Patton case*  
Governor Paul L. Patterson introduced Mr. Arthur G. Higgs, Assistant Attorney General, who made the initial statement concerning the Pelton Dam Decision (Exhibit III). Mr. Lewis A. Stanley, State Engineer for Oregon, stated that in his opinion the decision in effect nullified the State Water Act of 1909 and for practicable purposes largely removed the effectiveness of the new Water Resources Board established by the State legislature at its most recent session. Mr. Stanley was followed by Mr. Hugh A. Shamberger, State Engineer, who made a statement for Nevada (Exhibit IV). Mr. Willard Gatchell, Counsel for the Federal Power Commission, Washington, D. C., spoke giving his own views. His statement is attached as Exhibit V. The State of Washington representative, Mr. W. A. Galbraith, submitted a statement, attached as Exhibit VI.

*sent to Banks*  
The Chairman then opened the subject for general discussion which is summarized as follows:

Mr. Lewis A. Stanley asked whether or not the license issued by the Federal Power Commission for the Pelton project conferred upon the licensee the right to use the water of the Deschutes River. Mr. Gatchell replied that the licensee did have a right to use the unappropriated waters of the Deschutes River subject to certain restrictions imposed in the license. Mr. Stanley then asked if the license granted the licensee a water right. Mr. Gatchell replied in the negative, stating that the license gave the licensee the right to use so much of the unappropriated water of the Deschutes.

Mr. Abbott Goldberg, Deputy Attorney General for California, asked if the licensee might have a right to claim compensation for subsequent diversion for consumptive uses by appropriation under State law, Mr. Arthur Higgs adding that the western states had the right to control use of water on nonnavigable streams where there is Federal ownership of lands but where there had been no power site reservations made. In response to query from Mr. Stanley, Mr. Gatchell stated that the Federal Power Commission could grant a license for development on the Rogue River in spite of the fact that the State legislature had set the stream aside for recreational purposes.

Mr. Goldberg stated that California had under preparation a master water plan for state-wide development of its water resources and that the plan would probably receive legislative approval and become the engineering plan under which development in the State must proceed. He asked what the position of FPC would be in the event application was filed for project not in conformance with such a plan. Mr. Gatchell stated he couldn't say what the FPC might do, but it would deal with the problem when confronted with it.

Mr. Ralph Cowgill remarked that the Pelton decision cast doubt on the right of many Deschutes water users. Mr. Gatchell pointed out that

anyone with any vested right has nothing whatsoever to fear from the Pelton decision. There followed an extended discussion as to the relative rights of the licensee, the State, and the appropriators if the State subsequently approved appropriation and diversion for beneficial consumptive use of so much of the unappropriated water of the Deschutes that the operation of the licensee was interfered with, assuming that the licensee had not in the interim been able to perfect a water right under State law. The question is moot. It would appear that the exact rights of the parties in the event of occurrence of these improbable circumstances remain to be determined.

The following discussion took place between Governor Patterson and Mr. Gatchell:

Governor Paul L. Patterson, State of Oregon: It is my purpose, and I think all official representatives of Oregon, not to retry the Pelton case. The only thought I want to bring out is what you people attribute and believe that case to hold. Should the Federal Government, never having parted with title to these lands, still hold both land and water and should have the right to control what is done with that water through its agency the FPC.

Mr. Willard Gatchell: That is right. By the United States retaining title to the lands and water not separated under state laws, it still retains full control of the water on its lands.

Governor Patterson: Our 1909 water act says all water not appropriated as of that date shall be then subject to appropriation in the future under the terms of the act. From 1909 on my right and your right must be obtained through compliance with the laws. Is the Federal Government owning land and the water not having been appropriated prior to 1909 or since that time not bound or affected by laws passed by the State of Oregon?

Mr. Gatchell: The State of Oregon, in my opinion, could not bind the United States with respect to Federal property.

Governor Patterson: The Federal Government can proceed to use those waters if the Federal Government sees fit under its agency without being affected by the State law.

Mr. Gatchell: That is right.

Governor Patterson: We cannot have a national plan with the right of any of the 48 states to veto any decision within the boundary of its own state. It is your philosophy that the water of the United States should be subject to such a national plan and its use thereof should be without direction or control by the states within which they flow.

Mr. Gatchell: A fair statement of the philosophy seems to be inherent in the Federal Power Act. There must be a national plan without which there cannot be comprehensive river development.

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Bancroft - 1/6/56 Board meeting - legal by Mr. Clegg

Governor Patterson: I agree with the conclusion. In making our determination as to what, if any, our next step should be, we must answer for ourselves whether we suggest subscribing to a national plan of water without interference by the states or whether we want to assert the rights of the respective states to assert their jurisdiction over water within their boundaries.

Mr. Gatchell: That is inherent in the Pelton decision.

Governor Patterson: It is your position that the Pelton decision, regardless of the merits of the dam, establishes that the Federal Government has the right to control waters in both navigable and nonnavigable streams on lands that the Federal Government has reservations on or still has ownership of at least to the extent they do not infringe on the owner's established vested rights under state law.

Mr. Gatchell: That is right. The decision was made way back in 1920.

*Anderson*  
Governor Patterson: Would you question the right of Oregon to control the fishing on the Deschutes River by virtue of the boundary on the Warm Springs reservation established in 1854?

Mr. Gatchell: That has no reference to Pelton decision, but I doubt personally that the State of Oregon can set aside the treaty rights of the Indians.

Governor Patterson: You question the wisdom of the 17 western states, particularly the northwest states, from divorcing themselves from the national development of water because of dependence on hydroelectric energy in this area. Why do you believe our insistence upon the right of the state either individually or by compact with each other would have the effect of divorcing ourselves from the national picture if we took that action?

Mr. Gatchell: The 17 western states need water for the very fundamental purposes of life. This is not the only area where water is a prime necessity. There has been a very large increase in water consumption for industrial and other uses throughout the United States. This area is by no means the only area where water is of major concern. The water problem is of importance to the nation as a whole. Other states require consideration of their needs. Will you advance the future of Oregon or other states or retard them by individual approach?

This ended the general discussion. Mr. Eckley S. Ellison introduced the following motion which was passed without dissent:

"Resolved, that the Executive Subcommittee prepare a concise statement of the issues involved in the discussions here today on the Pelton Dam decision; summarize current practices of Federal agencies and future implications of these practices with respect to observance of state water laws; enumerate the points of conflict (if any) and epitomize the reasoning supporting the various views."

Meeting adjourned at 3:15 p.m.



SUMMARY OF ACTIVITIES - CONSTITUENT AGENCIES  
COLUMBIA BASIN INTER-AGENCY COMMITTEE

Federal Power Commission

The Federal Power Commission granted a 50-year license to Grant County Public Utility District for the Priest Rapids development, consisting of two dams. The initial installation at Priest Rapids will be 600,000 kilowatts, while the Wanapum project will have an initial installation of 570,000 kilowatts, with provisions for additional power to be added later at each plant.

As a matter of interest, the Commission also has recently issued the 1954 Supplement "Steam-Electric Plant Construction Cost and Annual Production Expenses." This document is referred to as FPC S-117, and may be purchased from the Washington office for \$1.50 a copy. These data are published annually.

Department of Interior

Bonneville Power Administration

Power situation and outlook. - All regional loads, including interruptible industrial loads, were carried through October with only a nominal amount of steam-electric generation in operation for spinning reserve. On major power streams in the Pacific Northwest, streamflows receded to about median by the end of September; as a consequence, storage release from Hungry Horse, Franklin D. Roosevelt, Flathead, and Albeni Falls reservoirs in September was about 528,000 acre-feet compared with 187,000 acre-feet a year ago. With above-average rainfall in October, streamflows have increased above median and a considerable part of the September storage-draft has been replenished. Curtailment in interruptible industrial loads served by the Federal system is not imminent.

Power rate. - The Secretary of the Interior has approved the Administration's recommendation that the rate of \$17.50 per kilowatt-year be extended for at least a year beyond December 20, 1956. This extension is possible owing to a substantial decrease in estimated construction costs of The Dalles and Chief Joseph Dams, to a reduction in transmission investment, and to savings in operation and maintenance.

Fish and Wildlife Service

A general plan for conserving and developing fish and wildlife resources of the Albeni Falls project was approved by the Corps of Engineers, Fish and Wildlife Service, and Idaho Fish and Game Department.

The Bureau of Reclamation and the Service are considering the storage of water solely to benefit fish. In the proposed enlargement of



the Bumping River Dam in the Yakima River system, it is planned to provide additional storage for release during the low water period to benefit fish in the lower reaches of the Yakima River.

The count of fall chinook salmon over Bonneville Dam in 1955 is the lowest on record, falling somewhat below the counts in 1953 and 1954 and considerably below the 10-year average of 180,000. The fall run from August 16 through October 30 totals 94,023 chinook salmon. From this low return the egg take at the lower river hatcheries fell short and is estimated not to exceed 45,000,000.

### Geological Survey

A major zinc-lead discovery has been made in the Hercules mine and a major copper-silver discovery in the Crescent mine, both in the Coeur d'Alene district, Idaho. There may be two important cobalt discoveries in the Blackbird district, Idaho.

### Bureau of Indian Affairs

Public Law 587 provides for the termination of Federal supervision over Indian property of the Klamath Reservation. Management specialists have prepared specifications for appraising tribal property and bids on the appraisal work will be opened November 30. The Stanford Research Institute has been engaged to assist in formulating management plans, to assist in some phases of the appraisal, and to provide guide lines for evaluating mineral resources.

### Bureau of Land Management

In October the Secretary of the Interior announced a four-point program for maximum use of the timber resources on lands in Oregon that are managed by the Bureau.

The program increases the total allowable yearly cut to 588,000,000 board-feet and involves three policy changes:

1. Amended regulations that will permit the lifting of the eight-year-old marketing restrictions governing sales of salvage timber.
2. Revamping BLM appraisal procedures to reflect more closely the results of competitive sales of O&C timber.
3. An expanded and intensified forest-management program on the O&C lands, with a recommendation that additional Federal and other funds be provided to that end. In part, this program aims to complete the basic inventory of timber and other resources within three years rather than six or more years.



Exhibit I

Bureau of Mines

Detailed surveys have been started to determine the extent of mineralization in the area of the Mt. Sheep and Pleasant Valley dams and the extent to which construction of the dams would adversely affect the mineral industry. This is at the request of FPC.

Bureau of Reclamation

Reclamation crop report. - A Bureau-wide crop report covering the 17 western states for 1954 has recently been released. It shows that crops valued at \$865 million were produced on 6,125,766 acres of project lands for an average value of \$141 per acre. The highest average crop value among all Reclamation projects \$874.89 per irrigated acre, was attained on the Tieton Division of the Yakima project, Washington. In 1953, crop values totaled \$786 million on 6,097,615 acres for an average value of \$129 per acre.

Corps of Engineers

Unit No. 10 at the McNary project went on the line officially October 28.

Department of Labor

Employment highlights. - After setting a record of 1,966,000 in July, total employment in the region edged downward to 1,950,000 in September as sharp declines in farm employment more than offset steady job gains in nonfarm activities. September's nonfarm employment climbed to a new peak of 1,666,000 under the pressure of continued strong demand for the region's principal products--lumber, paper, aluminum, and aircraft--and the impact of high employment and earnings in these activities on such secondary industries as trade and service. Farm employment slipped to about 284,000 in September from July's unusually high 335,000. Unemployment in the region fell to 43,200 in September, the lowest level in four years, as a result of active hiring programs to man the region's nonfarm jobs.

Within the individual states comprising the region: unemployment in Idaho dropped to 4,200 in September 1955, a decline of nearly 24% from the September 1954 level of 5,500. In September of this year the unemployed represented 1.6% of Idaho's labor force, compared with 2.2% in September 1954. In Oregon unemployment in September 1955 totaled 16,000, a decline of 43% from last September's 28,000. In September 1955 Oregon's unemployed accounted for 2.2% of the state's labor force compared with 3.9% in September 1954. In Washington unemployment declined 39% from 37,800 in September 1954 to 23,000 in September 1955. Washington's unemployment comprised 3.8% of the state's labor force in September 1954 against 2.2% in September 1955.



Exhibit II  
Minutes of 84th Meeting  
CBIAC - November 16, 1955

SUMMARY OF REMARKS BY F. S. BROWN  
Chief, Engineering Division, North Pacific Division on  
COLUMBIA RIVER REVIEW REPORT - PROGRESS AND PROBLEMS

From information in the press and previous discussions on the subject, you are generally familiar with the nature and scope of our proposed review report. Emphasis of the review will be on the main river and be directed towards problems of flood control, power, navigation, and related water uses.

There will be nothing confidential about the work of the Corps in this undertaking. We are relying heavily on the cooperation of all interested agencies. The Federal Power Commission will do most of the work relating to load growth and steam costs; Bonneville Power Administration will prepare data on transmission; the Bureau of Reclamation will be responsible for irrigation and will assist the Corps in conducting investigations in the Clark Fork Basin. In addition, the Department of Agriculture, various bureaus of the Interior Department, and the Department of Health, Education and Welfare will assist on matters germane to their agencies. It is expected that public hearings will be held sometime in February at several places in the basin to further inform the public of the progress the Corps is making on this work.

Progress on the flood control plan outlined in the 308 Report has been extremely slow. Although almost ten years have passed, we are still without major storage.

In reviewing the storage situation in Columbia River Basin, Mr. Brown brought out the following facts:

a. The Main Control Plan set forth in H. D. 531 contained approximately 27,000,000 acre-feet of usable storage. Of the above amount, approximately 21,000,000 acre-feet were used at the various reservoirs to control the 1894 flood to a flow of 800,000 cfs at The Dalles. This is equivalent to an effective storage at The Dalles of 17,300,000 acre-feet.

b. The present status of reservoir projects of the Main Control Plan is as follows:

(1) Glacier View - Not recommended because of opposition by recreation and wildlife interests.

(2) Libby - Authorized but construction delayed pending completion of negotiations with Canada.

(3) Priest Rapids - Plan proposed by PUD No. 2 of Grant County would provide only 500,000 acre-feet in lieu of 2,100,000 acre-feet contemplated in the Main Control Plan.



(4) John Day - Appears that 500,000 acre-feet in lieu of 2,000,000 acre-feet is about the maximum amount that can be obtained.

(5) Hells Canyon - Brownlee and Pleasant Valley would provide about 1,500,000 acre-feet as compared to 2,600,000 used in the Main Control Plan in controlling the 1894 flood.

c. The above changes reduce the total usable storage in the system from approximately 27,000,000 acre-feet to 13,500,000 acre-feet of which 9,500,000 acre-feet would be effective at The Dalles. This amount of storage would be sufficient to reduce the 1894 flood at The Dalles to a flow of 920,000 cfs as compared to 800,000 cfs under the Main Control Plan.

Hence, one of our main problems includes the development of a realistic plan for main river flood control. Early review indicates a good possibility of being able to develop sufficient storage in the United States for effective control. The Canadians, of course, are intensively studying their own resources to evolve their own plan of development. Our interest in these studies concerns the cost and long-range effectiveness of both power and flood control of such projects as Mica Creek and Arrow Lakes. We are working closely with the Canadians through the Engineering Committee of the International Joint Commission.

Preliminary studies by FPC of power load growth show that the power requirements in the region are growing rapidly. Annual energy requirements are expected to grow from some 4,500 mw at the present time to 40,000 mw by the year 2000. Inasmuch as reasonably full development of the hydro potential will provide only about 12,000 mw of that amount, it is obvious the system must be supplemented by thermal or nuclear power. If it were possible to complete the hydro development without interruption, it would all be usable in the load by 1970 to 1975. It is our intention to develop comparative long-range patterns of the compatible and economical integration of thermal power in the hydro system. Hydro systems utilizing various amounts of storage will be studied. The most economical ways of combining hydro and thermal operation and the long-range value of hydro storage will be products of this investigation. Our study will include discussion of nuclear power and will include latest authentic information obtainable from the Atomic Energy Commission.

No material change in the existing navigation plan is contemplated. We finished a new benefit study several months ago, now being reviewed by the Board of Engineers for Rivers and Harbors, which resulted in a substantial upward revision of our estimates of future tonnage and benefits. The provisions that should be made for future navigation at run-of-river plants on the Upper Columbia and on the Snake from Lewiston to the mouth of the Salmon River will be considered.

In making this review we will not overlook other water uses including fish and wildlife, recreation, pollution abatement, domestic water supply, etc.



Exhibit II

In closing I might point out that from the standpoint of physical labor this review report will in no wise constitute the monumental task that the original 1948 report constituted inasmuch as much of the basic information included in that report is still good. It does involve, however, many new complexities that did not accompany the 1948 study which treats the development and operation of the power resource as an all hydro system. I want to emphasize that this is a cooperative effort, and we recognize our responsibilities and yours and count materially on any assistance in evolving a revised and realistic plan for development of the region's water resources.

LEGAL EFFECT OF PELTON DECISION ON THE WATER RESOURCES  
OF THE DESERT LAND STATES

Statement by Mr. Arthur G. Higgs

Under the provisions of the Act of Congress of June 25, 1910 (36 Stat. 347), commonly known and referred to as the "withdrawal from entry on public land laws," the Secretary of the Interior has, from time to time, by executive order, withdrawn from entry, sale or location under the public land laws and has reserved for power purposes, numerous power sites on the public lands of the United States many of which power sites are located on, along and adjacent to local nonnavigable streams of the several states.

The Federal Power Commission, under the provisions of the Federal Power Act, 41 Stat. 1075, 16 U.S.C. 818, also has made numerous withdrawals from the public lands of the United States and has reserved for power purposes power sites on navigable and nonnavigable waters of the several states.

Ever since the enactment of the Desert Land Act of 1877, the Supreme Court of the United States, in numerous cases established the law that all nonnavigable waters then a part of the public domain became publici juris, and were subject to the plenary control of the states designated therein, with the right in each to determine for itself to what extent the rule of prior appropriation or the plenary control of the states designated therein, with the right in each to determine for itself to what extent the rule of prior appropriation or the common-law rule of riparian rights should obtain.

Under these same decisions it also has been the established law that the Federal Government as the owner of the public domain had the power to dispose of the land and the water composing it together or separately, and that under the Desert Land Act of 1877, if not before, Congress had severed the title to the land and the water and had established the rule that the land should be patented separately and that the Government title to the land would not carry with it a water right, but all nonnavigable waters were reserved for the use of the public under the laws of the several states.

On June 6, 1955 (75 S.C.R. 832), the Supreme Court of the United States upheld the validity of a license issued by the Federal Power Commission to construct a hydroelectric project on lands of the United States, withdrawn for power purposes, on the Deschutes River a nonnavigable stream, wholly within the State of Oregon without the consent of the state on the ground that the withdrawal site was a "reservation" and not "public lands," within the meaning of Section 3 (1) and (2) of the Federal Power Act.

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Exhibit III

The United States Court of Appeals for the ninth circuit, in setting aside the license issued by the Federal Power Commission in this case, held that:

"The Federal Power Commission had legal right to give its approval to the construction of a hydro-electric plant on the Deschutes River in Oregon and had power to grant its permissive license to construction of such proposed dam upon Federal property, but ownership of power dam site did not empower Federal Government to use waters of such river either at such site or elsewhere contrary to Oregon law.

"That the regulation of the Deschutes River as it flows through Oregon is one of powers of Oregon's sovereignty, and such power includes power to regulate fish in Oregon waters, and

"That whatever, if any, limitation there was upon Oregon's complete sovereignty over waters of the Deschutes River was wiped out by the Desert Land Act of 1877."

The Pelton decision, considered separately and as applied only to the Deschutes River, would have no very serious consequences. There is a difference of opinion among the people of Oregon as to whether the project should be built, some holding that the Deschutes River in this location is more valuable as a fishing and recreational stream and for the passage and spawning of anadromous fish, and others maintaining that the recreational possibilities would be enhanced by construction of the project. Regardless of these considerations, the decision is a critical one as it affects the control by the state of the waters of every other stream on which the Federal Government owns land. A map of Oregon on which power site reservations are marked shows that practically every potential power site has been reserved. The United States still owns 51 per cent of the land in Oregon.

It appears clear to me that the Congress in enacting the Federal Power Act very clearly expressed its intention that water rights for any project licensed by the Federal Power Commission must have approval by the state. Section 9(b) of the act expressly provides that the Federal Power Commission before issuing a license, shall require proof of the applicant that it has complied with the state laws with respect to the use of water and of the bed and banks of the stream.

The legal effect of the Pelton decision was to strip all the 17 western states of their sovereign powers to regulate the use of the waters of their nonnavigable streams insofar as the Federal Government has reserved thereon power sites.

I realize that nothing can be gained at this time by criticizing the decision of the Supreme Court. It is final. The only possible way of obtaining corrective action is through legislation by the Congress amending the Federal Power Act by providing that Federal Power Commission

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Exhibit III

shall require proof that the applicant for a license shall have obtained prior approval of the State in respect to the use of the waters and the beds and banks of streams, whether or not the project is located on public lands or reservations of the United States which has been withdrawn for power purposes.



STATEMENT OF HUGH A. SHAMBERGER, STATE ENGINEER OF NEVADA,  
AT THE 84TH MEETING OF THE COLUMBIA BASIN INTER-AGENCY COMMITTEE,  
NOVEMBER 16, 1955, PERTAINING TO THE PELTON DAM CASE

It will not be my purpose to discuss the Pelton Dam Case as such but to bring to your attention a development which has occurred in Nevada as a result of the Supreme Court Decision in the Case Federal Power Commission v. State of Oregon, commonly known as "The Pelton Dam Case".

*Shubert*  
At Hawthorne, Nevada, there is located a large Naval Ammunition Depot. This depot was set up some time prior to the year 1935 and the area of the land included within the boundaries of said depot was a portion of the land ceded to the United States by Mexico in 1848, and excepting such portions thereof that passed into private ownership, was treated by the United States as a proprietor of public lands until the establishment of the depot. Upon admission of Nevada into the Union in 1864, the United States neither by Act of Congress or by stipulation then, nor by any applicable Act of Congress thereafter, reserved any jurisdiction ousting the jurisdiction of the applicable laws of the state pertaining to ownership and the use of the waters thereof including the area comprising said depot. *12*

*file on water rights*  
At the time the depot was established, and during the subsequent years, water rights from surface streams on the Mt. Grant watershed were obtained, some by appropriation under state law and others by purchase of existing rights. Some time prior to 1950 it became evident that an additional water supply was needed. Six wells were drilled on the depot and subsequently applications to appropriate water from these six wells were filed with the State Engineer. The State Engineer granted permits to appropriate water and under the provisions of said permits provided that proofs of commencement of work, completion of work and beneficial use were to be filed prior to specific dates unless such dates were advanced by virtue of extensions of time. Pumps were installed on the wells by the Navy and subsequent to that period, up to and including the present time, water is being diverted from these wells for beneficial consumptive use. In 1950 proofs of commencement of work and completion of work were filed under said permits. Application for extensions of time within which to file proofs of beneficial use were filed by the U. S. Naval Ammunition Depot and by virtue of the latest filing proofs of beneficial use were due July 27, 1955. On said date said proofs not having been filed, and pursuant to law, the State Engineer sent notice by registered mail to the depot stating therein that unless said proofs were filed within thirty days of said date, the permits would be cancelled. The U. S. Naval Ammunition Depot, by a previous letter dated July 25, 1955, stated as follows:

"This is to advise your office that the applications for water rights with regard to the wells are being dropped and no continuing action is expected. This action is a result



*Butler Co*  
of instructions from the Commandant, Twelfth Naval District who in turn has based his decision on a recent rule of the U. S. Supreme Court (Federal Power Commission vs State of Oregon).

*9 pages of material*  
All of the wells on this Depot are located on reserved lands, that is, public lands which were withdrawn and reserved for the use of the Navy Department by executive orders."

On August 5 I replied to said letter and in part stated as follows:

*original copy sent to SF office*  
"Please be advised that if these permits are cancelled August 27, 1955 then any diversion from said wells after that date will be illegal and contrary to the water law of this State. Further, and upon the advice of Attorney General Harvey Dickerson, should the Depot make such illegal diversions the State of Nevada will take the matter into Court."

On August 15th my letter was replied to and I was advised that the decision to drop the permits was the result of instructions originating from the Chief of Yards and Docks, Navy Department, who in turn had based his decision on the recent ruling of the Supreme Court (Federal Power Commission vs. State of Oregon, 349 U. S. 435).

Acting on the advice of Harvey Dickerson, Attorney General of Nevada, I issued an order to the Navy Department dated September 7, 1955. In addition to cancelling said permits, the Order in part stated as follows:

"That the rule laid down in the cited Supreme Court Case is not applicable to the use of ground-water in Nevada and for that reason the ground-water laws of this state apply to the instant case.

It is therefore the opinion of the State Engineer that the use of ground-water from said wells without permits to appropriate water is contrary to the laws of this State and any such use thereof is an illegal use.

It is hereby the Order of the State Engineer that unless steps be taken within thirty (30) days from the date of this Order to reinstate said permits, either by filing proofs of beneficial use or filing applications for extension of time within which to file said proofs, that the use of water from said wells cease."

On September 12, 1955 the Navy Department, through the Commanding Officer at Hawthorne, acknowledged receipt of said Order and advised it was being sent to the Chief, Bureau of Yards and Docks, Navy Department, Washington, D. C., and to the Commandant, Twelfth Naval District at San Francisco.



Exhibit IV

Nothing further has been heard from the Navy Department and the Attorney General of Nevada will very shortly file a complaint for Declaratory Judgment in the Fifth Judicial District Court of the State of Nevada in and for the County of Mineral. The action is being brought in a State District Court pursuant to Section 208, 66 U. S. Statutes, 560 Title 2, approved July 10, 1952.

The issues which are involved are very serious. In Nevada approximately 85% of the state's area belongs to the Federal Government. Many millions of acres of land are reserved for National Forests, National Parks, Army and Navy Reserves, and others. The implications can easily be seen. In the Las Vegas basin, where the ground-water condition is very critical, we are, pursuant to ground-water law, curtailing to some extent the development of ground-water. Here the Army Air Force has a large reserve appurtenant to and including the Nellis Air Field and being within the Las Vegas Basin. The Air Force presently receives its water supply from wells and in this instance the state water laws have been complied with and certificates of appropriation have been issued. However if the Army Air Force were to assume the same policy as the Navy, they could further deplete the basin without any regard to state water laws.

In my opinion, unless the Congress now legislates to safeguard the rights of the states and to insure that their rights shall not be imperilled by Federal control, such state control by process of attrition from case to cases will be lost. We are very much in agreement with the objectives of the bill that Senator Barrett of Wyoming introduced in the last session of Congress, being Senate Bill 863 entitled "Water Rights Settlement Act of 1956".

Both the Association of Western State Engineers and the National Reclamation Association by recent resolutions took action on this important problem. The resolving clauses of Resolution No. 3, adopted at Lincoln, Nebraska by the National Reclamation Association, October 26, 1955, reads as follows:

"Now, THEREFORE, BE IT RESOLVED, by the National Reclamation Association that the Congress be urged to pass legislation to the affect that within the states lying wholly or partly west of the 98th Meridian and subject to water rights heretofore established in their respective states, all navigable and non-navigable waters together with under-ground water be reserved for beneficial use pursuant to state laws, and

BE IT FURTHER RESOLVED, that federal agencies, permittees, licensees, and employees of the Federal Government, in seeking the use of water for any purpose in connection with Federal programs, projects, activities, licenses, or permits, shall, as a condition precedent to the use of any such water, acquire rights to the use thereof in conformity with state laws and procedures relating to the control, appropriation, use or distribution of such water."



In conclusion, and in view of the decision of the Supreme Court in the so-called "Pelton Dam Case" and the effect that it may have as a precedent in future cases dealing with water, we cannot rest upon the assumption that when questions of Federal Government ownership of water arises, that it will be dismissed with a statement by the Court that it only assumes arguendo that the United States owns the unappropriated water.



THE SUPREME COURT DECISION IN F.P.C. v. OREGON

Remarks Before Columbia Basin Inter-Agency Committee  
By Willard W. Gatchell, General Counsel, F.P.C.  
Portland, Oregon - November 16, 1955

MR. CHAIRMAN, AND MEMBERS OF THE COMMITTEE:

The work of the Columbia Basin Inter-Agency Committee has been a matter of interest to the members and staff of the Federal Power Commission for so many years that it is a distinct honor to be invited to discuss with you some phases of the work in which you are engaged. I sincerely hope that the cordial relations we have heretofore shared may be improved by our exchange of ideas, for certainly it is to the manifest advantage of all public agencies--State, municipal and Federal--to work closely together in a genuine spirit of understanding and respect, for we will thereby promote more efficiently the broad public interests which we commonly serve.

We have been asked for some observations on the significance of the decision by the United States Supreme Court last June in the case of Federal Power Commission v. The State of Oregon, the Fish Commission of Oregon, and the Oregon State Game Commission (349 U. S. 435).

By the way of preliminary, may I say that while it is my privilege to serve as General Counsel of the Federal Power Commission, my remarks here are not necessarily the views of the members of the Commission and I am solely responsible for the opinions which I may express here. While the Federal Power Commission does not shirk responsibility it cannot, of course, assume responsibility for what any staff member may say, except to the extent that the Commission's formal opinions and orders and stated conclusions may be mentioned.

While we are to discuss a rather complex phase of constitutional law, I am aware of the membership on your Committee of many outstanding engineers and others who do not profess to follow the elusive muse or the intricacies of what we loosely term constitutional principles. Nevertheless, the many valuable contributions by the engineering staff of the Federal Power Commission to the advancement of legal thinking have given me a wholesome respect for the engineering profession and I shall endeavor to deal with the problems as fully as possible.

The Supreme Court said in the Pelton decision that the Federal Power Commission was within its statutory authority in issuing a license to the Portland General Electric Company to construct a power dam, to be known as Pelton Project, on the Deschutes River in Oregon. One side of the dam and reservoir would be on lands reserved for the Warm Springs Indians and title to lands on the other side of the River is in the Federal Government, having been reserved for power purposes. The Deschutes River

*See text of reservation for purpose of classification - not speaking because blanket with no other purpose than to limit private*



is entirely within the State of Oregon and flows into the Columbia River. No claim was made that it is navigable or that the Pelton project would affect lower navigable capacity, the Commission resting its jurisdiction for the purpose of this license solely upon the occupancy of lands of the United States.

3 only not consent of State  
The Warm Springs Indian reservation was reserved by treaty in 1855 and there was secured to the Indians by that treaty the exclusive right of taking fish in the streams "running through and bordering" the reservation (12 Stat. 964). The license requires formal consent by the Indians to the proposed construction and they offered no objection to the erection of the dam, for there are many advantages which will accrue to them by reason of the development.

The lands within the Warm Springs Indian Reservation were reserved for power development in 1910 <sup>1/</sup> and 1913 <sup>2/</sup>. The lands on the east bank across the river from the Warm Springs Indian Reservation had been withdrawn from entry, location and disposal under the public land laws and were reserved for power purposes in 1909 by a withdrawal that was made permanent in 1910 <sup>3/</sup>.

There was a further reservation of the lands of the United States on the east side of the river upon the filing of an application for a license for a similar project in 1924, and upon the filing of an application for the Pelton project in 1949.<sup>4/</sup>

The State of Oregon and its agencies objected to the issuance of a license, contending that the State of Oregon has authority to control the use of the Deschutes River as a nonnavigable river located entirely within the State. It said that the high Pelton dam would interfere with the upstream migration of anadromous fish; it would destroy the usefulness of the stream for spawning, and it would impair the usefulness of the State fish hatchery upstream from the project. Apparently for these

- 1/ Indian Power Site Reserve No. 2, created by the Secretary of the Interior, pursuant to the Act of June 25, 1910 (36 Stat. 855).
- 2/ Power Site Reserve No. 294, created by Executive Order of Oct. 8, 1913, pursuant to the Act of June 25, 1910 (36 Stat. 847).
- 3/ Power Site Reserve No. 66, created December 30, 1909, by order of the Secretary of the Interior, made permanent by Executive Order of July 2, 1910, pursuant to the Act of June 25, 1910 (36 Stat. 847).
- 4/ The first application in 1924 was filed for Project No. 57 by Columbia Valley Power Co., Inc. The license was issued but was canceled in 1936 upon failure of the licensee to proceed with construction. The second application was filed by Northwest Power Supply Company for Project No. 2030, to which the Portland General Electric Company succeeded in 1951.



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reasons, if not for others, the Oregon Hydroelectric Commission and the Fish Commission denied permits for the project.

*fluctuation  
condition  
obscure*

The project calls for no permanent diversion of the water, as the entire flow of the river will be taken either through the power plant or will be spilled over the dam. The State of Oregon made no claim that the water-power potential of the stream would not be fully developed or that it would object to the reregulating dam which the Commission required to be constructed three miles below the main dam for the sole purpose of smoothing over any irregularities in discharge through the power plant. The reregulating dam would be located on lands which are neither owned or reserved by the United States.

The State of Oregon, the Fish Commission, the Game Commission, and the Oregon Division of the Izaak Walton League intervened before the Commission and filed objections to the issuance of a license. Some of their objections went directly to the authority of the Commission and others to the adequacy and suitability of the proposed fish conservation facilities and measures.

The legal basis of the objections by the State and its agencies may be found in prior legislation. In 1921 Oregon had adopted a statute declaring unlawful the construction or maintenance of dams in streams "frequented by salmon or other food fish" without a passage-way for fish over the obstruction and providing for the issuance of permits by the Oregon Fish Commission. Where fish ladders were impracticable, the statute provided for the conveyance of lands to the State for the erection of a fish hatchery, if approved by the Fish Commission. <sup>5/</sup> In 1931 Oregon required the licensing of water-power projects by its Hydroelectric Commission. <sup>6/</sup> In its Water Code the State also said that "all water within the State from all sources of supply belongs to the public," a provision first enacted in 1909, <sup>7/</sup> although in common with most of the western States it has also provided for appropriation of water for beneficial uses. <sup>8/</sup>

*regulation*

After extended hearings, the Commission's Examiner recommended a license and the Commission itself considered his recommendations and the objections of those who opposed construction of the project. The Commission found that adequate precautions would be taken for the protection of fish and, including fish facilities the Power Company originally suggested, the Commission imposed requirements that will cost \$4,430,000 in capital investment and about \$795,000 a year, including a re-regulating dam. At the same time the Commission expressed the hope that the State agencies would reconsider their refusal of a permit, a hope, alas, which was not realized, for court review of the license order was sought by the State and its agencies.

<sup>5/</sup> 5 O.C.L.A., Sec. 83-316.

<sup>6/</sup> 8 O.C.L.A., Secs. 119-102, 119-103.

<sup>7/</sup> L. 1909, Ch. 221, Sec. 1, p. 370; O.C. 1930, Sec. 47-401.

<sup>8/</sup> 2 C.C.L.A., Sec. 16-402.



At the time when the United States Court of Appeals for the Ninth Circuit heard oral argument on its review of the Commission's license order for the Pelton project, it also heard oral argument on its review of the Commission's order issuing a license for the Cowlitz project proposed by the City of Tacoma but to which the State of Washington and certain of its agencies took exception. The Cowlitz license was promptly upheld by the Court, its decision being issued on October 5, 1953. It did not decide the Pelton case, however, until February 18 of the following year. It said that the Cowlitz River is a navigable stream of the United States over which Congress has jurisdiction and the proposed Cowlitz project would affect lower navigable capacity, thereby bringing the license within the ruling by the United States Supreme Court in First Iowa Cooperative v. Federal Power Commission, 328 U. S. 152. It did not, however, have the same basis for jurisdiction presented in the case of the Pelton project.

The Ninth Circuit (one judge dissenting) set aside the Commission's order for the Pelton license (211 F. 2d 347), recognizing the necessity for a license from the Federal Power Commission, but holding that Congress, by its public land legislation, had long ago transferred to the State of Oregon such control over the use of non-navigable waters that the Power Company must also secure the permission required by the State of Oregon.

The Commission having limited the basis of its jurisdiction solely to the occupancy of lands of the United States, the Supreme Court considered first whether the Commission had authority to issue a license on that ground alone. The authority to issue licenses for projects affecting waters of the United States springs from the Commerce Clause of the Constitution. The authority to issue licenses where lands of the United States would be occupied springs from the Property Clause of the Constitution, a clause giving Congress power to dispose of all property belonging to the United States. The Court also considered the applicability of the Desert Land Act of 1877 and related acts to the particular reserved lands to be occupied by the project, and finally adverted to the discretion exercised by the Commission in issuing the license.

Many other areas than the Pacific Northwest are being forced into serious study of water problems as related to the economic development and use of all natural resources. There are many areas faced by substantial increases in water consumption, some of these are caused by industrial water use, by air conditioning, by irrigation, by the expansion of what were previously suburban neighborhoods into populated areas, by stream pollution, and by destructive floods. The Commission, therefore, has traditionally approached the problem of issuing a license not only from a consideration of the question of water rights but also bearing in mind broad public responsibilities which especially in these days cannot be ignored.

An analysis of the Pelton decision will show that the authority of Congress to dispose of property of the United States was regarded by both courts as the crucial question. The Ninth Circuit said that the



Exhibit V

Federal Power Commission had authority to license the construction of a water-power project on lands of the United States, whether those lands were public lands or reservations, but that court had to examine the extent of the rights which the Federal license carries or purports to carry (211 F. 2d 347). It considered that in neither the Federal water-power legislation prior to 1920 nor in the Federal Water Power Act of that year did Congress change the ownership or control of non-navigable waters flowing across the lands of the United States, nor could Congress do so, having surrendered those rights over water to the States. If the Deschutes River waters were state waters before the adoption of the policy represented in that legislation, the Ninth Circuit said, they remained so after that legislation was enacted.

Apparently the fact that the re-regulating dam was to be constructed on lands that had been severed from the Federal domain played some part in the conclusion of the Circuit Court. In his dissenting opinion, Circuit Judge Healy refers to the re-regulating dam as having been required at the insistence of the Oregon Hydroelectric Commission, and so it was. The Supreme Court, however, gave scant attention to the re-regulating dam other than as mentioning it as one of the facilities to be constructed under the license, and stating that no objection was made to that dam.

The Ninth Circuit said that in the Desert Land Act of 1877 Congress had surrendered to the States all of its regulatory power over waters in or from the public domain, and while Congress may have been motivated by a desire to free those waters from the restrictive doctrine of riparian rights so that they could be applied economically to land for irrigation, nevertheless, the surrender was not limited to their use for irrigation, and whatever limitation there was, if any, on Oregon's complete sovereignty over the waters of the Deschutes River, was wiped out by the Desert Land Act of 1877.

The opinion of the Supreme Court in 1935 in California v. Beaver Portland Cement Company, 295 U. S. 142, was regarded by the Ninth Circuit as particularly persuasive together with the fact that the Supreme Court had there said that following the Desert Land Act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris subject to the plenary control of the designated States.

The reliance of the Circuit Court upon the Beaver Portland Cement decision, however, was misplaced. This was a controversy between two users of water on a non-navigable Oregon stream, the Rogue River. One claimant, the Power Company, relied on riparian rights which it contended attached to its land patented by the United States after the Desert Land Act of 1877 but, according to the argument, prior to the time Oregon abandoned the riparian rule. The other claimant, the Cement Company, relied on prior appropriation of the water. The Court resolved the dispute against the riparian claimant, saying that the land patent from the United States after the Desert Land Act carried with it no right to the use of water.

I said that the authority of Congress to allow the use of Government lands under a license is derived from the Property Clause of the Constitution pursuant to which Congress may dispose of property of the United States in such manner as it decides will be in the public interest. Yet it is difficult to define what is meant when we say that the United States owns property. My wife and I have a little farm in western New York State on which we pay a lot of taxes and spend some money. As a matter of fact, I am not sure whether we own the farm or it owns us, for there always seem to be expenses and the weather is not always the best for crops.

Also, we sometimes speak of the United States or a State as owning water, an even more elusive concept than the actuality of the ownership of land. What we mean by individual ownership of land is that, if we hold title and pay taxes and there are no zoning restrictions or a railroad or pipeline or telephone or electric company easement across it, or a highway or super-highway does not run straight through the back porch, or some other incidental purpose does not interfere, we can say what use shall be made or shall not be made of the land. I can't even keep the hunters off our farm. But it is this right to control the use of property which has occasioned difficulties in the past, and the present situation is no exception.

The Supreme Court in the Beaver Portland Cement decision did not decide that the United States has ceded full title and control of the waters to the States. Rather, the decision declared that subsequent to the Desert Land Act, the public lands could be patented separately from waters on those lands. Two properties of the United States formerly acquired together, land and the right to the use of water, were separated, the court said, and different means for their acquisition were provided by Congress. Title to the lands could be acquired in accordance with the statutes of Congress alone. The right to use the waters on the public lands could be acquired after the Desert Land Act only through compliance with State laws. But title to the land and the right to the use of water remained in the United States until there had been a fulfillment of the conditions imposed by Congress, and neither Congress nor the Supreme Court said that ownership of the waters themselves, navigable or non-navigable, would pass or had been passed to the States by the Desert Land Act or any related statutes.

The Supreme Court pointed out that the Desert Land Act at most covered only public lands of the United States and did not apply to lands which had been reserved and were no longer public lands, nor did it apply to waters on reserved lands. Consequently, the Beaver Portland Cement decision was of no assistance to the State of Oregon.

Circuit Judge Healy, disagreeing with the majority of the Circuit Court, said that the licensing or construction of the Pelton project would in no way impinge upon vested rights or interfere with the appropriation, diversion, distribution, or use of the water of the non-navigable Deschutes River for irrigation or other purposes.

*desert act did not apply to all land  
language limits its application to certain defined areas  
desert had significant meaning*



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The Supreme Court has pointed out in another connection that the Federal Power Act did not abolish private proprietary water rights existing under State law to use the water of even navigable streams for power purposes. F.P.C. v. Niagara Mohawk Power Corp., 347 U. S. 239 (1954). In its Pelton decision, the Supreme Court said there was "no question as to the constitutional and statutory authority of the 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 the water does not conflict with vested rights of others."

This leads me to the final phase of the Pelton decision. The State of Oregon objected to the Pelton license on much the same grounds as were advanced by the 43 States which argued in the New River case that the licensing provisions of the Federal Power Act were unconstitutional, a usurpation and invasion of sovereign rights granted to the States, United States v. Appalachian Electric Power Company, 311 U. S. 377 (1940). Similar arguments were advanced by the State of Iowa in objection to the issuance of a license which the Commission first refused because of the State objection (First Iowa Coop. v. F.P.C., 328 U. S. 152). After a license was actually issued to the Cooperative upon the Supreme Court's ruling that the Commission could authorize the development notwithstanding impossibility of compliance by the Cooperative with State law, the same arguments were again advanced by the State of Iowa (Iowa v. F.P.C., 178 F. 2d 421 (CA-8), certiorari denied 339 U. S. 979 (1950)).

The reasoning of the Court in the First Iowa Cooperative decision was applied in the Pelton case. While both State and Federal agencies had been consulted, there must be one final authority or duality of control will prevent what both sovereigns desire, namely, full utilization of natural resources in broad public interests and for the widest public benefits.

Does this mean there can be no harmony and cooperation between the States and the United States and that each sovereign must claim for itself full authority over water uses? The answer lies clearly before you in the licensing provisions of the Federal Power Act in its present form. Harmony and cooperation have been achieved save in a few instances and substantial progress has been made. Our mutual desire should be to so work together in the future that further progress may be made. Especially is this necessary in the Pacific Northwest where you face either exclusively Federal ownership of water power facilities in the future or a continuation of the policies which have been on the whole so successful in the past.

The licensing provisions of the Federal Power Act, first enacted as the Federal Water Power Act in 1920, were the product of years of debate and what proved to be progressive thinking by those who were determined to insure orderly development of the natural resources of the country. President Theodore Roosevelt, becoming alarmed at the wasteful dissipation of valuable water resources, brought to an end with vigorous vetoes the practice theretofore followed in Congress of granting perpetual water-power



franchises, without planning, without protection of the public interest, without consideration of full water-use possibilities, and without consideration of those benefits which we now regard as a priceless heritage of the people.

These veto messages on the Rainy River, White River and James River bills, followed by similar messages from President Taft, laid the framework for the effective water-development licensing measures embodied in the Federal Power Act. The Power Act looks to full development and utilization of water-power resources subject to Federal jurisdiction under plans which take into account the interests of the general public. They must be best adapted to comprehensive uses, to the interests of commerce, to navigation and flood control and to other beneficial public uses.

The Act also looks to State interests and to consultation with State agencies. Section 27 expressly saves from interference vested water rights acquired under State law for irrigation, water supply, and similar uses. In no desire to overstate the scope of the Act, may I point out that Section 9 (b) requires compliance by a licensee with certain State laws and add that the Pelton and First Iowa decisions were concerned with the nature of such local statutes in view of the major objective of the Power Act to secure water-power utilization.

The Supreme Court said in the Pelton decision that while final approval of the engineering requirements for this project rests with the Commission, there is no reason why the Commission and the State of Oregon, which also desires appropriate regulation of the flow of the stream, should not seek a mutually satisfactory solution to the problems presented by water-power development (fn. 20).

*maintain fish*  
Moreover, the measures taken in the Pelton license, as in other licenses, to conform to the desires of State agencies are by no means merely token gestures. The direct capital investments and annual expenditures required of the Power Company are substantial and even include \$100,000 contribution annually toward the cost of operation and maintenance of State fish conservation facilities. The Commission retained the power to fix the amount of the Power Company's contribution if a sum is not agreed upon with the State Fish Commission. As the Supreme Court also mentioned, the Fish Commission of Oregon is already operating somewhat comparable although smaller fish-protection facilities on the Metolius River, a tributary upstream from the Pelton reservoir. This is a feasible plan.

In his dissent Circuit Judge Healy referred to the finding of the Commission that in recent years the Deschutes has been only a sparse producer of anadromous fish. As a principal reason for the decline in the annual fish runs in comparison with those of earlier generations, the Commission commented on the effect of the increased irrigation diversions from the Upper Deschutes and its two principal tributaries. These irrigation diversions, the Commission said, appear to have almost depleted the waters of these streams in the spawning season and to have depleted also the natural food present in them.



Exhibit V

The Felton license (Article 28) not only recognizes existing rights, whether or not perfected, for domestic, stock, municipal and irrigation purposes, but makes provision for the use of certain rights which may be hereafter initiated. I might add that the Idaho Power Company license likewise provides for future upstream diversion and use of the Snake River water for the irrigation of lands and other beneficial consumptive uses.

R Another economic factor that apparently carried weight with the Commission but was not discussed by the Oregon State agencies, was the urgent need for increased power capacity in the Pacific Northwest. While power deficiencies may be a matter of minor significance in some areas, they are not to be lightly disregarded, nor has the Federal Power Commission been unaware of the power situation in this area. Nevertheless, power supplies can come only from power plants that are in operation. Insofar as the Federal Power Act is concerned there are two possible means by which water-power development can be undertaken: The Federal Government may, as it has in many instances especially in the Pacific Northwest, construct water-power plants as an incident to the construction of facilities for navigation, flood control, or reclamation. Or power facilities may be constructed by non-Federal agencies, public or private.

Section 7 (b) of the Federal Power Act requires the Commission to weigh carefully the possibility of Federal development of the water resources of any region where a license is sought and if in its judgment development should be undertaken by the United States, the Commission must deny the pending application for license and recommend to Congress what development should be made by the United States. The Commission said in its order issuing a license to the Idaho Power Company for construction of the Brownlee, Oxbow, and Hells Canyon dams on the Snake River:

The fact that in Section 7 (b) Congress allows the Commission either to set the particular water resources aside for Federal development or to grant a license for development by a non-Federal entity is in itself an affirmative recognition by Congress that it is not in the public interest for the United States to undertake every water-power development that can be made or to reserve such water-power resources exclusively for Federal development merely because they happen to be subject to Federal jurisdiction or even because they happen to be included in a Federal agency's plans for Federal development.

Consequently, the Commission has issued licenses for non-Federal development whenever the circumstances convinced it that the public interest would thereby be served. The large number of municipal licensees--some 70 in all--demonstrates that neither the Federal Power Act nor the Commission is concerned with any controversy over public power as against privately owned power plants. In addition to these licenses for municipal plants, the Commission has recommended the construction of power plants by the United States at a large number of multiple-purpose developments. This Committee knows better than any other group what substantial investments



in power plants and other water resource facilities have been made by the United States in the Pacific Northwest in recent years. Your problems, however, may be related more to the future than to the past, although there may be some who question whether the rate of past Federal expenditures should be continued in the future.

It is not for me to decide these questions but you may examine the possibilities under the Federal Power Act. For this region has greater water power potentialities than any other area in the United States and it is essential to continued growth that the potentialities be utilized.

Last June 30, the Commission had outstanding 227 licenses for hydro-electric projects of over 100 horsepower capacity, representing an investment of  $2\frac{1}{2}$  billion dollars and covering 7,300,000 horsepower of initial capacity. There were then pending 78 applications for preliminary permits or for licenses for new capacity totaling 14,400,000 kilowatts which would cost in the order of 4 billion dollars.

The Priest Rapids project recently licensed by the Commission for construction by Grant County Public Utility District will have a combined initial installation of 1,170,000 kilowatts and provision for additional capacity. The Brownlee, Oxbow and Hells Canyon plants, also recently licensed to the Idaho Power Company will add 783,400 kilowatts of initial capacity. The Beaver Marsh project is proposed by the City of Eugene and the staff and Examiner have recommended issuance of a license. While there is no way to predict what action the Commission will take on the City of Eugene application, it is noteworthy that no exceptions were filed to the Examiner's decision and under the Commission's rules the license will become effective in a few days unless the Commission otherwise directs. While we are speaking of new construction, there is no reason why the John Day project could not be constructed with local participation if Congress will modify the authorization for Federal construction and accept the substantial local contribution that has been proposed in the bill introduced by Congressman Coon. This, however, is a matter for Congress to decide. The Federal Power Commission recommended enactment of the bill with only a few amendments.

Recently the Pacific Northwest Power Company applied for a license for the proposed Mountain Sheep and Pleasant Valley developments to be located on Snake River downstream from Hells Canyon. These developments would add initially 1,000,000 kilowatts of installed capacity to the Northwest Power Pool and provision is to be made to install additional capacity.

The sharp increase in proposals for new power plant construction is an indication that the power demands can be met. The annual per capita use of electricity in the United States has increased from 1200 kwh in 1939 to 3400 kwh in 1954, and the rate of increase in use shows no signs of slackening. By expenditures of \$18.5 billion for new construction, the electric industry increased its margin of reserve capacity from 6 per cent in 1947 to 21.5 per cent in 1954, bringing the total industry investment to \$28 billion, a substantial sum even in these days.



## Exhibit V

The Federal Power Commission has played a significant role in both the financial stabilization of the electric industry and in its growth. If we also take pride in the regulatory accomplishments of the Commission in connection with both licensees and interstate utilities, it is because as workmen in the vineyard we have a firm conviction that public interests can be served by effective administration of this important policy of Congress.

THE U.S. SUPREME COURT DECISION IN THE CASE OF THE FEDERAL  
POWER COMMISSION VS THE STATE OF OREGON REGARDING  
THE PELTON DAM ON THE DESCHUTES RIVER AND ITS  
EFFECT ON THE WATER RESOURCE DEVELOPMENT  
IN THE STATE OF WASHINGTON

This decision is already beginning to show far reaching effects on the western states' constitutional rights to control the appropriation and use of the waters within their boundaries.

In this case the United States Supreme Court has said in effect that the United States has exclusive control over waters bordering or within boundaries of federal reservations regardless of the states' constitutional rights or existing rights to the use of water.

Insofar as the State of Washington is concerned the decision definitely strengthens the U. S. Justice Department's appeal before the Circuit Court of Appeals in the case of the United States vs. the Ahtanum Irrigation District in Yakima County, Washington.

This decision will also have a clinging effect in the case of the City of Tacoma vs. the Taxpayers and the Directors of the Departments of Fisheries and Game which is now pending in the Superior Court of Thurston County.

Every principal power site in the State of Washington is covered by a Federal Power Site Reserve similar to the one on the Deschutes River in Oregon.

Almost every major stream in Washington would be affected because of the many Indian reservations, army installations, national forests and Atomic Energy Commission reservations within the state.

Many of these streams and tributaries have already been adjudicated in accordance with the laws of the State of Washington. If we are now to find that the Federal Government may come in and claim these waters to any extent desired (which they are attempting to do in the Ahtanum Case) it will cloud the title to every acknowledged right to the use of water in this state and will certainly have a detrimental effect on the economic well being of our people and their property.

We do not find specific fault with most of the operating government agencies and we believe that they will abide by state law regarding appropriation and use of all waters within each state if and when so directed by Congress. However, we do feel that the United States Justice Department is doing everything possible to usurp the static

Reservations  
a much  
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Exhibit VI

constitutional rights and to disrupt the states' orderly procedure in administering their waters and in so doing is unnecessarily spending large amounts of the taxpayers' money in arguing these cases to the highest court of the land.

We, and every other state, should take a firm stand on this issue and join each defendant state who has cases pending which challenge the state's right to control the appropriation and use of both its surface and ground waters.

Submitted to Columbia Basin  
Interagency Committee  
November 16, 1955 by  
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