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safeguards. In order to counteract the pressure brought to bear upon administrative agencies by private groups to secure permits to remove dunes, in appropriate situations the North Carolina Attorney General's Department should use the public trust doctrine to protect coastline property. Although the guidelines should be spelled out in specific terms by our legislature, the attorney general should not hesitate to invoke the doctrine as enunciated in the case law.

FRANK B. JACKSON

Environmental Law—Water Resources—Zones of Shared Conservation Authority and United States Public Policy

The exercise of conservation authority must be understood in the context of the conservation movement as a living and evolving ethic in the American conscience. Many writers trace the emergence of the conservation movement as a real force in the United States to the Governor's Conference of 1908 called by President Roosevelt and the subsequent work of the National Conservation Commission.¹

In the beginning, this movement generated a great unity of purpose and direction. The Commission's scientists focused the laws of man on the laws of nature. The Commission itself contributed the concept of resource management to the movement by publishing an inventory of the nation's resources. Yet as the movement grew it began to fragment, for one of its essential characteristics was the propensity to attract exceptionally diverse groups. Those who placed nature's highest values in the aesthetics marched to the cause alongside the sportsmen, the lumbermen, the developers, and other groups who understood nature's utility value. While each group could agree on the general concept of conservation, their specific interests conflicted.

William Howard Taft, who followed Roosevelt into office, once remarked that conservation was such an abstruse subject that many people were for it no matter what it meant.² His remark captured the essential weakness of the movement. In the eyes of the political scientist, the form of the classic political struggle—which is the basic ingredient of the democratic process—surfaced in the conflict of the group interests:

¹See, e.g., N. WENGERT, *NATURAL RESOURCES AND THE POLITICAL STRUGGLE* 22 (1955).

²RESOURCES FOR THE FUTURE, *PERSPECTIVES ON CONSERVATION* 8 (1951).

“Like the warp and woof of a fine tapestry, decisions in this field are made up of many elements and influences, crisscrossing and interacting, yet not without pattern and design.”³ The purpose of this note is to examine the expression of that pattern in the nation’s water resource law within the framework of shared authority demanded by the federal system.

FEDERAL AUTHORITY

Federal authority over the nation’s waterways is not based on an express constitutional grant of power. By judicial construction and legislation, federal authority over the nation’s maritime law was forged from federal jurisdiction over commerce and navigation. In *Gibbons v. Ogden* the Supreme Court stated that commerce “comprehends navigation.”⁴ The Court faced the issue squarely in *Gilman v. Philadelphia*, where it stated that “[c]ommerce includes navigation” and that for that purpose all the nation’s navigable waters “are the public property of the nation, and subject to all the requisite legislation by Congress.”⁵

At the same time, however, the courts recognized that the states had a proprietary interest in the rivers and riverbeds, subject to the acknowledged federal jurisdiction. The technical title to the beds of the navigable rivers of the United States remained either in the states in which they were situated or in the riparian owners of their banks, depending on state law.⁶

Perhaps *Martin v. Lessee of Waddell*⁷ provides the most explicit statement of the interrelation of state and federal power over the nation’s rivers. There the Court declared that “when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.”⁸ From that paramount qualification developed the general rule that the

³N. WENGERT, *supra* note 1, at 3.

⁴22 U.S. (9 Wheat.) 1, 197 (1824).

⁵70 U.S. (3 Wall.) 713, 724-25 (1865).

⁶*See, e.g.,* United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 60 (1913).

⁷41 U.S. (16 Pet.) 367 (1842).

⁸*Id.* at 410.

United States held a superior easement in the flow of the nation's rivers based on its powers over commerce and navigation.⁹

After substantial judicial expansion of the commerce clause throughout the nineteenth century, Congress boldly enacted the Rivers and Harbors Appropriations Act of 1899.¹⁰ Section ten of that Act prohibits the creation of obstructions in any of the waters of the United States.¹¹ Section thirteen forbids the discharge of any refuse other than local sewage unless such discharge is pursuant to a permit granted by the Corps of Engineers.¹² The strength of these prohibitions reflects the deep concern of Americans over the threat of pollution at the turn of the century. It is paradoxical, however, that despite the apparent concern the real potential of this legislation would lie dormant for nearly seventy years.

ZONES OF SHARED AUTHORITY

Large areas of responsibility were left open to the states as the outline of a federal system of control over the nation's waterways began to emerge. Generally, the states exercised their inherent police power over the use, distribution, and conservation of water resources within their borders. Yet the flow of the nation's river systems did not always respect state boundaries, and infrastructures evolved within the federal framework as compacts or agreements were signed by the states. From the first, Congress liberally granted its constitutionally required¹³ consent to such compacts, and then by a statute enacted in 1948 Congress gave blanket consent to any such compact entered into for the purpose of conservation or pollution abatement.¹⁴ Compacts were a possible vehicle for bringing interstate action to the river basin.

However, development of the nation's water resources was soon dominated by a new concept of conservation. American technology was capable of producing the giant hydroelectric dam. Many conservation groups could identify their interests with the multi-purpose dam and its ability to provide flood control, irrigation, electric power, pollution

⁹3 PRESIDENT'S WATER RESOURCES POLICY COMM'N, WATER RESOURCES LAW 25 (1950).

¹⁰Act of March 3, 1899, ch. 425, §§ 1-22, 30 Stat. 1121 (codified in scattered sections of 33 U.S.C.).

¹¹33 U.S.C. § 403 (1964).

¹²33 U.S.C. § 407 (1964).

¹³U.S. CONST. art. I, § 10.

¹⁴33 U.S.C.A. § 1154(c) (1970), formerly 33 U.S.C. § 466(b) (1964).

control, and wildlife protection. Conflicting group interests reached a consensus in the theory of multiple use, which acknowledged the twin goals of conservation and economic development of nature's resources. The multiple-use doctrine was written into the Federal Power Act of 1920.¹⁵

The passage of the Federal Power Act foreshadowed federal dominance over river-basin development, and Congress marshalled most of its delegated power to take control. In 1950 the President's Water Resource Policy Commission Report referred to the use of the commerce power, the proprietary power, the war power, the treaty power, and the general welfare power by Congress.¹⁶ Strong economic forces also shaped resource policy at the federal level. Huge multi-purpose projects provided desperately needed work for those individuals displaced by the economic disasters of the 1930's.

Federal dominance over the river basin began to emerge when the Supreme Court announced that all "navigable waters [were] subject to national planning and control in the broad regulation of commerce granted the Federal Government."¹⁷ One year later the Court recognized that it was "for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, [would] have such a beneficial effect on the arteries of interstate commerce as to warrant it."¹⁸ In the same case the Court rejected the proposition that a federal multi-purpose project could be halted when that project interfered with the state's own program for water development and conservation.¹⁹ By 1957 the following comparison of federal and state controls was made:

The federal government now dominates in the fields of navigation, flood control, hydroelectric power development, irrigation and river basin planning. The states dominate in the fields of water rights, urban water supplies, drainage, and fish and wildlife management. The responsibilities are more shared in the fields of power regulation, recreational planning, pollution control, and small watershed development.²⁰

The multi-use doctrine had greatly altered the federal scheme.

¹⁵16 U.S.C. § 803(a) (1964).

¹⁶3 PRESIDENT'S WATER RESOURCES POLICY COMM'N, WATER RESOURCES LAW 5-70 (1950).

¹⁷United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426-27 (1940).

¹⁸Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 527 (1941).

¹⁹*Id.* at 534-35.

²⁰Englebert, *Federalism and Water Resources*, 22 LAW & CONTEMP. PROB. 325, 330 (1957).

NEW FOCUS ON SHARED AUTHORITY

The 1960's brought the conservation movement full circle. The science of ecology exposed the public to the concept that man exists in a closed ecosystem. The ethic acquired a new dimension in the knowledge that all life on earth is interdependent and that nature's delicate balance is severely threatened by pollution. Congress responded to protect what it saw as the public interest and passed several major amendments to the 1948 Water Pollution Control Act.²¹ Each amendment preserved the original policy of the 1948 Act, which left primary responsibility for pollution control in the states, but each addition staked out a new federal framework in the structure. By 1970 a clumsy system of pollution control had evolved, generated by the establishment of federal water-quality standards and enforced by a conference procedure, a hearing procedure, and court actions in abatement.

The threat of environmental degradation has placed a new burden on the institutional patterns of shared authority. The establishment of a conservation policy of pollution control must be accomplished within a new matrix of authority. First, water pollution is a local concern in the sense that it must be abated at the source. Local governments exercise the kinds of authority which must be used in pollution abatement: the power to zone and to grant the certification for certain uses of the water resource. In addition, water pollution in the river basin generates regional conflicts, as when, for example, a city in one state pollutes much of the downstream river basin in another state. Finally, institutions under public control—such as public utility installations regulated by state governments, local sewage systems, and large naval bases operated by the federal government—have been identified as major contributors to water pollution.²²

Public demands on these institutions can be expected to produce adjustments within the federal structure with regard to the exercise of resource policy. A trend in the exercise of federal authority surfaced recently in a report submitted to Congress by the House Standing Committee on Governmental Operations.²³ The Committee severely criticized the Federal Water Pollution Control Act on the following grounds: (1) federal water-quality standards apply only to waters that

²¹See 33 U.S.C.A. §§ 1151-75 (1970).

²²H.R. REP. NO. 1433, 91st Cong., 2d Sess. 53 (1970).

²³H.R. REP. NO. 91-917, 91st Cong., 2d Sess. (1970).

flow interstate; (2) abatement proceedings must be postponed until 180 days after notice of the violation of the Act is served; and, (3) abatement proceedings under the Act can be instituted only with the consent of the governor of the polluting state. The Committee compared the scope of the enforcement powers of the Federal Water Pollution Control Act with those of the older Rivers and Harbors Appropriations Act of 1899 and discovered that the 1899 Act has none of the limitations imposed on the more recent legislation, which provides that it shall not be construed to affect or impair the prohibitions of the 1899 Act.²⁴ Thus seventy years after its passage, Congress rediscovered the potential of one of the nation's earliest pollution controls.

In bold-face black type the Committee admonished the Corps of Engineers to enforce vigorously the 1899 Act. Several methods of enforcement are available under the Act. The Corps may seek an injunction in the federal courts or request that a polluter remove a discharge voluntarily.²⁵ Or, according to a recent Supreme Court case, the government can do the work itself and then bill the polluter for the cost if the polluter's conduct was wilful or negligent.²⁶ Finally, the Corps may seek a criminal sanction under the Act. Recently, in *Zabel v. Tabb*,²⁷ the Court of Appeals for the Fifth Circuit cited, quoted, and relied on the Committee report and stated that it "stifles any doubt as to how this part of Congress construes the Corps' duty under the Rivers and Harbors Act [of 1899]."²⁸

The most novel aspect of the Committee report was its suggestion that the ancient *qui tam* action be used to implement the criminal sanctions of section sixteen of the 1899 Act. Section sixteen imposes a fine of not more than 2,500 dollars and provides that "one-half of said fine [shall] be paid to person or persons giving information which shall lead to conviction."²⁹ The *qui tam* action arises where a statute such as the 1899 Act provides that part of the fine shall be paid to citizens who furnish sufficient information concerning a violation to convict the violator and the government fails to prosecute within a reasonable period of time. The informer can then sue the violator in the name of the

²⁴33 U.S.C.A. § 1174 (1970).

²⁵United States v. Republic Steel Corp., 362 U.S. 482 (1960).

²⁶Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967).

²⁷430 F.2d 199 (1970).

²⁸*Id.* at 214.

²⁹33 U.S.C. § 411 (1964).

government to collect his portion of the fine.³⁰ Because of this possibility, the 1899 Act appears to be a potent weapon in the federal arsenal.

CONCLUSION

The gradual evolution of the conservation ethic has produced a substantial change in the nation's resource policy. The idea that there is a public responsibility—even a public trust—involved in man's relation to his natural environment has distinctly emerged. Pressures are building on both the public and private sectors to carry out their fiduciary duty.

However, decision makers at every level of public activity are faced with a dilemma. The sheer magnitude of environmental degradation demands a unity of action, and yet the authority to deal with the problem resides at all levels of government. The weakness of the current pollution-control legislation was recently described in the President's proposals for improving the environment, which were submitted to Congress on February 8, 1971.³¹ Radical new innovations, such as the elimination of the cumbersome enforcement conference and the hearing procedure of the present law, were included in the presidential proposals. Also, there was a proposal requesting authorization for private legal actions against violators of water-quality standards in order to bolster state and federal enforcement efforts.

Notwithstanding the innovation represented by the President's proposals, the basic fault of the Water Pollution Control Act was not recognized: Pollution of the river basin remains basically a regional problem, but there was no proposal to shift the present state-centered authority over pollution control to regional authorities. Because the river basins have no respect for state boundaries, and in the absence of adequate federal legislation, successful pollution abatement in the future will depend upon the ability of the states to coordinate the sharing of intrastate as well as interstate zones of authority over the river basin.

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³⁰On August 13, 1970, the Governmental Operations Committee report was supplemented by a carefully researched report by its subcommittee on the *qui tam* action. Organized as an outline for citizen action under the 1899 Act, the latter report reviews the history of the action and cites the constitutional authority for it. See STAFF OF HOUSE COMM. ON GOVERNMENT OPERATIONS, 91ST CONG., 2D SESS., QUI TAM ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTERS OF THE NATION'S WATERWAYS (Comm. Print 1970).

³¹U.S. NEWS AND WORLD REPORT, Feb. 22, 1971, at 73.