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Green River Adjudication v. United States, 404 P.2d 251 (Utah 1965)

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lations Board enables it to maintain a close supervision of labor activity. The power of subpoena allows the board to look at the market place and its demands in light of the underlying policy favoring a free flow of commerce.[35] Specific abuses are and can be outlined by Congress in order to prevent general interference with the institution of collective bargaining. The Board has the quasi-judicial power to interpret and apply legislative provisions. However, in the area of collective bargaining the union power may be combined with that of management. This necessitates greater supervision than provided for by the labor statutes. As indicated by the decisions in the principal cases, the Supreme Court will recognize the power of the National Labor Relations Board, but will take jurisdiction under the antitrust laws in certain cases.

It is submitted that adherence to the tests announced in the *Pennington* and *Jewel Tea* cases sufficiently limits the *Allen Bradley* doctrine.[36] The limitation brings within the Court's jurisdiction only those cases in which agreements imposing restraints extend beyond the bargaining unit. However, the collective bargaining agreements falling within a bargaining unit are to be controlled by the administrative method set up by the National Labor Relations Act and its amendments. This approach will best promote the policies of the Sherman Act and of the labor statutes. A joint judicial and administrative approach to union antitrust activity would allow flexibility in reflecting the demands of the market place. Such joint effort is at the heart of our constitutional system and would promote effective government and a sound economy.

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WATER RIGHTS: UTAH ADJUDICATION EMPHASIZES FEDERAL-STATE CONFLICT.—The Utah state engineer joined the United States as a necessary party defendant in a water adjudication of the Green River. Although the lower court recognized the claim of the United States to water rights purchased from private individuals, it refused to recognize claims to additional unspecified water rights. The United States appealed to the Utah Supreme Court contending that the adjudicated water rights of individuals should be subject to the right of the United States to use all the water necessary for national forest reservations. *Held,* affirmed. The United States is bound by the decree to the same extent as any other party. "Therefore, any water rights which have been or could have been claimed within this adjudication are now concluded by it." *Green River Adjudication v. United States,* 404 P.2d 251 (Utah 1965).

The states claim control of all water rights within their boundaries.[1]

[35] *Id.* at 305, 394.

[36] For a discussion of the lengths to which the Court might have gone with the *Allen Bradley* decision see Sovern, *Some Ruminations on Labor, the Antitrust Laws and Allen Bradley,* 13 LAB. L. J. 957 (1962).

[1] Fed. Power Comm'n v. Oregon, 349 U.S. 435, 448 (1955).

The United States claims control of all water rights within federal reservations.[2] This conflict is the source of the federal-state water rights controversy.[3]

The history of this controversy began with the treaties that ceded the land which is now the western states to the United States.[4] Because of the cession, the United States has a common law riparian landowner's right to use water flowing through its land. This includes a right to use a reasonable quantity of water for domestic, agricultural, and other purposes incidental to use of the land and a correlative duty to return the surplus to the stream to maintain the natural flow to lands downstream.[5]

If a sole owner of all the land along a water course grants a nonriparian water use, it is enforceable as a property right against any adverse claimant.[6] However, if a riparian owner of less than all the land along a water course grants a nonriparian water use, such grant is enforceable only against the grantor and his successors in interest.[7] Downstream riparian landowners are not affected by the grant, since the riparian rights they hold are incidental to their land ownership.[8] Since the United States was the sole owner of Western America by treaty, it owned all the land along its water courses and had riparian rights to all running water. These rights necessarily included the right of a sole riparian owner to grant proprietary water rights to nonriparian uses.

During the California Gold Rush of 1849, however, a rule evolved conflicting with this common law riparian doctrine. The miners developed a custom that the first user of a quantity of water had a right superior to that of any subsequent user. This rule was recognized by the state courts and the water right so created became known as an "apropriation."[9] Since the United States, except in a few early cases,[10] failed to assert its rights as sole riparian owner, the California courts held that this appropriative right was as perfect "as if held under an express grant from the owner of the lands adjacent."[11] The California

[2]Arizona v. California, 373 U.S. 546, 600-01 (1963).

[3]*Hearings on S. 1275 Before a Subcommittee of the Senate Committee on Interior and Insular Affairs*, 88th Cong., 2d Sess. (1964). Hereinafter referred to as *"Hearings."*

[4]Note, 26 MONT. L. REV. 199, 200 n.5.

[5]Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18 (1895); Nuttall v. Bracewell, L.R. 2 Ex. 1 (1866).

[6]Ferguson v. Sherreff, 6 Dunlop, Bell & Murray's Report, Scotch Session Cases (Second Series) 1363, 1374 (1844); the court said:

> I know nothing more rudimental in our law, than that private rivers are the property of those through whose lands they flow. . . .It is a right of property in the stream itself. Accordingly, where a river runs its entire course through the land of a single person, he, as sole proprietor, may do with it as he pleases. . . .A river is, in this respect, exactly like a private lake surrounded by one estate. . . .

[7]Gould v. Hudson River R.R. Co., 6 N.Y. 542 (1852).

[8]Embrey v. Owen, 6 Ex. 352, 20 L.J. Ex. 212 (1851).

[9]In Lux v. Haggin, 69 Cal. 255, 339, 10 Pac. 674, 719 (1886), the court said: "The Courts have treated prior appropriators of water on public lands of the United States as having a better right than a subsequent appropriator. . . ."

[10]For example, United States v. Parrott, Fed. Cas. No. 15,998 (1858).

[11]Kidd v. Laird, 15 Cal. 161, 181, 76 Am. Dec. 472 (1860).

rule thus vested title in the first appropriator which was good against all other persons. Congress adopted the California water rights rule by passing the Act of 1866.[12] Since this Act vested the miners with complete ownership of their appropriative water rights, it granted appropriations in fee simple.[13]

Both the California rule and the express terms of the Act required compliance with local law before a person could acquire appropriative water rights.[14] Because compliance with state law was a condition precedent to the federal grant,[15] the administrative control of the state over water users was regarded by the public as indicating state ownership of water. This apparent state ownership blurred the distinction between federal property rights and state regulatory rights.[16] This distinction was largely immaterial for thirty years, but then it became the fundament of the federal-state water rights controversy.

The controversy began with the passage of the Forest Service Administration Act of 1897.[17] This act authorized the reservation of public lands for national forest purposes and the promulgation of rules for use of water on forest reservations.[18] This Act imposed a limitation upon all subsequent sales of reserved lands, and caused the cessation of the automatic grant of "fee simple" appropriative rights on the affected watersheds.[19] The automatic grant ceased because, under the Act of 1866, only *unreserved* public domain is "public land" which is unqualifiedly subject to sale and disposition. Thus the only appropriators to

[12]"Act of 1866" will be used to refer to the Act itself, its amendments, and successors including the Desert Land Act of 1877. Act of 1866, 14 Stat. 253, 43 U.S.C. 661 (1964); Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. 321 (1964).

[13]Jennison v. Kirk, 98 U.S. 453 (1878); Broder v. Water Co., 101 U.S. 274, 275 (1879). "Fee" is used here to mean that Congress granted all possible ownership; it does not mean ownership of the corpus of the water.

[14]Act of 1866, §§ 1, 9, *supra* note 12.

> [T]he mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, . . .subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not conflict with the laws of the United States.
>
> [W]henever, by priority of possession, rights to the use of water for mining. . .or other purposes, have vested and accrued, and the same are recognized and acknowledged by local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be. . .protected in the same. . . .

[15]Anderson v. Bassman, 140 Fed. 14, 21 (1905). The court held that the rights of an appropriator rest upon the laws of Congress, and the legislative enactment of a State is only a condition which brings the law of Congress into force.

[16]1 WIEL, WATER RIGHTS IN THE WESTERN STATES § 171 (3d ed. 1911).

[17]30 Stat. 34 (1897). This act referred to the Act of March 3, 1891 26 Stat. 1095, 1103 (1891) which provided at § 24:

> That the President of the United States may, from time to time set apart and *reserve*, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, *as public reservations*, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof. (Emphasis supplied.)

[18]"All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder." 30 Stat. 36 (1897).

[19]Because the statutes set out here apply to all public land included in the Withdrawal of Public Lands Act, 36 Stat. 847 (1910), 43 U.S.C. § 141 (1964), what is said here applies to reservations generally.

receive property rights were those acquiring water rights before the reservation of the land through which the water flowed.[20] Subsequent appropriators received only a revocable license from the United States.

The water rights appropriated subsequent to reservation will be referred to as "reservation apropriations." The water rights appropriated before reservation will be referred to as "Act appropriations." Reservation appropriations, unlike Act appropriations, are not "fee simple" rights. Reservation appropriations are defeasable by partial or total revocation of the federal license. The United States may revoke the license in whole or in part by using the water for reservation purposes,[21] or by promulgating federal administrative rules to replace inconsistent state regulations.[22] However, unless revoked, the federal license permits state control of all water users within the state.[23] This license is the sole basis of the reservation appropriator's property right.[24]

The power of the federal government in this area is increased by its relative immunity from state action. Thus, the court's decree in the instant case is probably unenforceable. Because the United States has the power to reserve water rights for use on its property,[25] its assertion of those water rights as against the state would not be a taking of property. Therefore, inverse condemnation under the Tucker Act would be unavailing.[26] Because all water rights not granted away are federal property,[27] an injunction against the United States would be ineffective for a "State cannot compel use of federal property on terms other than those prescribed or authorized by Congress."[28]

[20] *FPC v. Oregon, supra* note 1.

[21] *Arizona v. California, supra* note 2, at 587.

[22] State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned. . . .

Act of Admission of the State of California into the Union § 3, 9 Stat. 452 (1850). All other western states have similar clauses in their Acts of Admission.

[23] California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935). The Court, construing the Act of 1866 and the Desert Land Act of 1877, said, "all non-navigable waters. . .of the public domain became. . .subject to the plenary control of the designated states. . . ." See also Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 265 (1900).

[24] Nonetheless, a reservation appropriator has important statutory rights, such as a right to compensation, under Acts of Congress. See *infra* note 31. Also, a reservation appropriator's *power* to sue for an injunction will test whether the Federal official, who has interferred with the Appropriator's water rights, was acting pursuant to statutory authority. Whether sovereign immunity protects the official from suit depends on whether the official's act is authorized. The terms of the statute creating the reservation determine the scope of the official's authority. If the official's act of taking the reservation appropriator's water right is unauthorized, the official is enjoinable because he acted in his individual capacity. Malone v. Bowdoin, 369 U.S. 643, 647 (1962); Dugan v. Rank, 372 U.S. 609, 621 (1963).

[25] *Arizona v. California, supra* note 2.

[26] 28 U.S.C. 1346(c), 1491 (1964).

[27] In Howell v. Johnson, 89 Fed. 556, 558 (D. Mont. 1898), the court held: "The national government is the proprietor and owner of all the land. . .which it has not sold or granted to someone competent to take and hold the same. . . .The national government can sell or grant the same or the use thereof. . .under such conditions as many seem to it proper."

[28] Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275, 295 (1958).

The great extent of federal power in this area of water rights law gives rise to an apparent danger of federal confiscation of appropriative water rights without compensation. Even if federal ownership of reservation appropriations were denied, the possibility of uncompensated federal confiscation remains. Those who deny federal ownership advance the following argument.[29]

> Appropriative water rights are the creature of state law.
> Federal courts refuse to recognize state law on federal reservations.
> Because of this, federal courts refuse to recognize appropriative rights on federal reservations.
> Therefore, appropriative water rights in streams that flow over reservations can be confiscated for use on federal reservations without compensation.

But whether states rights or federal ownership is emphasized, little actual danger of uncompensated taking of water rights exists. Act appropriations are compensable property under the Fifth Amendment to the United States Constitution.[30] Reservation appropriations are compensable "property" by Act of Congress.[31]

Although there is a possibility of uncompensated taking of reservation appropriations under Article IV of the United States Constitution,[32] it is remote. Congress has consistently elected to compensate for all appropriations taken for federal projects;[33] and the Supreme Court has consistently interpreted Acts of Congress authorizing federal projects as requiring compensation for both Act and reservation appropriations.[34] The Federal Reclamation Act, the Federal Power Act, and the Federal Flood Control Act have all been drafted and interpreted in this manner.[35]

The principal significance of this instant case is that is illustrates the viewpoint of those who fear federal taking of water rights without compensation, even though such taking would be contrary to well established in government policy. In the instant case, the court said: "If. . .

[29]Senator Kuchel, *Hearings, supra* note 3, at 22; *FPC v. Oregon, supra* note 1 at 452-53, 456-57 (Douglas, J., dissenting.)

[30]Department of Justice Memorandum, *Hearings, supra* note 3, at 12, and cases therein.

[31]The Federal Reclamation Act, 32 Stat. 388, 390 (1902), 43 U.S.C. § 372 (1964), provides that water rights within the meaning of the Act will include both reservation and Act appropriative water rights. Section 8 of the above act provides that, "beneficial use shall be the basis, the measure, and the limit of the right." Vested rights and state laws defining reservation appropriations are unaffected by the Act. 43 U.S.C. § 383.
The United States Supreme Court construed the above statutes to mean that "the federal law adopts that of the State as the test of federal liability. . . ." United States v. Gerlach Live Stock Co., 339 U.S. 725, 739, 743 (1950).
Section 821 of the Federal Power Act, 41 Stat. 1077 (1920), 16 U.S.C. § 791 (1964), is substantially identical. The Court construed § 821 to require compensation for state defined appropriative water rights. FPC v. Niagara Mohawk Power Corp., 347 U.S. 239, 251 (1954).
The Federal Flood Control Act 58 Stat. 887 (1944), 33 U.S.C. § 701-1(b) (1964) has a like provision. Arizona v. California, 283 U.S. 423, 463 (1931), held that appropriators must be compensated whenever appropriative rights are taken.

[32]*Arizona v. California, supra* note 2, at 598.

[33]*United States v. Gerlach Live Stock Co., supra* note 31, at 740 n. 14-15.

[34]*Ibid.* at 742.

[35]See *supra* note 31.

the government. . . could be wholly arbitrary about asserting water rights if and when it pleased. . . .[I]n the future. . .the private water rights adjudicated could be made a shambles of; and the principle of res adjudicata defeated." This attitude is demonstrated by the introduction of Senate bill 1275.[36] The purpose of the bill was stated to be the protection of all state and private water rights from uncompensated taking.[37] As shown earlier,[38] the states have no water rights in their sovereign capacity because appropriative rights are dependent upon federal grant or federal license. Since the federal grants are made only to citizens, any water rights a state may have are equivalent to water rights held by a private citizen. Therefore, although the bill purported to protect state water rights, it actually would protect only private rights from federal taking without compensation.[39]

Senate bill 1275 sought to achieve its goal by extending the requirement of use, a necessary element of all appropriative water rights, to the proprietary water rights of the United States.[40] Since the states regulate the use of all appropriative water rights,[41] and the United States uses very little of its water,[42] the effect of this proposal would be an uncompensated conveyance from the United States to the several western states of the bulk of federal proprietary water rights.[43] Senate bill 1275 failed to pass.

Any such bill that would restrict federal water rights to water actually used by the government would be contrary to the public interest. The value of recreation and watershed areas now protected within federal reservations is not measurable monetarily. Such areas are valuable in their natural state because they are rapidly becoming the nation's only source of clean water. Whether water from these areas should be used should depend, as it does now, on the particular circumstances of each case. Only on this basis can a balance be achieved between the value of recreation and watershed areas and the value of a proposed use. Assumption of the risk that Congress might authorize confiscation of reservation appropriations is on balance preferable to absolute protecting reservation appropriations by a conveyance to the several western states.

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[36]Senator Kuchel, *Hearings, supra* note 3, at 22, 132. Senator Allott, *id.* at 135.
[37]Senator Kuchel, *ibid.*
[38]*Supra* notes 14, 23 and 27.
[39]Senator Church, *Hearings, supra* note 3, at 134.
[40]Senator Kuchel, *supra* note 36.
[41]*California-Oregon Power Co. v. Beaver Portland Cement Co., supra* note 23.
[42]Mr. Clark, Assistant Attorney General of the United States for Public Lands, *Hearings, supra* note 3, at 55.
[43]Department of Justice Memorandum, *supra* note 30; Mr. Goldberg, *id.* at 133.