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Constitutional Law

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husband, or the community character of which he has estopped himself from denying.

It was held that this case came within (2) above as Mr. Nadreau had permitted his wife to engage in business for nineteen years and, by accepting the benefits of the community from the profits earned, he could not now repudiate that which was against his interest.

The court also stated that the possible individual liability of the husband was not within the scope of the pleadings and then cited *Lucci v. Lucci*, 2 Wn.2d 624, 99 P.2d 393 (1940). The court there held the husband separately liable in addition to the community (the wife, as manager, had borrowed money to operate a grocery store for the benefit of the community). Perhaps this is an indication that in this case the court would have held Mr. Nadreau separately liable also if he had been brought within the scope of the pleading, or perhaps the court was only ready to clarify its position in the *Lucci* case. However, in a similar case it seems advisable to bring the husband within the scope of the pleadings with the hope of holding the husband separately liable also.

Liability of the Community for Intentional Torts of the Husband. In *Smith v. Retallick*, 48 Wn.2d 360, 293 P.2d 745 (1956), the defendant husband struck the plaintiff during a heated discussion which was caused by a near collision of their automobiles. The husband was driving alone to visit a friend who was then employed at a service station some distance from the husband's home.

The court held that while the husband committed a battery, the plaintiff could not recover damages from the community. The court stated that community liability for the torts of a spouse is predicated upon the doctrine of respondeat superior. It did not make an independent determination as to whether the husband was acting as an agent for the community in the present case, but relied upon the prior decision of *Newbury v. Remington*, 184 Wash. 665, 52 P.2d 312 (1935), to reach its conclusion because the facts of the prior case were identical with those in the present situation. Since the court in the present case limits its discussion to this peculiar factual situation, one is unsure of the extent to which the court will, in the future, find community liability for the intentional torts of the husband in other situations.

For further discussion of this problem see: Pruzan, *Community Property and Tort Liability in Washington*, 23 WASH. L. REV. 259 (1948); *LaFramboise v. Schmidt*, 42 Wn.2d 198, 254 P.2d 485 (1953); *McHenry v. Short*, 29 Wn.2d 263, 186 P.2d 900 (1947).

CONSTITUTIONAL LAW

Constitutional Law—Dams and Waterpower—Eminent Domain—Interstate Commerce—Municipal Corporations—Res Judicata—State Officers—The Cowlitz Dam Case, *Tacoma v. Taxpayers*, 49 Wn.2d 781, 307 P.2d 567 (1957). The case under examination is the culmination of nearly ten years of struggle, which now has been carried to the Supreme Court of the United States. Briefly, the salient events are these: In 1948 Tacoma filed with the Federal Power Commission (FPC) its declaration of intention to build two power dams on the Cowlitz River in Lewis County, one dam near Mayfield and the other near Mossyrock. The FPC granted a temporary license, the

main effect of which was to preserve Tacoma's priority to use the two dam sites. In 1949 the Washington legislature passed acts to the effect that anyone building a dam had to get a permit from the state director of hydraulics[1] and had to provide fish protective devices approved by the departments of fisheries and game[2] and that no dam over twenty-five feet high could be built within migration range of anadromous fish on any tributary of the Columbia River below McNary Dam.[3] During 1951 public hearings were held by the FPC in Tacoma and Washington, D.C., after which, on December 28, 1951, the FPC granted Tacoma a federal license to build the two dams[4] pursuant to the Federal Power Act.[5] The FPC's decision was forthwith appealed by the Washington State Sportsmen's Council and the State of Washington departments of fisheries and game to the United States Court of Appeals for the Ninth Circuit, which upheld the decision.[6] The Supreme Court refused to review the Ninth Circuit decision.[7]

In January, 1952, Tacoma brought the present action in Thurston County superior court against taxpayers of Tacoma and the state departments of fisheries and game, seeking a declaratory judgment determining the city's right to sell bonds to finance the dam project. The trial court sustained the taxpayers' demurrer to its complaint, and Tacoma appealed to the Washington supreme court, which, in the decision hereafter termed "the first Tacoma appeal,"[8] overruled the Thurston County court and remanded the case for further proceedings. The city sold its bonds and began construction on the Mayfield dam but not on the Mossyrock dam, which is not considered here.

During the further proceedings in Thurston County, two events of essential significance to this Note occurred: The sovereign State of Washington was added as a party defendant; and the defendants, by amended answer and cross-complaint, alleged that the reservoir from the Mayfield dam would flood out the state trout hatchery near Mossyrock, which they alleged Tacoma had no power to condemn. The superior court granted a temporary injunction (since continued and made permanent) against further construction on the dam. The

[1] RCW 75.20.050.
[2] RCW 75.20.100.
[3] The Columbia River Sanctuary Act, RCW 75.20.010.
[4] In the Matter of City of Tacoma, Washington, 10 F.P.C. 424 (1951).
[5] 49 STAT. 803 (1935) 16 U.S.C.A. §§ 791-825 (1941).
[6] State of Washington Dep't of Game v. Federal Power Comm'n, 207 F.2d 391 (9th Cir. 1953).
[7] 347 U.S. 936 (1954).
[8] Tacoma v. Taxpayers, 43 Wn.2d 468, 262 P.2d 214 (1953).

case came to trial, and from a judgment adverse to it, the city appealed a second time. Though the decision below had been on different grounds, extraneous to the present discussion, the Washington supreme court viewed the case as turning on one issue: Did the city have power to acquire the site of the Mossyrock fish hatchery by eminent domain? To answer this question, it became necessary to answer three major questions of law: 1) Was the decision of the Ninth Circuit determinative of the present case by the doctrine of res judicata? 2) Does a Washington municipal corporation have the power of eminent domain over state lands devoted to a public use? 3) May the federal government, in giving a municipal corporation a license to build a dam affecting interstate commerce, delegate to it the power to condemn lands of its state when the state which created the municipal corporation gave it no such power? Does the Federal Power Act purport to delegate such power? The Washington supreme court (5-3) answered the questions each in the negative and affirmed the judgment of the lower court.[9] Thereafter, Tacoma petitioned the Supreme Court of the United States for a writ of certiorari, which was granted December 9, 1957, generally for determination of the questions raised in 3) above.[10] Due to limitations of space and the overriding importance of the federal question, the two state questions will be dealt with summarily before the federal question is analyzed in detail.

Was Ninth Circuit decision res judicata? For the doctrine of res judicata to make an earlier action completely determinative of the outcome of a later one, two conditions have to be present: a) The parties to the later action are the same as or in privity with those in the earlier one, and b) the facts in controversy are essentially the same in both actions. The same issues do not necessarily have to be raised in the earlier action as in the later if, on the facts, they reasonably could have been raised.[11] There is little difficulty in determining that one of the conditions necessary to res judicata was present in the case here; namely, that the prospective inundation of the state fish hatchery was known to the FPC and to the Ninth Circuit. A representative of the department of game testified at the FPC hearings in Washington, D.C., that the hatchery would be flooded out by the reservoir of the Mayfield

[9] Tacoma v. Taxpayers, 49 Wn.2d 781, 307 P.2d 567 (1957).
[10] —— U.S. ——, 2 L.Ed.2d 188, 78 S.Ct. 262.
[11] Comm'r v. Sunnen, 333 U.S. 591 (1948); Fisch v. Marler, 1 Wn.2d 698, 97 P.2d 147 (1939); Woodruff v. Coate, 195 Wash. 201, 80 P.2d 555 (1938); RESTATEMENT, JUDGMENTS §§ 47, 48 (1942); Von Moschzisker, *Res Judicata*, 38 YALE L.J. 299 (1929).

dam.[12] The transcript of these hearings was the record of the case on appeal to the Ninth Circuit, and the departments of fisheries and game were parties there.[13] Therefore, the issue of res judicata depends upon whether the State of Washington in its sovereign capacity was a party to that prior action; i.e., were the directors of fisheries and game "the State of Washington"?

According to Washington decisions, a state officer may be party to an action involving his office without the state itself being a party in two situations. The first, with which this note is not concerned, is when the officer is charged with an unconstitutional or illegal act.[14] The second situation, involved here, did not seem clearly defined when this case arose. In 1915 the Washington court held that a suit to enjoin a state officer from paying out state funds was against the state, because the state had an interest in the funds and so in the suit.[15] Later the court said in *State ex rel. Pate v. Johns*[16] that the test of whether the state was a party was whether the "judgment or decree cannot be given . . . without affecting some right or interest of the State. . . ." *State v. Pacific Tel. & Tel. Co.*, decided in 1941, made the test "whether the officers have *authority* to represent the interests of the state in the prior action."[17] (Emphasis added.) The *Pate* case was referred to as supporting this rule, and the court seemingly noted no difference between a test based upon whether the interests of the state were in fact affected by a judgment and a test based upon whether a state officer had authority to represent the interests of the state. Both the majority and the dissent in the present case relied upon the *Pacific Tel. & Tel.* case. The majority emphasized that the officer must have the *authority* to represent the state, and the net result is that it is possible for a state officer to be a party to a suit for purposes of upholding certain laws he is charged with enforcing, without the state itself being party for other state purposes. The controlling factor is to be the authority of the officer.

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[12] Transcript of Record, pp. 3570-3574, State of Washington Dep't of Game v. Federal Power Comm'n, 207 F.2d 391 (9th Cir. 1953).

[13] It is true the taxpayers also were not a party before the Ninth Circuit. However, they were respondents in the first Tacoma appeal, and in the present case the appellant argued that the taxpayers were precluded by the law of the case as declared in the first appeal. The issue on the doctrine of the law of the case is not considered of enough importance to be dealt with here. For present purposes, it is sufficient to understand why the taxpayers were not involved in the res judicata issue.

[14] State ex rel. Fleming v. Cohn, 12 Wn.2d 415, 121 P.2d 954 (1942); State ex rel. Robinson v. Superior Court, 182 Wash. 277, 46 P.2d 1046 (1935).

[15] State ex rel. Pierce County v. Superior Court, 86 Wash. 685, 151 Pac. 108.

[16] 170 Wash. 125, 15 P.2d 693 (1932).

[17] 9 Wn.2d 11, 15, 113 P.2d 542.

Such information as can be found supports the conclusion of the Washington court that the directors of fisheries and game did not have authority to contest the right of Tacoma to condemn state lands and that they did not try to do so before the Ninth Circuit. The game director may acquire lands for fish hatcheries,[18] and he may have them sold, the actual sale being consummated by the commissioner of public lands.[19] There seems, however, to be no procedure set up for the condemnation of hatchery sites, which is logical enough, since, as will be seen presently, the state has not given the power of eminent domain over them. There are procedures for the condemnation of "public lands" by serving process on the commissioner of public lands,[20] but a fish hatchery would not be classified as "public lands."[21] The director of game may transfer "lands held by the state" to municipalities for the limited purpose of getting additional lands for game department purposes, but in such case the deed to the lands must be given by the governor.[22] In view of the foregoing, it would seem the legislature did not contemplate that the game director could dispose of state-owned lands, which in turn would support an inference that he could not permit, or defend against, their condemnation. He did not attempt to raise the eminent domain issue, either before the FPC or the Ninth Circuit. Examination of the transcript of the FPC hearings shows they were concerned with the harm the dams would do to fish runs and with the fact that Tacoma had not complied with certain Washington laws relating to dams and fish. While the fact that the fish hatchery would be flooded out was put in evidence, it was not to raise the eminent domain issue but simply to show how the building of the dams would harm the rearing of fish.[23] Neither the decision of the Ninth Circuit[24] nor the game department's brief therein[25] show the department tried to deny Tacoma's right to condemn state land. Indeed, the city of Tacoma's brief stated: "The State of Washington is not a party to his proceeding."[26]

Under Washington law, may a municipal corporation condemn state

[18] RCW 77.12.200.
[19] RCW 77.12.210.
[20] RCW 8.28.010.
[21] See RCW 79.04.010.
[22] RCW 77.12.200.
[23] Transcript of Record, *passim* and pp. 3570-3574, State of Washington Dept. of Game v. Federal Power Comm'n, 207 F.2d 391 (9th Cir. 1953).
[24] State of Washington Dep't of Game v. Federal Power Comm'n, 207 F.2d 391 (9th Cir. 1953).
[25] *Id.*, Opening Brief for Petitioners, *passim.*
[26] *Id.*, Brief of Intervener City of Tacoma, p. 2.

lands devoted to a public use? It is elementary that municipal corporations are created by the laws of the states wherein they exist and that their powers are derived from those laws. Thus, the determination of whether Tacoma was given power to condemn the fish hatchery is reached by statutory interpretation. Inasmuch as the power of eminent domain is a high attribute of sovereignty, the judicial posture has been that statutes conferring that power upon political subdivisions of the state or upon public utility corporations will be strictly construed. The power may be exercised by them only if clearly given and only in the prescribed manner.[27] RCW 8.12.030 confers general powers of eminent domain on cities and towns. It says they may condemn land, "including state, county, and school lands," for certain enumerated purposes, not including reservoirs, within the city and that they may condemn "land or property" without the city for enumerated purposes, including "reservoirs . . . for conveying into and through such city a supply of fresh water. . . ." RCW 80.40.010 gives cities and towns powers of eminent domain in connection with their building of waterworks for various purposes, including the generating of electricity. Under this statute, cities may condemn water rights and occupy beds and shores "up to the high water mark" and may condemn "*private* property . . . *above* high water mark. . . ." (Emphasis added.) Applying the rule of strict construction to these statutes, it is reasonably evident that they do not give cities the power to condemn state lands devoted to a public use.

The cases have recognized this as the principle in Washington for many years, though in its details it has been mutable. The doctrine has its traces in dictum found in 1902 in *Samish Boom Co. v. Callvert,*[28] a case not involving a municipal corporation but raising the question of the power of the commissioner of public lands to permit the sale of a tract of land allegedly already appropriated to a private person by the state. The court said: "Whenever a tract of public land is once legally appropriated to any purpose . . . authority to sell in general terms will not be construed to embrace or operate upon it. . . ." In *Roberts v. Seattle,*[29] the city had brought its action to condemn a strip of land on the edge of the University of Washington campus for widening a street. By analogy to the *Samish Boom* case, the court

[27] Tepley v. Sumerlin, 46 Wn.2d 504, 282 P.2d 827 (1955); State ex rel. Eastvold v. Yelle, 46 Wn.2d 166, 279 P.2d 645 (1955); State ex rel. Mower v. Superior Court, 43 Wn.2d 123, 260 P.2d 355 (1953).

[28] 27 Wash. 611, 68 Pac. 367 (1902).

[29] 63 Wash. 573, 116 Pac. 25 (1911).

stated the general rule that the city could not condemn state lands devoted to a prior public use, then it carved out an exception to the rule: "There is nothing in the record to indicate that the thirty-foot strip of land in question is actually in use by the university, and there is nothing to indicate that the taking of the strip of land will impair the use of the land remaining.... Under this condition it may be taken." But five years later when a railroad having powers of eminent domain tried to condemn tidelands the state had dedicated as a harbor area twenty-five years before, the right to condemn was denied, despite the fact that nothing had been done to improve or use the tidelands.[30] The court said the state's delay in improving the dedicated lands could "convey no legal right in the property to others which such others would not have possessed had the delay not have occurred." *Roberts v. Seattle* was not mentioned at all, despite the obvious similarity of the facts, the natural implication being that the court had decided not to follow it any longer. It came back in full force, however, in *Tacoma v. State*,[31] when Tacoma was allowed to condemn, for purposes of building a dam on the Skokomish River, a state eyeing station, which had been closed shortly after having been established on the river twenty-one years before. The decision was placed squarely on the authority of the *Roberts* case, and it remains good law today.

The general rule that a municipal corporation may not condemn state lands used for public purposes is not in doubt. And the exception of *Roberts v. Seattle* presumably would allow a city to condemn state lands once used for public purposes but no longer so used. The area of doubt would seem to be in the case of a public utility corporation where, on authority of the railroad case above, it might be argued that there was a different standard applied to public utility corporations than to cities. In the case under investigation in this note, there is no question of the state having abandoned the fish hatchery; thus there is no conflict with any of the above cases. The main point to note is that, whereas *Roberts v. Seattle* and *Tacoma v. State* recognized the general rule but did not apply it, the present case for the first time applied the rule to bar a city from condemning state lands. Hence, it is the first direct holding on the rule as far as municipalities are concerned.

Did the federal license given Tacoma to build the dam confer power on the city to condemn the fish hatchery? Tacoma v. Taxpayers took

[30] State v. Superior Court, 91 Wash. 454, 157 Pac. 1097 (1916).
[31] 121 Wash. 448, 209 Pac. 700 (1922).

on a new dimension when the Supreme Court of the United States granted the city's petition for certiorari December 9, 1957.[32] The petition put squarely in issue whether section 21 of the Federal Power Act[33] gives a municipality receiving a federal dam license the power to condemn state lands dedicated to a public use when the state itself has not given the municipality such power. The question falls into two natural subdivisions: a) Does the Federal Power Act purport to give such authority? b) Would the giving of such authority be a valid exercise of federal powers? Both are questions of first impression for the Supreme Court. They will be considered in the order stated.

a) *Does the Federal Power Act confer powers of eminent domain on licensees?* Section 21 of the Federal Power Act reads:

> When any licensee cannot acquire by contract or pledge an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or necessary thereto, . . . it may acquire the same by the exercise of *the right of eminent domain* in the district court of the United States for the district in which such land or other property may be located, or in the State Courts. The *practice and procedure* in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated. (Emphasis added.)

Use of the words "the right of eminent domain" virtually compels the conclusion that Congress referred to the *federal* power of eminent domain as the power to be exercised. It would be anomalous, to say the least, if Congress should enact legislation conferring state powers on federal licensees. Moreover, the provision that, when condemnation is in a district court, the "practice and procedure" shall be like that in the state courts does not detract from this conclusion. The power of eminent domain is a right of substantive law. The Supreme Court has held the words "practice and procedure" refer to a branch of adjective law dealing with the judicial process for enforcing substantive rights and duties.[34] While it is not in issue in this case, it might be noted at this point that a citizen of a state could not bring a condemnation action against his state in the federal courts, since

[32] —— U.S. ——, 2 L.Ed.2d 188, 78 S.Ct. 262.
[33] 41 Stat. 1074 (1921), 16 U.S.C.A. § 814 (1941).
[34] Kring v. Missouri, 107 U.S. 221 (1882); Sibbach v. Wilson & Co., 312 U.S. 1 (1940).

it is settled that the Constitution gives the federal courts no power to hear original causes between citizens and their states. [35] The act does, of course, provide for eminent domain actions in the state courts, so it cannot be inferred that Congress overlooked the possibility of such actions against states.

There are a handful of cases interpreting section 21 of the Federal Power Act, but only one addresses itself to the present problem. In the *Camden County* case, a federal district court, considering whether a public utility corporation, licensed by the FPC to build a dam, could condemn public highways, school districts, a county courthouse and other public buildings, stated in connection with section 21 of the Federal Power Act, "the licensee has been granted the power to acquire property by the exercise of eminent domain in express terms."[36] The action was to enjoin condemnation, and it is not entirely clear whether the licensee intended to assert the federal power of eminent domain, but apparently it did; so the statement was probably holding and not dictum. As for the Supreme Court, there is only the weakest indication of its thinking on the question. In the *First Iowa* case, a footnote gives a running summary of various sections of the power act, inserted to illustrate that there is a comprehensive plan of federal regulation of waterpower resources. The note says in part: "§ 21, federal powers of condemnation vested in licensee. . . ."[37] This is the nearest the Court has come to construing the section in relation to licensees' exercise of federal eminent domain powers. In another case, the Supreme Court held that a licensee, which was condemning land in state court under its state-granted powers, should pay compensation for the land according to the state's method of computing value. The Court side-stepped the issue of whether the condemnor could have asserted a federal power of condemnation by saying "the petitioner, likewise, is not seeking to enforce such rights as it *might* have to condemn this land by virtue of its federal license."[38] (Emphasis added.) *Oakland Club v. South Carolina Public Service Authority* involved the reverse of the situation in *Tacoma v. Taxpayers*. A licensee of the FPC was suing in federal court to condemn land under a state condemnation law. The district court viewed section 21 of

[35] Ex parte New York, 256 U.S. 490 (1921); Duhne v. New Jersey, 251 U.S. 311 (1920); Fitts v. McGhee, 172 U.S. 516 (1899); Hans v. Louisiana, 134 U.S. 1 (1890).
[36] Missouri ex rel. Camden County v. Union Electric Light & Power Co., 42 F.2d 692, 698 (W.D. Mo. 1930).
[37] First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 U.S. 152, 181, n. 25 (1946).
[38] Grand River Dam Authority v. Grand-Hydro, 335 U.S. 359, 373 (1948).

the power act as "enabling the holder of a Federal Power license to exercise in the Federal courts... the substantive rights of eminent domain granted to it under the State law." On appeal, the Fourth Circuit quoted this with approval and also said "the condemnor has an *election* to exercise the power of eminent domain either under the specified enumerations of the Federal Power Act or under the broader provisions of the Eminent Domain Act of South Carolina."[39] (Emphasis added.)

Summarizing, there are three possible interpretations of section 21: 1) It purports to give licensees federal powers of eminent domain to be exercised either in federal or state courts; 2) it purports to vest in licensees state powers of eminent domain to be exercised in federal or state courts; or 3) it purports to give licensees federal eminent domain powers to be exercised in federal or state courts, and it permits them to exercise state powers in federal courts. Logically, the language of the act seems to make the first interpretation preferable. The holding in the *Camden County* case would support the first interpretation, the holding in the *Oakland Club* case would support the second, and the dictum in the latter case would support the third. *Tacoma v. Taxpayers* calls only for determination of whether the first proposition obtains, since it has been seen Tacoma has no state power to condemn the fish hatchery.

b) *Would the delegation of federal power of eminent domain to a municipal corporation be valid?* If the Supreme Court decides the Federal Power Act purports to give the city of Tacoma federal eminent domain powers beyond those given by the State of Washington, the constitutionality of the act will be in issue. No ready answer will be found, and the reader may expect the discussion here to distintegrate from well-defined bases to inconclusive shades of gray.

As an abstract proposition, it can be stated that the United States Government has unlimited powers of eminent domain, which it may exercise by its various agencies in federal or state courts.[40] Of course it must, under the fifth amendment, make compensation for property so taken.[41] It may condemn any state lands, no matter what the state condemnation laws are and without regard to prior uses to which the state may have put the land.[42] Specifically, the federal government

[39] 30 F.Supp. 334, 341 (E.D. S.C. 1939), *aff'd*, 110 F.2d 84, 86 (4th Cir. 1940).

[40] Chappell v. United States, 160 U.S. 499 (1896); Kohl v. United States, 91 U.S. 367 (1876).

[41] United States v. Carmack, 329 U.S. 230 (1946).

[42] *Ibid.*; United States v. Montana, 134 F.2d 194 (9th Cir. 1943); Annot., 91 L.Ed. 221 (1946).

may condemn state lands for the building of a federal dam.[43] Moreover, Congress may charter corporations to facilitate the exercise of its powers,[44] and it may confer the federal power of eminent domain on corporations it charters.[45] All this does not, however, determine whether the federal government may confer its eminent domain powers on state-chartered corporations, which are functioning in an area subject to federal control.

The Supreme Court has held that the government constitutionally may not dissolve a state corporation and recharter it as a federal one,[46] nor may a corporation be resurrected for federal purposes when the state has dissolved it.[47] Within these extremes, Congress may confer federal powers on state corporations, and the Court has held the power of eminent domain may be so conferred. The *Cherokee Nation* case held Congress could give a railway power to condemn lands of the Indian nation. The Court said: "It is true that the Company authorized to construct and maintain it is a corporation created by the laws of a State, but it is none the less a fit instrumentality to accomplish the public objects contemplated by the Act of 1884."[48] *Thatcher v. Tennessee Gas Transmission Co.*[49] found "no novelty" in the proposition that the Natural Gas Act could confer federal powers of eminent domain over private lands on a public utility corporation. Reference has been made to the *Camden County* case, *supra,* in which a district court held, directly on the authority of section 21 of the Federal Power Act, that a licensee of the FPC had federal condemnation powers. In a different sort of case, the Supreme Court has said the Interstate Commerce Commission, by issuing a license to the Seaboard Airline Railroad, could enable it to operate rail lines in a state which had given it no corporate existence.[50] The railroad was incorporated in another state to operate as a railroad, so the federal government did not precisely give it new functions but, rather, extended the geographic area of existing functions. However, if the government could enable the corporation to operate in the new state without its having to comply with the state's corporation laws, it would seem to follow a fortiori

[43] Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941); Note, 55 MICH. L. REV. 272 (1957).
[44] McCulloch v. Maryland, 4 Wheat. 316 (1819).
[45] Luxton v. North River Bridge Co., 153 U.S. 525 (1894).
[46] Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U.S. 315 (1935).
[47] Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp., 302 U.S. 120 (1937).
[48] Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890).
[49] 180 F.2d 644 (5th Cir. 1950), *cert. denied,* 340 U.S. 829 (1950).
[50] Seaboard Airline R.R. v. Daniel, 333 U.S. 118 (1948).

that the corporation could have been authorized to do things not permitted by the state laws, so long as it was operating in an area of federal control (i.e., interstate commerce). A process of parallel reasoning could lead to the conclusion that, when a corporation was operating within its state of creation and performing functions under control of the federal government (i.e., dam building), then it too could be given federal power to do things the state had not permitted it to do.

In none of the foregoing cases is there raised the question of a corporation trying to assert a federally-derived power directly against the sovereign state of its creation and against the will of that state. But that question would be analogically close to the one in the *Seaboard Airline* case. There would seem to be no logical inconsistency in saying that, if a corporation were eligible to receive federal powers and did receive them, it would not matter against whom the powers were exercised. If this step in reasoning is taken, then the *Cherokee Nation, Thatcher* and *Camden County* cases are all authority for the proposition that a corporation could receive the federal power of eminent domain and could exercise it against its state of creation. It would not be necessary to inquire if the state had vested similar powers in it, since it would be relying exclusively on federal powers. Whatever process of reasoning is followed, perhaps these general observations are apropos: The cases presented have been chosen because they come closest to answering the problem being examined and not because they support a point of view. No contrary cases have been found. With uniformity, they seem to show a willingness by the federal courts to allow the federal government to make use of private state corporations to facilitate the discharge of federal powers.

There is one further and bewildering complication. Tacoma is not merely a corporation; it is a *municipal* corporation. Municipal corporations, unlike private ones, are organs of government exercising sovereign powers. In a series of Supreme Court cases, it has been said states may at their pleasure amend city charters without impairing the obligation of contracts, because states deal with their municipalities, not as persons, but as political subdivisions.[51] So it was said in *Trenton v. New Jersey:* "The city is a political subdivision of the state, created as a convenient agency for the exercise of such of the

[51] Williams v. Baltimore, 289 U.S. 36 (1933); Trenton v. New Jersey, 262 U.S. 182 (1923); Hunter v. Pittsburgh, 207 U.S. 161 (1907); Mt. Pleasant v. Beckwith, 100 U.S. 514 (1880).

governmental powers of the state as may be intrusted to it," and "a municipality is merely a department of the state. . . ."[52] More to the point, in a case binding on both the Supreme Court and Washington,[53] it was held that the city of Seattle was engaging in an exercise of state sovereign power in operating a municipal light and power system. The distinction between a city's performing "governmental" and "proprietary" functions, important in the field of torts,[54] seems not to figure here. It seems clear that a municipality would be exercising sovereign power in building a dam for electric power, and if this were so, then when the FPC granted a city powers beyond those given by the state, it would be an interference with the state's control of its internal government. Accordingly, there is a difference between the granting of federal powers to private corporations and to municipal ones. As far as diligent search has found, the Supreme Court has never even approached the question arising from this difference.

When the Cowlitz dam controversy was before the Ninth Circuit and the Washington courts previously,[55] it was argued that Tacoma, being a subordinate body of the state, could not violate the state's laws relating to dams and fish protective measures.[56] So the argument was that the federal government could not authorize a subordinate body to violate its own state's laws. Both courts relied upon the *First Iowa* case, *supra*,[57] and said that, since the Washington statutes were in conflict with the exclusive power of Congress to control streams affecting interstate navigation, the state laws were void and of no effect. Thus, by their *conflict* with federal powers, the state laws were *removed* as a bar to the city. That is not the same problem as is involved in this Note. Here, there is no question of a state law conflicting with federal law; the essential feature of the present problem is that there is an *absence* of state law. So no conflict of state and federal law is possible. Rather, the question is whether the federal government may endow Tacoma with a power which Washington never intended it to have. Therefore, the legal issues in the prior cases

[52] *Ibid.*, 185, 187.

[53] Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619 (1934), *affirming*, 172 Wash. 668, 21 P.2d 727 (1933).

[54] See Russell v. Grandview, 39 Wn.2d 551, 236 P.2d 1061 (1951).

[55] State of Washington Dep't of Game v. Federal Power Comm'n, 207 F.2d 391 (1953); Tacoma v. Taxpayers, 43 Wn.2d 468, 262 P.2d 214 (1953).

[56] RCW 75.20.010; RCW 75.20.050; RCW 75.20.100. See discussion thereof, *supra* at 1.

[57] In this case, the Supreme Court held a power company having a federal license to build a dam did not have to obtain a state license also, since state law requiring a license was in conflict with the Federal Power Act and so was void.

were not the same as in the present case, and the prior decisions are not controlling by stare decisis. It has already been seen that they are not res judicata.

The Cowlitz dam gave rise to a condemnation action brought by Tacoma, apparently against a private citizen, in the Federal District Court for the Western District of Washington. The court's memorandum opinion does not make it clear whether the city asserted federal or state powers of eminent domain, but the court dismissed the action on the ground that state law gave the city power to condemn only in the state courts and said: "The federal government does not have authority to remove limitations on the powers of Washington cities expressly provided by the legislature of that sovereign state."[58] The court, therefore, concluded that section 21 of the Federal Power Act did not remove the limitations the State of Washington has put on cities' exercise of eminent domain. The facts of that case were not those of the present one, but the ground for the decision would be entirely determinative of it if the Supreme Court wished to adopt it. One other case, the *Latinette* case, decided by the Seventh Circuit in 1912,[59] might be of some help. St. Louis, Missouri, had been given power to build a bridge across the Mississippi River by a special act of Congress, which gave the city federal eminent domain powers. The court held that the city could condemn land for the bridge in Illinois, where the city had no corporate existence. This is the counterpart of the *Seaboard Airline* case, *supra,* with a municipal corporation in place of a railroad.

No attempt will be made here to rationalize the "municipal corporation" issue; however, some questions will be posed: 1) If Tacoma is really a subdivision of the state government and it applies to the FPC for, and consents to take, a federal license to build a dam, then is not its consent the consent of the state? And if so, may not a superior arm of the state withdraw the consent? And could not the consent be withheld in advance; i.e., by state law? What would be the result if consent were withdrawn for part of the license (condemnation) and not for the rest? 2) The state has given its cities power to build dams. If this means it has given them permission to seek licenses, where needed, from the FPC, then has the state precluded itself from opposing the building of dams according to the terms of those licenses? 3) Or are the state laws giving cities power to build dams of no force

[58] Memorandum Opinion, Tacoma v. Severns, No. 1892 (W.D. Wash. 1955).
[59] Latinette v. St. Louis, 201 Fed. 676.

at all to give Tacoma power to build a dam on a navigable stream, since the state does not have that power to give? If so, then would not the very act of building the dam itself (which it is not disputed Tacoma may do) be the exercise of powers beyond those authorized by the state of creation?

Lurking just beyond the specific problems already delineated lies a virtually unexplored borderland of constitutional law, entered by the question, "Wherein and to what extent may the federal government use subordinate units of state government to accomplish federal purposes, with or without consent of the states"? Though the issues thus raised are largely unarticulated by decisions, a moment's reflection will suggest many of real consequence to the relationship of the federal government to the states. With this in mind, it is suggested that the forthcoming Supreme Court decision in *Tacoma v. Taxpayers* should be anticipated for two reasons: It promises to be an important case in the area of dams and waterpower; and it could be a landmark case in an area of federal-state relations where landmarks are few indeed.

WILLIAM B. STOEBUCK

Treaties with Indians—Fishing Rights. *State v. Satiacum*[1] was a criminal prosecution against certain Puyallup Indians for violations of state fishing regulations. The illegal acts alleged were fishing with nets and fishing during a closed season. The violations occurred at two places on the Puyallup river within the city limits of Tacoma. One place was found to be within the original boundaries of the reservation, the other was found to be outside the reservation at a "usual and accustomed ground and station" within the meaning of the Treaty of Medicine Creek.[2] This treaty, made before Washington became a state, was between the United States and the Medicine Creek tribes, which included the Puyallup Indians. Article III of the treaty provides:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, . . .

The defendants claimed that they were not subject to state fishing laws because of this treaty. The trial court dismissed the prosecution because the state had not shown that, as to the Puyallup Indians, the

[1] 50 Wn.2d 513, 314 P.2d 400 (1957).
[2] 10 STAT. 1132 (1855).

regulations were reasonable and necessary for the conservation of fish. The state appealed on the ground that it did not have this burden of proof. The supreme court affirmed, but split (4-4) on the reason. One opinion, written by Judge Donworth, affirmed on the ground that, although the trial court gave the wrong reason, the result was correct because the state has no authority to regulate fishing by the Indians because of the treaty. The other opinion, written by Judge Rosellini, affirmed for the reason given by the trial court. The issue of whether the state had the burden of proving the reasonableness of the state regulation was discussed in a paragraph of the Rosellini opinion. The view expressed there followed *Makah Indian Tribe v. Schoettler*,[3] giving the state the burden of proof since the regulation, if invalid, would be taking away rights given to the Indians by the treaty.

Because of U.S. CONST. art. II, § 2, commonly called the "supremacy clause," the states have no authority to interfere with the treaty rights of the Indians.[4] Therefore, the rights of the Indians under the treaty must be determined, and particularly, the meaning of the right to fish "in common with all citizens of the Territory."

Four earlier Washington cases have construed this phrase to mean that the state may regulate Indian fishing outside of the reservation.[6] The United States Supreme Court has not ruled directly on the point involved in the instant case, but three cases are helpful.

In *New York ex rel. Kennedy v. Becker*[7] the United States Supreme Court construed a similar provision of a conveyance by Indians to one Morris. Because of I STAT. 469, 472, ch. 30, such a conveyance had to be by treaty under the authority of the federal government. This treaty was ratified by Congress in 1797 at 7 STAT. 601. The conveyance under the treaty reserved to the Indians the right to hunt and fish on the conveyed land. The Indians claimed the right to fish on the conveyed land without being subject to the state fishing regulations. Because the Indians knew that the conveyed land would become subject to the sovereign powers of the state in which it was located, and

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[3] 192 F.2d 224 (9th cir., 1951).

[4] Worcester v. Georgia, 6 Pet. (U.S.) 515, 8 L.Ed. 483 (1832).

[5] State v. Towessnute, 89 Wash. 478, 154 Pac. 805 (1916); State v. Alexis, 89 Wash. 492, 154 Pac. 810 (1916); State v. Meninock, 115 Wash. 528, 197 Pac. 641 (1921); State v. Wallahee, 143 Wash. 117, 255 Pac. 94 (1927).

[6] Neither of the opinions distinguished between the power of the state to regulate fishing within the reservation, and the power to regulate fishing at usual and accustomed fishing grounds. It is doubtful if the state has power to regulate fishing on the reservation, even for conservation. See *Wash. Const.* art. XXVI, sec. 2; Pioneer Packing Co. v. Winslow, 159 Wash. 655, 294 Pac. 557 (1930).

[7] 241 U.S. 556 (1915).

because the conservation of wild life is within the sovereign powers of the state, the court upheld the conviction of the defendants for spearing fish in violation of the state game laws. The court said:

> (T)he clause [reserving the right to fish] is fully satisfied by considering it a reservation of a privilege of fishing . . . upon the granted lands in common with the grantees, . . . but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised.[8]

In the instant case, the conveyance under the treaty was to the federal government. Unless the treaty is construed to mean that the federal government bargained away part of its sovereign power to conserve game, this power should now be in the state of Washington, as a right of statehood, as to lands outside of the boundaries of the Indian reservation.

In *U.S. v. Winans*,[9] the United States Supreme Court held that persons taking land by grant from the state or federal government take it subject to the right of the Indians to fish according to a treaty similar to the one in the instant case, and that the Indians had an easement to fish at usual and accustomed fishing grounds. The court added,

> Nor does it [the right to fish in common with other citizens of the state] restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.[10]

In *Tulee v. State of Washington*,[11] the court, in holding that the state could not require Indians to purchase licenses to fish at usual and accustomed fishing grounds, said,

> (W)hile the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here.[12]

These cases indicate that the treaty in question could be construed to reserve to the Indians the right to fish at places off the reservation

[8] 241 U.S. 556, 563, 564.
[9] 198 U.S. 371 (1905).
[10] 198 U.S. at 384.
[11] 315 U.S. 681 (1941).
[12] 315 U.S. at 684.

subject to the reasonable conservation measures of the state, but not subject to other police or revenue measures. In rejecting this view, the Donworth opinion starts with the premises that (1) the treaty must be construed in favor of the Indians and as they saw it at the time that it was made, and (2) that if reasonable regulation for conservation is allowed, the treaty would have no effect except to allow the Indians to fish at certain places off the reservation without a license.

If the treaty is considered from the point of view of the Indians at the time it was made, it does not necessarily follow that the state may not regulate their method of fishing. The Indians no doubt intended to preserve their right to fish by methods previously used. However, even if the treaty was to protect all the fishing rights which the Indians had enjoyed, did either of the parties contemplate that it would give the Indians the right to fish, as they did here, outside the reservation with nearly invisible nylon nets which could stretch from one river bank to the other and which could be used to capture any fish making its way up-river to spawn? Certainly, the methods used now are more deadly to the fish than the methods used at the time of the treaty. It is partly because of new methods of fishing that conservation measures are necessary.

It is the writer's opinion that even if the treaty is construed to mean that the Indians are subject to reasonable regulations only for conservation while they are fishing outside the reservation, the treaty gives them rights which they would not otherwise have had. The treaty gives them the right to fish outside the reservation[13] with the same rights as citizens of the state. Further, if the rule of the *Makah* case is adopted, the state would have the burden of proving that the regulations operating against the Indians were reasonable conservation measures.

The extent to which the state can regulate fishing by Indians at their usual and accustomed fishing grounds outside of the reservation is still an open question in this state. It seems probable that if any regulation is to be allowed, the state, in a prosecution for violation of the regulation, will at least have to prove that the regulation is reasonable and necessary for conversation. ROBERT D. GREEN

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[13] The treaty in the instant case was prior to the 14th Amendment to the U.S. Constitution. Therefore, it is probable that at that time, at least, the state could exclude Indians from fishing rights outside the reservation. As to whether the same would be true now, see annotation, 96 L. Ed. 463.

[14] *Supra,* note 3.