Denver Law Review

Volume 22 | Issue 9 Article 3

July 2021

# Navigation and Irrigation in the Mountain States

William R. Kelly

# Navigation and Irrigation in the Mountain States

## The "Elephant Butte," Colorado, New, Red River Decisions; "Authorities"

BY WILLIAM R. KELLY*

This is a paper to trace to origin U. S. Supreme Court decisions of federal authority over water of non-navigable streams.

Control by the federal government of non-navigable tributaries had its first declaration in the Elephant Butte Dam Case.[1] The primary importance of this decision and its far-reaching implications were for many years not appreciated. It is its recent application which is a revelation of federal power which may be exerted.

It was in this decision that, at the instance of the United States, the federal Supreme Court pronounced that the building of a dam for irrigation might be restrained, though in a non-navigable section of a river, if the river is anywhere navigable lower down.

The dweller in the Rocky Mountain states, where irrigation is a necessity of life, has been prone to think he was not interested in navigation. In this he is mistaken. He has the risk that, by the extended application of the "commerce clause," his use of the water for irrigation may be enjoined because affecting navigability of the river a thousand miles away.

The scope given "interstate commerce" was brought forcibly to the irrigators' attention in the recent "New River" and "Red River" decisions. As a matter of fact, however, the principle had its application to irrigation at the turn of the century, in a case arising from the Rocky Mountain area. This was the "Elephant Butte Case."[1] Its bearing on small streams was not, until lately, realized. It will be invoked much in these momentous days when pressure is being brought in Washington to have Congress create regional "authorities," over states of western rivers and over their entire watersheds.

The "commerce clause" is U. S. Const. Art I, Sec. 8 (3).

Dominant over the claims of every citizen and of individual water users of all states is that power given by the states to the federal government—the power to regulate interstate commerce—an elastic term. The federal government controls the navigable streams. Congress and the Supreme Court determine what ones are navigable. Just lately this power has been brought out into bold emphasis for the Western states. Few have yet sensed its possibilities. The so-called "New River Decision" of December 16, 1940,[2] followed by the Red River Decision of June 2, 1941,[3] have awakened many.

This application of a federal power which the states at the outset ceded to the federal government, but which had long lain dormant,

*Of the Greeley, Colorado, bar.

admonishes us to reckon not alone on natural appearances that the river is not navigable where diversion is made. The irrigator from the non-navigable tributary has a real concern in the navigable river, though it be the Missouri, the Colorado, the lower Arkansas, or Rio Grande, and though his ditch headgate be in the mountains, as far away as middle Montana or the Continental Divide in Colorado or in Wyoming. So has the community, dependent upon the irrigator.

I.

The Elephant Butte Dam litigation was elephantine in more ways than the dam itself and the long reservoir it created on the Rio Grande. It had a career of exhaustive litigation which would halt the citizen daring to consider the financing and building of an irrigation project of magnitude.

Elephant Butte Dam history is worthy of outline here. The United States built the dam which it had sought to enjoin. It backs the water up in the Rio Grande River for 45 miles above the lava intrusion from whose shape the dam takes its name. It is in mountainous Sierra County, New Mexico, 125 miles above El Paso, Texas, and the Mexican border, and more than twelve hundred miles above the mouth of the river. The lake so created has capacity for 2,680,000 acre feet of water. It furnishes the irrigation supply for more than 180,000 acres of productive land in New Mexico and Texas and for 25,000 acres in the Republic of Mexico. Electric power for a great area is added.

The project was begun by private capital. New Mexico citizens, in 1893, convinced of the advantages of the site, proposed the construction of a dam across the Rio Grande River at Elephant Butte. Capital was largely raised in London by the Rio Grande Dam and Irrigation Company. They were starting construction when, in May, 1897, a suit was brought by the United States in the local federal court seeking injunction, on the ground that the dam would interfere with navigation. The litigation and the project became an international incident. The Rio Grande runs for a thousand miles on the Mexican border.

The first trial judge, in 1897, decided against the government. He found that, as a matter of judicial notice, the Rio Grande was not navigable at Elephant Butte. The government appealed to the Supreme Court of the territory of New Mexico and there lost, in 1898 (51 Pac. 674).

There was a series of nine trials, retrials and appeals, three times each in the territorial trial court, Supreme Court, and the U. S. Supreme Court. Judges changed. The irrigation company won each time except the last time. The reports of it are in six different volumes. The government in the last decision of the nine finally prevailed, by having it adjudged that the construction of the dam was too slow. (Not because it was in violation of navigability.)

On the first U. S. Supreme Court appeal, in the decision rendered on May 22, 1899, the opinion declared that obviously the Rio Grande River in New Mexico was not a navigable stream. However, it remanded the case to the District Court for taking evidence as to whether construction of the dam would interfere with navigability of the river lower down.[1] This opinion of the series is the one most cited in water cases. It made the precedent on affecting navigability.

On first remand to the District Court, there was dismissal of the United States complaint, for insufficient evidence to show that the dam was likely to impair navigability. On appeal again by the government, the New Mexico Supreme Court, in 1900, affirmed the dismissal (65 Pac. 276).

But on next appeal by the government to the U. S. Supreme Court, in an opinion by Mr. Justice Harlan, the highest federal court reversed the territorial Supreme Court and ordered taking of further evidence of effect upon navigability.[4] This time Mr. Justice Brewer dissented.

A supplemental complaint was then filed by the government alleging forfeiture for delay by the private company in completion. There was a new trial judge. He held the company had forfeited its rights to build, because it had not completed the dam within five years.

This was affirmed by the territorial Supreme Court in 1906 (85 Pac. 393). A third appeal was by the irrigation company to the U. S. Supreme Court. The forfeiture of its rights was upheld (215 U. S. 266, 54 L. ed. 190, Dec., 1909).

The company was by now vanquished, not for interference with navigability, but for failure to complete while engaged in the struggle. In 1904 the dam had been approved as a project by the Reclamation Bureau. But the government took longer than the five years for which the private company's rights, while in litigation, were declared forfeited. Actual construction by the government began in 1910. The main dam was completed in 1916, twelve years after its approval as a government project. An auxiliary, Caballo Dam, a few miles below, to utilize power possibilities, was built about twenty years later. In exchange for the power rights, which the landowners of the district relinquished to the United States upon building the Caballo Dam, the government has relieved the lands from all unpaid costs of construction.

On May 21, 1906, the rights of the two nations were settled by treaty providing for the equitable distribution of the water of the upper Rio Grande for irrigation purposes. Mexico was conceded 60,000 acre feet of water as its share. Negotiations of 25 years later resulted in the 1945 ratification by the United States Senate of the comprehensive treaty with Mexico to settle international stream rights, on this and on the Colorado River (which, because of California's opposition, was given greater publicity). For over thirty years irrigation development

on the Rio Grande was held up by withdrawals until Colorado, New Mexico and Texas, by interstate compact, agreed on interstate allocation of rights to use of its waters, in 1939.

The "Elephant Butte" or "Rio Grande" Dam decision is much cited in navigability and interstate stream cases. It fifty years ago invoked the "commerce clause" to both irrigation and navigation of a western river. Mr. Justice Brewer wrote the opinion.[1] He was considered to know the West. He dissented from its application. He later wrote the first Kansas vs. Colorado decision.[5]

The United States, in asking injunction, alleged the river was navigable from its mouth upward for one hundred miles above Elephant Butte. Elephant Butte is 125 miles above El Paso, Texas, and Mexico. The trial court held that judicial notice was taken that the Rio Grande River is not navigable within the territory of New Mexico.

On first appeal the decree was modified by the U. S. Supreme Court, remanding it to the lower court, which was ordered to accept the stream as non-navigable at the dam but to inquire into whether the dam and the appropriations of water of the Rio Grande River intended thereby will substantially diminish the navigability of the stream within the limits of present navigability.

Justice Brewer, in the first opinion, said, in part:[1]

"The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. * * *

"While this is undoubted, and the rule obtains in those states in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a state may change this common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. * * *

"Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs in each state, yet * * * it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country even against any state action. * * *

"On September 19, 1890, an act [c. 907] was passed containing this provision (26 Stat. 454, §10):

" 'That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect to which the United States has jurisdiction, is hereby prohibited. * * *'

"Whatever may be said in reference to obstructions existing at the time of the passage of the act, under the authority of state statutes, it is obvious that Congress meant that thereafter no state should interfere

with the navigability of a stream without the condition of national assent. It did not, of course, disturb any of the provisions of prior statutes in respect to the mere appropriation of water of non-navigable streams in disregard of the old common-law rule of continuous flow, and its only purpose, as is obvious, was to affirm that as to navigable waters nothing should be done to obstruct their navigability without the assent of the national government. It was an exercise by Congress of the power, oftentimes declared by this court to belong to it, of national control over navigable streams. * * * It is urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream, and that as it appears that, although the Rio Grande may be navigable for a certain distance above its mouth, it is not navigable in the territory of New Mexico, this statute has no applicability. The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States, which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition."

II.

The lately much discussed "New River"[2] and "Red River"[3] cases leave no question that the federal government will exert its latent authority. To base their recent decisions, both cases repeatedly cite the U. S. v. Rio Grande Dam and Irrigation Co.[1] The United States also called it into operation in the Boulder Dam Case.[6]

Does natural condition or artificial condition determine navigability? Can the federal government by constructing works in a river give itself control of that stream, although without that construction there was no navigability or any interstate commerce on it? Having so, artificially, made the lower stream navigable, can it control all the tributaries? Is the answer "yes" as to dams and diversions begun after September 19, 1890? It seems so.

The power of the federal government over navigable streams, so early declared, was amplified in the Arizona v. California decision.

Forty-one states thought it was already unduly extended and joined together in the "New River Case,"[2] to resist its application to streams not naturally navigable. It is first indicated in this decision that "commerce power" of the federal government is not limited to navigation but is to apply also for reclamation, power development, flood control, even though navigation be not an element.

Navigability decisions had extended review in U. S. A. v. Utah, decided April 13, 1931.[7]

The court rejected an act of the 1937 Utah legislature which declared "The Colorado River in Utah and the Green River in Utah" to be navigable streams.

Arizona v. California,[6] known as the "Boulder Dam Case," is a related 1931 decision on direct suit in the U. S. Supreme Court. The Colorado River there was decided navigable, by judicial notice of the United States Supreme Court without evidence, and on a motion to dismiss. Judicial notice was there taken of navigability, and this in the face of positive allegation of opposite fact.

What is "interstate commerce"? No citizen or lawyer will any longer guarantee to say what is *not* interstate commerce.

What is "navigability'? And how much may appropriators on non-navigable tributaries be subordinated to uses for commerce on the lower, navigable stream? The federal courts may determine, even though Congress does not.

Here it is well to point out some of the legal principles declared in the New River Case. (U. S. Appalachian Elec. P. Co.[2]—15 years in litigation.)

The U. S. Supreme Court overruled the findings of fact of two lower courts, the trial court and the U. S. C. C. A. Each had held the river was not navigable. In the suit, begun in Virginia federal district court, the United States asked injunction against construction and maintenance of a dam by the respondent company unless it obtain a license therefor from the Federal Power Commission. The six-judge opinion ordering the injunction is by Mr. Justice Reed. Mr. Justice Roberts wrote strong dissent here (as he did in 1945, to the Nebraska vs. Wyoming and Colorado opinion by Justice Douglas).

The following is mainly in the language of the opinion: It is laden with principles of federal power:

"Sections 9 and 10 of the Rivers and Harbors Act of 1899 make it unlawful to construct a dam in any navigable water of the United States without the consent of Congress. By the Federal Water Power Act of 1920, however, Congress created a Federal Power Commission with authority to license the construction of such dams upon specified conditions. Section 23 of that Act [16 USCA 816] provided that persons intending to construct a *dam in a non-navigable* stream may file a declaration of intention with the Commission. If after investigation the Commission finds that the interests of interstate or foreign commerce will not be affected, permission shall be granted for the construction. Otherwise construction cannot go forward. * * *

"We are dealing here with the sovereign powers of the Union, the nation's right that its waterways be utilized for the interests of the commerce of the whole country. It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the

floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the western mountains. The tests as to navigability must take these variations into consideration.

"To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. 'Natural and ordinary conditions' refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in section 3 [16 USCA 796 (8)] of the Water Power Act by defining 'navigable waters' as those 'which either in their natural or improved condition' are used or suitable for use. * * * Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic.

"The state and respondent alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i. e., to 'prescribe the rule by which commerce is to be governed.' This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The federal government has domination over the water power inherent in the flowing stream. * * *

"In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. * * * The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the federal government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power."

III.

The Red River Decision[3] was an appeal in a case where the state of Oklahoma sought to enjoin construction by the United States of Denison Reservoir, a dam in Red River on the Texas and Oklahoma

boundary. The grounds sued on were that the project authorization exceeded the power of Congress and was contrary to the sovereign and proprietary rights of the state. Denison Reservoir was authorized by act of Congress as for flood control. It would also develop power and improve navigation of the lower reaches of the river.

Justice Douglas wrote the opinion which held that the Denison Dam and reservoir project is a valid exercise of the commerce clause by Congress. Disconnected excerpts are inadequate, but may serve to epitomize it. Flood control in the tributary as a benefit to navigation is the basis, though "It is true that no part of the Red River within Oklahoma is navigable. * * * The fact that portions of a river are no longer used for commerce does not dilute the power of Congress over them * * * and it is true that Congress may exercise its control over the non-navigable stretches of the river in order to preserve or promote commerce on the navigable portions. * * * There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries. Nor is there constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river.

"We have recently recognized that 'Flood protection, watershed development, recovery of the cost of improvements through utilization of power are * * * parts of commerce control.'

"It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the articles of interstate commerce as to warrant it.

"Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the State." (Citing the "New River" and "Elephant Butte Dam" cases.)

## IV.

These recent decisions are of present moment. They are notice to those states settled through reclaiming land by irrigation. Powers of Congress over streams are now given broad possibilities. When the federal government gets ready to take over, either a navigable stream, or its non-navigable tributaries, for any of the expanded purposes of interstate commerce, diversion or storage dams built after 1890 may be allowed to continue only by the consent of federal authorities.

"Interstate commerce" power was in the past decade given widened definition by federal officials. It has become a matter of apprehension to the upstream states—particularly the Western Reclamation States—seventeen of them.

The foregoing are only part of the reasons why mountain states through their governors, attorneys general, senators and representatives

in Congress and irrigation associations are wakeful over their water rights. Thirty-one national and regional land and water organizations are coordinating against the encroachment.

A measure is now being vigorously pressed in Congress to create the Missouri Valley Authority of all the watersheds of the Missouri River. That includes the irrigation streams of the South Platte and North Platte and all their tributaries—from Clear Creek past the Cache la Poudre, Laramie and Sweetwater Rivers and mountain creeks between, and so over on the Big Horn, Powder River, Crazy Woman Creek, the Upper Missouri, Yellowstone and many more sources of water supply. way to navigation in down-stream states? Shall control of their streams be taken from the states and turned over to "regional authorities"—federal corporations clothed with the power of government? The decision is with Congress. Justice Brewer, in his dissent in 1902,[4] evidently foresaw the danger. The imminence is not illusive. It is now actually present. Determined men, disregarding states, are aggressively reaching for the power.

Several "authority" bills, "Missouri Valley Authority," "Arkansas Valley Authority," "Colorado River Authority," "Columbia Valley Authority," are being aggressively crowded. There will be extended hearings. The bills are advanced as "Little T.V.A.s." "Little" is a misnomer. The M.V.A. would be twelve times the size of the original T.V.A. This M.V.A. and A.V.A. alone would constitute 43% of the entire U. S. They would give federal appointees control of water rights in ten states—Colorado, Wyoming, Montana, Nebraska, North Dakota, South Dakota, Iowa, Kansas, Minnesota, Missouri. It would be a change in our form of government.

Much has been accomplished for the West by the Milliken-O'Mahoney amendments. They were included in the Flood Control Act of 1944 and to the River and Harbor Act of 1945, whereby Congress approved a comprehensive plan for flood control, irrigation, hydroelectric development in the Missouri Basin. They provide "That the use for navigation of waters arising in the states lying wholly or partly west of the ninety-eighth meridian shall not conflict with any beneficial consumptive use of such waters for domestic, municipal, state water, irrigation, mining or industrial uses."

These amendments protect state and local water rights. They are an effective weapon in meeting the "Authority" threat. They are a major accomplishment now written into law. They are important to be maintained. Their principle was advocated in "Preservation of Integrity of State Water Laws,"[8] a report in 1943 by the National Reclamation Association Committee, of which Judge Clifford Stone of Colorado was chairman—a treatise which was really the foundation upon

which representatives of the western states were able to secure the Milliken-O'Mahoney amendment.

---

[1]U. S. v. Rio Grande Dam and Irr. Co., 1899, 174 U. S. 690, 43 L. ed. 1136.
[2]U. S. v. Appalachian Elec. Power Co. (Dec. 1940), 311 U. S. 377, 85 L. ed. 243-267.
[3]Oklahoma v. Atkinson, June, 1941, 313 U. S. 508, 85 L. ed. 1487-1505.
[4]184 U. S. 416, 46 L. ed. 619 (1902).
[5]206 U. S. 46, 51 L. ed. 956.
[6]Arizona v. Calif. & U. S., 283 U. S. 423, 75 L. ed. 1154.
[7]283 U. S. 64, 75 L. ed. 844.
[8]National Reclamation Association, Washington, D. C., 1943. Other members of the committee: Jean S. Breitenstein and Ralph Carr, Colorado; Gus T. Backman, Utah; A. E. Chandler, California; George T. Cochran, Oregon; Fred Cunningham, Washington; Wardner G. Scott, Nebraska.
"The Authority Issue," 1945, distributed by the same association, among 30 other national and regional water organizations, also compiled by Judge Stone, is valuable reading.