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Western Water Rights: May They Be Taken without Compensation?

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nature of a trust, he should say this is "in trust," or he should instruct the bank "to collect and notify me" or to "collect and remit" or notify the depository that "this is a special deposit." Apparently, the court has accepted such instructions as indicating the intention of the parties, even though the transaction in substance does not bear out the trust.

The Federal Deposit Insurance Corporation was intended to safeguard deposits, and today it should not make any difference whether the deposit is general or special except in those cases where the amount is over the $10,000 allowed by the insurance. This insurance will reduce the number of cases considerably, but there still may be a few cases which will involve more than the insured amount. If such cases do come up, it is hoped that a consistent policy will be followed by the court.

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WESTERN WATER RIGHTS: MAY THEY BE TAKEN WITHOUT COMPENSATION?

In view of the fact that west of the 97th meridan, where the climate varies from subhumid, to semi-arid, to arid with some 750,000,000 acres of arid lands of which only 21,000,000 are irrigated with streams incapable of supplying more than a fraction of the water that could be beneficially used, and with annual precipitation varying from twenty inches to less than five inches, it is really apparent that water has come to mean everything, and any existing property right in it has become invaluable.[1] Because this is so, the time has now come when it is necessary to determine to what extent rights in western water are recognized and to what extent those recognized rights are protected in the individuals owning them from the encroachment of the Federal government.[2]

One of the more important questions relating to the protection and recognition of such rights wherein the rights of individuals were asserted against the rights of the Federal Government was presented to the Supreme Court of the United States in June, 1950.[3]

[1]"This condition of the arid region (west of the 97th meridian), and the imperative necessity for irrigation to render it productive, is a matter of such common knowledge that the courts judicially take notice that land within this region will not produce agricultural crops without irrigation." 1 KINNEY, IRRIGATION AND WATER RIGHTS. p. 400. (2d. ed. 1912).

[2]For a very able discussion of water law in Montana, see Heman, *Water Rights Under the Law of Montana*, 10 MONT. L. REV. 13.

[3]U.S. v. Gerlach Live Stock Co., 339 U.S. 725, 70 S.Ct. 955, 94 L. Ed. 1231 (1950).

This case involved the rights of riparian owners of "uncontrolled grass lands" along the San Joaquin River in California, who benefited for a few days each year from the natural seasonal overflow of the stream. The Federal Government in constructing the Friant Dam as a part of the Central Valley Project terminated this overflow by diverting the water to the north and south through a system of canals. The result will be that the vanishing San Joaquin inundation will not be replaced. The lower court awarded claimants compensation, and the Supreme Court granted certiorari. Although it was held that the river afforded navigation, but only at tidewater levels, the Court concluded that the navigation consequences of the project were economically insignificant as compared with the values realized from redistribution of water benefits.[4] And further, the Court held that inasmuch as the project from the beginning had provided for compensation and compliance with state law, claimant was entitled to compensation.[5]

Two issues were posed to the Court here: (1) Is there an obligation on the part of the government to pay for the destruction of water rights bordering on a navigable stream, and (2) If there is such an obligation, do these claimants have recognizable water rights? Inasmuch as the latter of these two questions has been adequately dealt with,[6] this discussion will be limited to the first question.

In the *Gerlach* case, the government sought to escape paying compensation on the ground that the overall project was authorized by Congress as a measure for the control of navigation, and that by reason of the government's superior navigation easement, there were no constitutional rights of compensation. The Court replied to this saying that since the navigation servitude was not invoked by Congress, it was not necessary for it to decide whether a general declaration of purpose was controlling where interference was neither the means nor the consequence of its advancement elsewhere.[7] Further, the Court said it was not necessary to decide whether by virtue of a highly fictional navigation purpose the government could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of them, for here Congress had not attempted such a thing. Briefly, the Court felt that the legislative intent was to compensate because various acts

[4]U.S. v. Gerlach, *supra*, note 3, at page 957.
[5]*Id.* at p. 964.
[6]1 STAN. L. REV. 172 (1948); 38 CAL. L. REV. 572 (1950).
[7]See note 3 *supra*, at p. 962.

reauthorizing the Central Valley Project directed that the provisions of the Reclamation law should govern its construction.[8]

There is ample authority to uphold the government's contention that there is a superior navigation easement which may be exercised without a duty to compensate for the property taken. One of the earliest cases extending the Commerce Clause to the control of navigation was *Gibbons v. Ogden*,[9] wherein it was stated:

> "The power of Congress . . . comprehends navigation, within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several states, or with Indian tribes'."

The extent of this superior easement is most adequately stated in the *New River* case,[10] where the Court, citing the *Chandler* and *Ashwander* cases,[11] said:

> "The Federal government has domination over the water power inherent in the flowing stream, it is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property. 'That the running water of a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the government's discretion."

And, this paramount power of the Federal government is not limited to control in aid of navigation, for it is said that the authority is for the regulation of commerce on its waters. Navigation is but a part of the whole, which includes flood protection, watershed development, and recovery of the cost of improvements through utilization of power.[12] And further, this power is no longer restricted to those streams navigable in fact, or in law, for as it was recently stated:

> "... Power of flood control extends to the tributaries of navigable streams. For just as control over the non-navigable parts of a river may be essential to the navigable portions, so may the key to flood control on a

[8] *Id.* at p. 964.

[9] 22 U.S. 1, at page 197 (1824).

[10] U.S. v. Appalachian Electric Power Co., 311 U.S. 377, 424; 61 S.Ct. 291, 308; 85 L. Ed. 243 (1940).

[11] U.S. v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 66, 69; 33 S.Ct. 667; 57 L.Ed. 1063, 1078, 1080 (1913). Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330; 56 S.Ct. 466; 80 L.Ed. 688, 702 (1936).

[12] See note 10 *supra*, 311 U.S. at page 426. See also 1 KINNEY, IRRIGATION AND WATER RIGHTS, pp. 15-20. (2d. ed. 1912) as to the importance of guarding the watersheds as an aid to navigation.

navigable stream be found in whole or in part in flood control on its tributaries.'"[13]

Thus, it is apparent, if we assume, as the Court apparently did in the *Gerlach* case, that the stream was navigable,[14] the government had ample authority to support its contentions. On the other hand, claimants also were supported in their suit for compensation by authority, especially in the form of Congressional expressions of intention. It is evident that throughout the history of "desert land" legislation the intention of Congress has been to protect vested water rights in the seventeen "desert land" states. This is best shown by reference to a few of such acts. Thus, for example, Section 8 of the Reclamation law of 1902 provides:

> "Nothing in this Chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory by relating to the control, appropriation, use, or other distribution of water used in irrigation, or any vested right acquired thereunder. . . ."[15]

A more recent declaration of the same intention is expressed in the 1944 Omnibus Flood Control Act, as amended in 1947.

> ". . . . it is hereby declared the policy of Congress to recognize the interests and rights of States, . . . to preserve and protect to the fullest extent established and potential uses, for all purposes, of the waters of the Nation's rivers; . . . ."[16]

> "The use for navigation . . . of waters arising in States wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."[17]

Upon considering this very brief background of authority supporting the contentions of the contestants in the *Gerlach* case, the correctness of the reason for the Supreme Court's conclusion may seriously be questioned. As in every case of interest, the soundness of a decision can only be ascertained by a careful

[13]Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, at p. 525, 61 S.Ct. 1050, 85 L.Ed. 1487 (1941). See also Kinney, note 12 *supra*, at pages 597 to 600 where the same principle is stated.
[14]See note 3 *supra*, at page 957.
[15]June 17, 1902, Ch. 1093 § 8, 32 STAT. 390, 43 U.S.C.A. 383.
[16]Dec. 22, 1944, Ch. 665, § 1, 58 STAT. 887 as amended July 26, 1947, Ch. 343, § 205 (a), 61 STAT. 501, 33 U.S.C.A. 701-1.
[17]*Id.* 33 U.S.C.A. 701-1 (b).

viewing of the grounds on which the Court rejected one party's agrument and accepted the other's. So here, why did the Court reject the government's argument by saying, "We conclude that, whether required to do so or not, Congress elected to recognize any state-created rights and to take them under its power of eminent domain."?[18]

Here, once again, the Supreme Court has been called upon to decide whether the owner of a water right acquired under State law has a sufficiently substantial right to protect him against a taking without compensation by the Federal government pursuant to the exercise of its power under the Commerce Clause.[19] And once again it has left the question undecided. It is submitted that this is to the consternation of those thousands of people of the West who are possessed at the present time with valuable property rights in water,[20] and who are, in most cases, dependent upon such water rights for their livelihood.[21] Under this decision it is entirely possible, if Congress should elect to do so, for virtually every acre-foot of water to be claimed as belonging to the Federal government and to be taken without compensation to either the States or the individual owners in the States.[22]

As was suggested in the previous paragraph, this is not the first time in recent years that the Supreme Court has been called upon to decide this question. In the case of *Nebraska v. Wyoming*,[23] the government asked the Court to hold that Section 8 of the Reclamation law was not mandatory on the Secretary of the Interior, but merely directory, and the Court answered by saying, "Whether they [water rights] might have been obtained by

[18]See note 3 *supra*, at p. 963.

[19]See note 11 *supra*. See also in this connection Gilman v. Philadelphia, 70 U.S. 713 (1865). "Commerce includes navigation. The power to regulate commerce comprehends the control, . . . of all the navigable waters of the United States . . . ." p. 724.

[20]1 WIEL, WATER RIGHTS IN THE WESTERN STATES, p. 787. (3d. ed. 1911) to the effect that riparian rights do exist in navigable streams. See also HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST, p. 37 (1942), and 1 KINNEY, IRRIGATION AND WATER RIGHTS, pp. 798, 799. (2d. ed. 1912).

[21]See note 1, *supra*.

[22]In the event that Congress should so elect, consider what one writer says. "Water is of such vital and increasing importance that its control would give its possessor a mastery over his fellows and opportunities for tyranny and extortion possessed by no autocrat of any previous empire, visible or invisible, feudal or industrial. The people may well be concerned by any gesture in that direction." JOHNSON, FEDERAL AND STATE CONTROL OF WATER POWER. (1928) p. 114.

[23]65 S.Ct. 1332, 325 U.S. 589, 89 L.Ed. 1816 (1945); 66 S.Ct. 1, 325 U.S. 665, 89 L.Ed. 1857 (1945).

Federal reservation is not important . . .'"[24] for here there had been compliance with State law, and compensation provided for.

The failure of the Supreme Court to declare affirmately what the law is in regard to water rights is regretable for the uncertainty that now exists in the law is not, to say the least, conducive to a feeling of security in present and future holders of water rights.[25] This is so, for as we have seen, 'exclusion' of water users from the benefits of the flow of a navigable stream without compensation is 'entirely within the government's discretion,'[26] and the stream no longer must be found to be navigable in fact for it is sufficient if it is navigable in law.[27] And, the Federal government's paramount right exists not only in those streams that are navigable in law, but also in their tributaries.[28] It is an idle question to ask how many rivulets and mountain streams do not connect somewhere in their course to the ocean with a stream that is navigable in law. Therefore, what guaranty is there that these property rights will be recognized and protected?

The apparent basis for the now existing western water right is the Desert Land Act of 1866.[29] Section 8 of the Reclamation law of 1902 purports to recognize and protect those rights. As far as the decisions show, only two have interpreted this section. In the early case of *Burley v. U.S.*,[30] it was held:

> "The Act of June 17, 1902, not only recognizes the Constitution and laws of the State providing for the appropriation of its waters and the reclamation of its arid lands, but it requires that the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformity with such laws.'"[31]

The other decision is in a case involving similar rights to those involved in the *Gerlach* case, and on the same river, the San Joaquin.[32] Its import is somewhat limited by the fact that it was decided just prior to the *Gerlach* case, and by a district court; however, it is believed that regardless of this fact, certain parts of the opinion serve to give a clear and correct exposition of the law. In it, the court held:

[24] *Id.* 352 U.S. at page 612, 616.
[25] This group includes all agricultural, industrial, municipal, and domestic users.
[26] See note 10, *supra.*
[27] *Id.*
[28] See note 13, *supra.*
[29] 14 STAT. 253. See also, the Act of Feb. 26, 1897, 29 STAT. 599; Kinney, *op. cit.* note 1 *supra*, at pages 1025, 1026, 1027, 1028.
[30] 179 F. 1, 102 C.C.A. 429 (1910).
[31] *Id.* at page 9.
[32] Rank v. Krug, 90 F.S. 773 (1950).

> "The question of property in water rights is to be determined by and under local and State law except in so far as Congress may exercise its Constitutional power to regulate navigable waters for flood control under Const. Art. I, Sec. 8."[33]

Here are two decisions where the question was directly passed upon. In the first case, it was said that the Secretary of the Interior was required to proceed in conformity with State laws. As far as this limitation goes, the case merely requires that when the government seeks to obtain water rights for reclamation purposes, under its right as a proprietor of Western lands, it must obtain rights in the same manner as any other seeking to obtain similar rights. In other words, all the court says is that the Desert Land Acts confer upon the States the power of administration and regulation of the waters flowing within its boundaries. The control, as distinct from the right to the waters, is in the States. The second case cited expressly says this is the situation. Under these rulings, if the government chooses to proceed in conformity with State laws, the water rights will be paid for; but, if the government chooses to proceed under its navigation easement, there will be no compensation. Therefore, it is apparent that up until the time the *Gerlach* case was decided, whether or not vested rights in water were valuable, in terms of whether they would be paid for when taken by the Federal government for one of its multi-purpose dam projects, depended solely upon the wishes of the government as expressed by Congress.[34]

It is respectfully submitted that those readers of this very recent decision who have interpreted it to mean that the Federal government will hereafter be required to recognize and compensate for vested water rights in the West, and feel that there will now be a uniform rule that owners of water rights along a navigable stream who are deprived of those rights will be compensated, regardless of the reason for the destruction of the right,[35] and who believe that the "paramount rights theory" is re-

[33] *Id.* at page 789.

[34] If this interpretation is correct, it is interesting to take notice of the fact that the wishes of the government are decided by a Congress in which the seventeen states lying west of the 97th meridian have only 94 votes in the House of Representatives, and 34 votes in the Senate, as compared with 341 votes, and 62 votes respectively in the other States having little to no interest in preservation of water rights of the West. WORLD ALMANAC. (1951) p. 768.

[35] 38 CAL. L. REV. 758, 761.

jected,[36] are giving more credit to the decision than is rightfully due.

This is not to say that the Court's decision in the *Gerlach* case is wrong, for it is clearly supportable when considered apart from the question of the import to be given to the Reclamation Act of 1902. It is supportable on the ground that the Court placed it.[37] And, as Kinney observes,[38] rights in water may be condemned under the power of eminent domain for agricultural uses, with or without the condemnation of the land itself, but, in such cases, there must be just compensation, otherwise there would be a violation of the constitutional guaranties.

In support of the contention that the Court here did not base its ruling upon any rejection of the "paramount rights theory," it is suggested that the Court was bound to affirm the judgment of the lower Court for two reasons.

I. Here, although the government asked the Court for a decree absolving it from any duty to compensate, it had already purchased and paid for these identical rights at the price allowed by the lower court.[39] Granting the fact that the Court refers to this and states that it is not bound by administrative mistakes, yet such was the situation here that if the Court had awarded a judgment for the government, the money previously placed in escrow would go to a third party, and the rightful claimant, plaintiff in the original action, would receive nothing.[40]

II. The Federal government had no superior navigation easement over this river, and therefore, it could not take away claimants rights without compensation. That is to say, it could only exert its power of eminent domain subject to the limitations imposed by the 5th Amendment.[41] The Federal government did not have a superior navigation easement because this, the San Joaquin River, was not a navigable stream of the United States, in contradistinction to a navigable stream of a State.

[36]38 CAL. L. REV. 600. "Presumably the principal point of general legal interest with respect to Reclamation projects in the decision [Gerlach case] is the rejection of the 'paramount rights theory'."

[37]See note 3, *supra*, at p. 962. ". . . the power of Congress to promote the general welfare through large-scale projects for reclamation, . . . is now as clear [under its power of eminent domain] and ample as its power to accomplish the same results directly through resort to strained interpretation of the power over navigation."

[38]2 KINNEY, IRRIGATION AND WATER RIGHTS. (2d. ed. 1912) p. 1955. And see note 29 *supra*, at page 11.

[39]See note 3 *supra*, at page 964.

[40]*Id.*

[41]U.S. Constitution. Fifth Amendment. ". . . nor shall private property be taken for a public use without just compensation."

That there is such a distinction between these two types of streams has been recognized by writers,[43] by Congress,[44] and by the courts.[45] It is granted that in the main, this distinction will seldom be important for the simple reason that there are very few streams that are not tributaries to an interstate stream, yet if there is such a distinction, this would seem to be a proper case in which to recognize it.

This position is further strengthened by the *Krug* case[46] decided just prior to the *Gerlach* case, wherein it was said:

> ". . . it is judicially noted that the San Joaquin River is a natural water course; it, together with its tributaries, arises and flows wholly within the State of California; . . . ."[46]
>
> ". . . neither the San Joaquin nor the Sacramento Rivers are interstate streams . . . ."[47]

This much being true, the Federal government stood, at the time this action was commenced, in the position of a sovereign exercising its power of eminent domain. And the Court so held.[48] Therefore, this was not a situation where the government could invoke its superior easement and deprive claimants of their property rights without compensation, and the Court did not hold that compensation must be made for a taking of water rights in all those cases where the government seeks to promote watershed

[43]Kinney, *op. cit. supra*, note 1, at page 575. "The navigable waters of a State, as distinguished from those of the United States, are wholly under the jurisdiction of the State wherein they are found. . . . A body of water wholly within the boundaries of a single State or one which is navigable only within a State, and on which can not be visited by vessels coming from or going to, by continuous voyages, navigable waters of other States, is not a navigable water body of the United States, and is not within the jurisdiction of Congress."

[44]Federal Power Act, Sec. 3 (8), as amended Aug. 26, 1935, 49 STAT. 838. "Navigable waters means those parts of streams or other bodies which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, . . ."

[45]The Daniel Ball, 77 U.S. 557, at page 563 (1870). ". . . And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which commerce is conducted by water." And see also U.S. v. The Montello, 78 U.S. 11 (Wall.) 411, 20 L.Ed. 191 (1870), and Gilman v. Philadelphia, note 19 *supra*. 56 Am. Jur. 656.

[46]See note 31 *supra*.

[46]*Id.* at page 783.

[47]*Id.* at page 795.

[48]See note 3 *supra*, at page 963.

development, flood protection, navigation, or conservation of water for irrigation and domestic purposes.

In conclusion, this contention may be summed up as follows: The Federal government was bound to compensate for claimant's rights, not because the Court interpreted the Reclamation Acts and amendments thereto as requiring it to do so, but because the San Joaquin River is not a navigable stream of the United States within the common definition of that term. Therefore, the Federal government could not exercise its superior navigation easement as it had the power to do over all navigable streams of the United States and their tributaries under the Commerce Clause; but it had to proceed in conformity with its power to promote the general welfare, as limited by the Fifth Amendment.

In the light of the history of water in the United States, it is difficult to see on what other grounds the decision may be sustained. Historically, upon the cession of territories after the Revolution, the United States became the owner of all the land and water west of the Mississippi and, under the common law rule, became the sole riparian proprietor. Being the exclusive owner, subject only to those rights acquired by competent authority before they were obtained by the United States, the Federal government could dispose of them in such manner and by such titles as it deemed advantageous. It is uniformly held that in disposing of these rights to new states, it reserved the use of all navigable waters to the public.[49] The more recent cases have extended this doctrine of reserved waters to include, not only those waters navigable in fact, but also those navigable in law, and their tributaries. With this historical background, there is little room for a contention that the *Gerlach* case abolished the "paramount rights theory," and requires the government in the future to compensate for a taking of vested rights in a navigable stream.

Even though it may be admitted that Congress has expressed its intention to protest these vested rights,[50] and the courts have purportedly enforced this policy, it is apparent that the power of the Federal government may still, under the guise of proceeding under the Commerce Clause, transcend the use of water rights acquired under State law by freely taking water for multipurpose reclamation projects. It is apparent that, thus far, provisions in Congressional acts relating to the development of the arid west with respect to observance of State laws and rights

[49]Kinney, op. cit. note 1, *supra*, at pages 574, 634, 756.
[50]See notes 14, 16, and 29, *supra*.

acquired thereunder have had no effect in limiting the power of the Federal government, or as a corollary, in protecting State rights and the rights of individuals in those States.

It is in the interest of the States of the West and of the people of those States that these rights be protected from further deprivation without compensation. In order for this to be accomplished, more must be done than an insertion of a clause in Congressional acts stating that it is the intention or the policy to recognize such rights, for as we have seen, such has been done in the past, and to no avail.

The final solution rests in Congress. It must be impressed with the importance of the need for a recognition by it that everything in regard to water should be done to advance the concept that the right to, the control and regulation of, and the utilization of water in the West should be in accord with the principle that the highest use is for domestic consumption and agricultural purposes; that water should be acquired only under and with respect to State law; and that only by the payment of just compensation may a person be divested of a valid water right, regardless of whether it is in a navigable stream or not.

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