

LIMITS ON STATE POWER TO MANAGE WATER RESOURCES: INTRODUCTION

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With more and more emphasis on water resource planning and management at the state and local levels of government, it is useful to explore the legal restraints that exist on the exercise of this planning and management function. The authors in this issue of Update explore many of the basic restraints that are imposed from outside the state with a particular focus on recent developments. Because the focus is on restraints from outside the state, the symposium does not deal with self-restraints such as the state constitutional provisions found in many western states that specify a regime for water resource management. However, the public trust doctrine is dealt with even though there is some question as to the source of the doctrine. All of the outside restraints have some relationship to the federal government. In a way all of the restraints are tied to the U.S. Constitution, some more directly than others.

The first question to be asked is whether there is authority to regulate the water resource in the first instance. At least in theory states have the plenary police power while the federal government is a government of only enumerated powers.

Early federal legislation dealing with water resources was justified on the basis that Congress through the Commerce Clause of the United States Constitution had power to regulate the navigable waters of the United States as they were the situs of the most important commerce in the nation. (*United States v. Appalachian Electric Power Co.*) The commerce clause provides simply and in its entirety: "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." (U.S. Const., art. I, § 8, cl. 3) Over the years as the U.S. Supreme Court's view of the Commerce Clause evolved and its scope thereby expanded, we came to the time where it was no longer necessary for the Congressional legislation dealing with the water resource to be limited to navigable waters. (*Kaiser Aetna v. United States*) While Congress was to continue using the phrase navigable waters such as in the Clean Water Act, it is clear that the validity of the federal legislation can be

tested on the basis not just of whether it involves an article in commerce or a mode of commerce but also on whether or not the activity or thing being regulated has a substantial effect on interstate commerce. Thus in recent times a federal court upheld federal regulation of the Rito Seco Creek located entirely within Costilla County in Colorado because two reservoirs collected all the water of the Creek which was then used for recreation and to irrigate crops that when harvested were sold in interstate commerce. (*United States v. Earth Sciences, Inc.*) However, also recently a different federal court showed reluctance to allow federal regulation of small isolated water bodies on the basis that ducks or other waterfowl traveling interstate used the water as a stopping off point. (*Hoffman Homes, Inc. v. Administrator, U.S.E.P.A.*) The Court ultimately concluded with reference to one of those bodies of water (labeled Area A and consisting of a bowl shaped depression of about 1 acre in size which collected water from time to time) that "the migratory birds are better judges of what is suitable for their welfare than are we Having avoided Area A the migratory birds have thus spoken and submitted their own evidence. We see no need to argue with them." Area B was not an isolated wetland but rather was located adjacent to an otherwise navigable body of water so that Hoffman Homes did not appeal the decision that regulatory power extended to that body.

Why is it of concern to states that the federal government has power to deal with the water resource? The U.S. Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...." (U.S. Const. art. VI, cl. 2). Professor Kelley explores the indirect restraint that this provision, commonly known as the supremacy clause, places on state power. However the fact that the federal government has acted with respect to a particular water resource does not mean that the state government has no power to act. This lack of understanding of our federal system was exhibited recently in the context of a water

project being developed by a local community in Illinois. Because the community had obtained permission from the Corps of Engineers which has to approve any deposit of dredge or fill material into a wetland and because the Corps had also determined that the federal endangered species act would not be violated by the project, the community appears to have assumed that it did not have to comply with the state endangered species act. This assumption would, however, be erroneous because states are permitted to have their own endangered species acts which can both cover additional species not covered under the federal act and be more stringent than the federal act on covered species. What states cannot do is act when the federal government has pre-empted the field or when the state action would conflict head-on with what the federal government expressly allows or expressly forbids.

But even though the federal government has not acted, the commerce clause as interpreted by the U.S. Supreme Court is a two-edged sword. As well as giving the federal government power, it restrains state power. Professor Grant explores the restraint that the “negative commerce clause” imposes on state water resource management and planning.

In addition to the commerce clause, the U.S. Supreme Court has also identified several other powers enumerated in the Constitution that allow the federal government to act regarding water resources. First, the Court said that the treaty power gives the federal government authority to enter into treaties that relate to water resources. (U.S. Const. art. II, § 2, cl. 2: “He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur”) This early case (*Missouri v. Holland*) involved the treaty with England (on behalf of Canada) to protect migratory waterfowl. The United States has entered into treaties and other agreements with Canada and Mexico concerning use and management of shared water resources. As noted above, the supremacy clause in the U.S. Constitution makes these treaties the supreme law of the land and, therefore, to the extent that they contain restraints on U.S. use and management of shared water resources, the states, in turn, will be restrained in planning for and managing those resources. However, even without these treaties principles of international law would apply to those water resources.

Somewhat akin to international law, states that share water resources, whether lakes or streams, do not have total control over the lake or stream in their state portion

of it. Here solutions to disputes are handled through original jurisdiction of the U.S. Supreme Court, through negotiation and approval of interstate compacts, and through Acts of Congress. The Supreme Court has developed the doctrine of “equitable apportionment” under which it allocates interstate waters among the relevant states. Once the Court has apportioned the water the upper state is required to let water pass to the lower state even though some private users in the upper state who now will not get water may have earlier use rights than users in the lower state. (*Hinderlider v. La Plata River & Cherry Creek Ditch Co.*) Around forty interstate compacts have been entered into that deal with water allocation or water pollution control. (Grant, *Water Apportionment Compacts Between States*; Beck, 1991) Because states voluntarily enter into compacts, these might be viewed as self-imposed restraints. Congress has exercised its power to allocate interstate waters only twice apart from approving interstate compacts. The first instance of congressional allocation involved the Colorado River and the second involved the Truckee and Carson Rivers and Pyramid Lake. (Grant, *Apportionment by Congress*)

In addition to the above sources of power, the U.S. Supreme Court has recognized two other constitutional powers as important sources of power for the federal government to regulate the water resource. The first is the property clause. This clause gives Congress power “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” (U.S. Const. art. IV, § 3, cl. 2) With the United States government still owning almost one-third of the land area of the United States this is an important power. The U.S. Supreme Court has held that the federal government has reserved water from the public domain to satisfy the primary needs of discrete land reservations whether Indian Reservations (*Winters v. United States*) or National Forests (*United States v. New Mexico*). The U.S. Supreme Court also has recognized the taxing and spending power as a separate source of power, particularly important for sustaining some federal water projects. (*United States v. Gerlach Live Stock Co.*) This clause provides that “Congress shall have Power To lay and collect Taxes ... to pay the Debts and provide for the ... general welfare of the United States....” (U.S. Const. art. II, § 8, cl. 1)

The second question to be asked is to what extent Congress has exercised its power to restrain state action with reference to the water resource. We could not begin to explore in detail all of the laws enacted by Congress,

under the various powers noted above, that put some restraint on the state's power to engage in water resource planning and management. However two authors do explore two specific areas of water resource management where Congress has exercised power that through the supremacy clause becomes binding on the states. Professor Royster explores the treatment by Congress of Indian Tribal reservations as states for purposes of water pollution control and Professor Davis explores federal flood control and wetlands regulation in the first of two related articles. Professor Davis's exploration covers not only where the water is being regulated as water but also where it is being regulated as the habitat of an endangered species.

The third and final question to be asked is whether even though there is authority to regulate, the state regulation goes too far. Here the principal restraints are the due process and takings clauses of the U.S. Constitution and the public trust doctrine, but obviously other restraints apply as well. Thus, for example, a public water utility would not be able to discriminate in providing water service on the basis of race as this would violate the equal protection clause. Only the takings and public trust doctrines are explored in this issue.

The U.S. Constitution provides "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (U.S. Const. amend. V) While the courts have decided that this provision applies only to the federal government, the same concepts are applied to states through the fourteenth amendment which provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." (U.S. Const. amend. XIV, § 1). For the most part the due process analysis in this context is a rather straightforward 3-question analysis. (Lawton v. Steele) Does the exercise of power by the state relate to a legitimate police power purpose (public health, safety, morals, or general welfare)? If not, it violates due process. Does the regulation that is imposed further the police power purpose (as commonly stated, do the means further the ends)? If not, it violates due process. Is the regulation that is imposed unduly oppressive (a balancing of the harm being corrected against the amount of restraint imposed)? If so, it violates due process. Thus there are three due process bases on which the state regulation might flounder.

Professor Davis in the second of his two related articles explores the takings clause in the context of floodplain

and wetlands regulation and endangered species protection. Finally, Professor Dunning explores the public trust doctrine as it relates to the water resource. Whatever the source of the public trust doctrine, it is clear that in many states the doctrine restrains state action regarding water resource management.

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