

FEDERAL PREEMPTION AND STATE WATER LAW

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A conspicuous federal presence can be detected in almost every aspect of natural resources use and development in the United States; from surface mining reclamation requirements in the coal fields of Indiana to protection of wild horses and burros on grazing ranges in Nevada to setting the terms of timber sales in the massive federal forest holdings in Alaska and the rest of the Pacific Northwest. The presence of the federal government is also apparent in the realm of water resources, from the TVA to Grand Coulee Dam, with Federal Energy Regulatory Commission (FERC) licensed facilities seemingly present on nearly every flowing stream in the country; and national water-based recreation areas ranging from ponds the size of football fields to Lake Powell.

But while the historical pedigree of the federal presence on our waterways is impeccable (the Army Corps of Engineers has existed since before the adoption of the United States Constitution), and the acknowledged authority of the federal government over at least navigable waters vastly predates the New Deal and the coming of the modern regulatory state (Gibbons v. Ogden in 1824), one cannot fairly say that federal rules dominate in the field of water law.

Indeed, while the United States' interest in harbors, canals, bridges, piers and other structures that relate to the public ability to engage in waterborne transportation has been a universal constant since the days of the Revolution, its interest in water for consumptive uses such as irrigation is only about a century old. Hydropower regulation has been the object of federal attention for slightly more than three quarters of a century, and federal water quality laws are largely a product of the last quarter century. In this absence of any congressional interest in establishing a legal regime for water allocation during the decades of western expansion in the 1800's, the States took it upon themselves to choose which theory of water rights, riparianism or prior appropriation, best suited their needs; a practice that Congress did not choose to disrupt retroactively, and that the Supreme Court approved in California Oregon Power

Co. v. Beaver Portland Cement Co. in 1935. For the most part, Congress has continued to demonstrate considerable respect for state water law regimes, even as different national interests have evolved. But, as will be discussed in the following materials, for some programs, most notably hydroelectric power generation, the federal government has been minimally respectful; for others, such as the Clean Water Act, a common choice has been to encourage "cooperative federalism"; and for yet another program, the reclamation program, state law (although with federal funds and management) has played a dominant role. Therefore, one also cannot fairly say that for all purposes, an analysis of federal-state relations in water will show a "consistent thread of purposeful and continued deference to state water law by Congress." (California v. United States referring to reclamation law.) A more apt characterization of the situation is that it involves "a concoction of Byzantine politics and legalistic archaeology". (Goldberg)

THE SUPREMACY CLAUSE AND THE PREEMPTION DOCTRINE

The immense variation in federal and state roles has made preemption analysis particularly unpredictable. For purposes of focusing on the preemption issue, this article assumes that in any specific case of possible friction between the national government and state law, ample congressional authority existed to enact the federal law. That being the case, the Supremacy Clause provides

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

(U.S. CONST. art. VI, cl.2) Being the Supreme Law of the Land, however, is not the same as being the Only Law of the Land. Preemption analysis is the tool developed by the judiciary to determine the instances when state law must yield. The key to understanding the analysis is that

it does not involve an examination of federal power, which is a separate issue, but rather involves an inquiry in to federal *intent*. It is also important to understand that not only congressional statutes, but also federal agency regulations may preempt state law; but only if those regulations are within the authority delegated to the agency by the legislative branch. One distinction that may exist between legislative and administrative preemption is that while it is *always* true that the federal government's intent to displace state law must be manifestly clear, and that courts will not "lightly presume" such a purpose, they will be even more exacting in their search for preemptive intent in cases involving alleged agency, versus congressional, ascendance over the States.

PREEMPTION ANALYSIS

Occasionally, Congress is sufficiently concerned about federal supremacy in an area that it expressly spells out its preemptive intent on the face of the federal law. This is called "express preemption"; and given the historical respect for state property law in general, and state water law in particular, it will not often occur in the water law arena. The closest analogue may be in some provisions of the Clean Water Act, where Congress dictates that certain requirements must be met, and provides for Environmental Protection Agency (EPA) enforcement if necessary. Most frequently, however, the States are allowed to have more stringent requirements (although certain bills introduced in the 104th Congress would have changed this). Furthermore, in many instances under the Clean Water Act, Congress utilized the "cooperative federalism" model of regulation, and invited the States to take over certain programs. For example, the majority of §402 (33 U.S.C. §1342) NPDES permit systems have been assumed by the States. This is a far cry from the typical express preemption scenario where the state role is entirely displaced. In addition to "express preemption", however, there are two different kinds of "implied preemption" analysis. These are the "field preemption" and the "conflict preemption" models.

In "field preemption" cases, the facts involve either a detailed and "pervasive" federal statutory and regulatory scheme; or a "dominant" federal interest; or both. In such cases, the palpable assertion of (or need for) unimpeded federal control leads the courts to attribute to Congress an intent to "occupy the field", leaving no room for state law. "Field" preemption has occurred in such areas as immigration policy (although not the entire law relating to aliens); nuclear power plant safety (although

not the entire area of state tort remedies); and interstate (although not intrastate) transportation of natural gas.

Given the lengthy history of the federal involvement in navigation, one might think that this would qualify as an area of "dominant" (and exclusive) federal interest. There is, however, an almost equally venerable historical role assumed by the states over navigable waters that refutes that notion. Under the Equal Footing Doctrine, upon statehood all of the States acquired title to the beds and banks of navigable waterways (unless they had previously clearly been reserved or disposed of to other parties) (Pollard's Lessee v. Hagan). Clearly, some concurrent state authority over those waterways has always been recognized; although the accompanying federal regulatory presence has not diminished perceptibly. Both sovereigns play on this "field"!

Realistically, the only area in water law where "field preemption" appears to have any role is the area of hydroelectric power generation (Sayles Hydro Association v. Maughan). It is indisputable that the federal government has a weighty interest in energy issues - there is even a cabinet level position dedicated to the area. The TVA and the BPA are examples of federal concentration on hydroelectric power, specifically. Furthermore, since the passage of the Federal Power Act in 1917, there has been a federal statutory and regulatory (originally the Federal Power Commission and now FERC) scheme that could legitimately be termed "pervasive". Nonetheless, Congress clearly never intended to absolutely occupy the field. Protection for state laws "relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein" was dictated by §27 of the original 1917 Act (16 U.S.C. §821). Although this section was given what many believe to be an unnecessarily cramped reading in two United States Supreme Court decisions spanning four decades (First Iowa Hydro-Electric Cooperative v. Federal Power Commission and California v. FERC); resulting in the preservation of only "proprietary interests" created by state laws, and not all state laws; it is still not an instance where there is "no room" for the States. They may not be able to effectively "veto" a hydropower project that has a federal "blessing", but they can protect property rights. An intriguing issue for the millennium is how the First Iowa and California v. FERC decisions will be applied to states that treat non-consumptive, instream uses *as* property rights.

Furthermore, and quite possibly more importantly, in the

“face”, so to speak, of the 1917 law, Congress itself has given the States a powerful tool for the protection of instream values. Section 303 of the Clean Water Act (33 U.S.C. §1313) requires states to adopt water quality standards and includes an “antidegradation policy”. Section 401 of the Clean Water Act (33 U.S.C. §1341) requires that applicants for federal licenses or permits for activities that may result in discharges into the state’s waters shall provide the federal licensing agency with a “certification” from the state. The certification will set forth those provisions necessary to assure, among many other things, that the applicant will comply with any “appropriate requirement of State law.” In 1994, the Supreme Court held that a state could include minimum stream flows as part of their (federally required) water quality standards, and that such minimum flow levels qualified as an “appropriate requirement of State law” under §401 (PUD of Jefferson County v. Washington Department of Ecology). Thus, the States are now enabled under one federal statute, the Clean Water Act, to exercise considerable authority over licensing under another federal statute, the Federal Power Act. Clearly, at least part of the “field” of hydroelectric power regulation is now shared with the States.

At last we come to “conflict” preemption, by far the most likely model for preemption analysis in the area of water law. “Conflict” analysis is really a two step process. First, one must ascertain with fair precision what the relevant federal and state laws dictate. This may be an arduous process in itself, entailing an odyssey through reams of statutes; tomes on the rules of statutory construction; and a deluge of legislative history. Then, as a second step, the courts compare the federal and state law, and set aside those aspects of the state law that directly conflict with the federal law, as well as those that “frustrate” the accomplishment of the objectives of Congress. The field is not “occupied”; state laws that are consistent with federal programs are welcome. Conflict preemption cases are necessarily decided on a case by case basis; one decision will not likely serve as very persuasive authority in another case involving different federal or state laws.

The reason why “conflict” preemption is the usual suspect for preemption analysis in the water law arena is the prevalence of what are known as “savings clauses”; express provisions in federal statutes that dictate some level of solicitude for state laws. The cases have uniformly rejected a literal reading of these savings clauses; that is to say, the courts have not read them to abolish outright any possibility of preemption. One such

recent case was United States v. Glenn-Colusa Irrigation District, where the court held that a requirement in the Endangered Species Act that federal agencies cooperate with state governments did not mean that state water rights prevailed over, or provided an exemption from, the Act’s prohibition on the “taking” of an endangered species.

The presence of a savings clause, however, is certainly persuasive that Congress did not intend to occupy an entire field to the total exclusion of the States. Hence, the emphasis in the case law has been to see exactly how the federal rules and the state rules can coexist, if at all. If an irreconcilable conflict arises, however, a clearly stated federal directive will prevail. The narrow reading of the savings clause in the 1917 Federal Power Act has already been described; but that constricted approach has not been workably transposed to other scenarios, perhaps because the highly visible and active federal role in energy regulation finds few counterparts elsewhere. (Or perhaps because the hydropower cases are historic relics, maintained for their antiquarian interest and a certain reverence for stare decisis.) In any case, two other savings clauses have received considerable judicial attention, and illustrate how the courts may attempt to reconcile potential disagreements between federal and state law.

Such reconciliation has occurred in interpretations of section 101(g) of the Clean Water Act (33 U.S.C. 1251(g), also called the “Wallop Amendment”), largely by avoiding dealing with the issue in a head-on fashion. This has been possible under the facts in the cases where §101(g) has been raised as an argument. The section provides that the States’ water allocation authority “shall not be superseded, abrogated or otherwise impaired,” and nothing “shall be construed to supersede or abrogate rights to quantities of water which have been established by any state.”

It is easy to describe fact patterns where application of the Clean Water Act could result in a direct collision with, for instance, the amount of an appropriative water right. (“Dilution is the Solution to Pollution...”) The litigated cases, however, have not to date involved such fact patterns. In United States v. Akers, a farmer tried to use §101(g) as support for an unpermitted filling of wetlands to create more farm acreage. The Ninth Circuit Court of Appeals had no trouble discerning that no state water right was involved; at most there might be an “*incidental effect*” that would not implicate the Wallop Amendment.

In Riverside Irrigation District v. Andrews, the Tenth Circuit determined that in implementing §404 of the Clean Water Act (33 U.S.C. §1344), the Army Corps of Engineers was required to consider impacts on endangered species (there, how building a proposed dam could affect downstream whooping crane habitat). Although §101(g) indicated that the Corps should accommodate the state's water management, the court held that the section could not "nullify" the clear dictates of the Endangered Species Act.

The Supreme Court finally addressed §101 (g) in PUD#1 of Jefferson County v. Washington Department of Ecology, where it appeared to agree with the "incidental effects" language of Akers (which in turn, is based on language from a statement made by Senator Wallop in the legislative history of §101(g)). In short, the "incidental effects" test focuses on whether the federal actions under the Clean Water Act are focused on water quality/pollution abatement (or prevention) controls. If so, "incidental" interferences with state water quantity rules are tolerated. But, in PUD#1, it was the *state itself* that was curtailing a proposed project. Thus, none of the major §101(g) cases have yet addressed a true collision between federal action under the Clean Water Act and an "established" water right as such.

This is not true in the area of reclamation law, where several landmark conflict preemption cases have been decided, and the States have had their greatest triumph. The relevant savings clause is §8 of the Reclamation Act of 1902 (43 U.S.C. §§372, 383), which provides that

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State...relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and *the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws...*

(emphasis added)

The first major §8 case was not a victory for state law. The federal statutes that had established and expanded the reclamation program through the development of massive water storage and delivery systems throughout the West had consistently required that water deliveries from federal projects would be limited to relatively small tracts suitable for the family farmer. These federal provisions were known as the Excess Lands Laws, or

Acreage Limitation Laws, and had existed since 1902. When larger farming operations attempted to raise California law (which did not limit the size of holdings) as a bar to enforcement of the federal law, the argument was rejected by the Supreme Court in forceful terms. The acreage limitation was a "specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects," and nothing in §8 "compels the United States to deliver water on conditions imposed by the State." (Ivanhoe Irrigation District v. McCracken)

Several additional cases followed the Ivanhoe decision, upholding increasingly broader and less specific claims of federal displacement of state law, until it appeared that the reclamation law savings clause might be as narrowly constricted as the clause in the Federal Power Act. The situation was dramatically reversed in 1978 in California v. United States. Rejecting a claim by the Bureau of Reclamation that amounted to an assertion of "field preemption" (the Bureau contended that the State of California had no authority to place any conditions whatsoever on a reclamation project), the Supreme Court adopted an exceedingly strict "conflict" preemption model of analysis that will operate most often to preserve state water law. Possibly because §8 explicitly provides that the Secretary of the Interior "shall proceed in conformity" with state laws (although the opinion does not spell out its reasoning on this point), no place for administrative preemption was recognized in California. For preemption to occur under the reclamation laws, the conflict with state laws must arise from a *congressional* directive. Furthermore, those directives must be "explicit" and "specific". Otherwise, state law will apply. Thus, unlike the case in the hydropower arena, where state rules rarely apply (unless the state is proceeding in conformance with its duties under the federal Clean Water Act), in the area of reclamation law, the states play a major role.

Even in the reclamation program, however, the Supremacy Clause dictates that state desires will give way to a specific directive of Congress. The ultimate power of the federal government has not been successfully challenged in any water case (although recent trends indicate that Congress may need to do a better job in making its intent to preempt more clear than it has at times in the past). Does this mean that the United States has committed itself to asserting its very considerable authority to the fullest? For the most part the answer seems to be "no"; albeit any ardent States' Rights purist would certainly disagree. Perhaps the failure to

“federalize” water law is due to political awareness, since championing the assertion of central government authority is currently not a popular position. Perhaps it is due to the recognition that water programs can be enormously expensive, and that continuing to operate and maintain the existing federal facilities is enough (and possibly too much). Perhaps there is some recognition of and sensitivity to history. Perhaps it is because when one carries a big stick (the Supremacy Clause), one can afford to walk and talk softly. In any event, the current federal approach may be exemplified by developments in Northern California. There are water quality and fish and wildlife problems of staggering proportions in the San Francisco Bay and the Sacramento/San Joaquin Delta. Upstream, the federal government has units of its premier water project, the Central Valley Project; the state also has the single largest state water project in the nation, the California Water Project. Although there has been controversy aplenty, and the parties faced considerable litigation in the 1980s and early 1990s, Congress did not choose to shove the state aside and dictate the measures to be taken to address the problem. Instead, the two governments have entered in to the “Bay Delta Agreement”. As is frequently true with agreements, the response elicited from many sectors (environmentalists, farmers, municipalities, etc.) is disappointment - agreements rarely produce clear “winners”. But accommodation, rather than subordination, may be the best long term relationship to build between two sovereigns.

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