Federal Limitations on State Water Law

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Federal Limitations on State Water Law

Erratum
Issue 3
PRIVATE rights to the use of the water of streams are generally recognized as the creatures of state law, and each state is free to choose the form that law shall take.\(^1\) A state's law of private water rights cannot be a self-contained unit, sealed off at the state lines, at which point the law of the adjoining state takes over. Two factors prevent this. First, water itself crosses the state lines or forms state boundaries, and what is done in one state will have repercussions in its neighbor. Secondly, the federated nature of American government will not permit such isolation, since the states are only quasi-sovereign. The Constitution gives the national government interests in water and powers to implement them, powers in some respects superior to those of the states, and the Constitution will not permit the states to act autonomously where extraterritorial effects of such action may harm a sister state.

The national interests that are served by federal water resource programs and laws are those inherent in the word "nation"—the use of the country's waters for the free flow of trade and travel between its different sections, for the strengthening of the country both internally and in its relations with foreign nations, and for the conduct of its national business. The federal government is one of delegated powers, and the Constitution gives to it powers to control commerce, provide for the common defense, make war, make treaties, control compacts between states, manage federal property, and provide for the general welfare of the country. All of these have been used to justify water regulation or resource development by the federal government.

The state powers to legislate in the field of water rights arise from the general sovereignty and imperium reserved to the states in the Tenth Amendment.\(^2\) The power to create property rights and the police power to regulate them, stemming from this reserved sovereignty, are the sources drawn upon in state regulation of private water rights. State water allocation laws have traditionally been directed to assigning water to individuals as property, in the form of rights to divert or store water and apply it to beneficial use to further the economic gain of the individuals. In the east most of this has been done by giving unfettered play to the doctrine of riparian rights, but recently much interest has been shown in reserving some measure of control in the best interests of the state and in preserving to the public certain rights to use the water

\(^*\) Dean and Professor of Law, University of Wyoming College of Law. The research for this article was performed as a part of the program of studies in water law undertaken by the University of Wisconsin Law School in cooperation with the United States Department of Agriculture, and is in part based on research performed by Associate Professor G. Graham Waite of the University of Buffalo School of Law, who also participated in that study. This paper was delivered, under a different title, at the Water Rights Conference held by the Michigan State University Cooperative Extension Service at East Lansing, Michigan, March 29-30, 1960.

in place for transportation, boating, fishing, and swimming.\textsuperscript{3} The balance between these public and private rights, the extent that private rights may be acquired or exercised, the security given to private rights, the shaping of the future development of water resources, are all matters of local interest with which the states are quite properly concerned.

But the division between powers delegated to the United States and those reserved to the states under our dual form of government is not always sharp and clear. The state and federal interests will not always coincide, and their laws may clash, where they deal with the same waters. The subject of water rights is one of those peculiarly subject to all of the uncertainties raised by the overlap of seemingly exclusive jurisdictions.

I. The Commerce Power

The most important source of federal jurisdiction over water is in relation to navigable water. This power depends upon a rather attenuated construction of Article I, Section 8 of the federal Constitution, giving Congress the power "to regulate commerce . . . among the several States." In \textit{Gibbons v. Ogden},\textsuperscript{4} Chief Justice John Marshall said that "commerce" includes "transportation" which in turn includes "navigation". In \textit{Gilman v. Philadelphia},\textsuperscript{5} the power to regulate navigation was held to comprehend the control of navigable waters for the purpose of navigation. The power to control navigation and navigable waters includes the power to destroy the navigable capacity of the waters, and prevent navigation, by the construction of obstructions.\textsuperscript{6} It also includes the power to protect the navigable capacity by preventing diversions of the water itself,\textsuperscript{7} or of nonnavigable tributaries that affect navigability,\textsuperscript{8} or by preventing obstructions by bridges\textsuperscript{9} or dams\textsuperscript{10} or by constructing flood control structures on the navigable waters or on their nonnavigable tributaries or even on the watersheds of the rivers and tributaries.\textsuperscript{11} The powers to prevent obstruction in turn lead to powers to license obstructions.\textsuperscript{12} The power to obstruct leads to the power to generate electric energy from the dammed water.\textsuperscript{13}

Using this somewhat flimsy looking, but by no means shaky, structure for a foundation, Congress has built a huge program of river regulation and water

\begin{itemize}
\item \textsuperscript{4} 9 Wheat. 1 (U.S. 1824).
\item \textsuperscript{5} 3 Wall. 713 (U.S. 1865).
\item \textsuperscript{6} Oklahoma v. Atkinson, 313 U.S. 508 (1941); South Carolina v. Georgia, 93 U.S. 4 (1876).
\item \textsuperscript{7} Sanitary District of Chicago v. United States, 266 U.S. 405 (1925).
\item \textsuperscript{8} United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899).
\item \textsuperscript{9} Union Bridge Co. v. U.S., 204 U.S. 364 (1907).
\item \textsuperscript{10} Economy Light & Power Co. v. U.S., 256 U.S. 113 (1921).
\item \textsuperscript{11} Oklahoma v. Atkinson, 313 U.S. 508 (1941).
\item \textsuperscript{12} United States v. Appalachian Power Co., 311 U.S. 377 (1940).
\item \textsuperscript{13} Ashwander v. T. V. A., 297 U.S. 288 (1936).
\end{itemize}
FEDERAL LIMITATIONS ON STATE WATER LAW

control. Buttressed by the general welfare clause and the property clause, the federal program is the most significant single factor in modern water regulation and conservation. Huge multipurpose projects combining features of navigation improvement, flood prevention, power production, irrigation and recreation, envisage in many cases the development of entire river basins.

These federal powers may be exercised in three ways, affirmatively, negatively, and permissively. The United States itself may take affirmative action, improving navigation channel and harbor facilities by dredging and constructing protective works. It may build dams for the purpose of storing water to provide a navigable stream by releasing the water during periods of low natural flow. It may build dams to protect the navigability of waters during floods and to prevent the navigable waters from doing flood damage to the uplands. Negatively, the United States may prohibit the interference by others with the navigable capacity of water over which it may exercise jurisdiction under the commerce clause. Permissively, the United States may license that which it may prevent, or delegate to others that which it may itself do.

A. Limitations on Power of State to Legislate

The existence of the federal power to control the navigable waters of the United States has thus far not resulted in any prohibition against state action vel non. The mere grant to Congress of the power to regulate commerce did not deprive the states of all powers over navigable waters and there is no indication of any intention on the part of the Congress to "occupy the field" and enact legislation so sweeping and comprehensive as to exclude all legislation on the subject by the states. Instead, the Supreme Court has recognized the vital interest of the states in the control of water resources, and has specifically conceded the power of the states to exercise control over navigable water for the interests of their citizens, saying that until Congress in some way asserts its superior power, such state action is not subject to challenge.

It has said that a state may establish regulations dealing with its local streams and also with the waters of the United States within that state in the absence of an assumption of jurisdiction by the United States over the navigability of its waters. The states were said to have a "traditional jurisdiction" subject to the admittedly superior right of the federal government to regulate interstate and foreign commerce.

15. Supra note 13.
18. Supra note 11.
19. Supra notes 7, 8, 9, 10.
B. Limitations on the Applicability of State Legislation

There seems to be no case in which a state water right law has been so closely restricted to navigable waters, as federally defined, that the entire statute fell before inconsistent Congressional legislation. State water rights legislation in the state’s “traditional jurisdiction” is usually aimed at local problems involving many waters that cannot be called navigable by any test, or only by the “state test”, and hence apply to federal waters only by general inclusion.

An inconsistency with federal law may do one of two things: it may prevent the state law from being applied to the federal waters, or it may only prevent the state law from being applied to a particular situation on those waters which give rise to the conflict. The state law remains untouched in form, and continues to be applicable to other waters to which the federal power does not attach, or to other controversies in which the federal interest does not arise.

An illustration of the first type of limitation was found in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission.* There, state requirements for licensing power projects and prohibitions against diversions of streams out of their watershed were held to have no application to navigable waters over which jurisdiction had been given to the Commission by Congress. Yet, of course, the state laws remained applicable to local waters in the state.

In *United States v. Rio Grande Irrigation Co.*, the limitation was of the latter type. That case involved a company which had appropriated water for irrigation under state laws applicable to all watercourses within its boundaries, but the particular appropriation was of such a large quantity that it would have had a substantial effect on the navigability of the Rio Grande and the required permission of the Secretary of War had not been obtained. An injunction against the diversion was granted, but this left the statute in full force for all other streams in the state and applicable still to any other appropriations of the Rio Grande that would not have the undesired effect.

Requirements of state law that a permit or license be obtained from state authorities before beginning construction of water control structures have no application to the United States when it constructs works on navigable streams. *Arizona v. California* was a suit brought to enjoin Ray Lyman Wilbur, Secretary of the Interior, from constructing Hoover Dam under authority of the Boulder Canyon Project Act. California and other states were in the suit only as necessary parties, since they claimed an interest in the waters of the Colorado River. The state claim of control over the dam and water rights, and the decision on these points are succinctly stated in the court’s opinion:

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27. 283 U.S. 423 (1931).
"The wrongs against which redress is sought are, first, the threatened invasion of the quasi sovereignty of Arizona by Wilbur in building the dam and reservoir without first securing the approval of the State Engineer as prescribed by its laws; and, second, the threatened invasion of Arizona's quasi sovereign rights to prohibit or to permit appropriation, under its own laws, of the unappropriated waters of the Colorado River flowing within the state. The latter invasion, it is alleged, will consist in the exercise, under the act and the compact, of a claimed superior right to store, divert, and use such water.

"First. The claim that quasi sovereign rights of Arizona will be invaded by the mere construction of the dam and reservoir rests upon the fact that both structures will be located partly within the state. At Black Canyon, the site of the dam, the middle channel of the river is the boundary between Nevada and Arizona. The latter's statutes prohibit the construction of any dam whatsoever until written approval of plans and specifications shall have been obtained from the State Engineer, and the statutes declare in terms that this provision applies to dams to be erected by the United States. . . . The United States has not secured such approval; nor has any application been made by Wilbur, who is proceeding to construct said dam in complete disregard of this law of Arizona.

"The United States may perform its functions without conforming to the police regulations of a state. . . . If Congress has power to authorize the construction of the dam and reservoir, Wilbur is under no obligation to submit the plans and specifications to the State Engineer for approval. And the federal government has the power to create this obstruction in the river for the purpose of improving navigation if the Colorado river is navigable. . . ." (Citations omitted)²⁸a

Federal supremacy gives freedom from State licensing requirements not only when the United States itself acts pursuant to its powers to control navigation, but also when it licenses others to do what it could do. The First Iowa case²⁹ involved an application for a federal license to build a dam, reservoir and power plant on the navigable Cedar River. The applicant had twice been refused a state permit to construct a plant on the site, and the state intervened before the Commission. The United States Supreme court held that the state's protests were unavailing, since the Federal Power Act was an instrument of federal policy, disclosing a vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation, by detailed provisions for a federal plan of regulation that left no room for conflicting state controls.

It is, of course, possible for Congress to exercise less than its complete power, and submit to state regulation as a matter of comity. For instance, the Reclamation Act of 1902 requires the Secretary of the Interior to proceed under state law in the prosecution of projects, i.e., to take out a state-licensed water right to appropriate water from streams on the public domain to irrigate public

²⁸(a). Supra note 27 at 451.
²⁹. Supra note 23. .
lands. Although Congress might have chosen a theory of federal ownership of the water and asserted federal water rights, instead it followed a long policy of permitting state law to control the appropriation of western water, and applied it even to water rights held by the federal government for federal purposes.

The Reclamation Act has been applied both administratively and legislatively to navigable waters. It was contended in *First Iowa* that Congress had made a similar choice in the power field by Section 9(b) of the Federal Power Act, requiring an applicant to submit to the F.P.C. "satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes." The State of Iowa argued that this language clearly contemplated a dual system of control and the exercise of appropriate powers by the state, as well as by the federal government, as indeed it seems to. By what has been called a "notable exegesis" the Court "read Section 9(b) out of the Act" and held that the applicant need only submit evidence that was satisfactory to the Commission of steps taken to secure state approval, but that actual compliance was required only with those laws that the Commission considered appropriate to effectuate the purposes of a federal license on the navigable waters of the United States.

Although the Court said the case "illustrates the integration of federal and state jurisdictions in licensing water power projects under the Federal Power Act," the only "duality of control" found by the Court was a sharp division of state and federal power, giving the United States final authority to issue licenses on navigable waters free from any state veto over the projects and free from the addition of state requirements to federal requirements.

Even though a power project is located on a nonnavigable stream, it is necessary to file a declaration of intention with the Federal Power Commission, which may require that a license be obtained if it finds that navigation or commerce will be affected. It is possible that in such a case the state interest in nonnavigable "local" waters would be recognized to the extent of requiring both a federal and a state license. But since the federal government may exercise jurisdiction over nonnavigable streams to protect its navigable rivers, a state project on such a river must yield to a federal project, and this may also be the case where the federal government licenses the inconsistent project.

34. Supra note 23.
C. Limitations on State Water Planning

Most states now have some form of agency empowered to study the possibilities of economic development within the state and to make recommendations or plans for the form that development should take. Few if any of these agencies have literally set up a blueprint for specific action, but many have attempted to indicate the general form development might best take and methods of seeing that it is accomplished. Single purpose agencies concerned with power, irrigation, pollution, and navigation have more narrow planning functions, and any agency with powers to give and withhold permits for water activities must have some pattern of development in mind. At a still lower level of planning, legislative design of some sort is implicit in laws that encourage or direct development along certain lines, or even in those laws that prohibit some forms of activity.

But a pattern of development that appears desirable to a state, not looking beyond its borders, may not fit into a federal development pattern for a river basin, a region, or for the nation as a whole. Here again the state must give way. To the extent that the federal plan is inconsistent with the state plan, the latter is superseded, and if it were a truly comprehensive and integrated plan, not only would the inconsistent features be eliminated but the remainder might be destroyed.

There are a number of examples of federal action overriding state controls designed to mold development into a pattern deemed desirable by the states. Arizona v. California has already been alluded to. In that case the major complaint of Arizona was that the Boulder Canyon Act authorized a project which when completed would prevent the state from exercising its right to prohibit or permit under its own law the appropriation of water flowing in or on its borders. The Court either did not grasp, or would not grant, that Arizona had any interest in the pattern of future appropriation or water development. It disposed of the issue by ignoring it, and based its decision on the fact that no existing appropriation was interfered with by the dam, nor would the Act prevent future appropriations of water that might be consistent with the project.

Another aspect of the First Iowa case demonstrates the supremacy of federal power even more forcibly. The power cooperative's development plan included a feature of diverting the Cedar River into another basin in order to get a greater drop and head for water power. This project obviously ran head-on against an Iowa statute requiring any water taken from a stream for power purposes to be returned to the same stream at the nearest practicable place. Rightly or wrongly, the legislature of the State of Iowa had decided that trans-divide diversions were against the policy of the state, and that developers of the water resources had to keep the streams in their original channels. This

38. Supra note 27.
39. Supra note 23.
was held to be of no avail if the project, though violating the state precept, furthered the federal objective of comprehensive development of national resources. "It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others."

The balancing of federal or regional interests against local and state interests was forcibly brought out in *Oklahoma v. Guy F. Atkinson Co.* 40 There the state planning function was more in the nature of a land use pattern, but there was in addition an unidentified water resource program. The state sought to enjoin the construction by agencies of the United States of a dam and reservoir on the Red River for joint purposes of flood control and power production. The project would inundate 100,000 acres of Oklahoma land, 3,800 of which were owned by the state, it would displace 8,000 persons, destroy productive farm land, stop the production and further development of oil resources, and seriously injure the state and local taxing units by causing the loss of taxable values and going concern values of the destroyed industry. The benefits of the project did not compensate Oklahoma for these losses; it was alleged that most of the power produced would be marketed in Texas, and the major flood control and navigation benefits would occur far downstream in Arkansas, and below the mouth of the Red in the lower Mississippi basin. The United States Supreme Court did not dwell on the congressional function, in authorizing the project, of balancing interests within the entire region, and the obvious unsuitability of state governments to make such a regional decision. It simply concentrated on the aspects of federal power to undertake the project, and closed its opinion denying the injunction with, "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. . . . And the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the 'superior power' of Congress."

But a national interest need not involve a region larger than a single state. The Cowlitz River, though navigable, lies wholly in the state of Washington. That state's Department of Game had evolved a comprehensive plan for the protection of anadromous fish (principally salmon and steelhead trout) which had led to the legislative adoption of the Columbia River Sanctuary Act prohibiting the construction of dams over 25 feet in height on the Cowlitz or other state streams tributary to the Columbia. The city of Tacoma applied for a license from the Federal Power Commission to build two dams, 500 and 240 feet high, to produce power for its industries. The Commission found a critical shortage of power existed in western Washington and issued the license over the objection of the state that the river should be left in a substantially natural condition for recreational purposes. On the strength of *First Iowa*, the state's

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40. 313 U.S. 508 (1941).
objections got short shrift from the Ninth Circuit, and the Supreme Court denied certiorari.41

**D. Effect on State-Granted Private Rights**

Since state powers in relation to navigable streams are not completely proscribed, most states treat them as they do other waters in granting or allocating private rights to the use of water.42 In the eastern states these allocations have been made principally by the recognition of riparian rights of the holders of property bordering the streams,43 in the west by permitting the appropriation of water to beneficial use.44 Such state-based rights cannot rise above the powers of the granting authority, and just as the state's powers are limited by the federal supremacy over navigable waters, the private rights are similarly limited.

The federal government may employ a sort of veto over the private water right, and prevent its exercise when inconsistent with a federal power or purpose. We have already seen that an appropriation of water may be prevented when it would divert and consume so substantial a quantity of water as to affect the navigability of a stream over which the United States has jurisdiction.45 A hydroelectric power dam that would constitute an obstruction to a navigable stream cannot be built on the strength of the riparian rights flowing from ownership of the damsite or of the permission of the state in the form of a license to construct the dam. The permission of the United States to obstruct the flow and build the structure in the bed is also required, in this case taking the form of a license from the Federal Power Commission.46

The power of the United States over navigable waters has been said to be a dominion over the flow of the waters. "That the running water in a great navigable stream is capable of private ownership is inconceivable."47 Thus, as far as the federal government is concerned, whatever rights a state may attempt to create in these waters are subject to its powers; these private rights carry within them an inherent infirmity. This has been frequently expressed by saying that the right is "subject to a dominant servitude"48 or to "a superior navigation easement."49

The most striking result of this subordination of private rights to the

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42. Of course, states recognize variations in the rights obtainable in navigable as against non-navigable waters, and exercise additional controls over private rights on the basis of navigability.
46. Supra note 12.
49. Supra note 14.
federal powers is that even after the United States has permitted a private use to become established as a going concern, it may destroy the use by the exercise of federal power, and pay nothing for the loss of the concern. It need not condemn the right, it merely exercises its easement, or imposes its servitude. There is thus no taking of property.

In United States v. Chandler-Dunbar Water Power Co., the government constructed a ship canal in the exercise of its power to improve navigation, and in the process destroyed a power plant. The company's structures on submerged land (to which it had title) had been built under a revocable license from the Secretary of War, and the act of Congress authorizing the navigation works ended this permission. The company sought no compensation for these structures, but did seek to recover the value of the 18 foot head of water power available at its site. The Supreme Court disallowed this, since the company had no right of property as against the government in the flow of the river, and any property values in the flow came from the right to place obstructions in the bed, a right held only on sufferance.

Similarly, the construction of a federal dam that backs the water of a navigable stream up against an upper private dam, and reduces the head of the latter and destroys much of the value of the power potential, does not give the owner of the upper dam a claim against the United States. The power of the government over the level of the water is plenary, and no rights can be acquired by individuals to have the river maintained at any particular level. But if the level of a nonnavigable tributary is affected, the riparian owner on the tributary has state property rights to the flow of the stream and can claim compensation for their loss. And where a dam on a navigable river does damage to the fast land beyond the bed of the river, as by destroying drainage by raising the level of the river, the landowner may recover compensation. Other riparian rights “destroyed” by the federal activity for which it need not pay are rights of access to navigable water, and rights to place structures between the high and low water marks.

Most of these cases seem to be based on one of two theories, almost but not quite opposite sides of the same coin. One is that the riparian owner on a navigable stream has no riparian rights that the government must recognize, the other is that the government need not pay damages for losses caused by the effect of its operation within the bed of the stream. The choice between these premises was forced in the case of United States v. Twin City Power Co., in which the government sought not to interfere with some going use, but to

50. 229 U.S. 53 (1913).
condemn land for a federal project, land which had been purchased by the power company as a damsite for a private project now precluded by the federal project. The fundamental issue was whether the government, in paying the fair market value of the property, need include values as a damsite, in other words, pay for the special values due to the riparian character of the land. A majority of the court seemingly adopted the first theory, holding that the company had no vested right in the water of the river, and the riparian rights recognized by state law created no private claim to navigable waters in the public domain. Four dissenting judges argued that the powers over navigation have "crystallized in terms of a servitude over the bed of the stream," and the United States was not here exercising its powers "within the limits of the servitude," but was rather taking fast land that clearly had a special locational value.

From the foregoing it could be argued that the supremacy of the federal powers over private rights to the use of navigable waters is constitutionally absolute, but one limitation has been suggested. In United States v. Gerlach Livestock Co., it was urged that the government, by constructing a multipurpose water control project on a navigable stream, did not have to pay for irrigation water rights destroyed by the project. The giant Central Valley Project in California was a joint undertaking of the Corps of Engineers acting under the power to control navigable water and the Bureau of Reclamation operating under the reclamation laws. The project literally dried up the river, putting an end to natural irrigation of riparian land by seasonal overflows, rights which had received recognition from the California courts. The waters were sold for the irrigation of other lands, and the owners of the riparian lands sued for compensation. The United States Supreme Court found in the authorizing legislation an intent that the projects were to be governed by the Reclamation Act which requires condemnation of and payment for any water rights taken in aid of a reclamation project. Thus the court never reached the constitutional issue, but the opinion states, "...we need not ponder 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. We have never held that or anything like it. ..." Mr. Justice Douglas, concurring, thought the constitutional power to take the water rights without compensation was clear.

The Gerlach case is important for its doctrine that Congress may use less than all its powers, and that it may elect to recognize state-created rights and pay for them if it takes them. In a number of quite different settings, the Court has similarly held that the United States need not insist on exercising the navigation servitude and may assign values to private rights in navigable waters. We have already seen that the government may exercise its powers

57. Supra note 14.
over navigable waters by delegating them to licensees, but in so doing, the Federal Power Act does not give the licensee the government's powers to destroy the riparian rights of others. If a licensee's dam will destroy the head of an upstream dam, the owner of the latter may enjoin such uncompensated destruction, though the United States itself may wreak just such damage. And though the United States might in the first instance take or prevent the exercise of riparian power rights, if it grants a license under the Power Act and then recaptures the plant it will pay an amount that includes the investment of the licensee in state water rights.

Indeed, Congress has gone farther and reversed the servitude, in relation to certain western streams that are the source of water for irrigation on which the regional economy depends. In consenting to some interstate compacts apportioning the waters between western states, Congress has declared that the United States recognizes that beneficial consumptive use is of paramount importance to the development of the river basins, and "will recognize" any valid established use for domestic and irrigation purposes which might be impaired by the exercise of federal jurisdiction over the rivers. And in connection with the large multipurpose projects in western states, the O'Mahoney-Milliken Amendment to the Flood Control Act of 1944 provides that in the operation of the projects the use of water for navigation will be subordinate to present and future beneficial consumptive uses—in other words, irrigation ditches will never be closed to provide water to float barges. This provision has been incorporated into subsequent rivers and harbors and flood control acts.

II. OTHER FEDERAL POWERS

The power to control navigable waters is by far the most important base upon which federal water development and control is rested, in the sense of the overall picture of what has been done by the government in the water field. The other powers occasionally called upon to justify federal action are quantitatively less significant, but will of course loom large in the particular case. The law relating to these other sources of federal water jurisdiction is less well developed than the law relating to navigation and its extensions, and it will not be necessary to divide the discussion of each into its effects on state laws, plans and private water rights. For the most part these effects are quite similar, in their overriding nature, to the effect of the exercise of the commerce power.

60. Supra note 51.
63. Republication River Compact, 57 Stat. 86 (1943); Belle Fourche Compact, 58 Stat. 94 (1944).
64. 58 Stat. 888 § 1(b), 33 U.S.C. 701-1 (1944).
FEDERAL LIMITATIONS ON STATE WATER LAW

A. Proprietary Powers

There are two sources of federal authority over water arising out of its presence on land owned by the national government within the boundaries of the states. The United States has legislative powers over some areas, and special proprietary rights in other tracts, whether owned as part of the public domain or acquired for the performance of governmental functions.

The Constitution gives exclusive legislative jurisdiction to the federal government over all places acquired by the United States, with the consent of the state concerned, for federal works. In many instances the federal government exercises less than exclusive power, and the states have a concurrent or partial jurisdiction under the terms of specific or general limitations or conditions upon the authority ceded by them. The laws established by Congress for these federal enclaves are of minor importance to this study, although the federal jurisdiction over large areas of lands, such as the national parks, would displace state water laws in these areas. Vested water rights acquired prior to transfer of the land to park status are preserved by special legislation.

Far more important are the areas, large in total, that the federal government owns as a proprietor, and upon which it exercises governmental functions. Here the important question is not the power of the federal government to legislate for the control of persons within these areas, but the extent to which the federal government, in performing its functions, is subject to state regulations. The United States is not an ordinary landowner, it has special powers and immunities with respect to its real property, and to the operations it carries out on that property, which are not possessed by ordinary landowners.

In general these special powers and immunities spring from either the Property Clause: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," or the Supremacy Clause of the federal Constitution: "This Constitution, and Laws of 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 Law of any State to the contrary notwithstanding." The factor that distinguishes the United States from other landowners is its right to perform the functions delegated to it by the Constitution free from interference from any source.

The case that brought this doctrine to the forefront in water matters was...
Federal Power Commission v. Oregon,73 which has come to be known as the "Pelton Dam case." The Supreme Court affirmed the granting of a license from the Federal Power Commission to a private power company to build a dam across the Deschutes River in Oregon, over the protests of that state, which had refused to issue a state license because the proposed dam would interfere with the migration of salmon and steelhead. The Deschutes River is clearly nonnavigable, and the authority of the Federal Power Commission was rested on the basis that the dam would be constructed on federal lands—on one side of the river an Indian reservation, on the other a power site reservation made in 1909. The Court said that the property clause of the Constitution gave the federal government the right to issue the license without the concurrence of the State. Oregon claimed that the waters sought to be impounded by the dam were under exclusive state control, relying primarily on the Desert Land Act of 1877,74 which had been construed as severing the water from western federal public lands and subjecting all nonnavigable water to the laws of the states and territories.75 But this act, the court held, was not applicable to the lands before it because they were "reservations," not "public lands" which are lands open for sale and disposition to the public.

Although the Pelton case raised a storm of protest in the west, because of the threat to the security of irrigation appropriations that might be deprived of water by extensions of the doctrine, the case had actually been foreshadowed a half a century earlier by the Rio Grande case discussed above. That decision was based on the power over navigation, as pointed out, but in dictum the court noted that the United States owned much of the land riparian to the river, and said that a state could not, without congressional consent, "destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the governmental property."76

Since the Pelton case, the government has attempted in several situations to extend its doctrine, and two such cases have come before the United States District Courts. The first of these is United States v. Fallbrook Utility District,77 which involved a claim by the United States that it owned "paramount" rights to the waters of the stream running through Camp Pendleton, a Marine Corps base in California. One phase of the litigation arose from the claim of the United States that it might use water in excess of the riparian right attached to the ranch that had been condemned for the base. The California federal court decided that the United States was the owner of the unappropriated water in the stream, by virtue of its ownership of the lands acquired for the base, and of public lands in the watershed from which the stream arose, but held that

76. Supra note 22 at 703.
only Congress could authorize an agency of the United States to make use of such water, and hence that executive officials of the Navy Department could not initiate such a use on their own motion. But in Nevada ex. rel. Shamberger v. United States, the district court for Nevada held that the commanding officer of the Hawthorne Naval Ammunition Depot need not comply with Nevada laws regulating the drilling of wells and the withdrawal of water from underground basins. In this respect, the case is directly contra to Fallbrook, since no congressional authorization was relied on. Rather, the Court held that the federal government was not compelled to “bend its knee” to state laws that might impede the lawful functions of the Department of the Navy in the management of a major military installation.

Still another type of proprietary right has been claimed by the federal government in reference to Indian reservations, lands held by the government in trust for the tribes. The creation of a reservation, whether by treaty or by executive order, reserves with the land such water as may be needed for the adequate development of that land. The United States, as trustee for the tribes, can develop the water resources of the reservation free from state water law, and without regard to inconsistent water rights established under state law.

The property clause also finds employment as the connecting link between the authority of the United States under the Commerce Clause and the production of hydroelectric power at federal dams. If Congress can control the flow of a river in aid of commerce, it can control the water power inherent in that flow. This was hinted at as early as 1898, but was spelled out in Ashwander v. Tennessee Valley Authority in 1936. It was objected that the government could not enter into a deliberate plan to generate and sell electricity at a dam constructed primarily for navigation control. The Court said:

“The Government acquired full title to the damsite with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the Federal Government. The mechanical energy was convertible into electric energy, and the electric energy thus produced, constitute property belonging to the United States. . . . Authority to dispose of property constitutionally acquired by the United States is expressly granted to Congress by Sec. 3 of Article IV of the Constitution. . . . The Government could sell or lease and fix the terms.”

B. War Power

The federal constitution gives to Congress the power to declare war and to levy taxes and appropriate money to provide for the common defense of the

81. Supra note 13.
81(a). Id. at 330.
United States. Some phases of federal resource development have been hinged on this power. The most notable was the Wilson Dam at Muscle Shoals on the Tennessee River, begun in 1917 and later incorporated into the system of the T.V.A.

Under the 1916 National Defense Act, Congress authorized the president to investigate the best means for the production of nitrates and other products for munitions of war, and to designate such sites on rivers and public lands as he deemed best suited for generation of power for the production of nitrates and other useful products. The Wilson Dam was constructed under this authority and, in peacetime, its hydroelectric energy was sold for distribution in the Tennessee Valley area. This arrangement was challenged in Ashwander v. Tennessee Valley Authority, but was upheld by the Supreme Court. Taking judicial notice of the international situation in 1916, the court concluded that the Wilson Dam and power plant were “adapted to the purposes of national defense,” and that the maintenance of these properties in operating condition, and the resulting assurance of an abundance of electric energy in the event of war, were national defense assets which the government might constitutionally construct and acquire.

The exercise of the war power has not been undertaken in such a way as to bring its resource development projects into direct conflict with state water laws or water rights. Normally, property taken for national defense purposes is condemned under the power of eminent domain. But when it is coupled with the power to control the property of the United States, and the nation uses its public domain or acquires private land for national defense installations, state laws may be superseded and private water rights could be preempted.

No direct expropriation of water rights has taken place, but the lower federal courts have held that the military can take such water as it needs for a camp or an ammunition depot, without compliance with state water law that might interfere with the management of the property in the best interests of defense.

C. Treaty Power

Treaties, made by the president and by and with the advice and consent of the Senate, are together with the federal constitution and laws “the supreme Law of the Land.” The presence of a water boundary between Canada and the Eastern United States, and the existence since 1909 of the Boundary Waters Treaty between the two nations impose obvious limitations on state action affecting the boundary waters and other waters flowing across the boundary or into the boundary waters. “The interests of the nation are more im-

83. Supra note 13.
84. Supra notes 77 and 78.
86. U.S. Constitution Art. IV.
87. 36 Stat. 2448 (1910).
important than those of any state," and the federal government may act to prevent a state from interfering with a national treaty obligation. As in the navigation cases, any state water law that appeared to authorize a use prescribed by the treaty would have to yield, and such a use could not be initiated, or could not be allowed to continue, though the law stood on the books as applicable to other waters. And treaty obligations of the United States give the nation an additional basis for authorizing works of improvements on international waterways.

D. General Welfare Powers

Although the Constitution gives Congress the power to levy taxes and to appropriate funds to provide for the general welfare of the United States, it was not until 1936 that it was thought that this clause delegated a separate power to the national government. In that year United States v. Butler decided that the general welfare clause was not restricted by the specific powers enumerated in the constitution, such as the power to regulate commerce. We have seen that Congress has stretched the power over commerce to almost unbelievable limits in grasping federal power over navigable waters, to an extent that even the United States Supreme Court has called "strained" and "highly fictional." The necessity for such fictions disappeared with the Butler case, and in United States v. Gerlach Livestock Co. the Court said that one of the largest federal basin-wide development projects—The Central Valley Project in California—may be sustained under this power. "Congress has a substantive power to tax and appropriate money for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose. . . . Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, and other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power over navigation."

The limits of this power have never been explored. However, the Gerlach case held that property rights destroyed by the project must be taken under eminent domain and paid for, and though the Court there relied upon specific statutes, there is some indication in the case that the exercise of this power does not result in the same overriding of riparian rights as does the exercise of the power over navigation.

89. Ibid.
93. 297 U.S. 1 (1936).
94. Supra note 14.
95. Ibid.
E. Control of Interstate Relations

The relations between the states of the union are matters of federal concern, and the United States Supreme Court is the forum for the judicial settlement of disputes between the states over the apportionment of the waters of interstate rivers. In such disputes the Court has applied some principles of international law, and has built up a significant body of interstate common law, as well as a form of federal common law that may not be the law of either state that is a party to the dispute. This law of interstate controversies acts as a limit upon the internal law of the states, but is not strictly within the topic of this paper because it gives no federal jurisdiction over water.

But the mechanism of the interstate lawsuit gives to the United States an important power to operate free from the claims of the states in certain instances. Where the interstate river is one in which the United States asserts substantial interests, the rights of the states cannot be determined without first determining the rights of the United States. But the United States is immune from suit. After Arizona lost its bid to block the construction of Hoover Dam, it sought in another proceeding to establish its position within the framework set by the Boulder Canyon Project. It sued the other states in the Colorado River basin, asking for a decree adjudicating to it an unclouded right to the permanent use of water, an equitable division of the privilege of future appropriation.

The proceeding was dismissed on the ground that the United States, not joined in the action, was an indispensable party without which the suit could not proceed. The Court said, "The 'equitable share' of Arizona in the unappropriated water impounded above Boulder Dam could not be determined without ascertaining the rights of the United States to dispose of the water in aid of and support of its project to control navigation. . . . Every right which Arizona asserts is so subordinate to and dependent upon the rights and the exercise of an authority asserted by the United States that no final determination of one can be made without the other."

On the North Platte River the federal government has substantial interests in the form of two Reclamation projects, indeed, the initiation of the later one triggered the case of Nebraska v. Wyoming, brought to apportion the river between the states. Since the water rights of reclamation projects are derived under state law, and the division of water between the states would govern the operation of the federal projects, the United States intervened and thus waived...
its immunity and consented to be bound by the decree. But apparently it was
felt that the federal operation of Reclamation projects on the Rio Grande
would somehow be hampered by a declaration of the rights of the states, and
when Texas sued New Mexico to enforce the Rio Grande Compact, the
United States not only refused to intervene but successfully sought to have the
suit dismissed. Arizona is now engaged in a second suit to determine the shares
of the Colorado River basin states in the water stored in the federal projects,
and in this latest proceeding, the United States has joined and is seeking
judicial aid instead of distributing the water by fiat. Seemingly, the matter
is in the hands of the Attorney General; his decision to intervene is a matter of
discretion.

The states having interests in a single river may settle their differences
by compact instead of resorting to litigation. Such a pact will operate as a
restriction upon private rights held under state law but inconsistent with
compact. State legislation inconsistent with the compact is unconstitutional.
But these regional adjustments are subject to federal control, since the Con-
stitution requires the consent of Congress to all interstate compacts. Congress
has refused to consent to a flood control compact deemed inconsistent with
federal interests and responsibilities. And since the consent of Congress
takes the form of legislation, it is subject to the veto power. President Truman
vetoed the act consenting to the original Republican River Compact, on the
ground that it would withdraw the navigation jurisdiction of the United States
over the river and would restrict the authority of the United States to construct
irrigation projects.

III. STATE AND FEDERAL COORDINATION AND COOPERATION

Up to this point the picture looks dark for the states. Viewed as a rival,
the federal government is indeed formidable. If it chooses to act in the field
of water development it can call upon a number of powers, varied to suit the
necessities of its purposes, and its laws and activities will override any contrary
state or local laws and interests, or subordinate them to the federal purpose.
Yet except for the spectacular exceptions that get into litigation, the states do
not ordinarily see the federal government as a rival in water development. Few
federal projects are locally resisted as invasions of states' rights. On the con-
trary, most are welcomed, and often eagerly sought, by local people and gov-
ernments.

The state is part of the nation, and its representatives in Congress help to

shape national policy. Many local and national interests will coincide. The states will often seek the aid of the federal government in the form of projects promising local as well as national benefits, or in the form of financial aid. The description of federal jurisdiction over water, in the sense of power to act, does not give anything like an accurate picture of how it operates in fact. The legislation establishing the federal agencies and authorizing them to prosecute projects is replete with procedures for consultation with the state and local authorities and for reconciling conflicts with State and local interests. In some instances the United States gives great weight to local laws, and in every major water development field, Congress has established mechanisms for obtaining a local voice in planning.

A. Express Federal Recognition of State Water Law

In many instances Congress has chosen to waive federal powers and has written into national legislation dealing with waters or federal activities provisions for the recognition and even use by the government of state water laws. The trend in this direction was started with reference to the western states, where the local adoptions of the prior appropriation doctrine had made possible the development of the early mining economy and the latter settlement of the “Great American Desert” through irrigation. Beginning in 1866, Congress gave its approval to the system of prior appropriation under state and local law as a legal method of obtaining water rights on its public domain.\textsuperscript{112} By the Desert Land Act of 1877,\textsuperscript{113} Congress severed all the non-navigable waters on the western public domain from the land and reserved them for the use of the public under the laws of the states and territories, which were given “plenary control” of the water laws applicable within their boundaries.\textsuperscript{114} When the federal government entered the field of irrigation development in 1902, Section 8 of the Reclamation Act provided that the Secretary of the Interior should proceed in conformity with state laws relating to the control, appropriation, use and distribution of water used in irrigation.\textsuperscript{115} Since then a long series of acts dealing with lesser programs or specific projects has contained similar language.\textsuperscript{116} This is the reason the occasional exception to this policy has created such a furor in the west and led to the movement for the “Barrett Bill”\textsuperscript{117} that would have subjected all federal activities to state laws, and its successors that at least would protect vested rights from federal preemption.\textsuperscript{118}

Some of these examples of federal comity have application to the eastern

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{112} 14 Stat. 253, Sec. 9, 43 U.S.C. 661 (1866).
\item\textsuperscript{113} 19 Stat. 377, 43 U.S.C. 321 (1877).
\item\textsuperscript{114} California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).
\item\textsuperscript{115} 32 Stat. 390, 43 U.S.C. 383 (1902).
\item\textsuperscript{116} Corker, Water Rights and Federalism. 45 California Law Rev. 604 (1957) contains a list of these statutes at p. 613.
\item\textsuperscript{117} S. 863, 85th Cong. 1st Sess. (1957).
\item\textsuperscript{118} See Hearings on H.R. 4567 and others, Subcommittee on Irrigation and Reclamation, House Committee on Interior and Insular Affairs, 86th Congress, 1st Sess. (1959).
\end{enumerate}
\end{footnotesize}
sections of the United States. Within the national forests, all waters may be used for domestic, mining, milling or irrigation purposes under the laws of the state in which the forest is situated, or under the laws of the United States and the rules and regulations established thereunder. Section 9(b) of the Federal Power Act must now be restricted in the light of the First Iowa decision, but it does require an applicant for a license to submit "satisfactory evidence that the applicant has complied with the requirements of the laws of the state or states within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion and use of water for power purposes." While the Supreme Court has held that "satisfactory evidence" of compliance need not include a showing that the applicant has received State approval, at least the state laws are given consideration by the Federal Power Commission, and Section 7 of the Act expressly disclaims an intention to affect or interfere with the laws of the states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right to such uses.

The 1944 Flood Control Act expresses a policy, though not a guaranty, of federal recognition of state interests:

"In connection with exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized, to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will result therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users."

This policy statement has been repeated in or made applicable to subsequent Rivers and Harbors and Flood Control acts. Congress has frequently declared certain rivers, or portions of them, to be nonnavigable, thus freeing them for state control, that may take the form of destruction of whatever navigable capabilities exist in fact.

119. 30 Stat. 36, 16 U.S.C. 481 (1897). The United States has concerned itself only with regulation of rights of way to protect the primary forest purposes. 43 C.F.R. 244.48 (1954).
120. 41 Stat. 1068, 16 U.S.C. 802 (1920).
122. 58 Stat. 888 (1944).
124. 33 U.S.C. 21 to 59(a) (1957).
Federal works for the improvement of navigation and the control of floods and their subsidiary features for hydroelectric power production, are primarily the responsibility of the Corps of Engineers, U. S. Army. Its civil works staff has historically been considered as a consulting body to Congress, in the initiation of projects, and the executive agency for carrying out congressional directives in the construction stages. The amount of state participation in project planning cannot be given by simply reciting the statutory requirements. Since the procedures of the Corps are quite complex, a description of them is necessary.

The first step in a project is the reconnaissance report, individually initiated by Congress in the current omnibus river and harbor or flood control bill, usually after local groups or officials have interested their congressman or senator in the stream improvement. The district engineer in whose territory the stream is located arranges for public hearings at which all persons having an interest are privileged to attend. Members of Congress, state and local officials, representatives of interest groups, and others may testify to the character and extent of the improvement desired and the need and advisability of its execution.

After a field reconnaissance of the area, a preliminary report to the Board of Engineers on the probable justification for the project is made by the District Engineer, and if his report is unfavorable, he issues a public notice stating that all parties have the privilege of a written or oral appeal to the Board of Engineers. The Board reviews the report and submits a recommendation to the Chief of Engineers, and again, if his recommendation is unfavorable, state and local interests may appear before the Chief of Engineers.

The Chief reports an unfavorable recommendation to Congress, and submits his report to the states in which the project is located, but if he approves the project a more detailed survey is undertaken, following the same procedural steps as the reconnaissance, with the same possibilities of hearings and appeals. The survey report is submitted to the states and any comments received from the States are appended to the report when it reaches Congress. Public hearings are then held before the Public Works Committees of the Senate and House when the project comes up for authorization. Other congressional hearings are possible when funds are appropriated for project construction.

In addition to these many opportunities to make the position of the states known and to urge its adoption or consideration by the Corps or by Congress, the states may, to the extent deemed practicable by the Chief of Engineers,

127. Statutory authorizations are found in 16 U.S.C. 541, 542, 701, 701-(1)(a) Maas, Muddy Waters, 21-36 (1951) analyzes the actual processes of the Corps, Water Resources Law (1950) collects the legal and statutory requirements, and a step by step presentation of a typical case is found in Hearings, Subcommittee to Study Civil Works, 74-77, 82d Cong. 2d Sess. No. 82-16 (1952). The following is condensed from all these sources.
cooperate in the investigation and actually participate in the formulation of project plans.

C. Federal Power Commission Licenses

A state voice (though not always a successful one, as we have seen) is guaranteed in all Federal Power Commission proceedings for licensing private power developments, by a provision of the act requiring notice of applications to be given to any state or municipality likely to be interested or affected.\textsuperscript{128} Consideration of state interests seems implicit in the admonition to the Commission to choose projects "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes."\textsuperscript{129} Furthermore, applicants for licenses come within the Fish and Wildlife Coordination Act and must comply with its requirements for consultation with the head of the state agency concerned with wildlife resources, with a view to preventing loss of and damage to those resources.\textsuperscript{130}

State policies favoring public power developed at the local level are fostered by Section 7 of the Federal Power Act requiring the Commission to give preference to applications of states and municipalities for licenses,\textsuperscript{131} and by Section 14 preserving the rights of states and municipalities to take over and operate any licensed project by condemnation proceedings and the payment of just compensation.\textsuperscript{132}

Two of the recent disputes between the states and the F.P.C. have been over the protection to be given to fish.\textsuperscript{133} In neither case did the Commission ride roughshod over the state's recreational interests and allow the fishing to be destroyed. It did disagree with the state's opinion that the dams would destroy the migratory runs of salmon and steelhead, but it conditioned the licenses on the inclusion of what have been termed "gold plated" fish protection devices, costing four million dollars in one case and seven million in the other.

D. Department of Agriculture Programs

The Department of Agriculture has gone the farthest of any federal agency in recognizing state water law and water rights and operating within their framework. This is probably due to two factors, the Department operates primarily on the principle of direct relations with farmers and landowners, and it is concerned in the area of the small stream and watershed, rather than with the large and navigable main stem.

\begin{itemize}
  \item \textsuperscript{128} 41 Stat. 1065, 16 U.S.C. 797 (1920).
  \item \textsuperscript{129} 41 Stat. 1068, 16 U.S.C. 803(a). (1920).
  \item \textsuperscript{130} 60 Stat. 1080, 16 U.S.C. 662 (1946).
  \item \textsuperscript{131} 41 Stat. 1069, 16 U.S.C. 800 (1920).
  \item \textsuperscript{132} 41 Stat. 1071, 16 U.S.C. 807 (1920).
  \item \textsuperscript{133} F.P.C. v. Oregon, supra note 73, State of Washington Dept. of Game v. F.P.C., supra note 40.
\end{itemize}
The program of the Soil Conservation Service, which was first directed toward control of soil erosion and flood protection, was augmented by the Agricultural Conservation Program, which added the objectives of water conservation and the beneficial use of water on individual farms, including measures to prevent runoff, the building of check dams and ponds, and facilities for applying water to the land. The Service conducts surveys, investigations, and research, and channels financial and technical assistance to the landowners through soil conservation districts created under state law.

The Department of Agriculture also has important flood control duties. The 1936 Flood Control Act provided that it should investigate watersheds and measures for runoff and water-flow retardation and soil erosion prevention, and the 1938 act authorized works of improvement along these lines. This authorization has also been prosecuted through the mechanism of benefits to soil conservation districts. Although the Secretary of Agriculture is not bound by the requirements of the 1944 Flood Control Act providing for transmitting a copy of proposed project reports to the affected states, he has administratively adopted that practice where the Soil Conservation Service proposes an accelerated regional program that can be likened to a project.

In addition to these grants in aid to or through soil conservation districts, the Water Facilities Act makes available loans to farmers for the construction of ponds, reservoirs and other facilities for water storage and utilization.

These programs for the most part envisage small individual projects and works on the farmer's land, and the water rights involved are of course those of the farmer, obtained under state law. In some instances title to small flood control works and water supply reservoirs belongs to the soil conservation districts, and again only state water rights are involved.

In 1954 the Hope-Aitken Small Watersheds Act, or "Public Law 566," as it is often called, was enacted to fill the gap between these programs, which emphasized land treatment and very small individual structures, and the program of the Corps of Engineers, with its emphasis on large dams on the main stems. As supplemented by the 1956 Poague Amendment, this act provides for financial and technical assistance to state and local agencies in the construction of multipurpose projects for flood control and the conservation, development, utilization and disposal of water in watersheds up to 250,000 acres. The federal government assumes up to $250,000 of the cost of flood preven-

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tion features and loans the local agency the balance, up to $5,000,000. Dams may be constructed that will impound 25,000 acre feet, including 5,000 acre feet of floodwater detention, and even larger projects are possible with the approval of Congress and other interested agencies.

Such middlesized water control works, having for their purposes flood control, recreational use, and water supply for irrigation, municipal and industrial uses, will obviously have an important effect on the smaller streams of the states. But the United States neither takes nor grants water rights for these projects, the act requires the local organization to acquire or provide assurance that the landowners or water users have acquired pursuant to state law, such water rights as are needed. The state planning function is similarly safeguarded; any application for assistance under the act must be approved by the state agency having supervisory control over such projects, or by the governor if there is no such agency.

E. Water Supply

The federal government, in its water resource programs in the eastern states, has taken an increasing interest in water supply problems. In 1936 the Secretary of the Army was authorized to provide additional storage capacity in flood control reservoirs for domestic water supply or other conservation storage, when the cost of the increased storage is contributed by local agencies and they agree to utilize it in a manner consistent with the federal purposes.

The 1944 Flood Control Act authorized the secretary to make contracts with states, municipalities, private concerns or individuals for providing surplus water for domestic and industrial uses. The increasing interest in irrigation in the east, as a means of preventing drought damage and of increasing yields by properly timed water application, has stimulated federal activity along these lines. The Corps of Engineers, in cooperation with the Department of Agriculture, is investigating Irrigation potentialities in the Delaware, Potomac, and lower Mississippi valleys, and presumably, if conditions so warrant, reservoirs will be recommended for federal construction that make provision for storage to meet irrigation demands.

The Small Watersheds (Hope-Aitken) Act provides aid to local groups for construction of reservoirs that may include capacity for municipal, industrial and irrigation supply. As noted above, the water rights for the latter are obtained under state law, but the status of water rights for the Corps' projects are not clear. Perhaps a city or irrigation enterprise would partake of the federal right to control the navigable waters; perhaps their water rights are derived

150. Supra note 145.
from state law, and the users simply utilize the federal storage works. The matter could stand clarification. While present withdrawals for these purposes are miniscule, they will undoubtedly increase, and if substantial amounts of water come to be impounded to maintain low flows for sewage and pollution dilution, the situation might get serious.

F. Fish and Wildlife, Recreation

The Secretary of the Interior can acquire large areas of land and water for purposes of establishing migratory bird and other wildlife refuges, and has the power to construct dams, dikes, ditches and other water control works for the benefit of the refuge.151 Presumably any water rights necessary for the project are asserted under the proprietary power and the Pelton doctrine,152 and present potential areas of conflict with state plans for and rights in the water. However, the head of the state fish and game department is made a voting member of the commission that must approve such refuges.

Wildlife restoration projects, as distinguished from refuges, are also constructed by the Secretary, but with the active cooperation of the states, and any construction work on such projects is performed in accordance with state laws.153 Federal projects having for their primary purpose the control of navigation or floods, or the production of power, often have secondary or subsidiary features for the protection and enhancement of fish and wildlife habitat and recreational opportunities. State conservation departments must be consulted concerning the effects of these projects on fish and wildlife resources, with a view to preventing loss or damage to those resources.154 These wildlife habitat development programs on federal water development projects are jointly planned by the Department of Interior's Fish and Wildlife Service and the state departments, and generally result in turning over the completed facilities and recreational areas to the state agencies for supervision and administration.155

CONCLUSION

Looking at "jurisdiction" in the sense of "power to act," the federal government seems to have almost unlimited jurisdiction over water: whenever a federal interest of any sort arises, it has the power to deal with the water to further that interest. This is not limited by any concept of "territorial jurisdiction"; it is not possible to divide up the country into areas and give the states power in some and the federal government power in others. Although navigation is the most commonly used federal power, it is not possible to identify the navigable waters and the head of navigation on each and say that the federal government has jurisdiction of a particular stream, but just to a particular point. The power of the states to act in the absence of federal regulation and develop-

152. Supra notes 70-79.
FEDERAL LIMITATIONS ON STATE WATER LAW

ment, and the facts of the hydrologic cycle, the physical interdependence of water, will not permit this. Furthermore, federal navigational interests extend beyond the head of navigation, and federal proprietary and war powers may affect even ground waters. Nor is it possible to identify legal areas and say that a certain type of legislation is for the state, another is for the United States. State property rights may affect navigation, federal navigation regulation may destroy property rights.

Nevertheless there is some division between things local and things national, and the states have much room left to them for state action based on what is deemed best for the state, independently of any national considerations. The federal government may be omnipotent, but it is not omnipresent. Since the federal jurisdiction is a conditional one, it may be ignored when the federal interest is not present or is not being exercised.

When federal and state interests do overlap, the United States seldom acts in a highhanded and overbearing manner. The American federation of states is a fairly good compromise for achieving the greatest freedom for states to deal with local problems while at the same time reserving to the federal government power to accomplish national objectives.

The cooperative and coordinative procedures set out above have been concessions to state and local interests that have been evolved to permit the interplay of governments and the balancing of State and national interests. The procedures of the federal agencies that have water resource development programs are designed to give the states a voice in those programs. At least the states have the chance to object that a state policy is violated, and to demonstrate its values. If private rights are to be destroyed, if public rights to fishing and recreation will be lost, these procedures provide an assurance that the destroyed values will be weighed against the federal advantages and counted as costs of the project. But local quirks and parochial laws will not be allowed to block federal projects where the federal agency's views are that these have little value or that their values can be otherwise attained. And an occasional imbalance between local costs and local benefits will not be allowed to stand in the way of large regional or national benefits. Still, considering the magnitude of the federal water program in the last half century it is surprising how few conflicts have arisen.

Some have seen the federal agencies armed with federal supremacy as the agents of the destruction of states' rights and the imposition of bureaucratic control over unwilling people. Others view the federal program as the only logical solution to national problems of security and economic welfare affecting all the people of all the United States, transcending local opposition to general welfare measures and overruling sectional rivalries. This is politics, not law,

156. Supra note 78.
and such issues are outside the scope of this study. It has been argued that the states should have a stronger voice in the federal program, perhaps a vote on a regional agency.\textsuperscript{159} There seems to be a strong possibility that the insecurity of private water rights resulting from the existence of the navigation servitude and the exercise of proprietary powers may be removed. Although the “Barret Bill” that would have subjected all federal water activity to state law had little chance of passage,\textsuperscript{160} milder legislation that will require payment for vested rights destroyed by the exercise of these powers is not resisted by the agencies and the administration.\textsuperscript{161}

As new problems arise from stepped-up state and federal activities in water projects, new methods of compromise and consultation can be expected to result. The dominance of the federal government is due only in part to its constitutional powers; most of it is due to the dominant position of the United States as financier and planner. It has been suggested that if the states wish a stronger voice in the national water development area, they will get it in proportion to the amount they increase their financial contributions, and as fast as they devise responsible state agencies capable of policy formulation and project management, free from undue pressures from local special interests.\textsuperscript{162}


\textsuperscript{160} S. 863, 84th Cong., 1st Sess. (1959); Hearings, Subcommittee on Irrigation and Reclamation 7 (1959).

\textsuperscript{161} Sato, Water Resources, the Federal-State Relationship, 48 Cal. L. Rev. 43 (1960).

\textsuperscript{162} Englebert, Federalism and Water Resources Development, 22 Law and Contemporary Problems 325 (1957).