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TITLE TO NON-NAVIGABLE WATERS IN WESTERN STATES

Do water-rights in non-navigable streams through public lands belong to the Federal Government, or to the States where the lands lie? And when the ownership now becomes vested in an individual, from which of these two sovereignties is title deraigned?

The Supreme Court of the United States has not yet resolved these two questions. Executive officers of the United States unqualifiedly declare that the ownership, and source of title, is Federal. Thus in his report for 1914, the Attorney General says, at page 39:

"The department takes the position that in the arid and semiarid regions, where the legality of diverting and appropriating water for beneficial uses on non-riparian lands is generally established, the original right of the Government to appropriate surplus water for its own uses, particularly for the reclamation of its enormous holdings of arid lands, has not been surrendered by any act of Congress or divested by the mere creation of the States into which those regions have now become incorporated. This position has been sustained by one of the district courts of the State of Colorado. Its soundness has been challenged by certain claimants who would have the Federal user dependent on the permission of State laws."

On the other hand, several western constitutions assert ownership in the respective States. For example, Article XVI, Sec. 5, of the Colorado Constitution reads:

"The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated

to the use of the people of the State, subject to appropriation as herein provided."

Other Western States have similar constitutional provisions¹; and the same attitude is expressed in the legislation of others.²

Both locally and nationally the questions are of increasing importance. They are of direct concern in the West; the extent of reclamation projects upon our 500,000,000 acres of public lands, with programs of further development for discharged soldiers, makes it desirable that the source of title be certain: for this may affect the value of lands, as will be noticed below. In the East, hundreds of millions of dollars' worth of irrigation bonds are already held; and settling these questions will help define the jurisdiction of the Land Commissioner at Washington and the State Land Boards, to whom the bondholders must look in many contingencies.

The two doctrines we are about to examine are supported by divergent views of academic principles, pressed by public and private partisans. If, as stated in the Virginia Bill of Rights, "no free government or the blessings of liberty can be preserved to any people but by . . . a frequent recurrence to fundamental principles," it may be well to begin with certain

DEFINITIONS

The *ownership of waters* does not mean title to the fugitive corpus, or even a proprietor's interest in so many gallons in a jug reduced to possession; but means a usufructuary water right, to take either a certain or a relative amount of the transitory waters at a point; just as a hunting right means no proprietary interest in certain foxes, but a right to take wild game.³

A *riparian water right* is one in common with other riparian proprietors, relatively, "a reasonable use of the stream as it flows by his land, subject to a like right belonging to all other riparian owners."⁴

1. See constitutions of Idaho, XV, sec. 1; Mont. III, sec. 15; N. Dak. XVII, sec. 210; N. Mex. XVI, sec. 2; Wyo. 1, sec. 31.

2. Arizona, R. S. 1901, sec. 4174; Idaho, R. C. 1908, sec. 3240; Nebraska Stat. 1911, sec. 6450; Nevada, R. L. 1912, sec. 4672; Oklahoma, C. L. 1901, sec. 3915; S. Dakota, Laws 1907, p. 737; Texas, R. C. S. 1911, sec. 4991; Utah, C. L. 1907, sec. 1288. Even California, after holding to the contrary, came into agreement with its neighbors in 1911 by an amendment providing that "All water or the use of water within the State of California is the property of the people of the State of California," Stats. and Amends. 1911, p. 421.

3. Water taken into possession is a subject of larceny at common law, as personal property, *Ferens v. O'Brien*, 11 Q. B. D. 21; so is a wild animal in a trap, 1 *Hale's Pleas to the Crown*, 511. For detailed explanation rather than definition of a water right see Kinney, *Irrigation and Water Rights* (2 ed.) p. 1313.

4. *Crawford, et al., Co. v. Hathaway*, 67 Neb. 325; 108 Am. St. Rep. 647.

It is real property, an incident of the freehold, and therefore perpetual whether used or not, and limited to the watershed. See 3 Kent Com. sec. 439. It is upon common law riparian rights that the Federal title is asserted, as belonging to the proprietor of the public lands.

An *appropriation water right* is absolute, to a certain amount of water with a certain order of priority among other appropriators, and may be put to non-riparian use, i. e., beyond the watershed; it is also real property, but severed from any particular freehold, and is lost by non-user. It is a legal recognition of the customs of miners in the gold fields, "who were emphatically the lawmakers."—Mr. Justice Field, outlining the appropriation theory in *Jennison vs. Kirk*, *infra*.⁵ Recently there has been a tendency to depart from the certainty of quantity in the prior appropriator and to pro-rate in times of shortage, interjecting a question of reasonableness to avoid "monopoly," and thus assimilating some of the equitable principles of common law distribution.⁶

HISTORICAL

Water rights in the West have had a peculiar development. The practice came first, and the law came later.

While the territory was owned by Mexico, there were so few settlers that the whole domain may be said to have been free public land. Over 80% of Idaho, Nevada and Utah, and over 50% of every other Pacific and Rocky Mountain State still belongs to the Federal government. The doctrine of riparian rights, of the civil law,⁷ was recognized with some exceptions; a settlement or "pueblo," was considered prior to the suburban land owner, with a superior right to such waters as the settlement might need. Thus the city of Los Angeles may take all the waters of the Los Angeles River.⁸

When the territory was acquired by the United States, ownership of the public lands passed to it; this is true also of territory acquired from others than Mexico. Practically all the lands were vacant and came to the Government not only as sovereign but as pro-

5. 98 U. S. 453.

6. *Rodgers v. Pitt*, 129 Fed. 932; and see *Kinney*, *Irrigation and Water Rights* (2 ed), p. 1009.

7. "Our law may be traced back through Blackstone, Hale, Britton, Fleta, and Bracton, to the Institutes of Justinian, from which Bracton evidently took his exposition of the subject," *Lindley*, L. J., in *Foster v. Wright*, 4 C. P. D. 438, 49 L. J. C. P. 97.

8. *Los Angeles v. Hunter*, 156 Calif. 603; and see *Lux v. Hagin*, 69 Calif. 255.

prietor. Its proprietary rights are to be defined by its own, not by Mexican or other laws.⁹

With the discovery of gold, crowds of young men went West to begin mining on these government lands. There was no method for acquiring titles from the government; but they developed valuable properties, used water in mining operations, and the naked possession of each pioneer was naturally good as a possessory claim against all except the government. The first man who found gold tried to initiate a preemption right with the nearest military officer, the only representative the government had; he was told that all the settlers were technically trespassers, but the military arm would not interfere, as it might under an act of March 3, 1807. So the miners were left to work out their own rights as long as they kept the peace. It is in the rules of miners, adopted in their meetings, recognized by their local courts, and finally by the act of Congress of 1866, that the present system of Western mining and water rights has its foundation. The miner took up his claim and pursued the lode even under other lands; at the outset he could have taken these other lands just as well. And he took water from the nearest stream, whether adjoining his land, and whether beyond the watershed or not; he could have taken the riparian lands where he tapped the stream, had he wanted to, just as well. Later when a riparian owner claimed the land bordering the stream, he was held by the customs of the miners, and by the local courts, to have taken up the land subject to the water right. And thus the doctrine of prior appropriation, first come first served, had its origin, based primarily upon non-action of the actual land owner, which was the Federal Government.

Things might have run on indefinitely with silent acquiescence in Washington but for a late realization of the importance of Federal control about the time the Reclamation Act was passed in 1902, and recent conflicts between states claiming the same waters from interstate streams. Secretary Ballinger, wedded to State control, was discountenanced. Now the question is whether, during its Rip Van Winkle sleep, the general government, as owner of the public lands, has lost its riparian water rights either by acquiescence, grant or some other action, inadvertent or not. For a long time it had seemed to make no difference whether the source of title was the General or the State government; the settler with his water seemed in the position of the United States with its title to Oregon, which may be supported by three theories, among which it has been needless to decide.¹⁰

9. *Pollard v. Hagan*, 3 How. 1. c. 225, citing *Vattel Law of Nations*.

10. *Shively v. Bowlby*, 152 U. S. 1.

But as the country has filled up, the landowner has found that it may make a difference to him in dollars and cents whether he got title from the Government or the State; for example, if he be a riparian owner, one condemning a right of way for a canal over his land will pay him the mere value of the acreage if his patent from the government does not carry water rights by implication; but if the common law of riparian rights and Federal source of title are both applicable, his measure of damages would be the value of the land plus the value (usually far greater) of the riparian water right.¹¹

CALIFORNIA DOCTRINE

In *Lux v. Hagin*,¹² the court says: "Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the State courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States. It has never been held that the right to appropriate waters on the lands of the United States was derived directly from the State of California as the owner of innavigable streams and their beds. And since the act of Congress granting or recognizing a property in waters actually diverted and usefully applied on the public lands of the United States, such rights have always been claimed to be deraigned by *private persons* under the Act of Congress, from the recognition accorded by the act or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval."

Holding the common law of riparian rights to obtain, the courts of California, and its Legislature up to 1911, recognized the Federal title. Indeed, in 1878, the California Legislature *requested Congress* to reserve riparian water rights in making land grants, and to grant and dedicate such reserved water rights to the States and Territories where situate, Statutes 1877-8, p. 1070. This is an admission against interest, to say the least. But Congress has heeded it only with respect to Black Hills land grants, (1906) 34 Stats. at Large, 234.

This recognition of the basic Federal title, by virtue of common law principles applicable to riparian ownership, has been called the "California Doctrine."¹³

11. 1 Weil Water Rights (3 ed.) F. 205; *Schneider v. Schneider*, 36 Colo. 518.

12. '69 Calif. l. c. 339.

13. The California doctrine has been followed by California, Kansas, Montana, North Dakota, Oregon until lately, South Dakota, Washington, and partially in Nebraska and Texas.

COLORADO DOCTRINE.

We stated above that the principles involved are academic, as they must be disposed of by the courts, though theories have followed the event. So we should now briefly explain a civil law conception upon which the Colorado doctrine has been developed.¹⁴ The Roman law classed running water with air, sea, and wild animals as *res nullius*, belonging to no one. They are also called *res communes*, from the other point of view—common because “while by nature things everyone has use for, they have not yet come into the ownership of anyone.”¹⁵

But in developing the common law, a distinction was early drawn, which is the point of the wedge now widely separating the California and Colorado doctrines here. It is not easy to apprehend at first.¹⁶ “Some things are *common*, as air, sea, and the shores of the sea,” says Fleta, lib. 3, c. 1. s. 4, “others *public*, as the right of fishing and using rivers and harbors.” Britton classes wild animals with things *common*, and running waters with things *public*, Bk. 2, c. 2, s. 1, *publici juris*. It is out of this alteration from *res communes*, belonging to the negative community, to the phrase *res publici juris*, that we get the modern statement or translation “belonging to the State as trustee for the people.”¹⁷ It is upon this academic foundation that the States following Colorado assert that because of the inherent nature of running waters they either belong to or are at the disposal of, the local sovereign under regulations to be prescribed by itself; and that they do not belong to the Federal government or any other riparian owner, because water rights do not pass as an incident in a transfer of the shore.

There are other theories upon which the Colorado doctrine has been maintained: 1. That some of the States asserted ownership in constitutions ratified by the Federal government, and the latter thereby transferred¹⁸ its rights; 2. that water rights are among the reserved

14. The Colorado doctrine is followed by Alaska, Arizona, Colorado, Idaho, New Mexico, Nevada, Oregon of late, Utah, Wyoming, and partially in Nebraska and Texas.

15. Vennius, quoted in *Mason v. Hill*, 5 Barn. & Adol. 1; Pothler, *Traite du Droit de Propriete*, No. 21.

16. Even the Supreme Court at least once lost sight of the outline of the “negative community” and spoke of things public and things common as alike within it, *Ohio Oil Co. v. Indiana*, 177 U. S. 1. c. 209, but has avoided doing so where the distinction was decisive of any case that we have been able to find.

17. There is a latent ambiguity in the phrase “the property of the State,” importing either sovereignty or ownership; it has been used in both senses, may be copied in a later decision with the other intention, and the reader is often unable to discern which is meant.

18. *Farm Co. v. Carpenter*, 9 Wyo. 110.

powers of the States, and inhere in each State on its admission to the Union, as stated at page 174 of Colorado's brief on reargument of *Wyoming v. Colorado*, in the Supreme Court—not yet decided; 3. that the public good demands substitution of appropriation for riparian rights in the West, involving denial of the Federal title, and that Western pioneers took with them only such parts of the common law as are not repugnant to their new surroundings¹⁹—hence they did not take the rule of riparian rights any more than they took the rule of primogeniture; 4. the history of congressional action is examined to show acquiescence and recognition of the transfer from Federal to State control,²⁰ or even an outright grant;²¹ 5. as government patents to the lands along the shore simply describe the land as bordering on the river, and are silent about water rights, it is argued that they fall within the rule that a deed to real estate must be construed by the laws of the State where the land lies,²² and by the laws of these States no water rights will be implied; and 6. the State has police powers even though the lands and waters belong to the Federal Government, *Withers v. Buckley*,* so the State acting in its sovereign capacity—and not as owner—regulates the use of water as a gift of God, the appropriator establishing title under the State as regulator and not as owner.²³ The number of these theories doubtless indicates a certain lack of confidence in some of them, sufficient to have encouraged the ingenuity of advocates to find a better.

ATTITUDE OF FEDERAL AUTHORITIES

Good Latin or bad Latin need not make good or bad law.²⁴ For

19. *Drake v. Earhart*, 2 Idaho 716; *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443; *Reno Smelting Co. v. Stevenson*, 20 Nevada 269; *Boquillas Co. v. Curtis*, 213 U. S. 339.

20. *U. S. v. Rio Grande Dam Co.*, 9 N. M. 303; same, 174 U. S. 690.

21. *Hough v. Porter*, 51 Ore. 318.

22. *Los Angeles Co. v. Los Angeles*, 217 U. S. 217. Under this head one should not misread cases like *Hardin v. Jordan*, 140 U. S. 371, l. c. 384, dealing with the meander line or the center line as bounding the fee, a question of boundary rather than of riparian water rights as an incident to the freehold.

*61 U. S. 84.

23. *Robertson v. People*, 40 Colo. 119; *Bear Lake v. Budge*, 9 Idaho 703; and see generally *Willey v. Decker*, 11 Wyo. 496; *Wallbridge v. Robinson*, 22 Idaho 236.

24. It has been said that the one passage in the Institutes referring to rivers as public rather than common referred to navigation, being used with harbors: "*Flumina autem omnia et portus publica sunt*"; that the Italian jurist Azo overlooked the relation to navigation, and was copied by Bracton, who was followed by Fleta and Britton. The right of navigation is public throughout the Institutes. The running waters are classed with air and wild animals everywhere else in the Institutes. But the common law writers felt constrained, by the quoted sentence, to separate *aqua profluens* from *res communes* and speak of it as *publici juris*; 1 Weil, *Water Rights*, sec. 5 and notes 7 and 8. If so, a little carelessly overliteral translation is the academic source of an elaborate Colorado doctrine today.

it is quite possible to build up a structure of logic and property rights under the rule of *stare decisis*, that has its foundation deep in things as they are, whatever may have been the forgotten academic roots of the timbers in another soil. It is because the academic principles have been generally argued that we have been at pains to fix them in mind. It is now our purpose to notice briefly what support has been given the two doctrines by Congress and the Federal executive officers, and then to examine more closely the application of both principles by the Supreme Court.

STATUTES.

"An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," July 26, 1866 (14 Stat. at L. 251), was the first general mining law and water rights law of the United States. Section 9, the corner stone in the present structure of legislation upon water rights, provided:

"That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purpose aforesaid is hereby acknowledged and confirmed: Provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any other settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." R. S. 2339.

As will be seen, this is an act for the relief of *persons*, not States; it confirms squatters' rights.

This section is referred to in an amendatory act of July 9, 1870 (16 Stat. at L. 217), as follows:

"That none of the rights conferred by sections five, eight and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth

section of the act of which this act is amendatory." R. S. 2340.

This again recognized *private* possessory rights, not States' rights beyond police power regulations.

The Desert Land Act of March 3, 1877, provided:

"That the right to the use of water by the persons so conducting the same on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." (19 Stat. L. 377.)

This act also was held to be no broader than its predecessors, until the Oregon Supreme Court construed it as a Federal grant to the States, *Hough v. Porter*.*

The act of March 3, 1891, respecting rights of way through public lands, provided:

"The privilege herein granted shall not be construed to interfere with the *control* of water for irrigation and other purposes under authority of the respective States or Territories." (26 Stat. L. 1095.)

This simply recognizes local police regulation by the local authority, whether a State or not.

The act of 1897 concerning reservoir sites provided that the charges for water

"shall always be subject to the control and regulation of the respective States and Territories." (29 Stat. L. 391.)

—again a recognition of local control and not of ownership. If the States or Territories owned the water, why was Congress mentioning the subject?

The Reclamation Act of 1902 provided:

"That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limitation of the right." (32 Stat. L. 388.)

*51 Ore. 318.

When Congress laid down this rule it assumed its own right to do so, and asserted that it had jurisdiction. And it was fixing private rights, and limiting State police powers to that extent.

The Forest Reserve Act of June 11, 1906, provides that in South Dakota, where the riparian doctrine obtains, Black Hills grants shall be subject to the appropriation doctrine, and no title

“shall vest in the patentee any riparian rights
and that such limitation of title shall be expressed in the patents.” (34 Stat. L. 233, sec. 3.)

Here Congress asserts its jurisdiction to choose between appropriation and riparian theories, regardless of State laws.

Finally, the act of 1911 concerning irrigation districts provided: “Nothing contained in this act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to *control* the waters of any stream in any State.” (36 Stat. 1, 925.)

Not a word about title; merely that such police powers as the States have already, they may still exercise.

EXECUTIVE ATTITUDE

Perhaps the change in the attitude of executive officers could not be better illustrated than by contrasting Mr. Roosevelt's first annual message to Congress, December, 1901, with a speech of his in San Francisco in 1911. In the message, while urging the passage of a Federal reclamation act, he not only approves the police powers of the States, but even their constitutional provisions asserting State ownership. True, he is deprecating the monopolies obtained by private persons failing to use the water rights they enjoy. He does not directly take up the question of Federal title—which was not much thought of at that time. But in his speech before the Commonwealth Club of San Francisco in March, 1911, after the question of Federal ownership had been raised, he bluntly contended that the United States could do with the waters on the public lands whatever it could do with the lands themselves.

The Attorney General's office rendered an opinion in 1903 for the Reclamation Service,²⁵ holding that the acts of Congress had so abandoned riparian rights that there remained “no authority to make such executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, or will in any manner interfere with its laws relating to the control, appropriation, use or distribution of water.”

25. Second Ann. Rep. U. S. Rec. Serv., p. 36.

This opinion by Assistant Attorney General Campbell has since been repudiated. We quoted the Attorney General's 1914 report above. . . and in 1917, in the Government's brief upon reargument of *Wyoming v. Colorado*, in the Supreme Court (not yet decided) it is said at page 123:

"That opinion dealt only with the power of the executive branch to assert the common law rights of the United States in unappropriated waters, and expressly stated that the power of Congress in that regard was not being passed upon. The conclusion that the executive was without authority to withdraw waters from appropriation was erroneous. See the Reclamation Act, 32 Stat. L. 388, and *U. S. v. Midwest Oil Co.*, 236 U. S. 459."

THE SUPREME COURT

The subject in hand is one peculiarly adapted to examination by the "case system." We have a foundation of community law in the customs of isolated pioneers, expounded and developed by a series of decisions, and recognized by rather declaratory statutes—a modern growth quite similar to that of the common law in England.

The course of adjudication in the Supreme Court cannot be intelligently considered apart from the personality of Mr. Justice Field. He had been on the California Supreme Bench as Chief Justice while the local customs of the miners were being formulated by judicial legislation, and there wrote the opinions in some of the leading cases, announcing the riparian theory of Federal right, under which the first appropriators were technically trespassers.²⁶ This was at the time when the issue of State rights and Federal power was being drawn to be finally settled upon the battlefields of the Civil War. He was instrumental in holding California in the Union, and his decisions in the State Court rang with loyalty to the General Government.

While on the Supreme Court bench, he was the author of the opinions in *Atchison v. Peterson*,²⁷ *Basey vs. Gallagher*,²⁸ and *Jenison v. Kirk*.²⁹ The principles there laid down are followed by the opinion of Mr. Justice Miller in *Broader v. Water Company*³⁰ and that of Chief Justice Fuller in *Sturr v. Beck*.³¹ After what has been said of the California doctrine, it is not necessary to make an extensive

26. See *Boggs v. Merced*, 14 Cal. 374; and *Moore v. Smaw*, 17 Cal. 199.

27. 20 Wall. 507.

28. 20 Wall. 670.

29. 98 U. S. 453.

30. 101 U. S. 274.

31. 133 U. S. 541.

analysis of these five decisions. It suffices to say that the General Government, as the owner of public lands, is recognized as the owner of the water rights in non-navigable streams, and to have consented, by the Act of 1866, to the *private* appropriation of such waters, whether for riparian or non-riparian uses of *individuals*; and these decisions are no authority for the assertion of any proprietary interest by any State or territory as against the Government; but quite the contrary.

The last of these cases was between a riparian owner, with Government patent, who had not actually diverted water, and one who appropriated it after the date of the patent. The Court held, "As the riparian owner has the right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the *land* should have the same effect." Locally the law of appropriation obtained.

II.

We come now to cases that are cited as supporting both the conflicting doctrines of Federal and States rights. Several contain important discussions obiter; they cite and do not overrule the earlier cases, yet propound inconsistent theories; and the Court is not always unanimous, as it had been in the first group. It follows that the law is now unsettled.

The first of these cases is *United States v. Rio Grande Dam and Irrigation Company*,³² which we shall consider with the later case of *Kansas v. Colorado*,³³ the opinions in both by Mr. Justice Brewer. The second was generally regarded at the time (1907) as a slap at President Roosevelt's "New Nationalism"; a drift in that direction is discernible in the first. And whether that attitude in the Supreme Court is to be reckoned with as fixed or ephemeral, in the present trend of affairs, is a factor in determining what weight these decisions shall have. Of that practical consideration we shall have nothing further to say.

The Rio Grande Dam case was injunction by the United States to prevent the erection of a dam and diversion of water, by a corporation chartered by the territory of New Mexico for that purpose, as interfering with navigation. The lower court "took judicial notice of

32. 174 U. S. 690.

33. 206 U. S. 46.

the fact" that the river was not navigable and dismissed the bill. This is reversed, with directions to make inquiry whether the dam would interfere with navigability; if so, to restrain the erection.

The court refers to the Act of 1890 (26 Stat. L. 454, Sec 9), prohibiting any obstruction of navigation, and says, "Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any state tending to destroy that navigability without the explicit assent of the National Government, enacted the Statute in question." This Statute is upheld.

After quoting 3 Kent, Sec. 439, on the Law of Riparian Rights, the Court holds that "as to every stream within its dominion a State may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise"—and concedes *arguendo* that a territory may do likewise.

Further, "although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation 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 government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

Then having referred to the different Acts of Congress, and quoted *Broader vs. Water Company, supra*, it is added, "Obviously by these Acts, so far as they extend, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. . . . And in reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries."

The noticeable feature of this case, and those that follow, as differing from the five in the earlier group, is that it says nothing whatever about the United States as proprietor of the public lands—the first premise in the California doctrine cases. If this opinion would indicate that Congress has severed the lands from the non-navigable waters, and consented that water rights are to be acquired by appropriation only in the appropriation States, then a patent would not

carry riparian rights. Yet there is a clear recognition that the source of title is the action of Congress. Justices Gray and McKenna took no part in the decision.

Kansas vs. Colorado, also by Mr. Justice Brewer, sought to enjoin the upper State and interested corporations from so appropriating waters of the Arkansas River as to interfere with proprietors in Kansas and reduce the value of their lands and the taxes available therefrom. The Attorney General of the United States intervened to protect the rights of the United States in respect to navigation and reclamation of arid lands generally, and not public arid lands alone. The Court found that the stream was not navigable and that reclamation was not among the enumerated powers in the Constitution, but was one of the powers reserved to the people. The intervening petition was therefore dismissed. The case on its merits was disposed of upon equitable principles practically identical with the riparian doctrine, it being found that there was no such diversion of the upper waters as the lower proprietors could reasonably complain of. The bill itself was dismissed without prejudice to the rights of Kansas to show later on that Colorado and its citizens were substantially and unreasonably damaging Kansas and its citizens. The interest of the United States in the use of waters upon its own lands was not in issue, the intervention being based on the theory that neither Kansas nor Colorado could regulate the use of the water beyond its own borders and that the power of regulation must reside in the United States with respect to interstate streams, "as a sort of national police power springing from the needs of the situation."

After finding that the Constitution, adopted at a time when there were no large tracts of arid land within its limits, makes no provision for national control of the arid regions or their reclamation, the Court says, "It does not follow from this that the national Government is entirely powerless in respect to this matter. These arid lands are largely within the territories, and . . . Congress has full power of legislation. . . . in respect to all arid lands within their limits. And as to those lands within the limits of the States, at least of the western States, the national Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. *We do not mean that its legislation can override State laws in respect to the general subject of reclamation.* While arid lands are to be found mainly, if not only, in the western and newer States, yet the powers of the national Government within the limits of those States, are the same, no greater and no less, than those within the limits of the original thirteen; and it would be strange if, in the

absence of a definite grant of power, the national Government could enter the territory of the States along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within their borders. . . . It is enough for the purposes of this case that *each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters.* It may determine for itself whether the common law rule in respect to riparian rights, or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation, shall control. Congress cannot enforce either rule upon any State."

A controversy is then supposed between two individuals, upper and lower riparian owners on a little stream, and the Court says, "We do not intimate that entirely different considerations obtain in a controversy between two States. Colorado could not be upheld in appropriating the entire flow of the Arkansas River, on the ground that it is willing to give, and does give, to Kansas something else which may be considered of equal value."

In this case, too, Mr. Justice Brewer seems to have purposely avoided the consideration of any question arising upon the proprietary interest of the United States in public lands. Much that is said in the long opinion is not necessary to the decision. Chief Justice White and Mr. Justice McKenna concurred only in the result, Mr. Justice Moody not sitting. Assistant Attorney General Campbell, of counsel for the United States, is the author of the opinion of September 5, 1903,³⁴ which has been referred to above as having since been repudiated.³⁵

III.

Then there is a group of cases employing the different Federal Statutes as a starting point, and deciding the issues with reference to the extent of rights established thereunder. Here is to be noticed an absence of any language of the Supreme Court akin to that, for example, of the Court of Appeals for the Ninth Circuit where the latter began an opinion with this assumption: "In the consideration of the case it is to be remembered that the United States owned the land, and the State of Idaho the water."³⁶ Typical of these cases is *Gutierrez v. Albuquerque Land Co.*³⁷ The Rio Grande Dam case, *supra*, is in the same category, and the Boquillas case, *infra*, is partly so.

34. Second Ann. Rep. U. S. Rec. Serv. 1902-3, p. 36.

35. For a strong criticism of the opinion in *Kansas v. Colorado*, by Judge Simeon E. Baldwin, see 18 Yale Law Journal, 8.

36. *Twin Falls Salmon River, etc., Co. v. Caldwell*, 242 Fed. 177.

37. 188 U. S. 545.

In the Gutierrez case a riparian owner sought to enjoin the defendant from crossing its lands to appropriate water: the plaintiff held under a Mexican grant and it was decided that a United States patent merely confirmed the Mexican grant, which had not carried riparian water rights in the territory of New Mexico. It was also urged that the waters, sought to be appropriated, were public waters of the United States and that the defendant corporation could not be empowered by the territorial acts of New Mexico to take or dispose of the same. Speaking by Chief Justice White, the Court says, "We perceive no merit in the contention that the proviso in the desert land act of March 3, 1877, declaring that *surplus* water on the public domain shall remain and be held free for the appropriation and *use of the public* for irrigation, mining, and manufacturing purposes, subject to existing rights, is an expression of the will of Congress that all public waters within its control or the control of a legislative body of its creation must be *directly* appropriated by the owners of land upon which a beneficial use of water is to be made, and that in consequence a territorial legislature cannot lawfully empower a corporation, such as the appellee, to become an intermediary for furnishing water to irrigate the lands of third parties."

The language of the Rio Grande case, that a State cannot destroy the right of the United States, as owners of lands bordering on a stream, to the continued flow of its waters, and the Federal power over navigation, is repeated and approved and the Court says further, "By the Act of March 3, 1877,³⁸ the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, *was granted*, and it was further provided that all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and *use of the public* for irrigation, mining, and manufacturing purposes, subject to existing rights.' That the purpose of Congress was to recognize as well the legislation of a territory as of a State with respect to the *regulation* of the use of public waters, is evidenced by the Act of March 3, 1891.³⁹

Mr. Justice McKenna dissented, but the extent of the opinion is that Congress has authorized private persons to acquire water rights, belonging to the United States, under rules and regulations adopted by the States and territories as local agencies acting under Federal author-

38. 19 Stat. L. 377.

39. 26 Stat. L. 1095

ity. As said in *Butte City Water Co. v. Baker*,⁴⁰ "If Congress has power to delegate to a body of miners the making of additional regulations respecting location, it cannot be doubted that it has equal power to delegate similar authority to a State legislature."

IV.

Then there are cases rather passing over both the ownership of the public lands and the Federal statutes, and employing for a starting point the undoubted police power of the states to regulate waters within their boundaries, no matter who owns them. Thus it is held that the power of eminent domain is different where conditions differ with respect to what is properly to be called a public use; so the rights of a riparian owner are not the same in the West as in the East. "These rights have been altered by many of the Western States by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed . . . for the very purpose of thereby contributing to the growth and prosperity of those states. . . . This Court must recognize the difference of climate and soil, which render necessary these different laws of the States so situated."⁴¹

Boquillas Cattle Co. v. Curtis,⁴² held that though Arizona had adopted the common law, "it is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames." Mr. Justice Holmes quotes the Arizona Statute providing that "all streams capable of being used for the purpose of irrigation are declared to be public property, and no one shall have the right to appropriate them exclusively, except under such equitable regulations as the legislature shall provide," and then says, "The right to use water is not confined to riparian proprietors. *Gutierrez v. Albuquerque Land & Irrigation Co.*, 188 U. S. 545, 556; *Coffin v. Left Hand Ditch Co.*, 73 Pac. Rep. 210, 220. Such an imitation would substitute accident for a rule based upon economic considerations, and an effort, adequate or not, to get the greatest use from all available land."

He makes a passing reference, to the Federal statutes, which has been the source of much speculation because of the language which we italicize. "The opinion that we have expressed makes it unnecessary to decide whether lands in the arid regions, patented after the Act of March 3, 1877, are not *accepted subject to* the rule that priority of appropriation gives priority of right by virtue of that act. construed

40. 196 U. S. 1. c. 127.

41. *Clark v. Nash*, 198 U. S. 361.

42. 213 U. S. 339.

with R. S. sec. 2339. *The Supreme Court of Oregon has rendered a decision to that effect on plausible grounds. Hough v. Porter, 98 Pac. 1083,* citing also the Act of 1891, and the Rio Grande Dam and the Gutierrez cases, *supra*.

Of this language, the Solicitor General of the United States says in his brief in *Wyoming v. Colorado* (not yet decided), "The opinion mentions the Oregon case and says, in a passage we have heretofore quoted, that it was decided on plausible grounds. The grounds on which it was decided and which were said to be plausible, were that riparian rights had been abrogated by *Congress* and not by the states."

V.

It will have been seen that there is nothing in these decisions of the Supreme Court to sustain any assertion of state title to the waters of non-navigable streams in the Western states. And all that has been said is limited by the cases we shall next examine. .

*Winters v. United States*⁴³ decided before the *Boquillas* case, is an opinion by Mr. Justice McKenna, who it will be remembered would not join in the language used by Mr. Justice Brewer in the *Rio Grande Dam* case and dissented in *Kansas v. Colorado*. In the *Winters* case the Government sought to restrain the construction of dams and reservoirs on Milk River in Montana, flowing to a certain Indian reservation. The Government had established the Indian reservation and subsequently admitted Montana to the Union, and the defendants argued that "any reservation in the agreement with the Indians whereby the waters of Milk River were not to be free to appropriation by the citizens and inhabitants of said State, was repealed by the Act of Admission." The injunction was granted below and this action is affirmed, the Court saying, "*The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be,*" citing the *Rio Grande Dam* case and *U. S. v. Winans*. Mr. Justice Brewer dissented, this decision receding from his position in *Kansas v. Colorado, supra*.

In a later case, *Bean v. Morris*,⁴⁴ Mr. Justice Holmes delivered the opinion of the unanimous court in a conflict between residents of Montana and Wyoming with respect to the waters of an interstate stream. The plaintiff was a prior appropriator in Wyoming, who sought to enjoin a subsequent appropriation in Montana nearer the source of a stream. The defendants conceded that, but for the fact that the prior appropriation was in one state, and the interference in another, the plaintiff would be

43. 207 U. S. 564.

44. 221 U. S. 485.

entitled to the relief prayed. The Court refers to the fact that the right of appropriation, under state laws, is subject to vested rights protected by the Constitution, and the decree enjoining the appropriation in the upper state was affirmed. It is said:

"We know no reason to doubt, and we assume that, subject to such rights as the lower state might be decided by this Court to have, and to vested private rights, if any, protected by the Constitution, the State of Montana has full legislative power over Sage Creek, while it flows within that state. *Kansas v. Colorado*, 206 U. S. 46. Therefore, subject to the same qualifications, we assume that the concurrence of the laws of Montana with those of Wyoming is necessary to create easements, or such private rights and obligations as are in dispute, across their common boundary line. . . . Montana cannot be presumed to be intent on suicide, and there are as many if not more cases in which it would lose as there are in which it would gain, if it invoked a trial of strength with its neighbors. . . . The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States, while Montana and Wyoming were such territory (R. S. Sec. 2339, 2340; Act of March 3, 1877), and is recognized by both states now. Before the state lines were drawn, of course, the principle prevailed between the lands that were destined to be thus artificially divided. Indeed, Morris had made his appropriation before either state was admitted to the Union. The only reasonable presumption is that the states, upon their incorporation, *continued the system that had prevailed theretofore, and made no changes other than those necessarily implied or expressed.* See *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; *Smith v. Denniff*, 24 Mont. 20, 50 L. R. A. 741, 81 Am. St. Rep. 408, 60 Pac. 398."

This language is reminiscent of that found in the early case of *Broader v. Water Company*, *supra*, under the California doctrine: "We are of the opinion that it is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the *rights of persons* who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the Act of 1866, and that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing*

right of possession constituting a valid claim to its continued use, than the establishment of a new one."

*Bothwell v. Bingham County*⁴⁵ arises under the Carey Act, where the procedure, in short, is that the Government segregates a portion of the public lands under a contract with a state where the land lies; the state makes a contract with an irrigation company, which builds the dam and canals, and is repaid by a lien upon the lands, in the nature of a first mortgage, when the settlers come in and get title; the Government issues its patent to the state, and the state deals out the several patents to the different entrymen. In this case, after the Government had issued its patent to the State, in accordance with the contract between the Government and the State, following the proof that the irrigation works had been built and of beneficial use of the land, the State of Idaho proceeded to tax the land as the property of the entrymen before the State had issued a patent to the settlers; i. e., the State treated the land as belonging to the settler, although he had not yet received title, the record title being in the State itself.

Mr. Justice VanDevanter, speaking for the unanimous Court, said:

"When the proceedings for the acquisition of the title have reached the point where nothing more remains to be done by the entryman, and the government no longer has any beneficial interest in the land, and does not exclude the entryman from the use of it, *he* is regarded as the beneficial owner, and the land as subject to taxation, even though the duty of passing the legal title to him has not been discharged,—the principle underlying the rule being that one who has acquired the beneficial ownership of the land, and is not excluded from its enjoyment, cannot be permitted to use the fact that the *naked legal title remains in the government* to avoid his just share of state taxation. . . . That the title was being passed through the state to the entryman or purchaser rather than by a direct conveyance is immaterial."

Here, though there was a contract between the Government and the State, and patent had issued to the State, the Court speaks of legal title in the *Government* still, and equitable title in the *settler*; in short, the State was a mere agency of transmission. If the State were even a trustee, legal title would have passed to it; the only theory on which the Court could find legal title still in the Government was that the State was its agent. And this attitude is consistent with the early case and the late Butte City case, *supra*.

The Federal Constitution provides⁴⁶ that *Congress* has exclusive

45. 237 U. S. 642.

46. Art. IV, sec. 3, sub. 2.

"power to *dispose of* and make all needful rules and regulations respecting the territory or other property belonging to the United States." Under this Constitutional provision, how did the title of the United States to water rights in non-navigable streams within public lands pass to a State so as to justify it "in asserting its ownership of all the natural streams within its borders," *Stockman v. Leddy*, 55 Colo. 24? The most that can be pointed to is an agency to make rules similar to, and classed with, the customs of groups of miners.

CONCLUSIONS.

It will have been seen that the course of adjudication has followed the tread of events, rather than keeping quite abreast of the times; this is usual in all courts, avoiding the extremes of popular variation, and yet responsive to the *vox populi* when it has become certain. So the Civil War conception of Federal authority continued down to about 1890; the reaction, which had already been felt by the people, reached the bench, and the Court took a slap at "New Nationalism"; meanwhile the tread of events has turned toward centralization at Washington more than ever before, and the last decisions seem to be giving ear to these expressions of popular sentiment. If so, the forthcoming decisions are likely to take account of limitations upon the rights of the states.

Riparian and appropriation rights have this in common, that each is predicated upon a right of access to the stream. In the older communities, where all the lands are privately held, access is wholly with the riparian owners; transfer of the land transfers the opportunity for access. In the Western public lands, a mere license subsequently sanctioned by Congress and the courts, has ripened into a right, and the right of appropriation is a consequence of this opportunity for diversion of the waters. And even though the waters themselves be said to belong to the negative community, like the air and the waves of the sea, the Federal Government as riparian owner dominates this right of access until it has parted with the same.

No act of Congress goes farther, expressly, than to permit Federal rights in land and water to pass to a private owner. The appropriation theory is predicated upon beneficial use; only one who does use gets title. But the state does not use, does not appropriate—does not perform the condition precedent for acquiring Federal title. The state, like a group of miners, may by its rules determine how a private appropriator shall proceed. But when the Federal Government makes the state the donee of a power of appointment, it does not make an

outright grant to the donee of the power; it does not transfer proprietorship, but creates an agency.

For fifty years counsel have sought to elicit from the Supreme Court an utterance declaring that the "State owns the waters," such as has come from lower Federal Courts, State Courts and is found in State Constitutions and Statutes. But though half a dozen theories have been urged, the efforts have been vain. The times are even less favorable for such contentions now. Meanwhile even state legislatures and Courts are imposing equitable limitations⁴⁷ on the strict doctrine of prior appropriation, to avoid monopoly and give a preference to domestic users, and pro-rate among appropriators during drouth and thus safeguard the necessities of now more thickly settled communities. That doctrine has come to stay; but not in its early arbitrary application, it seems from the authorities in the footnote, and certainly not at the expense of paramount Federal rights.

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47. *Barnes v. Shebron*, 10 Nev. 243; *Union Min. Co. v. Danberg*, 81 Fed. 73; *Anderson v. Bassman*, 140 Fed. 14; *Schodde v. Twin Falls L. & W. Co.*, 88 C. C. A. 207; *Fitzpatrick v. Montgomery*, 20 Mont. 181; *Young v. Hinderlider (N. M.)*, 110 Pac. 1045; *Salt Lake City v. Salt Lake, etc., Co.*, 25 Utah 456; *Farmers' Irrigation Dist. v. Frank*, 72 Neb. 136; 18 Yale L. Jour. 188; 19 Harvard L. Rev. 475.