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Water & Watercourses—Public Lands—Federal Control of Nonnavigable Waters as Related to Fisheries

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WATER & WATERCOURSES—PUBLIC LANDS—FEDERAL CONTROL OF NONNAVIGABLE WATERS AS RELATED TO FISHERIES.—In 1951 the Federal Power Commission licensed a power company to construct Pelton Dam on lands reserved by the United States as a power site on the Deschutes River in Oregon.[1] The State of Oregon protested that the Federal Power Commission could not grant the license without the permission of the state, and also objected to the adequacy of the proposed fish conservation facilities. The Commission denied a rehearing and the state sought a review by the Court of Appeals for the Ninth Circuit. That court set aside the Commission's order.[2] On certiorari to the United States Supreme Court, with several states filing briefs as amici curiae, *held,* reversed. The Desert Land Act of 1877,[3] relinquishing control over unappropriated waters on public lands to state law, does not apply to the waters on reserved lands of the United States, even though they may be nonnavigable.[4] Provision for fish conservation facilities is within the discretion of the Commission. *Federal Power Commission v. Oregon,* 349 U. S. 435 (1955) (Justice Douglas dissenting).

This decision shows clearly the extent to which the federal government has encroached upon what was formerly considered by the several states their right to control the nonnavigable waters within their boundaries. Earlier Supreme Court decisions on this matter had greatly modified the balance of power between the United States and the states concerning the control of lakes and rivers, and the present decision is a further example. The direct result of the ruling is that Pelton Dam may now be constructed regardless of the wishes of the State of Oregon. The indirect effect is that the anadromous fish[5] population of the substantial watershed of the Deschutes River which lies above the dam site is now to be controlled entirely by the fish conservation methods approved by the Commission. Prior to this decision, the regulation of the fish would have been the responsibility of the State of Oregon, working through its fish and game departments.

The control which the Federal Power Commission has now been granted over a state's program of fish conservation is indicative of the widening area in which the United States has concerned itself over matters which had long been within the purview of the state governments. The gradual growth of the federal power in the regulation of waters may be seen in the opinions handed down by the Supreme Court over the past century and a half. The expansion of federal control is first clearly seen in *Gibbons v. Ogden,*[6] in which the Supreme Court looked to the commerce clause of the Constitution[7] to decide that the power to regulate commerce necessarily included power over navigation.

For many years that decision represented the only important step in the direction of expanded federal control. Indeed, the Supreme Court re-

[1]It derived its authority from the Federal Power Act, 41 STAT. 1063 (1920), as amended, 16 U.S.C. §§ 791a-825r (1952).

[2]211 F.2d 347 (9th Cir. 1954).

[3]19 STAT. 377, 43 U.S.C. § 321 (1952).

[4]The holding that navigability is immaterial is implied since there was no finding as to the navigability of the river.

[5]Fish ascending rivers from the sea for breeding purposes. In this instance, especially salmon and steelhead trout.

[6]22 U.S. (9 Wheat.) 1 (1824).

[7]U.S. CONST. art. I, § 8, cl. 3.

fused to condone an extension of that control over the use of waters for reclamation purposes.[8] As recently as 1935 the Court confirmed the belief that the express intent of the Desert Land Act of 1877 was to permit the individual states to control all non-appropriated waters on public lands within each state.[9]

This tendency to limit federal control was not to continue, for the concept of federal preeminence in the realm of water rights was given renewed impetus in 1940 by the opinion in *United States v. Appalachian Power Co.*[10] The Court there decided that the federal government could impose conditions unrelated to navigation in any decision to build a dam on a stream which, though not navigable at present, could feasibly be made so. The opinion was based on the theory that the authority of Congress over navigable waters was as broad as the needs of commerce, and that a dam on this particular river would have an effect on its possible future navigability. The following year the Court decided in a similar vein that the federal government has the power to authorize dams on nonnavigable parts of otherwise navigable rivers in order to preserve or promote commerce on the navigable portions.[11] These cases marked the first advancement of federal power into the domain of state control over nonnavigable waters.

In 1946 the Court was faced directly with the question whether a federal power development project, even though located on a navigable river, had to be licensed or approved by the state in which the power site was situated. The Court held, in *First Iowa Coop. v. Federal Power Commission,*[12] that it was not necessary for the project to comply with state law, although the Commission, as set forth in the Federal Power Act, might choose to require such compliance. The opinion showed the court's concern that the requirement of a state license, as a condition precedent to securing a federal license for the same project, would give the state a veto power over the federal government's attempt to achieve a comprehensive, nation-wide plan for water resource utilization.

The present case marks the extension of federal control into a new dimension, that of regulating the waters within a state because the lands through which the waters flows are reservations[13] of the United States. Where formerly the federal government exercised no direct control over surplus waters on the public lands without the consent of the state involved,

[8]Kansas v. Colorado, 206 U.S. 46 (1906).

[9]California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

[10]311 U.S. 377 (1940).

[11]Oklahoma *ex rel.* Phillips v. Atkinson Co., 313 U.S. 508 (1941).

[12]328 U.S. 152 (1946).

[13]"The words defined in this act shall have the following meanings for purposes of this Act, to wit:

"(1) 'public lands' means such lands and interests in lands owned by the United States as are subject to private appropriation and disposed under public land laws. It shall not include 'reservations,' as hereinafter defined;

"(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks. . . ." 49 STAT. 838 (1935), 16 U.S.C. § 796(1), (2) (1952).

it now can exercise plenary power over waters on lands of the United States which are denominated "reservations." Any relationship to navigability has thus become irrelevant in these areas.

The dissenting opinion strongly urged that the term "reserved lands" as contemplated by the Federal Power Act meant only that the lands were withdrawn from homestead entry, and that the water rights were not disturbed. But the majority held otherwise, and by its interpretation of the wording of the Act has promulgated a radical extension of federal control over water rights.

In the field of conservation of fisheries, the federal government has obviously long been able to exert an influence over the regulation of migratory fish in navigable waters. A recent decision of the United States Court of Appeals emphasized this fact.[14] In that case the court held that if compliance with the laws of the State of Washington would prevent the licensing of a dam which the Power Commission felt was needed on the navigable Cowlitz River, then the state could not interfere by requiring a state license. The state law,[15] in an endeavor to protect the fishing industry, prohibited the construction of a dam over a certain height on that river, on the ground that a higher dam would prevent the migration of salmon. While elaborate plans were contemplated in the report of the Federal Power Commission looking toward safe transmission to fish to waters above the dam, the court indicated that the adequacy of those plans was at the discretion of the Commission, and that the court was powerless to interfere so long as the findings of the Commission were supported by "substantial evidence."

Much the same willingness to leave the adequacy of fish conservation measures to the discretion of the Federal Power Commission is shown in the instant Supreme Court case. Here, it is further held that the argument that Pelton Dam will preclude certain plans for the Columbia River Basin, which contemplate the concentration of fish in the Deschutes River, is one to be considered by the Commission, or that it should be directed to Congress. But no mention is made of the concern of the State of Oregon over this item. Thus it is evident that the federal government can disregard the wishes of a state concerning its fisheries wherever it believes that the interests of the nation are best served by permitting a dam to be built, and this applies even where the waters are nonnavigable, provided only that the power site is on reserved lands of the United States.

The effects of this decision are far-reaching, particularly in the western states. This would be true even though the federal government withdrew no additional lands from the public domain, which it apparently may do without limitation, since a great many of the best possible power sites have already been withdrawn. For example, it is estimated that almost all potential power sites on Oregon streams have been reserved by the United States.[16] In the neighboring State of Washington every principal power

[14]Washington Department of Game v. Federal Power Commission, 207 F.2d 391 (9th Cir. 1953).

[15]WASH. REV. CODE § 75.20.010 (1955).

[16]COLUMBIA BASIN INTER-AGENCY COMMITTEE, MINUTES OF EIGHTY-FOURTH MEETING, exhibit III at 2 (1955) (statement by Mr. A. G. Higgs, Assistant Attorney General of Oregon) (mimeographed).

site is within a federal reserve.[17] In light of these facts, it becomes evident that a state's regulation of its fisheries can in many instances be subordinated to the desire for power production, if the Federal Power Commission feels that this is justified. This is true even though the waters are non-navigable.

The problem is intensified by the fact that the term "reservation" is not limited to power sites. It includes any other lands set aside for a specific purpose,[18] at least in the contemplation of the Federal Power Act; and such lands as army installations, Indian reservations, and national forests become involved. The national forests alone cover large areas, particularly above the limits of navigability, and in some of the western states they constitute more than one-fourth of the total area. Necessarily, many streams not otherwise covered by a power site reservation will now fall within the primary control of the United States for purposes of dam construction.

From the point of view of the conservation of migratory fish, it is highly possible that the federal policies on the subject are more beneficial than the policies, and divergent efforts, of many of the states. If this be so, then the fact that large areas of the West are reservations of the United States may result in a wiser over-all management of this resource than if each state had the final decision as to whether a given dam is desirable or not.

The matter is not so easily resolved in those states where the people have shown real concern for the future of their fisheries for both commercial and recreational purposes. One illustration of this will suffice: The legislature of Oregon has set aside the lower portion of the Rogue River for recreational purposes primarily, and has set specific limitations on the construction of federal dams downstream from a certain point.[19] Following the present decision the Federal Power Commission could, if it saw fit, authorize the construction of power dams on those parts of the Rogue which flow through certain forest reserves, despite the desire of the State of Oregon to dedicate that river to recreational purposes.

This is but an isolated instance; in another area the federal government may well decide that the recreational values of a river are of paramount importance to the entire nation, or that migratory fish alone are of greater economic value than power development. The important point is that the power to make these decisions and the responsibility for them have been largely withdrawn from the people of the individual states, of the West especially, and placed in the hands of the federal government.

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[17] *Id.*, exhibit VI at 1 (statement by Mr. W. A. Galbraith, Director, Department of Conservation and Development of Washington).

[18] See note 13 *supra*.

[19] ORE. REV. STAT. § 542.210 (1955).