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Dudley Warren Woodbridge

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RIGHTS OF THE STATES IN THEIR NATURAL RESOURCES PARTICULARLY AS APPLIED TO WATER

DUDLEY WARREN WOODBRIDGE*

SOURCE OF RIGHTS OF STATES

The origin of the rights of the states to their natural resources is nowhere better stated than by Mr. Justice Stone in the case of *Commonwealth of Massachusetts v. State of New York*:¹

“The English possessions in America were claimed by right of discovery. The rights of property and dominion in the lands discovered by those acting under royal authority were held to vest in the crown, which under the principles of the British Constitution was deemed to hold them as a part of the public domain for the benefit of the nation. . . . As a result of the Revolution the people of each state became sovereign, and in that capacity acquired the rights of the crown in the public domain . . .”

The same principle was applied with respect to new states formed out of the territory of the original thirteen states.² However, title to lands ceded to or purchased by the United States is vested in the United States subject to treaty provisions and subsequent grants. The state is also the owner of all things *ferae naturae*. And in the well known case of *Georgia v. Tennessee Copper Co.*³ in which the State of Georgia sought to enjoin defendant Copper Companies from discharging noxious gases from their works in Tennessee over the lands in Georgia to the great injury thereof the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

“This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”

*Chancellor, Professor of Jurisprudence and Dean, Department of Jurisprudence, College of William and Mary.

1. 271 U. S. 65, 79 (1925).
2. *Pollard v. Hagan*, 3 How. 212 (U. S. 1844).
3. 206 U. S. 230, 237 (1906).

OWNERSHIP OF TIDELANDS

In a series of cases culminating in *United States v. State of Louisiana*,⁴ the Supreme Court of the United States has held that no state has any title to the natural resources under tidal waters. (No, not even Texas.)⁵ The Court speaking through Mr. Justice Douglas stated:

“The claim to our three mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.”⁶

OWNERSHIP OF CLOUDS

There has been much speculation as to who owns the clouds. Until recent years this speculation has been almost entirely academic, but since the advent of aviation and artificially induced rainfall the question has already become of practical importance and will undoubtedly increase in importance as time moves on. The private owner of the surface has some rights, at least as far up as is needed by him for the quiet enjoyment of the surface and structures on the surface. In fact The Uniform Aeronautics Act even states:⁷

“The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4.”

While this Act has been withdrawn⁸ from the active list of recommended uniform acts by the Commission on Uniform State Laws it has been adopted by some twenty-one states.

As clouds are *ferae naturae*, fugitive in nature, and exist over sovereign states, it is arguable that the states have a qualified ownership.

Since other states of the Union are affected by another's use of the clouds and since our national defense and our interstate com-

4. 339 U. S. 699 (1950).

5. *United States v. Texas*, 339 U. S. 707 (1950).

6. 339 U. S. 699, 704 (1950).

7. UNIFORM AERONAUTICS ACT, § 3, 11 U. L. A. 160 (1938).

8. 11 U. L. A. (1949 Cumulative Annual Pocket Part, p. 11).

merce and our navigable streams are vitally connected with the atmosphere it is arguable that the United States also has rights. Mr. Gus O. Hatfield in discussing legal problems raised by artificial rain-making concludes a note in the *Vanderbilt Law Review* as follows:⁹

“On the other hand, property interests and individual rights must be protected against unwarranted invasions by the negligent or capricious rain-maker. The only feasible solution appears to be some form of governmental regulation. It is doubtful that completely successful controls could be imposed at the state level, since interstate problems are certain to arise whenever weather control is attempted on any substantial scale. All of the problems which exist, especially the property aspect will be duplicated at both interstate and international levels. The effects of an artificially induced rainstorm cannot be confined to political boundaries. It therefore appears likely that in the near future it will be necessary to regulate rainmaking, not only by rules of nation-wide application, but also by international treaty.”

STATE OWNERSHIP OF WATERS: INTRODUCTION

There are various classifications of waters resulting from precipitation, but for the purposes of this paper I will use the following: (1) Waters flowing either on the surface or under the surface in a reasonably ascertainable well defined channel; (2) Surface waters not flowing in a reasonably well defined channel and not collected in natural ponds and lakes; (3) Underground waters not flowing in a well defined channel commonly called percolating waters and artesian waters.

Waters flowing on the surface in a reasonably well defined channel are either navigable or non-navigable though some writers have still a third kind, namely floatable but not navigable.

What are the rights of the states in each of these?

RIGHTS OF STATES IN SURFACE WATERS FLOWING IN WELL DEFINED CHANNELS: GENERAL PRINCIPLES

The waters of navigable streams and the beds of such streams are the property of the states subject however to certain rights of the federal government and of riparian owners. The prevailing test of navigability in the United States is one of fact. A stream is navigable when it is used, or is susceptible of being used, in its ordinary

⁹ 4 VANDERBILT LAW REV. 332, 337; See also BALL, SHAPING THE LAW OF WATER CONTROL, 58 YALE L. J.

condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.¹⁰

It is equally well settled that the states do not own the waters or beds of non-navigable streams. Thus in a Virginia case, *Garden Club of Virginia v. Virginia Public Service Company*,¹¹ it was held that a statute giving certain jurisdiction of the "waters of the state" to the State Corporation Commission had no application to the waters of a non-navigable stream, and hence in that case permission of the State Corporation Commission was not a prerequisite for the construction of a dam sixty-three feet high and four hundred fifty feet long near Goshen Pass in that State.

SAME: RIGHTS OF THE UNITED STATES—GENERAL

The Report of the President's Water Resources Policy Commission lists seven major limitations of the states on their powers of control of and use of their waters.¹² It is certain that some of these will be hotly denied by many, but at least they are worthy of our consideration.

SAME: COMMERCE POWER

The most important of these limitations is that of the commerce power. Where a river is used for the transportation of goods in interstate commerce even though the river is an intrastate one (such as the James River) it is a public highway. Mr. Chief Justice Marshall as early as 1824 in *Gibbons v. Ogden*,¹³ said:

"The power of Congress . . . comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes'."

And in *Gilman v. Philadelphia*,¹⁴ the Supreme Court said:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which

10. See *United States v. Oregon*, 295 U. S. 1 (1935).

11. 153 Va. 659, 151 S. E. 161 (1930).

12. Vol. 3, WATER RESOURCES LAW, pp. 5 to 72.

13. 9 WHEAT. 1, 197 (U. S. 1824).

14. 3 WALL. 713, 724 (U. S. 1865).

they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress.”

But generally, except for tidal waters there would be no navigable streams but for the convergence of innumerable non-navigable ones. As control of the non-navigable streams that affect the navigability of navigable streams is or may be necessary for the control of the latter Congress has jurisdiction over the former to the extent needed for the protection of the latter.¹⁵

Ramifications of this right of the United States over the navigable waters of the country include flood control projects and the development and disposition of electric power for the exercise of the commerce authority by Congress is not invalidated because it elects to serve purposes in addition to navigation, even if such other purposes would not alone justify an exercise of Congressional power.¹⁶

Moreover the Federal Power Act¹⁷ provides for the issuance of licenses to nonfederal agencies for the development of water power on streams under its jurisdiction. Any private company operating a power development prior to the passage of that Act took subject to the powers of Congress and may be lawfully required under that Act to accept a license with all its obligations and conditions.¹⁸

SAME: FEDERAL PROPRIETARY POWER

Another possible limitation on the rights of the state is the proprietary power of the federal government. This power exists in a number of phases. Article IV, Section 3, Clause II of the United States Constitution which deals with the admission of new states reads in part:

“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 . . .”

And in *United States v. San Francisco*,¹⁹ the United States Supreme Court stated:

“The power over the public land thus entrusted to Congress is without limitations.”

15. See *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690 (1899) and *Oklahoma v. Atkinson*, 313 U. S. 508 (1941).

16. See *Arizona v. California*, 283, U. S. 423, 456 (1931).

17. 41 STAT. 1063, 49 STAT. 838, as amended, 16 U. S. C. 791a-825r.

18. *Pennsylvania Water & Power Co. v. Federal Power Commission*, 123 F. 2d 155 (C. A. D. C. 1941), *cert. denied* 315 U. S. 806 (1942).

19. 310 U. S. 16, 29 (1939).

In *Light v. United States*,²⁰ the same court said:

“And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.”

And in *Canfield v. United States*,²¹ the Supreme Court states:

“While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation.”

The United States has acquired in one way or another vast tracts of lands. In the ownership of these lands it is not an ordinary owner, or even an ordinary riparian owner, for a state may not by legislation without the consent of Congress “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”.²²

When the United States acquires land from a state by purchase with consent of the state the latter can with the consent of the United States reserve certain specified rights of sovereignty,²³ but when the land is acquired without or despite the consent of the state the United States is not subject to any jurisdictional control by the state which would impair or destroy the effective use for the purpose for which the land was acquired.²⁴

SAME: WAR POWER

Under the war power²⁵ and the 1916 National Defense Act,²⁶ Congress authorized the President to cause an investigation to be made to determine the best means for the production of nitrates and other products for munitions of war. Out of this legislation there

20. 220 U. S. 523, 537 (1911).

21. 167 U. S. 518, 525 (1897).

22. *Kansas v. Colorado*, 206 U. S. 46 (1907).

23. See *Collins v. Yosemite Park & Curry Co.*, (taxing jurisdiction) 304 U. S. 518, 530 (1938).

24. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 539 (1885).

25. U. S. CONST. Art. I, § 8, cls. 1, 11; Art. I, § 9, cl. 7.

26. 39 STAT. 166, 50 U. S. C. A. 79.

eventually came the Wilson Dam at Muscle Shoals on the Tennessee River and finally the whole Tennessee Valley Authority Act.

But this is fast becoming the atomic age, and Congress knows that fact. By statutes passed August 1, 1946²⁷ there are: (1) A declaration of policy to the effect that there be established "a program for Government control of the production, ownership, and use of fissionable material to assure the common defense and security and to insure the broadest possible exploitation of the field;"²⁸ (2) With two unimportant exceptions the Atomic Energy Commission, as agent of the United States, shall be the exclusive owner of all facilities for the production of fissionable material;²⁹ (3) "All right, title, and interest within or under the jurisdiction of the United States, in or to any fissionable material, now or hereafter produced, shall be the property of the Commission;"³⁰ and, "no person shall have any title in or to any fissionable material;"³¹ (4) "As used in this chapter the term 'source material' means uranium, thorium or any other material which is determined by the Commission with the approval of the President, to be peculiarly essential to the production of fissionable materials;"³² (5) "The Commission is authorized and directed to purchase, take, requisition, condemn, or otherwise acquire, supplies of source materials or any interest in real property containing deposits of source materials to the extent it deems necessary to effectuate the provisions of this chapter."³³

I might put in parenthetically that it would not be too surprising if within the foreseeable future atomic power will be available for the large scale purification of ocean water and for the pumping of it and other waters wherever we desire for all our manifold uses. But be that as it may, I believe that it is safe to predict that the states as such will have little or no control over atomic energy and the natural resources required for its utilization.

SAME: GENERAL WELFARE CLAUSE

Further Congress is expressly empowered to levy taxes for the general welfare:

"The Congress shall have power to lay and collect taxes . . .

27. 60 STAT. 755, 42 U. S. C. A. 1801 *et seq.*

28. *Id.* § 1801 (4).

29. *Id.* § 1804 (c) (1).

30. *Id.* § 1805 (a) (2).

31. *Ibid.*

32. *Id.* § 1805 (b) (1).

33. *Id.* § 1805 (b) (5).

and provide for the common defense and general welfare of the United States.”³⁴

While the proper construction of this clause is controversial to say the least the Supreme Court of the United States has gone so far as to assert:³⁵

“Thus the power of Congress to promote the general welfare through large scale projects for reclamation, irrigation and other internal improvements, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power of navigation.”

The only certain limitation appears to be that such power should be exercised for the common benefit as distinguished from some mere local purpose.³⁶ Query: What is a mere local purpose? We have grown to be so interdependent that what is done in one locality frequently affects in one way or another what is done in many other places.

SAME: DOCTRINE OF EQUITABLE APPORTIONMENT

The rights of the states over their water courses may be further limited in some cases by the doctrine of equitable apportionment. This doctrine has been chiefly applied in the western States to interstate streams to insure to the inhabitants of each state involved a fair share of the benefits from the use of such waters. This result should be attained in so far as possible without quibbling over formulas.³⁷

SAME: INTERSTATE COMPACTS

Congress in 1911 authorized in advance the entering into by the states of interstate compacts “for the purpose of conserving the forests and the water supply of the States.”³⁸ To date these compacts have been used chiefly to apportion the waters of interstate streams, and to control pollution and floods. The action taken thereunder is binding upon the citizens of each state and all water claimants, even where the State had granted the water rights before it had entered into the compact.³⁹

34. U. S. CONST. Art. I, § 8, cl. 1.

35. *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 738 (1950).

36. *Ibid.*

37. *Kansas v. Colorado*, 206 U. S. 46 (1907).

38. 36 STAT. 961, 16 U. S. C. 552.

39. *Hinderlider v. La Plata Co.*, 304 U. S. 92, 106 (1938).

SAME: RIGHTS OF RIPARIAN OWNERS

The right of the state to its navigable waters is also subject to certain rights of riparian owners which the state can take away by eminent domain proceedings unless, of course, the United States is the riparian owner. Each such owner has a right of access to the channel, and the right to make a reasonable use of the water as it flows by and in connection with riparian land so long as he does not unreasonably pollute or divert it. The common law maxim is "Waters should flow as they have been accustomed to flow". When there is a great surplus of water for everyone no harm is done by such a rule, but when there is an acute shortage of water what rule could be more ridiculous? In effect such a rule would mean, "Since there is not enough water for all no one can use in substantial quantities what there is — and cursed be the non-riparian owners!"

SAME: SUMMARY

Thus while the states own their navigable waters this ownership is subject to the commerce power, the war power, the proprietary property rights, the treaty making power, the general welfare power of the federal government, the doctrine of equitable apportionment where the stream is an interstate one, to any interstate compacts that have been made as well as the rights of riparian owners.

THE JUS PUBLICUM AND THE JUS PRIVATUM

It is also said that the ownership of the states' navigable waters has a double aspect — the *jus publicum* or public right and the *jus privatum* or private right. To the extent that a state owns its navigable waters and the beds of streams in its private right it may alien the same as any owner, as for example a lease of a part of the bed of a drowned river bottom for the propagation of oysters. But to the extent that a state owns in its public right it owns in trust for all its citizens and can grant no monopoly. These principles were brought out strongly in the case of *Commonwealth v. Newport News*,⁴⁰ in which it was held that the legislature of the Commonwealth of Virginia had the power to authorize the City of Newport News to discharge its untreated sewage into the waters of Hampton Roads as long as no public nuisance resulted and navigation was not interfered with despite the fact that such pollution might contaminate nearby oyster beds and interfere with established recreational uses

40. 158 Va. 521, 164 S. E. 689 (1932).

of the tidal waters. The Commonwealth as owner in its private right could decide what use of that right best served the public interest, and any lessee of river bottoms for oyster culture took subject to such possibilities.

PERCOLATING WATERS: RIGHTS OF THE STATES

The State is vitally interested in the maintenance of the water table, for on it depends the capacity of wells and springs and to a great extent the production of all agricultural products. The water table in turn for the most part is dependent on percolating waters for its maintenance, *i. e.* that portion of the total rainfall that sinks into the ground rather than runs off or evaporates. These waters are in the very nature of things well nigh impossible of ownership until actually reduced to possession so that while they are in one sense the property of the state in much the same way as are wild animals this ownership (if it may be called such) is quite restricted. But it is sufficient to permit regulation as to such matters as waste, interference for spite only, and pollution.

Another type of percolating water is known as artesian water. It has its origin for the most part in the mountains where as a result of tilted strata the waters get under bed rock and gradually work their way to the seas or other outlets. These waters are frequently under pressure and in such a situation when the lower strata are tapped these waters flow naturally to the surface. The principal problem here is to prevent waste for experience has shown that an uncapped flowing well in one locality may affect the supply of quite distant localities.

OWNERSHIP OF BEDS OF STREAMS

In the case of non-navigable waters the ownership of the beds of the streams is in the adjoining landowners and not in the state. But in the case of navigable streams the ownership of the beds is in the state. Whether this state ownership extends to the ordinary low water mark or to ordinary high water mark is a question in much dispute. It has been held in Florida⁴¹ and in South Carolina⁴² that the State owns to the high water mark. But according to some writers⁴³ the better view, albeit a minority one, is that public ownership extends only to low water mark, and such is the law by statute in Virginia.⁴⁴

41. *Thiesen v. Gulf, F. & A. R. Co.*, 75 Fla. 28, 78 So. 491 (1917).

42. *State v. Pacific Guano Co.*, 22 S. C. 50 (1884).

43. See *MINOR ON REAL PROPERTY* (2d ed.) pp. 85-86 (1928).

44. VA. CODE ANN. § 62-2 (1950).

OWNERSHIP OF SURFACE WATERS

Waters gathered together on the surface of the land and not running in any well defined channel and not a part of a natural lake or pond are commonly called surface waters. Generally everyone disclaims ownership of them. According to one theory (mistakenly called the common law theory)⁴⁵ they are a common enemy from which let him save himself who can, subject of course to the general rule that in saving oneself one should do no more damage than necessary to others. According to another theory known as the civil law rule lower land is by nature servient to higher land in the matter of drainage. The role of the State in the case of surface water is primarily that of arbiter. Nevertheless there is at least in some localities a strong public policy in favor of control and conservation of temporarily excessive surface water in ponds, cisterns, and reservoirs.

STATE OR FEDERAL CONTROL AND DEVELOPMENT?

In the development, use, and conservation of these natural resources owned by the states the question is bound to arise, and has arisen over and over, as to whether cities, counties, states, or the federal government should play the dominant part. It is easy to say that local matters should be handled by the local governments, and general matters should be handled by the state or federal government either directly or through private enterprise. But this problem has too many ramifications for a paper of this sort. It is obviously in the interests of the nation as well as the states that we all use our water resources to their fullest potentialities. The main thing is that this be done wisely, efficiently and honestly. By whom it is to be done is, after all, of secondary importance.⁴⁶

45. See John B. Rood, *Surface Waters in Cities*, 6 MICH. L. REV. 449, 452.

46. For bibliographies on this subject prepared with special reference to the Central Valley of California but equally applicable to other projects see 38 CALIF. L. REV. pp. 761-781.