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WHOSE SPIGOT IS IT?

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WATER LAW 103: WATER FEDERALISM: "GET OUT AND PAY US"

Robert "Bo" Abrams, professor at Florida A&M University College of Law in Orlando, Florida, started the morning with a discussion of federalism at the sovereign level focusing on the Constitutional division of authority and state police power regarding property and resources. Abrams explored three areas of federalism: (1) pre-twentieth century, (2) twentieth century, when the balance of power began to shift to the federal government mid century; and (3) post 1978, when the states began to regain power.

First, Abrams addressed pre-twentieth century federalism. The nation changed shape through the Louisiana Purchase and the Treaty of Guadalupe Hidalgo, and questions arose about how later-formed states would be treated in regard to natural resources found within their boundaries. Once those areas became states, they argued for recognition of their sovereignty as being the same as existing states. This policy, known as the equal footing doctrine, ensured that all states would have a comparable police power over water and other natural resources. However, in the West, the equal footing doctrine meant that arid states might still have to adopt riparianism as a matter of federal law. In *California Oregon Power Co., v Beaver Portland Cement Co.*, the Court announced the Severance Doctrine, which severed water rights from federal land grants. Despite the fact that the Doctrine does not address navigable waters, the courts have treated it as if it did. This Doctrine led to western states becoming prior appropriation states. The Severance Doctrine does not change the federal power of navigation servitudes or of commerce power. The federal government still has the power to regulate, such as through the Clean Water Act and the Endangered Species Act.

Next, Abrams examined twentieth century federalism. Since the New Deal, the Court has construed the interstate commerce power broadly to support many federal programs. Reclamation and power generation remained solidly in the federal government's purview.

Further, during much of the twentieth century, the Court allowed states to discriminate in favor of their own citizens in regard to natural resources, and the Court extended the Dormant Commerce Clause to natural resources.

Finally, Abrams notes that beginning in 1978 with the decision in *California v. United States*, the federal reclamation program has had to adhere closely to state law requirements regarding water regulation and allocation, curtailing some federal power under interstate commerce power. Following *Sporhase v Nebraska* in 1982, states could rely on the Dormant Commerce Clause and could no longer implement anti-water export statutes because water is an article of commerce that brings it within the purview of the federal government. Since *Sporhase*, the only water hoarding that will survive Dormant Commerce Clause scrutiny are facially even-handed enactments. Abrams also discussed interstate allocations of shared basins that occur through congressional apportionments, interstate compacts, or equitable apportionment.

Holly Doremus, professor at Boalt Hall School of Law, University of California, spoke next. Dovetailing with Abrams' presentation, Doremus noted that the main exception to the primacy of state power is federal reserved water rights. These rights are essentially a wild card in the state law system that lie dormant until they are needed. Two types of reserved rights exist: tribal and non-tribal.

Focusing first on tribal rights, Doremus discussed the Winters doctrine, noting that that priority date of appropriation is the date of creation of the reservation. She then explained that the measure of the right is not use, but rather what is necessary to support tribal needs. Doremus then moved to non-tribal rights, stating that the Winters doctrine applies to areas such as national forests and national recreation areas. Discussing *U.S. v. Cappaert*, Doremus explained that when land is reserved for a specific public purpose, water is impliedly reserved also; the scope of the reservation is only what is needed to support the purpose, and no more. However, *U.S. v. New Mexico* narrowed *Cappaert* noting that federally reserved water can serve only the core purpose of federal reserved lands. Doremus concluded her presentation with a discussion of reclamation federalism, observing that it is a major source of tension between state and federal governments.

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CHANGING PARADIGMS AND NATIONAL AGENDAS

Thomas Sansonetti, of Holland & Hart L.L.P. and moderator of the panel, opened the discussion noting that changes in the presidential administrations often lead to changes in paradigms for federal agencies. Mr. Sansonetti noted that while some policies result from lobbying by interest groups, many policies however stem directly from the administrations themselves. He pointed out that the Obama administration has been no different in these regards. To that end, the