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Charles Corker

A Real Live Problem or Two for the Waning Energies of Frank J. Trelease

By Charles Corker*

In early March Frank Trelease sent Jerry Muys and me a draft of his paper entitled *Federal Reserved Water Rights Since PLLRC*. He said that he was giving us his "general tenor" and something to disagree about.

What surprised me was what he said about the "reservation doctrine" in his conclusion: "I no longer jump when the old tattered-sheet spector is thrust at me, and I am tired of leaping into action at every call of 'Wolf.' In the future, I intend to devote my waning energies to real live problems like —."

Maybe I misread a word he had substituted for one crossed out. It might be "waking energies," or "waxing energies." I hope it is "waxing energies." I hope Trelease waxes, not like the moon waxes before it wanes, but like Jehovah waxed—to wit, He waxed exceeding wroth—after He had to stamp out heresies among the Children of Israel—again, and again.

Trelease is surely right in saying that all the water diverted as a result of the "reservation doctrine," leaving out Indian water rights, is *de minimis*.[1] It is a quantity beneath the accuracy of a stream gauge. It is what a bird, a butterfly, a deer, or a back-packer drinks from a stream without need of permission. The rest of the water flows from the National Forests and the National Parks subject to the law of gravity.

At least I don't want Frank Trelease to worry about that. And instead, I want him to get angry. The reservation doctrine

* Professor of Law, University of Washington, Seattle.

[1] *See* Trelease, *Federal Reserve Water Rights Since PLLRC* (this issue). Maybe the uses on the federal wildlife refuges on the Colorado River main stream are not *de minimis*. At any rate, that part of the decree in *Arizona v. California*, 373 U.S. 546 (1963), will probably never get implemented. The 1941 priorities on the Arizona side are good, but on the California side, the 1941 priorities are as dry as the Sahara. Implementation will require piling up the water on the river's left bank, like Moses piled up the Red Sea. The job will be harder than the one Moses had, because Moses had to keep the sea piled up only long enough to let the Israelites through and could let it go to drown some Egyptians. This has to be a permanent Pile Up. If the great Pile Up happens, it will probably scare the ducks to death. The tourist attraction should be watched best from the California side of the river.

is a rhetorical, chimerical phantasmagoria. It is the product of a fabricated legislative history. It is a perversion and a prevarication.

The reservation doctrine risks attempts by undereducated lawyers and well-meaning judges to remake American water law without ever having understood it. There is no possibility that such attempts will succeed. There is no more danger that they will damage water law itself than that they will wreck an essential mechanism of our federal system, which is a sophisticated relationship of state and federal law.

For his first offense, I would not seek to disbar the federal lawyer who invokes the reservation doctrine. Even at second offense I would follow humane precedent, and accept his resignation from the bar with prejudice. I would thereafter even consider his reinstatement after suitable penitence. As punishment such a lawyer should do what Trelease and I have both done—he should read the full legislative history of the Desert Land Act of 1877,[2] and other statutes which Justice Sutherland misread and distorted in *California-Oregon Power Co. v. Beaver Portland Cement Co.*[3] in 1935. You have to read it all before you can say that nothing is there, but I can say it. No one in the nineteenth century could reasonably have thought that Congress intended to establish, or that Congress had the power to establish, a system of water rights in the states. The exceptions are readers of *Lux v. Haggin*[4] in 1886. In its origin, the California doctrine announced by that case was as mythic as *Goldilocks and the Three Bears.*

This is so for two reasons. They can be quickly and simply stated without exploring any legislative history. The first is that water rights have to be administered, wherever water rights are at all important. Federal officials and agencies to administer water rights have never been created. Federal judges cannot ad-

[2] 43 U.S.C. §§ 321-323 (1970) (originally enacted as Act of Mar. 3, 1877, ch. 107, 19 Stat. 377). As originally enacted, the Desert Land Act of Mar. 3, 1877, ch. 107, § 3, 19 Stat. 377 (amended to include Colorado by Act of Mar. 3, 1891, ch. 561, § 8, 26 Stat. 1095) was inapplicable to Colorado. Has anyone ever thought that prior appropriation did not exist in Colorado?

[3] 295 U.S. 142 (1935). Compare the quite different view of the statutes in the Court of Appeals for the Ninth Circuit, whose decision the Supreme Court affirmed, California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555 (9th Cir. 1934).

[4] 69 Cal. 255, 4 P. 919 (1884), 10 P. 674 (1886).

minister water rights without a federal administrator. There never has been a federally administered system of water rights, but every state where water is scarce has adopted and administered such a system.

The second reason is even more basic. Water law is not a discrete and separate branch of the law, but is part of the law of real property. State law differs as to how, and whether, water rights can be transferred separate from land, but it is clear that most transfers of water rights are accompanied by transfers of land in every state. Water rights, irrigation ditches, and access to a source of water supply are an inseparable whole. The parts cannot be totally independent. Practically, if not conceptually, real property law is far beyond the power of Congress to preempt. Conceivably Congress could invoke the Commerce power, the power to spend money for the general welfare, or some other power and enact, or compel states to enact, say, a statute of frauds for property, or render the existing statutes of frauds inoperative. It is most unlikely we shall ever find out, because Congress has no conceivable reason to attempt it.

There is no general federal common law. This has been established since 1812.[5] In *Swift v. Tyson*[6] Justice Story persuaded his colleagues in 1842 to apply a federal common law in bills and note cases, and such like, in the federal diversity jurisdiction. This federal common law endured for 96 years until *Erie R.R.*[7] overruled *Swift* in 1938. Federal common law in this context was grossly unfair, because a plaintiff by choosing either the federal or the state courts could choose his rule of substantive law.

So long as Trelease and even a few of his students survive—and we are all his students, I suspect—there is not much direct danger to water rights. However, there is danger to the federal system itself. That danger is illustrated by the three years which separate *Bonelli Cattle Co. v. Arizona*[8] from *Oregon v.*

[5] United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812).

[6] 41 U.S. (16 Pet.) 1 (1842).

[7] Erie R.R. v. Tompkins, 304 U.S. 64 (1938), *overruling* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). Justice Brandeis wrote the Court's opinion and in Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938), decided the same day, reaffirmed the existence of a federal interstate common law by which the Supreme Court resolves interstate disputes.

[8] 414 U.S. 313 (1973).

Corvallis Sand & Gravel Co.,[9] decided last January. With only one justice dissenting, *Bonelli* decided in 1973 that "federal common law" should supply the rule to decide a boundary issue between Arizona and an upland owner where the Colorado River had shifted locations.

How does a lawyer find out what the "federal common law" of accretion and avulsion is when he has just one case to go on? After two arguments, *Bonelli* was expressly overruled in *Corvallis Sand & Gravel.* It was a good thing. Hereafter, the rule of accretion of navigable streams will continue to be found in state law. The possibility that the Supreme Court of the United States at this time in its history could construct a meaningful federal common law intelligible to all federal and state courts in the land is quite unlikely.[10] Happily, the Court gave up the effort before great harm had been done.

From August 7, 1953 to January 3, 1975—twenty-two years—a fossilized state law existed on the outer continental shelf, beyond the power of the state legislatures, which had created this state law as it had existed on the earlier date, to amend it.[11] In the interim, *United States v. Sharpnack*[12] made clear that Congress can incorporate by reference future state law as well as state law at a fixed moment of time. Now, since 1975, current state law controls all the necessary legal relationships on the outer shelf where federal law is lacking. This history demonstrates dramatically that federal law, in our federal system, is not

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[9] 97 S. Ct. 582 (1977), *overruling* Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973).

[10] Hart, *The Supreme Court, 1958 Term—Forward: The Time Chart of the Justices,* 73 HARV. L. REV. 84 (1959), is the most impressive attempt I know to put in terms understandable to lawyers at the Supreme Court bar how little time the Court is likely to give to any particular case. "The two hours which the Justices spend . . . in listening to the contentions of counsel must amount to nearly half and often more than half of the time which those Justices who write no opinion in the case are able to devote to it. And they far exceed the total time which can be devoted to the average adjudication without oral argument." In the 1958 Term there were only 1,763 dispositions. *The Supreme Court, 1958 Term,* 73 HARV. L. REV. 126, 129 (1959). In the 1975 Term, there were 3,806 dispositions. *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 56,279 (1976).

[11] 43 U.S.C. § 1333(a)(2) (1970), incorporating by reference for cases not covered by federal law the law of adjacent states for the continental shelf. In 1975, this section was amended to incorporate the law of the adjacent state as it might exist from time to time. *Id.* (Supp. V 1976).

[12] 355 U.S. 286 (1958). The case overcame the former objection that federal incorporation of future state law was an impermissible delegaton of federal legislative power.

a competing system of law. Rather, federal law is altogether lacking in vast foundational areas like the law of contracts, torts, domestic relations, and water rights. To substitute nonexistent federal law for state law is not to introduce the centralized federal tyranny, sometimes feared. Instead it would introduce a state of no law at all—until the vacuum could be filled in some unpredictable way.

"Reservation doctrine" deserves the name neither of doctrine nor of law. Most reserved rights asserted rest on implication. There is no justification for a prudent government ever intentionally to rely on implications for the existence, quantity, priority, and nature of its right or rights enjoyed by its people. Due to its inherent uncertainty, the doctrine serves beneficiaries of the implied right badly, just as it badly serves prudent water users who have no means of learning of either the existence or the nature of the senior but "implied" water right.

Trelease, as no one else, can exorcise that evil and subversive ghost, the reservation doctrine. Water will continue to be a central concern in the United States, and a water law based on decisions of a court whose justices do not understand these simple facts about the relationship between federal and state law is dangerous to the federal system. You will recall the *Dred Scott* case from history.[13] The Court held the Missouri Compromise unconstitutional because Congress has no power to legislate under the property clause[14] with respect to the Louisiana Territory and federal territory to the west. The clause applies only to the federal territory which was part of the nation when the Constitution became effective in 1789. It took the Civil War to root out the heresy of that case.

The reservation doctrine also connects with the federal property clause. The property clause cannot perfrom its function, nor can the federal system operate, if water flowing from reserved public lands is not subject like other water to a nondiscriminatory state law. A single water law for the nation would be impossible even if the Constitution expressly compelled it.

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[13] Dred Scott v. Sandford, 16 U.S. (19 How.) 393 (1857).

[14] "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 . . . ." U.S. CONST. art. IV, § 3, cl. 2.

Diversity of state laws, particularly in water law, is essential to the well-being of the nation.

None of these problems will use up more than a few kilowatts of Trelease energy. Indian water rights, however, are more complicated. The *Winters v. United States*[15] case in 1908 is a "reservation doctrine" case. It is also, and more appropriately, a prior appropriation case. There is no doubt that when Congress creates an Indian reservation it can appropriate water in amounts necessary to carry out the particular purposes of the reservation. If there is no unappropriated water, it can condemn needed water rights by paying for them. If authorized by Congress, there is no need to seek a state license for the United States to appropriate water. There is no need for a federal appropriation to conform to state requirements of diligence. There is no need for a federal appropriation to compel even a diversion, if the water is more beneficially used in the stream rather than diverted from it.

Congress can dictate, and where it has not done so, federal administrators can be permitted to choose to take advantage of both state administration and state recording of water rights. A state cannot discriminate against appropriations by the United States in favor of appropriations by its own citizens. Why then do we need a reservation doctrine?

The Government has the power of eminent domain in aid of any permissible federal purpose. It can acquire all water rights needed for a public purpose by paying for them. Why should it not do so? The reservation doctrine is important only when the Government seeks to acquire a water right at the expense of its citizens without paying for it. The only good reason is *de minimis,* transaction costs, and all that.

Most non-Indian water rights are, as Trelease says, *de minimis.* The same is *not* true of Indian water rights. Unfortunately, there is no forum appropriate for their adjudication. Federal judges lack the expertise with which state judges are or can be provided. However, there is no federal counterpart to the office of State Engineer, as created by Elwood Mead. State court judges, on the other hand, are usually elected and they are more susceptible to pressure than federal judges—particularly against

[15] 207 U.S. 564 (1908).

hostile Indians. They are badly paid in comparison with their federal counterparts. Mechanisms are needed by which water right settlements can be negotiated between Indian tribes and their neighbors.

This is one great big real life problem we might generate for Trelease to solve. *De minimis non curat lex, et vice versa.* In translation this says, the law disregards trifles, but it does not lightly regard trifling with either water rights or the law thereof.

Excelsior! Trelease!!