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Correcting Mismatched Authorities: Erecting a New "Water Federalism"

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As the United States emerged from the colonial period, the several states, as confederated independent sovereigns and then as constituent states in the newly formed nation, succeeded the English Crown in many of the essential attributes of sovereignty. This fact was emphasized in 1791, when the last of the original ten constitutional amendments expressly confirmed that cession of enumerated power by the states to the national government was not intended to relinquish the states' residual role as what can be called "police power sovereigns." The traditional police power comprehends the ability to legislate and regulate to promote health, safety, and welfare. Resource management, particularly water resource management, is well within the ambit of that power. Accordingly, in the United States water law is a subset of property law that controls the use and allocation of the water resource. Water law was, and remains, state law; nothing in the Constitution purports to change that.

This structural relationship in the governance of water resources is deeply ingrained in American jurisprudence, although in much of the West the path taken was not entirely anticipated. For the Framers, a federal role in water policy was limited to the interstate and international commercial interest in navigation. The scope of federal sovereignty at the time of nationhood did not include even the possibility of playing a major role in regulating resources because the national government was not a significant landholder. With the Louisiana Purchase in 1803, the Treaty of Guadalupe Hidalgo in 1848, and Seward's Ice Box, however, the federal government became the owner of more than half of the nation's land. Suddenly, Article IV, § 3, cl. 2, the Property Clause granting Congress the authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," held profound possibilities for the federalization of water resource management because so much of the nation's water was found on or originated on federal land.

The Ebb and Flow of Water Federalism

Throughout the nineteenth century and into the early twentieth century, Supreme Court decisions carefully preserved state power over water law and water resources. Most centrally, the so-called "Equal Footing Doctrine" held that the later-created states had the same degree of sovereignty and rights to control their natural resources as did the original states. *See, e.g., Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1945). Similarly, *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), cemented the states' sovereign role as water resource trustee for the benefit of the public, a sovereign role held before nationhood by the English Crown. Finally, completing the circle that ascribed power over water resources to the states, the Court found that Congress had left the field of water law on the vast expanse of federal land to the states. The Court found that by express and implied acquiescence the federal land disposition programs, including the Desert Lands Act of 1877, effected a "severance" of federal land and the waters found on them. Federal land patentees were required to look to state law as the source of their water rights. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

In this way, the nineteenth century came to a close with the states clearly established as the masters of water law and thereby water allocation. The only significant role for the national government in the water resource area was the work of the Army Corps of Engineers (Corps) supporting navigational improvements along the nation's rivers and in its harbors. In that era, with the possible exception of the unique circumstances surrounding the Corps' approval of the Chicago Diversion, those projects had no discernible impact on or conflict with state water policy and state law water users.

Despite the heritage of state control of water rights and water allocation, in the twentieth century increasing federalization and the physical transformation of river systems by modern dams and technologies changed the playing field. Even a cursory glance at the contemporary physical landscape of water allocation challenges the proposition that the states are still the ones controlling the allocation of water. Almost all of the larger dams in the nation that control the flow of rivers are either federal facilities operated by the Corps or the Bureau of Reclamation (BoR) or run by power-generating entities subject to extensive operational regulation by the Federal Energy Regulatory Commission (FERC).

Assaying the legal landscape is more complex. For the BoR and FERC (originally created as the Federal Power Commission), Congress in 1902 and 1920, respectively, recognized the historic role of the states in determining water law and water allocation and built the foundation for what can be called "Water Federalism." Both laws, in essence, required that water rights be obtained under state law. *See* § 8 of the Reclamation Act of 1902 (now codified at 43 U.S.C.A. §§ 372, 383), and § 27 of the Federal Power Act of 1920 (now codified at 16 U.S.C.A. § 821). The federal judiciary, in its decisions, however, initially construed the respect for state law provisions narrowly, lest they

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frustrate the federal interests being pursued under the commerce power. *See, e.g., Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958) (reclamation), *First Iowa Hydro-Electric Co-op v. Federal Power Comm'n*, 328 U.S. 152 (1946) (hydropower).

More recent cases have weakened the federal hegemony in the reclamation context but essentially affirmed it in the FERC context. *Compare California v. United States*, 438 U.S. 645 (1978) (reclamation) *with California v. FERC* (*Rock Creek*), 495 U.S. 490 (1990) (hydropower). With the Corps, as exemplified by the mainstem Missouri River and Apalachicola-Chattahoochee-Flint (ACF) litigation, the disregard of state water law is even more striking. State water law is totally eclipsed and has no role whatever in the *de facto* physical water allocation affected by the Corps' dam operations.

On the Missouri, the Corps operates six major dams located in Montana, South Dakota, and Nebraska, having the capacity to store 75 million acre feet of water. (For nonwater specialists, that capacity is five to six times the annual flow of the Colorado River.) The Corps also maintains a 730-mile navigation channel that is nine feet deep and 300 feet wide from below the most downstream of those dams to the Missouri's confluence with the Mississippi River at St. Louis. Growing out of the Pick-Sloan Plan compromise, the BoR has concurrent authority over use of the basin's stored water for irrigation. That BoR role notwithstanding, the Supreme Court held that the principal purpose of the mainstem dams was for navigation and flood control and that the Corps, and not BoR and the Secretary of the Department of the Interior, could control use of the mainstem water. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988). The dams are operated in a coordinated fashion pursuant to a *Master Manual* that the Corps adopts and revises at infrequent intervals. Revisions to the manual are made per typical administrative procedures.

Fighting over Federal Authorizations, Not State Water Allocations

Increasingly, the upstream states have become dissatisfied with the way in which the Corps operates the dams. Finding that the principal contemporary water-related benefit of the dams to them was derived from recreational fishery, those states protested Corps releases of water to support downstream navigation in a series of drought years. The downstream states, who felt favored by the manual's provisions, supported the Corps. A paroxysm of litigation followed. The basin states, and later environmental groups invoking the Endangered Species Act, concurrently sued the Corps in federal courts in their respective states and in the District of Colombia. A series of injunctions were obtained, ordering the Corps to take contradictory actions, which eventually led to a single multidistrict resolution of the dispute in which the Corps was, in the main, victorious. Although the Corps was forced to issue a long-delayed revised *Master Manual*, the courts upheld the decisions embodied in that revised manual, which made only small changes from past practice, adding steps to avoid unacceptable impacts on endangered species and including the possibility of "navigation precludes" in the driest of years. *See In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 624 (8th Cir. 2005).

What is glaringly absent in all the litigation, of course, is state water law and state water allocation prerogatives. The entire decision relied on the determination that in crafting the *Master Manual*, the Corps, within an allowable range of discretion and given *Chevron* deference, had conformed the plan to the dictates set by Congress sixty years previously in the Flood Control Act of 1944 and other legislation related to the navigational channel. For a thorough examination of the Missouri River litigation, see John R. Seeronen, *Judicial Challenges to the Missouri River Mainstem Regulation*, 16 Mo. Envtl. L. & Pol'y Rev. 59 (2009).

In the ACF, the story is much the same, with the added feature of efforts by the basin states of Georgia, Alabama, and Florida to negotiate a compromise through a failed interstate compact. The Corps operates five dams on the Chattahoochee River, the most upstream of which, Buford Dam, is in proper proximity to Atlanta so that the waters of its reservoir, Lake Lanier, are an attractive source of municipal supply water. With the advent of burgeoning growth in the Atlanta metropolitan region, and the absence of other viable sources to expand municipal supply, over a period of more than thirty years, the Corps permitted Atlanta to hold increasing amounts of municipal supply water in Lake Lanier and increased releases from the dam for withdrawal downstream by the city. The overall effect of the Corps actions was to reallocate roughly 20 percent of the dam's total storage capacity of one million acre feet from the primary project purposes for which the dam was authorized and funded to municipal use, which was described as an "incidental" purpose of the dam (and not called upon for any part of the funding) when the dam was authorized in 1946. The downstream effect of the operational change is made more significant because, unlike most cities where the percentages of consumption are 10 percent or below, Atlanta's municipal water use is 30 percent consumptive, thereby reducing return flow to the river. Reinforcing the downstream impacts of increased storage and consumption, in the last three decades the basin has experienced increased drought frequency and intensity—a recipe for the two-plus decades of water use conflict that remains ongoing.

As in the Missouri, the focal point of the ACF litigation is the Corps, and, also as in the Missouri, the judicial resolution totally disregards state water planning and state water law. In the ACF, the consolidated litigation resulted in a decision against the Corps position granting extra water to Atlanta. *In re Tri-State Water Rights Litigation*, 639 F. Supp.2d 1308 (M.D. Fla. 2009). The proposed more-or-less permanent Corps reallocation away from the purposes announced in the 1946 authorization of the dam was held to violate a provision of the Water Supply Act of 1958 that forbids major operational changes of Corps-operated dams to municipal supply without congressional approval.

Reinvigorating State Water Management: Obstacles with Incentives

The twentieth century changed water federalism dramatically. Now, at the outset of the twenty-first century, federal control of federal projects and programs greatly reduces

the sphere of influence of state water law and the ability of the states to allocate water to the uses that best serve their respective public interests. To be sure, there is nothing unconstitutional about this result. The federalization of water governance traces to the commerce power and the more active programmatic role of the national government that began at the outset of the last century and expanded massively in the New Deal and Second World War eras. Under the dictates of the Supremacy Clause, the federal will prevails, but that is no guarantee that pursuit of those federal interests results in a sound allocation of water. To the contrary, there is considerable reason to doubt that an appropriate allocation of water is likely to occur under the current division of power, where so much control resides with the federal government.

Consider, for a moment, the dates mentioned thus far in relation to the major federal programs that are controlling the nation's largest water facilities and, thereby, the water allocation. All of them date back fifty years or more. Those statutes were a product of a different water reality in terms of economic contexts, technologies for water use, and, in most of the nation, supply and demand, as at that time water supply exceeded demand in most places. There is no good reason that the compromise amalgamation of the Pick and Sloan Plans embodied in the Flood Control Act and protecting a few additional weeks of relatively low-value barge traffic because it is "navigation" should be outcome determinative when the states of the Missouri's upper basin seek to allocate the water under their laws in ways that better serve their citizens.

The Corps may say it is being true to congressional intent, but those Congresses could have no meaningful view about the proper allocation among competing uses for the river's water in extreme drought conditions sixty years hence. In the ACF basin, the reallocation limitation of the Water Supply Act has a similar impact: it locks in sixty-year-old allocations unless Congress can be persuaded to act. Atlanta's water may be a big enough issue to get Congress' attention, but how many less-visible water allocation problems brought about by other half-century-old pork barrel statutory authorizations for Corps projects will reach their calendar?

In these and similar cases, the argument that the Corps is the agent that Congress appointed and put in long-term control of the water is hardly satisfying. If agency is the basis of the power, then it is notable that the agent was not given directions that address current conditions. To the extent that interstate conflicts are raised by Corps management choices, as a separation of powers matter, the Corps is, emphatically, not the federal entity chosen to resolve interstate conflicts over water. Likewise, from a water planning and use perspective, the Corps is a construction-project-oriented agency that historically has shown limited capacity for sound, long-term adaptive management of water resources. There is simply no justification for making the Corps the water master and several reasons to consider that allocation of responsibility deeply flawed. Yet, at the end of the day, that is the state of affairs in many basins. Similar arguments can be made against giving considerable degrees of control over water use to the BoR or FERC.

To remedy the anachronistic aspects of current law and the mismatch of water planning capacity and *de facto* water allocation control, the federal government could promulgate a water policy, though it should be noted it has never done so before and probably never will. Neither the federal agencies nor the Congress want to enter so contentious a field that for centuries has been viewed as a state prerogative. On two occasions in the last half century, in 1973 and again in 1998, the federal government has commissioned a focused study of water use planning and alternatives. Both times the studies have reaffirmed the role of the states and recognized a need for devolution of authority that matches water planning to the particulars of the water supply and demand conditions at the state and local levels. Second, even if the federal government were to take on the task, it seems unlikely to complete it successfully.

Although I have elsewhere argued for overarching allocative priorities favoring water for population security, ecological security, energy security, and food security in that order, how to achieve those ends or others that the states might desire cannot be done with a one-size-fits-all approach. The variations are too great, including topography, economy, history, future projections of population, and the increasing degree of climatically induced variability in rainfall and snowpack patterns that scientists describe as the loss of stationarity.

The most obvious drawback to state empowerment is the frequently interstate nature of the water, a flowing, common pool resource. What suits one state's priorities for water use may come at the expense of a neighbor, with the most common example being consumptive use or out-of-basin transfers in an upstream state that deprive the downstream state of its perceived fair share of the beneficial use of the resource. In both the Missouri and ACF examples, the contestants trying to bend the will of the Corps to their benefit are the competing states on those interstate waterways.

As masters of their water law and in the exercise of understandable political self-interest, it is hard to imagine any universal scenario in which states with the physically superior position will share the water fairly in time of shortage. There are some cases, such as the factual setting of *Bean v. Morris*, 221 U.S. 485 (1911), in which Justice Holmes asserted that Montana would voluntarily extend comity and honor the claims downstream of senior appropriators in Wyoming at the expense of Montana users, but that is the unusual case in which the two states share rivers that cross the border in both directions. The same is not true, for example, in the current controversy pending in the Supreme Court between North Carolina and South Carolina over the Catawba River. Given the regional topography, North Carolina is consistently upstream in all of the shared basins, and South Carolina asserts it has acted inequitably in diverting water to another basin in which North Carolina feels it has greater need. Some federal role is needed where water planning and allocations in one state have what are perceived as adverse spillover effects felt by another state.

The second drawback with an overall water policy that relies heavily on state water planning and management is that the states have not posted a very good record in those areas.

While the *de jure* laws on the books in an increasing number of states require creation of a state water plan that addresses such topics as groundwater-surface water integration, conservation, integrated water and growth planning, drought management, minimum levels, and flows, the promise far exceeds the execution. Taking my home state of Florida as an example, the 1973 Water Resources Act was the most far-sighted state water law in the nation, but the year is now 2010 and only minimal progress has been made on setting water levels and flows in advance of permitting uses that significantly and adversely impact the resources. Nor has Florida successfully implemented aspects of the law that could have linked residential development to adequate water supplies or imposed stringent conservation requirements. To the contrary, when the massive, clean, and inexpensive Floridan and Biscayne Aquifers were pumped to and beyond their carrying capacity, and cities and developers would have to look to "alternative sources" such as reuse, conserved water, and desalination to fuel growth, the Florida Legislature gerrymandered the definition of "alternative sources" to include surface water. Due to cost differentials, that change in definition has created a race to tap the state's surface waterways, such as the St. Johns River. Thus, if the states are to be relied upon as planners and managers of a scarce and stressed water resource, there has to be some assurance that they will rise to the occasion rather than succumb to the enchantment of unfettered growth and increased water use. An incentive that overcomes temptation is needed.

The third problem with restoring state primacy in water planning and management is that the states lack physical control of the waters. As has already been demonstrated, the largest water control facilities are in federal hands or are subject to federal regulation and are being managed to effectuate federal policies and priorities. Those management choices may be exactly what the state would choose if its hand was on the turbines, spillways, and pumps, but not necessarily. Building state facilities is unthinkable ecologically and economically, and the redundancy (other than where water is available and vitally needed storage might be increased) would be idiotic.

The CZMA as Model

The existing regulatory taxonomy that addresses the resource management and environmental fields frequently confronts federalism issues. One approach, in particular, is well suited to addressing the three problems noted here—the Coastal Zone Management Act of 1972 (CZMA). In regard to the locus of management, the CZMA choice was the states. Much as was shown here in regard to the state as the locus of the police power and authority to make water law and allocate the resource, the CZMA began with the clear understanding that land use planning in the coastal zone was a state function. In regard to incentives for rigorous planning, the carrots offered to the states in the CZMA were funding to prepare plans and, more importantly, inclusion of the "consistency provision." If a state files a plan that meets the federal planning standards, the federal government agrees to subordinate its decisional apparatus to the state plan by requiring that all federal actions affecting the coastal zone be consistent with the approved state plan. The statutory language is as follows: "[e]ach federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved state management programs." 16 U.S.C. § 1456(c)(1)(A). In the instant water management setting, the subordination worked by a consistency provision would be more far reaching, and therefore a stronger incentive to planning, because it requires the federal facilities to be operated consistently with the state plan.

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Interstate water competition can also be mediated under a CZMA-like structure. Initially, plan approval by the federal government is a prerequisite to the plan taking effect and triggering the consistency provision. An element in the plan approval process must be addressing interstate effects. This interstate mediation function already is a part of some federal environmental statutes. For example, §110(a)(2)(D)(i) of the Clean Air Act requires that EPA cannot approve a State Implementation Plan that would adversely affect a sister state's ability to comply with its air quality requirements. In the advocated water planning context, affected sister states could be given notice of the proposed plan together with the right to intervene in the administrative plan approval process to challenge the plan. As part of either the statute or its implementing rules, criteria that announce standards of interstate fairness should be articulated. Judicial review of the application of those standards in the administrative proceeding provides further protection that the plan will not unfairly disadvantage sister states. The agency chosen to administer the program can be one that is designed to undertake review of resource management plans and, importantly, can be an agency that does not have a programmatic interest that might bias its evaluations.

This CZMA-like proposal creates strong incentives that may spur states in shared basins each to engage in planning for its own use of the shared basin's water resources, creating the possibility of two states offering conflicting plans for managing the shared resource. However, it seems possible, indeed desirable, for the competing state plans for a shared resource to be considered together. There would be a genuine impetus for the states to negotiate with one another in good faith because the federal agency holds a "hammer," the power to impose a decision based on announced principles if the states could not

agree on a unified management strategy. The imminent threat of a federally imposed outcome has the additional benefit of providing political cover for a compromise, something that history has shown is not the first instinct of most states involved in a "water war" with a neighbor.

Conflicts over water allocation have become a national topic, rather than a regional one confined to the West. Increased water use and projections for further increased demand are combining with the decline of stationarity to underscore the importance of having sound water management policies and a coherent plan for water allocation at the ready and capable of implementation. Historically, and in an earlier era of water federalism, the state police power was acknowledged as the proper locus for making water law and policy.

In the twentieth century, even while laws and rhetoric respected the division of authority favoring the states, the real power over water in most basins passed into the federal government's programmatic and regulatory control, creating a mismatch of supposed authority and actual power over water. The federal imperatives that may have justified that shift when the relevant laws were enacted are now half a century old and seem out of touch with the modern reality of water management. A new statute that employs a structure similar to that of the CZMA will put the states back in control of the water and concurrently use federal authority in a role for which it is well suited, putting the states under pressure to make genuine concessions to one another in the management of shared basins and playing referee if they do not treat one another fairly.

Twenty-Five Years of *NR&E*

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and broadening approaches to water quality preservation. William Taylor and Mark Gerath set the tone for the issue, giving a history of watershed protection efforts and arguing that a watershed approach is the most promising means for effective water quality protection in the future. Former Governor Harry Hughes and Thomas Burke, Jr., wrote a timely account of the cleanup of the Chesapeake Bay, illustrating a successful implementation of the watershed approach. They walked Section members through the extensive and highly-coordinated cleanup efforts that spanned nearly twenty years, providing a fascinating tale of the people on the ground, applying and living with the water quality programs necessary to preserve the national treasure that is the Chesapeake Bay. Modeled after the Chesapeake Bay Program, the relatively new National Estuary Program is highlighted in an article by Matt Bowden, now Alabama Power Company's vice president for Environmental Affairs, with a step-by-step analysis of the processes and conservation plans required under the National Estuary Program, EPA's newest application of the watershed-based approach.

EPA's recent proposal to increase significantly the requirements of state and local storm water protection programs has skyrocketed better understanding of this previously sleepy issue to the top of many water quality lawyers' "to-do" lists. But *NR&E* was there first. The Spring 2007 issue is a storm water desk book. Soon-to-be Section Vice Chair Alex Dunn leads the issue with a very good article on storm water regulation from the MS4 perspective, somewhat prophetically speaking to the challenges associated with trying to apply numeric effluent limitations to the unpredictable character of typical storm water flows. Another article digests the history and practical application of storm water permitting requirements for construction sites, with a very useful discussion of typical permit elements and common enforcement issues and defenses. Speaking of enforcement problems, how about an article by an EPA enforcement lawyer on EPA's new emphasis on storm water enforcement at construction sites and a companion piece by a couple of experienced private practitioners on how to respond to such enforcement actions? No problem; they are both in there.

From what the Founding Fathers meant by "navigable waters" to the modern efforts to control "muddy water," *NR&E* has been a source of insight and instruction our Section's members could count on.

So, what do you think? For me, looking back over twenty-five years of *NR&E* makes me proud. As a member of the Editorial Board, the hard work of publishing every issue was always secondary to the effort we invested from the beginning of every volume to be sure we created something valuable to the Section's members. We always tried to balance "usefulness" with "enlightening" and give our members a unique magazine that would help them be better lawyers in several ways. Even though my service to the Section now involves many other things, I still consider *NR&E* as a critically important member benefit that reaches and serves all of us.

This quick review shows the breadth and depth of the legal education and professional discussion *NR&E* provides. Everyone from high government officials to young lawyers have made meaningful contributions. *NR&E* articles have forecasted legal problems and explained legal solutions, all at a high level of quality and with a careful sense of balance. *NR&E* is, in fact, a paginated reflection of our Section and its members as we have worked together these past twenty-five years to become better lawyers and to help others do so as well. To the current Editorial Board and all those who have gone before, congratulations on twenty-five years of high quality and high service. On behalf of your 11,000 readers, we salute you on this happy anniversary.

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