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Allocation of the Nation's Waters: The Constitutional Framework

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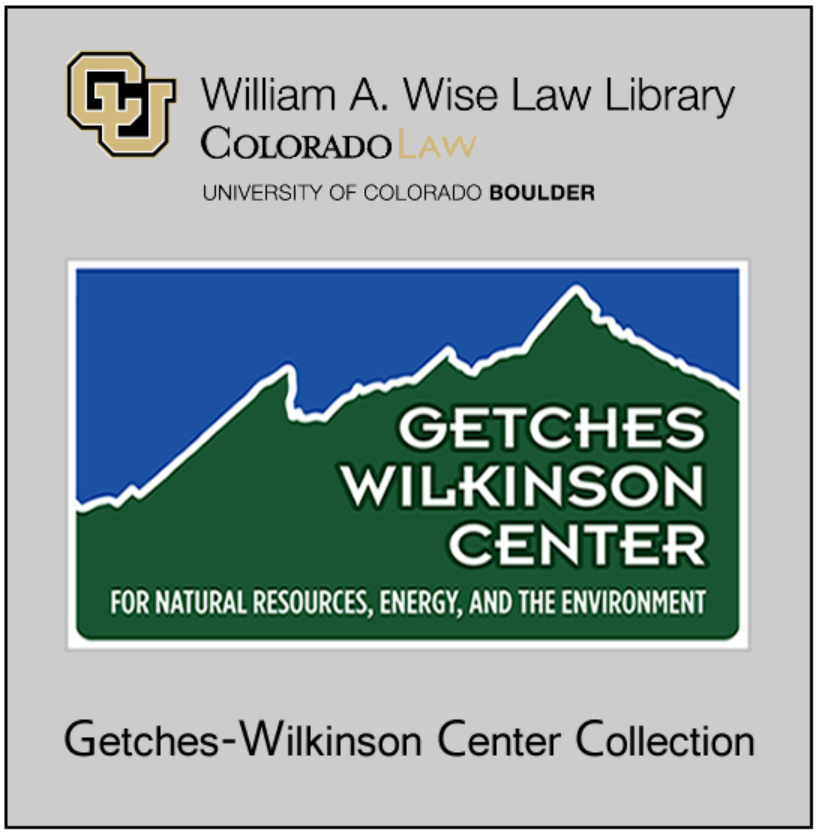

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ALLOCATION OF THE NATION'S WATERS:

THE CONSTITUTIONAL FRAMEWORK

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BOUNDARIES AND WATER:

ALLOCATION AND USE OF A SHARED RESOURCE

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I. INTRODUCTION

During the last two decades, interjurisdictional issues have become increasingly important in water allocation, planning and management. Supplies of water have become tight. Environmental concerns, often manifested in federal programs, have come to the fore. Indian tribes have begun to adjudicate and exercise their reserved rights. Ultimately, water development projects that traditionally were resolved as a matter of one state's internal law must now proceed in the context of obligations to other jurisdictions -- the federal government, other states, Indian tribes, and sometimes foreign governments. This presentation treats the constitutional division of power among governments in the field of water policy by examining federal power, state authority, tribal prerogatives, and the power of Congress and the courts to allocate water among jurisdictions.

II. THE NATURE OF FEDERAL POWER

A. The Concept of Navigability for Title

1. Development of the Doctrine

Most nations in the world have given some kind of special legal treatment to major watercourses receiving substantial commercial and recreational use. In the United States, the underlying rationale of the navigability concept traces to Roman and English law. Under Roman law, navigable rivers were a class of watercourses that received a higher degree of regulation and protection. In

England, the Crown held title to the beds and waters in all navigable rivers, subject to the jus publicum. See generally MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water, 3 Fla. St. U.L. Rev. 511 (1975). The United States, mostly through Supreme Court opinions, then built upon the Common Law and developed several rules relating to major watercourses, as discussed below.

2. Geographical Reach of Watercourses Navigable for Title

The English Common Law test of navigability was whether the water in question was affected by the ebb and flow of the tide; all inland waters above the influence of the tide were nonnavigable. See, e.g., The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825). The American test is broader. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870), redefined navigable waters as any waters that are "navigable in fact." The federal test that defines those watercourses navigable for title involves three main elements. First, navigability for title is determined as of the date of statehood. Second, the waterbody must be susceptible to navigation for commerce in its natural and ordinary condition at statehood.

Third, commercial navigation can be any "customary mode" of trade or travel, and does not require interstate commerce. See United States v. Holt State Bank, 270 U.S. 49 (1926); United States v. Oregon, 295 U.S. 1 (1935); Utah Division of State Lands v. United States, 107 S.Ct. 2318 (1987); Phillips Petroleum v. Mississippi, 108 S.Ct. 791 (1988).

3. Incidents of the Doctrine

There are three major legal ramifications when a watercourse meets the legal test for being navigable for the purposes of title. First, unless the United States has made a transfer to a private party or a reservation for a specific purpose, the state receives by implication title to the bed of the watercourse up to the mean highwater mark. See generally Utah Division of State Lands v. United States, 107 S.Ct. 2318 (1987). Second, the concept of title navigability defines the basic reach of the navigation servitude -- the rule of no compensation that allows the federal government to affect adversely private property without payment under the Fifth Amendment. The servitude extends to projects that affect watercourses navigable for title and, if Congress expressly so provides, to nonnavigable tributaries where there is a reasonable

relationship to navigability. See, e.g., United States v. Grand River Dam Authority, 363 U.S. 229 (1960). Third, the traditional public trust doctrine applies to watercourses navigable for title. See generally Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892). It should be noted that the classic federal Illinois Central doctrine applying to watercourses navigable for title has been extended in some states as a matter of state law. Thus, some states have applied public trust reasoning to navigable watercourses and have imposed requirements that may not be mandated by Illinois Central as a matter of federal law, see, e.g., National Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983), cert. denied, 464 U.S. 977 (1983), while other states have extended the public trust doctrine, as a matter of state law, to rivers not navigable for title, see, e.g., Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088 (Mont. 1984). See generally Dunning, The Public Trust Doctrine and Western Water Law: Discord or Harmony?, 30 Rocky Mtn. Min. L. Inst. 17 (1985).

B. Federal Regulatory Authority

1. Confusion with the Concept of Navigability for Title

In the early cases, the classification of waters as navigable for title was used as a measure of the federal government's regulatory authority under the Commerce Clause. The Court in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), interpreted the Commerce Clause as "comprehending navigation within the limits of every state." Under the federal commerce power, navigable waters were described as "the public property of the nation, and subject to all direct legislation by Congress." Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724-25 (1865). During the twentieth century, and especially after 1937, the reach of Congress's power under the Commerce Clause expanded dramatically. See, e.g., NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937); Katzenbach v. McClung, 379 U.S. 294 (1964). Unfortunately, widespread confusion developed between the concept of navigability for title and Congress's legislative authority, because some cases had treated the two synonymously, see, e.g., Gilman v. Philadelphia, supra, and because several federal statutes articulated Congress's regulatory authority in terms of "navigable waters," see, e.g., United States v. Appalachian Electric Power

Co., 311 U.S. 377 (1940) (the "New River" case, construing the Federal Power Act of 1920).

The Court has now clarified that there is no correlation between the concept of navigability for title and the reach of federal power. As Justice Rehnquist stated in Kaiser Aetna v. United States, 444 U.S. 164 (1979), "reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce:"

> It has long been settled that Congress has extensive authority over this nation's water under the Commerce Clause. Early in our history this court held that the power to regulate commerce necessarily includes power over navigation . . . . [But] a wide spectrum of economic activities "affect" interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved. The cases that discuss Congress' paramount authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of a more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting

navigation or may be characterized as "navigable water of the United States."

2. Extent of Federal Authority

The modern scope of federal regulatory power over water is nearly unlimited. The leading case involved section 404 (33 U.S.C.A. § 1344) of the Clean Water Act. For purposes of obtaining a permit to discharge dredge and fill material into navigable waters (defined as "the waters of the United States," 33 U.S.C.A. § 1362(7)) under section 404, the Corps of Engineers has defined navigable waters to include "freshwater wetlands." Freshwater wetlands are in turn defined by the Corps as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), a private landowner sought to fill 80 acres of low-lying marshy land. The lower court held that frequent flooding by adjacent navigable water was essential to regulation by the Corps. The Supreme Court reversed and upheld federal authority, acknowledging the hydrological connection between wetlands and other bodies of

water for the purposes of combatting water pollution under the Clean Water Act.

3. Exercise of Federal Authority

In spite of Congress' broad constitutional power, federal authority has been exercised quite sparingly in the area of water. In the area of water quality, the Army Corps of Engineer's authority over dredging and filling (now Section 404 of the Clean Water Act) has been on the books since 1899, but substantial regulatory authority was not exercised until the last several years. Section 402 of the Clean Water Act (33 U.S.C.A. § 1342), dealing with point source pollution, and Section 208 (33 U.S.C.A. § 1288), dealing with nonpoint source pollution, allow for broad delegation of authority to the states. Congress has been especially reluctant to legislate in the area of water quantity, with the exception of Indian reserved rights. In addition, statutes such as the Endangered Species Act and the Clean Water Act have had some impact on water quantity; notable examples include Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985), and the recent veto process initiated by EPA under Section 404(c) of the Clean Water Act in regard to Colorado's proposed Two Forks Dam.

C. Federal Limitations on Water Transfers

Federal law affects water marketing in three major ways. First, the demands of the dormant Commerce Clause can override the desire of any single state to ban exports of water. See Sporhase v. Nebraska, 458 U.S. 941 (1982). Second, Congress has regulated the transfer of Indian property rights since 1790 and the current statutory scheme prohibits marketing of Indian water in most situations. See Getches, Management and Marketing of Indian Water: From Conflict to Pragmatism, 58 U.Colo. L. Rev. 515 (1988). Third, congressional statutes relating to federal water projects may affect withdrawals and transfers of federal project rights. See generally ETSI Pipeline Project v. Missouri, 108 S.Ct. 805 (1988).

III. THE NATURE OF STATE AUTHORITY

A. State Ownership

Traditionally, state authority in the field of water law and policy has been described as being based upon state ownership of all water within a state's boundaries. Western state constitutions and statutes thus typically provide that all waters within the state belong to the state (see, e.g., Wyo. Const. § 1, Art. 9) or to the public (see, e.g., Ore. Rev. Stat. 537.110). Older cases often use the rationale of state or public ownership of all waters within the boundaries

of the state. See, e.g., State v. Hiber, 48 Wyo. 172, 44 P.2d 1005 (1935). Notions of property ownership, however, are inadequate to govern the allocation of a moving resource in a modern interjurisdictional context. Thus state authority is now best understood as being based on the exercise of state jurisdiction under the Tenth Amendment. The Court first debunked the state ownership doctrine in the related area of wildlife law, see, e.g., Hughes v. Oklahoma, 441 U.S. 322 (1979). Then, in Sporhase v. Nebraska, 458 U.S. 941 (1982), the Court rejected the state ownership doctrine in the context of water law and policy and, quoting Hughes, stated that state or public ownership is "but a fiction expressive in legal shorthand of the importance to its people that the State have the power to preserve and regulate the exploitation of an important resource."

B. State Regulatory Authority

State authority over water may not be based upon ownership, but it is uncommonly broad. Although Congress has nearly unlimited authority to preempt state regulatory authority over water, the constitutional fact is that state authority can be expansively exercised under the Tenth Amendment police power until it is disturbed by Congress. See, e.g., California v. United States, 438 U.S. 645 (1978) (holding that section 8 of the 1902 Reclamation Act, 43

U.S.C.A. §§ 372, 383, requires federal compliance with state water laws, including conditions imposed by state water agencies in federal permits). As noted, Congress has acted sparingly in many areas of water law.

The fact that state authority over water is based on regulatory jurisdiction, rather than ownership, still leaves room for expansive state authority over water. Take the example of water diversions under state law from the federal public lands. In California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935), the Court construed the Desert Land Act of 1877, 43 U.S.C.A. § 321, as severing any water rights that might have accompanied federal patents on non-navigable waters: "What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states . . . ." Two earlier acts, not limited to non-navigable waters, had also protected existing water rights as against the United States, Act of July 26, 1866, ch. 262, 14 Stat. 251, and as against subsequent patents, Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218. But these three acts leave numerous questions open. For example: What law applied on the public lands before 1877? Or 1870? Or 1866? What law applies to navigable waterways on the public lands? What law applies to public lands located in the states

not subject to the Desert Land Act? The answer on all counts (assuming that there is no special federal action, such as a federal reserved water right) is that state or territorial law, which often incorporated local customs, has always controlled because state law was never preempted. The acts of 1866, 1870, and 1877 only confirmed existing law. Thus state courts were correct from the beginning, see Irwin v. Phillips, 5 Cal. 140 (1855), in applying state water law on the public lands. See generally Trelease, Uneasy Federalism -- State Water Laws and National Water Uses, 55 Wash. L. Rev. 751, 758-68 (1980); Wilkinson, Western Water Law in Transition, 56 U. Colo. L. Rev. 317, 326 n. 38 (1985).

C. Limits on State Authority

In spite of the states' expansive authority to regulate water, there are significant limitations: states have obligations to other governments when issuing water rights. Thus, although such limitations almost never appear of record in regard to state water rights, state water rights granted by decree or permit may implicitly be limited by many other kinds of rights, the most significant of which are as follows: rights under the public trust doctrine, in those states where the doctrine applies to appropriative rights; pueblo water rights in the Southwest; federal reserved water rights; Indian reserved water rights; the rights of other

states; and the rights of foreign nations. It is the rights of other governments -- federal, state, tribal, and foreign -- that give rise to the increasingly extensive body of law involving the interjurisdictional allocation of water.

IV. AUTHORITY TO DETERMINE WATER ALLOCATION AND USE AMONG JURISDICTIONS

A. Congressional Authority

Congress's supremacy, when exercised, can control allocation and use. The treaty making authority, both as to Indian tribes and foreign nations, has led to important allocations of water. Perhaps the most sweeping Congressional action -- one not likely to be repeated -- was the congressional allocation of water in the Colorado River among the lower basin states upheld by the Supreme Court in Arizona v. California, 373 U.S. 546 (1963).

B. State Court General Stream Adjudications

Of course, the dominant method of allocating water is the general stream adjudication process employed, in one form or another, in every western state. Under the McCarran Amendment, 43 U.S.C.A. § 666(a), the states have authority to join the United States, United States v. District Court in and for Eagle County, 401 U.S. 520 (1971), and Indian tribes, see, e.g., Arizona v. San

Carlos Apache Tribe, 463 U.S. 545 (1983), in most situations.

C. Supreme Court Original Jurisdiction

Article III, Section 2, Clause 2 of the Constitution provides that the Supreme Court has original jurisdiction of "all cases . . . in which a state shall be a party." Under 28 U.S.C.A. § 1251(a), Supreme Court jurisdiction of suits between states is made both original and exclusive. Thus the only judicial remedy for apportionment of water between or among states is in the United States Supreme Court.

The Court has developed a prudential rule that it will not rule on the merits of apportionment cases unless the plaintiff state can show a substantial current detriment to its interests. Thus in Kansas v. Colorado, 206 U.S. 46 (1907), the Court dismissed Kansas's petition and the approach continues today, see, e.g., Idaho v. Oregon, 462 U.S. 1017 (1983). The policy reasoning behind the rule is that states should be encouraged to resolve their differences by compact rather than litigation. When the Court does reach the merits, it applies the doctrine of equitable apportionment, as articulated in Nebraska v. Wyoming, 325 U.S. 589 (1945):

> So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them.

> Apportionment calls for the exercise for an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former -- these are all relevant factors.

The Court took up water conservation issues in Colorado v. New Mexico, 459 U.S. 176 (1982), and Colorado v. New Mexico, 467 U.S. 310 (1984), finding that equitable apportionment requires only those conservation measures that are "financially and physically feasible" and "within practicable limits." See generally Tarlock, The Law of Equitable Apportionment Revisited, Updated, and Restated, 56 U. Colo. L. Rev. 381 (1985). Tarlock lists five principles that in his view reflect the Court's actual application of the equitable apportionment doctrine:

1. In appropriation states, the doctrine of prior appropriation will be presumptively applied across state lines in small river basins.

2. The doctrine of prior appropriation will also be presumptively applied in large river basins, but the presumption is weaker on large compared to small river basins. The Court will be more willing to temper the doctrine in the name of equality among states to remove some of the safety margins it offers to prior users.

3. In riparian states, the common law of riparian rights will be presumptively applied on both large and small river basins. As with the doctrine of prior appropriation, the Court will temper the common law. However, the Court will seek to preserve the essential feature of the common law that riparian states are entitled to a substantial quantity of the base flow or lake level left in place to support a wide variety of nonconsumptive uses.

4. In both prior appropriation and riparian jurisdictions, the Court retains the power to displace existing uses but this power will be exercised sparingly. On small streams, the inference that can be drawn from Colorado II is that market reallocations will first be given a chance to operate. On large streams, the state that wishes to initiate a new use has the burden to demonstrate that existing uses are wasteful,

and the proposed use will promote a more efficient allocation of the resource.

5. State planning to conserve existing supplies will assume a larger role in state efforts to avoid sharing duties or to impose sharing duties on other states.

56 U. Colo. L. Rev. at 410.

D. General Federal and State Court Jurisdiction

Interstate disputes between or among private parties are usually within the jurisdiction of federal district courts and state courts of general jurisdiction. In such cases the trial courts will borrow from the law of equitable apportionment and apply it to the private interstate dispute. See generally Bean v. Morris, 221 U.S. 485 (1911).

E. Interstate Compacts

Compacts are the preferred method of resolving domestic interjurisdictional water allocation disputes. The compact process allows for the kind of flexibility and innovation that is much more easily achieved through negotiation rather than litigation. Once approved by Congress under the Constitution, Article I, Section 10, Clause 3, they are binding upon the states and all affected private water users. See generally Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938); Texas v. New Mexico, 462 U.S. 554

(1983). See generally Frankfurter & Landis, The Compact Clause of the Constitution -- A Study in Interstate Adjustments, 34 Yale L.J. 685 (1925); J. Muys, Interstate Water Compacts: The Interstate Compact and Federal-Interstate Compact, National Water Commission Legal Study No. 14 (1971); C. Myers, A.D. Tarlock, J. Corbridge, & D. Getches, Water Resource Management 987-1007 (1988); J. Sax & R. Abrams, Legal Control of Water Resources 736-751 (1986).

V. CONCLUSION

The compact process, which combines both state and federal participation, offers many possibilities for the future. With the increased importance of water rights held and administered by tribal governments, it may be that Indian tribes will be participating in future compact negotiations. Conceptually, the compact process also suggests the value of intergovernmental negotiations on a watershed-wide basis that may result in innovative institutional arrangements that may be manifested in a federal statute, rather than a compact. Perhaps the leading example is the creation of the Northwest Power Planning Council by the Power Planning Act. See generally Volkman & Lee, Within the Hundredth Meridian: Western States and Their River Basins in a Time of Transition, 59 U. Colo. L. Rev. 551 (1988).