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6-5-1985

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Charles T. DuMars

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Citation Information

DuMars, Charles T., "Federal/State Relations in Theory and Practice: A Sovereignty Mismatch" (1985). *Western Water Law in Transition (Summer Conference, June 3-5)*.
<https://scholar.law.colorado.edu/western-water-law-in-transition/11>

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Charles T. DuMars, *Federal/State Relations in Theory and Practice: A Sovereignty Mismatch*, in *WESTERN WATER LAW IN TRANSITION* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1985).

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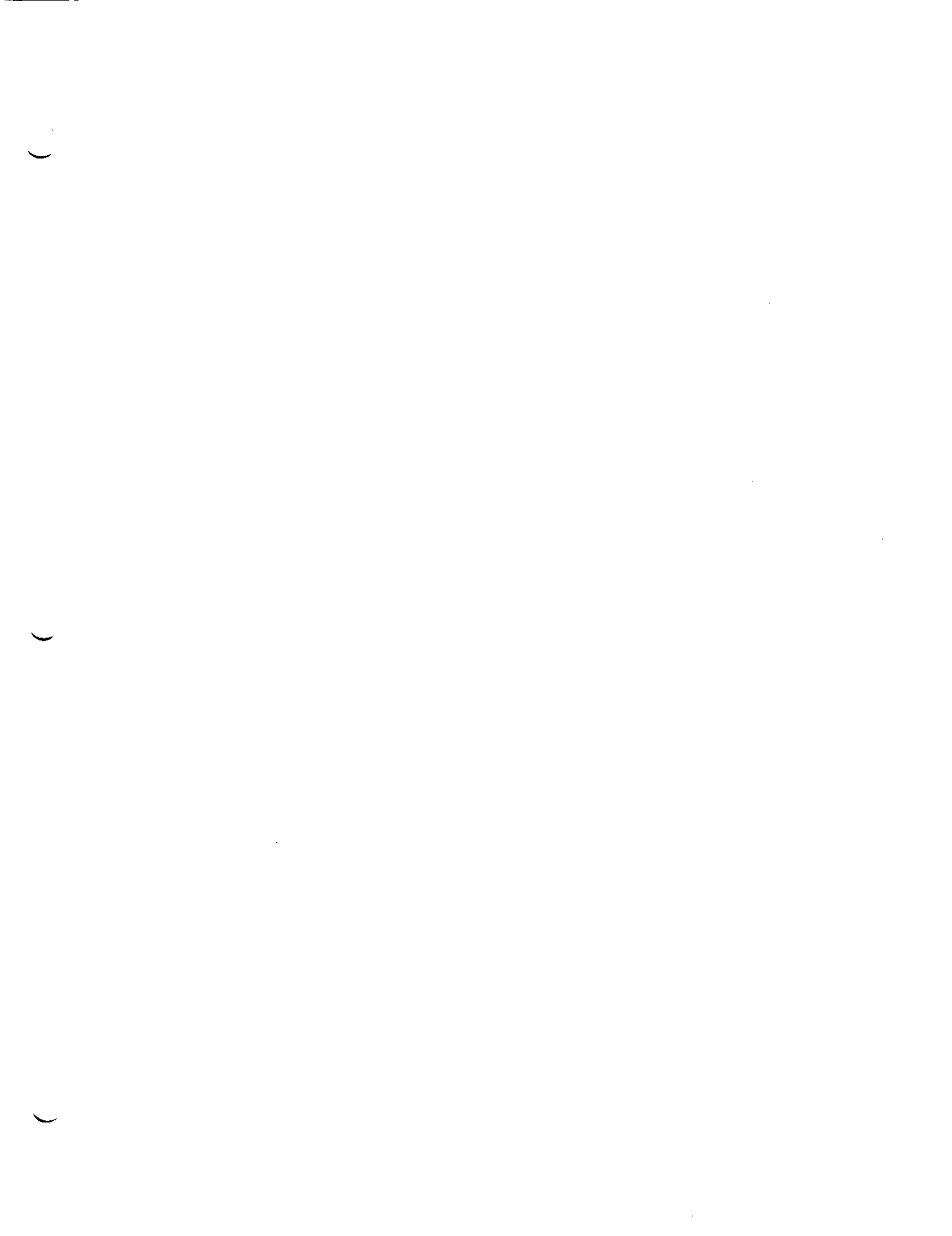
FEDERAL/STATE RELATIONS IN THEORY AND PRACTICE:

A SOVEREIGNTY MISMATCH

CHARLES T. DuMARS
Professor of Law
University of New Mexico School of Law
Member, Western States Water Council

WESTERN WATER IN TRANSITION

A conference sponsored by the
Natural Resources Law Center
University of Colorado School of Law
June 3-5, 1985



I. INTRODUCTION

A. The historic tension between federal and state power over the allocation of water within the states and the right to regulate water quality and to achieve the economic benefits from water through power generation, barge traffic and other uses is rooted in our federal Constitution. A logical and very revealing starting point is to examine the numerous provisions of the Constitution that vest regulatory power over water in the Federal Government.

B. See, e.g., U.S. Const. art. I, § 8, cl. 3 (Commerce Clause);
U.S. Const. art. IV, § 3, cl. 2 (Property Clause);
U.S. Const. art. VI, cl. 2 (Supremacy Clause);
U.S. Const. art. III, § 1, cl. 2 (Judiciary Article);
U.S. Const. art. I, § 10, cl. 3 (Compact Clause);
U.S. Const. art. I, § 8, cl. 1 (General Welfare Clause);
U.S. Const. art. I, § 8, cl. 1 (Taxing Clause);
U.S. Const. art. II, § 2, cl. 2 (Treaty Clause);
U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause).

- C. On the part of the States, there is only one provision that purports to reserve power. See U.S. Const. amend X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
- D. In my lecture, I will examine what I believe to be some of the current tensions between federal and state water regulation--an incredible mismatch of power that could have devastating impacts on the future of the smaller states attempting to survive on scarce nonrenewable water resources. I will also point out how the Supreme Court might change its role in interpreting its role vis-a-vis the States' interest in the precious natural resource of water.

II. NAVIGATION SERVITUDE

- A. The Congress and the Supreme Court have been extremely liberal in interpreting the breadth of the commerce power as it relates to what it has called the "federal navigation servitude," prompting some to conclude that a stream is navigable and therefore subject to paramount federal control if it will float a "supreme court opinion." Others have

concluded that not many would float because the logic is so full of holes. Nevertheless, this broad definition of "navigability" has given rise to extensive regulation and potential conflict exists between the state and federal interests in navigability and regulation of water quality and quantity.

- B. See, e.g., United States v. Appalachian Power Co., 311 U.S. 377 (1940), and cases cited therein, in particular, United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1898); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Federal Water Pollution Control Act of 1972 and Clean Water Act of 1977, 33 U.S.C.A. §§ 1251 - 1376; E.I. DuPont de Nemours and Co. v. Train, 430 U.S. 112 (1976).

III. HYDROPOWER

- A. There is now a growing concern and conflict between the States and the Federal Government over the extensive power given the Federal Government in the Federal Power Act. As federal sources of revenue for water projects disappear, states look to their own ability to generate revenue. One of

those is, of course, the generation and sale of hydroelectric power. The federal government has not been known, however, to overlook a cash register.

B. See, e.g.,

1. The Federal Power Act, 16 U.S.C.A. § 791(a) - 828 (incorporated into the Federal Water Power Act of 1920, 41 Stat. 1063 (1920)); see also 91 Stat. 565 (1977) (changing name to Federal Energy Regulatory Commission); 18 C.F.R. Subch. B, pt. 4 (1982).
2. Public Utilities Regulatory Act of 1978 (PURPA), 16 U.S.C. § 2501 - 2645; American Paper Institute, Inc. v. American Electrical Power Service Corp., 103 S. Ct. 1921 (1983).
3. Compare California v. United States, 438 U.S. 645 (1978), with FPC v. Union Electric Co., 381 U.S. 956 (1965), and First Iowa Hydro-Electric Corp. v. FPC, 328 U.S. 152 (1946). The latter case gives great breadth to Congress in this area and narrowly construes state power under 16 U.S.C. §§ 821 and 802.
4. See also Silkwood v. Kerr-McGee, 104 S. Ct. 615 (1984); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 75 L. Ed. 2d 752 (1983).

IV. FEDERAL RESERVED RIGHTS FOR INDIAN TRIBES

A. The rights of Indian tribes in the waters underlying or running through their reservations are likewise protected by the obligation to respect treaties, laws of antecedent sovereigns, and acts of Congress or a combination of all of these. Because these rights are outside the traditional sources of power under state law, uncertainty exists as to the value of water rights under state law, and expensive and seemingly never-ending adjudications of water rights are taking place throughout the West.

B. See, e.g., Winters v. United States, 207 U.S. 564 (1908);
Arizona v. California, 373 U.S. 546 (1963);
Arizona v. California, 103 S. Ct. 1382 (1983);
Arizona v. San Carlos Apache Tribe of Arizona, 103 S. Ct. 3201 (1983);
Nevada v. United States, 103 S. Ct. 2906 (1983).

V. RESERVED RIGHTS FOR FEDERAL LANDS

A. Although the Desert Lands Act of 1877 gave great latitude to the States in regulating their water resources and the extent of federal reserved water

rights has been narrowly construed, still the potential for exertion of federal power over groundwater is plainly evident and, indeed, water could be a source of federal revenue either through sales or leases.

- B. See, e.g., Desert Lands Act of 1877;
California-Oregon Power Co. v. Beaver Portland Cement Co., 285 U.S. 142 (1935);
United States v. New Mexico, 438 U.S. 696 (1978);
Kleppe v. New Mexico, 426 U.S. 529 (1976).

VI. FEDERAL POWER TO APPROVE INTERSTATE COMPACTS

- A. The approval of interstate compacts likewise has provided an extensive source of power preempting state law. An unanswered question is the relationship between compacts and the commerce clause: Does mere congressional approval of an apportionment under a compact entitle states to limit the use of water to users within the state if the states have allowed the development of an intrastate water market? Also unanswered is the issue of the extent to which these compacts include hydrologically related groundwater.

- B. See, e.g., Frankfurter & Landis, The Compact Clause of the Constitution, 34 Yale L.J. 685 (1925); Zimmerman & Wendell, The Interstate Compact since 1925 (Council of State Governments, 1925);

See also Intake Water Co. v. Yellowstone Compact Commission, 590 F. Supp. 293 (D. Mont. 1984); Texas v. New Mexico, 103 S. Ct. 2558 (1983).

VII. THE SUPREME COURT'S EQUITABLE APPORTIONMENT POWER

- A. The power of the Supreme Court to adjudicate the rights between states to interstate streams unapportioned by compacts or by the Congress is yet another example of a water policy being developed at the federal level. The degree to which these kinds of decisions will be extended to aquifers lying under more than one state and the degree to which they seem to promote the concept of water as a regionally controlled rather than a state-controlled resource likewise raises important issues for states seeking to control their water supplies.

- B. See, e.g., Colorado v. New Mexico, 104 S. Ct. 2433 (1983);

Idaho ex rel. Evans v. Oregon, 103 S. Ct. 2817
(1983).

VIII. THE SUPREME COURT AS PROMOTER OF A NATIONAL MARKET FOR
WATER AND PROTECTOR AGAINST EXCESSES OF STATE SOVER-
EIGNTY

A. The Supreme Court in its interpretation of its role as promoting the free flow of goods in interstate commerce, even where Congress has not acted, has had tremendous impact on the role of states in controlling their water supply. The Court has held that a state's ownership of water within its boundaries is a legal fiction and that states are in effect powerless to maintain some quantity of water within their borders for the future because water, according to the Court, is nothing more than a commodity.

B. See, e.g., Sporhase v. Nebraska, 458 U.S. 941
(1982);

El Paso v. Reynolds, 597 F. Supp. 694 (D.N.M.
1984).

IX. THE MARKET PARTICIPATION DOCTRINE--A SLIGHT CRACK IN THE FEDERAL ARMOR

A. Bending to the concept that the States should not be foreclosed from competing in the marketplace for commodities, and possibly for resources, the Supreme Court has held that states can exercise control in the fact of commerce clause challenges if the state is not regulating a commodity, such as water, but, rather, is acting as a market participant in the interstate market.

B. See, e.g., Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976);
Reeves v. Stake, 447 U.S. 429 (1980);
South Central Timber Development, Inc. v. Wunnicke, 104 S. Ct. 2237 (1984).

X. TRADITIONAL CONCEPTS OF SOVEREIGNTY MAY ULTIMATELY ASSIST STATES IN CONTROLLING THEIR WATER SUPPLY

A. Justice Stone many years ago in his famous footnote in the Caroline Products Co. case may have explained the need for the States to maintain control over their water resources and have more accurately described an appropriate role for the Supreme Court. The Court may need to emerge as

protector of the smaller, politically less powerful states in the face of growing congressional power. Stated simply, an adequate water supply is an essential prerequisite to state survival and state survival is mandated by the tenth amendment to the United States Constitution. Unlike a major corporation that leaves an area when nonrenewable water resources are gone, states cannot constitutionally go out of business.

- B. See, e.g., United States v. Caroline Products Co., 304 U.S. 144, 152-53 n.5 (1958);
DuMars, Evaluating Congressional Limits on a State's Severance Tax Equity Interest in Its Natural Resources: An Essential Responsibility for the Supreme Court, 22 Nat. Resources J. 673 (1982);
New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).