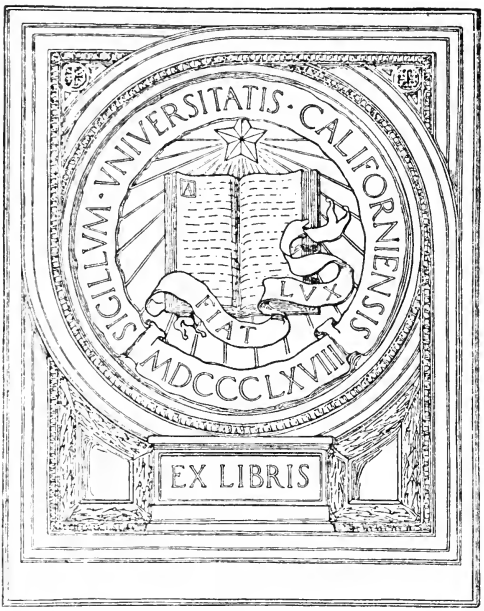

# Calendar No. 786.

63D CONGRESS, 3d Session. | SENATE. | REPT. 898. Part 2.



## DEVELOPMENT OF WATER POWER.

FEBRUARY 2, 1915.—Ordered to be printed.

Mr. WORKS, from the Committee on Public Lands, submitted the following

## VIEWS OF THE MINORITY.

[To accompany H. R. 16673.]

The report of the majority of the committee states the object of the bill as follows:

> The object of the measure is the better and speedier development for useful and beneficial purposes of the great undeveloped water power of the country, now lagging on account of inadequate and inefficient laws.

If this were the real object and purpose of the bill and this object would be attained even in reasonable degree and without unwarranted and dangerous encroachments by the National Government on the constitutional rights of the States, the signers of this minority report of the committee would not be found contending against its enactment, as they represent a constituency that is vitally interested in the development of all natural resources and their application to beneficial uses, freed as far as possible from limitations, obstructions, or unnecessary burdens of any kind. In any attempt to bring about such legislation we should carefully consider:

1. The rights of the States in the waters flowing through them in the natural streams and to regulate and control their appropriation, diversion, and use.
2. The limitations of the National Government in dealing with the appropriation, regulation, and use of these waters.
3. The rights of the people of the States to the use of the waters of the streams, as provided by law, commonly called the consumers.

But after all and in the last analysis it is the consumer that should be protected and his individual right to the use of the water maintained and preserved under reasonable rules and regulations that will insure the greater and more beneficial use of the water for all legitimate purposes.

The western semiarid States, where irrigation is necessary to their full development and prosperity, are peculiarly and vitally interested in making every drop of water beneficially useful, and in supplying every acre of land possible with the water without which much of

their lands are sterile and unproductive. This being true it must be seen that these States are interested and will support any just law that will extend the use of water either for the irrigation of their land or the development of power. And if it were believed by us that this bill, if it should become a law, would have that effect without violating any of the fundamental and constitutional rights of the States it would receive our earnest and united support. It is because we are fully convinced by our own knowledge of the subject and the testimony taken at the hearings before the committee that the bill will not conduce to the better or speedier development of the water power of the country, but will hinder and retard such development, and that its real object, purpose, and effect is to usurp by the National Government the rights and jurisdiction of the States in and over the flowing waters of the streams to the detriment of the States and to water consumers that we earnestly oppose the passage of the bill. And this attempt at what seems to us to be revolutionary, detrimental, and unwise legislation is so far-reaching and important that we feel it to be our duty to lay before the Senate our reasons for opposing the passage of the bill.

In dealing with the subject we assume that certain fundamental principles of law, controlling in their influence as affecting such legislation as this, have been firmly and unalterably established by both Federal and State decisions. They are as follows:

1. The ownership of flowing water and the right to dispose of and to regulate and control the use thereof within their borders belong exclusively to the States as a part of their sovereign power, subject only, in case of navigable streams, to the power of the Federal Government to regulate and promote commerce between the States.

Pollard's Lessee *v.* Hagan (3 How., U. S., 212);
Withers *v.* Buckley (20 How., 84);
Escanaba Co. *v.* Chicago (107 U. S., 678);
Kansas *v.* Colorado (206 U. S., 46);
Illinois Central Railroad *v.* Illinois (146 U. S., 387);
Shively *v.* Bowlby (152 U. S., 1);
Sands *v.* Manistee River Improvement Co. (123 U. S., 288);
Veazie *v.* Moor (14 How., U. S., 568);
Hudson Water Co. *v.* McCarter (209 U. S., 349);
City of New York *v.* Miln (11 Pet., 102);
Gutierras *v.* Albuquerque (188 U. S., 545);
County of Mobile *v.* Kimball (102 U. S., 691);
Cardwell *v.* American Bridge Co. (113 U. S., 205);
Willamette Iron Bridge Co. *v.* Hatch (125 U. S., 1);
United States *v.* Railroad Bridge Co. (6 McLean, 517).

2. That as a consequence the United States have no such right either of ownership, regulation, or control.

Pollard's Lessee *v.* Hagan (3 How., U. S., 212);
Kansas *v.* Colorado (206 U. S., 46);
Ward *v.* Race Horse (163 U. S., 504).

3. The rights of consumers to the use of the water are dependent upon State and not Federal laws and subject to State regulation and control, exclusively, unless the use is interstate.

Kansas *v.* Colorado (206 U. S., 46);
Osborne *v.* San Diego Land & Town Co. (178 U. S., 22);
Los Angeles *v.* Los Angeles Water Co. (177 U. S., 558);
St. Anthony Falls Water Power Co. *v.* St. Paul Water Commissioners (168 U. S., 349);
Bean *v.* Morris (221 U. S., 485).

4. The Federal Government owns the public lands as a proprietor only and not in its sovereign capacity.

Pollard's Lessee *v.* Hagan (3 How., U. S., 212);
Ward *v.* Race Horse (163 U. S., 504);
Woodruff *v.* North Bloomfield Gravel Mining Co. (18 Fed Rep., 753);
Boggs *v.* Merced Mining Co. (14 Cal., 279, 376).

5. The Federal Government has no power or jurisdiction to fix rates or regulate the use or disposition of water within a State.

Sands *v.* Manistee River Improvement Co. (123 U. S., 288);
Osborne *v.* San Diego Land & Town Co. (178 U. S., 22).

6. The power to fix rates or regulate the use of water not given to the Federal Government by the Constitution can not be bestowed by act of Congress as a condition to the leasing or sale of the public lands.

New Orleans *v.* United States (10 Pet., 662, 736);
Leovy *v.* United States (177 U. S., 621).

7. Absolute property in and dominion and sovereignty over the soils under the tide waters in the States are reserved to the several States.

Kansas *v.* United Land Association (142 U. S., 161).

8. Public lands owned by the United States are not subject to taxation by the States.

California *v.* Shearer (30 Cal., 645, 655, 658);
Van Brocklin *v.* Tennessee (117 U. S., 151).

9. The power of Congress to legislate or exercise sovereignty over lands within a State is confined to lands acquired by the Federal Government for certain specific purposes, and with the consent of the State.

United States *v.* Cornell (2 Mason, 60);
Woodruff *v.* North Bloomfield Gravel Mining Co. (18 Fed. Rep., 753).

The far-reaching effects of this proposed legislation and the evident attempt of the Federal Government to usurp the sovereign powers of the States move us to consider more extensively the effect of the principles above laid down and the cases supporting our views. In doing so we rest our views and conclusions largely upon the following premises:

1. Before the formation of the present Government all sovereign powers were vested in the several States within their borders.

2. The Federal Government formed by the States has only such powers as the States bestowed upon it by the Constitution. All others are reserved to the States.

3. The powers thus granted do not include the power to regulate or control the use of the waters of streams flowing within a State except to maintain and regulate commerce between the States, with foreign nations, and under treaties with the Indians.

4. The ownership of land within a State as a proprietary owner and not for governmental uses and purposes gives the Federal Government no power or jurisdiction to regulate or control the use of the waters of a stream on which the land borders.

5. Therefore any legislation attempting to vest any such power in the Government will be unconstitutional and void.

That the bill under consideration does provide for such usurpation of power we will show further along.

Having laid down these general principles that should guide and control our action, we quote, for the information of the Senate, some of the language of the courts on the subject which we regard as conclusive.

In Pollard's Lessee *v.* Hagan (3 How., 212) the question was as to the title to lands covered by the waters of a navigable stream and involved the power and jurisdiction of the United States Government over such lands. The court said:

The right which belongs to the society, or to the sovereign, of disposing in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs and is consequently a part of the empire, or sovereign power. (Vat. Law of Nations, sec. 244.) This definition shows, that the eminent domain, although a sovereign power, does not include all sovereign power, and this explains the sense in which it is used in this opinion. The compact made between the United States and the State of Georgia was sanctioned by the Constitution of the United States, by the third section of the fourth article of which it is declared that "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned, as well as of Congress."

When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted.

By the sixteenth clause of the eighth section of the first article of the Constitution power is given to Congress "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding 10 miles square) as may by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same may be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, the nation and municipal powers of government of every description are united in the government of the Union. And these are the only cases within the United States in which all the powers of government are united in a single government, except in cases already mentioned of the temporary territorial governments, and there a local government exists. The right of Alabama and every other new State to exercise all the powers of government, which belong to and may be exercised by the original States of the Union, must be admitted and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands.

We will now inquire into the nature and extent of the right of the United States to these lands, and whether that right can in any manner affect or control the decision of the case before us. This right originated in voluntary surrenders, made by several of the old States, of their waste and unappropriated lands to the United States, under a resolution of the old Congress of the 6th of September, 1780, recommending such surrender and cession, to aid in paying the public debt incurred by the War of the Revolution. The object of all the parties to these contracts of cession was to convert the land into money for the payment of the debt and to erect new States over the territory thus ceded; and as soon as these purposes could be accomplished the power of the United States over these lands, as property, was to cease.

Whenever the United States shall have fully executed these trusts the municipal sovereignty of the new States will be complete throughout their respective borders, and they and the original States will be upon an equal footing in all respects whatever. We, therefore, think the United States hold the public lands within the new States by force of the deeds of cession, and the statutes connected with them, and

not by any municipal sovereignty which it may be supposed they possess or have reserved by compact with the new States for that particular purpose. The provision of the Constitution above referred to shows that no such power can be exercised by the United States within a State. Such a power is not only repugnant to the Constitution, but it is inconsistent with the spirit and intention of the deeds of cession. The argument so much relied on by the counsel for the plaintiffs, that the agreement of the people inhabiting the new States, "that they forever disclaim all right and title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States," can not operate as a contract between the parties, but is binding as a law. Full power is given to Congress "to make all needful rules and regulations respecting the territory or other property of the United States." This authorized the passage of all laws necessary to secure the rights of the United States to the public lands and to provide for their sale, and to protect them from taxation.

The case of Withers *v.* Buckley (20 How., 84) involved the powers of the Federal and State Governments over navigable streams. It also lays down the rule since adhered to that the fifth and other amendments to the Constitution were intended to modify the powers granted to the Federal Government and do not limit or affect the powers of the State.

Quoting from the language of Chief Justice Marshall in Barron *v.* Baltimore (7 Peters, 247–248), the court said:

The question thus presented we think of great importance but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves; for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best adapted to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted by the instrument itself, not of distinct governments framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested, such as they deemed most proper for themselves. It is a subject on which they judge exclusively and with which others interfere no further than they are supposed to have a common interest.

Again, reverting to the causes which led to the proposal and adoption of the amendments of the Constitution, the same judge remarks (ib., p. 250)—and these remarks embrace the whole series of articles adopted: "In almost every convention in which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the General Government, not against those of the local governments.

"In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court can not so apply them. (Vide also the cases of Fox *v.* The State of Ohio, 5 How., 411; and of The West River Bridge Co. *v.* Dix et al., 6 How., 507.)"

And further, in considering an act of Congress relating to the subject, the court, in the same case, used this langage:

In considering this act of Congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, further than to affirm that it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign Government, nor to inhibit or diminish its perfect equality with the other members of the Confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the Confederacy, from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of Pollard's Lessee

*v.* Hagan (3 How., p. 223). The act of Congress of March 1, 1817, in prescribing the free navigation of the Mississippi and the navigable waters flowing into the river, could not have been designed to inhibit the power inseparable from every sovereign or efficient Government, to devise and to execute measures for the improvement of the State, although such measures might induce or render necessary changes in the channels or courses of rivers within the interior of the State, or might be productive of a change in the value of private property. Such consequences are not infrequently and indeed unavoidably incident to public and general measures highly promotive of and absolutely necessary to the public good. And here it may be asked whether the law complained of and the measures said to be in contemplation for its execution are in reality in conflict with the act of Congress of March 1, 1817, with respect either to the letter or the spirit of the act. On this point may be cited the case of Veazie et al. *v.* Moor (in 14 How., 568).

The case of Escanaba Co. *v.* Chicago (107 U. S., 678) involved the right of the States to legislate respecting the use of navigable streams over which, for purposes of commerce between the States, the Federal Government has jurisdiction. In dealing with this question the court said:

The power vested in the General Government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the States or with foreign countries. * * *

But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form and strength, and the size of their draws and the manner and times of using them be better vested than with the State or the authorities of the city upon whom it has devolved that duty. When its power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal Government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it as the supreme law of the land. But until Congress acts on the subject the power of the State over bridges across its navigable streams is plenary.

And further:

The doctrine declared in these several decisions is in accordance with the more general doctrine now firmly established—that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exercised are national in their character and admit and require uniformity of regulation affecting alike all the States. Upon such subjects only that authority can act which can speak for the whole country. Its nonaction is therefore a declaration that they shall remain free from all regulation.

Kansas *v.* Colorado (206 U. S., 46) involves directly the power of the Federal Government to legislate respecting the irrigation of arid lands. The question presented for decision is thus stated by the court:

Turning now to the controversy as here presented, it is whether Kansas has a right to the continuous flow of the waters of the Arkansas River, as that flow existed before any human interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States. * * *

The primary question is, of course, of national control. For, if the Nation has a right to regulate the flow of the waters, we must inquire what it has done in the way

of regulation. If it has done nothing the further question will then arise, What are the respective rights of the two States in the absence of national regulation?

## In discussing this question, as stated by the court, it was said:

Congress has, by virtue of the grant to it of power to regulate commerce "among the several States," extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or remove obstructions in the natural waterways and preserve the navigability of those ways. * * *

That involves the question whether the reclamation of arid lands is one of the powers granted to the General Government. As heretofore stated, the constant declaration of this court from the beginning is that this Government is one of enumerated powers. "The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." (Story, J., in Martin *v.* Hunter's Lessee, 1 Wheat., 304, 326.) "The Government of the United States is one of delegated, limited, and enumerated powers." (United States *v.* Harris, 106 U. S., 629, 635.)

Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution, it is enough to say that no one of them by any implication refers to the reclamation of arid lands. The last paragraph of the section, which authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof, is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned. * * *

We must look beyond section 8 for congressional authority over arid lands, and it is said to be found in the second paragraph of section 3 of Article IV, reading: "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; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the Territories, as distinguished from the States of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. *But, clearly, it does not grant to Congress any legislative control over the States and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.* Appreciating the force of this, counsel for the Government relies upon "the doctrine of sovereign and inherent power," adding, "I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference." His argument runs substantially along this line: All legislative power must be vested in either the State or the National Government; no legislative powers belong to a State government other than those which affect solely the internal affairs of that State, consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a Government of enumerated powers. That this is such a Government clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting specific things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the tenth amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination, the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads, "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 * * *.

One cardinal rule underlying all the relations of the States to each other is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others and is bound to yield its own views

to none. Yet, whenever, as in the case of Missouri *v.* Illinois (180 U. S., 208) the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

The court then proceeded to consider and determine the rights, not of the Federal Government, but of the States of Kansas and Colorado, in the waters of the Arkansas River, a stream which flows through both States.

The case of Shively *v.* Bowlby (152 U. S., 1) involved the title to lands below high-water mark in the Columbia River in the State of Oregon. It is one of the leading cases on the subject of the powers of the Federal and State Governments over navigable streams. That the power and jurisdiction of the States over nonnavigable streams and lands lying under them is exclusive is not questioned. It is only where the question of navigation for interstate purposes is involved that any question of sovereign power in the States has ever been controverted. In this case the laws of the several States on the subject and the numerous decided cases bearing upon it are fully reviewed and the doctrine laid down in Pollard's Lessee *v.* Hagan, quoted from above, confirmed and approved. The opinion in the case is an exceedingly interesting and instructive one and should receive attention in this connection. In closing, the court said:

> The United States, while they hold the country as a Territory, having all the powers both of national and municipal government, may grant for appropriate purposes, titles or rights in the soil below high-water mark of tidewaters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of this sovereign rights in navigable waters and in the soil under them to the control of the States, respectively, when organized and admitted into the Union.
>
> Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.
>
> The donation land claim, bounded by the Columbia River, upon which the plaintiff in error relies, includes no title or right in the land below high-water mark; and the statutes of Oregon, under which the defendants in error hold, are a constitutional and legal exercise by the State of Oregon of its dominion over the lands under navigable waters.

The following statement in the opinion in Illinois Central Railroad *v.* Illinois (146 U. S., 387, 435) is to the same effect:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tidewaters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation as far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court and is not questioned by counsel of any of the parties. (Pollard's Lessee *v.* Hagan, 3 How., 212; Weber *v.* Harbor Commissioners, 18 Wall., 57.)

As establishing the claim we make that the Constitution vests no power in the Federal Government to regulate or control the use of the waters of a stream within a State, and that this power

can not be given by a statute enacted by Congress, we quote this language from the opinion in New Orleans *v.* United States (10 Peters, 662, 736):

The Government of the United States, as was well observed in the argument, is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress can not, by legislation, enlarge the Federal jurisdiction, nor can it be enlarged under the treaty-making power.

That the States have the right to regulate the use of even navigable streams within their borders where Congress has not acted or where such action does not interfere with the paramount power of the Federal Government to regulate commerce between the States, is affirmed by Leovy *v.* United States (177 U. S., 621), in which it is said:

Subject, then, to the paramount jurisdiction of Congress over the navigable waters of the United States, the State of Louisiana has full power to authorize the construction and maintenance of levees, drains, and other structures necessary and suitable to reclaim swamp and overflowed lands within her limits.

And in the Daniel Ball (177 U. S., 10 Wall., 557) it is said:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Respecting the right of a State to control the navigation of a stream wholly within its limits it was said in the case of Veazie *v.* Moor (14 How., 568, 573):

Upon a comparison of this decree and of the statute upon which it is founded with the provision of the Constitution already referred to, we are unable to perceive by what rule of interpretation either the statute or the decree can be brought within either of the categories comprised in that provision.

These categories are: 1. Commerce with foreign nations. 2. Commerce amongst the several States. 3. Commerce with the Indian tribes. Taking the term commerce in its broadest acceptation, supposing it to embrace not merely traffic but the means and vehicles by which it is prosecuted, can it properly be made to include objects and purposes such as those contemplated by the law under review? Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extraterritorial. * * * The phrase can never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community. Nor can it be properly concluded that, because the products of domestic enterprise in agriculture or manufactures, or in the arts may ultimately become the subjects of foreign commerce, the control of the means of the encouragements by which enterprise is fostered and protected is legitimately within the import of the phrase foreign commerce, or fairly implied in any investiture of the power to regulate such commerce. A pretension as far-reaching as this would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations the results of which may not become the subjects of foreign commerce and be borne either by turnpikes, canals, or railroads from point to point within the several States toward an ultimate destination, like the one above mentioned. Such a pretension would effectually prevent or paralyze every effort at internal improvement by the several States; for it can not be supposed that the States would exhaust their capital and their credit in the construction of turnpikes, canals, and railroads, the remuneration derivable from which and all control over which might be immediately wrested from them, because such public works would be facilities for a commerce which, while availing itself of those facilities, was unquestionably internal, although intermediately or ultimately it might become foreign.

The rule here given with respect to the regulation of foreign commerce equally excludes from the regulation of commerce between the States and the Indian tribes

the control over turnpikes, canals, or railroads, or the clearing and deepening of watercourses exclusively within the States, or the management of the transportation upon and by means of such improvements.

In New York *v.* Miln (11 Pet., 102, 139) the absolute right of the State in this respect is more clearly and emphatically declared in this language:

But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare by every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained, and that consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive.

We are aware that it is at all times difficult to define any subject with proper precision and accuracy; that if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering.

If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a State or any individual within it, whether it related to their rights or their duties, whether it respected them as men or as citizens of the State, whether in their public or private relation, whether it related to the rights of persons or of property or of the whole people of the State or any individual within it, and whose operation was within the territorial limits of the State and upon the persons and things within its jurisdiction.

Applying this doctrine to the right of a State to protect and control the flow of water in the streams within its limits, the court said, in Hudson Water Co. *v.* McCarter (209 U. S., 349, 356):

The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors can not be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows. * * *

The right to receive water from a river through pipes is subject to territorial limits by nature, and those limits may be fixed by the State within which the river flows, even if they are made to coincide with the State line.

Respecting the effect of the admission of Wyoming as a State upon a treaty with the Indians by which they were given the right to hunt on the public domain, the court in Ward *v.* Race Horse (163 U. S. 504) used this language:

The argument now advanced in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become subject to State authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that privilege continued when the United States had called into being a sovereign State, a necessary incident of whose authority was the complete power to regulate the killing of

game within its borders. This argument indicates at once the conflict between the right to hunt in the unoccupied lands within the hunting districts and the assertion of the power to continue the exercise of the privilege in question in the State of Wyoming in defiance of its laws. * * *

The act which admitted Wyoming into the Union, as we have said, expressly declared that that State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of Government land and thereon disregard and violate the State law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule.

As to the limitation of the powers of the Federal Government based upon its proprietory ownership of lands within a State, this is said in Woodruff *v.* North Bloomfield Gravel Mining Co. (18 Fed. Rep., 753, 772):

Upon the cession of California by Mexico, the sovereignty and proprietorship of all the lands within its borders in which no private interest had vested passed to the United States. Upon the admission of California into the Union, upon an equal footing with the original States, the sovereignty for all internal municipal purposes, and for all purposes except such purposes and with such powers as are expressly conferred upon the National Government by the Constitution of the United States, passed to the State of California. Thenceforth the only interest of the United States in the public lands was that of a proprietor, like that of any other proprietor except that the State, under the express terms upon which it was admitted, could pass no laws to interfere with their primary disposal, and they were not subject to taxation. In all other respects the United States stood upon the same footing as private owners of land.

Having demonstrated, by reference to the decided cases, the respective rights of the Federal Government and the States in the subject matter of the bill, we proceed to consider the provisions of the bill itself and the bearing of the principles we have discussed above on its terms and conditions.

But before taking up the various provisions of the bill in detail we desire to consider it briefly as a whole.

The bill in its entire scope and purpose is an infringement upon and an usurpation of the sovereign powers of the States. This is not only its effect, but it is the avowed intention of its friends to transfer, in part, at least, from the States to the National Government the control over the use of the waters of the stream within the States. Ostensibly it is proposed to authorize the Government to lease its own lands. To this there are serious objections, as we shall point out further along. But the public lands that may be leased for power sites are of themselves practically worthless. The Government has no ownership or interest in the water flowing in the stream except that of a riparian owner, and that only in States where riparian rights are recognized. In most of the Western States riparian rights are abolished and the ownership of the water vested in the whole people of the State, to be appropriated and applied to beneficial uses, as the laws of the State may provide. The Government owns the land precisely as a private individual owns his land, and with the same rights and privileges as to the use of the water that flows by it—no more, no less. It does not own it in its sovereign capacity, as we have shown, and has no sovereign power over it or over the water that flows past it. But the effect of the bill is to lease, not alone the land it owns, but the waters of the stream upon which it borders, and by conditions and restrictions in the lease to determine how and for what purposes the lessee shall use the

water, as well as the land. This is in violation of the principles enunciated by the courts, as above pointed out, and an encroachment upon, and a plain and open violation of, the sovereign rights of the States to govern and control such use.

It is an ingenious effort to fasten upon the private ownership of the land, by the Government, the sovereign right to control the use of the waters, a right that the Government does not possess under the Constitution and can not be given it by statute, and which admittedly does belong to the States. The rental to be paid by the lessee is not based upon the value of the use of the land, but upon the amount of power that can be produced by the water, which belongs to the State, and, as the water, in which the Government has no ownership or interest, is thus leased, the attempt is made to control the use of the thing leased, namely, the water. It may be conceded that the Government, as lessor, and the lessee may agree upon any basis they please in fixing the rental or royalty to be paid. Of this the State could not justly complain. The trouble is that because the Government fixes the amount to be paid for the land by the amount of power that can be produced by the water, over which it can have no right or control, it is attempting to vest in itself the unwarranted power to determine how the water shall be used and what for. Ostensibly this is done to protect the Government, as lessor, and secure to it a compliance, on the part of the lessee, with the terms of the lease. But the intention and the effect of it is to draw to the Federal Government the right to control the use of the water. And this is the matter in controversy. Of this the States have every reason to complain. The granting of any such privilege is a betrayal of the sovereign rights of the State.

If any private owner of lands bordering on a stream should lease his lands for a power site and impose any such terms and conditions, affecting the use of the water, as this bill provides for, they would undoubtedly be inoperative and void. And, as the National Government, in this respect, has only the rights of a private owner, such conditions, made by the Government, would be equally so.

Having submitted these views on the general scope and effect of the bill, we proceed to verify what we have said of it by calling attention to some of its specific provisions.

In its first section the bill authorizes the Secretary of the Interior to lease lands of the Government for the "development, generation, transmission, and utilization of hydroelectric power." The effort is to devote not only the land leased, but the water, to a specific and exclusive purpose, namely, the generation of power. This is a direct violation of the right of the States to regulate and control the use or uses to which water should be applied, and in direct opposition to the policies of the States. In nearly all of the States where irrigation is practiced and in which this law, if enacted, will operate, have, either by direct statutory provisions or rules and regulations adopted by utility commissioners or other authorized official bodies, provided what uses of water shall be preferred over others where the water supply from any source is insufficient to meet all needs, usually in the following order: Domestic use, irrigation, development of power. This whole bill proceeds upon the theory that the Government can fix and designate the use to which the water shall be devoted, in spite of contrary rules fixed by the States. But we apprehend that if such

a lease as is proposed were made and the power plant erected, the State could at any time require that the water used for the purpose of generating power be applied to domestic use or irrigation, if the water is needed for that purpose, and the lessee's lease and plant rendered valueless. If not, then the Government has, by its lease and the application of the water to a single and specific use, deprived the State of its undoubted sovereign right to determine the uses to which the water shall be applied. No one can doubt under the authorities we have cited that in a conflict of this kind between the two governments the right of the State to say how and for what purposes water shall be used would be sustained.

The vice of this first section runs through the whole bill. All of its provisions and limitations relate wholly to the use of the water for the generation of power. There is a feeble attempt to remedy this defect by section 20, added as an amendment by this committee, which provides that the plant *may* be enlarged by the lessee "for the purpose of impounding and conveying water for irrigation, mining, municipal, domestic, and other beneficial purposes." But this does not correct the evil. It is a mere consent of the Government that the water *may* be used for other purposes if the lessee desires. It is a consent given in a matter over which the Government has no control and about which it has no power either to give or withhold consent. And its consent, when given, amounts to nothing as affecting the use to which the water shall be applied. That is a matter exclusively within the power and jurisdiction of the States.

There is another apparent effort to avoid this and other void provisions in the bill that we will come to directly, by section 14, which provides that it shall not affect or interfere with the laws of any State relating to the control, appropriation, use, or distribution of water. Either this provision must have no effect at all or it will nullify every important provision of the bill, because the whole scope and effect of the bill, as we have shown, directly interferes with such laws of the States.

We now pass to the consideration of other provisions of the bill equally objectionable.

### 1. LIMITATION OF LEASE TO 50 YEARS.

Any attempt to limit the life of a plant for the distribution and use of water is wholly at variance with the whole theory of water rights in the Western States. Where water is put to use for irrigation, for example, the use must be perpetual and not for a limited term, otherwise a landowner might have the use of the water until his trees are matured then lose his supply, bringing destruction upon his trees and his crops. To prevent this it is provided by statute in most, if not all of the irrigation States, that if a public service corporation shall once supply water to land for irrigation the right to its continued and perpetual use, as an appurtenant to his land, attaches and passes, like other appurtenances, by a conveyance of the land. This is not so important as applied to the use of water for the development of power, except where the power is used, as it is very generally, for the pumping and other means of supplying water for irrigation. In that case it is equally important with the direct supply of water for irrigation.

### 2. RIGHT TO USE WATER MUST FIRST BE OBTAINED FROM STATE.

It is provided that no lease shall be granted until the right to the water is secured from the State. In some of the States this provision will be impossible of execution because no right to the water can be obtained from the State until the plant to be used in applying it to a beneficial purpose is completed and approved by the State authorities and then no title to the water is granted, but only a license to use it. For example, in California a water commission is provided for by law. This commission is given complete and plenary power over the appropriation and use of water for any and all purposes. The commission is authorized to investigate all streams and determine the amount of total flow of the different streams in the State, the amount appropriated and in proper and necessary use, and the quantity open to appropriation. Anyone desiring to appropriate water from any stream must apply to this commission and state in his petition therefor certain required facts. Upon a proper showing being made, a permit is issued allowing the construction of proper works for its diversion and distribution.

The statute provides:

SEC. 16. Every application for a permit to appropriate water shall set forth the name and post-office address of the applicant, the source of water supply, the nature and amount of the proposed use, the location and description of the proposed head works, ditch, canal, and other works; the proposed place of diversion and the place where it is intended to use the water; the time within which it is proposed to begin construction, the time required for completion of the construction, and the time for the complete application of the water to the proposed use. If for agricultural purposes, the applicant shall, besides the above general requirements, give the legal subdivisions of the land and the acreage to be irrigated, as near as may be; if for power purposes, it shall give, besides the general requirements prescribed above, the nature of the works by means of which the power is to be developed, the head and amount of water to be utilized, and the use to which the power is to be applied; if for storage in a reservoir, it shall give, in addition to the general requirements prescribed above, the height of dam, the capacity of the reservoir, and the use to be made of the impounded waters; if for municipal water supply, it shall give, besides the general requirements specified above, the present population to be served, and, as near as may be, the future requirements of the city; if for mining purposes, it shall give, in addition to the general requirements prescribed above, the nature and location of the mines to be served and the methods of supplying and utilizing the water. (Cal. Stat., 1913, pp. 1012, 1021.)

The statute further provides:

SEC. 19. Immediately upon completion, in accordance with law, the rules and regulations of the State water commission, and the terms of the permit, of the project under such application, the holder of a permit for the right to appropriate water shall report said completion to the State water commission. The said commission shall immediately thereafter cause to be made a full inspection and examination of the works constructed and shall determine whether the construction of said works is in conformity with law, the terms of the approved application, the rules and regulations of the State water commission, and the permit. The said water commission shall, if said determination is favorable to the applicant, issue a license which shall give the right to the diversion of such an amount of water and to the use thereof as may be necessary to fulfill the purpose of approved application. (Cal. Stat., 1913, pp. 1012, 1023.)

So it will be seen that in California the provision that the applicant must first secure the right from the State can have no effect, because his right can not be passed upon until the whole works are completed and approved by the water commission. And if not approved, the applicant is refused a license to divert and use the water. And under the following provision of the statute all water not appropriated in

accordance with the laws of the State is declared to belong to the people:

And all waters flowing in any river, stream, canyon, ravine, or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purpose upon, or in so far as such waters are or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the State of California and subject to appropriation in accordance with the provisions of this act. (Cal. Stat., 1913, pp. 1012, 1023.)

### 3. PROVISION AS TO TIME AND MANNER OF DOING THE WORK OF ESTABLISHING THE PLANT.

This matter is completely covered by State laws, and the provision conflicts directly with those laws. The California statute to which we have referred places in the hands of the water commissioners the power to determine when, where, and how the water shall be applied and continued in actual use. It provides:

SEC. 12. The State water commission shall have authority to, and may, for good cause shown, upon the application of any appropriator or user of water under an appropriation made and maintained according to law prior to the passage of this act, prescribe the time within which the full amount of the water appropriated shall be applied to a useful or beneficial purpose.

And certain rules for determining what is a reasonable prosecution and completion of the work are laid down for the guidance of the commission. The statute further provides:

SEC. 18. Actual construction work upon any project shall begin within such time after the date of the approval of the application as shall be specified in said approval, which time shall not be less than sixty days from date of said approval, and the construction of the work thereafter shall be prosecuted with due diligence in accordance with this act, the terms of the approved application, and the rules and regulations of said commission; and said work shall be completed in accordance with law, the rules and regulations of the State water commission and the terms of the approved application, and within a period specified in the permit; but the period of completion specified in the permit may, for good cause shown, be extended by the State water commission. And if such work be not so commenced, prosecuted, and completed, the water commission shall, after notice in writing and mailed in a sealed, postage-prepaid and registered letter addressed to the applicant at the address given in his application for a permit to appropriate water, and a hearing before the commission, revoke its approval of the application. But any applicant the approval of whose application shall have been thus revoked shall have the right to bring an action in the superior court of the county in which is situated the point of the proposed diversion of the water for a review of the order of the commission revoking said approval of the application.

Thus we have a complete system of regulation in the State intended to secure an early application of the water to a beneficial use. To this end work is required to be commenced in *not less than sixty days* and prosecuted with due diligence, under rules and regulations prescribed by the commission.

This bill provides in section 2:

That each lease made in pursuance of this act shall provide for the diligent, orderly, and reasonable development and continuous operation of the water power subject to market conditions.

In other words, the State, admittedly the only authority having jurisdiction over the matter, provides that the work must commence within 60 days, be prosecuted with diligence, and completed under rules and regulations prescribed by the water commission. By this act we fix no time when the work shall be begun, prosecuted, and

completed, but require it to be done as the Secretary of the Interior shall prescribe in a lease and subject to market conditions. We have shown that the Federal Government has no power or jurisdiction over this matter of supplying water or power in a State; but if it had, this would involve a conflict of authority between the State and Federal Governments that must lead to conflicts and be intolerable.

### 4. ALLOWING INTERSTATE COMMERCE COMMISSION TO FIX RATES AND DETERMINE THE ISSUE OF STOCKS AND BONDS.

It is possible that where a corporation is engaged in transmitting power into another State the Federal Government would, because it is interstate business, have power to fix the rates to be charged against consumers, at least in the State to which it is transmitted. It is submitted, however, that it has no such power respecting power furnished by the corporation in its own State. And in no event could the Government justify itself in assuming to control the issue of stocks and bonds of a corporation as against the laws of the State of its creation. This would be an unwarranted exercise of authority based upon the mere fact that the corporation is its tenant, holding Government land within the State. Referring again to California, the railroad commission of the State has authority, conferred upon it by statute, to fix and determine not only the rates to be charged by a corporation furnishing power within the State, but to determine its bond and stock issue and other indebtedness. In other words, that commission has full and ample power to deal with the whole subject. Now it is proposed by this bill to give the same power to a Federal commission. This necessarily brings the two into direct conflict. The power can not be exercised by both Governments. It belongs of right to the State where it is organized and doing business and dealing with the water that belongs to the State and is being supplied to its people. There can be no just or valid claim that this power belongs to the Government, or can properly and legally be vested in it by statute.

### 5. AUTHORIZING COMBINATION OF PLANTS OR LINES.

The bill provides in section 3 that the Secretary of the Interior, in his discretion, may allow "the physical combination, distribution, and use of power or energy under this act or under leases given hereunder not in violation of law."

By what possible right could the Government, as a mere lessor of land, grant or withhold any such privilege? It is completely within the control and jurisdiction of the State.

Referring again to California. In that State the water can be diverted and used only under a license issued by the water commission after the works are completed, and for the purposes and in the manner the commission shall determine. And thereafter the exercise of the right is under complete control of the State authorities, as we have stated. The statute, after providing for the issuance of the license, further provides:

> All permits and licenses for the appropriation of water shall be under the terms and conditions of this act, and shall be effective for such time as the water actually appropriated under such permits and licenses shall actually be used for the useful

and beneficial purpose for which said water was appropriated, but no longer; and every such permit or license shall include the enumeration of conditions therein which in substance shall include all of the provisions of this section and likewise the statement that any appropriator of water, to whom said permit or license may be issued, shall take the same subject to such conditions as therein expressed.

The commission has ample power to determine whether there shall be combinations of plants or lines or not. They are fully authorized to say, in the license granted, whether this shall be done or not. And any effort to place this power, in whole or in part, in a Federal officer is in plain violation of the rights of the States and a usurpation of power.

### 6. FORBIDDING THE INCUMBRANCE OF THE PROPERTY LEASED.

Section 4 of the bill provides against the incumbrance of the property leased if within a Territory, or where the intention is to transmit power into two or more States, except upon the approval of the Secretary of the Interior for certain purposes.

This is much the same as the last previous question presented. It is, where the property leased is within a State, and, it may be the corporation organized under the laws of that State, the assumption of a power that belongs to and, in some of the States, is being actively and satisfactorily exercised. It is no part of the authority, power, or duty of the Federal Government and can not be acquired by the mere proprietary ownership and leasing of lands. The incumbrance may be necessary to carry on the work authorized and required by the State to complete the works and put the water which it owns to a beneficial use. This matter of determining whether the property devoted to a public use shall or shall not be incumbered, and if so, in what amount, belongs exclusively to the State and can not be exercised legally by the Government. To do so is a plain infringement of the sovereign rights of the States. It may prevent a public improvement that the people of the State need and have the right to have.

### 7. PROVISION AUTHORIZING THE GOVERNMENT TO TAKE OVER THE LAND AT THE EXPIRATION OF THE LEASE.



By this provision the Government is authorized to take over not only the land it has leased but a water-power plant to be used, and which must continue to be used, for the generation of power for public use and to become a public-utility corporation, obligated to operate the plant and supply power to the public. When it assumes this function, it becomes at once bound by the contracts and other obligations of the lessee to supply the power. It at once becomes amenable to the State authorities having power to regulate its business. If not then, the effect is to deprive the State of the right to regulate the use of the waters of the State as an exercise of its sovereign power. It may well be asked how, when the National Government becomes a utility corporation, the State can exercise as against it the power it has to regulate rates or otherwise control the use and operation of the plant, even to the extent, as it may, of taking away the use of the water and requiring it to be used for other purposes more necessary for the public good than the development of power.

Neither the State nor any consumer under the system could sue the Government or compel it in any way to perform its duty as a public-service corporation. This provision, if not illegal, is, it seems to us, absurd. It would lead to untold and innumerable conflicts of governmental authority and complications.

### 8. MAKING CONTRACTS FOR POWER.

Section 7 of the bill provides for the making of contracts for power upon the approval of the proper State authority and of the Secretary of the Interior.

We think we have demonstrated above that the Federal Government has no power or jurisdiction over this subject within a State. In this instance the right of the State to deal with it is recognized, but the Secretary of the Interior is given the power to nullify the action of the State in giving its approval by refusing to give his own. So action by the Secretary of the Interior, an officer who has no jurisdiction in the matter, and can be given none legally, is made necessary to any such action on the part of the utility corporation, for no better reason than that this particular corporation rents its power site from the Government. Other power corporations are not subject to any such limitation or double regulation. The State can not thus be shorn of its sovereign power over the subject matter by the Government in its capacity of a real estate dealer. It can not be possible that a renter from the Government must be subject to two regulating powers and two rules of regulation and other corporations owning their power sites or leasing them from some one else subject to but one. The mere statement of some of the results should be sufficient to condemn this provision.

### 9. OBJECTIONABLE MEANS OF ARRIVING AT RENT TO BE PAID.

The amount of rent to be paid for the land to be used as a power site is not fixed by the rental or other value of the land, but the amount of power produced by the use of the water belonging to the State. The land in and of itself is practically of no value. The profit, if any, resulting from the use of the water depends upon the rates collected by the corporation for the powers, which must be fixed by the State, if by anybody. In fixing the rates the State must allow the corporation the amount of rental it is required to pay to the Government as a part of its yearly operating expenses. The consumers must pay, not the interest on this amount only, as a part of the capital investment, but must pay it all each year as a part of the fixed annual charges of the company. A reasonable charge by the Government for the use of its land may be justified as a real estate transaction. It is not the exercise of sovereign power. It is nothing but a contract of lease, the same in all material respects as a transaction of a like kind by a private undividual, with the Secretary of the Interior acting as the real estate agent. This should be kept constantly in mind. But the basis upon which the rental is founded is a false and unjust one. It compels the consumers of water belonging to the State to pay a charge to the Government that it is unconscionable to make. It compels the people of the State to pay the Government for the use of the water that belongs to them

and to which the Government has no right and over which it has no power nor jurisdiction. The whole thing is unjust and unconscionable.

### 10. DISPOSITION OF PROCEEDS OF THE LEASE.

The injustice of the rental founded on the use of the water is made clear and accentuated by the provision, in the eighth section of the bill, that the proceeds shall be paid one half to the State and the other half to the Reclamation Service. This is clearly unjust to the State. The use of the water that belongs wholly to the State is the valuable thing. The Government has no interest in the water and is entitled to none of its benefits. But it assumes to rent it with the practically worthless land, the people of the State pay back the whole of it to the corporation, and the Government provides how the rental shall be divided without the approval or consent of the State. This is extending the power of the Federal Government over the sovereign rights of the States with a vengeance.

### 11. CONTROL GIVEN TO THE GOVERNMENT WHERE STATE HAS NO UTILITY COMMISSION.

In section 9 of the bill it is provided that where a State has no utility commission or other authority having power to regulate rates and service of electrical energy and the issuance of stock and bonds by public-utility corporations engaged in power development, these powers shall be vested in the Secretary of the Interior or committed to such body as may be authorized by Federal statute until such time as the State shall provide a commission or other authority for such regulation and control.

This attempt to vest in an officer of the Federal Government the power to control the power-developing corporations in their service and to determine their issuance of stock and bonds is in violation of the rights of the States and unconstitutional. We have shown that the Federal Government has no power whatever to deal with these questions within a State and that the power can not be created or conferred by statute. The fact that the State, for the time being, does not exercise the power can not have the effect of vesting it in the National Government. As the power of the Government can be conferred only by the Constitution and as this was not so conferred, it is reserved to the States. This we submit is beyond question.

### 12. AUTHORITY TO EXAMINE BOOKS OF LESSEE.

By section 11 the Secretary of the Interior is given authority to examine the books and accounts of the lessees and to require them to submit "statements, representations, or reports, including information as to cost of water rights, lands, easements, and other property acquired, production, use, distribution, and sale of energy; all of which statements, representations, or reports so required shall be upon oath, unless otherwise specified, and in such form and upon such blanks as the Secretary of the Interior may require."

This again is a plain usurpation of the power that belongs to the States. Both the water commission and the railroad commission of the State of California, under its laws, have the right to require all

of the information that is provided for in this section. This would subject a corporation that rents from the Federal Government to double examinations and double reports for which the consumers under that particular system must pay while other corporations, not renting from the Government, would be subject to only one examination and one report. Besides, the Government, as a mere lessor, of the property used as a power site, has no interest whatever in any of the things that are required to be reported upon by this section of the bill. As it is proposed to base the rents to be paid for the land upon the amount of power developed—if that be legal and justified, the Government has the right to satisfy itself of the amount of power developed. It has no interest further than that, and any effort to interfere with the business of the corporation or the operation of its plant, which belong alone to the State, is entirely unauthorized.

### 13. FORFEITURE OF LEASE.

Section 12 provides that this "lease may be forfeited and canceled, by appropriate proceedings, in a court of competent jurisdiction whenever the lessee, after reasonable notice, in writing, as prescribed in the lease, shall fail to comply with the terms of this act or with such conditions not inconsistent therewith as may be specifically recited in the lease."

This would place the lessee in a very unhappy situation. As the State has the undoubted power to regulate the use of the water and the operation of the plant, the lessee might be compelled by State regulations to violate numerous terms provided for in the lease or the regulations of the Secretary of the Interior. Where the power exercised by the Government—and that authority would be exercised by the Secretary of the Interior by this bill—and the State commission should conflict, the unfortunate lessee would have to take his chances of being prosecuted by the State authorities and his right to furnish power forfeited, or to comply with the rules, regulations, and orders of the Federal Government whereby his lease may be subject to forfeiture. This perhaps shows quite as clearly as anything else why it is utterly impossible that the provisions of this statute and the rules and regulations that may be prescribed by the Secretary of the Interior can not by any possibility be allowed to stand as against the sovereign power of the State to regulate and control all these things.

*Can the Government by a system of long leases perpetuate its ownership in the States of untaxed lands?*—We have shown by the decided cases that the Government owns the public lands as a proprietor and not in its sovereign capacity. This is too clearly and firmly established to admit of doubt. In a sense the Government owns the land in trust to dispose of it for use by the citizens of the country. Laws have been enacted, from time to time, providing for their disposition. Until now the national policy has been to convey the absolute title to the land in whatever way it may be disposed of. But it is now proposed to hold the title to the land in the Federal Government and lease it on long leases. This would be a radical change in Governmental policy. It is a very important one to the States. The land in the hands of the Government is not subject to taxation by the States.

In the hearings by the committee this startling statement was made by the Senator from Colorado (Mr. Shafroth):

I believe that any leasing bill for the public domain or resources thereof is a direct attack on the sovereignty of the States containing the same, because it must result in a perpetual ownership of the property in the United States Government. Inasmuch as taxes can not be imposed upon property owned by the Federal Government, it means, to carry it to its ultimate result, the depriving of the States of their means of existence.

I want to call the attention of the committee to a list contained in an article by Mr. W. V. M. Powelson of the number of acres of land in the various Western States now in the ownership of the Government. In Arizona, 92 per cent of the lands within the area of that State are in Government ownership; California, 52.58 per cent; Colorado, 56.67 per cent; Idaho, 83.80 per cent; Montana, 65.80 per cent; Nevada, 87.82 per cent; New Mexico, 62.83 per cent; Oregon, 51 per cent; Utah, 80.18 per cent; Washington, 40 per cent; Wyoming, 68 per cent.

Thus it is shown that lands in the several Western States ranging from 40 to 92 per cent are held in Government ownership and not subject to taxation by the State. And it is proposed by this and other bills pending in the Senate, making up the system of conservation proposed to be inaugurated, to perpetuate this condition and perpetually deprive the States of the right to tax this large percentage of the lands within its borders to maintain and support the State government. Whether the Government has the power to deal with its lands in that way or not, it must be seen by any observing person that it will be a rank injustice to the States in which these lands are situated. But we go further and maintain that the Government, holding the public lands in trust to dispose of them, has no right or authority to thus perpetuate its ownership of nontaxable lands and withhold them from purchase by the people of the country where the title should be vested.

Referring again to the case of Pollard's Lessee *v.* Hagan (3 How., 212), one of the leading cases on the subject, and from which we have quoted above, it will be seen that as to the public domain, not including lands acquired for permanent use for the erection of forts, magazines, arsenals, dockyards, and other needful buildings in the District of Columbia, the right and ownership of the land by the Government is "temporary," and so it has always, up to this time, been considered. The theory and understanding has always been that public lands are held by the Government temporarily and in trust to dispose of them and vest the permanent fee simple title in those who might acquire them under rules and regulations prescribed by Congress. It was never intended that title to such lands should be held permanently in the Government, and in our judgment any law that vests this right to permanently hold the lands free from State taxation will be an open violation of the trust under which the lands are held and of the sovereign rights of the States.

At the expense of further extending this already long report, we quote again a short extract from the case last mentioned:

We will now inquire into the nature and extent of the right of the United States to these lands, and whether that right can in any way affect or control the decision of the case before us. This right originated in voluntary surrenders, made by several of the old States, of their waste and unappropriated lands, to the United States, under a resolution of the old Congress of the 6th of September, 1780, recommending such surrender and cession to aid in paying the public debt incurred by the War of the Revolution. The object of all the parties to these contracts of cession was to convert the land into money for the payment of the debt and to erect new States over the territory thus

ceded; and as soon as these purposes could be accomplished the power of the United States over these lands, as property, was to cease.

Whenever the United States shall have fully executed these trusts the municipal sovereignty of the new States will be complete throughout their respective borders, and they and the original States will be upon an equal footing in all respects whatever. We therefore think the United States hold the public lands within the new States by force of the deeds of cession and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess or have reserved by compact with the new States for that particular purpose.

It clearly appears from this decision that the title of the Government in such lands is not permanent, but ceded only for the purpose of disposing of them, and that the Government can not make its title permanent or deprive itself for any length of time of the power to comply with the obligation of its trust to dispose of them.

*Will the bill, if enacted, bring the desired results?*—As stated in the beginning, the purpose of this proposed legislation, as stated by the majority of the committee, is to bring about a speedier development of our undeveloped water power. It may be said that this is a purpose not within the power or jurisdiction of the Federal Government. The whole purpose of the bill, as thus stated, is beyond the power of the Government. It has no undeveloped water power. It is only a landowner in the States and nothing else. The development, as well as the regulation and control of undeveloped water and water power, is a purely State matter. The States alone have power to deal with the subject. The Government may, in its generosity, offer its land to the State, as any other landowner might do, to aid the State to develop its natural resources. It can not constitutionally do anything more. The assumption of some conservationists that the National Government has anything to do, as a Government, with the development of the natural resources in a State is without the slightest foundation. As a landowner it may be interested in such development as a means of increasing the value of the land it holds in trust for the people, but nothing more. It may hinder the State in its efforts to develop its resources by withholding its lands, available for dam, reservoir, or power sites, or by placing burdensome terms and conditions of sale or lease of its lands, if it has power to lease them, as would make it impossible or impracticable to use them for such purposes. But any private landowner might do the same thing and with the same effect.

And we submit that this is just what Congress will do for the Government if it enacts this bill. The terms upon which the Secretary of the Interior is authorized to lease land for power purposes are so unreasonable and burdensome and so clearly in conflict with State rights and State laws as to prevent any prudent business man from investing any money in a power site in any State. He would be unable to determine whether, in constructing and managing his plant, he would be bound by the Federal or State law, or both where they are not in direct conflict. If he obeyed one, in many instances, as we have pointed out, he would violate the other. A compliance with the State law would in some cases forfeit his lease. On the other hand, if he followed the provisions of the lease, particularly as to the time of commencing and completion of his plant, he would, in California at least, forfeit his right to the water, the really valuable thing, and a license to use the water would have to be denied him for failure to comply with the State laws. This would be true in other States as well. We have used California and its laws only as an

illustration of the conflicts that would arise between the Government and the States if this bill should pass. The same conflicts would arise in the other Western States.

The present law relating to the use of public lands for power and irrigation purposes is entirely inadequate because of its uncertainty. But this proposed legislation would be infinitely worse because it is so certainly and fatally wrong. It would, if enacted, soon put an end to any development of water power. Witness after witness, practical and experienced men, appeared before the committee and pointed out that the law would be impractical and unrevokable and prevent investments in enterprises of this kind, and the reasons were clearly pointed out. On the other hand, we had information to the contrary from Government officials who sincerely believed the law would be beneficial; but they could only theorize about a very practical matter. They had no practical knowledge on the subject. There were others who appeared in support of the bill equally sincere, but without knowledge. And the friends of the bill made no effort to sustain its constitutionality or to defend it against the legal objections that we have been pointing out in this report.

We have given but little attention to the merely business objections made to the bill. To our minds the legal objections to it are so numerous and so conclusive that this is unnecessary. As to this phase of it we refer Senators to the public hearings that were full and fair. The friends of the bill gave its opponents every opportunity to point out and support their objections to it. These hearings on so important a matter should receive the careful attention of every Senator who desires to be informed on the subject.

For the reasons we have pointed out and for others that may be developed later on, we could not concur in the favorable report on the bill, and submit that it should not pass.

REED SMOOT.
JOHN D. WORKS.
C. D. CLARK.

## VIEWS OF SENATOR CHARLES S. THOMAS.

I am unable to accept the reasoning of the minority report in toto, but agree in the conclusions announced. My own view of the proper solution of the so-called water-power problem in the "public-land States" is the transfer by the Government to the States wherein they are located of all power sites upon the public domain in trust, and, conditioned upon their development by the transferers for the use and benefit of the public at rates sufficient to defray the cost of construction and operation, the sites to be forfeited to the General Government upon noncompliance with the terms and conditions of the trust. This insures development, prevents monopoly, and assures to the people an adequate supply of cheap power. It is conservation in the true meaning of the term.

C. S. THOMAS.



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