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Prior Appropriation and the Property Clause: A Dialogue of Accommodation

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> The discovery of gold in California was followed, as is well known, by an immense immigration into the State . . . . The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and cañons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between then either avoided or determined. These rules . . . recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practical limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State. . . . But the mines could not be worked without water. . . . Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to

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This article is, of course, dedicated to Chapin Clark who despite the press of his duties as dean found time to teach me water law—even if the time was 8:00 p.m.—and he may now decide that he failed. There is not enough space to express my appreciation for everything that Chapin has done for me and for the school of law.

the extent of actual use, the better right.[1]

WATER plays a key role in the founding myth of the West. In Justice Field's telling of the tale, water made mining possible. For others, water was the stuff that brought the desert to bloom; the tale was one of strong, self-reliant pioneers wresting a life from the land made verdant by irrigation, bringing civilization to the wilderness. Never mind that the grub-staked prospector had only a brief moment before being replaced by the corporate and the urban,[2] that the family farm was less common than the agribusiness,[3] that the westerner lived out of tin cans rather than on venison,[4] or that a "great deal of nonsense has been written (mostly in judicial opinions) about the customary law of the mining camps as a distinctive contribution to American jurisprudence."[5] Cowboys and Indians, gold and water—the myth of the sturdy emigrant is one of the lasting contributions of the West to popular culture and the law.[6]

But the West's contribution to water law—the prior appropriation doctrine—has a mirage at its core, just like the shimmering waters of the Great American Desert that danced before the prospector and his cantankerous mule. While commentators have spent much time praising, damning, and finally burying the prior appropriation doctrine,[7] the inherent tension between the local perspec-

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[1] Jennison v. Kirk, 98 U.S. 453, 457-58 (1878) (Field, J.); *see also* Basey v. Gallagher, 87 U.S. (20 Wall.) 670, 683-84 (1874) (Field, J.); Atchison v. Peterson, 87 U.S. (20 Wall.) 507, 512-13 (1874) (Field, J.). The "love of order" did not, of course, prevent the sturdy emigrants from trespassing on lands "not open, by law, to occupation." *Jennison*, 98 U.S. at 457. For a different perspective, see Gordon M. Bakken, *American Mining Law and the Environment: The Western Experience*, 1 W. LEGAL HIST. 211, 222-24 (1988).

[2] *E.g.*, RICHARD E. LINGENFELTER, THE HARDROCK MINERS: THE HISTORY OF THE MINING LABOR MOVEMENT IN THE AMERICAN WEST 1863-1893 (1974). As Bernard DeVoto noted, "The West . . . was born of industrialism." Bernard DeVoto, *The West: A Plundered Province*, 169 HARPERS 355, 358 (1934).

[3] *E.g.*, DONALD J. PISANI, FROM FAMILY THE FARM TO AGRIBUSINESS: THE IRRIGATION CRUSADE IN CALIFORNIA AND THE WEST 1850-1931, at 14-15 (1984).

[4] PATRICIA N. LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST 17-18 (1987).

[5] Robert W. Swenson, *Legal Aspects of Mineral Resources Exploitation*, *in* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 699, 709 (1968).

[6] On the contribution of the West to popular culture, see ROBERT WARSHOW, *Movie Chronicle: The Westerner*, *in* THE IMMEDIATE EXPERIENCE: MOVIES, COMICS, THEATRE & OTHER ASPECTS OF POPULAR CULTURE 91 (Anchor Books ed. 1962). On its contribution to the creation of "American mining law," see JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION 9-16 (1987). On the relationship between water and mining, *see* RODMAN PAUL, CALIFORNIA GOLD (1947).

[7] *See, e.g.*, MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS

tive of the prior appropriation rights and the national perspective of the Property Clause of the United States Constitution has attracted little attention. Yet, this tension has produced a dialogue between the western states and the nation that has spanned more than a century.[8] The primary participants in this conversation have been the courts of the United States and the western states, which in their opinions, and in their use of one another's opinions, have sought an accommodation of both the national and the local.

This brief essay traces the dialogue that led to this accommodation, tying it into a broader dialogue that has focused on control of nationally owned lands and their resources.[9]

I

NATIONAL LAND/STATE LAW: HONOR AMONG THIEVES

Property rights, particularly those rights associated with land, are generally creatures of state law,[10] the boundaries subject to state definition and determination.[11] Unlike most property, however, the right to the use of water recognized under the prior appropriation doctrine has a federalism problem at its core. This problem is linked to the history of public lands.

As Justice Field noted, in the arid, western part of the United States, courts erected a body of law that permitted water use rights to be established through diverting water from a stream and applying it for beneficial use. Under this, the prior appropriation doctrine, water rights were predicated upon priority of diversion and

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DISAPPEARING WATER (1986) (damning); DONALD WORSTER, RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST (1985) (same); James Munro, *The Pelton Decision: A New Riparianism?*, 36 OR. L. REV. 221 (1957) (praising); Charles F. Wilkinson, *In Memoriam: Prior Appropriation 1848-1991*, 21 ENVTL. L. at v (1991) (burying).

[8] The national government still owns 46% of the land in the 11 western states. BUREAU OF LAND MGMT., U.S. DEPT. INTERIOR, PUBLIC LAND STATISTIC 1989, at 5 (1990). In these states, the Property Clause gives the national government a potentially significant role in water management decisions.

[9] The history of the interpretation of the Property Clause and of the powers that it confers on Congress is a history of conflict between national and state governments over control of the resources located on federally owned lands. *See* Dale D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENVER U. L. REV. 495, 495-96 (1986). In the arid West, control of water has been a primary source of this conflict.

[10] *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372 (1977); Wilcox v. Jackson, 38 U.S. (13 Pet.) 496, 517 (1839).

[11] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (looking to Wisconsin law to define a property interest in employment).

use—upon "appropriation" of the water. In requiring an appropriation to establish a right, the doctrine is fundamentally inconsistent with the common law, which treats water as an incident of the ownership of riparian land and recognizes correlative rights in all riparian landowners to a continued flow of the stream.[12]

This inconsistency would have presented few jurisprudential problems but for the fact that one of the first statutes enacted by the territorial legislatures, in the territories that subsequently created the prior appropriation doctrine, expressly adopted the "common law of England" as the rule of decision for the courts.[13] The problem was obvious: If the common law of England was the law, then water rights were an incident of riparian real estate. As the Washington Supreme Court noted,

> [H]ow it can be held that that which is an inseparable incident to the ownership of land in the Atlantic states and the Mississippi valley is not such an incident in this or any other of the Pacific states, we are unable clearly to comprehend. It certainly cannot be true that a difference in climatic conditions or geographical position can operate to deprive one of a right of property vested in him by a well-settled rule of common law.[14]

The initial judicial decisions establishing the appropriation doctrine recognized the problem and responded by converting the issue into a question of public land law. This resolution was itself the result of the historical situation. As Justice Field's retelling of the myth noted, the doctrine developed during the gold rushes, initially in California and then throughout the West. Congress, caught in the sectional dissension that produced the Civil War, did nothing. As a result of federal inaction, those seeking land for mining or other uses had no method of obtaining title and were thus trespassers. The courts responded by developing land law based upon possession. Priority of possession, although conferring no rights

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[12] *See generally* DAVID H. GETCHES, WATER LAW IN A NUTSHELL (2d ed. 1990) (on the distinction between the prior appropriation and riparian doctrines).

[13] For example, the California reception statute provides: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." CAL. CIV. CODE § 22.2 (West 1982) (originally enacted in 1850); *accord* COLO. REV. STAT. ANN. § 2-4-211 (West 1991) (originally enacted in 1861); IDAHO CODE § 73-116 (1989) (originally enacted in 1864); *accord* United States Fidelity & Guar. Co. v. Bramwell, 217 P. 332, 333-34 (Or. 1923) ("The common law of England . . . has been adopted and is in force in [Oregon].").

[14] Benton v. Johncox, 49 P. 495, 497 (Wash. 1897). As the court also noted, "The necessities of one man, or of any number of men, cannot justify the taking of another's property without his consent, and without compensation." *Id.*

against the actual owner—the national government—nonetheless, did establish the better right among trespassers.[15] The California Supreme Court, in the first decision approving the prior appropriation doctrine, emphasized the status of the claimants. Since the lands through which the stream runs "are a part of the public domain, to which there is no claim of private proprietorship," the competing claimants could not challenge the diversion as unlawful since "at the common law the diversion of water courses could only be complained of by riparian owners."[16]

The state and territorial courts in the West were thus able to avoid the apparent conflict between the appropriation doctrine and

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[15] As Justice Field, then a California rather than United States Supreme Court Justice, had previously written:

> It is sometimes said, in speaking of the public lands, that there is a general license from the United States to work the mines which these lands contain. But this language, though it has found its way into some judicial decisions, is inaccurate, as applied to the action, or, rather, want of action, of the government. There is no license in the legal meaning of that term. A license . . . implies a permission . . . . It carries an interest in land, and arises only from grant. The mineral . . . is under the exclusive control of Congress, equally with any other interest which the government possesses in land. But Congress has adopted no specific action on the subject, and has left that matter to be controlled by its previous general legislation respecting the public domain. And it is from its want of specific action, from its passiveness, that the inference is drawn of a general license. The most which can be said is, that the government has forborne to exercise its rights, but this forbearance confers no positive right . . . .
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> It may be, and undoubtedly is, a very convenient rule, in determining controversies between parties on the public lands, where neither can have absolute rights, to presume a grant, from the government, of mines, water-privileges, and the like, to the first appropriator; but such a presumption can have no place for consideration against the superior proprietor.

Boggs v. Merced Mining Co., 14 Cal. 279, 374-75 (1859), *appeal dismissed sub nom.*, Mining Co. v. Boggs, 70 U.S. (3 Wall.) 304 (1865) (the only possible basis for jurisdiction is the allegation of prior possession "[b]ut this allegation does not set up any authority exercised under the United States in taking such possession"); *see also* Mallett v. Uncle Sam Gold & Silver Mining Co., 1 Nev. 188, 202 (1865); Gold Hill Quartz Mining Co. v. Ish, 5 Or. 104, 106 (1873). It was, and still is, illegal to occupy federal lands until "duly authorized by law." Act of Mar. 3, 1807, ch. 46, § 1, 2 Stat. 445, 445.

[16] Irwin v. Phillips, 5 Cal. 140, 145-46 (1855). The decision also suggests that the state had the authority—presumably as the owner of the water—to permit its diversion. *See id.* at 146-47. This was the court's contemporaneous position on mines. The court reasoned that at the common law, gold and silver mines were the exclusive property of the crown: "[The states,] in virtue of their respective sovereignties, are entitled to the jura regalia which pertained to the king at common law . . . . The mines of gold and silver on the public lands are as much the property of this State, by virtue of her sovereignty, as are similar mines in the lands of private citizens." Hicks v. Bell, 3 Cal. 219, 226-27 (1853). The court subsequently rejected the state-ownership theory. Lux v. Haggin, 10 P. 674, 721 (Cal. 1886).

the common law riparian doctrine adopted by their legislatures by treating the appropriation claims simply as possessory interests that did not affect the proprietary interests of the actual owner. As such, the possessors had no claim against the national government.

II

NATIONAL LAND/NATIONAL LAW: THE PROPERTY CLAUSE

The Property Clause in Article IV of the United States Constitution grants Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[17] In one of its first opinions construing the Clause, the Supreme Court held that under the Clause "power is vested in congress without limitation."[18] In addition to authorizing Congress to transfer all federal interests in a tract of land, the Property Clause authorizes Congress to lease lands,[19] reserve interests in lands,[20] and impose conditions on grants.[21] In short, the Clause confers all powers traditionally associated with the ownership of land.

But the Property Clause does more than delegate proprietary powers to Congress. Even before the gold rush era, the Supreme Court had held that the Clause also conferred sovereign powers on the national government. Most importantly, the Clause had been held to confer the power on Congress to create territorial governments and courts.[22] Similarly, because of the Property and Supremacy Clauses, questions concerning the nature of the interests conveyed by a federal patent are questions of national rather than state law.[23] Therefore, state law does not determine when title to

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[17] U.S. CONST. art. IV, § 3, cl. 2.

[18] United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840).

[19] *Id.*

[20] *See, e.g.*, United States v. Union Pac. R.R., 353 U.S. 112, 116 (1957) (retention of mineral estate under right of way conveyed in 1862 statute).

[21] The intent of Congress to convey or withhold a specific interest is controlling:

> It cannot be denied that all lands in the Territories . . . are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem most advantageous to the public fisc, or in other respects most politic.

Irvine v. Marshall, 61 U.S. (20 How.) 558, 561-62 (1857); *see also* Wilcox v. Jackson, 38 U.S. (13 Pet.) 496, 517 (1839).

[22] *E.g.*, American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 422 (1819).

[23] "[W]henever the question in any court, state or federal, is, whether a title to land which had once been property of the United States has passed, that question must be

national lands has vested in private individuals,[24] nor what interests have been conveyed by the patent.[25] Public domain lands, as incidents of national sovereignty, were different than all other lands within a state's boundaries because the rights associated with those lands were determined by national rather than state law.

Under this general principle of public land law, the nature of the interest conveyed by the federal patent to riparian lands was a question of national law. Since trespassers acquired no interest against the government,[26] in the absence of a reservation in a subsequent grant, the federal patent conveyed the unencumbered fee. This remained a theoretical problem until the proprietor began to convey land to private individuals under the Homestead Act of 1862.[27] The problem was pressing because the Act, while establishing a method for obtaining patents to lands, was silent on water rights. Conveyance of the federal title, therefore, rendered any existing possessory interests, including possessory rights to water based upon priority of appropriation, uncertain; if common law water rights were an incident of the ownership of riparian land, federal grantees obtained such rights as an incident of their patent, and appropriation-based interests were subject to defeasance by a subsequent patent. This was the conclusion of the initial judicial decisions pitting riparian patentees against prior appropriators. In the most widely noted case, the Nevada Supreme Court applied the logic of the earlier decisions recognizing possessory claims, and held for the subsequent patentee. The court reasoned that, since the appropriator was a trespasser, he "could acquire no right against the United States" because "[n]o presumption of grant arises against the sovereign, and no statute of limitation runs."[28] Therefore, the court found that when the United States issued the patent, it had

> the unincumbered fee of the soil; its instances and appurtenances; that was passed to Haines, there being no reservation in his pat-

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resolved by the laws of the United States." *Wilcox*, 38 U.S. (13 Pet.) at 517; *see also Irvine*, 61 U.S. (20 How.) at 563.

[24] *Wilcox*, 38 U.S. (13 Pet.) at 516-17; Bagnell v. Broderick, 38 U.S. (13 Pet.) 436, 450 (1839).

[25] *E.g.*, *Irvine*, 61 U.S. (20 How.) at 561-62; *Wilcox*, 38 U.S. (13 Pet.) at 517.

[26] "[N]o trespass . . . can give title to the trespasser, as against the United States, or bar the right of recovery . . . . Having the power of disposal and of protection, Congress alone can deal with the title, and no state law, whether limitations or otherwise, can defeat such title." Jourdan v. Barrett, 45 U.S. (4 How.) 168, 184 (1846).

[27] Act of May 20, 1862, ch. 75, 12 Stat. 392, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787.

[28] Vansickle v. Haines, 7 Nev. 249, 256 (1872).

> ent, and none is suggested. He became owner of the soil, and its incidents thereto, had the right to the benefit to be derived from the flow of the water therethrough; and no one could lawfully divert it against his consent.[29]

The earlier conversion of the issue into a public land law question created a significant problem; the question of riparian versus appropriation rights became one of federal rather than state law. Enforcing the appropriation rights of trespassers against federal patentees was either an attempt by the western states and territories to define the interests conveyed by the federal patent or a taking of private property.

III

NATIONAL LAND/NATIONAL LAW: CONGRESS TO THE RESCUE?

Responding to the need for revenue to pay the Civil War debt, Congress in 1864 began a debate on disposition of the publicly owned mineral lands. This debate led to the enactment in 1866 of the first of three statutes that Congress adopted over the next twenty years that dealt obliquely with western water rights. This first statute was the 1866 version of what has come to be known as the General Mining Law.[30] Section 9 of the Act provided,

> [W]henever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.[31]

In 1870, Congress amended the Mining Law and extended the priority water rights

> to all public lands affected by this act; and all patents granted, or

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[29] *Id.*; *see also* Ison v. Nelson Mining Co., 47 F. 199, 201 (C.C.D. Or. 1891); Union Mill & Mining Co. v. Dangberg, 24 F. Cas. 590, 590 (C.C.D. Nev. 1873) (No. 14,370); Union Mill & Mining Co. v. Ferris, 24 F. Cas. 594, 595 (C.C.D. Nev. 1873) (No. 14,371). *Vansickle* was subsequently overruled by Jones v. Adams, 6 P. 442 (Nev. 1885); *see also* Reno Smelting, Milling & Reduction Works v. Stevenson, 21 P. 317 (Nev. 1889).

[30] Act of July 26, 1866, ch. 262, 14 Stat. 251 (codified as amended at 30 U.S.C. § 51 and 43 U.S.C. § 661 (1988)). On its enactment, see generally Swenson, *supra* note 5, at 714-19.

[31] § 9, 14 Stat. at 253. The debate in the Congress makes no mention of the water law provisions of the Act. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3225-37, 3451-54, 3141-42, 4021-22, 4048-54 (1866).

> pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the [1866] act.[32]

The third statute was the Desert Land Act of 1877.[33] In addition to authorizing the sale of desert lands, this act provided that all unappropriated waters of nonnavigable streams on the public domain "shall remain and be held free for the appropriation and use of the public . . . subject to existing rights."[34]

These federal statutes embodied a message to the West: " 'Take it—take it all, if you can. This is the American century. Progress will result.' "[35]

While the pro-development message was clear and warmly received, nagging questions remained. The statutes subordinated federal interests to state created interests only in limited circumstances. The provisions in the General Mining Law, for example, subjected federal patents only to those appropriative claims that had "vested and accrued" before the patent was issued.[36] Thus, the patentee's property rights, including his common law water rights if he were a riparian owner, were presumptively superior to those of subsequent appropriators. Similarly, the Desert Land Act's declaration that waters on the public lands were "free for appropriation and use" was explicitly "subject to existing rights."[37] Most importantly, the

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[32] Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218 (codified as amended at 30 U.S.C. § 52 and 43 U.S.C. § 661 (1988)). The congressional debate does not refer to the water law provisions of the Act. *See* CONG. GLOBE, 41st Cong., 2d Sess. 2027-30, 4402-04 (1870).

[33] Act of Mar. 3, 1877, ch. 107, 19 Stat. 377 (codified as amended 43 U.S.C. §§ 321-339 (1988)).

[34] *Id.* § 1. The debate on the bill was extremely perfunctory and makes no mention of the water law provisions, which were added in the Conference Committee. *See* 5 CONG. REC., 2156, 2225 (1877).

[35] Wilkinson, *supra* note 7, at ix.

[36] The language is found in both Acts. *See* § 17, 16 Stat. at 218; § 9, 14 Stat. at 253.

[37] 43 U.S.C. § 321. Furthermore, the Act's provisions when read as a whole are ambiguous and their scope is limited:

> [T]he right to the use of water by the person so conducting the same, on or to any tract of desert land . . . shall depend upon bona fide appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

Id. Does the Act subject the claims of other, non-Desert Land Act entrymen to those

statutes did not demonstrate an intent to transfer to the states the power to define the process through which water rights were to be acquired. Indeed, the legislative intent seemed just the opposite; Congress chose to retain the power to define the interests included in a federal patent. Furthermore, Congress' definition carved out only a limited number of situations in which appropriation rights were to supercede riparian rights; the statutes were at best a quit-claim to a limited set of possessory rights.[38]

Thus, beneath the pro-development message lay a darker core of uncertainty: What was the relationship between appropriators and federal patentees? Were appropriations good only against subsequent patentees? Were appropriations good only on the public domain? Finally, the fact that statutes could be repealed created another concern: What Congress gives, it can also take away.

IV

NATIONAL LAND/STATE LAW: A STATE PERSPECTIVE ON NATIONAL PROPRIETARY RIGHTS (JURISPRUDENTIAL RATIONALIZATIONS)

The ambiguities and surrounding uncertainties were of more than idle concern because the national government was the region's dominant landowner. One common state court response was denial: "*If any consent of the general government was primarily requisite to the inception of the rule of prior appropriation,* that consent is to be found in several enactments by Congress, beginning with the act of July 26, 1866, and including the desert-land act of March 3, 1877."[39] This response had two apparent shortcomings. First, it failed to address the uncertainties created by the federal statutes. For example, since the statutes reserved only *prior* appropriations from the interests conveyed by a federal patent, did a riparian pat-

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of the Act? The Act only makes the water beyond the Act's entrymen's needs "free." Can uses other than irrigation, mining, and manufacturing appropriate water?

[38] [B]y the congressional acts [of 1866 and 1870] the government merely said that whenever it had acquiesced in asserted possessory rights on the public domain which were upheld by local customs and law and decisions of the courts, as between the possessors themselves, it would treat those possessors as though they had acquired prescriptive rights against the government, and would recognize such rights whenever afterwards granting patents to any part of its land.

Cave v. Tyler, 65 P. 1089, 1090 (Cal. 1901).

[39] Farm Inv. Co. v. Carpenter, 61 P. 258, 265 (Wyo. 1900) (emphasis added); *see also* Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882); Drake v. Earhart, 23 P. 541, 543 (Idaho 1890).

entee prevail in a contest with a *subsequent* appropriator? Second, regardless of the interpretation given the federal statutes, there remained those riparian patentees who had received their federal grants before 1866. What interests did such patentees hold?

The press of litigation on such issues led the state courts to seek a jurisprudential rationale for the conclusion that state based private interests are uniformly superior to any water rights a federal patentee might possess. While agreeing on the conclusion, the states differed on the rationale. Two theories developed in the period immediately following the enactment of the federal statutes.

The first and most extreme theory originated in Colorado. In *Coffin v. Left Hand Ditch Co.*,[40] the Colorado Supreme Court laid down three propositions: first, due to the aridity of the American West, the right to use water never had been an incident of land ownership; second, the national government had no greater property rights than any other proprietor; and third, those rights were determined by state law. These propositions led inexorably to the conclusion that the national government's property interests in the public domain did not include riparian water rights and, therefore, its patents did not convey such rights.[41] The Colorado doctrine thus asserts a state power to determine the scope of the rights conveyed by a federal patent; unlike the public domain of the United States in the more humid Mississippi Valley, the public domain within Colorado did not include common law riparian water rights.[42] Under this view, the federal acts of 1866, 1870, and 1877 were at best a "recognition" of state authority[43] and at worst simply nullities.

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[40] 6 Colo. 443 (1882).

[41] [The doctrine of prior appropriation] has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive . . . . Water . . . thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate, or right of property. . . . It is entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is part of the public domain; and it is immaterial whether or not it be mentioned in the patent and expressly excluded from the grant.

Id. at 446-47; *see also* Sternberger v. Seaton Mountain Elec. Light, Heat, & Power Co., 102 P. 168 (Colo. 1909); Hagerman Irrigation Co. v. McMurry, 113 P. 823 (N.M. 1911); Willey v. Decker, 73 P. 210 (Wyo. 1903); Moyer v. Preston, 44 P. 845 (Wyo. 1896).

[42] *See supra* note 14 and accompanying text (quoting Benton v. Johncox, 49 P. 495, 497 (Wash. 1897)).

[43] *E.g.*, *Willey*, 73 P. at 216.

A second theory was crafted by the California Supreme Court in *Lux v. Haggin*.[44] Starting from the proposition that prior to statehood the national government had been both proprietor and sovereign over the territory that became California, the court concluded that the admission of the state into the Union upon an equal footing with the original thirteen states[45] made it the sovereign but conferred no proprietary powers on the state. As sovereign, however, the state was empowered to determine the scope of all property rights—national as well as private: "The lands of the United States . . . are held, since the admission of the state into the Union, as are held the lands of private persons."[46] The national government's water rights, therefore, are determined by state law. Since the state, however, had adopted the common law and that law included riparian rights, the three federal statutes were viewed as grants by the riparian landowner to appropriators; subsequent federal patentees took subject to "vested and accrued" appropriative rights.[47]

Although the two theories reach the same conclusion, they differ in their view of the relationship between national and state powers. Both theories resolve the dilemma created by the existence of the prior appropriation doctrine and the presumptive common-law interest conveyed to the federal patentee by establishing that state law defined the interests conveyed by the federal patent. They differ, however, on the point in time at which state law becomes supreme. The Colorado theory assumes the complete supremacy of state-created rights over federal rights; under Colorado law, riparian rights never existed. Thus, the federal government as proprietor never possessed riparian rights and it therefore could not convey such rights to its grantees. The California theory, on the other hand, acknowledges that prior to statehood the national government had the power to define the interests that were incident to its land. This power, however, passed to the state upon its admission into the Union on an equal footing with the original states.

The Colorado and California theories are examples of a recurrent

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[44] 10 P. 674, 719 (Cal. 1886).

[45] *Id.*

[46] *Id.* *See generally* Eric T. Freyfogle, Lux v. Haggin *and the Common Law Burdens of Modern Water Law*, 57 U. COLO. L. REV. 485 (1986).

[47] *Lux*, 10 P. at 726. Since the national government—like any private proprietor—could dispose of the land and water separately, the 1866 and 1870 statutes were construed as granting property rights to take effect when the appropriator complies with applicable state law. Such grants are expressly excepted from the interests conveyed by any subsequent patent. *Id.* at 724-28.

dispute between national and state governments over the disposition of the public domain and its resources. These states seek to establish the legal tenet that the national government as a proprietor is like all other proprietors; the boundaries and content of its proprietary interests are defined by state law.[48] The Property Clause, in other words, confers no governmental power over federal land—at least once that land is included within a state.[49]

V

NATIONAL LAND/NATIONAL LAW: THE SUPREME COURT'S RESPONSE

This dispute between national and state power over the public lands has a lengthy history. Since the creation of the current national government, individual states have sought to control the public lands within their borders. Such state claims have met national resistance.[50] The recurrent state claims have been consistently rejected by the United States Supreme Court. One early example serves to define the dispute. In *Wilcox v. Jackson*,[51] the plaintiff sought to maintain an ejectment action against the United States based upon a Land Office Register's certificate, a pre-patent stage in acquiring federal land, that he had purchased. Under Illinois law, a certificate could serve as the basis for an ejectment action and the

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[48] *See* Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693 (1981); David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976); Robert E. Hardwicke, et al., *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398 (1948); C. Perry Patterson, *The Relationship of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43 (1949); Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980). *Contra* Goble, *supra* note 9.

[49] This is the primary difference between the Colorado and California theories; Colorado asserts the supremacy of local law prior to statehood, while California asserts supremacy only after statehood.

[50] *See generally* Goble, *supra* note 9. The Sagebrush Rebellion of the late 1970s is only the most recent example of this recurrent conflict. *See* John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980). The earliest explicit statement of the argument that I have found is in an address by Ninian Edwards, Governor of Illinois, to the Illinois General Assembly. *See* Ninian Edwards, Address before the Illinois General Assembly (Dec. 2, 1828), *in* JOURNAL OF THE ILLINOIS HOUSE OF REPRESENTATIVES, 6th Assembly, 1st Sess., at 10-39 (Kaskaskia ed., 1829); *cf.* Vansickle v. Haines, 7 Nev. 249, 261 (1872) (Lewis, C.J.) ("Although it has sometimes been suggested that the unoccupied lands belonged to the several states in which they may be located, the suggestion has never received the serious sanction of statesmen, or the courts of the country.").

[51] 38 U.S. (13 Pet.) 498 (1839).

plaintiff argued that the state had the power to declare what was sufficient evidence of title. The Supreme Court rejected the argument in broad language:

> [B]y the laws of the United States the legal title has not passed, but remains in the United States. Now, if it were competent for a state legislature to say, that notwithstanding this, the title shall be deemed to have passed; the effect of this would be, not that congress has the power of disposing of the public land . . . but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of congress, in relation to a subject confided by the constitution to congress only.[52]

This position had been reaffirmed by the Court as recently as 1871 in a decision that extended protection to federal grantees. The Court held that the power conferred on Congress by the Property Clause not only precludes states from interfering with its power "to prescribe the times, the conditions, and the mode" of transferring title, but also "forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted."[53]

The subordination of the proprietary rights of the national government under both the California and Colorado theories thus was inconsistent with a fair reading of existing Supreme Court decisions. Nonetheless, the two theories did raise the issue of the respective powers of national and state governments in a new context since they sought to remove only one interest—water rights—from the bundle of rights and claims called "property."

A. Water Law (phase i)

It was not until the 1870s that the Supreme Court was finally presented with a case that required it to determine the relationship between national land law and possessory claims such as those created under the prior appropriation doctrine.[54] The Court responded by constructing the charming, Jeffersonian myth that introduces this Article; the romantic vision of sturdy emigrants who

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[52] *Id.* at 516-17; *see also* Bagnell v. Broderick, 38 U.S. (13 Pet.) 436, 450 (1839); *cf.* United States v. Gratiot, 39 U.S. (14 Pet.) 526, 538 (1840) ("[Illinois] surely cannot claim a right to the public lands within her limits.").

[53] Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99-100 (1871).

[54] Prior to the enactment of the mining laws, the Court had recognized that possessory mining claims could be considered "property" at least to the extent that they satisfied the jurisdictional amount necessary for the Court to hear ejectment actions for such claims. *See, e.g.*, Sparrow v. Strong, 70 U.S. (3 Wall.) 97, 99-100 (1865); *see also* Mining Co. v. Boggs, 70 U.S. (3 Wall.) 304, 307-08 (1865).

"carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people" and who established a customary law predicated upon "absolute equality of right and privilege" so that "the first appropriator of water . . . was recognized as having, to the extent of actual use, the better right."[55] Initially, the national government, "by its silent acquiesence, assented" to the development of this customary law.[56] Formal approval came in the 1866 Act, which was intended "to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands."[57]

Despite its expansive rhetoric, the Court was careful to limit its holdings by noting that the cases involved disputes between trespassers claiming only possessory rights. For example, in *Basey v. Gallagher*,[58] the Court was presented with a dispute between appropriators to the flow of a stream. In deciding that priority of appropriation conferred the better right, the Court noted,

> [N]either party has any title from the United States; no question as to the rights of riparian proprietors can therefore arise. It will be time enough to consider those rights when either of the parties has obtained the patent of the government. At present, both parties stand upon the same footing; neither can allege that the other is a trespasser against the government without at the same time invalidating his own claim.[59]

The Court's careful qualifications tracked the then-current distinction between possessory and proprietary interests in the public domain. Priority was to be protected among conflicting possessory claims and against subsequent federal patentees to the extent that Congress had recognized the validity of the claims. But such possessory interests created no independent rights against the proprietary interests of the government.[60]

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[55] Jennison v. Kirk, 98 U.S. 453, 457-58 (1878) (Field, J.).

[56] Atchison v. Peterson, 87 U.S. (20 Wall.) 507, 512 (1874) (Field, J.); *see also* Basey v. Gallagher, 87 U.S. (20 Wall.) 670, 683-84 (1874) (Field, J.).

[57] *Jennison*, 98 U.S. at 457; *see also Basey*, 87 U.S. (20 Wall.) at 682; *Atchison*, 87 U.S. (20 Wall.) at 513-24.

[58] 87 U.S. (20 Wall.) 670.

[59] *Id.* at 681; *see also Atchison*, 87 U.S. (20 Wall.) at 510-11.

[60] *E.g.*, Forbes v. Gracey, 94 U.S. 762, 762-63, 766-67 (1876); *Atchison*, 87 U.S. (20 Wall.) at 510-11; Union Mill & Mining Co. v. Dangberg, 24 F. Cas. 590, 590 (C.C.D. Nev. 1873) (No. 14,370); Union Mill & Mining Co. v. Ferris, 24 F. Cas. 594, 595 (C.C.D. Nev. 1872) (No. 14,371); Vansickle v. Haines, 7 Nev. 249, 256 (1872); Irwin v. Phillips, 5 Cal. 141, 145-46 (1855); *cf.* The Yosemite Valley Case, 82 U.S. (15 Wall.) 77,

The question of the relationship of appropriation and riparian rights when title has passed from the government that the Court carefully reserved in *Basey v. Gallagher* was directly presented in an 1890 case, *Sturr v. Beck*.[61] The case involved an appropriation of water across lands within the patent of a prior riparian homesteader. The Court held that the appropriation was ineffective:

> When . . . the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. . . . [T]he riparian owner has the right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water.[62]

Thus, at the close of the 1890 term, the Supreme Court had decided that, while priority of possession determined rights among trespassers, it conferred no right against the national government or, by logical extension, against a patentee of the national government. Rights against the government and its patentees were determined under the statutes that Congress had adopted. Since these statutes spoke only of "vested and accrued water rights,"[63] an appropriation made after a patent had been issued did not confer rights against the patentee.

B. Meanwhile, Back at the Ranch . . .

Parallel developments were occurring in litigation involving other resources on the public domain. The use of federal lands for grazing offers the most apt analogy. Again, there was a well-established

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87 (1872) ("[M]ere occupation and improvement of any portion of the public lands . . . do not confer upon the settler any right in the land occupied, *as against the United States* . . . ."). The Court's careful qualifications were, however, overlooked by the state courts, which preferred the myth. The most frequently reiterated language came from Broder v. Water Co., 101 U.S. 274, 276 (1879): "We are of the opinion that the [1866 act] . . . was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one." Overlooked was the fact that the Court was construing a statute granting a railroad lands and that the statute protected any "*lawful claim*" and "the improvements of any *bona fide* settler." Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358 (emphasis added). *See, e.g.*, Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882); Drake v. Earhart, 23 P. 541, 543-44 (Idaho 1890); Willey v. Decker, 73 P. 210 (Wyo. 1903). *But see* Lux v. Haggin, 10 P. 674, 726-28, 729-30 (Cal. 1886).

61 133 U.S. 541 (1890).

62 *Id.* at 551; *see also* Bybee v. Oregon & Cal. R.R., 139 U.S. 663, 680 (1891) (appropriation after effective date of statute granting lands to railroad was ineffective under the 1866 Act).

63 § 17, 16 Stat. at 218; § 9, 14 Stat. at 253.

common law rule: "[E]very man must restrain his stock within his own grounds, and if he does not do so, and they get upon the unenclosed grounds of his neighbor, it is a trespass for which their owner is responsible."[64] That rule, however, also was "ill-adapted to the nature and conditions of the country" because of "the scarcity of means for enclosing lands, and the great value of the use of the public domain for pasturage";[65] and, once again, the states adopted laws reversing the common law and requiring the landowner to fence out livestock.[66] Thus, the grazing custom that developed in the American west corresponded to the customary water law; both reversed a common law rule to allow individuals to exploit a resource on the public domain without formal approval of the proprietor, the national government.

In considering the grazing cases, the Court held, as it had in the mining and water cases, that the long-standing acquiesence of the government conferred

> an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.[67]

This presumed national policy of equal access was reinforced by the various state fence-out statutes. After reviewing such statutes, the Court denied a request to enjoin a sheepherder from grazing his flock on a cattleman's checkerboard railroad lands.[68] To allow the injunction, the Court noted, would frustrate both policies by allowing the cattleman to obtain a monopoly over the entire tract.[69]

The national policy of open and equal access could, however, be overridden by state law. In 1875, Idaho enacted a statute precluding the grazing of sheep within two miles of any dwelling.[70] The effect of the statute was to close large areas of public domain to sheep and transfer the forage on it to cattle. The Supreme Court upheld the statute noting that "[t]he laws and policy of a State may

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[64] Buford v. Houtz, 133 U.S. 320, 326 (1890).

[65] *Id.* at 328; *see also* Morris v. Fraker, 5 Colo. 425, 427-29 (1880).

[66] *See Buford*, 133 U.S. at 328-29.

[67] *Id.* at 326.

[68] *Id.* at 325; *see also* Light v. United States, 220 U.S. 523, 535 (1911) (recounting similar facts and history).

[69] *Buford*, 133 U.S. at 332.

[70] Sweet v. Ballentyne, 69 P. 995, 996 (Idaho 1902); *see also* Sifers v. Johnson, 65 P. 709, 709 (Idaho 1901).

be framed and shaped to suit its conditions of climate and soil."[71] Following this decision, the state extended the law to prohibit the grazing of sheep on any range previously grazed by cattle; this extension was upheld by the Court in *Omaechevarria v. Idaho* [72] with the cursory statement that "[t]he police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject."[73]

State laws, whether requiring landowners to fence out livestock in contravention of the common law or allocating federal forage among competing claimants, thus provided the applicable law, at least until Congress chose to act. However, neither the "implied license," nor the state law, conferred "any vested right" on private individuals or "deprive[d] the United States of the power of recalling any implied license under which the land had been used for private purposes."[74] Congress, therefore, had the power to establish "forest reserves" and close the reserved lands to grazing.[75] Furthermore, the state fence law could not shield the cattleman from being enjoined from allowing his cattle to graze on the reserve after refusing to obtain a permit from the Forest Service.[76]

The most significant difference between the customary law of water and the customary law of grazing was that water law created individual interests based upon priority of use while grazing law did not.[77] The different results are traceable to Congress and the differences between the General Mining Law and the Unlawful Inclosures Act of 1885.[78] Because Congress recognized the validity of possessory claims to water in the General Mining Law, the Court had to struggle to reconcile those claims with its Property Clause jurisprudence. On the other hand, the Unlawful Inclosures Act

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[71] Bacon v. Walker, 204 U.S. 311, 315 (1907).

[72] 246 U.S. 343 (1918).

[73] *Id.* at 346.

[74] Light v. United States, 220 U.S. 523, 535 (1911).

[75] *Id.*, 220 U.S. at 535-38.

[76] *Id.* at 535, 537-38; *cf.* Utah Power & Light Co. v. United States, 243 U.S. 389, 403-05 (1917) (the right to use public lands for rights of way is determined by national rather than state law).

[77] *E.g.*, McGinnis v. Friedman, 17 P. 635 (Idaho 1888) (relying upon the Unlawful Inclosures Act, 43 U.S.C. §§ 1061-1066 (1988), to deny a prior possession claim for grazing rights); Anthony Wilkinson Live Stock Co. v. McIlquam, 83 P. 364, 369 (Wyo. 1905) ("Priority of use as to such pasturage does not create a priority of right."). Users were, however, able to circumvent part of this problem through state statutes allocating forage among competing claimants, see *supra* notes 70-73 and accompanying text, or through physical intimidation. *See* McKelvey v. United States, 260 U.S. 353 (1922).

[78] 43 U.S.C. §§ 1061-1066.

precluded "the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States,"[79] reinforcing the existing case law and denying graziers any private claim to forage. The Supreme Court's analysis of both grazing law and water law is consistent in the following respect: Congress alone had the power to dispose of interests in the public lands and its choice was to be upheld.[80]

A broad congruence thus existed between the public land law of grazing and the public land law of water. Federal acquiesence in private use of resources located on public lands conferred no legal rights against the national government; the national government's silence gave rise only to an implied license. But the national government's silence allowed state law to allocate resources and settle disputes among competing licensees.

C. Water Law (phase ii)

At this point, however, the Court appears to pause, reassess the implications of these decisions, and then seemingly to change direction. In the decade following 1899, the Court decided five cases that sought to balance the conflicting claims of national and local law.[81] The Court's rationale is best captured in a statement it made in a decision upholding a private right to condemn land for ditches. All but echoing Oliver Wendell Holmes' famous aphorism on "the

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[79] *Id.* § 1061.

[80] Thus, for example, the Court upheld an injunction against the maintenance of a carefully constructed fence that effectively enclosed some 20,000 acres of public lands. The fence builder argued that the Unlawful Inclosure Act was unconstitutional if construed to preclude the fence because it was located entirely on private land. The Supreme Court rejected this argument, holding,

> [Congress has] the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation.

Camfield v. United States, 167 U.S. 518, 526 (1897); *see also* McKelvey v. United States, 260 U.S. 353 (1922) (upholding provision of Unlawful Inclosure Act precluding the use of intimidation to prevent use); *cf.* United States v. Alford, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests.").

[81] The five cases are: Winters v. United States, 207 U.S. 564 (1908); Kansas v. Colorado, 206 U.S. 46 (1907); Clark v. Nash, 198 U.S. 361 (1905); Guitierres v. Albuquerque Land & Irrigation Co., 188 U.S. 545 (1903); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).

life of the law,"[82] the Court stated, "This court must recognize the difference of climate and soil, which render necessary these different laws in the States so situated."[83] At the same time, however, such differences did not require the abandonment of national interests to state control. These twin strands are present in *United States v. Rio Grande Dam & Irrigation Co.*,[84] the first of the cases decided during this second phase of the evolution of the accommodation of national and local.

Rio Grande Dam involved one of those grand schemes for remaking the entire landscape that has marked so much of western water law. The Rio Grande Dam and Irrigation Company intended to construct a dam across the Rio Grande to " 'create the largest artificial lake in the world' " and to give the company " 'control of the entire flow of the . . . Rio Grande and divert and use the [river for] irrigating large bodies of land, and to supply water for cities and towns, and for domestic and municipal purposes, and for milling and mechanical power . . . .' "[85] The United States sought to enjoin the construction to protect the downstream navigability of the river.

The Court began its analysis with the "unquestioned rule of the common law" that "every riparian owner was entitled to the continued natural flow of the stream."[86] The Court acknowledged that "it is also true that as to every stream within its dominion a State may change this common law rule and permit the appropriation of the flowing waters . . . ."[87] The states' power to change the common law rule is, however, limited by the national government's proprietary interests: "[I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the

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[82] "The life of the law has not been logic: it has been experience." OLIVER W. HOLMES, THE COMMON LAW 1 (1881).

[83] *Clark*, 198 U.S. at 370; *cf.* Butte City Water Co. v. Baker, 196 U.S. 119, 127 (1905):

> [I]t must be observed that this legislation [the 1866 Act] was enacted by Congress more than thirty years ago. . . . Property rights have been built up on the faith of it. To now strike it down would unsettle countless titles and work manifold injury to the great mining interests of the Far West. While, of course, consequences may not determine a decision, yet in a doubtful case the court may well pause before thereby it unsettles interests so many and so vast . . . .

[84] 174 U.S. 690 (1899).

[85] *Id.* at 691 (quoting Pl's. Am. Compl.).

[86] *Id.* at 702.

[87] *Id.* at 702-03.

beneficial uses of the government property."[88] In short, while a state may adopt the appropriation doctrine and apply it to private lands within its jurisdiction, the state may not divest the federal government of its rights as a riparian landowner.

The Court based its decision on the 1866 and 1877 federal statutes: "Obviously by these acts . . . Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow."[89] As the Court explained in subsequent decisions, these statutes were exceptions to the general requirement that property rights in federal lands could be acquired only through federal patents. Instead, these statutes authorized the creations of rights through compliance with local law.[90] This did not mean, however, that local law could deprive the United States of its superior rights under either the Commerce Clause or the Property Clause.[91]

Subsequent opinions emphasized one or the other side of the accommodation. In *Kansas v. Colorado*,[92] the Court stressed the power of a state to "determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control."[93] Congress, the Court stated, "cannot enforce either rule upon any State"[94] since upon admission into the Union each state is "admitted with the full powers of local sovereignty which belonged to other States."[95] The next year, in *Winters v. United States*,[96] the Court reemphasized the limitation on state-created interests that conflicted with national claims: "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not

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[88] *Id.* at 703. The Court also held that a state's power to allow appropriation of waters was subject to the "superior power" of Congress to protect navigation. *Id.*

[89] *Id.* at 706. The United States eventually obtained a permanent injunction against the project, but not before returning twice to the Supreme Court. *See* Rio Grande Dam & Irrigation Co. v. United States, 215 U.S. 266 (1909); United States v. Rio Grande Dam & Irrigation Co., 184 U.S. 416 (1902).

[90] *E.g.*, Gutierres v. Albuquerque Land & Irrigation Co., 188 U.S. 545, 552-53 (1903).

[91] *See, e.g.*, Winters v. United States, 207 U.S. 564, 577 (1908); *Guitierres*, 188 U.S. at 554-55.

[92] 206 U.S. 46 (1907).

[93] *Id.* at 94.

[94] *Id.*

[95] *Id.* at 95 (citations omitted).

[96] 207 U.S. 564 (1908).

be."[97] The reservation of waters arose by "implication" from the language of a treaty with the Gros Ventre and Assiniboine Indian Nations.[98]

Thus, by 1910 the general outlines of an accommodation had been sketched in. State law determined private rights within the state whether on private or federal lands. This dominance of state law over federal proprietary interests resulted from federal statutes granting that power to local law.[99] State law, however, did not limit federal rights beyond the provisions of the 1866, 1870, and 1877 statutes.

The Supreme Court thus rejected the Colorado theory that riparian rights had never existed in the arid West. Not only *had* such rights existed, but they *continued* to exist "so far at least as may be necessary for the beneficial uses of the government property."[100] The Court also rejected the central proposition of both the California and Colorado theories that the national government was a proprietor whose proprietary interests were determined by local law. National interests were determined by local law, the Court concluded, only to the extent that Congress chose to subordinate the national interests. This left the unresolved issue: To what extent *were* federal rights subordinated by the 1866, 1870, and 1877 statutes?

VI

NATIONAL LAND/STATE LAW: SEVERING WATER FROM LAND

Near the end of this flurry of Supreme Court decisions, a third state theory on the relation between the appropriation doctrine and the Property Clause was announced by the Oregon Supreme Court.[101] The court began with the proposition that national proprietary rights, including riparian water rights, were not affected by statehood; federal law remained supreme: "The right of the government to dispose of its public lands, and to deal with all rights incident thereto, in such a manner as it may deem best, has long been

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[97] *Id.* at 577 (citations omitted).

[98] *Id.* at 575-76.

[99] The constitutionality of using state legislation to establish rules for the disposition of federal proprietary interests was upheld in a case challenging the permissibility of the 1866 Act's delegation of power to mining districts and the state. Butte City Water Co. v. Baker, 196 U.S. 119, 125-26 (1905).

[100] United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).

[101] Hough v. Porter, 98 P. 1083, *reh'g denied*, 102 P. 728 (Or. 1909).

fully established and recognized by all decisions upon the subject."[102] Thus, the question is one of the proprietor's intent. The court found this intent expressed in the Desert Land Act,[103] which it construed as granting the public the right to appropriate the waters on the public domain:

> This unquestioned power of the owner over the public domain was exercised, and any one entering upon, and acquiring title to, any part of the public domain after the passage of [the Desert Land Act of 1877] accepted such land and title thereto with full knowledge of the law under which the patent was issued . . . this [riparian water] right incident to the soil was reserved by the government, to be held in trust for the public . . . .[104]

Thus, the Desert Land Act severed water from land so that subsequent federal patents carried no riparian rights. Furthermore, the court concluded that the Act was intended to establish "a uniform rule."[105] After the passage of the Act, *all* lands in the desert-land states[106] "were accepted with the implied understanding that . . . the first to appropriate and use the water for the purposes specified in the act should have the superior right thereto."[107]

The Oregon theory thus had two elements. First, the Desert Land Act severed land and water by providing that federal patentees acquire title only to land and not to water rights. Second, the only method for obtaining water rights in the desert-land states was through an appropriation under state law. Moreover, because Congress had decided that the only method for obtaining water rights was through an appropriation under state law, the national government also had to obtain its water rights by appropriation *under state law*.[108]

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[102] *Id.* at 1091-92.

[103] Ch. 107, 19 Stat. at 377.

[104] *Hough*, 98 P. at 1092.

[105] *Id.* at 1091.

[106] The Desert Land Act applied only to Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. 43 U.S.C. § 323.

[107] *Hough*, 98 P. at 1095.

[108] In an opinion handed down shortly after *Hough* was decided, the United States Supreme Court, while expressly declining to decide the issue, stated that the *Hough* decision was "plausible." Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339, 344 (1909).

VII

NATIONAL LAND/NATIONAL LAW-PRIVATE LAND/STATE LAW: THE ACCOMMODATION

The United States Supreme Court did not again address the relationship between state-law prior appropriation interests and the Property Clause until 1935 when it decided *California Oregon Power Co. v. Beaver Portland Cement Co.*[109] Plaintiff, a riparian landowner whose title derived from an 1885 federal patent, sought to enjoin defendant from constructing a power plant that would divert at least part of the flow of the Rogue River away from plaintiff's land. The plaintiff argued that the diversion was an infringement of its asserted rights as a riparian landowner.[110] The threshold question thus was whether the federal patent conveyed riparian water rights to plaintiff.

The Court began by recapitulating the myth of the sturdy emigrant. The prior appropriation doctrine arose, the Court stated, as customary law that recognized priority as the basis of rights to exploit natural resources located on the public domain. This customary law had received "formal confirmation" in the Acts of 1866 and 1870.[111] Even if these two statutes "did not constitute an entire abandonment of the common-law rule of running waters in so far as the public lands and subsequent grantees . . . were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877,"[112] which, the Court held,

> effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. . . . [Therefore] a patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed.[113]

Moreover, "to further the disposition and settlement of the public domain,"[114] the Act established a uniform rule: "[F]or the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states."[115] Finally:

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[109] 295 U.S. 142 (1935).
[110] *Id.* at 151-52.
[111] *Id.* at 154-55.
[112] *Id.* at 155.
[113] *Id.* at 158.
[114] *Id.* at 161.
[115] *Id.* at 162.

> If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted.[116]

Congress' grant of power to the desert-land states was, however, only permissive: "What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states . . . ."[117] Thus, the desert-land states had the power to determine the system of water rights that would exist within their boundaries.

By implication, the Court upheld the Oregon theory of federal-state relations; the Desert Land Act severed water rights from the land so that federal patents issued after 1877 carried no riparian rights.[118] Moreover, by granting desert-land states "plenary control" over the nature of water rights within their respective boundaries, Congress had created a uniform rule. Given the sweep of the Court's language, it is perhaps understandable that the Court's iteration of an earlier qualification—that a state could not destroy the riparian rights of the United States[119]—went largely unnoticed.

Twenty years later, the Supreme Court reemphasized the national propriety interest in riparian rights. *Federal Power Commission v. Oregon* [120] arose from a challenge by the State of Oregon to a license issued by the Federal Power Commission authorizing Portland General Electric Company to construct a hydroelectric project on the Deschutes River in central Oregon. The State contended that the company was required to obtain a state water right, basing its arguments on the Oregon theory seemingly ratified by the Supreme Court in *California Oregon Power Co.*

The Supreme Court disagreed. Beginning with the proposition that the project was located on federal reserved lands rather than

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116 *Id.*

117 *Id.* at 163-64.

118 *See also* Ickes v. Fox, 300 U.S. 82, 95 (1937):

> The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 . . . if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately.

119 *California Or. Power Co.*, 295 U.S. at 159 (quoting United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 706 (1899)).

120 349 U.S. 435 (1955).

public lands,[121] the Court concluded that it was not necessary to determine whether the three statutes constituted the "express delegation or conveyance of power that is claimed by the State, because these Acts are not applicable to the reserved lands and water here involved."[122] The Desert Land Act, the Court noted, "covers 'sources of water supply upon the public lands . . . .' The lands before us in this case are not 'public lands' but 'reservations.' "[123]

While the Court did not expressly cite the language of *Rio Grande Dam* and *California Oregon Power Co.*, its conclusion restates the limitation initially expressed in those cases:

> [I]n the absence of specific authority from Congress . . . a State could not by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow—so far, at least, as might be necessary for the beneficial use of the government property . . . .[124]

CONCLUSION

ACCOMMODATION AS THESIS

In a dialogue extending over more than a century, the national and state judiciaries crafted an accommodation that both reflects their respective interests and remains within the bounds of the Constitution. The need to recognize local "peculiarities" of soil and climate,[125] clothed in the language of the "equal footing" doctrine,[126]

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[121] The land at the eastern end of the dam had been reserved for power purposes in 1909. *See id.* at 439. The western end of the dam was located on lands within the Warm Springs Indian Reservation established by treaty in 1855. *See* Treaty between the United States and the Confederated tribes and bands of Indians of Middle Oregon, June 25, 1855, 12 Stat. 963, 964. Lands within the reservation had been reserved as power sites under the authority of the Act of June 25, 1910, ch. 431, § 13, 36 Stat. 855, 858, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792. The power site reservation took place in 1910 and 1913. *See Federal Power Comm'n*, 349 U.S. at 438 n.5.

[122] *Federal Power Comm'n*, 349 U.S. at 448.

[123] *Id.* (quoting § 1, 19 Stat. at 377).

[124] *California Or. Power Co.*, 295 U.S. at 159 (citing United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899)).

[125] *See* Clark v. Nash, 198 U.S. 361, 367-68 (1905).

[126] *See, e.g.*, Kansas v. Colorado, 206 U.S. 46, 95 (1907) (states entered into the Union with "full powers of local sovereignty which belonged to other states"); *see also Rio Grande Dam & Irrigation Co.*, 174 U.S. at 703 (states have the power to legislate for their own interests until Congress "in some way . . . asserts its superior power"). The equal footing doctrine simply requires that "new states have the same rights, sovereignty, and jurisdiction . . . as the original states." Pollard v. Hagan, 44 U.S. (3 How.) 212, 230 (1845); *see also* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 434 (1892) ("There can be no distinction between the several States of the Union in the character of the

served to justify the state power to replace the common-law riparian water rights with the prior appropriation doctrine;[127] state law, in other words, defines the boundaries and content of private property located within the state's borders.[128] At the same time, the national interest precludes a state from divesting the national government of its rights as a proprietor.[129] State-created interests are limited by national lands.

The dialogue between the state and national courts focused on the line between these interests. State assertion of authority to define the nature of federal proprietary interests was rejected[130] in favor of a rule cobbled together from three national statutes in which Congress had made only passing reference to water. By treating the General Mining Law and the Desert Land Act as severing "all waters upon the public domain, not theretofore appropriated, from the land itself,"[131] the courts arrived at this rule: The severance of land and water applies only to *public lands* and state

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jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits."); Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436 (1867).

[127] Each state "may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State." Kansas v. Colorado, 206 U.S. at 94; *see also* Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931) ("[E]very State is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise."); Whitaker v. McBride, 197 U.S. 510, 511-12 (1905) ("It is the settled rule that the question of the title of a riparian owner is one of local law.").

[128] State law fully applies only after the federal government has disposed of all of its interest in a particular tract. *See* Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517 (1839). Stated from the opposite perspective, federal law applies to land (1) if federal law is the basis for a claim of right, or (2) if the national government has not completely divested itself of a particular tract. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 377 (1977); *see also* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 669-71 (1979). Thus, the mere fact that title to property ultimately is traceable to a federal patent does not give rise to a federal question. *E.g.*, Joy v. City of St. Louis, 201 U.S. 332 (1906); De Lamar's Nev. Gold Mining Co. v. Nesbitt, 177 U.S. 523, 527 (1900); *cf.* United States v. Little Lake Misere Land Co., 412 U.S. 580, 595-96 (1973) ("aberrant or hostile state rules" will not be applied to determine federal interests); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 87-88 (1922) (changes in state law may not destroy interest vested before statehood).

[129] *E.g.*, Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1871); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517 (1839); Bagnell v. Broderick, 38 U.S. (13 Pet.) 436, 446-47 (1839).

[130] *Compare* Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882) *with* Sturr v. Beck, 133 U.S. 541, 552 (1890).

[131] California Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 158 (1935).

law is, therefore, inapplicable "to the use of waters on reservations of the United States."[132] When lands are federally reserved for a particular purpose, those lands have riparian rights "so far at least as may be necessary for the beneficial uses of the government property."[133] As with other federal interests, the existence and scope of federal reserved water rights are questions of congressional intent.[134]

In a dynamic system, every accommodation becomes merely a thesis for further examination, a point of departure for the next round of cases. There is no reason, therefore, to assume that the current accommodation is a final conclusion.[135]

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132 Federal Power Comm'n v. Oregon, 349 U.S. 435, 448 (1955); *see also* Cappaert v. United States, 426 U.S. 128, 143 (1976); United States v. District Court, 401 U.S. 520, 523 (1971) ("The federally reserved lands include any federal enclave."). For examples of "federally reserved lands," see United States v. New Mexico, 438 U.S. 696, 698-99 (1978) (national forest); Cappaert v. United States, 426 U.S. 128 (1975) (national monuments); United States v. District Court, 401 U.S. 520, 523 (1971) (national forest); Arizona v. California, 373 U.S. 546, 595-601 (1963) (Indian reservation, national forests, national recreation areas); United States v. Powers, 305 U.S. 527, 532-33 (1939) (Indian reservation); Winters v. United States, 207 U.S. 564, 577 (1908) (same).

133 United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899). Applying state law—including its water law—to retained federal lands "would place the public domain of the United States completely at the mercy of state legislation." Camfield v. United States, 167 U.S. 518, 526 (1897). Such a result is, of course, contrary to the fundamental structure of the federal system. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-06 (1819).

134 In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

Cappaert, 426 U.S. at 139.

135 *E.g.*, State Water Resources Control Bd. v. United States, 749 P.2d 324 (Cal.), *cert. denied*, 488 U.S. 824 (1988) (recognizing federal riparian water rights in national forest lands under state law); State v. Morros, 766 P.2d 263 (Nev. 1988) (state approval of federal water right for *in situ* water uses including recreation and wildlife watering).