Some Views Respecting the Federal Water Power Act

Moses Hooper
SOME VIEWS RESPECTING THE FEDERAL WATER POWER ACT

By Moses Hooper*

This Act is entitled, "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes." (41 Stat. 1063, 1920 Ch. 285).

No doubt it is competent to Congress to take charge of, and legislate concerning, waters powers, parcel of the public domain; and concerning the use for purposes of navigation, interstate and foreign of all navigable rivers within the territory of the United States. So far as the Act relates to these purposes no criticism is intended.

But does not the Act in terms extend beyond such purposes; and in terms apply to the water powers of navigable rivers not parcel of the public domain; and if so, are such parts of the Act, as so extend, valid?

It is quite plain that the Act assumes Federal property in, and right of Federal control over the water powers of all navigable rivers in the United States whether such powers are parcel of the public domain or not. Many of its provisions can rest only on such assumption.

The title of the Act itself leads to such a view of its scope. It says that it is "An Act * * to provide for * * the development of water powers" without any limitation as to what water power.

*Member of Oshkosh, Wisconsin, Bar.

Note—At the request of the writer, this article is published with reformed spelling. See circular, No. 8, 1893 United States Bureau of Education. —Ed.
Subdivision (d) of Section 4 purports to give the Commission authority to license applicants to construct and operate dams and other project works for utilization of power "in any of the navigable waters of the United States."

Section 10 (a) and (c) provide for the supervision of the works by the Commission to the effect that they shall not only be fit for navigation, but that they also be fit for water power development.

Section 10 (d), (e) and Section 12, 13 and 14 seem to be framed for the purpose of enabling the Federal Government to make gain out of the development of the water power of navigable streams not parcel of the public domain, and eventually to take such power over to itself.

Section 14 provides for such taking over "upon not less than two years' notice * * after the expiration of any license." The only limitation on the term of the license is that it must be "for the period of not exceeding fifty years," as provided by Section 6.

Sections 25 and 26 declare severe penalties against any persons who shall refuse to comply with any of the provisions of the Act.

Let us consider the interest of the United States in, and its authority over, the water powers of navigable rivers not parcel of the public domain.

**Publici Juris**

There seems to have arisen some vague idea that in some way water power, like navigation, is a sovereign right, and not a purely property right. This seems to be held as a progressivist idea,—a new idea. It would seem to be a socialistic idea,—an outgrowth of the Henry George philosophy that there can properly be no private ownership of natural resources. The idea is not new. It is nearly a hundred years old and exploded.


"Flowing water is originally *publici juris.*" "The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public." (913).

Justice Hoyroyd says "Running water is not in its nature private property." (914).
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Justice Littledale says, "All the King's subjects have the right to the use of flowing water." (917).

Blackstone says, "But after all there are some few things which * must still unavoidably remain in common * * such (among others) are the elements of light, air and water." (Book II, page 14).

"For water is a movable, wandering thing and must of necessity continue common by the law of nature." (Book II, p. 18).

But as actual water power development came about this rule failed to meet the exigency. Williams vs. Morland was overruled by the King's Bench in 1833 by Mason vs. Hill (5 Barn & Ad I) (100 Eng. Reprint 692) (27 E. C. L. R. 11). Therein Lord Denman said

"The possessor of land through which a natural stream runs has a right to the advantage of that stream and to use it when he pleases for any purpose of his own not inconsistent with a similar right in the proprietors of the land above and below." (27 E. C. L. R. 19).

All the associate judges concurred.

In 1851 the question came before the Court of Exchequer in Embray vs. Owen (6 Exch. 353). Therein Baron Park, referring to Kent's Commentaries and some American decisions said

"Each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it." (368).

This rule has since that day been held to be the law of England.¹

That the water power of a navigable stream is the private property of the riparian owner has been repeatedly adjudicated in contentions between private parties in American Courts both State and Federal.²

Kimberly and Clark Company vs. Hewitt related to the water power of the lower Fox River, a public navigable stream. Therein Justice Lyon said

¹Samson vs. Hodinot, 87 E. C. L. R. 590, 610 (1857); Swindon Water Works vs. Wilts and Burks Canal, L. R. 7 E. & I. App. 697 (1875); Hamelin vs. Bannerman, 11 R. 368 (1895); Hindon vs. Ashby, 3 Ch. 1 (1896); Coulson and Forbes, pp. 113 to 116 (1902).

"The rule is elementary that unless affected by license grant, prescription or public right, or the like, every proprietor of land on the bank of a stream of water, whether navigable or not, has the right to the use of the water as it is wont to run, without material alteration or diminution"; (337).

Language to practically the same effect is used in each of the other cases cited in Note 2.

Many cases have arisen wherein the riparian claim came in conflict with the public claim, or the claim publici juris. Uniformly the adjudication has sustained the riparian claim.

In Green Bay and Mississippi Canal Company vs. Kau. W. P Co., Justice Lyon said of the riparian on the lower Fox, a public navigable river,

"He has the right, however, to pass from his land to the river, and from the river to his land, and to utilize the waters of the river upon his land for any purpose not interfering with the navigation of the stream or the rights of other riparian owners." (653).

Whether water power is publici juris or private property was distinctly at issue between the State of New York and a grantee of the State of Massachusetts in Commissioners vs. Kempshall (26 Wend. 404) (1841).

By Treaty in 1786, New York granted to Massachusetts the "estate, right, title and property in and to" a large tract of land in the western part of that state reserving "only the right and title of government, sovereignty and jurisdiction." The Genessee River, a public navigable stream runs through this tract. Kempshall was a riparian on this river under grant from Massachusetts. A contention arose between him and the State of New York as to whether the water power of the river was publici juris and hence within the reservation, or private property of the riparian and hence within the grant. Held by the New York Court to be

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3 Walker vs. Board of Public Works, 16 Oh. 540, 543-4 (1847); Ex parte Jennings, 6 Cow. 519, 528, 536 (1826); Canal Com’rs vs. The State, 5 Wend. 423, 444, 447-8 (1830); Varick vs. Smith, 5 Paige Chancery, 137 (1835); Canal Com’rs vs. The State, 13 Wend. 32 (1835); Canal Com’rs vs. Kemp-shall, 26 Wend. 404, 413 (1841); People vs. Canal Appraisers, 33 N. Y. 461 (1865); Chenango Bridge Co. vs. Paige, 83 N. Y. 178, 185-6 (1880); G. B. & M. C. Co. vs. Kau. W. P. Co., 70 Wis. 635, 652 (1888).
private property of the riparian. The syllabus in the report reads thus

“Fresh-water rivers, to the middle of the stream, belong to the owners of the adjacent banks. If ‘navigable,’ the right of the owners is subject to the ‘servitude of the public interest’ for passage or navigation. The owners, however, are entitled to the usufruct of the waters flowing in the rivers, as appurtenant to the fee of the adjoining banks.”

The same question arose again in *Smith vs. Rochester* (92 N. Y. 463) (1883). Decision the same. Opinion by Chief Justice Ruger.

The most important water power contention in Wisconsin and, perhaps, in the United States, was The Water Power Cases (148 Wis. 124). The question,—Who owns the Water Power of public navigable rivers, the State or the riparians?—was raised directly between the State and the riparians.

In 1911, the Legislature of Wisconsin enacted Chapter 652. This Act declared that

“All energy developed or undeveloped of the navigable waters of this state is subject to the control of the state for the public good.

The beneficial use and natural energy of the navigable waters of this state for all public uses are held by the state in trust for all of the people.”

The Act directed the Railroad Commission and other State officers to enforce its provisions.

This legislation was challenged by the riparians. They commenced an action in the State Supreme Court against the Railroad Commission and other State officers to restrain them from attempting to enforce the provisions of the Act. Justice Timlin, expressing the opinion of the unanimous Court, said

“The right of the riparian owner to use the water of the river on his own land within his boundary, determined by ordinary high water mark, for the purpose of creating power, or as the act in question puts it, developing energy, returning the water again to the stream, is unquestionably a private right, appurtenant to the riparian land.”
To the same effect are many other decisions, both State and Federal.4 The right to use the energy of the falling water, or the right to the water power is, like the right of access and departure, held to be incident to the ownership of the bank of the stream. It does not depend upon the ownership of the bed. It is, as its name indicates, a bank right.5 Being such, it necessarily belongs to the owner of the bank. How can a bank right be a public right unless the public owns the bank?

Water power is held by the Courts to be not an easement but the body of the estate inseparably annexed to the soil itself.6 How, then, can the water power, parcel of the soil, be owned by the public unless the public owns the soil?

This rule holds good on public navigable streams as well as on private streams.7


5 Fox River Paper Company vs. Kelly, 70 Wis. 287, 294-5, 298 (1887); State vs. Milling Company, 26 Minn. 222, 227-8-9 (1879); Canal Com’rs vs. Kempshill, 26 Wend. 404, 418-9 (1841); Walker vs. Board of Public Works, 16 Oh. 540 (1847); U. S. vs. Ch. D. W. P. Co., 209 U. S. 447 (1908); Coulson & Forbes, 62-3-4; Coulson & Forbes, 110-1-2; Gould on Waters, Sec. 148; Farnham on Waters, Vol. 2, Sec. 463, pages 1568-9-0; So are the adjudged cases too numerous to cite.

6 Johnson vs. Jordan, 43 Mass. 234; Cary vs. Daniels, 49 Mass. 466, 480 (1844); Staden vs. New Rochells Water Company, 91 Hun. 272, 36 N. Y. S. 92 (1895); Tourtellot vs. Phelps, 70 Mass. 370, 376 (1855); Gould vs. Boston Duck Company, 79 Mass. 442, 450 (1859); Parker vs. Griswold, 17 Conn. 288, 299 (1845); Crittenton vs. Alger, 52 Mass. 281 (1846); Blanchard vs. Baker, 8 Maine, 253 (1832); Tillotson vs. Smith, 32 N. H. 90, 94 (1855); Keeney & Wood Mfg. Co. vs. Union Mfg. Co., 39 Conn. 576, 582 (1873); Brown vs. Bush, 45 Pa. St. 61 (1863); Gould on Waters, Section 204.

7 Morrill vs. St. Anthony’s Falls W. P. Co., 26 Minn. 222, Mississippi River (1879); G. B. & M. Canal Co. vs. Kaukauna W. P. Co., 70 Wis., 635, 649, 653, Lower Fox (1888); Kaukauna W. P. Co. vs. G. B. & M. Canal Co., 75 Wis., 385, 390, Lower Fox (1890); Kimberly & Clark Company vs. Hewitt, 79 Wis. 334, Lower Fox (1891); Kaukauna W. P. Co. vs. G. B. & M. Canal Co., 142 U. S. 254, 275 Lower Fox (1891); Varick vs. Smith, 9 Paige, 547; Walker vs. Board of Public Works, 16 Oh. 540, 543-4 (1847); Lewis on Eminent Domain, Vol. 1, Secs. 61, 69; Aver vs. Fox, 2 Fed. Cas. No. 674, 3rd, 4th and 5th columns (1868); Holyoke W. P. Co. vs. Conn. River Co., 52 Conn. 570 (1884).
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If water power were in its nature public then why does not a stream furnishing it become public irrespective of navigability? We call a river furnishing navigation public because it meets the public use,—navigation. Why then, if water power is publici juris, should we not call a river furnishing water power public because it meets a public use, to-wit, water power?

In that case the question would seem to be, not simply—Does the State or the riparian own the water power of a public stream? but—Does the State or the riparian own the water power of all streams; and are all streams capable of furnishing power public?

STATE OR FEDERAL CONTROL

But for the purposes of the argument, let us suppose that Mr. Henry George is right,—that there should be no private ownership of natural resources; and that we have so far developed that society recognizes that water power is publici juris. What then is the situation? Who controls the water powers of public rivers not parcel of the public domain? Does the State control or the Federal Government?

Let us consider the question in the case of one of the original thirteen states. Take Massachusetts. Before the Confederation, the State of Massachusetts was, and still is, a sovereign. The water powers of that state were the property of either the riparian or the sovereign state of Massachusetts. There could be no other ownership or right of control. If now the United States has acquired any right of property in, or sovereign control over, the same, that right must have passed from the State of Massachusetts directly or by inference through some provision of the Articles of Confederation or the Federal Constitution. There is no suggestion of surrender of sovereignty in the Articles of Confederation.

The only surrender by the States to the Federal Government of sovereign control of rivers grows out of the simple provision of the Constitution granting to Congress the right "to regulate commerce with foreign nations and among the several states" (Art. I, Sec. 8, clause 3). Otherwise than so far as necessary to that end,

* Martin vs. Waddell, 41 U. S. 367, 410 (1842); Penna. vs. Wheeling Bridge Co., 54 U. S. 518, 582-3 (1851); Penna. vs. Wheeling Bridge Co., 59 U. S. 421, 430 (1855); Shively vs. Bowolby, 152 U. S. 1, 40 (1894); Water Power Co. vs. Water Comrs, 168 U. S. 349, 358 (1897); Leovy vs. U. S., 177 U. S. 621, 632-3 (1899).
Congress has no control over rivers. Beyond that the control rests with the State and the riparian.\(^8\)

In *Martin vs. Waddell*, Chief Justice Taney says,

"For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." \((410)\)

In *Shively vs. Bowlby*, Mr. Justice Gray says,

"Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States." \((46)\)

In *Water Power Company vs. Water Com'rs*, Mr. Justice Peckham reaffirms the statement made by Chief Justice Taney in *Martin vs. Waddell* and says among other things,

"The jurisdiction of the State over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this Court." \((366)\)

The decisions in all the other cases cited in Note 8 are substantially equally emphatic, and to the same effect on the point to which they are cited.

In 1907 there was a hearing before Chief Justice Taft, then Secretary of War, in connection with the development of the Illinois Valley water power. Application was made to Secretary Taft requesting him not to take any action in relation to the Des Plaines River that might affect State action in relation thereto. The now Chief Justice then said,

"All the United States does, assuming it to be a navigable stream, is merely to protect the navigation of the stream. With reference to the water power, it has no function except in respect to water power which it itself creates by its own investment in property that it itself owns.

"It is not that we approve this:—It is not that we disapprove it. It is that we have nothing whatever to do with it." (Report of Sub Committee on Dams and Water Power Second Session, 60th Congress, Feb. 25, 1909, pages 37-38).
Mr. Rome G. Brown⁹ says in relation to Federal control of water powers,

"Obviously, also, as the power of regulation can extend no further than that which is expressed in the Federal Constitution, the right of regulation of the highway streams is limited to what is necessary to protect the interests of navigation. Beyond that, and subject to such limited Federal power, the power of regulation and other legislative functions with respect to water powers belong to the respective states." (Yale L. J. Nov., 1914, pp. 18 & 19).

The same rule of relative authority that holds in case of Massachusetts must, no doubt, hold in any of the states admitted to the Union, on account of the conditions on which they were admitted.

The first state admitted to the Union was Vermont, admitted on March 4, 1791 "as a new and entire member" (1 Stat. 191).

The second was Kentucky, admitted on June 1, 1792 "as a new and entire member" (1 Stat. 189).

On July 13 the Ordinance of 1787 was adopted for the government of the territory * * northwest of the River Ohio (1 Stat. 51, 53). Section 5 of that Ordinance provided for the admission of states, carved out of that territory, "on an equal footing with the original states in all respects whatever."

Tennessee was the third state admitted. This was on June 1, 1796. Act admitting used the same language as the Ordinance of 1787—"on an equal footing with the original states in all respects whatever." (1 Stat. 491).

The acts admitting states since 1787 have adopted substantially, and for the most part identically, the same language.

The Federal Supreme Court holds that the States admitted came in with the same rights respecting public navigable waters as the original thirteen had.¹⁰

Mr. Brown said

"Why is it that in these recent years * * there has been, comparatively speaking, no water power development in the United States * * ?

⁹ Lecturer on the Law of Water Rights in the University of Minnesota Law School and in the Minnesota College of Law.

¹⁰ Shively vs. Bowlby, 152 U. S. 1, 27 (1893); Water Power Co. vs. Water Comrs, 168 U. S. 349, 358-9 (1897).
"The cause is the halting, capricious, unreasonable and sometimes supersentimental attitude toward the water power question which is assumed by the Federal and State legislatures." (Yale L. J. November, 1914, pp. 12, 13).

What Mr. Brown would say to-day relative to the retarding of water power development by legislative control, I do not know. But my opinion is that the same cause still operates to the same effect though not to the same degree.