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# The Resource Conservation Group Proposal to Lease Colorado River Water

## ABSTRACT

The Resource Conservation Group, Inc. seeks to lease Colorado River water to San Diego. This offer follows in the wake of the Galloway proposal which also sought to lease Colorado River water to San Diego. However, the Galloway group could not get its proposal past the Upper Colorado River Basin Commission. It remains to be seen whether the Resource Conservation Group can get the Upper Basin commissioners to see any worth in its new scheme which like its predecessor proposal is likely to generate an unfavorable response. The Upper Basin commissioners are jealous guardians of the water originally apportioned to the Upper Basin states under the Colorado River Compact of 1922<sup>1</sup> and are not likely to approve the Resource Conservation Group's plans. This paper explores the legal problems as well as the history behind the animosity towards this proposal.

## BACKGROUND

California has an abundant supply of water but there is a shortage of relatively inexpensive water because, as is so often the case, the regions where population and irrigated agriculture are concentrated are also areas where water is scarce.<sup>2</sup> Southern California provides a worthy illustration of this ironical shortage. The Metropolitan Water District (MWD), founded in 1928 for the purpose of transporting Colorado River Water to the South Coast Basin, estimates that it needs more water to meet its future needs.<sup>3</sup> The MWD historically supplemented its member regions with Colorado River water apportioned to but unused by Arizona.<sup>4</sup> The Central Arizona

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1. The Colorado River Compact of 1922, *reprinted in Documents on the Use and Control of the Waters of Interstate and International Streams* (T. Witmer 2d ed. 1968) [hereinafter cited as Colorado River Compact of 1922].

2. Vaux, *Growth and Water in the South Coast Basin of California*, in *Water and Arid Lands of the Western United States* 233 (M. El-Ashry & D. Gibbons, eds. 1988).

3. The MWD estimates a population increase from 12.3 million in 1980 to 16.5 million in 2000 as well as an increase in water demand from 3.06 maf in 1980 to 3.61 maf in 2000. *Id.* at 255 (citing Metropolitan Water District of Southern California, *1982 Population and Water Demand Study Rep.* 946. Los Angeles).

4. The Supreme Court decision in *Arizona v. California* awarded Arizona 2.8 million acre feet (maf) annually from the Colorado River and the rights to all water tributary to the Colorado. The

Project (CAP) was designed to divert 1.2 million acre-feet (maf) yearly to population centers in Phoenix and Tucson. With a fully operational CAP, MWD will not longer enjoy this surplus water. Further, the quantification of Indian rights along the Colorado also threatens MWD's Colorado River supply. Hence, MWD will lose thousands of acre-feet every year.<sup>5</sup>

MWD has actively sought to augment its supply but has yet to secure a reliable future supply. MWD has negotiated with the Imperial Irrigation District to fund water conservation measures which would reduce irrigation use while increasing water available for municipal use.<sup>6</sup> An MWD proposal to purchase Imperial Irrigation District water also failed.<sup>7</sup> California voters failed to approve a proposal to construct a new canal, the Peripheral Canal, to supply water from northern to southern California.<sup>8</sup> It remains to be seen how MWD, in the face of consistent population growth, will supply its users with affordable water.

One possible answer to southern California's water problem could come from the Upper Colorado Basin.<sup>9</sup> Unlike the Lower Basin which uses all its share of available Colorado River water, the Upper Basin is not fully using its share.<sup>10</sup> According to estimates, consumptive use for the year 2000 may vary between 4.2 maf and 5.8 maf.<sup>11</sup> Steve Reynolds, the

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Court also sustained federal claims for 5 Indian reservations along the lower Colorado. These claims were left unquantified at the time. *Arizona v. California*, 373 U.S. 546, 565, 835 S. Ct. 1468, 1480 (1963). Arizona could not physically divert and transport this water to Phoenix and Tucson where the water was needed most. The unused portion that had aqueducts to transport the water to The South Coast areas was used by California. Vaux, *supra* note 2, at 249-50.

5. A fully operational CAP and the further quantification of Indian water rights will reduce MWD's supply from 1.212 maf to about 495,000 maf. Vaux, *supra* note 2, at 249-50.

6. Under the terms of this agreement, MWD would provide \$10 million annually to the Imperial Irrigation District to fund studies and projects that would result in conservation. Two years after the agreement, MWD would receive 100,000 af annually in return. *Id.* at 274.

7. El-Ashray and Gibbons, *New Water Policies for the West*, in *Water and Arid Lands of the Western United States*, *supra* note 2, at 377, 378-79.

8. Regional self-preservation motivated the votes of many Northern Californians. However, a general distaste for tax increases necessary to fund the canal soured most Californians' votes. *See id.* at 380.

9. This area includes 102,000 square miles, located in southwestern Wyoming, western Colorado, eastern Utah, northwest New Mexico, and northeastern Arizona. The major surface water supplies are found in the Green, Upper Colorado mainstem, and the San Juan Howe & Ahrens, *Water Resources of the Upper Colorado River Basin: Problems and Policy Alternatives*, in *Water and Arid Lands of the Western United States*, *supra* note 2, at 169, 171.

10. Weatherford & Jacoby, *Impact of Energy Development on the Law of the Colorado River*, 15 *Nat. Res. J.* 171, 193 (1975) The average annual water availability to the Upper Basin varies from 5.25 maf to 5.8 maf even though 7.5 maf is annually allocated to the Upper Basin for beneficial consumptive use under the Colorado River Compact of 1922. Howe & Ahrens, *supra* note 9, at 173.

11. A Department of Interior estimate made in 1974 predicts consumptive use to be 6.0 maf. *See Weatherford & Jacoby, supra* note 10, at 185-86 (citing U.S. Dept. of the Interior, Report on Water for Energy in the Upper Colorado River Basin 40, Table 11 (1974)). More recent estimates predict consumptive use to be 4.2 maf in the year 2000. *See Howe & Ahrens, supra* note 9, at 173.

former New Mexico State Engineer, stated that all but 750,000 af of water would be consumed annually by the year 2024.<sup>12</sup> If one calculates the average net surface outflows,<sup>13</sup> the Upper Basin has 2,894,000 af of excess water annually.<sup>14</sup> MWD could make use of this water without constructing any more diversion works. The only safe assumption to draw from these estimates is that while there is surplus water in the Upper Basin, the amount of surplus will decrease over time. It should be noted that the lack of reliable figures is an important factor which must be taken into account before any changes to the current allocation scheme may be made. MWD's projection of future water demand is, like any other prediction, subject to change. On the other hand, a host of variables prevent precise projection of the Colorado River's future supply.<sup>15</sup>

Various compacts, federal laws, Supreme Court decisions, and an international treaty govern the Colorado River's development. Chief among these legal institutions is the Colorado River Compact of 1922 ("the Compact").<sup>16</sup> The Compact apportions the waters of the Colorado between the Upper Basin states (Colorado, Wyoming, New Mexico, and Utah) and the Lower Basin states (California, Arizona, and Nevada). The dividing point between the two basins is at Lee Ferry in northern Arizona. The Upper Basin states are entitled to beneficially consume 7.5 maf per year and the Lower Basin states may beneficially consume 7.5 maf per year.<sup>17</sup> The Lower Basin states are also entitled to an additional 1 maf per year under article III(b).<sup>18</sup> The Compact requires the release of at least 75 maf every 10 years at Lee Ferry<sup>19</sup> and, most importantly, forbids the Upper Basin from withholding any water that can not be reasonably applied to domestic and agricultural use. Such water is to flow past Lee Ferry for Lower Basin use.<sup>20</sup>

### THE GALLOWAY AND RESOURCE CONSERVATION GROUP PROPOSALS

A private group has proposed two solutions to satisfy southern California's demand from the Upper Basin's supply. In 1984, the Galloway Group, Ltd., a Colorado corporation, sold to the San Diego County Water

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12. S. Reynolds, *The Galloway Group Incident* (Dec. 14, 1984) (unpublished manuscript prepared for the lecture presented before the Colorado River Water Users Ass'n.).

13. The average net surface outflows are calculated by subtracting the basin's consumptive use from the amount of water originating in the basin.

14. The figure takes into account the dual obligation to Mexico and the Lower Basin. Howe & Ahrens, *supra* note 9, at 182.

15. Weatherford & Jacoby, *supra* note 10, at 173.

16. Colorado River Compact of 1922, *supra* note 1.

17. *Id.* at art. III(a).

18. *Id.* at art. III(b).

19. *Id.* at art. III(c).

20. *Id.* at art. III(e).

Authority (SDCWA), itself an MWD member, a ten thousand dollar option to lease Upper Colorado River water; namely 300,000-500,000 af for 40 years.<sup>21</sup> Galloway claimed to have existing water rights to 1.3 maf of Upper Basin water. The corporation intended to raise over \$230,000,000 in private capital to construct dams and reservoirs for impoundment purposes.<sup>22</sup> Galloway planned to ship this water to San Diego via the river and existing aqueducts. The proposal never got off the ground.

There are many reasons why the project failed. The prominent reason cited for failure was the hostility of the six Upper Basin states.<sup>23</sup> Member states believed that Galloway's proposal would violate territorial use limitations of the Compact. Steve Reynolds argued that the Compact gave each basin an exclusive beneficial consumptive use to a specified amount of water; therefore it would violate the Compact to sell Colorado River water to California because California would then be buying more water than it was apportioned.<sup>24</sup> The Galloway group probably realized that it was not economically feasible to fight such opposition in court. They may have also realized that it would be a lot easier to market their plan if they had the states as friends rather than as foes. Finally, their idea of building more dams on the Colorado for storage, and alternatively for hydroelectric power generation, was neither economically feasible nor popular.<sup>25</sup>

The most recent proposal to lease water to southern California attempts to correct Galloway's shortcomings. Resource Conservation Group, Inc. (RCG) is a Colorado partnership composed of a corporation, Resource Conservation Group, Inc., and various investors. The corporation is the "operational managing partner" and is stuffed with prominent citizens of several of the Compact states.<sup>26</sup>

RCG has devised a "pooling concept" whereby RCG would utilize existing water storage facilities to store water in excess of what would be sold to Lower Basin consumers.<sup>27</sup> Simply, RCG would commingle what it maintains are three distinct types of Colorado River water.<sup>28</sup> First

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21. Gross, *The Galloway Project and the Colorado River Compacts: Will the Compacts bar Transbasin Diversions?*, 25 Nat. Res. J. 935, 936 (1985).

22. *Id.* at 936.

23. Telephone conversation with Dallen Jenson, attorney for Resource Conservation Group, Inc. (Feb. 27, 1980).

24. "Neither the Upper Division states nor their water right owners can by contract, control the distribution of that water in the Lower Basin. If they tried to, it would be like offering to sell the sleeves out of their vest." Statement of S. Reynolds, *supra* note 12, at 4.

25. Howe & Ahrens, *supra* note 9, at 216.

26. Former Governor Bruce Babbit is one such member. The investors include Doyle Berry, the developer of the original Galloway proposal. Presentation by the Resource Conservation Group, Inc. before the Upper Colorado River Commission (Nov. 16, 1989) (unpublished manuscript).

27. *Id.* at 7.

28. *Id.*

there is unallocated and under-developed free-flowing water currently arriving at Lee Ferry and being used by the Lower Basin states. This is the water described in art. III(e) of the Compact. Second, there is water allocated to the Upper Basin but not currently being used. This water also flows past Lee Ferry. Third, there is consumptive use water. This is water that is currently being used in the Upper Basin and never reaches Lee Ferry. Commingling these three different types of water is economically necessary. RCG realizes that it must have more water than it offers for sale because the Upper Basin states may make a call on their water. By having more water than is necessary, RCG would be able to have a supply available for its consumers and at the same time able to heed an Upper Basin call.<sup>29</sup>

RCG's proposal makes use of a second concept, a "privatization concept."<sup>30</sup> Basically, RCG contracts with the owner of a water right, paying for the use but not taking his right. RCG takes the farmer or rancher's right on a rotational basis; that is, for every year the water user does not have water there are perhaps two years that the farmer does have water for farming or ranching. RCG pays the farmer or rancher a "standby fee" for the years the water is not utilized and a "take fee" for the years that the water is utilized. The details of particular contracts would be subject to negotiation. RCG then enters into leases with Lower Basin users, collects the funds from the Lower Basin leases, keeping a certain percentage for itself, and returning the rest of the money to the state of origin of the water. This money is placed in an escrow account and is earmarked for future water development projects within the state.<sup>31</sup>

Ostensibly, this proposal has something in it for everyone. The water right gives the farmer two sources of income. If farming or ranching falls off there is always a quick dollar to be made leasing water to Lower Basin users. RCG makes money as a middle man. The state does not have to worry about permanent agricultural dryup because water is only temporarily taken from the user. Further, the state is relieved of the politically delicate decision to let farmers lease water. There is a guarantee, by virtue of the special escrow account, that state legislatures cannot raid this money and use it for other purposes. It appears that RCG has found an innovative way of helping the states meet the financial shortfall created by the federal government's slow departure from its reclamation philosophy.

The RCG proposal is different from the Galloway proposal because it recognizes Upper Basin concerns and attempts to work these concerns

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29. *Id.*

30. *Id.*

31. *Id.*

into its proposal. The fact that its operational group includes many prominent Upper Basin citizens further highlights RCG's realization that its proposal will not fly unless the quarrelsome signatory states first mutually agree to the proposal. The proposal is similar to the Galloway proposal because it tests the limits of the Colorado River Compact of 1922. Because the Compact provisions relevant to this proposal are clouded in ambiguities, it is impossible to say whether the RCG proposal violates the express terms of the Compact. Nevertheless, it is possible to highlight the significant issues and provide tentative answers.

### THE LAW OF THE RIVER

RCG's basic proposal transfers water from the Upper Basin to the Lower Basin. Before analyzing specific legal problems arising from RCG's pooling concept, it is necessary to determine whether RCG's contemplated transfer violates the Compact.<sup>32</sup> The Compact neither expressly prohibits nor expressly allows the sale or lease of water from the Upper Basin to the Lower Basin. Thus, it is necessary to ask whether any Compact provisions suggest that such a transfer is prohibited. It has been argued that the Compact requires each Basin to use its apportionment within that Basin's own territory.<sup>33</sup> A finding that each Basin can only use its apportioned water within its Basin would preclude RCG from selling Upper Basin water to Lower Basin users.

It is impossible to interpret the Compact without reviewing its historical context. The Lower Basin states realized and Upper Basin states feared the doctrine of prior appropriation given Supreme Court approval in the context of interstate apportionment in *Wyoming v. Colorado*.<sup>34</sup> The Supreme Court held that prior appropriators possess a better right to the continuous use of water than do subsequent users. Lower Basin states, especially California, had plans to immediately put the Colorado's water to use. Imperial Valley irrigators in southern California sought storage on the river to provide a stable supply.<sup>35</sup> The Upper Basin states were afraid that California would get legally enforceable rights to such water at the expense of their slow but inevitable development.<sup>36</sup> The Upper Basin wanted to reserve some water before California grabbed it all. California wanted a compact so it could get federal assistance for reclamation plans.<sup>37</sup>

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32. The Compact applies to the RCG proposal because individual holders of water rights are bound by state law which is in turn bound by compacts to which states are signatory. See *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1937).

33. See *Gross*, *supra* note 21, at 940.

34. 259 U.S. 419 (1921).

35. Meyers, *The Colorado River*, 19 *Stan. L. Rev.* 1, 11 (1966).

36. *Id.*

37. *Id.*

There were other concerns as well. The states, especially California and Colorado, wished to guarantee the right to transport water outside the drainage area of the Colorado River to growing metropolitan areas, such as Los Angeles and Denver.<sup>38</sup> The state-appointed commissioners knew that Congress had to approve the Compact and wished to divide the water without getting into an imbroglio with Congress over whether the federal government or the states owned the water. The Compact was carefully phrased to address these concerns. The Compact did not specifically address the sale of water between basins. Nevertheless, the concern that the Lower Basin would develop legally enforceable rights before the Upper Basin could fully utilize its share was a concern that motivated the particular phrasing of several of the Compact's provisions. These provisions, or territorial use limitations, arguably forbid leases or sales of water between basins.

### The Compact's Territorial Use Provisions

The first territorial use limitation is found within Article II, the definitions section of the Compact. The Compact divides the river into two basins. The Upper and Lower Basins consist of:

those parts of [either the states of the Upper or Lower Basin] within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry.<sup>39</sup>

The Compact defines the basins in such a way that states within a basin may transport apportioned water outside of the actual drainage basin of the river.<sup>40</sup> Hence water may be transferred to thirsty Denver and Los Angeles, cities outside of the drainage area of the river but within states where the river drains. The fact that transbasin diversions were defined only in terms of respective basins would not pose an interpretive problem were it not for article II (b) which curiously states that:

[t]he term "Colorado River Basin" means all of the drainage areas of the Colorado River System *and all other territory within the United States of America to which the waters of the Colorado River System could be beneficially applied.*<sup>41</sup>

Read in conjunction with article II(f) and (g) which state that water may be transported anywhere outside of the drainage area of the river

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38. R. Olson, *The Colorado River Compact* 186 (1926).

39. *Colorado River Compact of 1922*, *supra* note 1 at art. II(f) and (g).

40. *Id.*

41. *Id.* at art. II(b) (emphasis added).



but within that state, one is left with the uneasy conclusion that intrabasin transfers are permitted, inter basin transfers are not permitted, but one state may divert water to a state not signatory to the Compact. Nevertheless, history suggests the better conclusion that article II(b) was intended to allay Colorado's and California's concerns that they would not be able to supply water to Denver and Los Angeles.<sup>42</sup> The fact that the United States is mentioned could reflect an awareness that the Compact was not infringing on the federal government's rights to enter into a treaty with Mexico. Further, the definition of Upper and Lower Basin is more specific than the definition of the whole Basin.

These definitions reflect an understanding that a user did not have a better right to water solely because he was within the watershed.<sup>43</sup> This definition defines riparians in terms of two basins while recognizing that the creation of a riparian system via a compact does not preclude the recognition of a right in one who is able to transfer water outside of the watershed.<sup>44</sup> Any interpretation of these sections must understand the concerns behind the wording: that each basin be protected from the development of the other basin; and that states within a basin be allowed to transfer the river's waters to areas outside of the watershed.

Article III apportions the water. While the phrasing of this section contemplates territorial use restrictions, its wording also reflects a desire to avoid taking a stand on the thorny question of whether the states or the federal government owned the water.

Article III(a) apportions for "exclusive beneficial consumptive use," 7.5 maf per year to both the upper and Lower Basins.<sup>45</sup> Article III(b) then allows the Lower Basin an additional 1 maf per year.<sup>46</sup> Any water above these amounts is considered "surplus" under the Compact. Surplus is to be used to supply Mexico's share.<sup>47</sup>

The apportionment scheme makes sense if the reasons behind the apportionment are kept in mind. The commissioners recognized the importance of protecting the future right to use water from the prior appropriation doctrine. The apportionment was worked out to protect a

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42. See R. Olson, *supra* note 38, at 185.

43. See Coffin v. Left Hand Ditch Co., 6 Colo. 443, 449 (1882).

44. *Id.*

45. Colorado River Compact of 1922, *supra* note 1 at art. III(a).

46. *Id.* at art. III(b).

47. Under a treaty with Mexico made in 1944, Mexico was guaranteed 1.5 maf per year from the Colorado River. The Rio Grande, Colorado, and Tijuana Treaty, Feb. 3, 1944, United States-Mexico, art. X(a), 59 Stat. 1219, T.S. No. 994. Reprinted in Documents on the Use and Control of the Waters of Interstate and International Streams (T. Witmer 2d ed. 1968). Should there not be any surplus, then article III(c) mandates that each basin must share in the deficiency by subtracting Mexico's share from their respective shares. Article III(f) then states that any existing water not already apportioned in articles III (a)-(c) and not beneficially used shall become available for further apportionment. Colorado River Compact of 1922, *supra* note 1 at art. III(f).

slowly developing basin from the expansion of a rapidly developing basin. The word "exclusive" suggests such a territorial limitation. While the term "beneficial consumptive use" was left undefined, there is no evidence that these three words suggest any territorial use limitations. Rather, the word "exclusive" was meant to keep separate each basin's 7.5 maf apportionment while beneficial consumptive use was to be interpreted according to the manner in which this common water law phrase is usually interpreted.<sup>48</sup>

While not a territorial use provision, article III(e) serves to guarantee each basin its share of water by ensuring a flow between the two basins. In the absence of an apportionment of unused waters, the Upper Basin cannot withhold any water which cannot be beneficially applied to use.<sup>49</sup> Article III(e) permits one state to use water which another state cannot presently use, provided that the latter state may, "make a call on such water when it is ready to use it."<sup>50</sup> Hence article III(e) protects the Upper Basin from rights which the Lower Basin may seek to assert on the grounds that it was able to use this water before the Upper Basin. Article III(e) also ensures that water will flow to the Lower Basin.

Another territorial use limitation is found in article VIII. This article contemplates the construction of storage facilities. Once such storage facilities are built, present and perfected Lower Basin rights will be satisfied from these facilities rather than from the river itself.<sup>51</sup> The article then goes on to state: "[a]ll other rights [rights other than those perfected at the time the Compact was ratified] shall be satisfied solely from the water apportioned to that basin in which they are situated."<sup>52</sup> Again, the Compact's language affirms that the division of waters is meant to protect each basin's share from the other basin.

The provisions do not reflect the commissioners' chief aim to create a

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48. Gross, *supra* note 21, at 945. There is evidence in the records of the 1922 Colorado River Commission proceedings that the term "beneficial consumptive use" was used because it avoided the issue of whether the United States or the states had ownership rights in the water. A statement included in the official records of the proceedings stated that:

the States of the Upper Division . . . wish to state affirmatively . . . that it is the understanding that the use of the language in article III constitutes no waiver on their part or on the part of any one of them to any claim of ownership which they may have to the corpus of the waters or any recognition of any right or claim on the part of the United States to the corpus of any of the unappropriated waters of the stream, it being the understanding of those states that the language used is a middle ground which in no way raises or affects the title of ownership.

Colorado River Commission, Minutes of the Second Part, Meeting of Nov. 24, 1922, Bishop's Lodge, Santa Fe, p. 12, Friday, 10:00 a.m. (quoted in R. Olson, *supra* note 38, at 36.

For this reason the term "apportionment" was also favored over the term "appropriation").

49. Colorado River Compact of 1922, art. III(e) *supra* note 1, at art. III (e).

50. Meyers, *supra* note 35, at 17.

51. Colorado River Compact of 1922, *supra* note 1, at art. VIII. See, Meyers, *supra* note 35, at 13.

52. Meyers, *supra* note 35, at 13.

riparian system between the two basins. They sought to protect each basin's use of water by separating the two basins. However, the commissioners were not dictating how the water in each basin was to be used. Hence, one searches the Compact's provisions in vain for specific provisions forbidding RCG's leasing scheme. New Mexico State Engineer Steve Reynolds contends that "exclusive" as used in article III(a) means that the water has to be used in the basin for which the water is apportioned.<sup>53</sup> However, the word "exclusive" may mean that the Upper Basin's right to 7.5 maf is a right which it does not have to share with others. It may be that the word "exclusive," as well as the other territorial use provisions, were only meant to create a riparian system that protects each Basin from the other.

Nevertheless, RCG's proposal to lease Upper Basin water to the Lower Basin violates the spirit of the Compact. Perhaps the reason the Compact does not expressly address the lease of water is because the Compact itself was meant to obviate the need for such transfers; by allocating each Basin a specific share of water there was no need for the Upper Basin to sell or lease water to the Lower Basin. Article III(e) was meant to cover situations where the Upper Basin was not using its full share. Each basin was to get a specific share and each state within each basin was allowed to transfer water to areas where it was needed most.

A leasing arrangement would not violate the terms of the Compact because ownership would not pass from the Upper Basin to the Lower Basin. Nevertheless, such a leasing arrangement could intensify the fear that motivated the division of the river into two basins. By forfeiting the right to use the water for a period of years, the Lower Basin could develop rights to the water which the Upper Basin may ultimately find difficult to disturb.<sup>54</sup> It is possible that the acquisition of such rights could give the Lower Basin more water than it was apportioned.

### RCG's Pooling Concept

Even if this proposal does not violate the Compact's general purpose, RCG's pooling concept arguably violates specific Compact provisions. RCG states that there are three types of water in the Colorado. The first type of water is water which RCG states is article III(e) water. RCG defines this water as unallocated, undeveloped water. It appears that RCG means that this water is "surplus" water as surplus water is defined in the Compact. Because RCG defines type two water as water that is allocated to Upper Basin use,<sup>55</sup> and because they say that article III(e)

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53. S. Reynolds, *supra* note 12, at 2.

54. The same fear is prevalent in the proposed transfer of Indian rights to Anglo users. Weatherford & Jacoby, *supra* note 10, at 201.

55. Presentation by the Resource Conservation Group, *supra* note 26, at 6.

water is "surplus" water, RCG maintains that this water is different from type two and type three water.<sup>56</sup> RCG defines "surplus" water as article III(e) water while the Compact defines "surplus" water without reference to article III(e). Under the Compact, surplus water is the excess of the Upper and Lower Basins' respective shares of 7.5 maf per year.<sup>57</sup> Because the annual virgin flow averages less than 16 maf,<sup>58</sup> there is no surplus water barring years of unusual flow. Because the Upper Basin does not use all of its annual apportionment, a lot of water has been stored creating excess water. For example, the total amount in Upper Basin storage in 1981 was roughly 25,538,000 af (total storage capacity is about 33 maf). Hence in 1981 there was an excess of eight maf.<sup>59</sup> It is clear, however, that had the Upper Basin used its 7.5 maf each year, there would be no surplus water because annual virgin flow is usually less than 16 maf. Hence the eight maf surplus in 1981 is not surplus water from the virgin flow of the river for that year (when the virgin flow was less than 16 maf) but is an accumulation of water that the Upper Basin did not use. RCG contends that such unused water cannot be withheld by the Upper Basin,<sup>60</sup> because article III(e) mandates that water which is not beneficially used cannot be withheld from the Lower Basin. Such water flows to Lee Ferry and the Lower Basin can use it free of charge. However, simply because water is article III(e) water does not mean that it is surplus water.<sup>61</sup>

Type two water is water that is allocated to the Upper Basin as part of its 7.5 maf apportionment, but is not being used although it is perhaps earmarked for use.<sup>62</sup> If the Upper Basin does not use this water, then it too flows past Lee Ferry. Should the Upper Basin have met its delivery obligation to the Lower Basin and also have met its share of its obligation to Mexico under article III(c) and still have water left over after its consumptive uses have been satisfied, there is the question of whether such water may be withheld by the Upper Basin.<sup>63</sup> RCG admits that its proposal would never get off the ground if it depended only on type two water because the Lower Basin would not pay for water already flowing past Lee Ferry.<sup>64</sup> Steve Reynolds, the former New Mexico State Engineer,

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56. *Id.* at 19.

57. Colorado River Compact of 1922, *supra* note 1, at art. III(e).

58. The virgin flow for 1981 was just over eight maf. Upper Colorado River Commission, 1981 Ann. Rep. 24 (1982).

59. *Id.* at Table 2.

60. Presentation by Resource Conservation Group, *supra* note 26, at 6.

61. Because both surplus and article III(e) water are to flow to the Lower Basin free of charge, there really is no difference between the two. Why then does RCG create two separate types of water? RCG probably creates these two separate types of water in order to give life to their type two water which they would like to pool and lease to the Lower Basin.

62. Presentation by Resource Conservation Group, *supra* note 26, at 6.

63. This question also applies to RCG's type one water.

64. Presentation by Resource Conservation Group, *supra* note 26, at 19.

agreed. He maintained that under article III(e) such water becomes apportioned to the Lower Basin and available for use free of charge.<sup>65</sup> Arguably, the Upper Basin can withhold unused water from the Lower Basin whenever there is less than 7.5 maf in a year because the Upper Basin has an absolute right to 7.5 maf per year and can store the excess water which it does not use.<sup>66</sup> Article III(e), however, mandates that any water that cannot be beneficially used must flow to the Lower Basin.<sup>67</sup> Ironically, RCG resolves this conflict in its favor by supporting the Upper Basin argument that the Upper Basin may reserve water that it has been apportioned but is not using. RCG creates type one water to give meaning to its type two water. If one contends that there is hardly ever surplus water, and that under article III(e) water not used even if part of the Upper Basin's 7.5 annual maf apportionment must flow to the Lower Basin, then article III(e) water exists in the type two water. However, if one maintains that unused apportioned water may stay in the Upper Basin, then there would never be any article III(e) water except, of course, in years of unusual flow. At the very minimum, this pooling concept reopens old questions that were never conclusively resolved.

RCG maintains that this water is different from "surplus" water because even though it spills out of dams unused, it is earmarked for existing projects. Unlike surplus water, where there are no existing users or even anticipated uses, this water could always be used. However, in the absence of actual use, it is hard to see how this water is different from water flowing past Lee Ferry. Although there may be contracts for its use, it is not being consumptively used.

However, both these types of water are different from RCG's third type of water, consumptive use water. This is water that is currently being used in the Upper Basin. This water, like type two water, is water that RCG would like to lease. RCG maintains that type two and type three water are similar because both types of water are allocated for use and the Upper Basin is more likely to be interested in leasing allocated water because the Lower Basin does not have a legal right to the free use of such water.<sup>68</sup>

By pooling this water, RCG would assemble a larger amount of water

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65. S. Reynolds, *supra* note 12, at 4.

66. Meyers, *supra* note 35, at 21.

67. *Id.* at 25. Under article III(a) and (b) the supply comes first from surplus. If there's a deficiency, then the literal reading of article III(e) mandates that the deficiency is shared equally. If the supply is 15 maf and the Upper Basin is using 3 maf but the Lower Basin is using its full 7.5 maf, the Lower Basin would have to cut back on its use in order to supply Mexico. Suppose there is enough for 8.5 maf for the Lower Basin and existing 3 maf worth of uses in the Upper Basin. There is a total of 11.5 plus 3.5 in an Upper Basin dam or 15 maf. Article III(c) says that each side shares equally. But article III(e) says that the Upper Basin may not be able to withhold all but 750,000 af of this 3.5 maf. Hence there is an internal conflict within the Compact. *Id.*

68. Presentation by Resource Conservation Group, *supra* note 26, at 7.

than would actually be committed to the Lower Basin. However, there may be no pool if type one water does not really exist on a predictable basis and if type two water is perceived as water which the Lower Basin gets free of charge even though there is a paper contract or plan for its use. RCG's type three water would be the only type of water. In other words there could be two types of water, type two and type three water, but type two water might not be included if article III(e) covers this water as well. Of course the lack of an ability to pool water would be a serious impediment to RCG's plans because Lower Basin users would not be able to rely on an adequate supply. With the pooling concept, an Upper Basin state could make a call on water that was previously earmarked for an existing use and RCG would still have enough rights assembled to meet Lower Basin demands by leasing type three water. Without the pooling concept, RCG would only be able to assemble rights to consumptive use water.<sup>69</sup>

### THE UPPER BASIN COMPACT APPLIED TO RCG'S PROPOSAL

Aside from legal problems arising from the Compact, this proposal also faces problems under the Upper Basin Compact. As has been seen, the negotiators of the Compact of 1922 overestimated the annual virgin flow of the Colorado River. Because Lower Basin uses had increased while Upper Basin uses remained unchanged,<sup>70</sup> it became apparent that only storage would enable the Upper Basin to both expand and meet its delivery obligation to the Lower Basin.<sup>71</sup> But the Bureau of Reclamation refused to authorize any programs until the Upper Basin divided amongst its member states its share of water.<sup>72</sup> Hence the Upper Basin states negotiated a new compact.<sup>73</sup> The negotiators set out to divide the water by apportioning fixed percentages based upon the 7.5 maf annually apportioned to the Upper Basin by the original Compact.<sup>74</sup>

The commissioners also had to determine how much water there was for each state to use and how much water each state was using. The

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69. Even with the pooling concept RCG would have to make clear exactly what type of water it was leasing to a Lower Basin user because water rights are inherently individual in nature. The Upper Basin would never allow RCG to adopt a scheme whereby the characteristics of rights became undistinguishable from other rights because the individual flavor of such rights might be lost.

70. Upper Colorado River Commission, 1954 Ann. Rep. 23 (1955) (cited in Meyers, *supra* note 35, at 27).

71. Meyers, *supra* note 35, at 27.

72. *Id.*

73. Upper Colorado River Basin Compact of 1948, reprinted in Documents on the Use and Control of the Waters of Interstate and International Streams (T. Witmer 2d ed. 1968) [hereinafter cited as Upper Basin Compact of 1948].

74. *Id.* at art. III(f). Article III(f) declares that the percentage allocation applies only to the 7.5 maf apportioned by article III(a) of the Compact of 1922.

commissioners adopted the inflow definition of water use.<sup>75</sup> This definition took into account the fact that the Colorado loses water as it nears its mouth. The inflow was calculated by using historic virgin flow data at state lines.<sup>76</sup> Outflow was measured at gauging stations at the state line.<sup>77</sup> A credit was given for salvaged channel losses.<sup>78</sup> The difference between the inflow and the outflow equaled the state's beneficial consumptive use.<sup>79</sup> This definition was useful to the Upper Basin whose many small diversions made it impossible to measure each consumptive use.<sup>80</sup> Furthermore, "this formula does not charge users for water they apply to beneficial use if the water would have been lost anyway in a state of nature."<sup>81</sup> Hence the Upper Basin could consume more than 7.5 maf because much water returns to nature.<sup>82</sup>

It is hard to fit RCG's proposed leasing scheme into the Upper Basin's use calculations. First, any diversion would have to be charged to the Upper Basin, otherwise the Lower Basin would be receiving more water at Lee Ferry than it is entitled to receive. Each diversion would also have to be measured at the site of diversion which is contrary to the Upper Basin method of measuring outflows at state lines. Because RCG plans on using the river to transport water to the Lower Basin, the amount of water leased to the Lower Basin would reach the state line and be measured as part of the outflow, that is, as part of the water to be used to satisfy that state's contribution towards the Lower Basin's share at Lee Ferry. However, this would not be equitable because the amount diverted has to be charged to the Upper Basin. It would not be possible to subtract the amount leased to the Lower Basin from the state's inflow because this figure is based upon historical data. Therefore, the amount leased to the Lower Basin would have to be measured at the site of diversion. Such measurement would either have to consider the amount leased a complete diversion or a complete return flow. Such individual measurements could lead to regulation of individual users who may not necessarily desire such quantification.

### THE COMMERCE CLAUSE APPLIED TO THE RCG PROPOSAL

Of course RCG's consumptive use water may not be freely available for sale to Lower Basin interests. If the Compact's territorial use limi-

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75. Meyers, *supra* note 35, at 29.

76. *Id.* at 30.

77. *Id.* at 29.

78. *Id.* The formula is expressed as: "depletion at state line = virgin flow - man-made depletions + salvage." *Id.*

79. *Id.* at 30.

80. *Id.*

81. *Id.* at 19.

82. Gross, *supra* note 21, at 941.

tations forbid the sale and transfer of Upper Basin water to the Lower Basin, the question remains whether it would be a violation of the dormant Commerce Clause for the Compact to forbid individual Upper Basin users from entering into leasing arrangements with the Lower Basin via RCG's intermediary role.

Article I, section 8 of the United States Constitution states that, "Congress shall have the power to regulate commerce . . . among the several states. . . ." <sup>83</sup> The Commerce Clause has been interpreted to mean that when Congress has the power to regulate commerce among states but has not acted, the states may not regulate in such a way that unduly burdens commerce. A state may not enact a statute which unnecessarily burdens the exportation of its resources. Such statutes are considered embargoes. <sup>84</sup> The Supreme Court has stated that water is an article of commerce. A state may conserve water, but it must do so in a nondiscriminatory manner. <sup>85</sup>

At the same time, however, the Constitution gives the states the power, with the consent of Congress, to enter into compacts with other states. <sup>86</sup> Water compacts typically govern the use of named waters among the signatory states. Such compacts often have territorial use restrictions and their effect is to give the signatory states and their citizens preferred rights over the use of such waters. <sup>87</sup> The Commerce Clause seeks to avoid the economic Balkanization that results from one state hoarding its resources. However, compacts allow groups of states to divide resources amongst themselves thus magnifying the effects of economic Balkanization. <sup>88</sup> Compacts, as exercises of state sovereignty, are subject to Commerce Clause analysis. <sup>89</sup> If, however, compacts are considered federal law, they are immune from Commerce Clause scrutiny, because, "[o]nly state regulation which Congress has not expressly authorized is vulnerable to commerce clause attack." <sup>90</sup>

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83. U.S. Const. art. I, sec. 8., cl. 3.

84. J. Nowak, R. Rotunda, & J. Young, *Constitutional Law* section 8.9 (3rd ed. 1986).

85. *Sporhase v. Nebraska*, 458 U.S. 941, 954, 102 S. Ct. 3456, 3459 (1982).

86. U.S. Const. art. I sec. 10, cl. 3). See Gross, *supra* note 21, at 938. Gross stated, "The Compact Clause of the Constitution required federal consent, so that Congress would determine whether the arrangement truly was a compact and Congress could exercise 'national supervision' and 'protect national interests' from undue erosion of national sovereignty." *Id.* at 938 (quoting *Petty v. Tennessee-Missouri Comm'n*, 359 U.S. 275, 282 n.7, 288).

87. Simms & Davis, *Water Transfers across State Systems*, Min. L. Inst. 22-1 sec. 27.05 (1986).

88. Practically speaking, this fear is unfounded. The Colorado River Compact was designed to settle possible disagreements over the use and apportionment of water by states that could make use of the water at the time when the Compact was formed. R. Olson, *supra* note 38, at 186. The Compact included as signatory states all who could possibly make use of the water. Hence Ohio could not claim that the Colorado River Compact enables its signatory states to hoard water because Ohio could never afford to transport the River's water. While states situated in close proximity to the Colorado River Basin states might be able to afford to transport Colorado river water, it was not economically feasible to do so at the time the Compact was written. *Id.*

89. See generally, Simms & Davis, *supra* note 87.

90. Gross, *supra* note 21, at 954.



Despite the fact that the framers of the Compact did not intend to hoard water *per se*, an impermissible purpose could be inferred from a discriminatory effect. Therefore it is necessary to analyze whether the Commerce Clause prohibits the application of territorial use limitations when they operate in a manner that disallows the lease of Upper Basin water to Lower Basin interests.

"[O]nce given, 'congressional consent transforms an interstate compact . . . into a law of the United States.'"<sup>91</sup> In *Texas v. New Mexico*, the Court was concerned with whether it could rewrite the Pecos River Compact to avoid a deadlock created in the Compact which threatened to make it unworkable. New Mexico and Texas each had one vote on actions arising under the Compact, while the United States representative, the third commissioner, had no vote. The Supreme Court stated that because a compact is federal law it was powerless to rewrite it absent any constitutional problems.<sup>92</sup>

Following this decision, the Ninth Circuit heard a case involving a proposed sale of water regulated by the Yellowstone River Compact.<sup>93</sup> This case followed in the wake of a water company's attempt to divert 30,000 af of Yellowstone River water for municipal and industrial use outside of the river's basin. Intake Water Company argued that the Compact was subject to Commerce Clause scrutiny because Congress had not expressly stated that the compact was immune from such scrutiny. The Ninth Circuit held that when Congress approved a compact, it was acting within its authority to immunize state law from constitutional objections by transforming the law into a federal statute.<sup>94</sup> The Ninth Circuit placed heavy reliance on *Northeast Bancorp Inc. v. Board of Governors of the Federal Reserve System*,<sup>95</sup> in which the Supreme Court held that an interstate banking agreement between Massachusetts and Connecticut did not burden interstate commerce. In a generous holding the Supreme Court stated that, "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."<sup>96</sup> The Ninth Circuit refused to go further and analyze whether Congress intended to allow the Compact to burden commerce by precluding sales of water.

Were it not for the Supreme Court's holding in *Sporhase v. Nebraska* that water is an article of commerce, there would be no argument that

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91. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981) and citing *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 13 How. 518, 566 (1852)).

92. *Id.* at 564-66.

93. *Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d 568 (9th Cir. 1985), *aff'g* 590 F. Supp. 293 (D. Mont. 1983).

94. *Id.* at 570 (citing *Cuyler v. Adams*, 449 U.S. 433 (1981)).

95. 472 U.S. 159, 105 S.Ct. 2545 (1985).

96. *Id.* at 175, 105 S.Ct. at 2554.

compacts were not immune from Commerce Clause scrutiny.<sup>97</sup> There is the chance, however, that the Supreme Court may one day resolve the issue. Faced with the argument that because Congress did not expressly exempt the Compact from Commerce Clause scrutiny, the Supreme Court may decide that Congress did not intend to let the states burden commerce.<sup>98</sup> On the other hand, the Court may respond that an interstate compact is the same as any other agreement given congressional approval.<sup>99</sup> It is therefore necessary to consider whether the Colorado River Compact of 1922 is federal law and then decide whether it is immune from Commerce Clause scrutiny.

Congress has not expressly stated that this Compact is immune from Commerce Clause scrutiny. However, there can be little doubt that the Compact is federal law. When the Compact was written, states realized that they could not tame the river without federal money. The Bureau of Reclamation's philosophy of developing the arid West saw its greatest triumph in the taming of this river. If Congress did not expressly legislate a division of the Colorado it was because a compact provided the best way to further the development of the West. A compact was well suited to the purpose of ensuring that the young agricultural and power interests could grow in a climate free from quarrelsome and selfish state interests. The supervisory role of the federal government has played such a major role in the development of the Colorado that it would be hard to say that the Compact was only an exercise of state sovereignty. For example, in the Colorado River Basin Act of 1968, itself a child of the 1922 Compact, Congress authorized the Secretary of the Interior to "adopt 'criteria for the coordinated long-range operation' of the federal reservoirs in the Colorado River System."<sup>100</sup> Even before this Act, the Secretary of the Interior was in charge of operating the dams,<sup>101</sup> and his decisions in his capacity as door keeper often threatened state sovereignty. In 1964, when

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97. 458 U.S. at 954, 102 S. Ct. 3456 (1982). In *Sporhase*, the Court recognized in dicta that the compacts provide an example of constitutionally permissible restrictions on the use of water. *Id.* at 956.

98. In cases where a state is allegedly burdening interstate commerce, the Supreme Court will apply strict scrutiny to analyze whether there is a burden on interstate commerce. *See, e.g., Hughes v. Oklahoma* 441 U.S. 322, 337 (1979).

99. Various arguments have been raised as to how the Supreme Court should resolve this conflict in the event that the issue does present itself before the High Court. Some have proposed that surface water should be considered an article of commerce in order to further the policy of transferring water to areas where it is needed most. *See generally* Simms & Davis, *supra* note 87. Others have proposed that equitable apportionment should govern both surface water and groundwater. *See* Utton, *In Search of An Integrating Principle For Interstate Water Law: Regulation versus the Market Place*, 25 Nat. Res. J. 985 (1985). The Colorado Compact is more than congressional approval of state sovereignty, it is federal law.

100. Colorado River Basin Act of 1968, 43 U.S.C. § 1501, 1552 (1988) (*quoted in* Weatherford & Jacoby, *supra* note 10, at 178).

101. Meyers, *supra* note 35, at 22.

Secretary Udall opened the gates at Glenn Canyon Dam to provide water for power production at Hoover Dam, he reduced the water level at Lake Powell, thus reducing Upper Basin power generation and revenues which were used to pay for Upper Basin Irrigation projects.<sup>102</sup> To say that the Compact of 1922 is only an expression of state sovereignty is to effectively ignore the Boulder Canyon Project Act, the Colorado River Basin Act of 1968, and the Upper Colorado River Compact, all the progeny of the Compact of 1922. The Supreme Court did not forget history when it stated that the Compact of 1922 addressed national concerns.<sup>103</sup>

Whether this Compact is immune from Commerce Clause scrutiny depends on how closely one analyzes the terms of and history behind the Compact. The Supreme Court could hold that an interstate compact is just like any other agreement and that it is immune from Commerce Clause scrutiny. On the other hand, the Court could decide to take a closer look and answer the question of whether Congress intended to preclude market transfers when it approved the Compact.

While Congress did not expressly state that the Compact was immune from Commerce Clause scrutiny, it ratified a Compact that addressed Commerce Clause issues existing at the time. The Compact's provisions make it clear that the Commissioners were cognizant of the federal government's possible rights in the river's waters. The Commissioners took the view that the Colorado was not a navigable stream.<sup>104</sup> In *Gibbons v. Ogden*,<sup>105</sup> the Supreme Court stated that the Commerce Clause empowers Congress to regulate transportation of persons and property by land and by water. But because Congress had contemplated the construction of the Boulder Canyon Dam, it was generally agreed that Congress did not intend to exercise its Commerce Clause power over navigable streams.<sup>106</sup> Consequently, article IV of the Compact states that since the Colorado has ceased to be navigable, the use of its waters for navigational purposes would be subservient to all other possible uses.<sup>107</sup> The Compact then states that, "[i]f the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding."<sup>108</sup> Furthermore, the Compact reserves the federal government's right to allocate a portion of the river's water to Mexico.<sup>109</sup> Finally, the Com-

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102. *Id.* at 22.

103. *Arizona v. California*, 373 U.S. 546, 554 (1963).

104. R. Olson, *supra* note 38, at 101. See *Arizona v. California*, 283 U.S. 423 (1931). In this precursor to the Court's decision in 1963, the Court held that Congress exercised its Commerce Clause power over the Colorado as a navigable stream by constructing a dam.

105. 22 U.S. (9 Wheat.) 1, 185 (1824) cited in R. Olson, *supra* note 38, at 101.

106. R. Olson, *supra* note 38, at 110.

107. Colorado River Compact of 1922, *supra* note 1, at art. IV.

108. *Id.* at art. IV(a).

109. *Id.* at art. III(c).

missioners took great pains to select the words "apportionment" and "beneficial consumptive use" so as not to take a stand on whether the federal government or the states had ownership rights in the water.<sup>110</sup> The commissioners were aware of the tension existing between the respective spheres of federal and state authority and did not wish to create an unconstitutional document. Had groundwater been declared an article of commerce and had it been known that groundwater and surface water are hydrologically connected then the wording of the Compact might have been different. It could be argued that RCG is not violating the Compact provisions that were given congressional approval. Thus, it could be argued that Congress did not consent to a Compact that prohibited the lease of water from the Upper Basin to the Lower Basin.

This argument is a long shot which is likely to miss its target entirely. There is no single compact provision that could be declared unconstitutional without invalidating the entire Compact. The territorial use limitations are so woven into the fabric of the Compact that it is hard to pinpoint their existence. The Supreme Court is not likely to apply strict scrutiny to invalidate two or three or four clauses of a compact which set into motion a whole host of federal laws, Supreme Court decisions, state laws, and an international treaty.<sup>111</sup> At the expense of what may be an implied violation of the Commerce Clause it would be even more unwise to tamper with a document on which has been placed so much reliance.

If the Compact's territorial use limitations preclude the Upper Basin farmer from contracting with Lower Basin users there is no violation of the Commerce Clause. Further, an individual citizen of an Upper Basin state is bound by the terms of the Compact. In *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*,<sup>112</sup> the Supreme Court held that whether an apportionment is made by compact or by judicial decree, "the apportionment is binding upon the citizens of each state and all water

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110. R. Olson, *supra* note 38, at 319, Chairman Hoover, commissioner for the United States stated:

I am sitting here between two fires; one that this compact doesn't properly protect the unappropriated waters in the sense of the federal government's rights to them, the other the extreme state right that would contend that the corpus of the water title rests in the state . . . I have thought we could avoid the whole issue by confining this whole pact and discussion simply to the beneficial use of the water. If you wish to make the pact in the form that gives that oblique attitude to it, then the responsibility of getting it through Congress will necessarily rest with you a great deal.

*Id.*

111. The Yellowstone River Compact has a clause which could be severed which states: "No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory states." Yellowstone River Compact of 1950, art. X. (*reprinted in Documents on the Use and Control of the Waters of Interstate and International Streams* (T. Witmer 2d. ed. 1968).

112. 304 U.S. 92 (1938).

claimants even where the State had granted the water rights before it entered into the Compact."<sup>113</sup> Thus if the territorial use limitations forbid RCG's lease plan, and if the Compact is immune from the Commerce Clause, then the individual farmer must obey such restrictions as well.<sup>114</sup>

### CONCLUSION

The law of the river, coupled with the probability that the Colorado River Compact is immune from Commerce Clause scrutiny, creates serious problems for a group that is unlikely to befriend the Upper Basin Commissioners.<sup>115</sup> Legal problems aside, RCG's proposal fails to satisfy two of the prerequisites necessary for a viable water market: well defined and easily transferable rights.<sup>116</sup>

RCG's biggest practical problem is that water rights in the Upper Basin are not well defined.<sup>117</sup> It is difficult to ascertain how much water an Upper Basin user has for sale when Upper Basin rights are defined in terms of diversions rather than in terms of individual consumptive uses. The Upper Basin states measure their use at state lines rather than at the individual sites where water is consumed. Further, even though western states do purport to administer rights based upon consumptive use, regulation is often not strict.<sup>118</sup>

Water rights are not easily transferable either. As is often the case, a farmer will divert more water than is actually needed for irrigation. The rest of this water then returns to the stream where it is used downstream at another point of diversion. The farmer's actual consumptive use would have to be defined in the lease agreement to ensure that downstream users would not be shortchanged. RCG faces decisive barriers to its plans because individual consumptive uses are not presently quantified and there are widespread local traditions of unregulated consumptive uses.

One of the main criticisms of western water markets is that cities are often the only willing buyers and farmers or ranchers the only willing sellers. The absence of many buyers and sellers creates a monopoly situation in any market. Moreover, the lack of diversity in western water markets tends over the long term to effectuate a redistribution of wealth from the agricultural to the municipal sector.<sup>119</sup> The RCG proposal, which

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113. *Id.* at 106.

114. From a policy standpoint this is just because the territorial use provisions having historically protected the Upper Basin from the harshness of prior appropriation also mandate that the rancher not sell out to the Lower Basin user.

115. In fact at least two of the commissioners saw no difference between the RCG proposal and the previous Galloway proposal. See Resource Conservation Group *supra* note 26.

116. See Brajer, Church, Cummings, and Farah, *The Strengths and Weaknesses of Water Markets as They Affect Water Scarcity and Sovereignty Interests in the West*, 29 Nat. Res. J. 489,496 (1989).

117. See text *supra* at 19.

118. See R. Smith, *Troubled Waters: Financing Water in the West* 132 (1984).

119. See Brajer, Church, Cummings & Farah, *supra* note 116, at 496.

offers a temporary and rotational water leasing system, purports to mitigate the harshness of this redistribution. In fact, the RCG proposal standing alone will not create such a redistribution. As long as the farmers still farm, the tax base is not eroded and the Upper Basin economy remains healthy.

However, the purpose of the Compact was to protect the Upper Basin from the Lower Basin so that the Upper Basin could develop economically, and not just remain healthy. The right to water is a condition precedent to economic growth.<sup>120</sup> The RCG proposal, if allowed, would create a dangerous precedent threatening the Upper Basin's economic growth. Even the suggestion of such a proposal is easily perceived as a shift in the political equities which have for so long operated to separate the two basins' use of water.<sup>121</sup> Rather than rekindling such fears, RCG may well profit by avoiding the fight entirely.

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120. Weatherford & Jacoby, *supra* note 10, at 212.

121. *Id.*