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Interstate Compacts That Are for the Birds: A Proposal for Reconciling Federal Wetlands Protection with State Water Rights Through Federal- Interstate Compacts*

I. INTRODUCTION

A sense of time lies thick and heavy on such a place. Yearly since the ice age [the peat bog] has awakened each spring to the clangor of cranes. . . . The cranes stand, as it were, upon the sodden pages of their own history.

* * *

Our ability to perceive quality in nature begins, as in art, with the pretty. It expands through successive stages of the beautiful to values as yet uncaptured by language. The quality of cranes lies, I think, in this higher gamut, as yet beyond the reach of words.

Aldo Leopold¹

In 1850 Congress passed the General Swamp Land Act permitting states to select and acquire the unclaimed swampland within their boundaries.² Swampland was considered useless and Congress hoped that by giving it to the states, farmers would drain it and turn it into valuable farmland.³ The plan worked too well. As with many early land disposition schemes,⁴ the General Swamp Land Act was subject to

* Copyright © 1996 by Erik G. Davis. My working title was *Section 404: The Creature from the Federal Lagoon*. I also briefly considered calling this Comment simply *Swamp Thing*. I ruled both of these titles out, however, because I decided that for state water rights holders the phrase "federal wetlands protection" was at least as terrifying as anything that ever appeared in a Hollywood "B" movie.

I wish to express thanks to Professor Ray Jay Davis who terrified a generation of BYU law students until his retirement last year. This paper could not have been written without Professor Davis' insights, experience, and occasional terrorizing.

1. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 102-03 (Ballantine Books 1989) (1949).

2. General Swamp Land Act, ch. 84, 9 Stat. 519 (1850).

3. Dalana W. Johnson, *Saving the Wetlands from Agriculture: An Examination of Section 404 of the Clean Water Act and the Conservation Provisions of the 1985 and 1990 Farm Bills*, 7 J. LAND USE & ENV'T'L L. 299, 300 (1992) (citing S. REP. NO. 357, 101st Cong., 2d Sess. 215-16 (1990)).

4. Squatting on the public lands was so common in early American history that Congress finally capitulated and legalized the practice in the General Preemption Act, ch. 16,

rampant abuse and fraud. One land agent for the State of Mississippi allegedly "judged as swampland all tracts over which a boat could pass [so he] drove a work animal 'hitched to a canoe across thousands of acres' of pinelands at fairly high elevations, listed his selections and, though contested by the Federal government, they were finally patented to the state."⁵ The government originally intended to give away five to six million acres, but before the General Swamp Land Act was amended and finally repealed, more than eighty million acres of purported swampland had been selected, much of which was ultimately patented to the states and obtained by wealthy land speculators.⁶

In this century Congress has recognized the enormous ecological and hydrological value of these lands. A change of terminology reflects this new understanding. What were "swamplands" in the nineteenth century are now "wetlands." Wetlands are some of the richest and most biologically diverse ecosystems in nature,⁷ but their importance is more than just ecological. Modern legislation recognizes the important recreational and aesthetic values that wetlands represent, as well as their essential role in flood control and water quality management.⁸ Unfortu-

5 Stat. 453 (1841), an (unsuccessful) attempt to regulate squatting. GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 80-81 (3d ed. 1993).

Other major land disposition and reclamation schemes subject to abuse included the Homestead Act, ch. 75, 12 Stat. 392 (1862); the Graduation Act, ch. 244, 10 Stat. 574 (1854); the Desert Land Act, ch. 107, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. §§ 321-334 (1988)); the Kinkaid Act, ch. 1801, 33 Stat. 547 (1904) (*repealed* 1976); the Enlarged Homestead Act, ch. 160, 35 Stat. 639 (1909) (*repealed* 1976); the Pickett Act, ch. 421, 36 Stat. 847 (1910) (*repealed* 1943); and the Stock-Raising Homestead Act, ch. 9, 39 Stat. 862 (1916) (codified as amended at 43 U.S.C. §§ 299-301 (1988)). Most of these were repealed by the Federal Land Policy Management Act of 1976 (FLPMA) 43 U.S.C. §§ 1701-1784 (1988).

Grants to the railroads were so generous that the land disposition plan came to be known as "the Great Barbecue." COGGINS, *supra* at 97.

5. COGGINS, *supra* note 4, at 78 (citing PAUL GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 328 (1968)).

6. *Id.*

7. Michael R. Deland, *No Net Loss of Wetlands: A Comprehensive Approach*, 7 NAT. RESOURCES & ENV'T, Summer 1992, at 3; see also DAVID SALVESON, MITIGATING AND REGULATING DEVELOPMENT IMPACTS, 15 fig. 1.3 (1990).

8. Robert Beck cites what he calls "an exhaustive statement of wetland values" from an Illinois wetlands protection statute:

- (1) reducing flood damages by absorbing, storing and conveying peak flows from storms;
- (2) improving water quality by serving as sedimentation and filtering basins and as natural biological treatment areas;
- (3) providing breeding, nesting, forage and protective habitat for approximately 40 percent of the State's threatened and endangered plants and animals, in addition to other forms of fish, wildlife, waterfowl and shorebirds;

nately, support for these values came only after much of the nation's wetlands had disappeared. In the past 200 years more than half of the wetlands in the lower forty-eight states have been destroyed.⁹ Some states have lost over eighty percent of their wetlands.¹⁰ Predictably, this loss of habitat has drastically reduced migratory bird and waterfowl populations, which by 1989 reached their lowest numbers in recorded history.¹¹ While many species inhabit wetlands, waterfowl are often monitored particularly closely. This is because they are good "indicator species," species whose vitality—like the canary in the coal mine—is indicative of the general health of the entire ecosystem.

The federal government, belatedly recognizing the value of what it gave away 150 years ago, has in recent years developed a policy goal of "no net loss" of wetlands.¹² Any development projects that reduce the nation's total wetlands area must be offset by the creation of new wetlands.¹³ Various state and federal regulatory and non-regulatory schemes manifest this "no net loss" policy.¹⁴ Unfortunately, about

(4) protecting underground water resources and helping to recharge rivers, streams and local or regional underground water supplies;

(5) serving as recreational areas for hunting, fishing, boating, hiking, bird watching, photography and other uses;

(6) providing open space and aesthetic values, particularly in rapidly developing areas;

(7) providing unique educational and research opportunities because of their high diversity of plants and animals, their support for a high incidence of threatened and endangered species, and their function as a natural buffer for rivers, lakes and streams;

(8) supplying nutrients in freshwater food cycles and serving as nursery areas and sanctuaries for young fish; and

(9) helping to protect shorelines from the forces of erosion.

ILL. REV. STAT. ch. 96½, ¶ 9701-2(c), (cited in Robert E. Beck & C. Peter Goplerud III, *Wetlands Preservation*, 6 WATERS AND WATER RIGHTS 547, 548-49 (Robert E. Beck ed., 1991)).

9. Beck, *supra* note 8, at 548-49; *see also* Johnson, *supra* note 3, at 299.

10. Deland, *supra* note 7, at 3.

11. *See* Beck, *supra* note 8, at 556 n.53 (citing [Current Developments] *Env't Rep.* (BNA) 1433 (1989)).

12. Memorandum of Agreement, 55 Fed. Reg. 9210 (1990) (recording agreement between the Army Corps of Engineers and the Environmental Protection Agency to maintain a policy of "no net loss" of wetlands); North American Wetlands Conservation Act, Pub. L. No. 101-233, 103 Stat. 1968 (1989) (touted by President Bush as the first step in implementing a "no net loss" policy); *see also* Beck, *supra* note 8, at 548; Deland, *supra* note 7, at 3.

13. Memorandum of Agreement, *supra* note 12; *see generally* Margot Zallen, *The Mitigation Agreement—A Major Development in Wetland Regulation*, NAT. RESOURCES & ENV'T, Summer 1992, at 19.

14. Recent non-regulatory agricultural incentives, known as the "swampbuster" provisions, include the Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1566 (codified as amended in scattered sections of 7, 16, 19 and 42 U.S.C. (1988)), and the Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, 1990 U.S.C.C.A.N. (104 Stat.) 3359 (Title XIV of the Act codified at 16 U.S.C. §§ 3822-3824 (1991)) (amending

three-fourths of the remaining wetlands in the lower forty-eight states are now privately owned, largely because of the General Swamp Land Act and similar laws.¹⁵ Converting swampland to farmland typified public land policy throughout the nineteenth and early twentieth centuries. However, with the growing urgency of the wetlands situation, the federal government has increasingly regulated private wetlands and related water rights.¹⁶ Not surprisingly, those who own the regulated land or water rights generally oppose such federal regulation.

The federal government's principal regulatory tool for preserving wetlands and the focal point of the debate surrounding wetlands preservation is the Clean Water Act.¹⁷ Section 404 of the Act requires a permit from the Army Corps of Engineers to discharge any dredge or fill material in the nation's navigable waters (including wetlands),¹⁸ but section 404's application is much broader than the words "dredge and fill permitting" suggest. Much controversy has surrounded the expansion of federal regulatory jurisdiction over land use under section 404,¹⁹ but this Comment will deal less with land use conflicts than with water apportionment disputes, which if somewhat less common, are no less divisive. Many who hold state water rights have been particularly frustrated by the effect of federal wetlands regulation on interstate compacts.

The Constitution gives states the power to enter into compacts with other states, subject to the approval of Congress.²⁰ Compacts have been used to settle interstate conflicts throughout our country's history, but they were not used to resolve water allocation disputes until the early 1920s.²¹ The first interstate water compact was approved by Congress and written into law in 1925.²² This was the La Plata River Compact, signed by Colorado and New Mexico.²³ Professor Felix Frankfurter (later Justice Frankfurter) was so enamored with the idea that he published an article with James M. Landis that same year in the *Yale Law*

the Food Security Act of 1985). Other federal legislation has been enacted in the last decade aimed exclusively at protecting wetlands, especially the Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, 100 Stat. 3582 (1986), 16 U.S.C. §§ 3951-3956 (1991), and the North American Wetlands Conservation Act, Pub. L. No. 101-233, 103 Stat. 1968 (1989).

15. Deland, *supra* note 7, at 3; see also SALVESON, *supra* note 7, at 19 fig. 1.5.

16. Deland, *supra* note 7, at 3-4.

17. 33 U.S.C. §§ 1251-1387 (1988 & Supp. III 1991); see Beck, *supra* note 8, at 557.

18. 33 U.S.C. § 1344 (1988).

19. See, e.g., James W. Sanderson, *Section 404: Federal Interference with State and Local Land Use?* 7 NAT. RESOURCES & ENV'T, Summer 1992, at 6.

20. U.S. CONST. art. I, § 10, cl. 3.

21. Douglas L. Grant, *Water Apportionment Compacts between the States*, 6 WATERS AND WATER RIGHTS 549, 549 (Robert E. Beck ed., 1991).

22. *Id.*

23. La Plata River Compact, 43 Stat. 796 (Jan. 29, 1925).

*Journal*²⁴ in which they enthusiastically praised the notion of interstate compacts and expressed their hope that the use of such compacts would soon become general.²⁵ In the seventy-odd years since Frankfurter and Landis published their article, this hope has largely been realized as interstate water compacts have proliferated. There are now at least twenty-one interstate compacts apportioning the water rights to various rivers or river systems throughout the United States, and other compacts governing various aspects of water management.²⁶

This Comment examines the section 404 permitting process and how it affects interstate water allocations under interstate compacts. Part I discusses the section 404 permitting process, including jurisdictional disputes and the scope of the Clean Water Act. Part II examines particular water allocation problems that have arisen because of conflicts between federal wetlands preservation and state and local water laws. Part III examines how these conflicts affect interstate water allocation. Finally, Part IV proposes resolutions to these conflicts, concluding that federal-interstate water compacts are the best solution.

II. THE CORPS OF ENGINEERS AND THE SECTION 404 PERMITTING PROGRAM

*For [the whooping cranes], the song of the power shovel came near to being an elegy. The high priests of progress knew nothing of cranes, and cared less. What is a species more or less among engineers? What good is an undrained marsh anyhow?*²⁷

Until 1972 the role of the U.S. Army Corps of Engineers (the "Corps") was limited largely to improving navigation and rendering technical assistance to states for bridge and dam construction. Any contact the Corps had with wetlands consisted of simply draining swamps. In 1972 Congress passed amendments to the National Water Pollution Control Act which were intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²⁸ One of these amendments was the addition of section 404, which requires anyone who wishes to discharge dredged or fill material into the navigable waters of the United States to first obtain a permit from the

24. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925).

25. Grant, *supra* note 21, at 552.

26. *Id.* at 549-51.

27. LEOPOLD, *supra* note 1, at 107.

28. 33 U.S.C. § 1251(a) (1988).

Secretary of the Army through the Corps.²⁹ Five years later the 1972 Amendments became the Clean Water Act.³⁰

Early controversies surrounding section 404 concerned the jurisdiction of the Corps of Engineers' permitting program and the definition of "navigable waters" as used in section 404(a).³¹ Originally, the Corps was reluctant to apply the program vigorously and required section 404 permits only on traditionally navigable waters as interpreted under the River and Harbor Act of 1899,³² the Corps' original grant of jurisdiction.³³ In 1975 environmental groups sued the Secretary of the Army, forcing the Corps to expand its jurisdiction to include those waters included generally under the Clean Water Act's statutory definition in section 502(7).³⁴ This section defines navigable waters as "waters of the United States, including the territorial seas."³⁵ This broad definition significantly enlarged the Corps' jurisdiction. In subsequent regulations, the Corps interpreted "waters" to include wetlands³⁶ and wetlands adjacent to waters of the United States.³⁷ As one judge explained, the new definition put any "moist land adjacent to a creek" under the permitting jurisdiction of the Corps of Engineers.³⁸ It may appear that this regulation stretches the definition of "navigable waters of the United States" beyond all recognition. One should remember, however, that it traditionally takes very little water to navigate a boat across swamplands or wetlands in the United States.³⁹

Further litigation was necessary to define "dredge and fill material,"⁴⁰ "wetlands," and "adjacent wetlands." In the end, the Supreme Court also defined these terms broadly.⁴¹ In *United States v. Riverside*

29. *Id.* at § 1344(a). The Corps' authority to administer this program is based on the Refuse Act of 1899, 33 U.S.C. § 407, a piece of legislation that was discovered and resuscitated by environmental activists in the 1960s and used as a federal pollution control statute until passage of the Clean Water Act. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 9.03[2] (1994).

30. 33 U.S.C. §§ 1251-1387 (1988); see also SALVESON, *supra* note 7, at 29 fig 2.1.

31. 33 U.S.C. § 1344(a) (1988).

32. *Id.* at § 403.

33. Beck, *supra* note 8, at 558 (citing *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978)).

34. *Natural Resources Defense Council, Inc. v. Calloway*, 392 F. Supp. 685 (D.D.C. 1975).

35. 33 U.S.C. § 1362(7) (1988).

36. 33 C.F.R. § 328.3(a)(3) (1994).

37. *Id.* § 328.3(a)(7).

38. *United States v. Larkins*, 852 F.2d 189, 194 (1988) (Merritt, J., concurring).

39. See *supra* text accompanying note 5.

40. See, e.g., *Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. 525 (W.D. La. 1979) (holding that the clearing of vegetation from a periodically inundated area was subject to a § 404 permit).

41. See Beck, *supra* note 8, at 559-60.

Bayview Homes, Inc., the Supreme Court reversed a Sixth Circuit holding that would have restricted section 404's application to areas frequently flooded by navigable waters.⁴² Instead, the Court determined that Congress intended to apply the Clean Water Act as broadly as possible under the Commerce Clause.⁴³ Consequently, the Court upheld the Corps' definition of wetlands, which does not require flooding by surface waters, but only proximity to navigable waters and sufficient saturation to support typical wetland vegetation.⁴⁴ Broad readings of section 404's statutory language have expanded the Corps of Engineers' already expansive regulatory power over state water rights and land development activities. Section 404 provides some exemptions from the permitting requirements, principally for traditional agriculture and silviculture activities.⁴⁵ These exemptions, however, have been narrowly construed by the courts.⁴⁶

The Corps' section 404 permitting program is subject to federal environmental regulations, including the National Environmental Policy Act (NEPA)⁴⁷ and the Endangered Species Act (ESA).⁴⁸ For example,

42. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

43. *Id.* at 133. The congressional record seems clear on this point. A memorandum introduced by Congressman Dingell asserting Congress' broad powers under the commerce clause states:

[T]his new definition clearly encompasses all water bodies including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill. Indeed, the conference report states on page 144: "The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."

House Consideration of the Report of the Conference Comm., Oct. 4, 1972, S. REP. NO. 1, 93 Cong., 1st Sess. (1972), *reprinted in* 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS, 1972, at 250-51 (1973) (Statement of Rep. Dingell, *quoted in* TARLOCK, *supra* note 29, at § 9.03[2]).

44. 33 C.F.R. § 328.3(b) (1994). This section of the Corps' regulations defines wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." *Id.*

45. 33 U.S.C. § 1344(f)(1)(a) (1988).

46. *See, e.g.*, *United States v. Akers*, 785 F.2d 814 (9th Cir. 1986) (requiring a § 404 permit for a new dike and drainage system to convert former wetlands to agricultural uses); *see also* Beck, *supra* note 8, at 562; DAVID H. GETCHES, *WATER LAW* 387 (1990); TARLOCK, *supra* note 29, at § 9.06[2][a]; Johnson, *supra* note 3, at 304-06 n.54.

47. 42 U.S.C. §§ 4321-4370 (1986).

48. 16 U.S.C. §§ 1531-1543 (1988). Other federal laws that are incorporated by implication in § 404 include the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-662 (1988), Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1276 (1988), and the Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1988). *See also* FRANK J. TRELEASE & GEORGE A. GOULD, *WATER LAW* 759 (4th ed., 1986).

section 7 of the ESA requires federal agencies to preserve the habitat of threatened and endangered species.⁴⁹ This section was invoked to deny a permit for dam construction on Wildcat Creek in Colorado because the diversion would probably leave insufficient water in the Upper Platte River to protect critical whooping crane habitat far downstream in Nebraska.⁵⁰ Because a permit is required even for purely private dredge and fill projects in the navigable waters of the United States,⁵¹ section 404 insures a full environmental review of some activities of private parties not otherwise affected by federal environmental legislation.⁵²

Although recent years have seen a "greening" of the Corps of Engineers, the Corps' mission has historically concerned navigation and water resource development, not environmental protection. The environmental role traditionally belongs to the Environmental Protection Agency (EPA), which plays an important part in section 404 administration. Because of the EPA's decidedly environmentalist bent, developers and their advocates have been disturbed by the EPA's broad powers under section 404. The legislative history of the Clean Water Act indicates that the more development-minded House and the more environmentally-minded Senate compromised to use the EPA as a check on the Corps' power.⁵³ Subsections (b) and (c) of section 404 give the EPA broad powers of oversight to regulate the permitting program, which is essentially administered by the Corps of Engineers.⁵⁴ Under subsection (b), the Administrator of the EPA promulgates guidelines that the Corps must follow in issuing section 404 permits. The Clean Water Act requires these guidelines to be based on criteria set out for ocean discharges in subsection 403(c), which reflects mostly environmental concerns.⁵⁵ Under subsection 404(c), the EPA has power to review and

49. 16 U.S.C.A. § 1536 (1985).

50. *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985).

51. 33 U.S.C. § 1344 (1988).

52. GETCHES, *supra* note 46, at 388.

53. Sanderson, *supra* note 19, at 8.

54. 33 U.S.C. §§ 1344(b),(c) (1988).

55. 33 U.S.C. § 1343(c) (1988). The criteria to be taken into account include:

- (A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;
- (B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their by-products through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;
- (C) the effect of disposal of pollutants on esthetic, recreation, and economic values;
- (D) the persistence and permanence of the effects of disposal of pollutants;
- (E) the effect of the disposal at varying rates, of particular volumes and concentrations of pollutants;

veto the Corps' decisions to issue dredge and fill permits. Although the Corps vigorously contends that EPA vetoes have little effect on its permitting decisions,⁵⁶ some critics claim that the EPA is biased against development interests and uses its veto power as a "vehicle for driving the entire Section 404 program from the tail-end of the process."⁵⁷

III. HOW FEDERAL WETLANDS PROTECTION AFFECTS STATE WATER RIGHTS

The county records may allege that you own this pasture, but the plover airily rules out such trivial legalities. He has just flown 4,000 miles to reassert the title he got from the Indians, and until the young plovers are a-wing, this pasture is his, and none may trespass without his protest.

* * *

*In farm country, the plover has only two real enemies: the gully and the drainage ditch. Perhaps we shall one day find that these are our enemies too.*⁵⁸

A. Does Section 404 Actually Affect State Water Rights?

The extent to which section 404 actually affects water allocation under state water law is the subject of some controversy. Dan Tarlock has argued that when combined with the Endangered Species Act, the effect of section 404 on state water diversion and impoundment projects is so substantial that it creates a de facto federal water right—what he calls a federal "regulatory property right."⁵⁹ Federal regulatory rights, to the extent that they are recognized at all today, are acknowledged to be merely a "conceptual analysis"⁶⁰—a convenient way of talking about the federal government's regulatory power over state water rights. But in the late 1970s, the Solicitor of the Department of the Interior briefly asserted the actual existence of federal "non-reserved" water rights

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

56. Lance D. Wood, *Section 404: Federal Wetlands Regulation Is Essential*, 7 NAT RESOURCES & ENV'T, Summer 1992, at 7, 55.

57. William B. Ellis, *Section 404(c): Where is the Balance?*, 7 NAT RESOURCES & ENV'T, Summer 1992, at 25, 65.

58. LEOPOLD, *supra* note 1, at 37-38.

59. A. Dan Tarlock, *The Endangered Species Act and Western Water Rights*, 20 LAND & WATER L. REV. 1, 1 (1985).

60. *Id.* at 26.

"arising out of land management functions of the federal agencies."⁶¹ While the Secretary no longer maintains this position, federal agency authority over private water rights remains a difficult issue.

Certainly in 1972 when Congress enacted section 404 to amend the Federal Water Pollution Control Act it did not intend to create a new federal water right. In fact, Congress did not necessarily intend to affect water allocation *quantities* at all; the legislation's primary purpose was to improve the *quality* of the nation's waters.⁶² If Congress foresaw any effects on private water rights, these effects must have appeared minor and incidental. In fact, during the first few years after its passage, section 404's impact on state and local water law was not fully apparent.⁶³ It was not until the late 1970s when the EPA had completed its regulatory guidelines and section 404 began to be used with other environmental statutes that the new law's use as an environmental regulatory tool became apparent.⁶⁴

There is still debate about whether section 404's effect on state water rights is more than minimal.⁶⁵ Clearly what Frank Trelease argued regarding federal reserved rights cannot be claimed for the section 404 program. Trelease wrote in 1977 that water resource developers' fears about federal reserved rights ultimately amounted to little more than "crying wolf."⁶⁶ But while wetlands regulation and federal reservations

61. Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and Bureau of Land Management, 86 Interior Dec. 553 (1979), (cited in Lawrence MacDonnell, *Federal Interests in Western Water Resources: Conflict and Accommodation*, 29 NAT. RESOURCES J. 389, 398 (1989)). This statement, known as the Krulitz opinion, was essentially withdrawn after Secretary Watt came to the Department of the Interior on the basis of a study issued by the Department of Justice concluding that no federal water rights exist under FLPMA or the Taylor Grazing Act. Supplement to Solicitor Opinion No. M-36914 (Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and Bureau of Land Management), 88 Interior Dec. 253 (1981), cited in MacDonnell, *supra* at 398. To my knowledge federal regulatory water rights have not been reasserted since the Krulitz administration.

62. See Clean Water Act, 33 U.S.C. § 1251(a) (1988); Sanderson, *supra* note 19, at 6, 8-9.

63. Lawrence MacDonnell remarks that "[m]uch has been written about the many ways in which water quality regulation could affect the availability of water for consumptive use. In fact there has been surprisingly little direct conflict along these lines." MacDonnell, *supra* note 61, at 400. However, whether "surprisingly little" means that there is in fact little conflict or simply that the conflicts resulting from § 404's implementation have been somewhat less catastrophic than anticipated is unclear. In fact, and as MacDonnell points out, it is the indirect effects of the Clean Water Act, among which he includes the § 404 permitting program, that have raised problems. *Id.*

64. See Ellis, *supra* note 57, at 63.

65. See Sanderson, *supra* note 19; Wood, *supra* note 56.

66. Frank J. Trelease, *Federal Reserved Rights Since PLLRC*, 54 DENVER L.J. 473, 492 (1977). Trelease points out that as far as federal reserved rights go, "not a single case of harm has been reported, that 'for all the outcry . . . not one state, not one county, not one

are similarly benign in some ways—both are typically non-consumptive, instream uses—wetlands differ from reserved rights in other important ways. For instance, they are not typically limited to mountainous upstream areas. But most importantly, unlike federal reserved rights, section 404 has in fact been invoked to protect wetlands at the expense of various water development plans. Still, it is clear that the program has not made development of water and land resources impossible.

Lance Wood, chief counsel on Environmental Law and Regulatory Programs for the Corps, argues that the section 404 program is typically deferential and that it interferes with state and local laws only when they clearly conflict with federal interests.⁶⁷ Of the more than 90,000 projects the Corps reviews each year, only about 500 are denied a section 404 permit.⁶⁸ Wood also argues that the EPA's influence over the Corps permit decisions is slight to non-existent. Since the creation of the section 404 permitting program in 1972, the EPA had, as of 1992, exercised its veto power a total of only eleven times, and the Corps claims that these decisions have had little impact on their permitting program.⁶⁹

On the other hand, critics of the section 404 program claim that "only the naive would conclude that EPA is not . . . intending the [veto] action to 'drive' the program."⁷⁰ James Sanderson argues that judicial glosses on section 404 have allowed the EPA to extend the jurisdictional and theoretical reach of the statute far beyond the simple water quality goals that Congress intended to address when it originally passed the National Water Pollution Control Act amendments in 1972.⁷¹ Others complain that the courts and federal agencies have failed to balance environmental concerns with "social interests" (read "development interests") in the way that Congress intended when it split the permitting authority and the veto power between the Corps of Engineers and the

municipality, not one irrigation district, not one corporation, not one individual has come forward to plead and prove that the United States . . . has destroyed any private right." *Id.* at 491 (quoting *Hearings on S. 1275 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs*, 88th Cong., 2nd Sess. 39 (1964) (Statement of Senator Clifford P. Anderson)). In 1988 John Leshy reconfirmed that what Trelease recognized in 1977 is still true today, and particularly so in the case of federal wilderness area reserved rights. For all the concern about federal non-Indian reserved rights the reservation of such rights has had an extremely minimal effect on state water allocation. John D. Leshy, *Water and Wilderness/Law and Politics*, 23 *LAND & WATER L. REV.* 389 (1988).

67. Wood, *supra* note 56, at 10.

68. *Id.* at 54.

69. *Id.* at 55.

70. Sanderson, *supra* note 19, at 9.

71. *Id.* at 54.

EPA under section 404(c).⁷² William Ellis points out that while EPA vetoes of Corps permitting decisions are rare (he counts twelve since 1972),⁷³ this is due more to delays in promulgating EPA regulations than to any kind of agency restraint.⁷⁴ He also notes that "the last five EPA vetoes have all been public water resource projects,"⁷⁵ and concludes that "EPA's vetoes of these projects plainly reveal its current domination of both the Corps and the section 404 program."⁷⁶

Congress was aware of the potential for conflict with state water laws when it passed the Clean Water Act. The issue is addressed explicitly in section 510(g) of the Act, which recognizes state water rights only to the extent of creating an exception to them in the Act: "*Except as expressly provided in this chapter, nothing . . . shall . . . be construed as impairing or in any manner affecting any right of jurisdiction of the States with respect to the waters . . . of such States.*"⁷⁷

In 1977, legislation known as the Wallop Amendment⁷⁸ was added to the policy section of the Clean Water Act with the purpose of defusing tension between state water law and federal regulatory powers under the Clean Water Act. It states:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent,

72. Ellis, *supra* note 57, at 28.

73. *Id.* at 64. Wood counts eleven. See *supra* note 56 and accompanying text. This inconsistency can be explained by the fact that the Ware Creek Reservoir Project was actually vetoed twice because of judicial invalidation of the first veto. Ellis, *supra* note 57, at 64.

74. Ellis, *supra* note 57, at 62.

75. *Id.* at 64. Interestingly, four of these vetoes have resulted in litigation: (1) *City of Alma v. United States*, 744 F. Supp. 1546 (S.D. Ga. 1990) (contesting EPA veto of lake construction, Lake Alma, Bacon County, Georgia, 54 Fed. Reg. 6749 (Feb. 14, 1989)); (2) *James City County v. EPA*, 758 F. Supp. 348 (E.D. Va. 1990) (contesting EPA veto of municipal water supply project, Ware Creek Reservoir, James City County, Virginia (July 10, 1989), 54 Fed. Reg. 33,608 (Aug. 15, 1989)); (3) *Alameda Water & Sanitation District v. Reilly*, No. 91-M-2047 (D. Colo. filed Nov. 22, 1991) (contesting EPA veto of a municipal water supply project, Two Forks Dam and Reservoir, Water supply impoundment, Jefferson County, Colorado (Nov. 23, 1990), 56 Fed. Reg. 76 (Jan. 2, 1991)); (4) *James City County v. EPA*, 12 F.3d 1330 (4th Cir. 1993) (On remand, the James City County Project, *supra* number (2), was vetoed again by the EPA. Ware Creek Reservoir, James City County, Virginia (March 27, 1992)).

76. Ellis, *supra* note 57, at 64.

77. 33 U.S.C. § 1370(2) (1988) (emphasis added).

78. 33 U.S.C. § 1251(g) (1988).

reduce, and eliminate pollution in concert with programs for managing water resources.⁷⁹

Shortly after the passage of this amendment a Corps decision to deny a section 404 permit for a dam on Wildcat Creek was challenged as, among other things, a federal intrusion upon state water allocation law, contrary to the policy statement in section 510(g) of the Clean Water Act.⁸⁰ The Tenth Circuit Court held that as a statement of policy, the Wallop Amendment "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly stated purpose."⁸¹

The Ninth Circuit Court reached the same conclusion in *United States v. Akers*.⁸² In that case the Corps had required a California farmer to obtain a section 404 permit before cultivating a wetlands area on his farm, but the permit requirement infringed on the farmer's water rights under state law.⁸³ The court held that "any incidental effect on Akers' rights to state allocated water from the Pit River is justified because protection of Big Swamp is the type of legitimate purpose for which the act was intended."⁸⁴

While encouraging cooperation between federal and state agencies, the Wallop Amendment, as currently understood by the courts, does not prevent federal agencies from interfering with state water allocation if the agency can show a legitimate regulatory purpose for its action.

Another subject of controversy is the extent of EPA control over the section 404 process. This includes its authority to promulgate the regulations for the permitting program and its power to veto decisions of

79. *Id.*; cf. THE BOOK OF MORMON, 3 Nephi 11: 28-30:

. . . And there shall be no disputations among you, as there have hitherto been; neither shall there be disputations among you concerning the points of my doctrine, as there have hitherto been.

For verily, verily I say unto you, he that hath the spirit of contention is not of me [Jesus Christ], but is of the devil, who is the father of contention, and he stirreth up the hearts of men to contend with anger, one with another.

Behold, this is not my doctrine, to stir up the hearts of men with anger, one against another; but this is my doctrine, that such things should be done away.

Unfortunately, the policy expressed in the Wallop amendment has fared no better than the doctrine expressed in Jesus' admonition to the Nephites. The broad language of both has left loopholes that have been exploited by the truly contentious.

80. *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985).

81. *Id.* at 513 (quoting *Connecticut Light and Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 527 (1945)).

82. 785 F.2d 814 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 107 (1986).

83. *Id.* at 817.

84. *Id.* at 821 (citing statements of Senator Wallop from the legislative history, 3 Leg. Hist. 532, Senate Debate, Dec. 5, 1977).

the Corps granting dredge and fill permits.⁸⁵ Though exercised rarely, many believe the EPA's veto power has a tremendous effect on all section 404 permit decisions.⁸⁶ This could signify an increasing impact of section 404 on state water rights, since the EPA's five most recent vetoes have all involved public water projects.⁸⁷ A 1994 case highlights the regulatory power of the EPA under section 404. In *James City County v. EPA*, the Fourth Circuit Court upheld an EPA decision to veto a section 404 permit for a municipal water supply reservoir. The court held that the EPA's veto was valid even if based on purely environmental concerns, without regard for the county's water needs.⁸⁸

Plaintiffs in many of the cases challenging both EPA and Corps decisions have an uphill battle because they must usually show the agency's action was "arbitrary and capricious [or] an abuse of discretion."⁸⁹ This is a difficult standard of review for any plaintiff to meet.⁹⁰

B. Section 404 Permit Denials and Regulatory Takings Claims

Some landowners and water rights holders have attempted to limit section 404's effect on private rights by claiming that the denial of a section 404 permit constitutes a taking of property without compensation contrary to the Fifth Amendment.⁹¹ Since at least 1922 the Supreme Court has recognized regulatory takings—cases in which regulation of property becomes so severe that a property interest is infringed upon and compensation must be paid.⁹² But claims that section 404 permit denials constitute a regulatory taking have been largely unsuccessful.⁹³ Beck notes that, "courts faced with the [takings] question in the section 404 context have found either minimal depreciation of the property or no depreciation resulting from the denial of the permit. These cases emphasize the idea that a property owner is not guaranteed the highest

85. See Ellis, *supra* note 57.

86. *Id.* at 64-65.

87. *Id.* at 64.

88. *James City County v. EPA*, 12 F.3d 1330, 1335 (4th Cir. 1993), *cert. denied*, 115 S. Ct. 87 (1994).

89. Administrative Procedure Act, 5 U.S.C.A. § 706(2)(A) (1986).

90. See, e.g., *James City County*, 12 F.3d at 1337-39.

91. See Want, *The Taking Defense to Wetlands Regulation*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 10, 169 (1984).

92. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

93. *Smithwick v. Alexander*, 673 F.2d 1317 (4th Cir. 1981); *Jentgen v. United States*, 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

and best use of property."⁹⁴ The few successful takings claims based on a permit denial have involved a valid pre-existing land use disallowed by the imposition of the section 404 permitting program. None of them has involved a claim for the taking of a water right.⁹⁵

In 1992 the Supreme Court revisited the regulatory takings question in *Lucas v. South Carolina Coastal Council*.⁹⁶ Justice Scalia articulated the general rule in this case by stating that "[w]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."⁹⁷ The requirement that *all* beneficial uses be destroyed by the state action precludes most takings claims under section 404. But the question remains as to whether water rights holders under a prior appropriation scheme have a valid claim. Courts generally hold that water rights are vested rights in western states;⁹⁸ if federal regulations under Clean Water Act section 404 prohibit use of a water right, the right holder may have a takings claim against the government.⁹⁹

However, even if a water right holder could prove he or she had been denied all economically beneficial uses of the water, a second hurdle must be overcome to prove a taking. Courts have long recognized a nuisance exception to the general rule of takings, by which governments may forbid harmful uses of property under their police power. In *Lucas* the Court narrowed this exception to cases in which the regulation "does not proscribe a productive use that was previously permissible under relevant property and nuisance principles."¹⁰⁰ To explain how this rule would work, Scalia writes "the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land."¹⁰¹ This would seem to put section 404 permitting within the nuisance exception to takings claims, but by limiting the exception to

94. Beck, *supra* note 8, at 572.

95. 1902 Atlantic, Ltd. v. Hudson, 574 F. Supp. 1381 (E.D. Va. 1983); 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575 (1992); Florida Rock Indus. v. United States, 31 Env't. Rep. Cas. (BNA) 1835 (Cl. Ct. 1990); Loveladies Harbor, Inc. v. United States, 31 Env't. Rep. Cas. (BNA) 1847 (Cl. Ct. 1990); Formanek v. United States, 26 Cl. Ct. 332 (1992). *But see* Ciampitti v. United States, 32 Env't. Rep. Cas. (BNA) 1608 (Cl. Ct. 1990); Dufau v. United States, 32 Env't. Rep. Cas. (BNA) 1524 (Cl. Ct. 1990).

96. 112 S.Ct 2886 (1992).

97. *Id.* at 2895.

98. Zachary L. McCormick, *Interstate Water Allocation Compacts in the Western United States—Some Suggestions*, 30 WATER RESOURCES BULL. 385, 394 (1994).

99. *Id.*

100. 112 S. Ct. at 2901.

101. *Id.* at 2900.

common law principles of nuisance, the Court apparently excluded exceptions to the takings law based on modern congressional notions of harmful activities.¹⁰²

In the case of wetlands regulation, the common law would thus uphold Corps permit decisions intended to protect against such hydrological threats as undue flooding or erosion, but might not find a nuisance exception in Corps decisions and EPA vetoes aimed at protecting against ecological threats. This may leave section 404 permit denials open to takings claims when they are made in the interest of environmental and other more esoteric values associated with wetlands. Especially vulnerable may be decisions such as the EPA's veto of the Ware Creek municipal water development project, which was justified on purely environmental grounds.¹⁰³ Some commentators have questioned whether the *Lucas* decision would apply to takings claims for natural resources since these resources are generally controlled by federal law rather than by common law.¹⁰⁴ But water is an exception. It is still controlled by state law and might therefore be subject to regulatory takings claims, at least in western states.¹⁰⁵ However, in general it remains true that section 404 does not easily lend itself to takings claims for water rights.¹⁰⁶

Whether one chooses to characterize section 404's impact on state water law as "minimal" or "excessive," it is undeniable that conflicts between state law and wetlands protection under section 404 have generated abundant litigation. The case law growing out of the Clean Water Act's section 404 has only exacerbated the fears of most state water rights holders and their advocates.

102. *Id.* at 2903 (Kennedy, J., concurring) ("[The majority's emphasis] on the common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations, whatever their source.").

103. *James City County v. EPA*, 12 F.3d 1330 (4th Cir. 1993). This particular case probably would not give rise to a takings claim because it took place in Virginia and involved a riparian water right. However, if the Corps or the EPA follow this case in the West, the regulatory takings question may arise.

104. See *COGGINS*, *supra* note 4, at 249-51.

105. See *Fallini v. Hodel*, 963 F.2d 275 (9th Cir. 1991).

106. *But see TARLOCK*, *supra* note 29, at § 9.06[1] (arguing that "[a] severe curtailment of an existing right could be a compensable taking," but admitting that "most challenges will fail because they are not ripe or the federal government has sufficiently accommodated the state right").

IV. HOW FEDERAL WETLANDS PROTECTION AFFECTS STATE WATER ALLOCATIONS UNDER INTERSTATE COMPACTS

*[O]n cool August nights you can hear their whistled signals as [the young plovers] set wing for the pampas, to prove again the age-old unity of the Americas. Hemisphere solidarity [and interstate solidarity] is new among statesmen, but not among the feathered navies of the sky.*¹⁰⁷

A. *The Interstate Compact*

Because the waters of most rivers are not confined within the borders of any one state, and because water law is predominantly state law, conflicts over the allocation of interstate streams are particularly difficult to resolve. Various methods of resolving interstate water disputes have evolved, but it is generally conceded that the most effective means of allocating water between states is the interstate compact.¹⁰⁸

Congress can allocate the waters of interstate streams, but it has done so only rarely and with, at best, mixed results.¹⁰⁹ Statutory allocation is not ideal, first because it takes the issue completely out of the hands of the states, and second because a congressional statute gives the allocation such permanence and force that inequities or outright stupidities written into the law are almost impossible to remedy.¹¹⁰ Gratefully, statutory

107. LEOPOLD, *supra* note 1, at 38.

108. Jerome C. Muys, *Allocation and Management of Interstate Water Resources: The Emergence of the Federal-Interstate Compact*, 6 J. INT'L L. & POL'Y 307, 311 (1976); George W. Sherk, *Resolving Interstate Water Conflicts in the Eastern United States: The Re-Emergence of the Federal-Interstate Compact*, 30 WATER RESOURCES BULL. 397, 406 (1994).

109. See Boulder Canyon Project Act, 45 Stat. 1057 (1928), 43 U.S.C. §§ 617-617t (effecting a statutory apportionment of the waters of the Colorado River between Upper Basin states (Colorado, Utah, Wyoming) and Lower Basin states (Arizona, California, Nevada)); Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, 104 Stat. 3295 (1990) (apportioning the rights of the Truckee River Basin between California, Nevada, and federal interests represented by the Pyramid Lake band of the Paiute Nation).

110. The Boulder Canyon Project Act was "intended to put an end to the long-standing dispute over Colorado River Waters." *Arizona v. California*, 373 U.S. 546, 560 (1963). Instead it was the foundation for a whole new line of cases with names that sound like PAC 10 football matchups. *Arizona v. California*, is just one instance.

Another recent example of the drawbacks inherent in statutory apportionment has come with the growth of Las Vegas. Because the Boulder Canyon Project Act allocates water from the Colorado River but not its tributaries, Las Vegas may be forced to construct a diversion from the Virgin River at enormous waste and expense and at the jeopardy of an endangered species, the Virgin River Chub. If not for the terms of the statutory apportionment, Las Vegas could "wheel" the same water through Lake Mead at a fraction of the cost. See Ryan Dennett, *Las Vegas and the Virgin River: Cashing in on a Jackpot in the Southern Desert* 28-31 (Dec. 16, 1994) (unpublished student paper, on file at the J. Reuben Clark Law School Library).

allocation has been used only when states are completely unable to reach a satisfactory agreement on their own.¹¹¹ Judicial solutions, including adjudication or litigation before the Supreme Court, tend to be equally slow and possibly more expensive.¹¹² The Supreme Court's hesitancy to involve itself in fractious interstate water controversies is understandable, and the Court has acknowledged that litigation is really a fairly blunt instrument unsuited for the extremely complex factual considerations, changing circumstances and unique local issues that interstate water allocation requires.¹¹³

Allocating interstate water rights through compacts has numerous advantages, two of which Felix Frankfurter and James Landis recognized in 1925.¹¹⁴ First, because the negotiation process that leads to the adoption of a compact is unconstrained by strict legal rules, compacts permit parties to reach a mutually beneficial "sensible compromise" outside the adversarial context of the courtroom.¹¹⁵ Second, compacts are more versatile and better able to adjust to changing circumstances than a judicial decision allocating water rights could ever be.¹¹⁶ This is particularly true of water compacts, since many compacts—nearly two-thirds of the existing apportionment compacts—provide for the creation of a perpetual compact commission to administer the agreement.¹¹⁷ Third, the establishment of compacts helps stabilize ownership rights in the water of interstate streams, making investment less risky and thus providing for the full development of interstate water resources.¹¹⁸ In

111. Both the Boulder Dam Project Act and the Truckee-Carson-Pyramid Lake Water Rights Settlement Act were passed only after literally decades of negotiations were unable to bring the various parties to an agreement.

112. GETCHES, *supra* note 46, at 402-03; Muys, *supra* note 108, at 310-11.

113. In *Nebraska v. Wyoming* the Court bemoaned the inadequacy of the judicial system to resolve interstate water controversies:

[T]hese controversies between the States over the waters of interstate streams "involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power."

325 U.S. 589, 616 (1945), *cited in* Muys, *supra* note 108, at 310-11.

114. Frankfurter & Landis, *supra* note 24.

115. *Id.* at 706 (quoted in Grant, *supra* note 21, at 552).

116. *Id.* at 701, 707 (also quoted in Grant, *supra* note 21, at 552).

117. Grant, *supra* note 21, at 559 (citing Carver, *Interstate Compacts Appendix*, in *NEW SOURCES OF WATER FOR ENERGY DEVELOPMENT AND GROWTH: INTERBASIN TRANSFERS* (Natural Resources Law Center, University of Colorado School of Law, June 7-10, 1982).

118. *See* Grant, *supra* note 21, at 573.

the cases of the Colorado River and the Snake River, Congress made the establishment of an interstate agreement a precondition to its funding the development of the river.¹¹⁹

B. Recent Challenges to Interstate Compacts

Recently, however, some have questioned the ability of interstate compacts to accomplish the ends that Frankfurter and Landis found so valuable.¹²⁰ The development of the federal reserved rights doctrine,¹²¹ and increasing federal regulatory power over the nation's waters—environmental regulations in particular—have created a serious challenge for many interstate water compacts. A good example of such a challenge is the Clean Water Act's section 404 permitting program.

Because interstate compacts usually incorporate state water law in their allocations, section 404's impacts on individual water rights also affect water allocation under interstate compacts. Water users in an upstream state may be forced to let their allocation run by their land and out of the state, thus upsetting not only their plans and expectations, but also the balance achieved between states by compact.

In only one reported instance has wetlands preservation under section 404 of the Clean Water Act interfered with the water allocation of an interstate compact.¹²² One of the arguments raised by the Colorado irrigation company in *Riverside* was that the section 404 permit denial would prevent Colorado from diverting and using the water allocated to it under the South Platte River Compact.¹²³ The district court held that Congress has the power to enact legislation that conflicts with and overrides a prior compact, even if its effect is to alter interstate water compact allocations.¹²⁴ But Judge McKay's circuit court opinion specifi-

119. *Id.*; see also Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 48 (1966) (suggesting that "[m]ost compacts" were negotiated in an effort to obtain "federal benefits . . . contingent upon agreement being reached"); Blaine Cannon, *The Snake River Compact: Facing an Uncertain Future*, 2 (Dec. 16, 1994) (unpublished student paper, on file at the J. Reuben Clark Law School Library) (noting that the Snake River Compact was negotiated after the federal government made it a prerequisite to any federal funding for construction of the Palisades dam) (citing Letter from R.J. Newell, Federal Representative, Snake River Compact Commission, to R.F. Bessey, Chairman, Pac. Northwest Field Committee, *Department of the Interior* 2 (Dec. 13, 1949) (copy on file with Blaine Cannon)).

120. Tarlock, *supra* note 59, at 24-25.

121. See *United States v. Winters*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963). See LEONARD RICE & MICHAEL D. WHITE, *ENGINEERING ASPECTS OF WATER LAW* 108-11 (1987) (discussing the development of the federal "reserved rights" doctrine).

122. *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985).

123. 758 F.2d at 513-14. It has been suggested by some commentators that the invocation of the ESA and § 404 was simply a device used by Nebraska farmers to circumvent the interstate allocation under the agreement. Tarlock, *supra* note 59, at 20.

124. 758 F.2d at 589-90.

cally refuses to address the question of compact preemption and finds for the Corps on other grounds.¹²⁵

That congressional legislation can supersede an interstate compact seems consistent with the theory of interstate compacts.¹²⁶ Felix Frankfurter and James Landis argue that when giving congressional approval to interstate compacts:

Congress does not surrender any of its powers; it merely finds no occasion for its present exercise of them. There is, therefore, no "delegation" of its power in any legally significant use of the term. But Congress does not foreclose the future. If and when circumstances which now call for solution through compact change, Congress is wholly free to assume control.¹²⁷

Although it has been argued that Congress should be bound by an interstate compact it ratified, the Supreme Court answered the question unequivocally in *Pennsylvania v. Wheeling and Belmont Bridge Co.*¹²⁸ "Clearly not. Otherwise Congress and two states would possess the power to modify and alter the Constitution itself."¹²⁹

The *Wheeling* decision specifically precluded enforcement of the compact when its effect would have limited Congress' power under the Commerce Clause; it does not necessarily mean that all compacts are preemptable. However it probably does mean that water allocation compacts can be preempted, since the Supreme Court's decision in *Sporhase v. Nebraska*¹³⁰ clearly makes state water rights subject to congressional control under the negative commerce clause.¹³¹ One must assume that an interstate compact provides little protection for state water rights against congressional interference.¹³² Dan Tarlock explains:

[S]tate interests recognized in a compact may be subject to federal policies articulated after the compact was negotiated. The federal government has the power to apportion interstate waters, and therefore no state rights are vested against federal apportionment. Any state water rights, be they based on state law or an interstate compact,

125. *Riverside Irr. Dist. v. United States*, 758 F.2d 508, 514 (10th Cir. 1985) ("[A] decision on the question of the impact of the interstate compact would be premature.").

126. Frankfurter & Landis, *supra* note 24, at 685.

127. *Id.* at 726-27.

128. 59 U.S. 421 (1855).

129. *Id.* at 433.

130. 458 U.S. 491 (1982).

131. Tarlock, *supra* note 59, at 24.

132. Grant, *supra* note 21, at 556.

therefore remain subject to subsequent diminution by Congress, if Congress decides to use this power.¹³³

Though traditionally deferential to state water law, Congress could preempt state law under the Commerce Clause. The *Riverside* decisions indicate that water allocations under congressionally approved interstate compacts "may not be as firm as they were once thought to be."¹³⁴ Interstate compacts lacking congressional approval, like the compacts between California and Nevada allocating the water of the Truckee River in the Reno-Tahoe area, are even less reliable. These compacts are subject not only to congressional preemption,¹³⁵ but also to the regulations of federal agencies.¹³⁶

Ultimately, the question of whether federal wetlands regulation significantly burdens state water rights is largely academic; any interference with state rights is important to the extent that landowners and water rights holders think it poses a threat to their rights. The perceived threat of a section 404 permit denial creates something analogous to a cloud on private title to water rights. Good water policy should recognize that the threat itself, despite, or even because of, the fact that it is exaggerated, may significantly impact the efficient development of water resources. The threat of regulatory interference decreases the value of state water rights insofar as potential developers think the threat is real.

What is the solution to this difficult problem? Reducing federal regulation of state water under section 404 is not the answer. Even if Congress could be persuaded to amend section 404, or if the courts could be persuaded to read the statute more narrowly—and they have made it emphatically clear that they have no such intention—an effort to circumvent wetlands protection would be counterproductive. As frustrating as it may be to private developers faced with a section 404 permit denial, wetlands represent a valuable and increasingly rare national treasure, well worth the price of their protection. Instead of trying to circumvent federal regulations or have them repealed, lawyers and state water administrators should direct their efforts toward creating the

133. Tarlock, *supra* note 59, at 25.

134. *Id.* at 24 n.119.

135. See Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, 104 Stat. 3294 (1990), discussed in Charles Harlow, If At First You Don't Succeed: Resolving Water Quality Issues in the Lake Tahoe Basin Through Interstate Allocation and Regional Development Compacts 12 (Dec. 16, 1994) (unpublished student paper, copy on file at the J. Reuben Clark Law School Library).

136. *E.g.*, Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984) (upholding a decision of the Secretary of the Interior requiring the release of storage water intended for municipal use in order to maintain sufficient water levels in Pyramid Lake to preserve the endangered lahontan cutthroat trout).

maximum amount of stability in water rights while allowing for the possibility of federal interference with those rights. This Comment supports the proposition that interstate compacts, or more particularly, federal-interstate compacts, create one of the best opportunities to achieve this end.

V. AN INTERESTS-BASED APPROACH TO WETLANDS PROTECTION

*Industrial landowners and users . . . are inclined to wail long and loudly about the extension of government ownership and regulation to land, but . . . they show little disposition to develop the only visible alternative: the voluntary practice of conservation on their own lands. When the private landowner is asked to perform some unprofitable act for the good of the community, he today assents only with outstretched palm. If the act costs him cash this is fair and proper, but when it costs only fore-thought, open-mindedness, or time, the issue is at least debateable.*¹³⁷

A. Is Federal Regulation Really Necessary?

It has been suggested that perhaps the best way to protect state and local water rights and land use from federal wetlands regulation is to put the permitting program in the hands of the states.¹³⁸ In fact, subsections (g) through (i) of section 404¹³⁹ provide for state administration of the program upon approval by the EPA, but because the Corps must retain jurisdiction over actually navigable waters, this amounts to only a partial delegation of federal authority, and only one state, Michigan, has chosen this route.¹⁴⁰ Some argue that federal standards should be relaxed to facilitate state administration of the program, but there are good reasons for preserving federal control over the section 404 permitting process. Many of the values represented in wetlands are federal and interstate in nature.¹⁴¹ Historically, state and local water users have tended to ignore interstate and national interests in wetlands preservation and have pursued their own interests in development.¹⁴² As a result, the federal government has assumed many of the functions necessary to protect these vital ecosystems.¹⁴³

137. LEOPOLD, *supra* note 1, at 50.

138. TRELEASE & GOULD, *supra* note 48, at 760; *see also* Sanderson, *supra* note 19.

139. 33 U.S.C. §§ 1344(g)-(i) (1988).

140. 49 Fed. Reg. 39,012 (1984).

141. Wood, *supra* note 56, at 10-11.

142. *Id.* at 11.

143. *Id.*

1. *The interested parties*

State regulatory commissions that administer interstate compacts and states that contemplate drafting interstate water compacts need to be aware of the possibility that water rights allocated under interstate compacts may be disrupted by federal environmental regulations, including wetlands regulation under section 404. For an interstate compact to be truly effective it must be comprehensive—that is, it must deal with all aspects of water regulation within the river system.¹⁴⁴ This means the agreement should cover groundwater¹⁴⁵ and atmospheric water,¹⁴⁶ as well as surface water. It also means that compacts should recognize and address water quantity and water quality issues, as well as related environmental interests. An interstate compact cannot pretend to be comprehensive unless it addresses federal rights—both reserved rights and regulatory powers such as those administered under section 404 of the Clean Water Act. New interstate compacts should be drafted and existing compacts should be amended to provide maximum stability to individual water rights while preserving the equitable allocation of water among compact states. These provisions must be broad enough to deal both with the effects of current regulatory programs such as section 404, and with the possibility of future environmental legislation that may disturb what states and individuals presume to be their settled water rights.

2. *The compact solution*

The question then arises, how can an interstate compact that is itself subject to federal regulation mitigate the effects of that regulation on state water rights and interstate allocation? It is the thesis of this Comment that the most effective way to stabilize water rights is through federal-

144. McCormick, *supra* note 98, at 392-94.

145. According to Douglas Grant, only three interstate compacts currently deal with groundwater resources at all. They are (1) the Amended Bear River Compact arts. V(A), VI(B), 94 Stat. 4, 10-11 (1980); (2) the Kansas-Nebraska Big Blue River Compact art. V(5.2), 86 Stat. 193, 196-97 (1972); and (3) the Upper Niobrara River Compact art. VI(A), 83 Stat. 86, 89 (1969). Grant, *supra* note 21, at 556-57. However, both of the federal-interstate compacts "treat groundwater on a par with surface water." *Id.*; see Delaware River Basin Compact §§ 1.2(i), 3.3(a), 10.1, Pub. L. No. 87-328, 75 Stat. 688, 690, 692, 699 (1961); Susquehanna River Basin Compact §§ 1.2(9), 3.3, 3.4(2)-(5), 4.2(a), 10.1, 11.1 to 11.5, Pub. L. No. 91-575, 84 Stat. 1509, 1511, 1513, 1514, 1515, 1518, 1523, 1524, (1970).

146. No current compact mentions atmospheric water resources, Grant, *supra* note 21, at 556, but a model state law compact on weather modification has been written and is supported by the American Society of Civil Engineers. RAY JAY DAVIS, *FUTURE LEGAL REGULATION OF WEATHER MODIFICATION* (1988).

interstate compacts, compacts between two or more states and the federal government.¹⁴⁷ By making the federal government a party to a compact, water allocation and development decisions can be coordinated from the beginning with federal interests in mind, rather than having state allocations and individual expectations disrupted by a section 404 denial or an EPA veto in the later stages of a development plan.¹⁴⁸ Furthermore, while the federal government is unlikely to fully abandon its regulatory powers to an interstate commission,¹⁴⁹ a federal-interstate compact commission could provide state water administrators an opportunity to participate in the federal regulatory process.

The federal-interstate compacts now in existence have been roundly praised by commentators and have more than fulfilled the expectations of the signatory states.¹⁵⁰ The principle model of a successful federal-interstate compact is the Delaware River Compact, signed by Pennsylvania, New York, New Jersey, and Delaware.¹⁵¹ It resulted in the creation of a powerful compact commission, with broad regulatory powers over all aspects of the water within the basin, including power to allocate the waters of the river.¹⁵²

The Delaware River Compact was successfully used as the model for the Susquehanna River Compact.¹⁵³ However, these compacts involve only eastern states and deal mostly with water quality issues rather than water quantity or allocation. Some question whether the federal-interstate model would work in the more arid western states.¹⁵⁴ State governments in the West tend to mistrust the federal government and are especially resentful of federal power over natural resources such as water. Zachary McCormick argues that western states have traditionally been very stingy both in funding interstate compact commissions and in the delegation of state sovereignty to those commissions. He maintains that western states would therefore be unlikely candidates for the kind of broad-ranging federal-interstate compacts that have been so successful in the East.¹⁵⁵ Western intransigence is admittedly an obstacle to the

147. TRELEASE & GOULD, *supra* note 48, at 620-22, gives a good explanation and a short history of the development of federal-interstate compacts.

148. Muys, *supra* note 108, at 324-25.

149. TRELEASE & GOULD, *supra* note 48, at 622.

150. Muys, *supra* note 108, at 313-14.

151. Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961).

152. *Id.* at 692-93.

153. Susquehanna River Basin Compact, Pub. L. No. 91-575, 84 Stat. 1509 (1970); see Sherk, *supra* note 108, at 402-03 (1994) (citing SUSQUEHANNA RIVER BASIN COMMISSION, PUBLIC FORUM: THE SRBC COMES OF AGE—21 YEARS OF SERVICE TO WATER USERS OF THE BASIN (1992)).

154. McCormick, *supra* note 98, at 394.

155. *Id.*

federal-interstate compact, but not an insurmountable one. In fact, there is no reason why a federal-interstate compact could not work in the West as well as it has worked in the East, and in many ways the peculiar conditions of western politics and the western climate make the federal-interstate compact solution particularly suited to the west.¹⁵⁶

The abiding mistrust of western landowners and political leaders may make the negotiation of federal-interstate compacts more difficult, but this is no reason to dismiss the possibility entirely. The mistrust of all things federal can be overcome; for as westerners are fond of saying, "we may be dumb but we're not stupid."¹⁵⁷ Even westerners will accept a federal-interstate compact they think is fair, especially if they believe the compact is the best way to protect state water rights.

But first, western water rights holders must be dispossessed of any quixotic delusions of resurgent federalism and states' rights.¹⁵⁸ Despite what many westerners may think, the overwhelming consensus of the legal community is that Congress has ample power under the Commerce and Supremacy Clauses of the Constitution to simply occupy the field of water allocation and preempt state law altogether.¹⁵⁹ This may seem like a political impossibility at this point, especially considering the elections of November 8, 1994, but Congresses come and Congresses go; the environment is here to stay.¹⁶⁰ If states continue to ignore federal interests, especially environmental interests, the political tide may quickly turn against them.¹⁶¹ Clearly state governments would be well-advised to learn to compromise with the federal government on water uses. Interestingly, Jerome Muys suggests that the federal-interstate compact is a desirable solution *particularly* in the West because the federal government already has such powerful rights and interests in water allocation.¹⁶² State participation in the federal process can only increase a state's influence over largely discretionary agency regulatory decisions.

156. Muys, *supra* note 108, at 311; see also Olen Paul Matthews, *Judicial Resolution of Transboundary Water Conflicts*, 30 WATER RESOURCES BULL., 375, 382 (1994).

157. I wish I could cite convincing authority for this proposition, but unfortunately, examples from natural resources law tend to prove just the opposite. I will just have to assert it on my own authority, which, as a Utahn, may be suspect.

158. See Muys, *supra* note 108, at 325.

159. MacDonnell, *supra* note 61, at 411; Muys, *supra* note 108, at 315; Tarlock, *supra* note 59, at 24-25; Frankfurter & Landis, *supra* note 24, at 726-27.

160. At least we hope so. If it does go away we will not be far behind.

161. While commentators have been warning states for years that their persistent failure to recognize federal interests could result in federal preemption of state water law, the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, 104 Stat. 3295 (1990), is a current case in point. See Harlow, *supra* note 135, at 12-15.

162. Muys, *supra* note 108, at 311.

Another objection raised to federal-interstate compacts is the fear that federal agencies will not be willing to participate in negotiations that will place limitations on their currently unquantified, and thus unlimited water rights under the reserved rights doctrine and various regulatory programs.¹⁶³ Paul Bloom suggests that Congress should enact legislation forcing all agencies with reserved claims on certain streams to quantify those claims so the rest of river can be allocated under state law.¹⁶⁴ In effect, this would create a de facto federal-interstate compact.

Zachary McCormick has criticized this approach as going too far.¹⁶⁵ McCormick argues that rather than make the federal government a signatory party to an interstate compact, compacts should merely contain a provision requiring the federal agencies to recognize, with certain reservations, the interstate allocation and state water law.¹⁶⁶ This approach has been used before on the Republican¹⁶⁷ and Belle Fourche River Compacts,¹⁶⁸ approved in 1943 and 1944 respectively, and McCormick suggests that the same approach should be used to protect state water interests today.¹⁶⁹ However it seems unlikely that even a conservative Republican Congress would countenance such broad restrictions on federal power in the 1990s. Most of the older interstate compacts are "so environmentally outdated" that Congress probably would not approve a similar agreement today.¹⁷⁰

This point is illustrated by the interminable negotiations over the Truckee River Compact. Congress rejected proposed compacts containing provisions similar to those in the Republican and Belle Fourche River Compacts that would have limited federal interference with state water law.¹⁷¹ Although the compact was drafted in cooperation with a representative of the federal government¹⁷² and was ratified by

163. McCormick, *supra* note 98, at 393.

164. Paul Bloom, *Law of the Range: A Critique of an Extraordinary Legal System*, in *NEW COURSES FOR THE COLORADO RIVER* 139 (Gary D. Weatherford & F. Lee Brown eds., 1986), in McCormick, *supra* note 98, at 393.

165. McCormick, *supra* note 98, at 393.

166. *Id.* at 394.

167. Republican River Compact, Pub. L. No. 60, ch. 104, 57 Stat. 86 (1943) (between Colorado, Kansas, and Nebraska).

168. Belle Fourche River Compact, Pub. L. No. 236, ch. 64, 58 Stat. 94 (1944) (between South Dakota and Wyoming).

169. *Id.*

170. Sherk, *supra* note 108, at 406, (quoting Jerome C. Muys, *Approaches and Considerations for Allocation of Interstate Waters* (forthcoming 1994)).

171. John Kramer, *Lake Tahoe, the Truckee River, and Pyramid Lake: the Past, Present and Future of Interstate Water Issues*, 19 PAC. L.J. 1339, 1363-64 n.101 (1988).

172. *Id.* at 1364.

both Nevada and California,¹⁷³ Congress did not ratify it because it failed to adequately address federal water rights in the Truckee River basin.¹⁷⁴ The particular federal rights in question were Indian reserved rights claimed by the Paiute tribe, and water to protect threatened and endangered fish species in Pyramid lake. Such values were of little concern when the compact was first drafted in the early 1960s. But by the time the compact was finalized, Indian rights and species protection were important political issues, and Congress would not approve it.¹⁷⁵

Since 1971, California and Nevada have been unsuccessful in obtaining congressional approval of the Truckee compact.¹⁷⁶ Ironically, in 1979 Secretary of Interior Cecil Andrus suggested the adoption of a federal-interstate compact for the Truckee River Basin modeled on the Delaware River Basin Compact.¹⁷⁷ The states rejected this option, so ultimately Congress imposed its own water allocation statute in 1990.¹⁷⁸ The history of the Truckee River suggests that modern interstate compacts that attempt to coerce federal recognition of state water rights might not obtain the necessary congressional approval.

The Truckee River history shows one reason states should negotiate federal-interstate compacts, but it does not necessarily provide a reason for federal agencies to negotiate. Ultimately, a congressional mandate forcing federal agencies to co-operate with state and local agencies in quantifying federal reserved rights may be necessary. But a one-time quantification such as Bloom suggests may be inadequate to protect federal interests; for example, compact negotiators can not foresee all of the effects of potential water developments on current or future endangered species.¹⁷⁹ Instead, an ongoing system of oversight and coopera-

173. See NEV. REV. STAT. ANN. § 538.600 (Michie 1986); CAL. WATER CODE § 5976 (West 1971).

174. Kramer, *supra* note 171, at 1364-67.

175. *Id.* at 1367.

176. *Id.* at 1371-76.

177. See *Pyramid Lake Paiute and Truckee River Settlement Act of 1985: Hearings on S. 1558 Before the Senate Subcomm. on Public Lands, Reserved Water, and Resource Conservation of the Comm. on Energy and Natural Resources*, 99th Cong., 1st Sess., at 277-81 (letter from Cecil D. Andrus to James T. McIntyre, Director, Office of Management and Budget (May 25, 1979)) [hereinafter Andrus], (*quoted in Kramer, supra* note 171, at 1370 n.124).

178. Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, 104 Stat. 3295 (1990). See Harlow, *supra* note 135, at 12-15.

179. See, e.g., *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (danger to snail darter species discovered after construction of Tellico Dam was under way). It is impossible for biologists to know enough about where and how all endangered species live to quantify their water appropriation needs in advance. Biological inquiries are usually not undertaken until a project is proposed and the process is triggered by the ESA, 16 U.S.C. § 1536(c)(1) (1988).

tion between the federal government and the states is needed.¹⁸⁰ For water regulation under the Clean Water Act, the legislation coercing federal participation in such a system may already be in place.

The Wallop Amendment states that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired,"¹⁸¹ and that "nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State."¹⁸² Both imperatives are qualified by language characterizing them as merely "the policy of Congress."¹⁸³ But Congress did not similarly qualify the concluding language of the statute, which commands unequivocally that "[f]ederal agencies *shall co-operate* with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources."¹⁸⁴ States may be able to compel federal participation and cooperation in compact negotiations under the Wallop Amendment.

An observation made by George Sherk pertaining to the Delaware River Basin Compact suggests a final argument for federal-interstate compacts in the West. Sherk noted that existing federal-interstate compacts have helped redefine the relationship between the federal government and member states in positive ways.¹⁸⁵ Because it allows the various state and federal agencies an opportunity to meet and work through problems in a setting of cooperation rather than competition, the federal-interstate compact may actually reduce animosities and tensions between member states and the federal government. One does not want to pin too many expectations on a single agreement, but anything that might help redefine the relationship between federal and state governments in the West should be pursued. Sherk suggests that the model interstate stream compact being prepared by the American Society of Civil Engineers should be a federal-interstate compact.¹⁸⁶ The rest of this Comment explores the ways an interstate or federal-interstate compact might address the problem of federal wetlands protection and state water rights.

180. Muys, *supra* note 108, at 324-25.

181. 33 U.S.C. § 1251(g) (1988).

182. *Id.*

183. *Id.*; see also *supra* notes 78-83 and accompanying text.

184. *Id.* (emphasis added).

185. Sherk, *supra* note 108, at 406.

186. *Id.* at 406-07.

B. A Wetlands Protection Proposal for Interstate and Federal-Interstate Compacts

Wetlands protection under section 404 of the Clean Water Act provides an excellent example of how an interstate or federal-interstate compact might resolve the conflict between federal regulation and state law. Successful resolution of the wetlands question may suggest ways to resolve other state-federal water rights conflicts. One of the aspects of interstate compacts that Frankfurter and Landis praised was the ability to creatively resolve conflicts not easily addressed by strict application of legal principles.¹⁸⁷ This means that interstate and federal-interstate water commissions could work to achieve compromises between competing interests rather than simply choosing one interest over the other as often happens in the judicial setting.

Clearly some kind of equitable compromise is needed to address the wetlands preservation issue under section 404 of the Clean Water Act. Such a compromise should evaluate the problem in terms of who bears the cost, and who benefits from the various wetlands values that the particular policy either protects or allows to be developed. Federal regulation of private water rights under section 404 has often been justified by the fact that wetlands preservation serves interests that are interstate, national, or in the case of some environmental protection measures, international in scope.¹⁸⁸ However, local and state interests usually stand to gain more by developing wetlands than by protecting them, at least in the short term.¹⁸⁹ If wetlands are to be saved at all, they will be saved by those who recognize an interstate or national interest in their preservation and are relatively disinterested in local development projects. Clearly, wetlands have received far greater and more effective protection under federal authority than they would under exclusively state laws.¹⁹⁰

However, a state prevented from diverting its share of interstate waters, or an individual who loses the ability to develop private water rights based on interstate or national interests should not have to bear the full brunt of the loss. By arguing that federal protection is necessary to protect wetlands, conservationists acknowledge that wetlands regulation serves national and interstate interests at the expense of local and intra-state interests. If the benefits claimed by wetlands protection are in fact

187. Frankfurter & Landis, *supra* note 24, at 706.

188. Wood, *supra* note 56, at 10-11.

189. *Id.* at 11.

190. Beck, *supra* note 9, at 548-51.

interstate and national, the costs should not be all intrastate and local. To the extent that all states in the basin or drainage area benefit from the protection of wetlands on interstate streams, all should share in the cost of protecting them. To the extent that the nation as a whole profits from environmental benefits of wetlands protection, the federal government should share in the costs of that protection. But so far, courts have been hesitant to characterize wetlands preservation as a "taking" or to impose the costs of compensation on the federal government. To do so would make the cost of wetlands preservation prohibitive, thus defeating a clear congressional imperative and possibly resulting in the permanent loss of many of our greatest national treasures in exchange for an increased number of mini-malls.

This Comment suggests two possible compact provisions aimed at resolving conflicts between state water allocation and federal wetlands protection. The first (*see* Appendix 1) is a simple measure designed to equitably distribute the burden of wetlands protection between states when that protection affects water allocations under interstate compacts.¹⁹¹ The second, (*see* Appendix 2) is a more comprehensive and ambitious approach and requires the cooperation of the federal government. This suggestion attempts to get at the root of the problem—the instability of state water rights in light of federal wetlands protection.¹⁹²

1. *Federal burdens on interstate streams: sharing the costs*

When wetlands preservation policies result in a section 404 permit denial that affects interstate water allocation, this is a determination made in the interests of flood protection and water quality enhancement that benefits all the states that use the water of that stream. The burdens therefore should be shared proportionally among the states instead of falling exclusively on the state where the permit was denied. This burden apportionment could be accomplished through a simple provision in most interstate compacts and need not involve the federal government.¹⁹³

Interstate water compacts should provide that when the federal government prevents a state from diverting water allocated to it by interstate compact to protect downstream wetlands, each state's allotment should be reduced accordingly. This principle could be applied generally to federal interests in state water, though perhaps not as well for federal Indian reserved rights, which serve local citizens and state interests. The idea of sharing the burden of federal interests between states is not new.

191. *See* Appendix 1: Model Interstate Compact Wetlands Provision, *infra*.

192. *See* Appendix 2: Model Federal-Interstate Compact Wetlands Provision, *infra*.

193. *See* Appendix 1, *infra*.

The Department of Interior, in comments on the provisional draft of the Truckee River Compact submitted to federal agencies in 1965, "recommended that federal uses of water be a claim on the entire interstate stream system and not be charged only against the allocation of the state where the uses are made."¹⁹⁴

This proposal recognizes that interstate interests such as water quality, wildlife, flood protection, and resource conservation are often synonymous with federal interests. It would also provide a disincentive to states that hope to circumvent interstate compact allocations by manipulating federal environmental protection statutes or lodging spurious environmental claims.¹⁹⁵ States whose own allocation will be reduced by a section 404 permit denial in an upstream state will be less likely to argue for federal water rights on an interstate stream.

2. *A national interest in state resources: compensating private parties*

Federal-interstate compact commissions are in a unique position to fairly balance the burdens incident to wetlands protection. The Model Federal-Interstate Compact Wetlands Provision suggested by this Comment should be understood as merely one way in which federal-interstate compact commissions could address the problem of stabilizing state water rights against the threat of federal regulation. No compact presently in existence dabbles in the minutiae of federal regulatory decision-making to the extent that the proposed compact provision does. Perhaps these suggestions are better suited for service in the by-laws of a federal-interstate compact commission than as part of the compact itself. The key here is that only a federal-interstate compact can provide the kind of versatility that would allow parties to reach the most equitable and creative solutions to their water-use conflicts.

For instance, when a local use is sacrificed for a national interest, the federal government should compensate landowners and holders of water rights for the reasonable value of water "condemned" to wetland uses.¹⁹⁶ This approach to wetlands protection is also not without precedent. Similar measures providing for the purchase of "conservation easements" have been included in the federal "swampbuster" incen-

194. Kramer, *supra* note 171, at 1365 (citing Andrus, *supra* note 177).

195. See Tarlock, *supra* note 59, at 20 (suggesting that the litigation in Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583 (D. Colo. 1985), "arose when Nebraska discovered that downstream irrigators on the Platte River could be better protected under the wing of the endangered whooping crane than by litigating the allocation of the river under interstate compacts and the doctrine of equitable apportionment").

196. See Appendix 2, *infra* at III.1.(b).

tives,¹⁹⁷ in state wetlands preservation statutes,¹⁹⁸ and in the Truckee-Carson-Pyramid Lake Water Rights Settlement Act.¹⁹⁹ Federal-interstate compacts should contain provisions requiring compact members to negotiate a reasonable rate of compensation that could be applied uniformly without resort to legal condemnation proceedings.²⁰⁰

Thus far, judicial resolution has created a situation in which no one comes out ahead except the lawyers and one or two lucky plaintiffs. In most instances compensation is denied, but when landowners obtain a "regulatory taking" ruling, it can be extremely expensive for the government.²⁰¹ Federal-interstate compacts can work out solutions to this problem that are fair to both sides. A compact commission could establish a "condemnation" price for wetlands conservation easements in which landowners and water rights holders would not get the full value of the land or the water right put to its highest economic use. Instead, they would be compensated at some considerably lower rate—perhaps a rate analogous to the cost of the unimproved land.

Through a federal-interstate compact, the costs of wetlands protection could be shared equitably among the interested parties. The principles guiding this compensation should reflect the interests of the various parties.²⁰² All the wetlands values to be considered in Corps decisions would be allocated among the parties according to whose interests are protected.²⁰³ The interests of each compact member would be represented by different categories of wetlands values, and each party to the contract might be allotted a certain number of points to "bid" for those values it wanted represented in the Corps decision.²⁰⁴ For example, endangered species protection might be more in the national interest and less in the interest of states. Other interests might be shared by several

197. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 1990 U.S.C.C.A.N. (104 Stat. 3359) §§ 1431, 1438-40, 1461-63 (amending 16 U.S.C. §§ 1231, 3831, 1001-09); *see also* Johnson, *supra* note 3, at 319 (praising the acts for "appealing to farmers who must survive economically," and for "finally placing inherent value on the land to ensure a public benefit for the nation").

198. *See* Chown, *Protecting Wetlands with Conservation Easements*, GREAT LAKES WETLANDS, Spring 1990, at 3, col. 1, *cited in* Beck, *supra* note 8, at 553.

199. Pub. L. No. 101-618, 104 Stat. 3295 (1990), *quoted in* Harlow, *supra* note 136, at 12.

200. *See* Appendix 2, *infra*, at III.1.(b).

201. *Loveladies Harbor, Inc. v. United States*, 31 Env't Rep. Cas. (BNA) 1847 (Cl. Ct. 1990) (\$2.5 million compensation awarded for section 404 permit denial). *But see* *Florida Rock Indus. v. United States*, 31 Env't Rep. Cas. (BNA) 1835 (Cl. Ct. 1990) (\$1 million award for regulatory taking caused by § 404 permit denial), *vacated by* *Florida Rock Indus. Inc. v. United States*, 18 F.3d 1560 (1994).

202. *See* Appendix 2 *infra* part II.1.(a)-(b).

203. *See* Appendix 2 *infra* part II.2-3.

204. *See* Appendix 2 *infra* part II.2.

parties. Wildlife protection might be partly in the federal interest and partly in the interest of the states. Protection of fish and game wildlife within a state might be worth more to the state than protection of species outside the state. States might even sell part of their bid allotment to private developers or divide it among agencies or competing special interest groups within the state. If local landowners' interests are best represented by development values, they can pay to have those values represented in the Corps' decision. The final decision would still rest with the Corps,²⁰⁵ but this decision also would have to be represented by a bid.²⁰⁶

The significance of the bid is that it represents not only the right to have one's interests represented, but also the responsibility to pay for those benefits that are in one's interest. If the Corps decided to deny a permit application, it would be required to justify its decision by providing a breakdown of its rationale in terms of the values the decision was meant to protect.²⁰⁷ Landowners and water right holders affected by permit denial would be compensated, but the cost of compensation could be readily divided among the federal government and any other parties with interests represented in the decision.²⁰⁸ The costs of protecting each value represented in the Corps' evaluation would be allocated among the parties according to their bids. On the other hand, decisions to develop a wetland would require indemnification to offset the cost of wetlands mitigation and maintenance from the local landowner or other parties with interests represented in that decision.²⁰⁹ The details of the compensation plan would have to be worked out by the members of the compact and would be renegotiated at regular intervals.²¹⁰ The compensation plan would contain a formula to guide the commission in

205. This can be assured by allotting the federal representative a majority of the points and permitting them to bid after all other parties have made their bids. See Appendix 2 *infra* part II.2.(a)-(c).

206. See Appendix 2 *infra* part III.

207. See Appendix 2 *infra* part III.1.(a).

208. See Appendix 2 *infra* part III.1.(b)(i)-(ii).

209. See Appendix 2 *infra* part III.2.(b)(i)-(ii). Oliver Houck suggests that a three to one ratio is necessary because of the uncertain success of artificial wetlands, and because of the need to restore wetlands already lost. While I agree that a three to one ratio is desirable and even necessary to restore the massive amount of wetlands already lost, it does not seem fair to require those seeking a permit today to pay for the losses of the past two hundred years. A two to one mitigation ratio would prevent further wetlands losses, taking into account the uncertainty involved in wetlands mitigation efforts. The costs of wetlands restoration should be shared by the nation as a whole. Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773, 838-39 (1989).

210. See Appendix 2 *infra* part III.1.(b).

determining which parties were responsible for compensation and for how much.

Compensating landowners for wetlands preservation may be less expensive to the government than defending itself in a takings situation, and landowners and water rights holders will not go uncompensated for their lost expectations. By establishing a fixed rate of compensation, legal costs to both sides can be avoided. By keeping the compensation rates low, the government can protect itself against spurious developers who buy wetlands and then look for a windfall by claiming a loss of beneficial use. Furthermore, anyone who acquired wetlands after either state or federal wetlands legislation was in place should be estopped from arguing that the legislation took away the value of developing their land or water right.²¹¹

The federal government should be safe from takings claims under this compact provision for the same reasons that it is safe today,²¹² but it will enjoy the added protection of having paid a reasonable amount for lost potential uses. By compensating landowners who cannot develop their wetlands, the government insures against the possibility of having to defend itself in various takings actions. The money saved by eliminating such takings claims could probably pay the compensation rate for the approximately 500 dredge and fill projects that are denied each year.²¹³

VI. CONCLUSION

*Like winds and sunsets, wild things were taken for granted until progress began to do away with them. Now we face the question whether a still higher 'standard of living' is worth its cost in things natural, wild, and free. For us of the minority, the opportunity to see geese is more important than television, and the chance to find a pasque-flower is a right as inalienable as free speech.*²¹⁴

To the degree that wetlands preservation protects the interests of all the water users on an interstate stream, states should equally share the burden of that protection. Interstate compact commissions are in a unique position to oversee the reallocation of waters among compact states incident to a section 404 permit denial that affects interstate water allocation.

211. Appendix 2 *infra* part II.1.(b).

212. See *supra* discussion accompanying notes 90-106.

213. See Wood, *supra* note 56, at 54-55.

214. LEOPOLD, *supra* note 1, at xvii.

If we truly believe that wetlands protection is in the national interest, then we must continue to look for less burdensome ways of protecting them, and the cost of that protection should be shared by the nation as a whole—that is, by the federal government. If we are unwilling to share the cost of protecting wetlands, then perhaps wetlands protection is not as much in the public interest as Congress has presumed it to be. I believe the American people have recognized the value of wetlands protection and are willing to pay for it. Wetlands are a national treasure well worth the price of their preservation. However, we should not expect farmers and the water users to bear the full burden of benefits enjoyed by the whole nation. Federal-interstate compacts can provide various and dynamic methods of reallocating these costs.

Erik G. Davis

APPENDIX 1: MODEL INTERSTATE COMPACT WETLANDS PROVISION

I. Federal water uses within the Basin shall be considered a claim on the entire interstate stream system and shall not be charged to the allocation of the state where the uses are made.

APPENDIX 2: MODEL FEDERAL-INTERSTATE COMPACT WETLANDS
PROVISION

- I. COMPLIANCE WITH STATE AND FEDERAL WETLANDS LAWS. No provision of this compact and no agreements reached under this compact shall be construed in any way to excuse or reduce the liability of any party or their duties to comply with all applicable state and federal laws and regulations for the purpose of wetlands protection and preservation.

- II. BIDDING ON THE WEIGHT OF EVALUATION FACTORS. As part of the Public Interest Review required under 33 C.F.R. § 320.4 and the Evaluation required by § 404(b)(1) of the Clean Water Act, the United States Army Corps of Engineers shall take and weigh the bids of all state parties to the Compact before approving or denying a proposal under § 404 of the Clean Water Act.
 1. WETLANDS VALUES. For each project that comes before the commission, the compact commission shall prepare two lists of wetlands values, one listing the values represented by the proposed development, and one listing those values threatened by the project.
 - (a) EVALUATION CRITERIA. These values shall include but shall not be limited to those wetlands functions important to the public and private interest as set forth in the laws of states party to the compact and the United States Army Corps of Engineers' General Policies for Evaluating Permit Applications.¹
 - (b) ADDITIONAL VALUES. Other values associated with wetlands and deemed to be of particular relevance to the proposal at hand may be added to the lists by any party to the compact. Parties to the compact may also remove any values from the lists that they deem to be irrelevant to the proposed project as long as no other party objects to the removal. The identities of those moving to add values to or remove values from the lists and the identities of parties objecting to removal shall be secret.

1. "All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, flood-plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership." 33 C.F.R. § 320.4(a).

2. **BIDDING.** Each project application that comes before the Commission shall be subject to an evaluation by the compact parties. Each party to the compact shall be allotted a certain number of "points." A party may use these points to "bid" for those values of particular concern to the party. Bidding shall be done according to the following procedural rules:
- (a) **ALLOCATION OF BID POINTS TO THE FEDERAL REPRESENTATIVE.** The bid allocation of the federal representative shall be no less than 51 points.
- (b) **ALLOCATION OF BID POINTS TO STATE PARTIES.** The combined bid allocation of the all the state parties to the compact shall be no more than forty-nine points, divided equally among state parties to the compact, with a remainder of one point to the state in which the action is proposed.²
- (c) **BIDDING PERIOD.** The federal representative shall designate a time after which no bids may be received. This time shall be after the Public Notice, Comment Period, Public Interest Review, and Evaluation Period required by the statute and regulations, but it shall be before the acceptance or denial of the application. Bids shall remain open and subject to change by the parties until the designated time. The federal representative shall bid after all state bids are received.
3. (a) **BIDS.** Each bid shall consist of two parts:
- (i) an allocation of points for and/or against the proposal; and
- (ii) a justification or allocation of points among one or more of the wetlands values contained on the lists promulgated pursuant to section II.1. The total of points bid by any party may not surpass the party's bid allotment as determined in subsections II.2(b) or II.2(c).
- (b) **OPEN AND CLOSED BALLOTS.** During the bidding period the tally of points bid both for and against the proposal shall be public information. However, the allocation of points bid towards each of the listed values shall remain secret until all state parties have bid. The federal representative shall bid after all state parties have bid.

2. Thus if there are two state parties to the compact, the state in which the project is to be constructed would be allotted 25% of the state bid and the other party would be allotted 24%. If there were three state parties to the compact, the "home" state would get 17% of the state bid, and the other states would get 16% each. If there are four state parties the allocation is 13% to the "home" state, 12% to the rest. If the number of states in the compact is 5, 7, 9, 10, or any other number that leaves a remainder of more than one, then the percentage of the bid allotted to the states can be adjusted. For example, five states would divide the bid such that the "home" state got 10% and the other four got 9.75% each.

(c) **ABSTENTIONS.** Any party to the compact may abstain from bidding on an application with the following exceptions:

- (i) The federal representative may not abstain from bidding unless it is shown by substantial evidence that the project will involve no adverse impact to any wetlands functions important to the public interest as delineated in 33 C.F.R. § 320.4(b).³
- (ii) State parties may not abstain from bidding unless it is shown by substantial evidence that the proposed project will produce no adverse impact to wetlands values protected by statutes of that state.
- (iii) Any party that adds a new value to either list shall be required to allocate a given percentage of its points to that value.

III. PROJECT APPROVAL OR DISAPPROVAL. All projects requiring the discharge of dredge and fill materials in the navigable waters of the Basin shall be subject to review and approval by the federal representative from the Corps of Engineers as required by section 404(b) of the Clean Water Act (U.S.C. § 1344(b)). This review shall conform to the requirements of 33 C.F.R. § 320.4(3), in that the specific weight of each factor for or against the proposal shall be determined and reflected in the bid of the federal representative.

1. **PROJECT DISAPPROVAL.** If the total of points bid by all parties against the proposed project is greater than the total of points bid for it, the project shall be disapproved and the § 404 permit denied.

3. Wetlands considered to perform functions important to the public interest under this section include:

- (i) Wetlands which serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species;
- (ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;
- (iii) Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;
- (iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;
- (v) Wetlands which serve as valuable storage areas for storm and flood waters;
- (vi) Wetlands which are ground water discharge areas that maintain minimum baseflows important to aquatic resources and those which are prime natural recharge areas;
- (vii) Wetlands which serve significant water purification functions; and
- (viii) Wetlands which are unique in nature or scarce in quality to the region or local area.

When a permit for any project is denied, a Memorandum of Rationale shall be prepared by the commission identifying and quantifying the reasons for the permit denial.

a. MEMORANDUM OF RATIONALE. The Memorandum of Rationale shall reflect the bids of all the parties that opposed the proposal, and shall contain the following:

(i) An enumeration of specific wetlands values threatened by the proposed project as set forth in section II.1.

(ii) A percentage-based quantification of the weight given to each wetlands preservation value by the parties bidding to deny the permit. 33 C.F.R. § 320.4(a)(3).

b. COMPENSATION TO PRIVATE LANDOWNERS AND WATER RIGHTS HOLDERS. Every five years, or at any interval agreed to by the parties to this compact, the Commission shall establish a fixed and uniform rate of compensation for landowners and water rights holders who acquired the property or water right that is the subject of the permit application before applicable state or federal wetlands preservation statutes were enacted and who are denied the full use of their property because of a section 404 permit denial.

(i) Compensation shall be based on the present value of the land or water right, but need not represent the highest economic use of the property.

(ii) The cost of compensation shall be divided among those parties that opposed the project in proportion to their bids for wetlands values listed as threatened by the proposed project.

2. PROJECT APPROVAL. If the total of all bids in favor of the proposed development is greater than those opposed, the Corps of Engineers shall approve the project. Whenever any project in the Basin is approved, and before actual work in the Basin is permitted to take place, the Commission shall prepare a Memorandum of Rationale identifying and quantifying the reasons for the permit approval.

a. MEMORANDUM OF RATIONALE. The Memorandum of Rationale shall reflect the bids of all the parties that favored the proposal, and shall contain the following:

(i) An enumeration of specific wetlands values served by the project as set forth in section II.1.

(ii) A percentage-based quantification of the weight given to each wetlands development value by the parties bidding to approve the permit. 33 C.F.R. § 320.4(a)(3).

(iii) A showing, by substantial evidence, that the project will not adversely affect any listed wetlands value, or

(a) plans showing how adverse impacts to wetlands will be minimized, and

(b) plans showing how any loss of wetlands area or values will be mitigated, including the cost of mitigation.

b. WETLANDS MITIGATION. Wetlands acreage shall be mitigated at a ratio to be decided by the commission but not less than three acres of new wetlands of equal or greater biological productivity shall be created for every acre of wetlands destroyed or seriously impacted by the project.

(i) Before actual work on any approved project begins wetlands mitigation as required and agreed upon by the commission pursuant to subsection III.2.b. shall be accomplished. If the parties to this compact agree that work on the project should be permitted to begin immediately, a bond shall be posted sufficient to accomplish complete mitigation as required by this compact.

(ii) The cost of the mitigation project or the cost of the bond shall be divided among those parties that bid in favor of the project in proportion to their bids in favor of the project.